The Indefinite Detention of People with Cognitive and Psychiatric Impairments in Australia

Submission of the Aboriginal Disability Justice Campaign, Australian Lawyers for Human Rights and La Trobe Law School Disability Justice Project

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Aboriginal Disability Justice Campaign

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

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The Aboriginal Disability Justice Campaign (ADJC), Australian Lawyers for Human Rights (ALHR) and La Trobe University Law School thank the Senate Community Affairs Reference Committee for the opportunity to make a submission to the Senate Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia.

This submission responds to the following terms of reference:

a. 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;

b. compliance with Australia's human rights obligations;

c. the role and nature, accessibility and efficacy of programs that divert people with cognitive and psychiatric impairment from the criminal justice system;

These terms of reference are addressed through the consideration of articles 12, 13, 14 and 15 of the Convention on the Rights of Persons with Disabilities (CRPD).

This Submission endorses the submission coordinated by First Peoples Disability Network.

The ADJC was established in 2009 and advocates for changes to legislation, policy and practice that leads to the recurrent and indefinite detention of people with cognitive impairments. The ADJC particularly advocates for Indigenous Australians recognizing the disproportionate impact that recurrent and indefinite detention has on Indigenous Australians.

Australian Lawyers for Human Rights (ALHR) is an association of legal professionals active in practising and promoting awareness of international human rights standards in Australia. It is supported by La Trobe Law School. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

La Trobe Law School was established in 1992. It offers an innovative, high-quality legal education with a strong commitment to human rights and access to justice, interdisciplinary enquiry and an emphasis on hands-on experience. The Disability Justice Project is a group of legal scholars and practising lawyers that research and write about justice issues for people with disability.

The Introduction and Paragraphs 1 – 10 were prepared by Patrick McGee on behalf of the ADJC. Paragraphs 11 – 34 were prepared by Susan Peukert, Farzana Choudbury and Heike Febig on behalf of the ALHR. Paragraph 35 and the UNHRC Submissions that follow were prepared by Dr Emma Henderson, Nicole Shackleton, Stephanie Falconer, Professor Patrick Keyzer, Natalie Wade (ALHR), Patrick McGee (ADJC) and Ian McKinlay (ADJC).

1. Across Australia, people with a cognitive impairment (intellectual disability or acquired brain injury) are overrepresented in the criminal justice system. So are Aboriginal people. Indigenous Australians with a cognitive impairment face multiple disadvantage with the majority also experiencing mental illness, poor physical health and severe social disadvantage. They are seldom provided the accommodation and support needed for a positive and lawful lifestyle. As such Indigenous Australians with a cognitive impairment are particularly vulnerable to recurrent and indefinite detention.

2. Many Indigenous Australians with a cognitive impairment are being charged with a range of offences (with a small proportion of that group committing serious offences) and found unfit to be tried or not guilty due to their impairment. This often leads to indefinite incarceration in prison (or sometimes a psychiatric hospital) despite the person not having been convicted. This practice occurs across Australia, particularly in Queensland, Western Australia and the Northern Territory. In the Northern, people are indefinitely detained in maximum-security prisons and having reviews of their detention occurring only at the end of a period specified in the detention order or at the discretion of a judge. This practice breaches Australia's treaty obligations under the International Covenant on Civil and Political Rights, the International Convention on the Rights of Persons with Disabilities and the International Convention on the Elimination of All Forms of Racial Discrimination.

3. There are practical alternatives. In Victoria and NSW, disability services operate specialist accommodation and support programs backed by a wide body of international research. NSW has legislation for "limiting terms" which prevents a person found unfit to be tried being imprisoned for longer than if he or she had been convicted of the offence.

4. The ADJC seeks legislative and service frameworks to address the needs of Aboriginal alleged offenders with cognitive impairments, including:

   a. Cross-departmental responsibility.

   b. Accommodation and support programs both as an alternative to prison and post release

   c. That any detention in prison be a last resort and the least restrictive option suited to the person's circumstances.

   d. Skilled intervention and support to address offending behaviour being a central element of all services, whether in the community or in prison.

   e. Mandatory review of orders for detention of unconvicted individuals at least annually, with a court or tribunal carrying out the review and the individual legally represented and independently assessed.

5. The Aboriginal Disability Justice Campaign campaigns for changes to legislation policy and practice that results in recurrent and indefinite detention. The ADJC seeks the end of the widespread and unwarranted use of prisons for the management of unconvicted Indigenous Australians with cognitive impairments. Particularly the Aboriginal Disability Justice Campaign is concerned about:

a. The use of maximum security prisons as default accommodation and support options
b. The overrepresentation of indigenous Australians with cognitive impairments who are detained but unconvicted
c. The lack of clinical treatment which focus on reducing the person's risk of harm to others
d. The lack of culturally responsive service systems
e. Workforce issues such as the use of short term contracts and the lack of appropriately qualified staff

6. Justice requires recognising that the experience of cognitive disability is shaped by our social, cultural and personal contexts. Gender, age, language, culture and geographical location are amongst the factors that change the lived experience of disability and justice. The "Line in the Sand" Action Statement was developed in November 2014 with the aim to preserve the individuality and identity of Aboriginal and Torres Strait Islander people with cognitive impairment and to recognise and honour their voices (Keyzer and O'Donovan, 2016).

7. In order to ensure that Indigenous people with cognitive impairment are not held indefinitely in prison further research and evaluation of outcomes is needed. Justice for Indigenous Australians with a cognitive impairment requires:

a. *Individualised support in community settings:* Tailored, culturally-responsive sentencing options *other than prison.* Sustainable, secure, individualised and culturally-responsive accommodation, community support and transitional service options, staffed by independent, culturally-competent caseworkers.

b. *Prevention and early intervention:* Early assessment, diagnosis, support and intervention (including in the juvenile justice system) that is capable of identifying and addressing root causes of offending/anti-social behaviour and that aims to prevent criminalisation and institutionalisation.

c. *Integrated and coordinated services:* Responsive systems and agencies that adopt systemic case and risk management approaches using non-punitive, educative, least restrictive practice frameworks that leverages support from families and communities and other relevant social services (e.g. NDIS, Public Guardian etc).

d. *Uniform law reform:* Targeted, uniform, human-rights focused law reform that acknowledges individual needs, ensures the evidence against the person is tested, accommodates both support for people with cognitive impairment and protection of the community, ensures that decision-making supports are identified and provided to enable a person to exercise their legal capacity, ensures terms are

limited and regularly reviewed, incorporates a complaints mechanism, ensures access to competent legal representation and accords procedural fairness.

e. *Leadership and education:* Long-term political will and public sector leadership to build an appropriate framework of responsive laws and policies, administered by agencies that are accountable.

f. Identification and recognition of people with cognitive impairment by the justice system (e.g. lawyers, police, corrections, guardians) that acknowledges individual differences (e.g. gender, language) and diversity of situations, conditions and needs.

g. Raised public awareness and knowledge in the community, within and across the criminal justice system and service systems (including among corrections, among lawyers), to better understand the problem.

8. People with cognitive and psychiatric impairments who are detained for the purposes of treatment should not be detained indefinitely and such detention should not occur in prisons. As evidenced by the human rights applications contained in this Submission, prisons are not safe spaces for people with cognitive and psychiatric disabilities. Human rights breaches occur and people who remain unconvicted often languish in this centre with no exit pathway. It is a convenient place for governments to hide people away who have inconvenient circumstances who require intensive and expensive treatment, but does nothing to meet the legislative criteria that pertains to this group of people: that people are detained for the purposes of treatment in order to reduce their risk of harm to others and to keep the community safe and that this occurs in the least restrictive manner possible.

9. Indigenous Australians with cognitive and psychiatric impairments are particularly vulnerable to recurrent and indefinite detention in every state and territory in Australia. The truth of the matter is that even in the Northern Territory where the human rights breaches that are outlined in this Submission have occurred, the bones of a functioning forensic system exist. Legislation, facilities, non-government organisation willing to provide services, policies and procedures and facilities such as the Secure Care facility are already in place. What is now needed is the political will to undertake to provide the access to justice that these citizens.

10. It is vital to understand that the improvement of the treatment of Indigenous people with cognitive and psychiatric impairments who are incarcerated in the Northern Territory is not simply a matter for the 'Territories". This response to the issue, quite apart from representing an inappropriate abdication of responsibility is destitute of constitutional foundation. The self-governing territories in Australia including the Northern Territory, only have separate legislative and executive power because the Commonwealth Government has so decided. This is well-evidenced by the Commonwealth's relatively recent decision to resume responsibility for governing Norfolk Island and reducing the self-government powers of the people in that Territory. In short, any and all of the Northern Territory's legislative or executive power can be affected by inconsistent Commonwealth regulation. So when it is said that this issue is a "matter for the territory, the person who makes this statement is in

fact saying, "even though the Commonwealth has full constitutional and legal power to address these issues in the Northern Territory we are choosing not to address these because we believe some or even many people will be persuaded by an argument that this ought to be a matter for the Territory. It is very readily apparent that the Northern Territory needs support and assistance to address the human rights issues identified in this report. If the Northern Territory cannot adequately address the human rights issues identified in this report and the communications incorporated in it, then the Commonwealth should intervene directly to ensure that the human rights issues are addressed consistent with domestic and international law.

11. Australia signed the CRPD on 30 March 2007 and ratified it on 17 July 2008 however the CRPD has not been formally adopted in Australian domestic law. Australia has developed the National Disability Strategy to outline how implementation across a range of areas will occur. However, at present, while the CRPD prescribes the standards to which Australia has committed, there are presently no formal domestic avenues of recourse for breach of its terms.

12. Australia acceded to the *Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities* on 21 August 2009. The Optional Protocol came into force for Australia on 20 September 2009 and empowers the Committee on the Rights of Persons with Disabilities to receive complaints from individuals and groups who believe that their country has breached the convention after all domestic remedies have been exhausted.

13. Specific to this submission are articles 12, 13, 14 and 15 of the CRPD which address the rights that are affected when people with cognitive and psychiatric impairments are detained in Australia.

14. Consistent with the CRPD, ALHR adopts the view that persons with cognitive or psychiatric impairments apply to the CRPD and hereby any reference to 'person with disability' is inclusive of those cognitive or psychiatric impairments.

15. People with cognitive impairment or psychiatric disabilities may be detained under mental health laws or because they are found not fit to plead at trial but are detained in prisons in the absence of any other secure facilities. Within the broad issue of people with cognitive impairment and psychiatric disabilities being detained is a specific issue faced by Aboriginal people with cognitive impairment and psychiatric disabilities who are overrepresented in the number of people detained in prisons without conviction. For completeness, both types of detention will be addressed will be address in this submission with particular issues faced by Aboriginal people raised where appropriate.

16. The length of detention for some people with cognitive impairment or psychiatric disability is extreme. For example in 2013-14 152 persons were detained for a period of up to 12 months under mental health orders in South Australia.[1] For those detained in the forensic mental health facility in South Australia, James Nash House under forensic inpatient

[1] Office of Chief Psychiatrist Annual Report 2013-14 p 9.

orders the average length of stay of 158.6 days.[2] The demand for forensic mental health facilities is high across Australia and cannot be met. The lack of available facilities sees people with disabilities being inappropriately imprisoned in mainstream prisons rather than being placed in forensic mental health facilities.

17. The number of people with disabilities who have not been found guilty of a crime or unfit to plead and subsequently detained in mainstream prisons is unacceptable. For example, in July 2015 South Australia reported eight individuals had either been found not guilty of a crime or were found unfit to plead due to mental incapacity and imprisoned in Yatala Labour Prison without access to psychiatric care. Long periods of detention without proper access to psychiatric care where required are a breach of article 12 of the CRPD. To meet this international human rights obligation, ALHR strongly argues that persons with disabilities who have been found not guilty of a crime or unfit to plead should never be detained in prisons. Accordingly, ALHR calls on State Governments to ensure adequate beds for the forensic mental health sector, with appropriate psychiatric treatment available to all patients.

18. Article 12 of the CRPD addresses the right for persons with disabilities to equal recognition before the law.[3] Accordingly, persons with disabilities have the right to recognition of their legal capacity on an equal basis with all others and the provision of decision-making supports for those persons with disabilities exhibiting decision-making ability deficits who request support to enable them to make decisions.[4] There is a key distinction between legal capacity and mental capacity where, legal capacity refers to the exercise of a legal power bestowed by legislation or common law, for example, the right to make a treatment decision[5]and mental capacity means the *ability* to make treatment decisions. When people are denied their legal capacity on the basis of their disability, there is a risk that they will be indefinitely detained either through mental health laws or criminal codes. The period of detention can often be lengthy and without relief.

19. In accordance with the requirements of article 12 of the CRPD, once a person regains mental capacity they should be entitled to contribute to decisions about their treatment.

20. Australia's ratification of the CRPD imposes human rights obligations upon Federal and State jurisdictions. Current mental health legislation or criminal codes permitting the detention of people without conviction on the basis of their disability in Australia does not comply with our obligations under the CRPD.

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[2] Office of Chief Psychiatrist Annual Report 2013-14 p 18.
[3] *Convention on the Rights of Persons with Disabilities*, Signed for Australia 30 March 2007, [2008] 999 UNTS 171 (entered into force in Australia 16 August 2008) Art 1.
[4] *Convention on the Rights of Persons with Disabilities*, Signed for Australia 30 March 2007, [2008] 999 UNTS 171 (entered into force in Australia 16 August 2008) Art 12(2) and (3).
[5] Philip Bielby, 'The Conflation of Competence and Capacity in English Medical Law: A Philosophical Critique' (2005) 8 *Medicine, Health Care and Philosophy* 357, 359.

21. For example, under the revised mental health legislation of Victoria, Tasmania and Western Australia a determination of a lack of mental capacity leads to the loss of legal capacity; and a determination that an individual lacks capacity means that they can be treated involuntarily for their mental illness.[6] The involuntary treatment of those who lack mental capacity is in violation of the requirements of the CRPD. In General Comment No. 1, the Committee on the Rights of Persons with Disabilities stated that 'perceived or actual deficits in mental capacity must not be used as a justification for denying legal capacity.'[7] Rather, art 12(3) of the CRPD advocates for the provision of supported decision-making to enable those with mental capacity impairments to make their own decisions.[8] Accordingly, such laws are inconsistent with article 12(2) of the CRPD.

22. Conversely, the *Mental Health Act 2009* (SA) does not have a capacity provision. In South Australia, persons being involuntarily detained are treated 'despite the absence or refusal of consent to the treatment'[9] if a person has a mental illness and poses a risk of harm to self or others. The involuntary treatment of those with mental capacity impairments in Western Australia, Victoria and Tasmania, and the lack of recognition of decision-making ability under South Australia's mental health are deficiencies that needs to be addressed because they negatively impact upon the ability of individuals with a mental illness to realise their autonomy and human rights.

23. Various legislative regimes regulate the treatment of those unfit to plead or who have been found mentally incompetent. For example, in Western Australia, under s 178 of the *Mental Health Act 2014* (WA), mentally impaired accused persons can be treated involuntarily regardless of their capacity status. Under s 179, the treating psychiatrist must have regard to the mentally impaired accused person's wishes to the degree practicable. Custody orders, ordering the custody in hospital or prison, are made under the provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). Under s 24(2), a mentally impaired accused person will only be hospitalised in Western Australia if they have a mental illness capable of being treated. This means that mentally impaired accused persons may be imprisoned for lengthy time periods even though they are not guilty of committing a crime. This is inappropriate and violates of the obligations imposed under the CRPD.

24. Article 13 of CRPD[10] provides:

> 1. States Parties shall 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, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

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[6] *Mental Health Act 2013* (Tas) s 7, *Mental Health Act 2014* (Vic) ss 68-70, *Mental Health Act 2014* (WA) s 13.
[7] UN Committee on the Rights of Persons with Disabilities, *General Comment No. 1: Article 12: Equal Recognition before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [13].
[8] *Convention of the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 12(3).
[9] *Mental Health Act 2009* (SA) ss 24(2), 28(2), 31(2).
[10] *UN Convention on the Rights of Persons with Disabilities ('CRDP')*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

> 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

25. Article 13 of the CRPD thus requires states to enable equal and effective access to justice for people with disability.

26. When a person is found unfit to plead at trial by reason of incapacity, all jurisdictions have a process of diverting people who are unfit to stand trial away from the criminal justice system to the mental health system. This can lead to persons being diverted in detention in prisons or mental health facilities for unspecified times, possibly for 'periods well in excess of those expected if their case had been progressed through the courts.'[11] In some jurisdictions this can lead to indefinite detention and recent cases of this have been seen in the northern Territory and Western Australia.

27. Different jurisdictions have different standards around access to justice, especially with regards to competency and diversion. The various jurisdictions all have some diversion procedures and legislation in place but all are different, using different definitions, processes and reviews. In most jurisdictions, rules and regulations are relatively vague and leave too much to the discretion of the courts. There is no consistency. In any event, court diversion programs are only available for minor or summary offences, not for serious or indictable ones. Under the Crimes Act 1914 (Cth), those found unfit to be tried under division 6 can be detained for a specific period of time not exceeding the maximum sentence of imprisonment that could have been given had the person been found guilty.

28. In NSW, however, those diverted under the *Mental Health (Forensic Provisions) Act 1990* (NSW) after being found unfit to be tried are referred to the Mental Health Review Tribunal established under the *Mental Health Act 2007* (NSW). The Act distinguishes between accused persons facing the Supreme Court and District Courts (part 2) and Magistrate Courts (part 3). Oddly, the definitions in part 1 of the Act specifically exclude people with intellectual or cognitive disabilities[12], whereas in part 3, under 32.1(a)(i) specifically include "developmentally disabled" persons. This means people with intellectual disabilities are potentially treated differently in the Supreme and District Court from the Magistrates Court. It is not clear why this distinction is made. A recent NSW Law Reform Commission found people with intellectual disabilities are not currently dealt with effectively in the Criminal Justice System[13] and not adequately acknowledged in law[14]. The report recommended amending the Act to include people with intellectual disability be included in part 2 of the Act[15] in order to improve access to justice for people with

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[11] Anti-discrimination Commissioner (Tasmania) submission 71 in ALRC at 7.21 (page 196)

[12] Part 1.3. of the Mental Health (Forensic Provisions) Act 1990 defines **"mental condition"** as 'a condition of disability of mind not including either mental illness or developmental disability of mind'.

[13] NSWLR report p45-49.

[14] NSWLRC report 49-52.

[15] Recommendation 1.2. in NSWLRC, 2013, People with Cognitive and Mental Health Impairments in the Criminal Justice System – Criminal Responsibility and Consequences, Report 138, May 2013 at 0.6.

disabilities in line with Australia's obligations under the CRPD[16]. Under s 30, forensic patients can be detained in a health facility or other place for an unspecified period of time and have no avenue to apply for parole; they are wholly dependent on the Mental Health Review Tribunal to make recommendations regarding a person's detention and release. This, in effect, amounts to indefinite detention, contrary to fundamental principles of law and our international human rights obligations.[17]

29. Article 15 of the CPRD requires that people with disabilities are free from torture or cruel, inhuman or degrading treatment or punishment:

1. *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.*
2. *States Parties shall 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.*

30. The distinction between torture in contrast to cruel, inhuman or degrading treatment or punishment can be unclear. The UN Special Rapporteur on Torture or Cruel, Inhuman or Degrading Treatment or Punishment noted: '[the difference] may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted'.[18]

31. The use of prisons to detain people with disabilities indefinitely without a conviction where they have been deemed unfit to stand trial because of their cognitive or psychiatric disability[19] is a breach of their human rights. Moreover, where people with disabilities are detained indefinitely due to a lack of disability accommodation options in the community. In particular, Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairment, who are overrepresented in the criminal justice system generally, have been affected by the practice of indefinite detention in prisons and psychiatric units.[20]

32. ALHR is concerned that indefinite detention of people with cognitive and psychiatric impairment in Australia could in some circumstances constitute cruel, inhuman or degrading treatment or punishment. The indefinite detention of people with cognitive and psychiatric impairment can be considered a non-consensual intervention for which, in some situations,

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[16] *UN Convention on the Rights of Persons with Disabilities ('CRDP')*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).
[17] Article 9 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[18] Mendez E Juan, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment', United Nations General Assembly, 1 February 2013.
[19] Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009) in People with Disability Australia, *Submission on the Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* (October 2014) <http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc> 35.
[20] M Sotiri, P McGee and E Baldry, *"No End in Sight" The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment* (University of New South Wales, September 2012) <http://www.pwd.org.au/documents/project/2012ADJC-NoEndInSight.docx >, 8.

there may be no free and informed consent. Further, access to protective services, and support services such as mental health support, can also be limited through indefinite detention.[21] This barrier to accessing medical services, in addition to the uncertainty of indefinite detention, can have further psychological impacts on detainees. This arguably constitutes cruel and degrading treatment, which is a breach of their human rights. Tina Minkowitize (World Network of users and Survivors of Psychiatry) suggested in an expert meeting convened by the UN Office of the High Commissioner for Human Rights on "freedom from torture, cruel, inhuman or degrading treatment or punishment and persons with disabilities", that indefinite detention should be considered cruel, inhuman or degrading treatment.[22] ALHR agrees with this position.

33. ALHR submits that the practice of indefinite detention for people with cognitive and psychiatric impairment violates Australia's international human rights obligations guaranteed in article 15. This is because the practice is degrading, can have further repercussions for health and wellbeing of detainees with cognitive and psychiatric impairment, and is an unwarranted practice if the detention is occurring simply due to an unavailability of reasonable accommodation.

34. Article 15(2) calls for legislative, administrative and judicial measures to prevent persons with disabilities from being subjected to torture or cruel, inhuman or degrading treatment or punishment on an equal basis with others. Stronger options for recourse for people with disabilities who are subjected to cruel or degrading treatment as a result of indefinite detention under domestic legislation are required, in accordance with article 15(2).

35. This Submission will now set out the fundamental components of two recent communications to the United Nations Human Rights Committee cited on behalf of Mr Malcolm Moreton and Ms Anthony Scotty.

Mr Malcolm Moreton

[21] Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009) in People with Disability Australia, *Submission on the Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* (October 2014) <http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc> 40-41.
[22] United Nations Office of the High Commissioner for Human Rights, 'Report on Expert Seminar on Freedom from Torture and Ill Treatment of Persons with Disabilities', Geneva, 11 December 2007, United Nations Office Geneva, 6.

I. State Concerned/Articles violated

Name of the State against which the complaint is directed:

1. The Commonwealth of Australia is a State Party to the ICCPR. Australia ratified the ICCPR on 13 August 1980 and acceded to the First Optional Protocol to the Treaty on 25 September 1991.[23]

1.1. Australia lodged a reservation to Article 2 in 1980, which was withdrawn on 6 November 1984.[24]

1.2. When ratifying the ICCPR, Australia made a general declaration that:

> Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.[25]

1.2.1. The Australian Human Rights Commission has stated that this general declaration 'was not intended as a derogation from an international obligation, but rather as an explanation of the way in which Australia intended to implement the ICCPR'.[26]

1.3. The Applicant specifically notes the operation of Article 10 of the OPICCPR:

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

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[23] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[24] Gillian Triggs, President, Australian Human Rights Commission, *Notice under s 29 of the Australian Human Rights Commission Act 1986 (Cth) – Report Regarding Complaints of Mr Malcolm Morton et al* (August 2014), para 174-176.
[25] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[26] Triggs, above n 4, [176].

Articles of the Covenant or Convention alleged to have been violated:

2. The Communication alleges violations of Articles 2.1, 7, 9, 10.1, 10.3, 17.1, 23.1, 26 & 27 of the ICCPR.[27]

2.1. The Communication also references Articles 1, 2, 3, 4, 14, 15, 17, 19, 25, 26 and 28 of the CRPD in support of rights provided by the ICCPR.[28]

III. Exhaustion of domestic remedies/Application to other international procedures

EXHAUSTION OF DOMESTIC REMEDIES

3. In accordance with Articles 2 and 5.2(b) of the OPICCPR, a complaint may only be submitted if all available domestic remedies have been exhausted.

3.1. Past jurisprudence indicates that there is no obligation to pursue remedies that have no prospect of success.[29]

3.2. The Applicant submits that he has done everything that could be reasonably expected of him to exhaust any and all available domestic remedies.[30]

3.3. Furthermore, the UNHRC has acknowledged the purposive approach to the assessment of the requirement to exhaust domestic remedies, which is to:

> Enable the State Parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring.[31]

As such, it is submitted that where a State Party is aware and has acknowledged a particular violation, the obligation to exhaust any further remedies is displaced.[32]

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[27] See Appendix B.
[28] Ibid.
[29] *Pratt and Morgan v. Jamaica*, Communication No. 210/1986 and 225/1987, U.N. Doc. Supp. No. 40 (A/44/40) [222].
[30] *Case of Kozacioglu v Turkey*, Application No. 2334/03, Grand Chamber, Judgment, 19 February 2009.
[31] *TK v France,* Communication No. 220/1987, UN Doc CCPR/C/37/D/220/1987 (8 November 1989) [8.3].
[32] *Dordevic v Croatia* 41526/10 (2012) ECHR 1640, (2012) MHLO 136, [110].

3.4. The Applicant submits that Australia is aware of the details set out in this Communication and has not acted to remedy them and, as a result, the need to exhaust domestic remedies has been satisfied or displaced.

3.5. The Applicant submits that the obligations in Articles 2 and 5.2(b) have either been satisfied or displaced by the following facts, discussed below:

3.5.1. The lack of an available and reasonable cause of action under Northern Territory or Australian federal law;

3.5.2. In the alternative, the lack of a reasonable prospect of success were an action to be brought before the High Court of Australia;

3.5.3. The fact that the Applicant has sought all administrative remedies available to him; and

3.5.4. The conflict of interest that arises as a result of the Applicant's estate resting with the Public Trustee of the Northern Territory.

<u>The lack of an available cause of action in domestic legal system:</u>

4. The obligation to exhaust domestic remedies is 'based on the assumption that there is an effective remedy available in respect of the alleged breach in the domestic system.'[33]

5. The Applicant has no effective judicial remedies by way of appeal or otherwise available within the Australian legal system:[34]

5.1. Neither Australia, nor the Northern Territory, have a Constitutional or legislative Bill of Rights to provide the Applicant with a legal avenue to pursue relief.

5.2. The Australian and Northern Territory Governments have not incorporated the above mentioned ICCPR or CRPD rights into enforceable domestic law.

5.3. The Applicant cannot appeal the indictment for murder as it was quashed when the jury at trial returned a qualified verdict.[35]

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[33] *Kozacioglu v Turkey*, (European Court of Human Rights, Grand Chamber) Application No. 2334/03, 19 February 2009, [39].

[34] *RT v France* (220/87) Communication No. 262/1987, U.N. Doc. CCPR/C/35/D/262/1987 (1989).

5.4. The Applicant does not contend that he is detained unlawfully; rather the Applicant contends that the legislation which authorises his continued incarceration is inconsistent with his rights as guaranteed by the ICCPR.

5.4.1. There is no judicial process available to the Applicant to compel the Australian or Northern Territory Governments to provide an appropriate supervised accommodation facility which would be consistent with his rights as guaranteed by the ICCPR.

5.4.2. The Applicant submits that the High Court of Australia could not provide an effective remedy to the violations referred to in this Communication.

<u>The lack of a reasonable prospect of success:</u>

6. The Applicant recognises that while a subjective belief is not sufficient to remove the obligation to exhaust all domestic remedies, expert legal advice has been provided which recommends against bringing the matter before the High Court of Australia because no effective legal remedy is available.

6.1.1. Professor Patrick Keyzer.[36]

6.1.2. Ian Freckelton QC.[37]

7. In the alternative, the Applicant submits that if he did pursue the matter before the High Court of Australia, the High Court would have no power to provide remedies that would address the violations mentioned in this Communication. There is no legislation, Bill of Rights or Constitutional provision which could be utilised to remedy the violations.

8. Past domestic jurisprudence has held that the detention of prisoners in similar situations is lawful under Australian law. The High Court, in *Fardon*,[38] found that the incarceration

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[35] *R v Morton* [2010] NTSC 26 [3]; *Criminal Code* 1983 (NT), s 43X states that a qualified verdict 'does not constitute a basis in law for a finding of guilt' ('*Criminal Code*').
[36] Appendix C.
[37] Appendix D.
[38] *Robert John Fardon v Australia*, Communication No. 1629/2007, U.N. Doc. CCPR/C/98/D/1629/2007 (2010) ('*Fardon v Australia*').

of a person in prison, even though they have committed no additional crime, is constitutionally valid under domestic law. This was also found in *Tillman.*[39]

8.1. This Committee found violations of the Applicants' rights in those cases, but Australia has done nothing to change the laws, authorizing the infringements of Article 9 of the ICCPR found in this Communication. [40]

9. The consequences of seeking a futile action would not only waste time and funds, but would also constitute professional misconduct of the legal practitioners acting for the Applicant under the rules of legal practice.[41]

10. In addition, there is a significant risk of an adverse costs order being made against the Applicant's Guardian, Mr McGee, because of the known risk of futility.[42]

11. There is no obligation to pursue futile legal actions.[43] The Applicant submits that due to a lack of available causes of action under domestic law, and the fact that there is no reasonable prospect of success, the obligation to exhaust domestic remedies is satisfied.[44]

<u>Administrative remedies sought:</u>

12. The obligation on the Applicant is to have exhausted all reasonable avenues to secure a remedy.[45]

13. In light of the lack of judicial remedies available, the Applicant has attempted to seek administrative remedies available domestically.

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[39] *Tillman v Australia*, Communication No. 1635/2007, U.N. Doc. CCPR/C/98/D/1635/2007 (2010) ('*Tillman v Australia*').

[40] *Fardon v Australia*, U.N. Doc. CCPR/C/98/D/1629/2007; *Tillman v Australia*, U.N. Doc. CCPR/C/98/D/1635/2007.

[41] Solicitors have a professional duty to assist both client and court to further the expeditious resolution of real issues. Conduct which has been held to justify an order that a practitioner personally pay the costs includes attempting to re-agitate previously decided issues: *Vasram v AMP Life Ltd* [2002] FCA 1286; see also *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 922; *Kendirjian v Ayoub* at [208]–[216].

[42] See eg, Chen v Secretary, DEEWR & Anor [2009] FMCA 576; *Lindon v Commonwealth* [1996] HCA 14.

[43] *Earl Pratt and Ivan Morgan v Jamaica*, Communication No. 210/1986 and 225/1987, U.N. Doc. Supp. No. 40 (A/44/40), 222.

[44] *Pratt and Morgan v Jamaica*, Communication No. 210/1986 and 225/1987, U.N. Doc. Supp. No. 40 (A/44/40) at para 222 (1989); see *also Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992.

[45] *Kozacioglu v Turkey*, (European Court of Human Rights, Grand Chamber) Application No. 2334/03, 19 February 2009, [40].

14. The Applicant's circumstances were directly considered by the Australian Human Rights Commission ('the AHRC')[46] and the findings of the AHRC were published in a report ('AHRC Report') which is attached at Appendix E.[47] The AHRC Report provides material that is relied on in this Communication. The Applicant submits that the Commission's findings, particularly that he has had been arbitrarily detained and has been subjected to cruel, inhuman and degrading treatment, confirm his own submission that his detention is a breach of Australia's obligations under the ICCPR.

15. The Commonwealth of Australia has officially acknowledged the AHRC Report, and in doing so attributed sole responsibility for any violations established in the AHRC Report to the Northern Territory government. The statement made by the Commonwealth Attorney-General, Senator the Hon George Brandis QC, when he tabled the AHRC Report in Parliament, is attached at Appendix F.[48]

    15.1. In this statement Senator Brandis QC acknowledged that there are 'complex issues and particular challenges' involved in providing services in Australia for people with intellectual disabilities who are unfit to plead to criminal charges.

    15.2. Despite this acknowledgment, Senator Brandis QC refused to engage in a detailed assessment of the Commission's findings, rather arguing that the Commission had 'conflated Australia, as a State Party to relevant treaties, with the Commonwealth Government.'[49]

    15.3. Senator Brandis QC contends that the issues of detention raised in the AHRC Report are the responsibility of the Northern Territory Government given the allocation of responsibility for criminal matters to the states and territories under the Australian Constitution. Further, Senator Brandis QC denies that the

[46] Appendix E includes an explanation of the Australian Human Rights Commission, its legal foundation, a brief summary of its complaints mechanism and what remedies are available via this mechanism.
[47] Triggs, above n 4.
[48] Australian Government, Statement by the Attorney-General for Australia, Senator the Hon George Brandis QC, *Tabling of the Australian Human Rights Commission Report – KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80.
[49] Ibid.

Commonwealth government is responsible for compliance with Australia's human rights obligations that fall outside its Constitutional responsibilities. [50]

16. The Applicant observes that the Commonwealth of Australia's refusal to consider the findings or remedy the violations contained within the AHRC Report is consistent with previous failures to consider and rectify the human rights violations set out in this Communication.[51]

17. The Northern Territory Government has not provided a response to the AHRC Report. The Applicant submits that this constitutes constructive refusal to accept responsibility for the human rights violations identified in the AHRC Report.

18. The failure of both the Northern Territory and Commonwealth Governments to accept responsibility for rectifying the human rights breaches detailed in the AHRC Report demonstrates that the AHRC is incapable of providing an effective domestic remedy for the Applicant.[52]

19. The Applicant also lodged a complaint with the Northern Territory Health Services Complaints Commission ('NTHSCC') in late 2012 *via* its online complaints mechanism.[53]

    19.1. In February 2014, the Commissioner finally ordered a limited investigation on the following terms:

> 1. Decision making and appropriateness of use of medications in management of behaviour;
> 2. The reasonableness of policies and practice in relation to restraint insofar as they relate to individuals in [the Applicant's] situation; and

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[50] Ibid.

[51] The Northern Territory government notified the State Party in 2005 that it was unable to appropriately respond to the needs of persons such as the applicant; see Northern Territory, *Submission to the Senate Select Committee on Mental Health* (2005); at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/mentalhealth/submissions/~/media/wopapub/senate/committee/mentalhealth_ctte/submissions/sub393_pdf. ashx (viewed 4 February 2014), 22. The *Senate Committee on Mental Health* tabled its final report, titled 'A National Approach to Mental Health – from Crisis to Community' in Parliament in April 2006; at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/mentalhealth/report02/index (viewed 29 February 2016).

[52] *T. K. v. France*, Communication No. 220/1987, 8 November 1989, CCPR/C/37/D/220/1987.

[53] The NTHSCC online complaints mechanism can be found at http://www.hcscc.nt.gov.au/complaints/making-a-complaint/make-a-complaint-online/ .

3. The reasonableness of ASCC's consultation and communication with guardians surrounding the use of restraint for persons detained under Part IIA [of the *Criminal Code* 1983 (NT) ('*Criminal Code*')].[54]

19.2. Accordingly, while the Applicant's treatment formed the basis for the investigation, the terms of reference pertain to the prison system in general, and are not designed to address the specific complaint made by the Applicant.

19.3. Furthermore, the NTHSCC's authority extends only to non-binding recommendations and, as a result, even if the complaint is eventually upheld, any recommendation made will not constitute an effective remedy for the human rights violations contained with this Communication.[55]

20. On 2 December 2015 the Australian Senate announced an inquiry into the indefinite detention of people with cognitive and psychiatric impairment. Submissions have been invited and the reporting date is 30 July 2016.

20.1. While this inquiry will consider the indefinite detention of persons in similar circumstances to the Applicant, the authority of the Senate extends only to recommendations which have no binding effect on Commonwealth or State and Territory Governments. As such, it is submitted that this inquiry has no bearing on the admissibility of this Communication.

21. In conclusion, the Applicant submits that all domestic mechanisms for providing a remedy to the Applicant have proved to be ineffective, and accordingly Article 5.2(b) OPICCPR is satisfied.

OTHER INTERNATIONAL INVESTIGATIONS

22. Article 5.2(a) of the OPICCPR requires that the matters contained in a Communication are not currently under examination by another international procedure.

22.1. The Applicant submits that the matters contained in this Communication have not been submitted for examination by any other international procedure of investigation.

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[54] Appendix F; *Criminal Code*.
[55] The powers of the NTHSCC can be found at http://www.hcscc.nt.gov.au/complaints/complaint-resolution/investigating-complaints/ .

IV. Facts of the Complaint

23. The Applicant submits that all human rights are indivisible, interdependent, and interrelated.[56] As multiple violations of different human rights may arise from a particular factual matrix, rather than rendering such claims duplicative or unnecessary, it is submitted that the sum of such claims may demonstrate the aggravated nature of the Applicant's case.

24. In accordance with Rule 86 of the *Rules of Procedure of the UN Human Rights Committee*, and in light of paragraph 25 above, this Communication sets out the facts of the matter in as much detail as possible in order to present a *prima facie* case.[57]

25. PERSONHOOD

25.1. The Applicant, Mr Malcolm Morton, was born on 30 December 1990. His mother, Edna Wallace, was 17 years old at the time of the Applicant's birth. Edna suffered from an Acquired Brain Injury and as a result the Applicant was raised by his grandmother and family IN A REMOTE INDIGENOUS AUSTRALIAN COMMUNITY, TITJIKALA, LOCATED approximately 120 kilometres south of Alice Springs in the Northern Territory, Australia. The Applicant and his father, Harold Morton, were estranged. [58] When the Applicant was seven years old (1997) he moved to Ltyntye Apurte (also known as Santa Teresa, approximately 176km away from Titjikala)[59] until he was taken into custody in 2007.

25.2. The Applicant is a proud Arrente man and has a strong connection to culture, family, Community and Country. The Applicant also speaks two Indigenous Australian languages: Arrente and Luritja, as well as limited English.

26. DIAGNOSIS AND CHILDHOOD OF THE APPLICANT

Living arrangements

[56] *Vienna Declaration and Programme of Action*, UN Doc A/RES/60/1 [121].
[57] *Rules of Procedure of the Human Rights Committee*, HRC 103rd sess, 2852nd mtg, CCPR/C/3/Rev.10 (12 January 2012) r 86.
[58] Triggs, above n 4, [100].
[59] For the purposes of this Communication, Ltyntye Apurte will be referred to as Santa Teresa.

26.1. The Applicant was raised by his maternal grandmother in Titjikala until the age of seven.[60] Following the death of his grandmother, the Applicant was relocated to Santa Teresa in 1997 to be cared for by his Uncle, Simon Wallace and Mr Wallace's partner, Ms Ruth Oliver. During this period, issues associated with the Applicant's disabilities, including frequent epileptic seizures and behavioural issues, led to a number of hospital admissions, psychological evaluations, child protection notifications and repeated changes to his living situation.[61] These difficulties significantly impacted on Mr Wallace's ability to care for the Applicant leaving the Applicant regularly unsupervised and unsupported. In addition, the Applicant's behaviour prevented him from attending school and led to his isolation and marginalization from Community.[62]

26.2. In 2000, when the Applicant was ten, the Northern Territory Child Protection Agency funded an initial project aimed at providing one-on-one support to the Applicant. Following the conclusion of this project, support was funded through the newly established Positive Behaviour Support Unit and various officers including the Applicant's current guardian Patrick McGee were appointed to provide one-on-one support and behavior management to the Applicant from 2000 – 2005. During this period of time the Applicant's behaviour was managed via a Positive Behaviour Support Plan ('PBSP') and his quality of life began to improve.[63] Improvements included regular access to medical treatment facilities for his epilepsy, and improved access to education and recreational activities. The Applicant's relationship with family members improved. The Applicant also experienced safe and secure accommodation throughout this period.

26.3. In 2005 responsibility for the Applicant's disability support was formally transferred to the Lyentye Apeurte Community Council. The Council paid Mr

[60] Appendix G, 3.
[61] Appendix G.
[62] *R v Morton* [2010] NTSC 26, 8 [14]-[15]; Appendix G, 3 - 4, 8, 11.
[63] A PBSP focuses on proactive and strength-based approaches to develop alternative pro-social skills to replace aggressive and violent behavior. Positive behavior support for persons with disabilities is in stark contrast to a correctional setting, which acts reactively in applying punishment to control behaviours. A PBSP is designed to replace behaviours that result in harm to self and others with different means of communication, and support the individual to develop more effective methods of coping. For more details see, eg, Appendix H.

Wallace to be the Applicant's primary carer. From this point onwards, the complexity of the Applicant's behaviour and associated needs surrounding his disability overwhelmed Mr Wallace and his capacity to provide effective care for the Applicant dwindled.[64] In January 2007, guardianship for the Applicant was transferred jointly to Mr McGee and the Office of the Northern Territory Public Guardian. The Applicant's quality of life continued to disintegrate and by the time the Applicant was arrested in 2007, his life was again characterised by the same problems that had existed before 2000.

Behavioural and cognitive diagnosis

26.4. From a young age the Applicant has been the subject of multiple evaluations and assessments, and corresponding reports. These evaluations have assessed issues such the Applicant's level of cognitive functioning, behavioural concerns and physical health.[65]

26.5. The Applicant has an extensive history of epilepsy dating back to the age of 13 months when he was diagnosed with epileptic seizures and a brain injury.[66] Assessments have concluded that a number of prolonged seizures in the Applicant's childhood contributed to him acquiring right temporal lobe damage.[67]

26.6. Some reports concerning the Applicant's cognitive function conclude that the Applicant has a mild intellectual disability while others conclude that his intellectual disability is far more serious.[68] The Applicant has poor communication skills, and has difficulty with instructions more than two steps long. Impaired receptive and expressive communication skills are clinical indicators for risk of aggression in people with disability.[69] Various assessments have concluded that the Applicant may have Autism Spectrum Disorder,[70] Intermittent Explosive Disorder, Organic

[64] Appendix G, 4.
[65] Appendix G; see also Appendix H, 7 – 10.
[66] Triggs, above n 4, [101].
[67] Appendix G, 6.
[68] Appendix G, 4 (section 1.3).
[69] D Allen, 'Devising Individualised Risk Management Plans' in D Allan, editor, *Ethical Approaches to Physical Interventions: Responding to Challenging Behaviours in People with Intellectual Disabilities* (2002, BILD Publications) 71.
[70] Triggs, above n 4, [101].

Personality Disorder, Reactive Attachment Disorder and ADHD.[71] There is no doubt from the various reports that the Applicant has a significant cognitive impairment, and his adaptive behavioural skills are below the average range. [72] The Applicant's disabilities also mean that maintaining existing relationships is very important. [73]

26.7. Given the Applicant's disabilities, including a significant cognitive impairment, difficulty with social interaction, behavioural history and his life on Community, the Applicant requires a comprehensive PBSP which is designed to support his specific intellectual disability needs. [74]

27. FACTS LEADING TO DETENTION

27.1. On 19 July 2007, the Applicant was charged with the murder of Mr Wallace on or around 17 July 2007. The Applicant was 16 years of age when he was charged and was 18 years of age when he was tried in 2009.

27.2. In the relation to the circumstances of the murder of Mr Wallace, the AHRC Report found that:

> [The Applicant] had overheard his Uncle having a conversation that morning about the possibility of arranging a visit to Titjikala so that [the Applicant] could stay there with an Aunt. She had later told [the Applicant's] Uncle that she could not take him. The police found a backpack packed with clothes, keys, a tablet dispenser and a second bag with [the Applicant's] Nintendo game. The Crown asked the jury to infer that [the Applicant] expected to be taken to Titjikala and waited all day for his uncle to come home from work to take him there. Instead, his uncle came home drunk. [The Applicant] became angry when he found out that his uncle was not going to take him to Titjikala and was drunk. [The Applicant] picked up a knife and stabbed him five times. His uncle fled to his bedroom and locked the door from the inside. He died about 20 minutes later.[75]

[71] Appendix G, 5.
[72] In addition, the Supreme Court of the Northern Territory ('the SCNT') found the Applicant to have the mental capacity of a seven year old. *R v Morton* [2010] NTSC 26, 8 [26].
[73] Appendix G, 9; see also, Appendix I.
[74] Appendix G, 21.
[75] Triggs, above n 4, [106].

27.3. On 17 November 2009, Mildren J of the NTSC found that the Applicant was not fit to stand trial.[76] A special hearing was conducted on 26 November 2009, and at the conclusion of this hearing the jury returned a qualified verdict of manslaughter by reason of diminished responsibility, on the basis that:[77]

27.3.1. The Applicant caused Mr Wallace's death by stabbing him with a knife;

27.3.2. The Applicant actions were voluntary;

27.3.3. The Applicant intended to kill Mr Wallace or cause him serious harm;

27.3.4. The defence of mental impairment was not satisfied;[78]

27.3.5. There was no provocation by Mr Wallace; but

27.3.6. The Applicant had established the defence of diminished responsibility because, at the time,

27.3.6.1. His mental capacity was substantially impaired;

27.3.6.2. The impairment arose wholly or partly from an underlying condition, and given the extent of his impairment, the Applicant should not be convicted of murder. [79]

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[76] *R v Morton* [2010] NTSC 26 [2]; *Criminal Code*, s 43. Section 43J (1) states that a person is unfit to stand trial if the person is:

(a) Unable to understand the nature of the charge against him or her;
(b) Unable to plead to the charge and to exercise the right of challenge
(c) Unable to understand the nature of the trial (that is that a trial is an inquiry as to whether the person committed the offence);
(d) Unable to follow the course of the proceedings;
(e) Unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
(f) Unable to give instructions to his or her legal counsel.

[77] *R v Morton* [2010] NTSC 26 [3]; *Criminal Code*, Part IIA.

[78] S 43C of the *Criminal Code*, entitled 'Defence of mental impairment' states that:

(1). The defence of mental impairment in established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the offence, suffering from a mental impairment and as a consequence of that impairment:

(a) He or she did not know the nature and quality of the conduct;
(b) He or she did not know that the conduct was wrong (that is he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by a reasonable person, was wrong); or
(c) He or she was not able to control his or her actions.

[79] *R v Morton* [2010] NTSC 26, 13 [23].

27.4. Section 43X of the *Criminal Code* provides that returning of a qualified verdict by a jury at a special hearing 'does not constitute a basis in law for a finding of guilt'.[80]

27.5. Upon the finding of a qualified verdict, section 43X(3) of the *Criminal Code* required the NTSC to declare that the Applicant was liable for supervision under Division 5 and as a result the Applicant was remanded in custody until his custodial supervision order was made.[81]

28. TERMS OF THE APPLICANT'S DETENTION

28.1. On 24 May 2010, Mildren J of the NTSC committed the Applicant to the Alice Springs Correctional Centre ('ASCC'), a maximum security prison, pursuant to a Custodial Supervision Order ('CSO'). Part IIA of the *Criminal Code* sets out the law regarding CSOs, which is attached in Appendix J.

28.1.1. CSOs are imposed when it is necessary to incarcerate a mentally ill or impaired individual on the basis that they pose a threat to the community. Under the *Criminal Code* such an order must be imposed by the SCNT and must specify the conditions of incarceration which are appropriate to the particular individual.[82]

28.1.2. Section 43ZA(2) provides that 'the [NTSC] must not make a [CSO] committing the accused person to custody in a custodial correctional facility unless it is satisfied that there is no practicable alternative given the circumstances of the person.'[83]

28.1.3. Chief Justice Martin commented in a similar case:

> [c]ustody in a gaol is quite inappropriate for people [with severe cognitive impairments] 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 [Northern] Territory. The need for that facility is acute and growing rapidly.[84]

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[80] *Criminal Code* s 43X.
[81] *Criminal Code* s 43X(3).
[82] *Criminal Code* s 43ZA.
[83] *Criminal Code* s 43ZA(2).
[84] Quoted in Triggs, above n 4,[253].

28.1.4. At the Applicant's supervision order hearing on 24 May 2010, Mildren J found that there was no practicable alternative to incarceration at ASCC available for the Applicant in the current circumstances.[85]

28.2. Pursuant to s 43ZG(3) of the *Criminal Code*, the only mandatory review of the Applicant's CSO will take place no later than 23 April 2019. At the review, the NTSC will consider whether the Applicant continues to be a danger to himself or the community, and at that time the NTSC will have the power to release the Applicant if he is found not to be a danger.[86]

28.3. Section 43A of the *Criminal Code* provides for an annual report to be submitted to the NTSC during the period of the Applicant's detention. However, this does not constitute a review of the Applicant's CSO.[87]

29. VIOLATIONS WHILST INCARCERATED

29.1. The Applicant submits that his ongoing detention at ASCC since June 2009 amounts to a violation of his fundamental human rights under the ICCPR on the following grounds:

A. INHUMAN TREATMENT (ICCPR: ARTICLES 7 & 10.1 & 3, IN CONJUNCTION WITH ARTICLES 2.1 & 26; CRPD: ARTICLES 4, 15, 17, 26, 28)

30. *Conditions of detention and treatment while detained*

30.1. The current conditions of the Applicant's detention amount to cruel, inhuman and degrading treatment, constituting a violation of both Article 7 and Article 10 of the ICCPR. The specifics of these conditions include:

30.1.1. The use of chemical restraint;

30.1.2. Use of physical and mechanical restraints;

30.1.3. Extended periods of isolation; and

[85] *R v Morton* [2010] NTSC 26 [4].
[86] *R v Morton* [2010] NTSC 26 [64]; *Criminal Code* s 43ZG(1).
[87] *R v Morton* [2010] NTSC 26 [64.10].

30.1.4. The overall inappropriateness of the prison setting considering the disabilities of the Applicant.

30.2. Article 7 is a non-derogable right that prohibits the use of torture or cruel, inhuman or degrading treatment or punishment. The UNHRC, in General Comment 20, states that 'the aim of… Article 7… is to protect both the dignity and the physical and mental integrity of the individual.' In addition, 'exacerbating factors [which extend] beyond the usual incidents of detention' such as the victim's mental health may elevate certain treatment so as to bring it within the definition of Article 7.[88]

30.2.1. In this respect, the UNHRC has noted that:

> The Covenant does not contain any definition of the concepts covered by Article 7, nor does the committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on nature, purpose and severity of the treatment applied.[89]

30.3. Furthermore, according to the UNHRC in *Vuolanne v. Finland*;

> The assessment of what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of the health of the victim…. The Committee expresses the view that for punishment to be degrading, the humiliation… must entail other elements beyond the mere fact of deprivation of liberty.[90]

30.4. The Applicant submits that his treatment while in detention goes far beyond the 'mere fact of deprivation of liberty' and that its nature, purpose and severity constitutes a violation of Article 7.

30.5. The fundamental human right of freedom from torture or cruel or inhumane or degrading treatment is also reflected in Article 15 of the CRPD requiring State Parties to enact all effective legislative, administrative, judicial or other measures to prevent persons with disabilities from being exposed to torture or cruel or inhuman

[88] *Michael Jensen v Australia*, Communication No. 762/1997, U. N. Doc. CCPR/C/71/D/726/1997 (2001) [6.2].

[89] Human Rights Committee, *General Comment No 20*, 42nd sess, UN Doc A/47/40 (1994), [4].

[90] *Vuolanne v Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) (1989), [9.2].

or degrading treatment. It is clear in both treaties that people with disabilities must not be exposed to such treatment.

30.6. Further, Article 10.1 provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. This Article:

> Imposes on State Parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture and other cruel, inhuman or degrading treatment or punishment contained in Article 7.[91]

30.7. The rights and obligations contained within Article 10 are 'fundamental and universally applicable' and 'cannot be dependent on the material resources available in the State Party.'[92] There can be no derogation of the obligations contained within Article 10. This Article forbids any hardship or constraint other than the necessary detention and provides that 'respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'[93]

30.7.1. In addition, Article 109 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)* states that 'persons who are found to be not criminally responsible [for reasons of mental impairment,] … shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.'[94] This obligation is relevant to determining whether a State has breached Article 10.1 of the ICCPR.

30.8. Likewise, Article 17 of the CPRD guarantees that 'every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis

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[91] Human Rights Committee *General Comment No 21*: Article 10, 44th sess, (1992) **UN Doc HRI/GEN/1/Rev.1 (1994)** [3].

[92] Ibid.

[93] Ibid.

[94] *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 17th sess, Agenda Item 106, UN Doc A/RES/70/175 (8 January 2016) rule 109.1; Gillian Triggs, President, Australian Human Rights Commission, *Notice under s 29 of the Australian Human Rights Commission Act 1986 (Cth) – Report Regarding Complaints of Mr Malcolm Morton et al* (August 2014), [260].

with others.' The emphasis in both Article 10 of the ICCPR and Article 17 of the CRPD to treat people with humanity, including respect for their physical and mental integrity, is clear.

Particulars of the use of restraint:

30.9. Prison staff have responded to the Applicant's behaviours of concern by first physically restraining the Applicant, then mechanically restraining him in a restraint chair with leather binds, before chemically restraining him by administering PRN sedation.[95]

Chemical restraint:

30.10. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment in 2008 released an interim report which addressed the use of chemical restraint on persons with disabilities.[96] He stated that chemical restraint could cause muscle atrophy, life-threatening deformities and organ failure.[97] Compellingly, the Special Rapporteur noted that 'there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment.'[98]

30.10.1. The Interim Report stated that the CRPD complements other human rights instruments [such as the ICCPR] and provides 'further authoritative guidance' for interpretation and application.[99]

Particulars of the use of chemical restraint:

30.10.2. When the Applicant is distressed, he responds by banging his head against the wall – often until his head begins to bleed. The response of ASCC staff is to

[95] PRN sedation is a form of chemical restraint. Section 34 of the *Disability Services Act* 1993 (NT) defines chemical restraint as the application of psychotropic medication to control behaviour rather to treat a mental illness.
[96] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Mendez, twenty-second session, 1 February 2013, A/63/175, [55].
[97] Ibid.
[98] Ibid.
[99] Ibid, [44].

forcibly remove the Applicant from his cell, belt him into a restraint chair and administer sedatives. He has been kept in this position for up to two hours.[100]

30.10.3. The sedative used in these cases is Chlorpromazine (also known as Largactyl) – an anti-psychotic medication.[101]

30.11. In order to administer the chemical restraints in cases of severe distress, the Applicant must first be physically restrained by the staff and then mechanically restrained in the restraint chair.

30.11.1. For example, on 6 October 2012, after being isolated in his cell, the Applicant began to bang his head on hard surfaces in his cell until he was bleeding. The Applicant was then restrained by six officers, strapped to a chair and injected with tranquilizers until he was unconscious.[102]

30.11.2. Another instance of this process being used is September 2015 after the Applicant injured himself while agitated. He was again physically restrained, mechanically restrained and chemically sedated for between 30-45 minutes.[103]

30.11.3. The most recent instance of physical, mechanical and chemical restraint was 31 March 2016. The Applicant was administered 100mg Largactyl in order to sedate him.[104]

30.12. The AHRC report specifically noted 16 instances of this physical, mechanical and chemical restraint over the course of his incarceration up to 6 November 2013.[105]

30.13. In addition, Dr Astrid Birgden, a Department of Health ('DoH') appointed Consultant Forensic Psychologist tasked with providing an independent review of service delivery to the Applicant, reported that there were 22 instances of PRN restraint used on the Applicant between March 2014 and August 2015.[106]

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[100] Triggs, above n 4, [118].
[101] Second DoH Summary Progress Report, Affidavit/Report of Ms K Kennett, 27 November 2014.
[102] Triggs, above n 4, [115].
[103] Appendix L.
[104] Appendix I.
[105] Triggs, above n 4, [117].
[106] Appendix M; see also Appendix H, 13, where Dr Birgden describes six uses of PRN restraint on the Applicant from 16 December 2012 – 25 December 2013.

30.14. As the need for restraint arises when the Applicant is distressed, this physical and mechanical restraint has the effect of further distressing him. The Applicant is also aware that mechanical restraint is followed by chemical restraint in the form of injected sedatives.

30.15. It is submitted that the Applicant's cognitive impairments exacerbate the suffering caused by the frequent use of chemical restraints.

30.16. The Applicant is also frequently subjected to chemical sedation without physical restraint. In the Senate submission referred to in paragraph 35.10.2, it is stated that the Applicant was sedated in this manner 40 out of the 52 weeks of the year between 2012 and 2013.[107]

30.17. The Applicant submits that the use of these chemicals to restrain and sedate is purely responsive to behaviours of concern and has no therapeutic justification, is not proportionate to the level of risk that the Applicant presents and is harmful to his long-term health.[108]

30.18. The Applicant submits that the level of suffering as a result of the frequent chemical restraint is exacerbated by his disabilities, and constitutes cruel, inhuman or degrading treatment as described by Articles 7 and 10.1 of the ICCPR and Article 15 of the CRPD.

Physical and mechanical restraints:

30.19. It is submitted that the physical and mechanical restraint of the Applicant amounts to inhuman and cruel treatment, constituting a violation of Article 7 of the ICCPR and articles 15 and 17 of the CRPD.

30.20. The use of shackles, handcuffs and other mechanical restraints on people with mental disabilities for even a short period of time may constitute torture and ill-treatment.[109] The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Juan E Mendez, stated that:

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[107] Appendix L.
[108] Appendix G, 23.
[109] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 22nd sess, 1 Feb 2013, A/HRC/22/53, para 63; See also Committee Against Torture,

> It is essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty.[110]

30.20.1. In the case of *Cabal and Pasini v Australia*,[111] Mr Hipolito Solari-Yrigoyen issued a dissenting opinion in which he refuted the majority's finding that a justification for the need of shackling had been made out by the State Party. In that case, Australia argued that the use of shackles was necessary when transporting the author because he was a high flight risk.[112] Mr Solari-Yrigoyen concluded that Australia's justification for the use of shackles was not sufficient to displace the obligation to refrain from using 'humiliating and unnecessary methods that are inconsistent with respect for the inherent dignity of the human person and the treatment to which anyone deprived of his liberty is entitled.'[113]

30.21. The classification of these restraint mechanisms as torture, cruel, inhuman or degrading treatment by the Special Rapporteur, and Mr Solari-Yrigoyen's opinion, indicate that any physical restraint of the Applicant is a violation of Articles 7 and 10.1 of the ICCPR.

30.21.1. The Applicant has been shackled on numerous occasions over the course of his incarceration at ASCC. This is evidenced in multiple incident reports as well as his transition plan.[114]

30.21.2. For example, on 26 September 2015[115] prison staff collecting the Applicant from the SCF used handcuffs before placing him in the 'cage' in the back of the prison vehicle. This led to the Applicant becoming distressed and repeatedly

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Convention against Torture and other cruel, inhuman or degrading treatment or punishment, 48th sess, 25 June 2012, CAT/C/CAN/CO/6, para 19(d); *Bures v Czech Republic (European Court of Human Rights)*, Application No. 3769/08 (18 October 2012), [132].

[110] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 22nd sess, 1 Feb 2013, A/HRC/22/53, [63].

[111] *Cabal and Pasini v Australia,* Communication No. 1020/2001, 19 September 2003, UN Doc CCPR/C/78/D/1020/2001.

[112] Ibid, [8.2].

[113] Ibid, Appendix, dissenting opinion [8.2].

[114] See Appendices E and M.

[115] Appendix L.

banging his head on the roof and walls of the vehicle until he was bleeding profusely from the head.[116]

30.21.3. As discussed at paragraphs 35.11 to 35.13, the Applicant has on many occasions been physically and mechanically restrained in a metal chair with leather straps to facilitate the provision of PRN sedatives.[117]

30.22. The Applicant submits that because of his cognitive impairments, the use of restraints causes him significant distress, more so than for a person without his disability. As he is not able to process his emotions and control his behaviour in the same way as someone without his disability, the ASCC staff respond with further physical and mechanical restraint, in a cycle which is difficult to break in the prison environment.

30.23. The frequent use of physical and mechanical restraint violates the Applicant's dignity and physical and mental integrity. This conduct amounts to more than a 'mere deprivation of liberty', and coupled with his status as a vulnerable prisoner amounts to cruel, inhuman and degrading treatment violating Articles 7 and 10.1 of the ICCPR[118] and Articles 15 and 17 of the CRPD.

<u>Particulars of extended periods of isolation:</u>

30.24. The Applicant submits that he is subject to extended periods of isolation in breach of Article 10.1 of the ICCPR and Article 17 of the CRPD.

30.25. The AHRC Report found that in 2014 'the Applicant spent approximately 16 hours a day in isolation' in his cell at ASCC.[119]

30.25.1. In *Brough v Australia*[120] the UNHRC found that the conditions of detention of a juvenile Indigenous inmate with a mental disability were incompatible with Article 10.1 of the ICCPR. In that case, the author was confined to a 'dry cell' for extended periods of time, meaning that the author had no possibility of

[116] Ibid.
[117] Appendix O.
[118] *Vuolanne v. Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) (1989), [9.2].
[119] Triggs, above n 4, [119]; see also Appendix M, 2012 Report, 7.
[120] ***Brough v Australia*, Communication No. 1184/2003, U.N. Doc. CCPR/C/86/D/1184/2003 (2006).**

communication, was exposed to artificial light for long periods, and had his clothes and blankets removed.

30.25.2. Although the State Party submitted that the author's confinement to a 'dry cell' was to protect him from self-harming, the HRC found the use of this measure to be incompatible with the purposes of Article 10 of the ICCPR, particularly considering the status of the author as an Indigenous juvenile with a mental impairment.

30.26. The Applicant submits that, analogous to *Brough v Australia*, the use of extended periods of isolation are incompatible with the purposes of Article 10.1 of the ICCPR and Article 17 of the CRPD and violates the State's obligations to treat the Applicant with humanity and respect for the inherent dignity of the human person.

30.27. The Applicant further submits that similarly to *Brough v Australia*, the impact of the Applicant's detention is exacerbated by his mental impairment and his status as an Indigenous Australian. In failing to ensure that the conditions of the Applicant's detention reflect his status as a particularly vulnerable prisoner, the State Party has breached its obligation under Article 10.1 of the ICCPR and Article 17 of the CRPD.

<u>Particulars of the general inappropriateness of the prison setting:</u>

30.28. ASCC is a maximum security prison, which falls under the jurisdiction of the Department of Corrections ('DoC').[121]

30.29. Maximum security prisons are structured around discipline and punishment, and as such ASCC staff are not equipped to provide appropriate, adequate and adapted care to the Applicant. While prison staff receive training in relation to controlling the behaviours of those prisoners with mental impairments[122] the Applicant submits that this is not sufficient to amount to appropriate, adequate and adapted care for persons such as the Applicant.

[121] *Correctional Services Act* 2014 (NT).
[122] Appendix G.

30.30. The detention of the Applicant in a maximum security prison is inappropriate because of his mental impairment, physical disabilities and Indigenous heritage and constitutes a violation of Article 10.1 of the ICCPR and Article 17 of the CRPD.

30.31. Ms Leigh-Smith in her Risk Assessment Report states that:

> Principles underlying service to people with an intellectual disability identify that service[s] should be provided in the least restrictive manner…. In Victoria there is recognition that people with an intellectual disability who engage in aggressive and violent behaviour as a consequence of their developmental disorder can be managed within a community based setting when that setting is specifically and physically tailored to their needs.[123]

30.32. Within the security setting of ASCC it is evident that the primary response of the prison staff to the Applicant's challenging behaviours is forced restraint and isolation. These responses cause significant stress for the Applicant.

30.33. It is clear that the Applicant's detention at ASCC within a disciplinary setting is inappropriate, and that the Applicant should be treated within a less restrictive environment. The AHRC Report stated that incarceration of the Applicant within a restrictive security environment causes him such a significant level of distress as to amount to inhuman conduct.[124]

30.34. Accordingly, the failure of the State Party to treat the Applicant within a community based setting, as suggested by Ms Leigh-Smith, violates the Applicant's right be treated with respect for the inherent dignity of the human person according to Article 10.1 of the ICCPR and the Applicant's physical and mental integrity according to Article 17 of the CRPD.

31. *Failure to provide appropriate rehabilitation*

31.1. Article 2.1 of the ICCPR requires State Parties to ensure that all individuals are able to enjoy their rights under the Covenant without discrimination.

31.2. In addition, Article 26 of the ICCPR entitles all persons to equal protection before the law without discrimination of any kind.

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[123] Appendix G, 23 - 24.
[124] Triggs, above n 4, [259-261].

31.3. Article 10.3 of the ICCPR provides that any detention shall 'essentially seek the reformation and social rehabilitation of the prisoner.'[125] This obliges State Parties to implement programs that are designed to rehabilitate prisoners in terms of their offending, and ultimately lead to their release into the community without discrimination on the basis of, *inter alia*, disability.

31.4. Article 26 of the CRPD imposes further obligations upon States Parties including the positive obligation to take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence. The obligation includes the organization, strengthening and extension of comprehensive habilitation and rehabilitation services and programmes at the earliest possible opportunity, to enable persons with disabilities to access and benefit from such services. Article 26 also provides an explanation of what is meant by habilitation and rehabilitation and, thus, what the State Party is required to provide.

31.4.1. Article 26.2 (CRPD) states that the professionals and staff working in such services ought to be appropriately trained.

31.5. An interpretation of Article 10.3 of the ICCPR, in light of Articles 2.1 and 26 (ICCPR) and Article 26 (CRPD), leads to an obligation for the State Party to provide appropriate rehabilitation programs that target both offending and the ability to maintain and maximise independence for all prisoners, regardless of ability or race.

31.6. The Applicant submits that both forms of rehabilitation are essential to his development, and that encompassed within the right to rehabilitative and reformative services, is the right to have a complete Treatment Plan, including a Behavioural Plan where required by the circumstances of the individual.[126]

Particulars:

[125] Human Rights Committee *General Comment No 21*: Article 10, 44th sess, (1992) **UN Doc HRI/GEN/1/Rev.1 (1994),** [3].

[126] Appendix P.

31.7. The Northern Territory Government has utilized a number of different contradictory plans regarding the Applicant's care and treatment. None of these plans have been completely appropriate for the Applicant's circumstances.[127]

31.7.1. In May 2012, a DoH weekly report demonstrated that staff involved in dealing with the Applicant failed to provide a consistent response when dealing with his behaviours of concern. This lack of consistency between responses is arguably responsible for exacerbating distress and concerning behaviours. [128]

31.8. In January 2014, the Applicant's support workers and his Guardian worked collaboratively to develop a Transition Plan ('TP') aimed at transitioning the Applicant to a Secure Care Facility ('SCF') in Alice Springs, with the ultimate goal of transitioning the Applicant out of prison permanently.

31.8.1. On 30 January 2014, the NTSC varied the Applicant's CSO (Appendix N) to allow him to participate in 'day release' from ASCC to the SCF in a manner consistent with his TP.[129]

31.8.2. The TP outlines five stages for transitioning the Applicant to the SCF. Each stage increases the amount of time that the Applicant will spend at the SCF, from two days a week in Stage one to five days a week in Stage four (10am – 4pm). Stage five will includes the commencement of overnight stays at the SCF. In order for the Applicant to progress from one Stage to the next, the Applicant must complete each Stage for a certain number of days in a row without incident.

31.8.3. The Applicant is currently at Stage Three and spends three days a week at the SCF.

31.8.4. Treatment within a therapeutic environment outside the prison setting has had a positive impact on the Applicant.

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[127] Ibid.
[128] Appendix Q.
[129] Appendix N.

31.9. Despite these improvements of the Applicant since the TP was implemented, it is submitted that the TP is not intended to lead to the Applicant's transition from prison into a SCF, nor his release into a community based treatment setting.

31.9.1. To progress to the next Stage the Applicant's behaviour must remain incident- free for 20 consecutive business days. An 'incident' involves escalation from 'yellow' behaviours including frowning, humbugging[130] and withdrawing communication, to 'orange' or 'red' behaviours including aggression, threats or violence.[131] This means that weekends spent in maximum security prison at the ASCC, in the control of prison staff who lack the same training as the SCF staff, can have the practical effect of limiting his ability to satisfactorily complete 20 days in a row without incident.[132] For instance, the Applicant had progressed to Stage Four in recent months but has regressed to Stage Three in April 2016. It is, thus, highly unlikely that the Applicant will ever progress to Stage five.

31.9.2. Further, the Applicant's guardian gives evidence that even if he does complete the TP, the staff at the SCF do not believe that they have adequate capabilities and support to permanently care for the Applicant.[133] There is no indication that DoH or DoC intends to provide further training to the staff or increase funding for the SCF. Accordingly, it is submitted that the Transition Plan is not intended to lead to the Applicant's permanent release from prison.

31.9.3. Further, in the most recent section 43ZK Periodic Report submitted to NTSC by DoH on 4 December 2015, DoH stated that those individuals who are currently receiving services from DoH at ASCC, including the Applicant, are being considered for transfer to the Complex Behaviour Unit ('CBU') at the Darwin Correctional Centre ('DCC').[134]

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[130] Humbugging has a specific meaning within Indigenous culture and behaviours in which the individual is persistently demanding in order to meet a need. Fay H. Johnston, Susan P. Jacups, Amy J. Vickery and David M. J. S. Bowman "Ecohealth and Aboriginal Testimony of the Nexus Between Human Health and Place" *EcoHealth* 4, 489–499, 2007.
[131] Appendix M, 11.
[132] Ibid.
[133] Appendix I.
[134] Appendix R, December 2015 Report, 1.

31.9.4. Other prisoners subject to CSOs and hosed at the JBU in ASCC have already been moved to the CBU in DCC. According to the Applicant's guardian, it is highly likely that the Applicant's will be moved to Darwin in May 2016.

31.9.5. The Applicant submits that if this transfer occurs it will terminate the Applicant's TP. The termination of the TP means that the Applicant will no longer have access to therapeutic treatment outside of the prison environment and he will return to full time residence in a maximum security prison. As argued above, the prison environment is inappropriate for the Applicant's special needs including his need for intense therapy in order that he learn how to response to external stimuli without posing a risk to himself or others.

31.9.5.1. Further, the PBSP which are the norm throughout Australia for individuals such as the Applicant, cannot be implemented within the prison environment. The methods utilised by such programs are incompatible with the necessarily strict regime of discipline imposed in prisons.[135]

31.9.5.2. The transfer will also negatively impact on any progress discussed above. It will also have a severely detrimental effect on his mental health.

31.10. The fact that the Applicant was never intended to transition to full time care at the SCF demonstrates that his detention is effectively punitive, rather than rehabilitative and reformative; directly violating Article 10.3 of the ICCPR. As previously submitted, detention in a maximum security prison is particularly inappropriate for the Applicant due to his mental impairment, his status as an Indigenous Australian and the fact that he has not been convicted of a crime.

31.10.1. Unlike the author in the UNHRC case of *Jensen v Australia*, the Applicant has not refused to participate, nor unsuccessfully participated, in rehabilitation programs.[136] Rather, due to his mental impairment, the State Party has failed to

[135] Standard Rehabilitation Programs within prisons are undertaken within a correctional context which is not appropriate for the needs of the Applicant and cannot be accessed by him. Even where the service was available to the Applicant, his cognitive limitations would prevent him from successfully engaging in this programmes. *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80, [82].

[136] *Jensen v Australia*, Communication No. 762/1997, UN Doc CCPR/C/71/D/726/1997 (2001).

provide sufficient and appropriate programs for the Applicant. This violates the State's obligation to ensure that the Applicant can enjoy his rights under Article 10.3 without discrimination of any kind.

31.11. By failing to provide effective ongoing reformative and rehabilitative programs designed to treat the Applicant's responses to distressing situations and therefore the likelihood that he will engage in future offending, such that he could ultimately be released from prison, Australia has discriminated against the Applicant on the basis of his disability. Accordingly, Australia has violated Articles 2.1, 10.3 and 26 of the ICCPR and Article 26 of the CRPD.

B. ARBITRARY DETENTION (ICCPR: ARTICLE 9; CRPD: ARTICLE 14)

32. The Applicant submits that his detention is arbitrary and in contravention of Article 9 of the ICCPR on the grounds that his detention is discriminatory, grossly inappropriate and effectively indefinite.

32.1. Article 9 of the ICCPR provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

32.2. Similarly, article 14 of the CRPD provides:

> States Parties shall ensure that persons with disabilities, on an equal basis with others:
>
> (a) Enjoy the right to liberty and security of person;
>
> (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

32.3. Detention will be arbitrary where it is unreasonable, unnecessary and disproportionate and, thus, inconsistent with the Convention.[137]

[137] *Tillman v Australia*, U.N. Doc. CCPR/C/98/D/1635/2007.

32.3.1. The *travaux preparatoires* for the ICCPR indicate that arbitrariness incorporates 'elements of injustice, unpredictability, unreasonableness, capriciousness and disproportionality.[138]

32.4. In addition to Article 14 of the CRPD, the Applicants allege breaches of Articles 19, 25, 26.1 and 28.1 of the CRPD and each will be discussed in context below.

Detention is Arbitrary because it is Discriminatory

32.5. The Applicant submits that his detention is arbitrary because it is discriminatory. It has arisen without conviction, solely as a result of his cognitive impairment.

32.6. The law committing the Applicant to detention applies only to persons with cognitive impairment. It provides for the indefinite detention of persons with cognitive impairment who are charged with offences under the *Criminal Code* without any finding of guilt. Persons who do not have cognitive impairments are not subject to any equivalent law. In this respect this is a discriminatory status-based law.

32.7. Article 9 of the ICCPR requires Australia to ensure that no one is deprived of their liberty except where authorised by law. Article 14 of the CRPD specifies that the 'existence of a disability shall in no case justify a deprivation of liberty.'

32.7.1. Article 2 of the CRPD states that discrimination on the basis of disability means:

> Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including a lack of reasonable accommodation.[139]

32.8. Further, Article 19 of the CRPD affords persons with disabilities the right to live in the community with choices equal to others.

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[138] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd ed, 2005), 172.
[139] Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E Mendez, 22nd sess, 1 February 2013, A/63/175, [48].

32.8.1. The Applicant submits that his indefinite detention in prison without conviction and only as a result of a lack of availability of appropriate alternatives and community support is inconsistent with his Article 19 (CRPD) rights.

32.9. It is submitted that Australia's failure to provide viable alternatives for people with disabilities who, under law, are required to remain in custody, is a violation of Article 19. Were it not for his disabilities, the Applicant's lack of conviction would prevent him being detained for any period of time.

32.10. Accordingly, it is submitted that the Applicant's detention at the ASCC is arbitrary because it is discriminatory.

Particulars:

32.11. The Australian Government has failed to provide alternative accommodation and care options. The Northern Territory legislative framework provides that in lieu of an appropriate place the Applicant was to be detained in a maximum security prison, subject to a CSO.[140]

32.12. The *Criminal Code*, sections 43J and 43R(3), provides that mentally impaired persons who are accused of having committed a crime are unfit to be tried, except by Special Hearing. Section 43Z(3)(a) provides that a qualified verdict amounts to a non-conviction. Then, section 43X provides that the accused person is to be either released unconditionally, placed under a non-custodial supervision order or made subject to a CSO where, as in the Applicant's case, they would be a danger to themselves or others if they were not placed in custody.

32.12.1. Section 43ZA(2) stipulates that detention in prison should be as a last resort and only where there is no available alternative.

32.13. The Applicant submits that CSOs are only imposed on persons with mental impairments and, as such, the legislation authorising them is discriminatory.

32.14. It follows that the subsequent incarceration in a maximum security prison is discriminatory.

[140] *Criminal Code* s 43ZA(2); see also *R v Morton* [2010] NTSC 26, [4].

Detention is Inappropriate in the Circumstances:

32.15. The UNHRC has found that;

> To avoid arbitrariness, detention must be reasonable, necessary in all the circumstances of the case and proportionate to achieving the legitimate aims of the State party. If the State party may achieve its legitimate ends by less invasive means than detention, detention will be rendered arbitrary.[141]

32.16. The Applicant submits that owing to his disabilities, detention in a maximum security prison is grossly inappropriate in the circumstances and thus constitutes arbitrary detention for the purposes of Article 9 of the ICCPR, as further expounded in Article 14 of the CRPD.

Particulars:

32.17. As discussed above at paragraphs 32.28 to 32.30, the environment of a maximum security prison such as ASCC is wholly inappropriate for the rehabilitation of non-convicted individuals who suffer from serious mental impairment and disability issues, such as the Applicant. The Commission found that the Applicant's detention is so inappropriate as to amount to arbitrary detention according to Article 9.1 of the ICCPR.[142]

32.18. Past jurisprudence and General Comments establish that Article 9 applies to situations where lawful detention has become arbitrary because it is unjust, unreasonably or disproportionate to the initial purpose of detention.[143] Arbitrary

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[141] *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007; see also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.2-9.4]; *Mr. C. v Australia,* Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999 (2002) [8.2]; *Mr. Omar Sharif Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003) [7.2]; *Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v. Australia*, Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003) [9.2 and 9.4]; *Rafael Marques de Morais v Angola*, Communication No. 1128, 2002, UN Doc CCPR/C/83/D/1128/2002 (2005) [6.1]; *Abdelhamid Taright et al v Algeria*, Communication No. 1085/2002, U.N. Doc. CCPR/C/86/D/1085/2002 (2006) [8.3]; *Danyal Shafiq v. Australia*, Communication No. 1324/2004, UN Doc CCPR/C/88/D/1324/2004 (2006)..

[142] Triggs, above n 4, [257].

[143] See Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21 (2004), [6], particularly as regards discussion of legal obligations and 'lawfulness' of State-imposed restrictions to rights covered under the ICCPR.

does not mean 'against the law',[144] meaning that detention does not have to be unlawful to be arbitrary.[145] Furthermore, the State Party must always have justification for any deprivation of liberty, and where the State cannot provide this justification, any continued detention is arbitrary.[146]

32.18.1. The Applicant submits that Australia's failure to provide alternatives or appropriate rehabilitative programs which would empower the Applicant to live outside of a maximum security prison cannot be a valid justification. He is forced to live as a prisoner even though he has not been convicted with no means available to him by which to improve his situation.

32.19. The Applicant is currently treated as a prisoner while he is detained at ASCC. The Applicant submits that this type of treatment is arbitrary as it amounts to punishment despite the Applicant's status as an un-convicted person.[147]

32.20. It is clear that a more reasonable and appropriate means of protecting both the Applicant and the community would be by providing an appropriate SCF designed to deliver proper care for persons such as the Applicant.

32.20.1. A SCF would provide a far less invasive way for the State Party to achieve the legitimate purpose of protecting the community and providing rehabilitation to the Applicant, as compared to detention in a maximum security prison.

32.21. Additionally, the incarceration of the Applicant in a maximum security prison is not a proportionate method of protecting the community because of the

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[144] UN Human Rights Committee, *General Comment 35, Article 9: Liberty and security of the person,* UN Doc CCPR/C/GC/35 (2014).

[145] *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.2-9.4]; *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).

[146] UN Human Rights Committee, *General Comment 35, Article 9: Liberty and security of the person,* UN Doc CCPR/C/GC/35 (2014).; *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/76/D/900/1993 (1997); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).

[147] *Fardon v Australia*, U.N. Doc. CCPR/C/98/D/1629/2007; *Tillman v Australia*, U.N. Doc. CCPR/C/98/D/1635/2007.

disproportionate impact that it has on the Applicant in light of his special vulnerabilities.

32.22. Consequently, the detention of the Applicant is inappropriate and violates Article 9.1 of the ICCPR.

Indefinite detention amounting to arbitrary detention:

32.23. General Comment 8 states that if preventative detention is imposed on an individual for the purpose of public safety, there must be a number of safeguards in place, including judicial oversight of the detention. Without these safeguards, the indefinite detention of the individual will amount to arbitrary detention in violation of Article 9.1.

32.24. The Applicant submits that the CSO imposed on the Applicant lacks any provision for, and is not designed to, facilitate the Applicant's release.[148] This accordingly amounts to an indefinite term of detention.

Particulars:

32.25. Part IIA of the *Criminal Code* states that a supervision order is for an indefinite term[149] and requires that, in order for the Applicant to be released into the community, the Applicant must demonstrate that he is no longer a danger to himself or society. As the Northern Territory has no specialist facilities available which would provide appropriate care, treatment and security, the CSO is, in effect, an order of indefinite imprisonment. This is an unequivocal breach of the Applicant's human rights guaranteed in Article 9.1 of the ICCPR.

C. VIOLATION OF THE APPLICANT'S MINORITY RIGHTS AND INTERFERENCE WITH HIS PRIVATE LIFE (ICCPR: ARTICLE 27 IN CONJUNCTION WITH ARTICLE 10.1, AND ARTICLE 17.1 IN CONJUNCTION WITH ARTICLE 23)

33. *Removal from Country*

33.1. The Applicant submits that the State Party has failed to adequately protect the Applicant's right to enjoy his own culture while detained at ASCC, constituting a violation of Article 27 of the ICCPR, read in conjunction with Article 10.1.

[148] See also discussion above at paragraph 33.9.
[149] *Criminal Code* Part IIA, s 43ZC.

33.2. Article 10.1 provides that incarcerated persons shall be treated with humanity and with respect for the inherent dignity of the human person.

33.3. Article 27, relating to minority rights, states that 'persons belonging to an ethnic, religious or linguistic minority shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

33.4. General Comment 23 states that these minority rights are 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned.'[150]

33.5. This Communication specifically focuses on two forms of minority rights: the right of Indigenous Australians to have a connection to their Community and Country, and the right to use their own language.

33.6. As with most indigenous peoples, the importance of Community and Country to Indigenous Australian culture cannot be understated. Indigenous Australian society is 'inextricably interwoven with, and connected to the land…[r]emoved from ours lands, we are literally removed from ourselves.'[151] The relationship that Indigenous Australians have to their Country is 'a deep spiritual connection that is different from the relationship held by other Australians.'[152] It has been well established by Australian federal government agencies that maintaining a physical, spiritual and emotional connection to Country is essential for the maintenance of the mental, social and emotional wellbeing of Indigenous Australians.[153] Accordingly,

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[150] **Human Rights Committee, *General Comment 23, Article 27* (50th sess, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).**

[151] Dodson M, 'Reconciliation in crisis' in Yunupingu G (ed.) *Our land is our life: Land rights – past, present and future* (University of Queensland Press, 1997) 137 – 149.

[152] Pat Dudgeon, Michael Wright, Yin Paradies, Darren Garvey and Iain Walker (eds.) 'The Social, Cultural and Historical Context of Aboriginal and Torres Strait Islander Australians', *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, (Department of Health and Ageing, 2010).

[153] See, eg, Pat Dudgeon, Helen Milroy and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, (Department of Health and Ageing, 2nd ed, 2010); Royal Commission into Aboriginal Deaths in Custody (Report published April 1991); House of Representatives Committee Inquiry into Language Learning in Indigenous Communities (*Our Land Our Languages Report* tabled 17 September 2012); National Aboriginal and Torres Strait Islander Social Survey (NATSISS) 2008 (published Australian Bureau of Statistics, 2010).

interference with the Applicant's connection to his Community and Country amounts to a serious deprivation of his minority rights under the ICCPR.

33.7. The right to enjoy one's culture includes a right to use one's own language. As with all other Indigenous peoples, language is vital aspect of Indigenous Australian culture, and it connects individuals to their Community and Country. Language helps shape the identity of Indigenous as:

> [l]anguage is an essential part of, and intrinsically linked to indigenous peoples' way of life, culture and identities. Languages embody many indigenous values and concepts and contain indigenous peoples' histories and development. They are fundamental markers of indigenous peoples' distinctiveness and cohesiveness as peoples.[154]

The importance of language to an individual's sense of identity and belonging also has an impact on their social and emotional health and wellbeing.[155]

33.8. The State Party has long been aware of the importance of language, Community, Country and kin to Indigenous Australian identity and wellbeing. Multiple studies, commissions and committees have inquired into the disparities between Indigenous and non-Indigenous Australian mortality rates, incarceration rates, education levels and employment outcomes.[156]

Incarceration of Indigenous Australians and minority rights:

[154] House of Representatives Committees Inquiry into language learning in Indigenous communities (*Our Land Our Languages Report*, tabled 17 September 2012), Chapter 2, especially at 8–9, where the Report directly quotes from the Human Rights Council *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 5th sess 9-13 July 2012, A/HRC/EMRIP/2012/3, at 8.

[155] National Aboriginal and Torres Strait Islander Social Survey (NATSISS), Submission 127 to the House of Representatives Committees Inquiry into language learning in Indigenous communities, Office of the Arts, at 2.

[156] *Closing the Gap*, Prime Ministers Report 2016, Department of the Office of the Prime Minister and Cabinet <http://closingthegap.dpmc.gov.au/>; Aboriginal Deaths in Custody Final Report April 1991; Australia's Health – Indigenous Health Report 2014 <http://www.aihw.gov.au/australias-health/2014/indigenous-health/>; Australian Aboriginal and Torres Strait Islander Health Survey (AATSIHS) 2012 – 2013 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4727.0.55.003~2012-13~Main%20Features~About%20the%20National%20Aboriginal%20and%20Torres%20Strait%20Islander%20Health%20Measures%20Survey~110>; Australian Bureau of Statistics, Australian Social Trends - exploring the gap in Labour Market Outcomes for Aboriginal and Torres Strait Islander peoples, 2014 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0main+features72014>.

33.9. One of the most significant issues that impacts upon Indigenous Australian health and wellbeing is the disproportionate rate of imprisonment of Indigenous Australians, particularly young men.[157]

33.10. It is well established that adequate access to family, kin and members of their Community is of paramount importance to Indigenous Australian prisoners as it can ameliorate the impact of prison.[158]

33.11. In addition, the transfer of Indigenous Australian prisoners to prisons located a considerable distance away from Country and Community causes considerable anguish and hardship.[159]

33.12. Article 10.1 forbids any hardship or constraint beyond the necessary detention and provides that 'respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'[160]

33.13. The Applicant submits that Article 10.1, read in conjunction with Article 27, guarantees the Applicant the same rights to protection of his culture as that of an Indigenous Australian who is not being held in detention, other than derogations of the Applicant's minority rights which are a necessary part of his detention in ASCC.

33.14. The Applicant submits that, in order to fulfil the obligations under Articles 10.1 and 27, Australia must take positive measures to ensure that the Applicant's

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[157] See the Australian Bureau of Statistics, 2015 Prisoner statistics: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Imprisonment%20rates~14. When the Aboriginal Deaths in Custody Royal Commission was established in 1987, Indigenous Australians were 15 more likely to be incarcerated in an Australian prison compared with non-Indigenous Australians (see *Aboriginal Deaths in Custody final report* April 1991 [9.3.1]. The Australian Federal Government website gives back ground information on the Royal Commission into Aboriginal Deaths in Custody: see http://www.naa.gov.au/collection/fact-sheets/fs112.aspx. That statistic remained the same in 2012 (see Pat Dudgeon, Helen Milroy and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, (Department of Health and Ageing, 2nd ed, 2014)), 102 and footnote 65.

[158] Ibid, *Aboriginal Deaths in Custody Final Report*, [25.3.1].

[159] Ibid, [25.3.5].

[160] Human Rights Committee *General Comment No 21*: Article 10, 44th sess, (1992) **UN Doc HRI/GEN/1/Rev.1 (1994)** [3].

connection to his Country, Community and language is maintained while incarcerated.[161]

Particulars:

33.15. As discussed above, the Applicant is a proud Arrente man who grew up with his grandmother and family in a remote Indigenous Australian Community, Titjikala.[162] When the Applicant was seven years old he moved to Ltyntye Apurte, and lived there until he was taken into custody in 2007.[163] While living on Community the Applicant learnt traditional hunting and gathering skills, and spend periods of time living off the land.[164] The Applicant speaks two Indigenous Australian languages: Arrente and Luritja. The Applicant's identity as an Arrente man is very important to him, and he has a strong connection to Community and Country.

33.16. The Applicant submits that Australia has not taken sufficient measures to ensure that the Applicant has been able to maintain an adequate connection to Country and Community while incarcerated at ASCC. The Applicant's incarceration at ASCC has removed him from his Community, and accordingly has contributed to a loss of the Applicant's connection to his culture.

33.17. As discussed above, a SCF would provide a more appropriate environment for the Applicant compared with detention at ASCC.[165] However, Australia continues to detain the Applicant in a maximum security prison away from his traditional Country. Accordingly, interference with Applicant's minority rights by removing him from his Country and detaining him at ASCC is not necessary, and therefore violates Articles 10.1 and 27 of the ICCPR.

33.18. For the majority of the time that the Applicant has been in contact with authorities, either through support programs or the justice system, it was assumed that the Applicant had a very limited ability to communicate verbally. However, as

[161] Human Rights Committee, *General Comment 23: Article 27* (50th sess, 1994), Compilation of General Comments & General Recommendations adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1; 38.
[162] Discussed above at paragraph 28.1.
[163] Triggs, above n 4, [98, 102-104].
[164] Appendices G and I.
[165] See also above at 30.1.4 and 32.30-32.34.

the authorities have recently realised, although the Applicant is not able to communicate effectively in English, the Applicant is well versed in and can competently converse in his traditional languages.[166]

33.19. The Applicant submits that, owing to his incarceration and isolation at ASCC, he has limited opportunities to communicate in his traditional languages, For the Applicant, the ability to communicate clearly and effectively in either of his traditional languages connects him to his Indigenous Community and heritage.[167] Accordingly, the limited ability of the Applicant to converse in Arrente or Luritja contributed to a loss of enjoyment of his culture.[168]

33.20. As a result, the inappropriate detention of the Applicant at ASCC interferes with the Applicant's ability to use his own language and communicate effectively, violating the Applicant's right to maintain his own culture while imprisoned according to Articles 10.1 and 27. The interference with the Applicant's ability to use his own language also creates a potential barrier to re-integration into his Community if he is released in the future.

34. *Interference with the Applicant's family life*

34.1. The Applicant submits that the State Party has arbitrarily interfered with the Applicant's family life in violation of Articles 17.1 and 23, by incarcerating him in a maximum security prison when a more appropriate environment for the Applicant would be a secure care facility.

34.2. Article 17.1 states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence…'

34.2.1. In determining whether an interference with the right to privacy is 'arbitrary' the UNHRC has stated that the interference should be 'in accordance

[166] It was not until Mr McGee, the Applicant's current guardian, arranged and was present during a family visit at the ASCC in 2016 that the extent of the Applicant's language skills were realised. It should be noted that English is the Applicant's third language; as a child he spoke Arrente or Luritja with his family.

[167] House of Representatives Committees Inquiry into language learning in Indigenous communities (*Our Land Our Languages Report*, tabled 17 September 2012), Chapter 2, especially at 8–9, where the Report directly quotes from the Human Rights Council *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 5th sess 9-13 July 2012, A/HRC/EMRIP/2012/3, 7.

[168] There are hundreds of different Indigenous languages in Australia: http://www.abc.net.au/indigenous/map/.

with the provisions, aims and objectives of the Covenant and should be… reasonable.'[169]

34.2.2. In *Toonen v Australia*, the HRC interpreted the term 'reasonable' to 'imply that any interference with privacy must be proportionate to the end sought and necessary in the circumstances of any given case.'[170]

34.3. Additionally, Article 23, entitled 'protection of the family', states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

34.4. General Comment 16 states that 'the objectives of the Covenant require that for purposes of Article 17 [the term family] be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.'[171] In *Hopu and Bessert v France*, the UNHRC recognised that cultural traditions should be taken into account when defining the term 'family'.[172] In this case, the UNHRC found that ancestors of an indigenous population of Tahiti constituted part of the author's family.

34.5. Accordingly, the Applicant submits that definition of his family should be construed broadly, to encompass the Indigenous Australian cultural belief of the importance of kin and familial responsibilities. Such a definition of the Applicant's family would include aunties, uncles, cousins and other members of his extended family.

Particulars:

34.6. Since late 2015, the Applicant has been receiving visits at ASCC from his aunt and cousin. The Applicant's aunt is a senior member of his Community, and the Applicant acknowledges this by demonstrating deferential behaviour in her

[169] Human Rights Committee, *General Comment 16*, (23rd sess, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, 21.
[170] *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992.
[171] Human Rights Committee, *General Comment 16*, (23rd sess, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, 21.
[172] *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1.

presence. During these visits, the Applicant is excited and very happy to see his family, and is able to speak with great ease in Arrente for the entirety of the visit.[173]

34.7. Arrangements have now been made, via the DoH, for future visits with members of the Applicant's family in the last week of each month.[174] These arrangements include provision for transport from Community and accommodation for the family.

34.8. While these new arrangements are beneficial, the fact that the Applicant remains incarcerated in a maximum security prison means that he unable to exercise his right to family life under the Article 17 of the ICCPR. Due to the correctional setting of the ASCC, there is little flexibility or spontaneity allowed for family visits. Furthermore, the physical environment in which these visits take place has a restrictive effect on family interaction. A more appropriate environment for the Applicant would be a SCF, where there is more freedom allowed for visits from family, and where the Applicant can better exercise his right to family life.

35. Conclusion

35.1. In sum, and as was found by the Australian Human Rights Commissioner, the Applicant submits that he has the human right, under the International Covenant on Civil and Political Rights:

35.1.1. Not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.

35.1.2. To be treated with humanity and with respect for the inherent dignity of the human person while detained,

35.1.3. Not to be arbitrarily detained,

35.1.4. To enjoy his minority culture, and

35.1.5. To enjoy his family life without interference.

[173] Appendix I.
[174] Appendix S.

35.2. Accordingly, the Northern Territory and Commonwealth Governments have a 'corresponding responsibility to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to these rights.'[175]

Mr Anthony Scotty

II. State Concerned/Articles Violated

Name of the State against which the complaint is directed:

1. The Commonwealth of Australia is a State Party to the ICCPR. Australia ratified the ICCPR on 13 August 1980 and acceded to the First Optional Protocol to the Treaty on 25 September 1991.[176]

    a. Australia lodged a reservation to Article 2 in 1980, which was withdrawn on 6 November 1984.[177]

    b. When ratifying the ICCPR, Australia made a general declaration that:

        i. Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be

[175] Gillian Triggs, President, Australian Human Rights Commission, *Notice under s 29 of the Australian Human Rights Commission Act 1986 (Cth) – Report Regarding Complaints of Mr Malcolm Morton et al* (August 2014).
[176] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').
[177] Gillian Triggs, President, Australian Human Rights Commission, *Notice under s 29 of the Australian Human Rights Commission Act 1986 (Cth) – Report Regarding Complaints of Mr Malcolm Morton et al* (August 2014), [174] – [176].

effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.[178]

ii. The Australian Human Rights Commission ('AHRC') has stated that this general declaration 'was not intended as a derogation from an international obligation, but rather as an explanation of the way in which Australia intended to implement the ICCPR'.[179]

c. The Applicant specifically notes the operation of Article 10 of the OPICCPR:

i. The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

2. Articles of the Covenant or Convention alleged to have been violated:

3. The Communication alleges violations of Articles 2.1, 7, 9, 10.1, 10.3, 17.1, 23.1, 26 & 27 of the ICCPR.[180]

4. The Communication also refers to Articles 1, 2, 4, 14, 15, 17, and 26 of the CRPD in support of rights provided by the ICCPR.[181]

5. Exhaustion of domestic remedies/Application to other international procedures

6. EXHAUSTION OF DOMESTIC REMEDIES

7. In accordance with Articles 2 and 5.2(b) of the OPICCPR, a complaint may only be submitted if all available domestic remedies have been exhausted.

a. The Applicant submits that he has done everything that could be reasonably expected of him to exhaust any and all available domestic remedies.[182]

b. The Applicant submits that Australia is aware of the details set out in this Communication and has not acted to remedy them, and as a result the need to exhaust domestic remedies has been satisfied or displaced.

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[178] United Nations Human Rights Office of the High Commissioner, *Status of Ratification* (2014) <http://indicators.ohchr.org/>.
[179] Triggs, above n 5, [176].
[180] Appendix B.
[181] Ibid.
[182] *Case of Kozacioglu v Turkey*, Application No. 2334/03, Eur Court HR, Grand Chamber, Judgment, 19 February 2009 ('*Kozacioglu v Turkey*').

c. Past jurisprudence indicates that there is no obligation to pursue remedies that have no prospect of success.[183]

d. The UNHRC takes a purposive approach to the assessment of the requirement to exhaust domestic remedies, which is to:

    i. Enable the State Parties to examine, on the basis of individual complaints, the implementation, within their territory and by their organs, of the provisions of the Covenant and, if necessary, remedy the violations occurring.[184]

e. As such, it is submitted that where a State Party is aware of and has acknowledged a particular violation, the obligation to exhaust any further remedies is displaced.[185]

f. The Applicant submits that the obligations in Articles 2 and 5.2(b) have either been satisfied or displaced by the following facts, discussed below between paragraphs 7 and 21:

    i. The lack of an available and reasonable cause of action or remedy under Northern Territory or Australian federal law;

    ii. In addition, the lack of a reasonable prospect of success even if it were possible that an action could be brought before the High Court of Australia; and

    iii. The fact that the Applicant has sought all administrative remedies available to him.

g. Finally, the Applicant submits that, owing to the fact that an independent guardian was not appointed to him until 2013, the Applicant has had no previous opportunity to seek domestic remedies.

8. <u>Particulars:</u>

9. The lack of an available cause of action in domestic legal system:

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[183] *Pratt and Morgan v. Jamaica*, Communication No. 210/1986 and 225/1987, U.N. Doc. Supp. No. 40 (A/44/40) [222] ('*Pratt and Morgan v Jamaica*').

[184] *TK v France,* Communication No. 220/1987, UN Doc CCPR/C/37/D/220/1987 (8 November 1989) [8.3] ('*T.K. v France*').

[185] *Dordevic v Croatia* 41526/10 (2012) Eur Court HR 1640, (2012) MHLO 136, [110].

10. The Applicant submits that the obligation to exhaust domestic remedies is 'based on the assumption that there is an effective remedy available in respect of the alleged breach in the domestic system.'[186]

    a. The Applicant cannot appeal the indictments for which he was tried,[187] as these were quashed when the jury returned a verdict of not guilty on the ground of insanity for each count.[188]

    b. Neither Australia nor the Northern Territory have a Constitutional or legislative Bill of Rights to provide the Applicant with a legal avenue to pursue relief for a violation of his fundamental human rights, and as such the High Court of Australia cannot provide an effective remedy to the violations referred to in this Communication.[189]

    c. As a dualist jurisdiction, international treaties, to take effect, must be directly incorporated into domestic law by a Parliament. Neither the ICCPR nor the CRPD have been incorporated into domestic law by Australia or the Northern Territory in a manner that would provide the Applicant with effective redress for the violation of his human rights.

        i. Therefore, there is no judicial process available to the Applicant to compel the Australian or Northern Territory governments to provide

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[186] *Kozacioglu v Turkey*, Application No. 2334/03, [39].

[187] *In the matter of Scotty* [2007] NTSC 27 [1] (Appendix C) (note – the trial decision of 1986 is unavailable), the Applicant was indicted on four counts:

> Count 1: Murder of Rosemary McIntyre at Alice Springs on 15 August 1995;
> Count 2: Robbery on 15 August 1995;
> Count 3: Unlawful assault upon a female on 15 August 1995;
> Count 4: Attempted sexual intercourse without consent on 12 August 1995.

[188] *In the matter of Scotty* [2007] NTSC 27; *Criminal Code* 1983 (NT), s 35(1) (repealed) states that:

> A person is excused from criminal responsibility for an act, omission or event if, at the time of doing the act, making the omission or causing the event he was in such a state of abnormality of mind as to deprive him of capacity to understand what he was doing or of capacity to control his actions or of capacity to know that he ought not do the act, make the omission or cause the event.

The repealed version of the *Criminal Code* 1983 (NT) ('*Criminal Code*') referred to in the Communication can be found at:
http://notes.nt.gov.au/dcm/legislat/history.nsf/d2340eb59903a401692569f900180b08/d8264d3f7015a27969256bda0077714f?OpenDocument.

[189] Discussed below at [9] – [13].

the remedies outlined herein which are necessary to realise the Applicant's human rights under the ICCPR.

11. The Applicant has no effective judicial remedy, by way of appeal or otherwise, available within the Australian legal system.[190]

12. The lack of a reasonable prospect of success:

13. The Applicant recognizes that a subjective belief is not sufficient to remove the obligation to exhaust all domestic remedies. As such, expert legal advice received by the Applicant recommends that the matter should not be brought before the High Court of Australia because no effective legal remedy is available.

    i. Professor Patrick Keyzer.[191]

    ii. Ian Freckelton QC.[192]

14. In *Tillman v Australia*, the UNHRC found that the opinions of a professor of law and a senior counsel confirming the futility of an application for a domestic legal remedy may be a sufficient basis to conclude that domestic remedies have been exhausted.[193]

15. The Applicant submits that if he did pursue the matter before the High Court of Australia, the High Court would have no power to provide remedies that would address the violations mentioned in this Communication. As mentioned above, there is no legislation, Bill of Rights or Constitutional provision which could be utilized to remedy the violations set out in this Communication.

16. The UNHRC has found that there is no obligation to pursue futile legal actions.[194] In the current matter, the consequences of seeking a futile action would not only be

[190] *RT v France* (220/87) Communication No. 262/1987, U.N. Doc. CCPR/C/35/D/262/1987 (1989).
[191] Appendix D.
[192] Appendix E.
[193] *Tillman v Australia*, Communication No. 1635/2007, U.N. Doc. CCPR/C/98/D/1635/2007 (2010) ('*Tillman v Australia*') [5.2], [6.3]; see also *Robert John Fardon v Australia*, Communication No. 1629/2007, U.N. Doc. CCPR/C/98/D/1629/2007 (2010) ('*Fardon v Australia*').

[194] *Pratt and Morgan v Jamaica*, U.N. Doc. Supp. No. 40 (A/44/40) [222].

wasted time and funds, but may also constitute professional misconduct under the rules of legal practice, by the legal practitioners acting for the Applicant.[195]

a. In addition, there is a significant risk of an adverse costs order being made against the Applicant's Guardian, Mr McKinlay, because of the known risk of futility.[196]

b. The rule applied in Australian civil litigation is that the loser pays the winner's costs.[197]

c. If the Applicant applied for judicial review of his incarceration on human rights grounds, the application would be struck out with costs ordered against him. [198]

17. For the forgoing reasons, it is submitted that the obligation to exhaust domestic remedies is satisfied.

18. The Applicant has sought all available and appropriate administrative remedies:

19. In light of the unavailability of judicial remedies, the Applicant has sought administrative remedies available domestically.

20. The Applicant complained to the AHRC in relation to his circumstances. The findings of the AHRC were published in a report ('AHRC Report').[199]

21. The Applicant submits that the AHRC's findings, particularly that he has been arbitrarily detained and has been subjected to cruel, inhuman and degrading treatment, very strongly support his submission that his detention is a breach of Australia's obligations under the ICCPR.

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[195] Solicitors have a professional duty to assist both client and court to further the expeditious resolution of real issues. Conduct which has been held to justify an order that a practitioner personally pay the costs includes attempting to re-agitate previously decided issues: *Vasram v AMP Life Ltd* [2002] FCA 1286; see also *Gersten v Minister for Immigration and Multicultural Affairs* [2000] FCA 922; *Kendirjian v Ayoub* at [208]–[216].

[196] See eg*, Chen v Secretary, DEEWR & Anor* [2009] FMCA 576; *Lindon v Commonwealth* [1996] HCA 14.

[197] See eg, *Construction, Forestry, Mining and Energy Union v Australian Industrial Relations Commission* (2001) 203 CLR 645; *Free v Kelly* (1996) 185 CLR 296; *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207.

[198] *Chen v Secretary*, *DEEWR & Anor* [2009] FMCA 576; *Lindon v Commonwealth* [1996] HCA 14; see *also Länsman et al. v. Finland*, Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992.

[199] Triggs, above n 5 (Appendix F).

22. The Commonwealth of Australia has officially acknowledged the AHRC Report, and attributed sole responsibility for the violations established in the AHRC Report to the Northern Territory government.[200]

    a. The Commonwealth Attorney-General, Senator the Hon George Brandis QC, responded to the AHRC Report in Parliament, stating that:

        i. The issue of detention raised by this report is primarily a matter for state and territory governments given their responsibilities for the criminal justice system, including police, courts and corrections…

        ii. …the Commonwealth disagrees with the [AHRC's] interpretation of Australia's international human rights obligations. Australia, comprised of the Commonwealth and the states and territories, is a party to a range of United Nations international human rights treaties. The Commonwealth and the states and territories are responsible for compliance with Australia's human rights obligations within their constitutional responsibilities.

        iii. In this report, the [AHRC] appears to have conflated Australia, as a State Party to relevant treaties, with the Commonwealth Government. The [AHRC] has relied upon this rationale to make adverse findings against the Commonwealth, holding it responsible for the actions of state and territory governments, without due regard for the allocation of responsibilities under the Constitution between the Commonwealth and the states and territories. The Commonwealth does not accept this analysis.[201]

    b. The Applicant submits that this statement is grounded in mistakes of fact and law.

        i. The content of State and Territory criminal law is not exclusively a function of State and Territory legislation. The Commonwealth has constitutional power to enact criminal legislation via its external affairs power, which has effect in the States and Territories.

            1. Accordingly, as the AHRC Report concluded that the Applicant's ICCPR rights have been breached, the

[200] Australian Government, Statement by the Attorney-General for Australia, Senator the Hon George Brandis QC, *Tabling of the Australian Human Rights Commission Report – KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80 (Appendix G).
[201] Appendix G.

Commonwealth Parliament has the constitutional authority to enact legislation remedying these breaches.

ii. In the past, the Commonwealth has given effect to this power in ways which directly impact on state and territory criminal laws. For example, the Commonwealth Parliament enacted the *Human Rights (Sexual Conduct) Act* 1994 (Cth) to give effect to this Committee's finding in *Toonen v Australia.*[202]

iii. Further, in *Coleman v Australia* the UNHRC found that Australia's objection to the admissibility of the communication was invalid, as conduct attributed to the State of Queensland was, under the rules of State Responsibilty and Article 50 of the ICCPR, the legal responsibility of Australia.[203]

iv. In addition, in responses to Australia's third and fourth reports submitted in accordance with Article 40 of the ICCPR to the UNHRC, this Committee stated that:

v. …[the] political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.[204]

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[202] *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 ('*Toonen v Australia*'); for another example of the use of the external affairs power by the Commonwealth, see the *World Heritage Properties Conservation Act 1983 (Cth),* introduced by the Commonwealth government to protect the Franklin River, pursuant to it's listing by UNESCO. This legislation was challenged in *Commonwealth v Tasmania* (Tasmania Dams Case) (1983) 158 CLR 1.

[203] *Coleman v Australia*, Communication No. 1157/2003, UN Doc CCPR/C/87/D/1157/2003 (2006), [4.1], [6.1]. In this case, Australia argued, at [4.1], that the communication was inadmissible because:

> …[the communication was] directed against Sergeant Nicolas Selleres of the Queensland police, the Townsville City Council and the State of Queensland, these parties not being States parties to the Covenant.

The UNHRC determined, at [6.1], that:

> …both on ordinary rules of State responsibility and in light of article 50 of the Covenant, the acts and omissions of constituent political units and their officers are imputable to the State. The acts complained of are thus appropriately imputed ratione personae to the State party, Australia.

[204] UNHRC, *Concluding observations on Australia*, 55th session, UN Doc A/55/40 (24 July 2000) vol II, [516] - [517]. In addition, the UNHRC also stated that:

> While noting the explanation by [Australia] that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses

vi. In light of Australia's obligation not to repudiate its international human rights obligations,[205] the Attorney-General's statement invokes an invalid justification for it's failure to act.

vii. Given the State Party's insistence that the Commonwealth does not have ultimate responsibility for ensuring compliance with rights guaranteed within the ICCPR, contrary to previous decisions by this Committee, the Applicant invites the UNHRC to make a direct finding that the Attorney-General's statement constitutes repudiation of Australia's international human rights obligations.[206]

23. The Applicant observes that the Commonwealth of Australia's refusal to remedy the violations contained within the AHRC Report is consistent with previous failures to consider and rectify the human rights violations set out in this Communication.[207]

24. The Northern Territory Government has not provided a response to the AHRC Report. The Applicant submits that this constitutes constructive refusal to accept responsibility for the human rights violations identified in the AHRC Report.

25. The failure of both the Northern Territory and Commonwealth Governments to accept responsibility for rectifying the human rights breaches detailed in the AHRC Report reinforces the fact that the AHRC does not have the authority to enforce its own findings. It is therefore submitted that while the AHRC complaint process found

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that such negotiations cannot relieve the State party of its obligations to respect and ensure Covenant rights in all parts of its territory without any limitations or exceptions (art. 50).

[205] See above at [3.2] – [3.2].

[206] See eg, *Coleman v Australia*, UN Doc CCPR/C/87/D/1157/2003; UNHRC, *Concluding observations on Australia*, 55th session, UN Doc A/55/40 (24 July 2000) vol II.

[207] The Northern Territory government notified the State Party in 2005 that it was unable to appropriately respond to the needs of persons such as the applicant; see Northern Territory, *Submission to the Senate Select Committee on Mental Health* (2005); at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/mentalhealth/submissions/~/media/wopapub/senate/committee/mentalhealth_ctte/submissions/sub393_pdf. ashx (viewed 4 February 2014), 22. The *Senate Committee on Mental Health* tabled its final report, titled 'A National Approach to Mental Health – from Crisis to Community' in Parliament in April 2006; at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/mentalhealth/report02/index (viewed 29 February 2016).

in favour of the Applicant, this does not mean that the process constitutes an effective remedy for the Applicant.[208]

26. In conclusion, the Applicant submits that all domestic mechanisms for providing a remedy to the Applicant have proved to be ineffective, and accordingly Article 5.2(b) OPICCPR is satisfied.

27. OTHER INTERNATIONAL INVESTIGATIONS

28. Article 5.2(a) of the OPICCPR requires that the matters contained in a Communication are not currently under examination by another international procedure.

    a. The Applicant submits that the matters contained in this Communication have not been submitted for examination by any other international procedure of investigation.

29. Facts of the Complaint

30. The Applicant submits that all human rights are indivisible, interdependent, and interrelated.[209] As multiple violations of different human rights may arise from a particular factual matrix, rather than rendering such claims duplicative or unnecessary, it is submitted that the sum of such claims may demonstrate the aggravated nature of the Applicant's case.

31. In accordance with Rule 86 of the *Rules of Procedure of the UN Human Rights Committee*, and in light of paragraph 23 above, this Communication sets out the facts of the matter in as much detail as possible in order to present a *prima facie* case.[210]

32. PERSONHOOD

[208] *T. K. v. France*, UN Doc CCPR/C/37/D/220/1987.
[209] *Vienna Declaration and Programme of Action*, UN Doc A/RES/60/1 [121].
[210] *Rules of Procedure of the Human Rights Committee*, HRC 103rd sess, 2852nd mtg, CCPR/C/3/Rev.10 (12 January 2012) r 86.

a. The Applicant, Mr Anthony Scotty, was born on 27 May 1963 in Amoonguna.[211] Sometime during the Applicant's teenage years, he and his mother moved to Alice Springs, which appears to have been his primary place of residence until he was taken into custody in 1995.[212]

b. The Applicant identifies as a Pitjantjatara elder and derived satisfaction and respect in mentoring younger Indigenous men at the Alice Springs Correctional Centre ('ASCC') prior to being moved to Darwin in 2015. The Applicant speaks and understands Pitjantjatara, Arrernte and Luritja, as well as basic English.

33. DIAGNOSIS AND CHILDHOOD OF THE APPLICANT

34. Childhood

a. The Applicant experienced a traumatic childhood, characterised by parental substance abuse, physical abuse and emotional neglect.[213] At the age of 17 months, the Applicant was admitted to the hospital for 'failing to thrive', a diagnosis that indicates developmental issues. This assessment was based on factors including sores, diarrhea and parental neglect.[214] At the age of four, the Applicant was reported to have been malnourished, afflicted with sores and having suffered a significant head injury.[215] Reports indicate that the Applicant did not regularly attend school, and left school at the age of 14 or 15.[216]

35. Behavioural and cognitive diagnosis

a. The Applicant has had a long and scattered history of hospital admissions, from a young age, both for medical and psychiatric treatment.[217] At the age of 21, the Applicant was admitted to hospital for 'bizarre and aggressive behaviour'. The principle diagnosis for this behaviour was brain damage caused by

[211] Appendix H, 2.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Appendix H, 2.
[216] Ibid 5.
[217] Appendix J, 2.

prolonged petrol sniffing.[218] At the age of 31, the Applicant suffered seizures caused by alcohol abuse.[219]

b. The Applicant has a dual diagnosis of mental illness and cognitive impairment. The Applicant suffers from intellectual impairment due to a developmental disorder and prolonged substance abuse.[220] The Applicant also suffers from paranoia and delusions, and it has been suggested that he has schizophrenia.[221]

c. Reports indicate that the Applicant has cognitive deficit, including impairments in speed of thinking, processing, verbal attention, memory, organisation and initiation.[222] The Applicant has poor communication skills and has difficulty with instructions more than two steps long. The Applicant's impaired problem-solving skills make it difficult for him to cope with unfamiliar, unexpected or novel situations. This impacts upon the Applicant's capacity to accurately interpret and process events, which can cause the Applicant to become highly distressed and fearful, perceiving threats in his environment that do not exist.[223] Impaired receptive and expressive communication skills may be clinical indicators for risk of aggression in persons with disabilities similar to the Applicant.[224] The Applicant has a significant intellectual impairment, and his adaptive behavioural skills are below the average range. [225]

d. Given the Applicant's disability, which includes a significant intellectual impairment, mental illness, difficulty with social interaction and behavioural history, it is submitted that the Applicant requires a comprehensive plan, for

[218] Appendix H, 3.
[219] Ibid.
[220] Ibid.
[221] Ibid; Appendix K, 8.
[222] Dr Kathryn Hoskin, Neuropsychology Report of Mr Scotty, 2011, cited in Appendix H, 4.
[223] Appendix H, 4.
[224] D Allen, 'Devising Individualised Risk Management Plans' in D Allan, editor, *Ethical Approaches to Physical Interventions: Responding to Challenging Behaviours in People with Intellectual Disabilities* (2002, BILD Publications) 71.
[225] Appendix H; Appendix J.

example a Positive Behaviour Support Plan ('PBSP'), which is specifically designed to empower the Applicant to enjoy his ICCPR rights.[226]

36. FACTS LEADING TO DETENTION

a. On 15 August 1995, the Applicant was arrested and charged with the murder, robbery and assault of a women unknown to him, allegedly committed on the same day as his arrest.[227] At the time of his arrest, the Applicant was 32 years old. The Applicant was held in remand from the day of his arrest until his trial in October 1996.

b. On 14 October 1996, the Applicant was indicted for murder, robbery and unlawful assault in the Northern Territory Supreme Court ('NTSC') in relation to the events of 15 August 1995.[228] At trial, the jury heard the following facts:

   i. The deceased had been tending to her front garden in Alice Springs when the Applicant approached and assaulted her;

   ii. She fled into her house and was followed by the Applicant;

   iii. The Applicant picked up a knife from the victim's kitchen; and

   iv. The Applicant then fatally stabbed the victim.

c. On 15 October 1996, the jury returned a verdict of not guilty on the ground of insanity to each count on the indictment.[229]

d. Pursuant to s 382(2) of the *Criminal Code* (since repealed), the NTSC ordered that the Applicant be kept in strict custody at ASCC until the Administrator's Pleasure was known.

e. On 27 September 2001, the Administrator of the Northern Territory ordered that the Applicant be detained at ASCC, subject to the authority of the

[226] Appendix H, 10.
[227] *In the matter of Scotty* [2007] NTSC 27, [1].
[228] Ibid.
[229] Ibid [3].

Director of Correctional Services,[230] under the *Prisoners (Correctional Services) Act.*[231]

37. TERMS OF THE APPLICANT'S DETENTION

a. On 15 June 2002, Part IIA of the *Criminal Code* came into operation.[232] Changes to the *Criminal Code* replaced the function of the 'Administrator's Pleasure' with Custodial Supervision Orders ('CSOs') in trials where the accused suffers a mental impairment. Part IIA of the *Criminal Code* sets out the law regarding CSOs, and is attached in Appendix L.

b. Pursuant to the savings and transitional provisions in section 6 of the *Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act* ('the Amending Act'), the Applicant was taken to be a supervised person held in custody for the purpose of the Act, and in 2007 Justice Mildren of the NTSC held that the Applicant was subject to a CSO.[233]

    i. The purpose of a CSO is to incarcerate a mentally ill or impaired individual, where necessary, on the basis that the individual poses a threat to the community.

    ii. Section 43ZA(2) of the *Criminal Code* provides that 'the [NTSC] must not make a [CSO] committing the accused person to custody in a custodial correctional facility *unless it is satisfied that there is no practicable alternative* given the circumstances of the person.'[234]

    iii. Chief Justice Martin of the NTSC, in a similar case, commented that:

[230] *Criminal Code* s 382(3) (repealed).
[231] All parts of the Act, except for Part XVII, were held to apply to the Applicant.
[232] *Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act* ('the Amending Act').
[233] *In the matter of Scotty* [2007] NTSC 27, [8].
[234] *Criminal Code* s 43ZA(2) (emphasis added).

iv. [c]ustody in a gaol is quite inappropriate for people [with severe cognitive impairments] 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 [Northern] Territory. The need for that facility is acute and growing rapidly.[235]

v. In 2003, Chief Justice Martin determined that there were no adequate resources available for the treatment and support of the Applicant in the community, and accordingly there was no practicable alternative to incarceration at ASCC available for the Applicant.[236]

c. In 2007, the NTSC found that the only compulsory review of the Applicant's CSO had taken place in 2003, and there would be no further compulsory reviews of the Applicant's CSO.[237] Accordingly, the *Criminal Code* does not require the NTSC to review the Applicant's CSO at any point in the future while he remains incarcerated.

d. Section 43ZK of the *Criminal Code* provides that an annual report should be submitted to the NTSC throughout the term of the CSO. Section 43ZH states that after receiving a report under s43ZK, the court *may* if it considers it appropriate, conduct a review. Thus, the annual report is *not* a review and there is nothing to compel the court to grant a review.[238]

e. Further, the filing of the annual reports does not require or allow the attendance of the Applicant or his legal guardian at a court hearing. Accordingly, the Applicant does not have the opportunity to test the conclusions set out in the Report. This supports the argument that the

[235] Quoted in Triggs, above n 5, [253].
[236] *Scotty* [2003] NTSC 98, [21] (Appendix M).
[237] *In the matter of Scotty* [2007] NTSC 27, [27]. This decision, and the repercussions for the Applicant, is discussed below from [30.30] onwards.
[238] *Criminal Code* s 43ZI; see also ss 43A, 43ZD, 43ZE, 43ZG - other than the major review, there is nothing in the legislation to compel the NTSC to conduct a review of the Applicant's CSO. There is also no right to appear before the NTSC during the consideration of the annual reports. The only right to appear before the court is during a review or when an order is being sought to vary the CSO.

annual report does not meet the requirements of a review as established by the *Rameka v New Zealand* ('*Rameka*') decision.[239]

f. The annual reports filed with the NTSC since 2003 have not resulted in any improvements in the conditions in which the Applicant has been incarcerated.

38. VIOLATIONS WHILST INCARCERATED

a. The Applicant submits that his ongoing detention at ASCC since 15 August 1995 amounts to a violation of his fundamental human rights under the ICCPR on the following grounds:

39. **ARBITRARY DETENTION (ICCPR: ARTICLE 9; CRPD: ARTICLES 2 & 14)**

69. The Applicant submits that his detention is arbitrary and in contravention of Article 9 of the ICCPR on the grounds that his detention is unreasonable, unnecessary and disproportionate.[240]

a. Article 9 of the ICCPR provides that:

i. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

b. Similarly, Article 14 of the CRPD provides:

i. States Parties shall ensure that persons with disabilities, on an equal basis with others:

70. Enjoy the right to liberty and security of person;

71. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

72. Detention is Arbitrary because it is Unreasonable

[239] ***Mr. Tai Wairiki Rameka et al v New Zealand*, Communication No. 1090/2002, U.N. Doc CCPR/C/79/D/1090/2002 (2003)**; see below at [30.24] – [30.26].
[240] *Tillman v Australia*, U.N. Doc. CCPR/C/98/D/1635/2007.

a. The Applicant submits that his detention is unreasonable because it arises solely from the Applicant's mental impairment rather than from a criminal conviction.

b. The Northern Territory CSO legislation committing the Applicant to detention applies only to persons with mental impairment.[241] It provides for the indefinite detention of persons with mental impairment who are charged with, but not found guilty of, offences under the *Criminal Code*. Persons who do not have a mental impairment are not subject to any equivalent legislative provision. Accordingly, this legislative regime is a discriminatory status-based law. This is not, in and of itself, a basis for a finding that a law violates human rights. However, if the operation of the law in the Applicant's case produces a relatively unreasonable result, then the UNHRC's authority is enlivened.

c. The Applicant submits that, as the Australian and Northern Territory Governments have failed to provide suitable accommodation and secure care facilities for the Applicant, the NTSC has no option other than to order the Applicant's incarceration in a maximum security prison.

d. As outlined above at paragraphs 30.1 and 30.2, Article 9 of the ICCPR requires Australia to prevent the deprivation of liberty, except where authorised by law. Article 14 of the CRPD specifies that the 'existence of a disability shall in no case justify a deprivation of liberty.'

    i. Article 2 of the CRPD states that discrimination on the basis of disability means:

    ii. Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including a lack of reasonable accommodation.[242]

[241] *Criminal Code* Part IIA.
[242] Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E Mendez, 22nd sess, 1 February 2013, A/63/175, [48].

e. The Applicant, therefore, submits that Article 14 (CRPD) and Article 9 (ICCPR) have been violated because the effect of the legislation is unreasonable and therefore arbitrary.[243] It results in persons with a mental impairment being detained in a maximum security prison, despite a lack of conviction for a criminal offence, when persons without a disability in a similar situation would not be subject to incarceration.

73. Particulars:

a. At the Applicant's trial in 1996, the *Criminal Code* provided that persons found not guilty due to insanity were to be 'kept in strict custody in such place and in such manner as the court thinks fit until the Administrator's pleasure is known'.[244] This provision was interpreted by the NTSC as requiring incarceration in a maximum security prison as there was no other suitable facility available. The NTSC ordered that the Applicant be incarcerated at ASCC.[245]

b. On 27 September 2001, nearly five years after the Applicant's trial, the Administrator ordered the Director of Correctional Services be responsible for the Applicant's safe custody, that he be confined to ASCC, and that the *Prisoners (Correctional Services) Act* 1980 (NT) was to apply to the Applicant as if he were under a sentence of imprisonment.[246]

c. In 2003, the NTSC determined that, pursuant to the *Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act* 2002 (NT) ('the Amending Act') which came into operation on 15 June 2002, the Applicant was a 'supervised person' subject to a CSO within the meaning of Part IIA of the amended *Criminal Code*.[247]

[243] *Tillman v Australia*, U.N. Doc. CCPR/C/98/D/1635/2007; *Fardon v Australia*, U.N. Doc. CCPR/C/98/D/1629/2007.
[244] *Criminal Code* s 382(2) (repealed).
[245] *Scotty* [2003] NTSC 98 [1].
[246] Ibid [2].
[247] Ibid [5].

d. The NTSC determined that the Applicant should be held at an 'appropriate place' as the Applicant would be a danger to himself or others if he were to be released unconditionally.[248]

e. Section 43ZA(2) of the *Criminal Code* stipulates that detention in prison should be as a last resort and only where there is no available alternative.[249] The NTSC determined that, pursuant to s 43ZA(2), the Applicant was to be detained at the ASCC, as no suitable facility existed in the Northern Territory.

f. The Applicant submits that this legislative regime, which is only imposed on persons with a mental impairment, is discriminatory, and that the Applicant's

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[248] Ibid [21]; *Criminal Code* s 43ZA defines 'appropriate place' as a place that the court deems appropriate.
[249] *Criminal Code* s43ZA**;** see also *R v Morton* [2010] NTSC 26, [4].
Criminal Code s 43ZA, entitled 'Nature of supervision orders' states that:

(1) A supervision order may, subject to the conditions the court considers appropriate and specifies in the order:
  (a) if it is a custodial supervision order – commit the accused person to custody:
    (i) subject to subsection (2) – in a custodial correctional facility; or
    (ii) subject to subsection (3) – in another place (an ***appropriate place***) the court considers appropriate; or
  (b) if it is a non-custodial supervision order – release the accused person.
(2) The court must not make a custodial supervision order committing the accused person to custody in a custodial correctional facility unless it is satisfied that there is no practicable alternative given the circumstances of the person.
(2A) Without limiting subsection (1), the court may decide a supervision order is subject to the condition that a person (an ***authorised person***) authorised by the CEO (Health) may use any reasonable force and assistance:
  (a) to enforce the order; and
  (b) without limiting paragraph (a) – to take the accused person into custody, or to restrain the accused person, in order to prevent the accused person harming himself or herself or someone else.
(2B) The CEO (Health):
  (a) must, by *Gazette* notice, make supervision directions about:
    (i) the qualifications of an authorised person; and
    (ii) the reporting by an authorised person of any use of force or assistance for subsection (2A); and
  (b) may, in the supervision directions, provide for any other matters about the use of such force and assistance as decided by the CEO (Health).
(2C) An authorised person may use reasonable force or assistance as provided in subsection (2A) only in accordance with the supervision directions.
(3) Unless the court receives a certificate from the CEO (Health) mentioned in subsection (4), the court must not make a supervision order:
  (a) committing the accused person to custody in an appropriate place; or
  (b) providing for the accused person to receive treatment or other services in, at or from an appropriate place.
(4) The certificate of the CEO (Health) must state:
  (a) facilities or services are available in the appropriate place for the custody, care or treatment of the accused person; and
  (b) if the appropriate place is a secure care facility - the accused person fulfils the criteria for involuntary treatment and care under the *Disability Services Act*.

incarceration in a maximum security prison since 1995 is unreasonable and therefore arbitrary, in violation of Article 9.1 of ICCPR and Article 14 of CRPD.

74. Detention is Arbitrary because it is Unnecessary in the Circumstances:

a. The Applicant submits that his detention in a maximum security prison is unnecessary in the circumstances and therefore arbitrary.

b. The UNHRC has found that;

i. To avoid arbitrariness, detention must be reasonable, necessary in all the circumstances of the case and proportionate to achieving the legitimate aims of the State party. If the State party may achieve its legitimate ends by less invasive means than detention, detention will be rendered arbitrary.[250]

ii. Arbitrary does not mean 'against the law',[251] and therefore detention does not have to be unlawful in order to be arbitrary.[252]

iii. Further, the State Party must always justify any deprivation of liberty, and where the State Party cannot provide this justification, any continued detention is arbitrary.[253]

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[250] See Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21 (2004), [6], particularly as regards discussion of legal obligations and 'lawfulness' of State-imposed restrictions to rights covered under the ICCPR; *Tillman v Australia*, UN Doc CCPR/C/98/D/1635/2007; see also *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) [9.2-9.4] ('*A v Australia*'); *Mr. C. v Australia,* Communication No. 900/1999, UN Doc. CCPR/C/76/D/900/1999 (2002) [8.2] ('*C v Australia*'); *Mr. Omar Sharif Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003) [7.2]; *Mr. Ali Aqsar Bakhtiyari and Mrs. Roqaiha Bakhtiyari v. Australia*, Communication No. 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (2003) [9.2 and 9.4]; *Rafael Marques de Morais v Angola*, Communication No. 1128, 2002, UN Doc CCPR/C/83/D/1128/2002 (2005) [6.1]; *Abdelhamid Taright et al v Algeria*, Communication No. 1085/2002, U.N. Doc. CCPR/C/86/D/1085/2002 (2006) [8.3]; *Danyal Shafiq v. Australia*, Communication No. 1324/2004, UN Doc CCPR/C/88/D/1324/2004 (2006).

[251] UN Human Rights Committee, *General Comment 35, Article 9: Liberty and security of the person,* UN Doc CCPR/C/GC/35 (2014) ('*General Comment 35*').

[252] *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, UN Doc CCPR/C/59/D/560/1993 [9.2-9.4]; *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).

[253] *General Comment 35*; *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/76/D/900/1993 (1997); *C v Australia*, UN Doc CCPR/C/76/D/900/1999.

c. The Application submits that, in all the circumstances of his case, his detention in a maximum security prison is unnecessary as Australia could achieve it's legitimate ends by a less invasive means, such as accommodation in a SCF. Accordingly, detention of the Applicant in a maximum security prison constitutes arbitrary detention in violation of Article 9 of the ICCPR (as further expounded in Article 14 of the CRPD).

75. Particulars:

a. The Applicant submits that the environment of a maximum security prison such as ASCC or Darwin Correctional Centre ('DCC') is wholly inappropriate for the rehabilitation and care of non-convicted individuals who suffer from a serious mental impairment.[254]

b. Australia has failed to provide an appropriate Secure Care Facility ('SCF') and rehabilitative programs outside the maximum security prison environment. The Applicant submits that the failure to provide a SCF is not a valid justification for the Applicant's detention in a maximum security prison because it has led to his forced existence as a prisoner even though he has not been convicted of a crime.

c. The AHRC found, on the same grounds, that the Applicant's detention amounts to arbitrary detention according to Article 9.1 of the ICCPR.[255]

d. The Applicant submits that he should be accommodated at a SCF designed to deliver appropriate and adapted care.[256]

e. Accordingly, it is submitted that the detention of the Applicant is so unnecessary in all the circumstance of the Applicant's case as to amount to a violation of Article 9.1 of ICCPR and Article 14 of CRPD.

76. Detention is Arbitrary because it is Disproportionate:

[254] Appendix I, 7; this is discussed further below at [31.25] – [31.30].
[255] Triggs, above n 5, [258].
[256] Appendix H, 10.

a. The Applicant submits that his detention under the CSO legislative regime is disproportionate to the legitimate ends of the State party and therefore arbitrary in violation of Article 9.1 of ICCPR.

b. General Comment 8 states that if preventative detention is imposed on an individual for the purpose of public safety, there must be a number of safeguards in place, including judicial oversight of the detention.[257] Without these safeguards, the indefinite detention of the individual will amount to arbitrary detention in violation of Article 9.1.

c. In *Rameka*, the UNHRC held that preventative detention would only be permissible if the detention was regularly reviewed.[258]

    i. In *Rameka*, three authors who had been found guilty for (unrelated) sexual offences in New Zealand were each sentenced to a term of indefinite preventative detention. The legislation stipulated that the authors were to be detained until released by an order of the Parole Board.[259]

    ii. The *Criminal Justice Act 1985* (NZ) provided that after a period of ten years, the authors' sentences would be eligible for review, and must be reviewed annually until the Parole Board was of the opinion that an offender should be released on parole.

    iii. The UNHRC found that detention of the authors was not arbitrary according to Article 9.1, as their detention was subject to 'compulsory annual reviews by the independent Parole Board,' mandated by the legislation.[260]

    iv. Similarly to *Rameka,* the European Court of Human Rights has also found that regular reviews to assess the dangerousness of a detainee

[257] Human Rights Committee, *General Comment 8, Article 9 (Right to Liberty and Security of Persons)*(16th sess, 1982), U.N Doc. HR1/GEN/Rev.1 at 8 (1982).
[258] *Rameka v New Zealand,* **U.N. Doc CCPR/C/79/D/1090/2002,** [3.4].
[259] *Criminal Justice Act 1985* (NZ) s 77.
[260] *Rameka v New Zealand*, **UN Doc CCPR/C/79/D/1090/2002 (2003)**, [7.3]; *Criminal Justice Act 1985* (NZ) s 94.

are a necessary requirement if preventative detention regimes are not to amount to a violation of the rule against arbitrary detention. [261]

d. The Applicant submits that the regime set by the *Criminal Code* is substantively inadequate according to the criteria set out in *Rameka*, because the annual reporting mechanism requires only that the conditions of detention be reported, as opposed to a rigorous and independent review.

e. It is submitted that as the Applicant's detention under the CSO regime is arbitrary because it is effectively indefinite and conducted without the safeguards specified by the UNHRC, in breach of the ICCPR and the CRPD, it is therefore disproportionate to the legitimate aims of the State Party.

77. Particulars:

a. Part IIA of the *Criminal Code* states that a supervision order is for an indefinite term.[262]

b. The *Criminal Code* requires, in order for the Applicant to be released from custody, that the NTSC be satisfied, at either the mandatory review or a discretionary review of the Applicant's CSO, that he is no longer a danger to himself or society.[263]

i. As the Northern Territory has no specialist facilities available which would provide appropriate care, treatment and security such as could facilitate the Applicant's rehabilitation and allow him to demonstrate that he is no longer a danger to himself or society, the CSO is, in effect, an order of indefinite imprisonment.

c. According to the *Criminal Code*, an individual subject to a CSO is entitled to a mandatory review at a time fixed by the court.[264] If the NTSC confirms the CSO, and orders that the individual remain incarcerated at the mandatory review, the legislation does not require a further review.

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[261] *Weeks v United Kingdom* (1988) 10 EHRR 293.
[262] *Criminal Code* s 43ZC.
[263] Ibid ss 43ZG(6), 43ZH(2).
[264] Ibid s 43ZH.

d. In 2007, it was determined by the NTSC that the only compulsory 'major review' of the Applicant's CSO occurred on 10 September 2003. The NTSC held that the legislation did not require a further review of the Applicant's CSO. [265]

e. According to the *Criminal Code*, once the NTSC makes a supervision order placing someone on a CSO, an 'appropriate person' must submit an annual report to the NTSC regarding the treatment and management of the supervised person's mental impairment, condition or disability.[266] These reports must be submitted to the NTSC at intervals of not more than 12 months, until the CSO is revoked.[267]

f. Upon receiving an annual report, the NTSC, if it considers it appropriate, *may* conduct a review of Applicant's CSO to determine whether the CSO should be varied or revoked. The Applicant can also request a review of his CSO.[268]

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[265] *In the matter of Scotty* [2007] NTSC 27, [27].

[266] *Criminal Code* s 43ZK entitled 'Periodic reports on condition of supervised persons', states that:

(1) If the court makes a supervision order, the appropriate person must, at intervals of not more than 12 months, until the supervision order is revoked, prepare and submit a report to the court on the treatment and management of the supervised person's mental impairment, condition or disability.

(2) A report referred to in subsection (1) is to contain:

(a) details of the treatment, therapy or counselling that the supervised person has received, and the services that have been provided to the supervised person, since the supervision order was made or the last report was prepared (as the case may require); and

(b) details of any changes to the prognosis of the supervised person's mental impairment, condition or disability and to the plan for managing the mental impairment, condition or disability.

s43A defines an 'appropriate person' as:

(a) in relation to an accused person or supervised person who is detained or in custody in, or receives treatment, services or assistance in, at or from, an approved treatment facility or an approved temporary treatment facility within the meaning of the *Mental Health and Related Services Act* – the CEO (Health);

(b) in relation to an accused person or supervised person who is detained or in custody in, or receives treatment, services or assistance in, at or from, a prescribed person, organisation or facility or a person, organisation or facility who or which is a member of a class of prescribed persons, organisations or facilities – the CEO (Health);

(c) in relation to a person who is a represented person within the meaning of the *Adult Guardianship Act* – the CEO (Health); or

(d) in relation to a person who is held in custody in a custodial correctional facility or is under the supervision of a probation and parole officer under the *Parole Act* – the chief executive officer of the Agency administering that Act.

[267] Ibid s 43ZK.

[268] *In the matter of Scotty* [2007] NTSC 27, [27]; Criminal Code s 43ZH.

Criminal Code s 43ZH, entitled 'Periodic review of supervision orders', states that:

(1) After considering a report submitted by an appropriate person under section 43ZK, if the court considers it is appropriate, the court **may** conduct a review to determine whether the supervised person the subject of the report may be released from the supervision order (emphasis added).

g. The Applicant submits that the Northern Territory CSO legislative regime, under which the Applicant is detained, does not satisfy the requirements set out in the decision in *Rameka*, as it is not compulsory for the NTSC to review the Applicant's CSO upon receiving a annual report. For that reason, the regime does not provide the safeguard or guarantee of 'regular reviews' of the Applicant's detention as required by the UNHRC.

h. Therefore the Applicant submits that his detention is disproportionate to the legitimate ends of the State Party as it both lacks the required safeguards and is effectively indefinite, in breach of the Applicant's human rights guaranteed in Article 9.1.

78. TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (ICCPR: ARTICLES 7 & 10.1 & 3, IN CONJUNCTION WITH ARTICLES 2.1 & 26; CRPD: ARTICLES 4, 15, 17 & 26)

79. *Conditions of detention and treatment while detained*

a. It is submitted that the current conditions of the Applicant's detention amount to torture or cruel, inhuman and degrading treatment, constituting a violation of Article 7 and Article 10 of the ICCPR. The specifics of these conditions include:

i. Extended periods of isolation; and

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(2) On completing the review of a custodial supervision order, the court must:
  (a) vary the supervision order to a non-custodial supervision order unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order; or
  (b) if the court is satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is released on a non-custodial supervision order:
    (i) confirm the order; or
    (ii) vary the conditions of the order, including the place of custody where the supervised person is detained.

(3) On completing the review of a non-custodial supervision order, the court may:
  (a) confirm the order;
  (b) vary the conditions of the order;
  (c) vary the supervision order to a custodial supervision order and impose the conditions on the order the court considers appropriate; or
  (d) revoke the order and release the supervised person unconditionally.

ii. The overall inappropriateness of the prison setting considering the disabilities of the Applicant.

b. Article 7 states that:

i. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

c. Article 7 is an absolute right provided by the ICCPR. It provides a non-derogable right that prohibits the use of torture or cruel, inhuman or degrading treatment or punishment.

d. In General Comment 20, the UNHRC states that 'the aim of… Article 7… is to protect both the dignity and the physical and mental integrity of the individual.'

e. In addition, the UNHRC has held that 'exacerbating factors [which extend] beyond the usual incidents of detention', such as the victim's mental health, may elevate certain treatment so as to bring it within the definition of Article 7.[269]

f. Article 7 contains two thresholds against which to measure the extent of violations of the ICCPR. The first of these, torture, is of a higher threshold compared to cruel or inhuman treatment or punishment.

g. Torture is also prohibited by the *Convention Against Torture* ('CAT').[270] The UNHRC has previously used the definition of torture contained within Article 1 of the CAT to ascertain whether violations alleged under Article 7 of the ICCPR constitute torture.[271]

h. Article 1 of CAT states that torture is:

i. Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as…punishing him for an act he…committed…or for any reason

[269] *Michael Jensen v Australia*, Communication No. 762/1997, U.N. Doc. CCPR/C/71/D/726/1997 (2001) [6.2] ('*Jensen v Australia*').

[270] *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) ('CAT').

[271] *Giri v Nepal*, **Communication No. 1761/2008, U.N. Doc CCPR/C/101/D/1761/2008 (2011)**, [7.5].

> based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[272]

i. The UNHRC has not provided a specific definition of torture as covered by Article 7 of the ICCPR. Instead it has preferred to note that:

> i. The committee [does not] consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment [protected by Article 7]; the distinctions depend on nature, purpose and severity of the treatment applied.[273]

j. Cruel, inhuman or degrading treatment or punishment is the lower threshold under which violations of Article 7 of the ICCPR can be alleged.

k. According to the UNHRC in *Vuolanne v. Finland*:

> i. The assessment of what constitutes inhuman or degrading treatment falling within the meaning of Article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of the health of the victim…. The Committee expresses the view that for punishment to be degrading, the humiliation… must entail other elements beyond the mere fact of deprivation of liberty.[274]

l. Article 10.1 of the ICCPR also provides that:

> i. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

m. According to the UNHRC, this Article:

> i. Imposes on State Parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture and other cruel, inhuman or degrading treatment or punishment contained in Article 7.[275]

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[272] CAT, art 1.
[273] Human Rights Committee, *General Comment No 20*, 42nd sess, UN Doc A/47/40 (1994), [4].
[274] *Vuolanne v Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) (1989), [9.2].
[275] Human Rights Committee *General Comment No 21*: Article 10, 44th sess, (1992**) UN Doc HRI/GEN/1/Rev.1 (1994)** [3] ('*General Comment No 21*').

n. Article 10 of the ICCPR is also a non-derogable provision and the rights and obligations contained within Article 10 are 'fundamental and universally applicable' and 'cannot be dependent on the material resources available in the State Party.'[276] This Article forbids any hardship or constraint other than the necessary detention and provides that 'respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'[277]

o. Article 109 of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)* states that:

   i. 'persons who are found to be not criminally responsible [for reasons of mental impairment,] … shall not be detained in prisons, and arrangements shall be made to transfer them to mental health facilities as soon as possible.'[278]

p. This obligation is relevant to determining whether a State has breached Article 10.1 of the ICCPR because the UNHRC has indicated that the norms found in the Standard Minimum Rules are incorporated into the Article 10 guarantee.[279]

q. The Applicant submits that his treatment while in detention goes far beyond the 'mere fact of deprivation of liberty' and that the nature, purpose and severity of the treatment constitutes a violation of Article 7.[280]

80. <u>Particulars of extended periods of isolation:</u>

[276] Ibid.
[277] Ibid.
[278] *United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 17th sess, Agenda Item 106, UN Doc A/RES/70/175 (8 January 2016) rule 109.1; Triggs, above n 5, [260].

[279] *Mukong v Cameroon*, [9.3]; see also *Potter v New Zeal*and (632/95), para 6.3, stating that the Standard Minimum Rules 'constitute valuable guidelines for the interpretation of the Covenant.'
[280] *Vuolanne v Finland*, Communication No. 265/1987, U.N. Doc. Supp. No. 40 (A/44/40) (1989), [9.2].

a. The Applicant submits that he has been subject to extended periods of isolation in breach of Articles 7 and 10.1 of the ICCPR.

b. According to the Applicant's legal guardian, between 1995 and 2004, the Applicant spent most of his time 'locked down' in isolation cells for up to 23 hours per day.[281]

r. The cell accommodation was minimal with only a bed and a toilet and no other amenities.

s. It is submitted that holding the Applicant in a single cell in a 'lock-down' regime for 23 hours a day is inhuman, cruel and degrading treatment or punishment, and is properly characterised as torture.

t. It is also submitted that the Applicant was subject to punishment by the prison staff, who would relocate him to the hottest cell in summer and the coldest cell in winter, as retribution for the actions which led to his incarceration.[282]

u. The Applicant submits that keeping him in isolation for up to 23 hours a day is a violation of Article 7. Adopting the definition of torture from Article 1 of the CAT, the Applicant suffered severely, both mentally and physically, as a result of intentional decisions to keep him locked down for 23 hours a day, and to use extreme weather conditions as a punitive device, by prison officials acting in their official capacity.

v. It is further submitted that the treatment of the Applicant is a violation of Article 10.

    i. In *Brough v Australia*[283] the UNHRC found that the conditions of detention of a juvenile Indigenous inmate with a mental disability were incompatible with Article 10.1 of the ICCPR. In that case, the author was confined to a 'dry cell' for extended periods of time, meaning that the author had no possibility of communication, was

[281] Appendix I, 5.
[282] Ibid 6.
[283] ***Brough v Australia*, Communication No. 1184/2003, U.N. Doc. CCPR/C/86/D/1184/2003 (2006).**

exposed to artificial light for long periods, and had his clothes and blankets removed.

ii. Although the State Party submitted that the author's confinement to a 'dry cell' was to protect him from self-harming, the UNHRC found the use of this measure to be incompatible with the purposes of Article 10 of the ICCPR, particularly considering the status of the author as an Indigenous juvenile with a mental impairment.

w. The Applicant submits that, analogous to *Brough v Australia*, the use of extended periods of isolation is incompatible with the rights established in Article 10.1 of the ICCPR and violates the State's obligation to treat the Applicant with humanity and respect for the inherent dignity of the human person.

x. The Applicant further submits that similarly to *Brough v Australia*, the impact of extended periods of isolation was exacerbated by his mental impairment and his status as an Indigenous Australian. In failing to ensure that the conditions of the Applicant's detention reflect his status as a particularly vulnerable prisoner, the State Party has breached its obligation under Article 10.1 of the ICCPR.

112. Particulars of the general inappropriateness of the prison setting in a maximum security prison:

a. It is submitted that the incarceration of the Applicant in a maximum security prison is wholly inappropriate and amounts to torture or cruel, inhuman or degrading treatment or punishment.

b. The ASCC and DCC are both maximum security prisons and fall under the jurisdiction of the Department of Corrections ('DoC').[284] The Applicant was incarcerated at the ASCC from 1995 – 2015; he was transferred to DCC in late 2015.

[284] *Correctional Services Act* 2014 (NT).

c. In 2003 the NTSC held that the Applicant's incarceration in maximum security prison was wholly inappropriate. Chief Justice Martin stated that:

    i. The resources available [in a maximum security prison] are not appropriate for the custody and care of [the Applicant]. He was ordered to be taken to a prison environment where he has been treated as a prisoner as if convicted of committing an offence…. By reason of his mental impairment he was not able to control his behaviour which brought about unwanted attention from other prisoners from time to time….[285] It is plain that by reason of his disability [the Applicant] was and continues to be unable to live under conditions in a prison where he can associate with other prisoners even subject to usual management and discipline. [The Applicant] has been isolated in a small single cell.[286]

d. In 2014, the AHRC found that:

    i. Custody in a goal is quite inappropriate for people like [the Applicant] … 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 [Northern] Territory. The need for that facility is acute and growing rapidly.[287]

e. The Applicant submits that his continued detention in a maximum security prison is inappropriate because of his mental impairment and physical disabilities, and constitutes an ongoing violation of Article 10.1 of the ICCPR and Article 17 of the CRPD.

    i. Article 17 of the CPRD guarantees that 'every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.' The emphasis in both Article 10 of the ICCPR and Article 17 of the CRPD to treat people with humanity, including respect for their physical and mental integrity, is clear.

f. Further, it is submitted that the failure of the State Party to treat the Applicant within a secure community-based setting, for example in a SCF, violates the Applicant's right be treated with respect for the inherent dignity

[285] *Scotty* [2003] NTSC 98, [18].
[286] Ibid [19].
[287] Triggs, above n 5, [253].

of the human person according to Article 10.1 of the ICCPR and the Applicant's physical and mental integrity according to Article 17 of the CRPD.

113. *Failure to provide appropriate rehabilitation*

a. Article 2.1 of the ICCPR requires State Parties to ensure that all individuals are able to enjoy their rights under the Covenant without discrimination.

b. In addition, Article 26 of the ICCPR entitles all persons to equal protection before the law without discrimination of any kind.

c. Article 10.3 of the ICCPR provides that the penal system must provide treatment, the essential aim of which must be to 'seek the reformation and social rehabilitation of the prisoner.'[288] This obliges State Parties to implement programs that are designed to rehabilitate prisoners in terms of their offending, and ultimately lead to their release into the community without discrimination on the basis of, *inter alia*, disability.

    i. Article 26 of the CRPD imposes further obligations upon States Parties including the positive obligation to take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence. The obligation includes the organization, strengthening and extension of comprehensive habilitation and rehabilitation services and programmes at the earliest possible opportunity, to enable persons with disabilities to access and benefit from such services.

    ii. Article 26 of the CRPD also provides an explanation of what is meant by habilitation and rehabilitation and, thus, what the State Party is required to provide.

    iii. Article 26.2 (CRPD) states that the professionals and staff working in such services ought to be appropriately trained.

[288] *General Comment No 21*, [3] in relation to Article 10 of the ICCPR.

d. It is submitted that Article 10.3 of the ICCPR must be interpreted in light of Articles 2.1 and 26 of the ICCPR and Article 26 of the CRPD. Such an interpretation creates an obligation for the State Party to provide appropriate rehabilitation programs that target both offending and the ability to maintain and maximise independence for all prisoners, regardless of ability or race.

e. The Applicant further submits that this interpretation of Article 10.3 necessarily includes his right to have a complete plan for his eventual transition out of detention in a maximum security setting.

114. Particulars:

a. It is submitted that the Applicant has not been provided with the necessary rehabilitative services to allow him to obtain the highest possible degree of independence.

b. The first and only comprehensive behavioural support plan drawn up to effect the rehabilitation of the Applicant did not take effect until 23 December 2013.[289] Prior to this time, there is no evidence of an attempt to provide the positive behavioural support rehabilitation and services required by the Applicant.

c. The 23 December 2013 transition plan ('TP') was implemented to effect the Applicant's relocation from the ASCC to the SCF and eventually lead to his reintegration into society.[290]

d. The Applicant successfully progressed through to the final stage of the TP and was residing full time at the SCF[291] before a number of incidents occurred in which the Applicant showed 'behaviours of concern'. These incidents caused the plan to be reviewed and eventually abandoned with the Applicant being returned to full-time incarceration at ASCC.[292]

[289] Appendix N.
[290] Appendix O.
[291] Appendix I, 7.
[292] Ibid; Appendix N.

e. The 2013 TP was not followed by a new plan, or a revision of the existing plan and new resources to ensure that the plan could be completed. Instead the Applicant was returned to full time detention at the ASCC. No other rehabilitative services were offered in its place.

f. In a psychiatric report provided to the NTSC in May 2014, it was acknowledged that the rehabilitation needs of the Applicant were "prolonged and complex and require attention to a wide range of realms of functioning."[293] It was advised that "the development of a rehabilitation programme for a person with complex needs such as [the Applicant] requires the expertise of a multidisciplinary team of a variety of specialties…."[294] The report then advised that the rehabilitation services needed by the Applicant could only be provided in an appropriate facility outside of maximum security prison.[295]

g. The Applicant was relocated to DCC in late 2015. There are no SCFs in the Darwin area. This transfer means that there is no opportunity for the Applicant to transition out of maximum security incarceration in Darwin. Indeed, with no transition plan, and no available SCF in Darwin, there is no indication that the Applicant will ever be able to transfer out of a maximum security facility. There has been no attempt to implement any rehabilitative services suitable to the Applicant's needs, at DCC.

h. The fact that the Applicant will not be able to transition to full time care at a SCF in Darwin demonstrates that his detention is not rehabilitative in direct violation of Article 10.3 of the ICCPR. As previously submitted, detention in a maximum security prison is particularly inappropriate for the Applicant due to his mental impairment and the fact that he has not been convicted of a crime.

i. It is submitted that, owing to his mental impairment, the State Party has failed to provide sufficient and appropriate programs for the Applicant. By

[293] Appendix J, 2.
[294] Ibid.
[295] Ibid.

failing to provide effective ongoing rehabilitative programs designed to allow the Applicant to be ultimately released from care in a maximum security prison, Australia has discriminated against the Applicant on the basis of his disability. Accordingly, Australia has violated Articles 2.1, 10.3 and 26 of the ICCPR and Article 26 of the CRPD

115. VIOLATION OF THE APPLICANT'S MINORITY RIGHTS AND INTERFERENCE WITH HIS PRIVATE LIFE (ICCPR: ARTICLE 27 IN CONJUNCTION WITH ARTICLE 10.1, AND ARTICLE 17.1 IN CONJUNCTION WITH ARTICLE 23)

116. *Removal from Country*

a. The Applicant submits that the State Party has failed to adequately protect the Applicant's right to enjoy his own culture while detained at ASCC, constituting a violation of Article 27 of the ICCPR, read in conjunction with Article 10.1.

b. Article 10.1 provides that incarcerated persons shall be treated with humanity and with respect for the inherent dignity of the human person.

c. Article 27, pertaining to minority rights, states that 'persons belonging to an ethnic, religious or linguistic minority shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'.

d. General Comment 23 states that these minority rights are 'directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned.'[296]

e. This Communication specifically focuses on two forms of minority rights: the right of Indigenous Australians to have a connection to their people and to Country, and to the right to use their own language/s.

f. As with most indigenous peoples, the centrality of Community and Country to Indigenous Australian culture cannot be understated. Indigenous

[296] **Human Rights Committee, *General Comment No 23, Article 27* (50th sess, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) ('*General Comment No 23*').**

Australian society is 'inextricably interwoven with, and connected to the land…[r]emoved from ours lands, we are literally removed from ourselves.'[297] The relationship that Indigenous Australians have to Country is 'a deep spiritual connection that is different from the relationship held by other Australians.'[298] It has been well established by Australian Federal government agencies that maintaining a physical, spiritual and emotional connection to Country is essential for the maintenance of the mental, social and emotional wellbeing of Indigenous Australians.[299]

g. Kinship and relationships with countrymen are also fundamental parts of Indigenous Australian culture. The relational nature of Indigenous culture places significant emphasis on a person's particular status within their Community. The importance of this status is understood from a very young age, and the relationships attained from this position within the Community provide a sense of belonging.[300] Research supports the understanding that the protection of an Indigenous Australian's standing within their own Community is essential for their physical, emotional and cultural health.[301]

h. Accordingly, the Applicant submits that interference with his connection to his fellow countrymen and Country, and his status as a respected Indigenous elder, amounts to a serious deprivation of his minority rights under Article 27 of the ICCPR.

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[297] Dodson M, 'Reconciliation in crisis' in Yunupingu G (ed.) *Our land is our life: Land rights – past, present and future* (University of Queensland Press, 1997) 137 – 149.

[298] Pat Dudgeon, Michael Wright, Yin Paradies, Darren Garvey and Iain Walker (eds.) 'The Social, Cultural and Historical Context of Aboriginal and Torres Strait Islander Australians', *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, (Department of Health and Ageing, 2010); see also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

[299] See, eg, Pat Dudgeon, Helen Milroy and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, (Department of Health and Ageing, 2nd ed, 2010); Royal Commission into Aboriginal Deaths in Custody (Report published April 1991); House of Representatives Committee Inquiry into Language Learning in Indigenous Communities (*Our Land Our Languages Report* tabled 17 September 2012); National Aboriginal and Torres Strait Islander Social Survey (NATSISS) 2008 (published Australian Bureau of Statistics, 2010).

[300] Dudgeon et al, above n 126, 105.

[301] Commission on Social Determinants of Health, *Closing the gap in a generation: health equity through action on the social determinants of health – Final Report of the Commission on Social Determinants of Health* (Geneva, 2008), cited in Dudgeon et al, above n 126, 95.

i. The right to enjoy one's culture also includes a right to use one's own language/s. As with all other Indigenous peoples, language is a vital aspect of Indigenous Australian culture, connecting individuals to their Community and Country. Language helps shape the identity of Indigenous as:

> i. [l]anguage is an essential part of, and intrinsically linked to indigenous peoples' way of life, culture and identities. Languages embody many indigenous values and concepts and contain indigenous peoples' histories and development. They are fundamental markers of indigenous peoples' distinctiveness and cohesiveness as peoples.[302]

j. The importance of language to an individual's sense of identity and belonging is deeply connected to social and emotional health and wellbeing.[303]

k. The State Party has long been aware of the importance of language, Country, countrymen and kin to Indigenous Australian identity and wellbeing. Multiple studies, commissions and committees have inquired into the disparities between Indigenous and non-Indigenous Australian mortality rates, incarceration rates, education levels and employment outcomes and concluded on the importance of these connections.[304]

117. Incarceration of Indigenous Australians and minority rights:

[302] House of Representatives Committees Inquiry into language learning in Indigenous communities (*Our Land Our Languages Report*, tabled 17 September 2012), Chapter 2, especially at 8–9, where the Report directly quotes from the Human Rights Council *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 5th sess 9-13 July 2012, A/HRC/EMRIP/2012/3, at 8.

[303] National Aboriginal and Torres Strait Islander Social Survey (NATSISS), Submission 127 to the House of Representatives Committees Inquiry into language learning in Indigenous communities, Office of the Arts, at 2.

[304] *Closing the Gap*, Prime Ministers Report 2016, Department of the Office of the Prime Minister and Cabinet <http://closingthegap.dpmc.gov.au/>; Aboriginal Deaths in Custody Final Report April 1991; Australia's Health – Indigenous Health Report 2014 <http://www.aihw.gov.au/australias-health/2014/indigenous-health/>; Australian Aboriginal and Torres Strait Islander Health Survey (AATSIHS) 2012 – 2013 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4727.0.55.003~2012-13~Main%20Features~About%20the%20National%20Aboriginal%20and%20Torres%20Strait%20Islander%20Health%20Measures%20Survey~110>; Australian Bureau of Statistics, Australian Social Trends - exploring the gap in Labour Market Outcomes for Aboriginal and Torres Strait Islander peoples, 2014 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0main+features72014>.

a. One of the most significant issues that impacts upon Indigenous Australian health and wellbeing is the disproportionate rate of imprisonment of Indigenous Australians, particularly young men.[305]

b. In addition, the transfer of Indigenous Australians away from Country and Community to prisons located a considerable distance away, has been acknowledged to cause considerable anguish and hardship.[306]

c. It is well established that adequate access to family, kin and Community is of paramount importance to Indigenous Australian prisoners, as it can ameliorate the negative effects of imprisonment.[307]

d. Article 10.1 forbids any hardship or constraint beyond the necessary detention, and provides that 'respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons.'[308]

e. The Applicant submits that Article 10.1, read in conjunction with Article 27, guarantees the Applicant the same rights to protection of his culture as that of an Indigenous Australian who is not being held in detention, other than derogations of the Applicant's minority rights which are a necessary part of his detention in ASCC.

f. The Applicant further submits that, in order to fulfill the obligations under Articles 10.1 and 27, Australia must take positive measures to ensure that the Applicant's connection to his Country, Community and language is maintained while incarcerated.[309]

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[305] See the Australian Bureau of Statistics, 2015 Prisoner statistics: http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Imprisonment%20rates~14. When the Aboriginal Deaths in Custody Royal Commission was established in 1987, Indigenous Australians were 15 more likely to be incarcerated in an Australian prison compared with non-Indigenous Australians (see *Aboriginal Deaths in Custody final report* April 1991 [9.3.1]. The Australian Federal Government website gives background information on the Royal Commission into Aboriginal Deaths in Custody: see http://www.naa.gov.au/collection/fact-sheets/fs112.aspx. That statistic remained the same in 2012 (see Pat Dudgeon, Helen Milroy and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, (Department of Health and Ageing, 2nd ed, 2014)), 102 and footnote 65.

[306] *Aboriginal Deaths in Custody Final Report* [25.3.5].

[307] Ibid [25.3.1].

[308] *General Comment No 21*, [3].

[309] ***General Comment No 23,* 38.**

118. Particulars:

a. As discussed above, the Applicant is a proud Pitjantjatara man who grew up in Alice Springs. The Applicant speaks and understands three Indigenous languages: Pitjantjatara, Arrernte and Luritja.[310] The applicant has only a basic familiarity with the English language.

b. The Applicant's identity as Pitjantjatara man is very important to him, as is his identity as a respected Indigenous elder and mentor.[311] The Applicant has a strong emotional connection to Country.

c. The Applicant submits that Australia has not taken sufficient measures to ensure that he has been able to maintain an adequate connection to Country and his fellow countrymen while incarcerated at ASCC. The Applicant has had no contact with Country, in the south-west area of Alice Springs, since his imprisonment in 1995; a period of over twenty years.[312] During his incarceration at ASCC he has had minimal contact with family members, and limited contact with countrymen who were also incarcerated at ASCC.[313] This lack of contact with the Applicant's Country and countrymen has contributed to a loss of the Applicant's connection to his culture.

d. The interference with the Applicant's minority rights has been exacerbated by his recent transfer to Darwin. As discussed above, the NTSC varied the Applicant's CSO on 25 November 2015 to allow for his transfer to DCC.[314] At the time of this submission, the Applicant is incarcerated at DCC.

e. The transfer of the Applicant from Alice Springs to Darwin has physically removed the Applicant from his Country. While it is inappropriate to incarcerate the Applicant in *any* maximum security prison, ASCC is built on the Applicant's traditional lands. DCC, in Darwin, is located almost 1500 kms (a 16 hour drive) away from Alice Springs, on lands far removed from his traditional Country.

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[310] Appendix J, 2.
[311] Appendix O, 1.
[312] Appendix I, 6.
[313] Appendix I.
[314] See above, [32.12]; Appendix Q.

f. The transfer from his traditional lands in Alice Springs, to a distant land in Darwin, has had the additional consequence of the Applicant losing his status as a tribal elder within the confines of ASCC. While at ASCC, the Applicant enjoyed mentoring young male countrymen with whom he came in contact.[315] The Applicant's status as a respected Indigenous elder has led to improvements in self-confidence and has enhanced the Applicant's connection with his culture.[316] The loss of the Applicant's particular status as a respected elder, by transfer to a facility located within an entirely different Indigenous Nation, has affected the Applicant's emotional health, and has detrimentally impacted on his connection to culture, Country and countrymen.[317]

g. In addition, the Applicant submits that the transfer to Darwin has interfered with his right to use his own language/s according to Article 27. The DCC is built on lands which are related to entirely different linguistic regions than those surrounding Alice Springs, and as a result the opportunities for him to speak his own language/s are remote. [318]

h. For the Applicant, the ability to communicate clearly and effectively in his traditional languages connects him to his Indigenous countrymen and heritage.[319] Accordingly, the limited ability of the Applicant to converse in Pitjantjatara, Arrente or Luritja while at ASCC has contributed to a loss of the Applicant's ability to connect to his culture and community.[320]

i. The interferences with the Applicant's minority rights outlined in this Communication are not necessary. A more appropriate environment for the Applicant is a SCF in a region related to his traditional lands, such as that

[315] Appendix O, 7.
[316] Ibid.
[317] There are hundreds of different Indigenous languages and Nations in Australia: http://www.abc.net.au/indigenous/map/.
[318] Ibid.
[319] House of Representatives Committees Inquiry into language learning in Indigenous communities (*Our Land Our Languages Report*, tabled 17 September 2012), Chapter 2, especially at 8–9, where the Report directly quotes from the Human Rights Council Expert *Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, 5th sess 9-13 July 2012, A/HRC/EMRIP/2012/3, 7.
[320] Appendix J, 2.

connected to the ASCC.[321] Accordingly, the inappropriate detention of the Applicant in a maximum security prison interferes with the right to maintain his own culture while incarcerated, a clear violation of Articles 10.1 and 27 of the ICCPR.

j. Furthermore, the physical separation of the Applicant from his traditional Country and countrymen, and the interference with the Applicant's ability to use his own language, creates a barrier to re-integration with his Country and operates as a significant hurdle to his rehabilitation.

119. *Interference with the Applicant's family life*

a. The Applicant submits that the State Party has arbitrarily interfered with the Applicant's family life in violation of Articles 17.1 and 23 of the ICCPR, by incarcerating him in a maximum security prison when a more appropriate environment for the Applicant would be a SCF.

b. Article 23 protects the right to family, and states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.

c. Article 17.1 states that 'no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence….'

i. The UNHRC has stated that interference with the rights protected by Article 17.1 will be arbitrary if the interference is not 'in accordance with the provisions, aims and objectives of the Covenant' and is not reasonable.[322]

ii. In *Toonen v Australia*, the HRC interpreted the term 'reasonable' to 'imply that any interference with privacy must be proportionate to

[321] Appendix H, 10; see also above at [31. 25] – [31.30] and [33].

[322] **Human Rights Committee, *General Comment No 16*, (23rd sess, 1988), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, 21 ('*General Comment No 16*').**

the end sought and necessary in the circumstances of any given case.'[323]

d. General Comment 16 states that 'the objectives of the Covenant require that for purposes of Article 17 [the term family] be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.'[324]

    i. In *Hopu and Bessert v France*, the UNHRC recognised that cultural traditions should be taken into account when defining the term 'family'.[325] In this case, the UNHRC found that ancestors of an indigenous population of Tahiti constituted part of the author's family.

e. The Applicant submits that Indigenous Australian cultural understandings about kin and familial responsibilities means that the definition of the Applicant's family should include not just members of his extended (blood) family but also non-blood relatives such as fellow countrymen, including those members of his Country incarcerated in ASCC.

120. Particulars:

a. The Applicant submits that his transfer from Alice Springs, where he was able to have some contact with members of his family, to Darwin where he has no contact with his family, constitutes arbitrary interference in the Applicant's family life, and therefore violates Articles 17.1 and 23 of the ICCPR.

b. From 2013 until his transfer to DCC, the Applicant had some contact with blood relations at ASCC. The Applicant received visits from his family on three known occasions.[326] The Applicant also had some contact with family

[323] *Toonen v Australia*, U.N. Doc CCPR/C/50/D/488/1992.
[324] ***General Comment No 16*, 21.**
[325] ***Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1.**
[326] Appendix R, 4.

members during weekly lunches held at ASCC and the SCF, which were instigated as part of the Applicant's TP. [327]

i. The initiation of family visits coincided with the appointment of an independent guardian for the Applicant in 2013.

c. As discussed above, while detained at ASCC the Applicant came into contact with countrymen who were also imprisoned at ASCC. As part of his role as an indigenous elder, the Applicant enjoyed mentoring young prisoners from his Country. The Applicant submits that, considering the broad definition of family upheld in *Hopu and Bessert v France*, the Applicant's countrymen should be considered as members of his family.

d. Since being transferred to DCC in Darwin, the Applicant has not had any contact with family. Darwin is almost 1500 kms (a 16 hour drive) away from Alice Springs where his family is located.[328] No provision has been made to assist members of his family to visit him in Darwin.[329] Additionally, since being transferred to Darwin, the Applicant has had no contact with his countrymen, as prisoners from his Country are normally incarcerated at ASCC. Accordingly, the transfer of the Applicant from Alice Springs to Darwin has interfered with the Applicant's family life.

e. Further, the interference in the Applicant's family life is arbitrary and therefore violates Articles 17.1 and 23 for the following reasons:

i. The transfer of the Applicant from Alice Springs to Darwin is not in accordance with the aims of the ICCPR, as it violates the Applicant's minority rights Article 10.1 and Article 27.[330]

ii. The transfer was not necessary and was proposed with the sole purpose of centralising the population of prisoners with cognitive impairments in the Northern Territory.

[327] Appendix P.
[328] Appendix R, 4; Appendix I, 6 – 7.
[329] Ibid.
[330] Violation of the Applicant's minority rights is discussed above at [33].

iii. The impact of the transfer on the Applicant is disproportionate to its purpose, which is to centralize the population of prisoners with a cognitive impairment in the Northern Territory. The transfer will have a significantly detrimental impact on the Applicant's wellbeing, and will not provide suitable rehabilitation or care for the Applicant; as a result it is submitted that the transfer is not proportionate to the ends sought by Australia.

f. Accordingly, the Applicant submits his transfer from Alice Springs to Darwin constitutes arbitrary interference with his family life, and therefore violates Articles 17.1 and 23 of the ICCPR.

121. Conclusion

a. In sum, and as was found by the Australian Human Rights Commissioner, the Applicant submits that he has the human right, under the ICCPR:

i. Not to be arbitrarily detained,

ii. Not to be subjected to torture or cruel, inhuman or degrading treatment or punishment,

iii. To be treated with humanity and with respect for the inherent dignity of the human person while detained,

iv. To enjoy his minority culture, and

v. To enjoy his family life without interference.

b. Accordingly, the Northern Territory and Commonwealth Governments have a 'corresponding responsibility to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to these rights.'[331]

[331] Triggs, above n 5.