



Submission

Senate Community Affairs References Committee

Inquiry into Indefinite Detention of People with Cognitive and
Psychiatric Impairment in Australia

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CONTENTS

The Australian Cross Disability Alliance.....	3
Introduction	4
Key Recommendations.....	7
I. Indefinite detention of people with cognitive impairment and or psychosocial disability.....	9
Unfitness to plead.....	9
Mental impairment defence.....	11
Mental health laws.....	12
Immigration detention.....	14
II. Consequences for Human Rights.....	15
Use of restrictive practices	15
Solitary confinement.....	16
Forced treatment	17
Denial of reasonable accommodation	19
Inappropriate detention environments	20
III. Reforms Required.....	21
Recognition of legal capacity	21
Removing barriers to accessing justice.....	23
Limits on detention	24
Elimination of restrictive practices	25
Provision of adequate disability support	25
Treatment not punishment.....	27
Ending indefinite mandatory detention of asylum seekers.....	28
Conclusion.....	28

The Australian Cross Disability Alliance

The Australian Cross Disability Alliance (ACDA) is an alliance of national Disabled People's Organisations (DPOs) in Australia. The key purpose of the ACDA is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes and strategic priorities and opportunities. The ACDA was founded by, and is made up of four national cross-disability DPOs that have been funded by the Australian Government to be the recognised coordinating point between Government/s and other stakeholders, for consultation and engagement with people with disability in Australia. In forming the ACDA, its four founding member organisations recognise and value the strength of working together in a spirit of mutual respect and trust, to proactively pursue human rights outcomes for all people with disability in Australia. The four ACDA members are:

[Women With Disabilities Australia \(WWDA\)](#) is the national cross-disability DPO for women and girls with all types of disabilities in Australia. It operates as a transnational human rights organisation and is run by women with disabilities, for women with disabilities. WWDA's work is grounded in a human rights based framework which links gender and disability issues to a full range of civil, political, economic, social and cultural rights.

[First Peoples Disability Network Australia \(FPDNA\)](#) is the national cross-disability DPO representing Aboriginal and Torres Strait Islander people with disability and their families. FPDNA utilises a range of strategies in its representative role, including through the provision of high-level advice to governments, and educating the government and non-government sectors about how to meet the unmet needs of Aboriginal and Torres Strait Islander people with disability.

[People with Disability Australia \(PWDA\)](#) is the national cross disability rights and advocacy organisation run by and for people with disability. Working within a human rights framework, PWDA represents the interests of people with all kinds of disability. Its primary membership is made up of people with disability and organisations primarily constituted by people with disability. It also has a large associate membership of other individuals and organisations committed to the disability rights movement.

[National Ethnic Disability Alliance \(NEDA\)](#) is the national peak organisation representing the rights and interests of people from Culturally and Linguistically Diverse (CALD/NESB) people with disability, their families and carers throughout Australia. NEDA advocates at the federal level so that CALD/NESB people with disability can participate fully in all aspects of social, economic, political and cultural life.

The key objectives of the ACDA are to:

- work to advance the rights of all people with disability from all walks of Australian life, in relevant policy frameworks, strategies, partnership agreements and any other relevant initiatives;
- promote and engender a collaborative, co-operative and respectful relationship with all levels of Government in the efforts of the ACDA to advance the human rights of people with disability;
- build on and further develop networks, strategic alliances and partnerships at state/territory, national and international levels to advance human rights of people with disability;
- promote the ACDA at national and international levels as the coordinating point for engagement with the Australian DPO sector; and build respect for, appreciation of, and faith in the DPO sector in Australia.

Introduction

1. This submission provides an overview of the circumstances leading to and consequences of indefinite detention of people with cognitive and psychosocial disability in Australia. In doing so it uses information previously published in *Disability Rights Now*¹, the civil society report on the Convention on the Rights of Persons with Disabilities (CRPD), 2012. *Disability Rights Now* was compiled from consultations with people with disability and their representative and advocacy organisations, evidence from government and community initiated inquiries, and various reports and submissions produced by civil society involved in the protection and promotion of human rights for people with disability. It was primarily drafted by eight DPOs and disability advocacy organisations and received over eighty endorsements.
2. The submission also incorporates the work of ACDA members on issues pertinent to indefinite detention of people with disability including the [Submission to the Senate Inquiry into Violence against People with Disability](#), ACDA 2015; the [Shadow Report to the Committee Against Torture \(CAT\)](#), PWDA 2014; [Submissions to the Australian Law Reform Commission \(ALRC\) Inquiry into Equality, Capacity and Disability](#), PWDA 2014; representations made during the [United Nations Human Rights Council Universal Periodic Review](#) (UPR) of Australia, ACDA 2015; and the report, [The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned](#), NEDA 2015.
3. In relation to the specific circumstances of the indefinite detention of Aboriginal and Torres Strait Islander people with disability in the criminal justice system, the ACDA fully supports and endorses the submission made to this Inquiry by First Peoples Disability Justice Consortium, *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment*. This Consortium is an initiative of ACDA member, FPDN.
4. People with cognitive impairment and/or psychosocial disability in Australia experience extraordinary levels of direct and systemic discrimination and as a result multiple violations of their human rights, many characterised by violence and segregation². For those who come into contact with either the criminal justice or mental health systems their risk of detention based on the existence of actual or perceived disability is high. National figures indicate at least half of the Australian prisoner population has some form of psychosocial, cognitive or physical impairment,³ and the number of prisoners with disability entering or leaving Australian prisons throughout a year is in the tens of thousands.⁴ Approximately 150 people

¹ Available at <http://www.pwd.org.au/issues/crpd-civil-society-shadow-report-group.html>

² See Phillip French, Julie Dardel and Sonya-Price-Kelly, [Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment](#), (People With Disability Australia, 2009)

³ Australian Institute of Health and Welfare (2013), p 3

⁴ Baldry, E. *Disability at the Margins: Limits of the Law*. Griffith Law Review, 2014 Vol. 23, No. 3, 370–388,

around Australia are currently detained under mental impairment legislation in prisons and psychiatric units.⁵

5. Aside from asylum seekers, including those with disability who are mandatorily detained on their arrival to Australia⁶, people with cognitive impairment and/or psychosocial disability are the only group who experience indefinite detention in Australia. Aboriginal people with disability are disproportionately represented in this cohort with approximately 50 Aboriginal persons with disability currently being detained indefinitely in prisons and psychiatric units throughout Australia.⁷
6. Indefinite detention of people with cognitive impairment and/or psychosocial disability in prisons, hospitals, psychiatric facilities or other place of incarceration such as a Disability Justice Centres or immigration centres is a violation of Article 14 (Liberty and Security of the Person) of the CRPD. It is a violation of Article 16 (Cruel, Inhuman or Degrading Treatment or Punishment) of the Convention Against Torture (CAT) and in some instances also a violation of Article 1 (Torture) due to the vulnerability of the person involved (for example, age, gender, disability), the environment in which it takes place, and the cumulative effect of various factors including the prolonged duration of the experience.⁸ The intersectional discrimination at the heart of indefinite detention of Aboriginal and Torres Strait Islander people with disability also invokes Article 5 (Equality Before the Law) of the Convention on the Elimination of Racial Discrimination (CERD).
7. This Inquiry comes at a time when there is increasing international scrutiny on the deprivation of liberty for people with disability as a result of work intended to progress States Parties understanding and implementation of the CRPD. In September 2015, the United Nations Office of the High Commission for Human Rights (OHCHR) held an Expert Meeting on Deprivation of Liberty of Persons with Disability which resulted in the development of the following Standards:
 - *Absolute ban on deprivation of liberty on the basis of impairments;*
 - *Ban on forced or non-consensual treatment, or which is in any way in violation of the free and informed consent of the person concerned;*
 - *Upholding of the standard of “best interpretations of will and preferences of the person” for the exercise of legal capacity, superseding the standard of “best interest of the person” in all contexts for adults with disabilities;*
 - *Rejection of unfitness to stand trial;*

⁵ Senate Standing Committee on Legal and Constitutional Affairs; *Attorney-General’s Department; Group 2; Program 1.3, Question No. 88*, 16 October 2012.

⁶ *Migration Act 1958* (Cth) amended

⁷ Sitori, M., McGee, P. and Baldry, E. (2012) *The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*; A Report Prepared by the Aboriginal Disability Justice Campaign. Sydney: University of NSW.

⁸ General Comment Number 2, Interpretation of Article 2 of the Convention Against Torture, page 6.

- *Duty to guarantee access to justice, including through procedural accommodations at all stages of procedures;*
- *Rejection of non-liability on the basis of disability;*
- *Rejection of security measures, including those involving indefinite deprivation of liberty and forced treatment;*
- *Rejection of the concepts of dangerousness and predictability as grounds for deprivation of liberty of persons with disabilities;*
- *Person with disabilities should only be deprived of their liberty when found guilty of a crime after following a criminal procedure with all the safeguards and guarantees applicable to everyone; and*
- *Preference for diversion mechanisms and restorative justice schemes not requiring medical treatment.*⁹

8. The ACDA strongly suggests that the Senate Community Affairs References Committee acknowledges Australia's obligation as a State Party to the CRPD, and use these standards from the OHCHR Expert Group to inform this Inquiry and its recommendations. Considerable work needs to be done in order to fully examine what the States, Territories and Commonwealth governments need to do in order to end the indefinite detention of people with cognitive impairment and/or psychosocial disability. This Inquiry is a welcome starting point and opportunity to scope out how this work will be done, by whom and with what resources.

9. This submission firstly focuses on the circumstances which lead to indefinite detention of people with cognitive impairment and/or psychosocial disability in the Australian context, particularly violations of the recognition of legal capacity inherent in unfitness to plead legislation, mental impairment legislation and mental health laws. Secondly, it examines the consequences for people with disability including further violations of their rights through the use of restrictive practices, the denial of reasonable accommodation and inappropriate detention environments. Thirdly, an overview of the legal and policy changes required to address the problem of indefinite detention will be considered including support for decision making based on rights will and preference, limits on the term of detention, removal of barriers to accessing justice for people with disability, elimination of restrictive practices, increased provision of disability supports, effective treatment as opposed to punishment, and ending indefinite mandatory detention of asylum seekers.

⁹ OHCHR Expert Meeting on Deprivation of Liberty of Persons with Disability, full materials available at <http://www.ohchr.org/EN/Issues/Disability/Pages/deprivationofliberty.aspx>

Recommendations

- A. The Australian Government urgently ratify and ensure domestic implementation of the Optional Protocol to the Convention against Torture (OPCAT) and the establishment of an independent national preventive mechanism to monitor places of detention, including where people with disability are detained, such as immigration detention centres, prisons, forensic facilities, juvenile justice detention centres, disability justice centres and mental health facilities.
- B. Australian governments should establish uniform national legislation, in line with international human rights law, to facilitate due legal process to end indefinite detention of people with disability without conviction. This should be accompanied by the establishment of gender and culturally relevant administrative and disability support frameworks that enable unconvicted people with disability to receive genuine community based treatment, rehabilitation and support in the community.
- C. Australian governments should develop and implement a range of gender and culture specific diversionary programs and mechanisms and community based sentencing options that are integrated with individualised disability support packages and social support programs to prevent people with disability coming into contact with the criminal justice system.
- D. Australian governments should review 'mental impairment defence' legislation and policy, in line with international human rights law, to establish a nationally consistent approach to ensuring regular, periodic, judicial review of a person's detention; and ensuring that there is a focus on treatment and rehabilitation with the provision of adequate and appropriate supports, including disability and mental health supports.
- E. The National Disability Insurance Agency should work with State and Territory justice departments to develop a nationally consistent strategy for correctional facilities to identify NDIS eligible prisoners whilst they are in detention so that NDIS Plans can be developed prior to release into the community.
- F. Australian governments, in partnership with people with disability develop and implement Disability Justice Strategies that identify and address barriers to justice for people with disability, whether as a victim, a witness or a defendant. Such Strategies could be developed in line with the recommendations from the Australian Human Rights Commission's report, *Equal Before the Law: Towards Disability Justice Strategies*.
- G. Australian governments develop and implement nationally consistent programs that provide support (including urgent support) for people with disability involved in the criminal justice system, regardless of whether the person is a victim, witness or defendant. Such programs could include a similar scheme to UK Registered Intermediaries and similar online resources similar to the Advocates Gateway.

- H. The Australian Government repeal legal provisions that establish and permit mandatory detention for asylum seekers; enact legislation that ensures that any detention only occurs where strictly necessary, for the shortest time possible and as a last resort, that ceases immigration detention of children and their families, that ensures regular, periodic, judicial review of a person's detention, and that ensures that detainees have adequate supports and safeguards, including disability supports, aids, assistive technology, physical and mental health services, interpreters and communication facilities.
- I. Australian governments modify, repeal or nullify any law or policy, and counteract any practice or custom, which has the purpose or effect of denying or diminishing recognition of any person as a person before the law, or of denying or diminishing any person's ability to exercise legal capacity; enact laws that recognise the right of all people in all situations to recognition before the law; that creates a presumption of legal capacity for all people, and which expressly extends to those circumstances where support may be required for a person to exercise legal capacity; and enshrine the primacy of supported decision-making mechanisms in the exercise of legal capacity.
- J. Australia should establish a nationally consistent supported decision-making framework that strongly and positively promotes and supports people to effectively assert and exercise their legal capacity and enshrines the primacy of supported decision-making mechanisms.
- K. The Australian Government and State and Territory Governments move to eliminate all forms of forced treatment and restrictive practices on and against all people with disability. To commence this work, and in consultation with people with disability, the Australian Government conduct a comprehensive audit of laws, policies and administrative arrangements underpinning forced treatment and restrictive practices with a view to introducing reforms to eliminate laws and practices that relate to forced treatment and restrictive practices that inherently breach human rights.
- L. Australia establishes a CRPD and CAT compliant nationally consistent legislative and administrative framework for the protection of people with disability from behaviour modification and restrictive practices that constitute torture and ill-treatment, including the prohibition of and criminal sanctions for these practices.

I. Indefinite detention of people with cognitive impairment and or psychosocial disability

10. A key driver leading to the indefinite detention of people with cognitive impairment and/or psychosocial disability is a failure to recognise legal capacity. Article 12 of the CRPD, Equal Recognition Before the Law, establishes that all people with disability have legal capacity; that States have an obligation to provide support for the exercise of the capacity to act, including decision making support; that failure to provide this support constitutes discrimination; and that only in instances where it is absolutely not possible for an individual's will and preference to be obtained can representative decisions (as opposed to best interest decisions) be made, subject to safeguards and based on rights and any previously expressed will and preferences.¹⁰ There are three areas of law which operate in violation of the right of a person to exercise their legal capacity and which can lead to detention of a person with disability which may become indefinite: unfitness to plead legislation, mental impairment legislation and mental health laws.

Unfitness to plead

11. All Australian jurisdictions have legislation in place that provides for a defendant to be found unfit to stand trial. These justice diversion provisions are applied to people with cognitive impairment and/or psychosocial disability and can be raised as an issue before or during the trial process.¹¹ The finding of unfitness is based on an assessment that the defendant is not able to understand the proceedings to the extent necessary to participate, and that to proceed would be unfair. However, despite their protective intent, these justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.¹²

Case Study: Mr Noble is an Aboriginal man with intellectual disability. He spent ten years in a Western Australian prison without ever being found guilty of a crime. Mr Noble was charged with sexually assaulting two girls in 2001, but has never faced trial after he was deemed 'unfit to plead'. His lawyer estimates that if he had been convicted he would have only served about five years in prison. There appears to be no evidence that the crimes he was charged with ever actually occurred. He was released in January 2012 under stringent

¹⁰ S PWDA, Australian Centre for Disability Law, Australian Human Rights Centre (July 2014), Submission to the Australian Law Reform Commission Discussion Paper, Equality, Capacity and Disability in Commonwealth Laws, <http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-ACDL-AHRCentre.doc>

¹¹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, (2014).

¹² UPR Disability Coordination Group [UPR Fact Sheet 2: Indefinite Detention](#), May 2015

conditions that limit his ability to lead a normal life in the community, despite never being convicted of the crime he was charged with.¹³

12. In 2013¹⁴, the CRPD Committee recommended that Australia establish “legislative, administrative and support frameworks that comply with the Convention”, and stop using prisons “for the management of unconvicted persons with disabilities”.¹⁵ In 2014, the Australian Human Rights Commission (AHRC) found that the Commonwealth had failed: “to take measures to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges”.¹⁶
13. The complainants in this case were four Aboriginal men with cognitive disability who complained that their detention was arbitrary, the conditions of their detention were inhumane, and “the lack of alternatives to detention...and the lack of mental health and rehabilitation services” had resulted in a breach of their human rights.¹⁷ The AHRC found that the Commonwealth had breached rights to liberty and security of the person under articles 9(1) and 10(1) of the International Covenant on Civil and Political Rights (ICCPR)¹⁸ and article 14(1) of the CRPD. It also found breaches to CRPD articles 19 [Living independently and being included in the community]; 25 [Health]; 26 [Habilitation and rehabilitation]; and in the case of two of the complainants, the AHRC found they had been subjected to torture and ill-treatment in breach of ICCPR article 7 and CRPD article 15, [Freedom from torture or cruel, inhuman or degrading treatment or punishment].¹⁹
14. The Australian Government rejected the finding, stating that the complaint was not within the jurisdiction of the Commonwealth but a matter for State and Territory governments, and it would therefore “not engage in a detailed assessment of [the AHRC’s] recommendations”.²⁰ The Australian Government has ‘washed its hands’ of the significant human rights violations experienced by these four men, and effectively of the violence, abuse and neglect that is inherent to the indefinite detention of unconvicted people with disability in prisons and other facilities.

¹³ See also Michael Brull, ‘The sad story of Marlon Noble’ on ABC Ramp Up, *Ramp Up* (9 December 2011) <www.abc.net.au/rampup/articles/2011/12/09/3387845.htm>.

¹⁴ Points 12-17 in this section has been extracted from Frohmader, C., & Sands, T., (2015) *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*, ACDA, Sydney, Australia p. 48.

¹⁵ CRPD/C/AUS/CO/1, para 32(a)

¹⁶ *KA, KB, KC and KD v Commonwealth of Australia* (2014) AusHRC 80, para 273

¹⁷ *Ibid* para 10

¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

¹⁹ *KA, KB, KC and KD v Commonwealth of Australia*, OpCit., para 273

²⁰ Attorney-General for Australia, Senator the Hon George Brandis QC, *Statement on the tabling of the Australian Human Rights Commission Report – KA, KB, KC and KD v Commonwealth of Australia [2014] AusHRC 80*, Australian Government, p 2.

15. The response to the issue of indefinite detention in the Northern Territory and Western Australian has been to build Disability Justice Centres, and in Queensland to detain people in its Forensic Disability Service and highly restrictive 'community based treatment settings'. However, these facilities still operate as institutional places of detention, with features such as long term solitary living arrangements, locked windows and doors, video surveillance and limited opportunities for physical, recreational, therapeutic, rehabilitation or social activities.²¹

Case Study: Mr J is 24 and has acquired brain injury. He has been ordered to live in a 'community forensic facility' after being found unfit to plead to a charge of assault. The 'duplex' where he lives is on the same grounds as the prison and he lives there alone, his only regular contact being with the staff who monitor the 24 hour surveillance from the observation window. A cage covers the small outside yard and windows and doors are locked, including the bathroom so he must request permission to use the toilet, shower or to get water. The duplex contains one table and bench bolted to the floor and a bed. James has no visitors as his parents live hours away, he has little opportunity to exercise and there are no recreational opportunities - he has no books, TV, radio or computer to maintain contact with the outside world. He told his advocate, "I don't understand why I'm here, I'd rather be in prison"²²

16. Congregating unconvicted people with disability in this way can increase stigma towards people with disability and community perceptions of dangerousness. It is also well documented that the institutional congregation of people with disability intensifies their exposure to restrictive practices and other forms of violence, abuse and neglect. The development of this new form of institution for people with disability is discriminatory; and also heightens the imperative for Australia to implement a robust oversight mechanism to monitor places of detention such as the model provided by the Optional Protocol on the Convention against Torture (OPCAT).²³
17. In reviewing Commonwealth laws and programs and legal capacity for people with disability, the Australian Law Reform Commission recommended reform of the 'unfitness' test, provision of supports, limits and reviews on detention.²⁴ Australia has yet to respond to this report.

Mental impairment defence

18. All Australian jurisdictions have legislation in place that provides for the defence of 'mental impairment' when it is clearly proven that at the time of committing the criminal act, the

²¹ See People with Disability Australia (2014), *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* at <http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc>

²² See People with Disability Australia (2014), *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* p. 37.

²³ Ibid, para 101, p. 36

²⁴ Australian Law Reform Commission (2014) OpCit, p.191.

accused's state of mind meant that they did not know what they were doing, or if they did, that it was wrong. The recognition of legal capacity and adequate provision of disability support to enable a person to participate in a trial does not impact upon this circumstance. It is different to a test of 'unfitness' as it turns on whether the defendant had the necessary intention to commit the crime at the time the act was done as opposed to the impact of disability on the fairness of proceedings.

19. However, people who are found not guilty by reason of 'mental impairment' become forensic patients in prisons, hospitals, psychiatric facilities or other places of detention such as Disability Justice Centres. Their situation is then reviewed by a Mental Health Tribunal that determines whether the person should be released into the community, and if so under what conditions.
20. Forensic treatment orders may not be time limited, and even if they are, can frequently be renewed on expiry by the Tribunal. The decision is based on an assessment of harm to others and whether the person can safely be released into the community which again can result in people with disability being detained indefinitely, or "detained forever—even though they are actually found not guilty by law"²⁵. The possibility of indefinite detention prompts some lawyers to avoid using this defence, instead opting to have their client's mental illness simply taken into account as a mitigating factor in sentencing.²⁶

Mental health laws²⁷

21. On ratification of the CRPD, Australia made an Interpretive Declaration stating that it understands Article 17 of the CRPD, Protecting the Integrity of the person, to allow for compulsory assistance or treatment of persons, including measures taken for the treatment of psychosocial disability, where such treatment is necessary, as a last resort and subject to safeguards.²⁸ The declaration is largely directed to state and territory frameworks that underpin the mental health system in Australia, and clarifies that Australia believes the existing legislative, policy and practice frameworks governing compulsory assistance or treatment of mental ill-health should be maintained.
22. Laws, policy and practice for involuntary detention and treatment of people with psychosocial disability purport to 'protect' people who may be of harm to themselves or others by providing compulsory treatment in the community or in mental health facilities. Despite the significant limitations placed on a person's autonomy and equal recognition before the law, there is no consistency across state and territory mental health laws in assessing, or

²⁵ ['A plea of insanity, mental illness and the criminal justice system'](#), ABC, Lynne Malcolm, 10 June 2015,

²⁶ Ibid.

²⁷ This section is extracted from People with Disability Australia (2014), [Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture](#) pp. 29-30.

²⁸ *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*.

determining 'risk of harm to self or others'; or assessing a person's ability or support needs to provide full and informed consent.

23. As a result, many people with psychosocial disability and cognitive impairment experience serious breaches of their human rights and widespread abuse, neglect and exploitation within the current legislative, policy and practice framework that purports to 'protect' them. Instead of addressing mental health laws as an inherent breach of human rights, states and territories have focused on reviewing and amending mental health legislation in an effort to increase compliance with human rights.
24. Since ratification of CRPD, a number of people with disability, their representative organisations, disability advocacy and legal groups in Australia have questioned the validity of separate mental health legislation, given this legislation prescribes limitations to human rights on the basis of disability,²⁹ and is not legislation that limits human rights for everyone in the community in relation to risk of harm to self and others and the need for compulsory treatment and detention.
25. The Special Rapporteur on Torture, Manfred Nowak has noted with respect to involuntary commitment to psychiatric institutions that "Article 14 of CRPD prohibits ... the existence of a disability as a justification for deprivation of liberty",³⁰ and the subsequent Special Rapporteur on Torture has said that "provisions allowing confinement or compulsory treatment in mental health settings, including through guardianship and other substituted decision-making, must be repealed."³¹
26. Similar to the situation for people found not guilty due to mental impairment, people under involuntary treatment orders can reside in secure accommodation with no release date, or with the possibility that their treatment order will be continually extended prior to expiry.

Case Study: Ms A. was homeless when she was placed under an involuntary treatment order in 2010. Despite reviews of her involuntary treatment order, it was deemed to be in her 'best interests' to continually detain Ms A. in a psychiatric unit as she was considered to be a risk to herself, and there was a view that there were no community mental health supports that could be tailored to her specific needs. This detention lasted for six years, until

²⁹ Department of Human Services, 'Review of the *Mental Health Act 1986*: Community Consultation Report' (Report, Victorian Government, July 2009) 14, 19.

³⁰ Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd sess, UN Doc A/63/175 (28 July 2008)16.

³¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez Human Rights Council Twenty-second session,

<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/116/31/PDF/G1311631.pdf?OpenElement> page 2.

advocacy support successfully negotiated her release to appropriate community accommodation and support³².

Immigration detention³³

27. Australia's policy of indefinite mandatory detention of asylum seekers has been the subject of substantial condemnation from human rights treaty bodies and other UN experts.³⁴ In both its 2008 and 2014 concluding observations, the CAT Committee recommended that Australia abolish its policy of onshore and offshore mandatory immigration detention and advised using detention as a measure of last resort only and setting a reasonable time limit for detention.³⁵ The Committee also recommended that children no longer be held in immigration detention under any circumstances, and as a matter of priority, ensure that asylum seekers who have been detained are provided with adequate physical and mental health care.³⁶ Australia has not addressed the Committee's recommendations.
28. Specific areas of concern for people with disability include overwhelming evidence of heightened risks of physical and sexual violence, inadequate and inaccessible facilities; lack of access to necessary aids, equipment, medication, health and allied health care; lack of access to diverse language and communication supports and support for families and carers.³⁷ There is also evidence of the withdrawal of essential medication and equipment, including instances

³² Case study from the Individual Advocacy Program at PWDA.

³³ This section is extracted from Frohmader, C., & Sands, T., (2015) *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*, ACDA, Sydney, Australia p. 51.

³⁴ See Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Australia*, 95th sess, 2624th mtg, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [23]-[24]; Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 of the Covenant – Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, 26th mtg, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [25], [30]; Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 60th sess, 1725th mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [31], [80]; Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict – Concluding observations: Australia*, 60th sess, 1725th mtg, UN Doc CRC/C/OPAC/AUS/CO/1 (11 July 2012) [24]; Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention – Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77th sess, 2043rd mtg, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010) [24]; Anand Grover, Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest standard of physical and mental health – Mission to Australia*, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20/Add.4 (3 June 2010) [64]; Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1: Australia*, 10th sess, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) [47]-[49]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011) [18], [42], [78].

³⁵ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 11; UN Doc CRC/C/AUS/CO/4 para 16

³⁶ Committee against Torture, UN UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 11; UN Doc CRC/C/AUS/CO/4 para 11, para 16

³⁷ National Ethnic Disability Alliance (NEDA), *The Plight of People with Disabilities within Australian Immigration Detention: Demonised, Detained and Disowned*, (March 2015), NEDA, Canberra, Australia.

of hearing aids and prosthetic limbs being removed and destroyed,³⁸ the use of solitary confinement³⁹ and the separation of people with disability from their primary carers, including spouses.⁴⁰

29. In November 2013, Christmas Island Detention Centre Medical Officers wrote an open letter of concern regarding the operation of the Centre. The letter identified the Christmas Island immigration detention centre as unsuitable for any person living with significant intellectual or physical disability: “[t]he detention environment exacerbates their burden of care and the facilities and medical services provided are inadequate to accommodate their needs.” It described how a young woman with cerebral palsy was “confined to a wheelchair in one of the island compounds”. Despite medical officers raising concerns from the time of her arrival that she was “not suitable for the detention environment”, and although “exhibiting signs of mental distress, she had not been transferred.”⁴¹

II. Consequences for Human Rights

30. Failures to recognise legal capacity and the inadequate provision of supported decision making mechanisms leads to heightened risk of people with cognitive impairment and/or psychosocial disability being indefinitely detained. Moreover, when a finding of legal incapacity is found in a criminal or mental health context it impacts on other areas of a person’s life including the way that they are treated while in detention. In many instances, these rights violations can constitute torture or ill-treatment.

Use of restrictive practices⁴²

31. People with disability in Australia are routinely subjected to unregulated and under-regulated behaviour management or treatment programs, known as restrictive practices that include chemical, mechanical, social and physical restraint, detention, seclusion and exclusionary time

³⁸ Evidence given by Dr John-Paul Sanggaran Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014* (Public Hearing, Sydney, 31 July 2014).

³⁹ Human Rights Law Resource Centre, Submission to the Joint Standing Committee on Migration Review of Immigration Detention, *Inquiry into Immigration Detention in Australia*, August 2008, 20, www.hrlrc.org.au/content/topics/refugees-and-asylum-seekers/refugee-rights-submission-inquiry-immigration-detention/

⁴⁰ Suresh Rajan, ‘Fairness does not mean everyone gets the same. Fairness means everyone gets what they need’ (21 May 2015) *The Stringer*, Saturday 22nd of August 2015, <http://thestringer.com.au/fairness-does-not-mean-everyone-gets-the-same-fairness-means-everyone-gets-what-they-need-rick-riordan-10311>

⁴¹ *Christmas Island Medical Officer’s Letter of Concerns* (November 2013), www.theguardian.com/world/interactive/2014/jan/13/christmas-island-doctors-letter-of-concern-in-full

⁴² This section is extracted from Frohmader, C., & Sands, T., (2015) *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*, ACDA, Sydney, Australia, p.45-46

out.⁴³ These practices can cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, and alter thought and thought processes.⁴⁴

32. There is a lack of evidence that these practices “offer positive health outcomes” and they “are commonly associated with further trauma, risk of violence and potential human rights abuse”.⁴⁵ Many of the practices would be considered crimes if committed against people without disability, or outside of institutional and residential settings.⁴⁶ However, when “perpetrated against persons with disabilities”, restrictive practices “remain invisible or are being justified” as legitimate treatment, behaviour modification or management instead of recognised as “torture or other cruel, inhuman or degrading treatment or punishment”.⁴⁷
33. Available research has shown that “behaviours of concern” are often “adaptive behaviours to maladaptive environments”, and “legitimate responses to difficult environments and situations”, especially “communal settings [which] multiply behaviours which make [people with disability] feel unsafe”.⁴⁸ These behaviours can be viewed as a form of resistance or protest to maladaptive environments; and should be viewed as legitimate responses to problematic environments and situations. Changing services, systems and environments should be the starting point for changing behaviour, rather than changing the person.⁴⁹ Protests against treatment or detention itself may often be understood as “behaviours of concern” necessitating restrictive practices.

Solitary confinement

34. In the indefinite detention context of prison, forensic disability units and disability justice centres restrictive practices commonly include solitary confinement (also known as seclusion or isolation). The Special Rapporteur on Torture Juan Mendez has previously concluded that the imposition of solitary confinement to people with “mental disability” is cruel, inhuman or

⁴³ CRPD Civil Society Parallel Report Project Group, *Disability Rights Now* (August 2012) p.91.

⁴⁴ People With Disability Australia and NSW Mental Health Coordinating Council, Submission to the NSW Legislative Council: ‘Substitute Decision-Making: Time for Reform’, *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 2009, 27.

⁴⁵ National Mental Health Consumer and Carer Forum, ‘Ending Seclusion and Restraint in Australian Mental Health Services’ (Position Statement, 2009); National Mental Health Commission, ‘Position on seclusion and restraint in mental health’ (29 May 2015), <http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project/our-position-paper-a-case-for-change.aspx>

⁴⁶ See People with Disability Australia (2014), *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* at <http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc>

⁴⁷ Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd sess, UN Doc A/63/175 (28 July 2008) para 58

⁴⁸ Ramcharan, P., Nankervis, K., Strong, M., and Robertson, A. (2009) ‘Experiences of Restrictive Practices: A view from people with disabilities and family carers: A final research report to the Office of the Senior Practitioner’ Office of the Senior Practitioner, Victoria, pp. 1-3.

⁴⁹ *Ibid* 17.

degrading treatment and violates Article 16 CAT, and that its prolonged use - over 15 days - may constitute torture.⁵⁰

35. Prolonged solitary confinement is used as a management tool for people incarcerated within Australian prisons and Disability Justice Centres. Under Australian law, the governor of a correctional centre may direct that an inmate be held in solitary confinement if the inmate poses a threat to the security or good order and discipline of the prison.⁵¹ The practice is particularly damaging for people with psychosocial disability as it can lead to exacerbating their condition.⁵²
36. Prisoners with disability are often placed in isolated management and observation cells when displaying 'behaviours of concern' because of a lack of other appropriate accommodation and support options.⁵³ Being placed in isolation and seclusion also occurs where a prisoner has been diagnosed with a health condition or impairment that requires appropriate treatment or support rather than punishment.⁵⁴

Case Study: Mr S a forensic patient in prison who committed suicide in 2006 whilst in solitary confinement. Contrary to medical advice, Mr S was placed in solitary confinement in the High Risk Management Unit after murdering his cellmate during a 'psychotic' episode. Mr S committed suicide shortly after being found not guilty of his cellmate's murder on the grounds of 'mental impairment'. Due to a lack of beds for forensic patients in the state prisons, Mr S was never moved to a mental health facility. The Deputy State Coroner strongly criticised the events that led to his suicide and recommended persons with psychosocial disability are not subjected to solitary confinement except as a safety intervention of last resort and for limited periods of time.⁵⁵

Forced treatment⁵⁶

37. People with disability face a deprivation of their mental and physical integrity through involuntary treatment. The UN Rapporteur on Torture has stated that "the more intrusive and

⁵⁰ <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf> para.78 and 32.

⁵¹ Human Rights Law Resource Centre, 'Australia's Compliance with the *Convention against Torture*: Report to the UN Committee against Torture' (Report, April 2008) [50] <www.hrlrc.org.au/files/4M6OEL69DU/HRLRC%20Report%20to%20CAT.pdf>.

⁵² *Inquest into the death of Scott Ashley Simpson* (Unreported, New South Wales Coroner's Court, Pinch SM, 17 July 2006).

⁵³ Forensicare, above n 67, 21.

⁵⁴ *Ibid* 20.

⁵⁵ *Inquest into the death of Scott Ashley Simpson* (Unreported, NSW Coroner's Court, Pinch SM, 17 July 2006); NSW Council for Civil Liberties, 'Addendum — Shadow Report Prepared for the United Nations Committee Against Torture on the Occasion of its Review of Australia's Third Periodic Report under the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*' (Report, NSW Council for Civil Liberties, 16 September 2007) 10–12 <<http://www2.ohchr.org/english/bodies/cat/docs/ngos/NSWCCL.Add.1.pdf>>.

⁵⁶ Parts of this section are extracted from People with Disability Australia (2014), *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* at <http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc>

irreversible the treatment, the greater the obligation on States to ensure that health professionals provide care to persons with disabilities only on the basis of their free and informed consent”.⁵⁷ This comment was directed to the use of forced psychosurgery and electroconvulsive therapy (ECT), but the Rapporteur has also stated that “forced psychiatric interventions, when committed against persons with psychosocial disabilities, satisfies both intent and purpose required under Article 1 of CAT (Torture) notwithstanding claims of ‘good intentions’ by medical professionals.”⁵⁸

38. The compulsory treatment of people with disability in the form of an Involuntary Treatment Order (ITO),⁵⁹ Supervised Treatment Order (STO)⁶⁰ or Community Treatment Order (CTO)⁶¹ is authorised by mental health laws in all states and territories in Australia. Individuals who refuse compulsory treatment may be detained. Involuntary detention under Australian mental health laws gives rise to an ‘authority to treat’, except in Tasmania where the Guardianship Tribunals or the statutory ‘person responsible’ has responsibility for determining an order for treatment.⁶²

39. The laws regulating involuntary mental health treatment vary across the states and territories, but they all have failed to prevent, and in some cases, actively condone unacceptable practices, including the widespread use of non-consensual psychiatric medications, electroconvulsive therapy (ECT), restrictive practices, such as seclusion and restraints and arbitrary detention.⁶³

40. In 2013, the UN CRPD Committee recommended to Australia to:

*“...repeal all legislation that authorises medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community...”*⁶⁴

⁵⁷ Richard Baker and Nick McKenzie, ‘Deaths in Mental Health Facilities: Unexpected, Unnatural and Violent’, *The Age* (Melbourne) 3 September 2011 <www.theage.com.au/victoria/deaths-in-mental-health-facilities-unexpected-unnatural-and-violent-20110902-1jqdg.html#ixzz1bYnkl55H> 14.

⁵⁸ A/HRC/22/53 Juan E. Mendez para 32.

⁵⁹ An involuntary treatment order authorises involuntary treatment for mental illness. An involuntary treatment order can be made if an authorised doctor is satisfied that all the criteria for involuntary treatment apply: Queensland Health, ‘*Mental Health Act 2000 — Involuntary Treatment*’ (Fact Sheet No 3, Queensland Government, undated) <www.health.qld.gov.au/mha2000/documents/factsheet3.pdf>.

⁶⁰ A supervised treatment order is a civil order in relation to a person with an intellectual disability (who is receiving residential services) to prevent the risk of significant harm to others: Department of Human Services, ‘*Supervised Treatment — Disability Act 2006*’ (Information Sheet No 15, Victorian Government, 2011) www.dhs.vic.gov.au/data/assets/pdf_file/0005/152663/disact_infosheet15supervisedtreatment_pdf_280607.pdf.

⁶¹ A Community Treatment Order allows a person to receive compulsory treatment whilst living in the community.

⁶² Terry Carney and Fleur Beaupert, ‘Mental Health Tribunals: Rights Drowning in Un-Chartered’ Health Waters?’ (2008) 3 *Australian Journal of Human Right* 181.

⁶³ Frohmader, C., & Sands, T., (2015) *op.cit.*, p.54

⁶⁴ UN Doc CRPD/C/AUS/CO/1, Para 34

Denial of reasonable accommodation⁶⁵

41. There is a lack of reasonable accommodation provided to prisoners with disability in general, and the consequences of this are compounded for people with cognitive impairment and or psychosocial disability. Despite the significant overrepresentation of people with disability in prison, prisoners with disability are often not provided with the necessary supports and safeguards they require to maintain their security and enjoyment of other human rights. Key issues include:⁶⁶
- lack of protective supports to address the greater risks of people with disability, particularly people with intellectual disability to sexual assault, abuse and victimisation, and coercion into breaking rules and conducting illegal activities, such as drug dealing;
 - inadequate complaints processes and mechanisms for recording and responding to incidents, to support prisoners to make complaints and to ensure adequate protections against retribution for making complaints, including being placed in protective custody;
 - lack of information about prisoner rights and access to support to exercise their rights;
 - lack of identification of people with disability in prison, and consequent measures to provide necessary supports;⁶⁷
 - inadequate services to provide support to prisoners leading up to their release, or provide assistance from community and forensic mental health workers;⁶⁸
 - lack of planning with disability, mental health and other social supports to facilitate successful return to the community;⁶⁹
 - lack of physical access to prison facilities and services;
 - lack of access to relevant aids and communication devices, sign language and community language interpreters and lack of personal care and hygiene supports; and
 - lack of necessary services and supports, such as mental health and medical services and supports.
42. Prisoners can face significant problems having complaints about prison administration investigated properly by Ombudsman due to a lack of resources, and the lack of enforceability

⁶⁵ This section is extracted from People with Disability Australia (2014), *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* at <http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc> pp.40-41

⁶⁶ Kathy Ellem, 'The Impact of Imprisonment for People Labelled as Having an Intellectual Disability: A Qualitative Life Story Approach in the Queensland Context' (PhD Research Proposal, School of Social Work and Applied Human Sciences, The University of Queensland, undated) <www.sistersinside.com.au/media/ResearchProposal15KathyEllem.pdf>.

⁶⁷ Forensicare (Victorian Institute of Forensic Mental Health), Submission to the Senate Select Committee on Mental Health, 'Forensic Mental Health — Working with Offenders with a Serious Mental Illness', 2005, 20 <www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub306.pdf>.

⁶⁸ Ibid 20–1.

⁶⁹ Ibid 19.

of determinations made by Ombudsman.⁷⁰ Common law remedies based on a negligence claim against the relevant government department by inmates who have sustained injury, including acquiring a mental health condition whilst in prison are limited.⁷¹ In many cases, prisoners are also unable to bring negligence claims on the grounds of a lack of government resources, for example, supervisory resources, even where limited resources may have contributed to the injury occurring.⁷²

Inappropriate detention environments

43. The situation of indefinite detention is exacerbated by a lack of appropriate accommodation, therapeutic, rehabilitation and disability support options available for people with disability who are deemed unfit to stand trial due to cognitive or psychosocial disability; a situation disproportionately experienced by Aboriginal and Torres Strait Islander people with disability.⁷³ An investigation by Lateline in 2014 revealed that dozens of Aboriginal and Torres Strait Islander people with disability were being detained in prisons due to a lack of healthcare facilities⁷⁴.
44. Some States and Territories, particularly the Northern Territory and Western Australia, do not have adequate facilities to detain or treat people with cognitive impairment and or psychosocial disability resulting in their placement in inappropriate environments which can either hinder their effective treatment or increase their level of suffering while in detention. For example, women with psychosocial disability and intellectual or learning disability are disproportionately classified as high security prisoners and are more likely to be in high security facilities, than other prisoners.⁷⁵ Inadequate services and facilities can also lead to people rotating between criminal justice and disability service institutions as neither are equipped to accommodate, support and / or provide treatment to the person, which in some instances leads to indefinite detention.

Case Study: Ms F is a young aboriginal woman with intellectual disability, foetal alcohol syndrome and a significant history of trauma including repeated physical and sexual abuse

⁷⁰ The Shopfront Youth Legal Centre, Submission: 'Sexual Assault of Young Men in Prison Project', *National Human Rights Consultation*, 15 June 2009, 4 <[www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/DB51D48972D82AFBCA25761500277B6A/\\$file/Jane%20Sanders_AGWW-7T26DXAGWW-7T26DX.pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/DB51D48972D82AFBCA25761500277B6A/$file/Jane%20Sanders_AGWW-7T26DXAGWW-7T26DX.pdf)>.

⁷¹ Ibid 3.

⁷² Ibid.

⁷³ Aboriginal Disability Justice Campaign, 'Position Statement on the Inappropriate Incarceration of Aboriginal People with Cognitive Impairment', (Position Paper, People with Disability Australia, October 2008), www.pwd.org.au/systemic/adjc.html

⁷⁴ Aboriginal Woman's Jailing Highlights Plight of Intellectually Disabled Aboriginal Offenders, John Stewart, 13 March 2014, <http://www.abc.net.au/news/2014-03-12/intellectually-disabled%20aboriginal-people-stuck-in-legal-limbo/5316892>

⁷⁵ Sisters Inside, Submission: 'Rights of Women Prisoners', *National Human Rights Consultation*, June 2009 <www.sistersinside.com.au/media/FINAL%20-%20National%20HR%20Submission%20June%202009.pdf>.

from childhood. In 2012 she was indefinitely detained in a WA prison for 18 months when she was found unfit to plead to minor assault and damages charges. In 2014 she was moved into community housing in the Northern Territory in order to receive treatment but this arrangement proved unsustainable. Despite considerable advocacy on her behalf from her guardian and disability advocates, Ms F remains in a cycle of being detained as unfit to plead on minor criminal charges, transitioning through failed treatment programs, supported accommodation and disability support.

III. Reforms Required

45. The indefinite detention of people with disability in prisons, mental health facilities and immigration detention facilities warrants broad ranging legislative, policy and program reform that brings Australia into compliance with its international human rights obligations.

Recognition of legal capacity

46. The deprivation of legal capacity for people with disability is not only a breach of that particular right. It leads to further actual and potential breaches of rights such as the right to live in the community, the right to access justice, the right to be free from violence and abuse, torture, inhuman and degrading treatment, the right to physical and mental integrity, and the right to liberty. Reforms to the legal framework regarding legal capacity should aim to reduce and limit the potential for these further rights violations to occur. Supporting, as opposed to limiting the exercise of legal capacity by people with disability in order for them to exercise control over decisions that affect their lives is the most significant step required in ending this cycle of discrimination and abuse. The National Decision Making Principles outlined in the recent Australian Law Reform Commission (ALRC) Report, *Equality, Capacity and Disability*⁷⁶ would form the basis for reform in this area, and provide impetus for State and Territory reform.

47. Full recognition of the legal capacity of people with cognitive impairment and/or psychosocial disability in Commonwealth, state and territory laws is necessary in order to reform discriminatory processes that can lead to indefinite detention such as unfitness to plead, mental impairment, guardianship and mental health laws. Article 12 of the CRPD confirms the following:

- Every person has the right to equal recognition before the law. This includes the capacity to have rights and the capacity to act on those rights (to exercise legal agency) as well as to have those acts recognised by the law.
- This is a non-derogable civil and political right requiring immediate implementation.⁷⁷
- Legal agency is exercised when will and preference is expressed.

⁷⁶Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, (2014).

<https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>

⁷⁷ By virtue of Article 5 and 12 of the CRPD.

- Every person has the right to support to express their will and preference if required. For some people this may include decision making support.
- The State is obliged to provide the support necessary for a person to express their will and preference. As equality before the law is a civil and political right there is no limit to the level of support that must be provided to achieve this.
- Failure to provide adequate support, including the inadequate resourcing of support options, may constitute discrimination.
- Where there is *no formulation of support* that can determine will and preferences then legal agency is not being exercised. In this circumstance a Representative may be appointed to make decisions based on the previously expressed will and preference of the person and/or their human rights as applicable to the situation.⁷⁸

48. To summarise, the onus is on the support to facilitate the expression of a person's will and preference and hence their legal agency. Any test of a person's ability to exercise their legal agency is actually a test of whether the supports provided to the person are adequate and appropriate to the task in hand. If not they should be altered and / or increased until will and preference can be expressed, or it becomes apparent that this is not possible. The CRPD does not provide for a circumstance whereby a person is tested on their ability or impairment type.

49. In general, the law does not provide for people (with or without disability) to consent to practices which may cause them physical or psychological harm or deprive them of their liberty. It follows that a person cannot consent to their deprivation of liberty or the application of harmful restrictive practices through a supported decision making mechanism, and a Representative cannot discern that this was the person's will and preference or permit practices that are considered to be violations of human rights.

50. Regarding unfitness to plead legislation⁷⁹, Commonwealth, state and territory legislation should be amended to provide that it should not be permitted for a person to stand trial in a particular criminal proceeding if they *cannot be supported to*: understand the information relevant to the decisions that they will have to make in the course of the proceedings; retain that information to the extent necessary to make decisions in the course of the proceedings; use or weigh that information as part of the process of making decisions; and communicate decisions in some way.

⁷⁸ PWDA, Australian Centre for Disability Law, Australian Human Rights Centre (July 2014), Submission to the Australian Law Reform Commission Discussion Paper, Equality, Capacity and Disability in Commonwealth Laws, <http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-ACDL-AHRCentre.doc>

⁷⁹ PWDA, National Association of Community Legal Centres (July 2014), Submission to the Australian Law Reform Commission Discussion Paper, Equality, Capacity and Disability in Commonwealth Laws, <http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-NACLC.doc>

51. The focus of any 'test' should be on the adequacy of the supports available to the individual to facilitate their participation in the proceedings. This shifts the emphasis to an assessment of the supports that are available to a person, rather than an assessment of the person themselves. If the necessary supports are provided, but still do not enable a person to be able to express their will and preferences, and to make decisions, then it follows that they will not be able to comprehend the proceedings sufficiently to participate, and they may be deemed unfit to stand trial for the particular criminal proceedings.

Removing barriers to accessing justice⁸⁰

52. Recent reports demonstrate that barriers to accessing justice for people with disability, whether as a victim, a witness or a defendant are a significant problem in every jurisdiction in Australia.⁸¹ Barriers exist in legislation, in policy and in the practices of police, prosecutors, courts and judges. These barriers mean that people with disability are not afforded the same legal rights, protections and redress mechanisms as other people in the community. Many people with disability are "being left without protection and at risk of ongoing violence, or [are] more likely to be jailed and destined to have repeated contact with the criminal justice system... many offenders had previously been victims of violence and this had not be responded to appropriately".⁸²

53. Laws, policy and practice may prevent people with disability from giving evidence, making legal decisions or participating in legal proceedings. Laws of evidence may deny legal capacity for people with cognitive impairment and psychosocial disability and prevent them from giving evidence; assumptions about the credibility of their evidence may be made by police and court officers, such as prosecutors, judges and magistrates.⁸³ Additionally, laws and procedures may not allow for people with disability to use sign language interpreters, communication aids or communication support workers.⁸⁴

54. Comprehensive training in providing accommodations and supports to people with disability is neither compulsory nor consistent across different jurisdictions for judicial officers, legal practitioners and court staff.⁸⁵ A lack of awareness about disability issues leads to

⁸⁰ This section is extracted from Frohmader, C., & Sands, T., (2015) op.cit., pp. 55-57.

⁸¹ Australian Human Rights Commission (2014) *'Equal Before the Law: Towards Disability Justice Strategies'*, https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf;

Victorian Equal Opportunity and Human Rights Commission (2014) OpCit.

⁸² Australian Human Rights Commission (2014), op. cit., p. 9

⁸³ French, P. (2007) *'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland'* (Report, Queensland Advocacy Incorporated, 22 May 2007).

⁸⁴ See eg. Kelly Vincent, *'Justice denied no more'*, (Media Release, 2 July 2015), <http://www.kellyvincentmlc.com/dignity-for-disability-mlc-kelly-vincent-media-release-justice-denied-no-more>

⁸⁵ For different examples of training programs for Court staff see NSW Attorney General's Department, *'Disability Strategic Plan'*, and Victorian Department of Justice, *'Disability Action Plan'*, Disability issues or discrimination law is currently not compulsory for Australian law graduates.

discrimination and negative attitudes.⁸⁶ In spite of Police commitment in some jurisdictions to addressing these forms of discrimination, it continues to occur.⁸⁷

55. Some jurisdictions, such as NSW and Victoria have schemes that provide support for people with disability involved in the criminal justice system, such as the NSW Intellectual Disability Rights Service 'Criminal Justice Support Network' and Victoria's Independent Third Person (ITP) Program. While these are valuable programs, they are not available to all people with disability and they are staffed by volunteers.
56. England, Wales and Northern Ireland have progressively introduced witness intermediaries schemes since initial pilots in 2004. The schemes are designed to provide police and court officials with immediate access to communication professionals to enable children and people with disability to give their best possible evidence and participate fully in justice processes. In England, the Ministry of Justice keeps a list of Registered Intermediaries, who are communication professionals, such as speech pathologists and psychologists, and who have undertaken specific training. These intermediaries solely assist police and court officials with communication with the person with disability or child. The scheme ensures communication support throughout a justice process, and is increasingly being used with, for example defendants with disability in the UK.⁸⁸ Professor Penny Cooper, who has designed and implemented the Registered Intermediaries schemes across a number of jurisdictions has recently been in Australia assisting the NSW Department of Justice in the development of their 'Children's Champions' witness intermediaries pilot. Professor Cooper has also developed the Advocate's Gateway, an online resource that provides "free access to practical, evidence-based guidance on vulnerable witnesses and defendants".⁸⁹

Limits on detention⁹⁰

57. There is significant inconsistency across Australian jurisdictions with respect to statutory limits on the period of detention for people found unfit to stand trial and also for those detained for the purposes of involuntary treatment under mental health legislation. State and territory laws should provide for limits on the period of detention of a person who has been found unfit to stand trial, and for regular periodic review of other detention orders.
58. A useful starting point exists in Commonwealth legislation where s 20BD of the *Crimes Act* requires review at least once every six months. However, given that the availability and adequacy of support provision which would enable a person with disability to, for example,

⁸⁶ Louis Schetzer and Judith Henderson, 'Access to Justice and Legal Needs, Stage 1 Public Consultations' (Report, Law and Justice Foundation of NSW, 2003) 216, 225, www.lawfoundation.net.au/report/consultations

⁸⁷ Victorian Equal Opportunity and Human Rights Commission (2014), op cit, pp.20-21

⁸⁸ Wurtzel, David and Cooper, Penny (2013) *Making it meaningful - how to ensure the effective participation of vulnerable defendants in a trial*, Counsel, pp. 23-25.

⁸⁹ The Advocate's Gateway, <http://theadvocategateway.org>

⁹⁰ See PWDA, National Association of Community Legal Centres (July 2014), op.cit., <http://www.pwd.org.au/documents/pubs/SB14-ALRC-Submission-PWDA-NACLC.doc>

participate in a criminal trial or have a Representative make rights based decisions on their behalf can fluctuate, more frequent reviews would be preferable. Legislation should also be amended to incorporate reference to seeking alternative regimes of supports that may be provided which would facilitate the person's participation in a trial, in treatment and other life decisions or render a Representative decision maker unnecessary.

Elimination of restrictive practices

59. Restrictive practices occur in a variety of places of detention such as prisons and juvenile justice facilities as well as other settings such as disability and mental health services, large residential institutions, group homes, boarding houses and mental health facilities as well as government, private and special schools, hospitals, residential aged care facilities, immigration detention and family homes.⁹¹ However, the only framework available to address these rights violations is the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*⁹² (the National Framework). The National Framework has considerable limitations⁹³ in that it only applies to the disability service sector, it focuses on when and how to authorise restrictive practices rather than eliminating their use, there is no coverage or connection to other initiatives seeking to address restrictive practices, such as the National Mental Health Commission's National Seclusion and Restraint Project;⁹⁴ and there is no reference to Australia's obligations under CAT.
60. Understanding restrictive practices within the CAT Framework would ensure much greater protections including the enactment of nationally consistent legislation to criminalise torture, cruel, inhuman or degrading treatment or punishment, the provision for legal action to be taken to remedy a breach, the ratification of the Optional Protocol to CAT, and the establishment of an independent national preventative mechanism to monitor places of detention, including disability residential settings, mental health facilities, disability justice centres and prisons.

Provision of adequate disability support

61. People with disability, particularly those with cognitive impairment and/or psychosocial disability, are vastly overrepresented in the criminal justice system. This is a problem in itself and is compounded by ineffective access to justice. However, it also reflects an underlying lack of access to adequate disability services and support in the community which can lead to people with disability becoming vulnerable to coming into conflict with the law.

⁹¹ People with Disability Australia, (2014) OpCit; Women with Disabilities Australia, Submission to the UN, *Analytical Study on Violence against Women and Girls with Disabilities*, December 2011, 25; French, P. et al (2009) OpCit.

⁹² Endorsed by all Australian Governments in March 2014, the Framework is available at <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector>

⁹³ People with Disability Australia (2014) OpCit, pp. 23-35.

⁹⁴ National Mental Health Commission, *National Seclusion and Restraint Project*, <http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project.aspx>

62. While data is not uniform or consistent across jurisdictions, available data suggests that almost half to 78% of prisoners have experienced a 'psychiatric disorder' compared with 11% of the general population; and 20% of prisoners have an intellectual disability compared with 2–3% of the general population.⁹⁵ Women with disability consist of between 30 to 50% of the female prison population. Research also indicates that the percentage of women with disability in prisons is greater than men with disability and that rates for women with disability from Aboriginal and Torres Strait Islander background is also higher than equivalent figures for men.⁹⁶
63. Aboriginal and Torres Strait Islander people with disability are almost 14 times more likely to be imprisoned than the rest of the population.⁹⁷ Given that it is estimated that the incidence of disability in Aboriginal and Torres Strait Islander communities is twice that of the general community, it can be assumed that there is significant over-representation of Aboriginal and Torres Strait Islander people with disability in Australian prisons.
64. Available evidence from 2010 suggests that nearly "half the young people in New South Wales juvenile detention centres have an intellectual or 'borderline' intellectual disability".⁹⁸ A higher proportion of Aboriginal and Torres Strait Islander young people were represented in this group — 39% compared to 26%.⁹⁹ The majority of young people were found to have a 'psychological condition' (85%), with two thirds (73%) reporting two or more 'psychological conditions'. There were a significantly higher proportion of young women and Aboriginal and Torres Strait Islander young people in this group.¹⁰⁰ The study also found that 32% of young people in New South Wales juvenile detention centres had a traumatic brain injury or a head injury, and that this incidence had increased significantly for young women since the previous survey in 2003 (from 6 to 33%).¹⁰¹
65. Increased and significantly resourced efforts must be made by the Commonwealth and all State and Territory governments to provide adequate health care and adequate disability support, including early intervention supports, so that people with cognitive impairments and/or psychosocial disability especially those from an Aboriginal and Torres Strait Islander background are supported to participate socially and economically as opposed to living on the margins experiencing high levels of violence, isolation and criminal behaviour.

⁹⁵ NSW Law Reform Commission, 'People with Cognitive and Mental Health Impairments in the Criminal Justice System: An Overview' (Consultation Paper No 5, January 2010) 13–15.

⁹⁶ See e.g. Sisters Inside <www.sistersinside.com.au>; Australian Bureau of Statistics, *Prisoners in Australia, 2013* (ABS Catalogue No 4517.0, 5 December 2013), www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0.

⁹⁷ Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System* (March 2010) 5.

⁹⁸ Adele Horin, 'Report Finds Disability and Disadvantage Common in Young Offenders', *Sydney Morning Herald* (Sydney), 27 February 2010 <www.smh.com.au/nsw/report-finds-disability-and-disadvantage-common-in-young-offenders-20100226-p95r.html>.

⁹⁹ Devon Indig et al. '2009 NSW Young People in Custody Health Survey: Full Report'. (Report, Justice Health, NSW Health and Human Services Juvenile Justice, NSW Government, 2011) 15.

¹⁰⁰ Ibid 15.

¹⁰¹ Ibid 77.

66. Only some Australian governments have established court diversion programs that provide interventions and supports to people with disability to prevent unnecessary contact with the criminal justice system. Inappropriate and unnecessary contact with the criminal justice system often leads to multiple offences, fines and incarceration.¹⁰² Examples of programs that focus on intensive support, investment and diversion of people with cognitive impairment and/or psychosocial disability from the justice system include the NSW Integrated Services Project (ISP), the NSW Court Referral of Eligible Defendants into Treatment (CREDIT) Program, and the Victorian Court Integrated Services Program (CISP).
67. Research suggests that not only do programs such as these result in “a large proportion of clients say[ing] that their life is changed for the better by the program, a reduction in recidivism has been observed.”¹⁰³ Evidence collected from the NSW ISP program concluded that while on the ISP clients number of hospital days reduced by an average of 90%, while the number of days in custody reduced by an average on 94%.¹⁰⁴
68. The National Disability Insurance Scheme (NDIS) should have a critical role in reaching marginalised people, such as those with cognitive impairment and/or psychosocial disability at risk of coming into contact with the criminal justice system or experiencing repeated involuntary treatment orders. Considerable outreach needs to be done to ensure that the NDIS serves this cohort, and that their support plans are developed in a way that recognises their heightened risk of deprivation of liberty. The NDIA and State and Territory justice departments must work together to develop a strategy for correctional facilities to identify people with disability whilst they are in detention so that they can become participants of the NDIS (where eligible) and develop their Plans before they are released back in to the community. If a person’s NDIS plan is suspended while they are under the control of a prison, hospital or psychiatric facility, the NDIS plan must be reviewed and resumed immediately on their release so that they receive the supports they are entitled to. It is also essential that people with disability have access to independent advocacy support to assist them during these processes.

Treatment not punishment

69. People with cognitive impairment and/or psychosocial disability must receive quality, effective and appropriate treatment, rehabilitation and supports while in detention (in the case of those subject to forensic treatment orders) or in the community (in the case of those found unfit to plead). Given they have not been found guilty of a crime, the focus should not be on punishment.

¹⁰² Submission by attendee at the CRPD Shadow Report consultation in Perth, WA (30 November 2009).

¹⁰³ Baldry, E, McCausland, R, Johnson, S and Cohen, A; *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost Benefit Analysis of Early Support and Diversion*, August 2013, <https://www.humanrights.gov.au/sites/default/files/document/publication/Cost%20benefit%20analysis.pdf>

¹⁰⁴ Ibid.

Ending indefinite mandatory detention of asylum seekers

70. The current conditions facing detainees in indefinite mandatory immigration detention raise serious concerns with respect to Australia's obligation to ensure people with disability, particularly those with cognitive impairment and/or psychosocial disability are not subject to cruel, inhuman or degrading conditions. Mandatory detention of asylum seekers can also lead to the development of psychosocial disability, either while in detention or as a result of this detention.¹⁰⁵ Australia remains under an obligation to provide reasonable accommodation to people with cognitive impairment and/or psychosocial disability in all places of detention under their control and this would include onshore and offshore detention facilities.

Conclusion

71. People with disability in Australia represent the most detained sector of our population; disproportionality prevalent in our prisons, institutionalised within our communities, hospitalised and confined in psychiatric wards and indefinitely detained in detention centres, including immigration detention.¹⁰⁶
72. Unaddressed and wide-ranging systemic failures in our criminal justice and disability service systems facilitate conditions that give rise to ill-treatment of people with disability, particularly those with cognitive impairment and/or psychosocial disability who experience indefinite detention. This is compounded by guardianship and mental health laws which deny legal capacity and provide a gateway through which further abusive practices can occur.
73. Aboriginal and Torres Strait Islander people with cognitive impairment and/or psychosocial disability are disproportionately affected, with evidence suggesting multiple intersectional deprivations significantly compounding their risk of ill-treatment.
74. Addressing the problem of indefinite detention requires legislative, policy and program reform in multiple areas to prevent indefinite detention becoming inevitable, and to eliminate breaches of human rights for those people with disability who are detained lawfully on an equal basis as those without disability.



¹⁰⁵ See *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii v Moldova* [2007] ECHR 8721/05.

¹⁰⁶ Frohmader, C., & Sands, T., (2015) op.cit., p.6