Ending unfitness-to-plead regimes in all Australian jurisdictions

submission to the Disability Royal Commission

by

Remedy.org.au

December 2020

Disability Royal Commission
G.P.O. Box 1422
Brisbane QLD 4001

10 December 2020

Dear Commissioners,

We welcome the opportunity to contribute to the work of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability with the following submission by Mary O'Callaghan and Jordan Bova on behalf of Remedy Australia in collaboration with the Castan Centre Human Rights Clinic at Monash Law School.

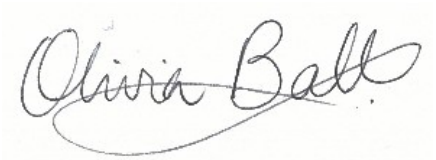
Remedy Australia is a non-governmental organisation dedicated to monitoring Australia's compliance with decisions of United Nations human rights treaty bodies in response to individual complaints. Remedy Australia advocates for the right to an effective remedy.

Our vision is to see every human rights violation by Australia, as determined by the UN treaty bodies, remedied. An effective remedy encompasses substantive remedies for the individual, as well as non-repetition measures to prevent the violations recurring.

This submission draws your attention to human rights violations against three Aboriginal men with disabilities – egregious violations which remain unremedied – namely Messrs Christopher Leo, Manuway (Kerry) Doolan and Marlon Noble. United Nations treaty bodies have found these men were held in arbitrary and indefinite detention as a result of Australia's unfit-to-plead regimes, in violation of the *Convention on the Rights of Persons with Disabilities* and other international human rights treaties to which Australia is a state party. Upwards of 40 people with disabilities are arbitrarily detained right now due to Australia's failure to fulfil the non-repetition measures recommended by UN Committees.

Australia's various unfit-to-plead regimes must be repealed, and we offer recommendations to uphold the human rights of persons with disabilities in our justice systems.

Yours faithfully,



Dr Olivia Ball
Director, Remedy Australia

Nick Toonen OAM
Director, Remedy Australia

Recommendations

Remedy Australia recommends to the Royal Commission that all Australian governments:

Recommendation 1:

> Repeal federal, state and territory unfit-to-plead regimes because they deny the right of persons with disabilities to enjoy legal capacity on an equal basis with others.

Recommendation 2:

> Ensure persons with disability may exercise their legal capacity on an equal basis with others by:
>
> - providing individually determined procedural accommodations as an enforceable right;
> - extending the National Disability Insurance Scheme (NDIS) to people within the criminal justice system;
> - making frameworks of supported decision-making available to people with disability throughout the legal process.

Recommendation 3:

> Ensure that courts reserve custodial sentences as a last resort for persons with disabilities.

Recommendation 4:

> Legislate to require courts to develop and implement a service plan for any person with disabilities given a custodial sentence as a last resort, detailing how reasonable access to less restrictive environments will be achieved over a reasonable period of time.[1]

[1] See also P. Keyzer & D. O'Donovan (2016), 'Imprisonment of Indigenous people with cognitive impairment: What do professional stakeholders think? What might human rights-compliant legislation look like?', *Indigenous Law Bulletin*, vol. 8(22), pp17-20.

Contents

Introduction

This submission addresses the Royal Commission's Terms of Reference by identifying what Australian governments should do to protect persons with disabilities from arbitrary detention, including indefinite detention through so-called 'unfit to plead' regimes.[2] Indefinite detention is an egregious form of institutionalised violence, abuse and neglect, while unfit-to-plead regimes, whatever their outcome, are discriminatory and deny people with disability the right to legal capacity. Compliance with recommendations to Australia by the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) will promote a more inclusive society that supports people with disabilities and respects their rights.[3]

Additionally, this submission draws attention to the intersection between race and disability in the context of Australia's indefinite detention of people deemed unfit to plead.[4] Case studies reflect that unfit-to-plead regimes disproportionately affect Indigenous persons with intellectual disabilities.

This submission acknowledges and supports the concurrent submissions to the Royal Commission by Professor Patrick Keyzer, formerly of La Trobe Law School, and Patrick McGee of the Australian Federation of Disability Organisations. Our submission complements these submissions by focusing specifically on the recommendations to Australia by the CRPD Committee in the matters of *Noble, Leo* and *Doolan.*

Australia and the CRPD Committee

Australia is a party to all the major human rights treaties, including, since 2008, the *Convention on the Rights of Persons with Disabilities* (CRPD). In 2009, Australia acceded to the *Optional Protocol to the CRPD* (OP-CRPD), which allows individuals and groups of individuals to petition the CRPD Committee alleging violations of the CRPD by Australia. Thus Australia recognises the quasi-judicial role of the CRPD Committee in deciding when a breach of the CRPD has occurred and recommending remedies for any violations. Complaints – known as 'communications' – are made and responded to by the Commonwealth in writing, with the Committee's 'Final Views', as they are known, recommending remedial action where complaints are upheld. In ratifying the CRPD and acceding to the OP-CRPD, Australia has consented to be bound by this body of international human rights law and to act in good faith on the recommendations of the CRPD Committee.

To date, the CRPD Committee has upheld five complaints of individual breaches of the CRPD by Australia,[5] three of which are examined here. They concern the indefinite

[2] Terms of Reference, para. a.
[3] Terms of Reference, para. c, e.
[4] Terms of Reference, para. g.
[5] See Remedy Australia, 'Cases lodged under the Convention on the Rights of Persons with Disabilities', <https://remedy.org.au/cases/treaty/4/>. Australia's record of compliance with the Final Views of UN human rights treaty bodies in individual communications is poor. Of the 50 complaints against Australia that have resulted in a finding of violations, 32 remain unremedied (64%), 12 have been partially remedied (24%) and only six have been fully remedied (12%). Of the 5 CRPD cases, we estimate one (*Noble*) has been partially remedied and the other 4 remain unrememdied. See Remedy Australia, 'Complaints upheld against Australia' (2020) <https://remedy.org.au/cases/>.

detention of three Aboriginal men with intellectual disabilities: *Noble v Australia* (2016),[6] *Doolan v Australia* (2019)[7] and *Leo v Australia* (2016).[8]

Noble v Australia (CRPD, 2016)

An Australian court decided that Marlon Noble, an intellectually impaired teen facing criminal charges, was unfit to plead. He was imprisoned indefinitely without trial. A psychologist determined that, with appropriate assistance, Mr Noble was capable of standing trial, but the charges were *dropped owing to insufficient evidence*. But even then he wasn't released. After 10 years in prison without charge or trial, Mr Noble was released on 'very restrictive' conditions of unlimited duration (ultimately, 13 additional years) and with no avenue of appeal to have them lifted.

The CRPD Committee found Mr Noble was denied a fair trial, equal protection under the law, and the support he required to exercise his legal capacity. The Committee found his disability was the 'core cause' of his deprivation of liberty, which it deemed arbitrary and a form of inhuman and degrading treatment.

> *"As a result of the application of the [Mentally Impaired Defendants Act of 1996, Mr Noble's] right to a fair trial was … fully suspended, depriving him of the protection and equal benefit of the law."*[9]

In response, Australia admitted failures, but denied violating Mr Noble's rights and declined to comply with any of the Committee's recommendations. While Mr Noble has since been released unconditionally, meaning the CRPD Committee's views have been partially implemented, the conditions of his 'civil detention' were not revoked immediately, as required by the CRPD Committee, nor were they replaced "with all necessary support measures for his inclusion in the community."[10]

Leo v Australia (CRPD, 2019)

Christopher Leo is a young Aboriginal man from Ernabella in the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands in the remote north-west of South Australia. He was arrested for an assault committed while he was apparently suffering psychosis. He was deemed unfit to stand trial due to his intellectual impairment, but the court ordered that he remain in custody. He was held indefinitely in maximum security prison for over 9 years – far longer than any sentence that might have been imposed had he been tried and convicted – and he was, at times, held in solitary confinement, subjected to involuntary treatment and given 'very limited or no access' to mental health and disability services or rehabilitation programs.

The CRPD Committee found that Australia did not provide Mr Leo with the support he needed to stand trial, to exercise legal capacity and access justice (art. 12(2), 12(3) &

---

[6] Committee on the Rights of Persons with Disabilities, *Views: Communication No: 7/2012,* 16th sess, UN Doc CRPD/C/16/D/7/2012 (10 October 2016) ('*Noble v Australia*').
[7] Committee on the Rights of Persons with Disabilities, *Views: Communication No: 18/2013,* 22nd sess, UN Doc CRPD/C/22/D/18/2013 (17 October 2019) ('*Doolan v Australia*').
[8] Committee on the Rights of Persons with Disabilities, *Views: Communication No: 17/2013,* 22nd sess, UN Doc CRPD/C/22/D/17/2013 (18 October 2019) ('*Leo v Australia*').
[9] *Noble v Australia*, para 8.4.
[10] Final Views, para. 9(a)(ii). Read more about *Noble v Australia*, including Australia's response to the Committee's Final Views, here: <https://remedy.org.au/cases/40/>.

13(1). Mr Leo was deprived of his right to a fair trial and of the equal protection and benefit of the law (art. 5(1) & (2)). Making public mental health services conditional on people with disabilities living in an institution is discriminatory (art. 5). The Committee found that Australia justified Mr Leo's arbitrary detention on the basis of his disability (art. 14(1)(b)) and that his treatment was inhuman and degrading (art. 15).[11]

Doolan v Australia (CRPD, 2019)

Manuway (Kerry) Doolan is an Aboriginal man from Mutitjulu, a small community near Uluru. He was arrested for offences committed while suffering psychosis. He was deemed unfit to stand trial due to his intellectual impairment, but the court ordered that he remain in custody. He was held indefinitely in maximum security prison for over 7 years – far longer than any sentence that might have been imposed had he been tried and convicted – and he was, at times, held in solitary confinement, subjected to involuntary treatment and given 'very limited or no access' to mental health and disability services or rehabilitation programs.

The CRPD Committee found that Australia did not provide Mr Doolan with the accommodation and supports he needed to stand trial, to exercise legal capacity and access justice (art. 12(2), 12(3) & 13(1)). Mr Doolan was deprived of his right to a fair trial and of the equal protection and benefit of the law (art. 5(1) & (2)). Mr Doolan's indefinite detention was arbitrary and his treatment, including 'long periods' of solitary confinement, involuntary treatment, violence from other prisoners, denial of habilitation, rehabilitation, mental health and support services was degrading, in violation of article 15.

> "[T]he Committee considers that the indefinite custody to which the author was subjected amounts to inhuman and degrading treatment."[12]

The CRPD Committee found that by operation of Western Australia's *Mentally Impaired Defendants' Act* (in the case of Mr Noble) and Part IIA of the Northern Territory's *Criminal Code* (in the case of Messrs Doolan and Leo), Australia did not provide the applicants with the accommodation and support they needed to stand trial, exercise legal capacity or access justice.[13]

The Committee held that all three applicants were deprived of their right to a fair trial and to equal protection and benefit of the law.[14] It also found that the applicants' disabilities were the 'core cause' of their deprivation of liberty, and the indefinite nature of each sentence amounted to inhuman and degrading treatment.

The Committee recommended substantive remedies for the individuals concerned, as well as non-repetition measures to prevent the violations recurring. None of these cases has been fully remedied.

[11] Read more about *Leo v Australia* here: <remedy.org.au/cases/41>.
[12] *Doolan v Australia*, para. 8.10. Read more about *Doolan v Australia* here: <remedy.org.au/cases/42>.
[13] *Noble v Australia*, para. 8.4; *Doolan v Australia*, para. 8.4; *Leo v Australia*, para. 8.4.
[14] *Noble v Australia*, para. 8.4; *Doolan v Australia*, 8.4; *Leo v Australia*, para. 8.4.

The right to an effective remedy

The right to an effective remedy for a human rights violation (ICCPR art. 2(3)) involves a number of steps in an approximate order. *Cessation* is usually the first step – ensuring the violation, if ongoing, promptly ends. Releasing people held without trial or conviction would be a form of cessation. Remediation for the violation may involve *restitution* (of children or housing or employment or anything else lost through imprisonment) and *reparations* for the violation (most commonly monetary compensation). Truth-telling and -recording and symbolic forms of remedy may be appropriate (such as a memorial or an apology). Following or concurrent with these, are *non-repetition measures* to prevent the violation recurring.

In this submission, we focus on the non-repetition measures recommended by the CRPD Committee in the cases of *Noble*, *Leo* and *Doolan* and not the individual remedies regarding each applicant;[15] more specifically, amendments to the legal frameworks concerning fitness to plead. Further, non-repetition measures must establish adequate systems of support and accommodation for persons with disabilities in the criminal justice system.

In both *Leo* and *Doolan*, the CRPD Committee was clear, asking Australia to:

> "Amend Part IIA of the Criminal Code of the Northern Territory and all equivalent or related federal and state legislation, in close consultation with persons with disabilities and their representative organisations, ensuring compliance with the principles of the Convention and with the Committee's Guidelines on article 14 of the Convention."[16]

In *Noble*, the CRPD Committee recommended Australia:

> "Amend the Mentally Impaired Defendants Act (WA) and all equivalent or related federal and state legislations, in close consultation with persons with disabilities and their representative organisations, ensuring compliance with the principles of the Convention and with the Committee's Guidelines on Article 14."[17]

The CRPD Committee refers here to its 2017 *Guidelines on the right to liberty and security of persons with disability*.[18] Importantly, the Committee recommends not only what all Australian governments should do, but how they should do it: in close consultation with persons with disability – in order to fulfil their legal obligations on the CRPD.

All three decisions recommended that Australia:

> "Ensure that adequate support and accommodation measures are provided to persons with mental and intellectual disabilities to enable them to exercise their legal capacity before the courts whenever necessary.[19]

Australia has not implemented these measures recommended by the CRPD to prevent the violations in *Noble*, *Leo* and *Doolan* from continuing and recurring. And they are continuing to this day.

---

[15] For example, Australia was asked to pay each man's legal costs and compensation. They had already been released by the time the Committee adopted its Final Views.
[16] para. 9(b)(i).
[17] para. 9(b)(i).
[18] See pp22-27: <www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc>.
[19] *Noble v Australia*, para. 9(b)(ii); *Doolan v Australia*, para. 9(b)(ii); *Leo v Australia*, para. 9(b)(ii).

Remedy Australia is aware that approximately 40 people with disability are currently arbitrarily detained in the Northern Territory, including persons in indefinite detention as a result of the Territory's discriminatory unfit-to-plead regime. At the time of writing, two detainees have initiated their own individual communications to the CRPD Committee and await its Views.[20]

The CRPD Committee recommends that all States party to the Convention "abolish in law and in practice the deprivation of legal capacity on the basis of impairment," and introduce instead supported decision-making schemes to "ensure that persons with disabilities have access to individualized support that fully respects their autonomy, will and preferences, and that it is provided on the basis of the free and informed consent of the person concerned."[21]

Supported decision-making enabling persons with disabilities to exercise legal capacity is not enshrined in law in any Australian jurisdiction.

The rights of persons with disability in the criminal justice system

Recently, UN experts on the rights of persons with disabilities[22] for the first time released *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (aka UN Access to Justice Guidelines).[23] The authors view articles 12 and 13 of the CRPD as a 'paradigm shift' in recognising the legal capacity of persons with disabilities.[24] These new UN Access to Justice Guidelines underpin our recommendations to the Commission.

Equality and non-discrimination

> "All persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. [...]
>
> "Prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds."
>
> – Article 5, *Convention on the Rights of Persons with Disabilities*

Article 5(1) of the CRPD enshrines equal recognition of persons with disabilities both before and under the law. The concept of 'equality under the law' recognises the right of persons with disabilities to use the law for personal benefit. By contrast, 'equality before the law' refers to the right to be protected by the law.[25]

Article 5(2) requires States parties to prohibit all forms of discrimination against persons with disabilities, including direct discrimination, indirect discrimination, denial

[20] Prof. Patrick Keyzer, personal communication, Melbourne (30 July 2020).
[21] CRPD Committee (2017), *Report of the Committee on the Rights of Persons with Disabilities*, para. 34.
[22] Including the CRPD Committee, the Special Rapporteur on the Rights of Persons with Disabilities and the Special Envoy of the Secretary-General on Disability and Accessibility.
[23] See *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (Geneva, August 2020) <www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf>.
[24] *Ibid*. p6.
[25] CRPD Committee (2018), *General Comment No. 6: Equality and Non-Discrimination*, para. 14.

of reasonable accommodation and harassment.[26] In addition to prohibitions, the CRPD Committee emphasises the need for positive action to ensure everyone can participate on an equal basis, particularly groups vulnerable to multiple or intersectional discrimination,[27] such as Aboriginal and Torres Strait Islander people with disability.

In its 2019 Concluding Observations on Australia's implementation of the CRPD, the CRPD Committee expressed concern that "there is no effective legislative framework to protect persons with disabilities from systemic, intersectional and multiple forms of discrimination" and that "Aboriginal and Torres Strait Islander persons with disabilities are particularly disadvantaged and often not consulted on matters that affect them." It raised concerns that the complaints mechanisms available under the *Disability Discrimination Act 1992* are inaccessible to persons with disabilities.[28]

To remedy these deficiencies, the CRPD Committee recommended that Australia:

> "Address and prohibit systemic, intersectional and multiple forms of discrimination, recognizing discrimination on a single or on multiple and/or intersectional characteristics and allowing for systemic complaints, representative and group actions and a sanction mechanism for a lack of access and for discriminatory behaviour; and
>
> "Support persons with disabilities in their own decisions, actions and filing complaints, especially persons with high support requirements, and persons with intellectual or psychosocial disabilities."[29]

Equal recognition before the law

> "Persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life… Take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."
>
> – Article 12, *Convention on the Rights of Persons with Disabilities*

The CRPD recognises persons with disabilities' right to enjoy legal capacity on an equal basis with others. This is echoed in the *UN Access to Justice Guidelines*, which reaffirm that mental status assessments must not restrict a person's right to legal capacity.[30] Legal capacity means being "both a holder of rights and an actor under the law."[31]

The CRPD Committee distinguishes legal capacity and mental capacity. Australia has conflated the two in its unfit-to-plead provisions,[32] such that where a person is considered to have impaired decision-making skills (often because of a cognitive or psycho-social disability) their legal capacity may be wrongfully denied. As well as refraining from any action that deprives person with disabilities of the right to equal recognition before the law (that is, *respecting* their rights), and acting to prevent non-

[26] *Ibid*. para. 18.
[27] *Ibid*. para. 19 & 73(o).
[28] CRPD Committee (2019), *Concluding Observations on the second and third period reports of Australia*, para. 9.
[29] *Ibid*. para. 10.
[30] *UN Access to Justice Guidelines* (n 20) Guideline 1.2 (c).
[31] CRPD Committee (2014), *General Comment No. 1: Equal Recognition Before the Law*, para. 12.
[32] CRPD Committee (2019), *Concluding Observations on Australia*, paras 23-4.

State actors and private persons from interfering with persons with disabilities' right to legal capacity (*protecting* their rights), Article 12 requires that support be provided in the exercise of legal capacity (*fulfilling* their rights).[33]

Substituted decision-making regimes deny legal capacity and are to be replaced with procedural accommodations including supported decision-making.[34] In *Noble, Doolan* and *Leo* the CRPD Committee called on Australia to "ensure adequate support and accommodation measures are provided to persons with disabilities to enable them to exercise their legal capacity."[35]

These accommodations should include, *inter alia*: establishing a program of independent intermediaries,[36] ensuring communication support and adopting procedures for hearings that enable the full participation of persons with disabilities during proceedings.[37]

Support to exercise one's legal capacity is understood as a dynamic thing:

> "One of the aims of support in the exercise of legal capacity is to build the confidence and skills of persons with disabilities so that they can exercise their legal capacity with less support in the future, if they so wish. [Australia has] an obligation to provide training for persons receiving support so that they can decide when less support is needed or when they no longer require support in the exercise of their legal capacity."[38]

The *UN Access to Justice Guidelines* also emphasise the need for States to implement gender- and age-appropriate individualised procedural accommodations.[39]

In 2019, the CRPD Committee recommended that as well as repealing "any laws and policies, and end practices or customs, which have the purpose or effect of denying or diminishing recognition of any person with disabilities as a person before the law" in Australia, we must "implement a nationally consistent supported decision-making framework,"[40] as already proposed by the Australian Law Reform Commission in its 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*.[41]

Access to Justice

> "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

[33] CRPD Committee (2014), *General Comment No. 1,* para. 24.
[34] CRPD Committee (2014), *General Comment No. 1*, para. 28.
[35] *Noble v Australia*, para. 9(b)(ii); *Leo v Australia*, para. 9(b)(ii); *Doolan v Australia*, para. 9(b)(ii).
[36] The *UN Access to Justice Guidelines* (n.20) describe intermediaries as "[p]ersons who work with justice system personnel and persons with disabilities to ensure effective communication during legal proceedings. They support persons with disabilities to understand and make informed choices, making sure that things are explained and talked about in ways that they can understand and that appropriate accommodations and support are provided. They are neutral and they do not speak for persons with disabilities or for the justice system, nor do they lead or influence decisions or outcomes;" at p9.
[37] See *UN Access to Justice Guidelines* (n.20) Guideline 3.2 for further appropriate accommodations.
[38] CRPD Committee (2014), *General Comment No. 1,* para. 24.
[39] *UN Access to Justice Guidelines* (n.20) Guideline 3.1.
[40] CRPD Committee (2019), *Concluding Observations on Australia*, para. 24.
[41] Australian Law Reform Commission (2014), *Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124)*, (Commonwealth of Australia: Sydney).

participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."

– Article 13, *Convention on the Rights of Persons with Disabilities*

Australian legislation views persons with intellectual disabilities as being unfit to plead. The CRPD Committee expressed concern over our continued use of substituted decision-making for persons deemed "unable to navigate the legal system by themselves".[42]

Detaining persons with disabilities without a conviction (and often indefinitely) is extremely problematic. Access to justice depends on exercise of legal capacity which, in turn, relies on procedural accommodations such as supported decision-making and many other adjustments.[43]

The CRPD Committee recommends that Australia:

> "Review the legal situation of persons whose equal recognition before the law is restricted and have been declared unfit to stand to trial;
>
> "... provide community-based sentencing options;
>
> "Develop nationally consistent Disability Justice Plans across governments to ensure that persons with disabilities ... are supported in accessing the same legal protections and redress as the rest of the community;
>
> "Eliminate substitute decision-making, provide gender and culture-specific individualized support, including psychosocial support, for persons with disabilities in the justice system; [and]
>
> "make information accessible."[44]

Liberty and security of person

> "Ensure that persons with disabilities, on an equal basis with others are…[n]ot 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."

– Article 14, *Convention on the Rights of Persons with Disabilities*

Everyone is entitled to the right of liberty and security of the person, including persons with intellectual disabilities. Everyone has a right to defend themselves against criminal charges. Article 14 thus prohibits all discrimination based on disability in the exercise of the right to liberty.[45]

---

[42] CRPD Committee (2019), *Concluding Observations on Australia*, para. 25.
[43] See *UN Access to Justice Guidelines* (n.20), Principle 3 for examples of adjustments that should be made.
[44] CRPD Committee (2019), *Concluding Observations on Australia*, para. 26.
[45] CRPD Committee (2016), *Report of the Committee on the Rights of Persons with Disabilities,* UNGAOR, Supp No 55, UN Doc A/72/55, 16 [3]-[5].

Unfit-to-plead provisions deprive people of their right to due process and safeguards to which every defendant is otherwise entitled.[46] As such, the CRPD Committee has called on Australia to abolish the unfit-to-plead provisions in our criminal justice systems.[47] The Committee recommends providing support and reasonable accommodation to facilitate the effective participation of persons with intellectual disabilities in criminal proceedings, as well as procedural accommodations to safeguard their rights to a fair trial and due process.[48]

Incarcerating people with intellectual or psychosocial disabilities can exacerbate their condition. The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (aka the 'Mandela Rules') require that such persons are not imprisoned.[49]

The CRPD Committee couldn't be clearer, and again draws on domestic sources of reform, when it calls on Australia to:[50]

> "End committing persons with disabilities to custody and to indefinite terms or to terms longer than those imposed in criminal convictions;
>
> "End the practice of detaining ... children with disabilities in any settings;
>
> "Collect data on ... persons indefinitely detained ... on an annual basis, disaggregated by [*inter alia*] disability ... with the aim to review their detention;
>
> "Repeal any law and policy and cease any practice or custom that enables deprivation of liberty on the basis of impairment ... particularly Indigenous persons with disabilities; [and]
>
> "Implement the recommendations from the 2016 Senate report into the *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*."[51]

Freedom from inhuman and degrading treatment

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
>
> – Article 15, *Convention on the Rights of Persons with Disabilities*

Indefinite detention of a person with intellectual disability amounts to inhuman and degrading treatment.[52] The international prohibition on torture, cruel, inhuman or degrading treatment – unlike most human rights – is absolute: it cannot be justified under any circumstances and cannot be derogated by nation states.[53] As a consequence, no-one with an intellectual disability should ever be held in indefinite detention.

---

[46] *Ibid.* 19 [16].
[47] *Ibid*.
[48] *Ibid*.
[49] *UN Standard Minimum Rules for the Treatment of Prisoners (the 'Mandela Rules'),* GA Res, 70/175, UN Doc A/RES/70/175 (17 December 2015), Rule 109.
[50] CRPD Committee (2019), *Concluding Observations on Australia*, para. 28.
[51] Senate Standing Committee on Community Affairs (2016), *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (Canberra).
[52] See eg, *Leo v Australia*, para. 8.10.
[53] *International Covenant on Civil and Political Rights*, art. 4(2).

Unfit-to-plead provisions in some Australian states and territories expressly permit indefinite detention of persons with intellectual and psychosocial disabilities.[54]

The UN Special Rapporteur on Torture has found that detention facilities that fail to make reasonable accommodations for persons with disabilities may increase their "risk of exposure to neglect, violence, abuse, torture and ill-treatment."[55]

The CRPD Committee found that the indefinite character of Mr Noble's detention and the repeated acts of violence to which he was subjected during his detention amounted to a violation of article 15 of the Convention by Australia.[56]

The CRPD Committee held that the indefinite character of Mr Leo and Mr Doolan's custody, their detention in a prison without having been convicted of a criminal offence, their solitary confinement, their involuntary treatment and their detention together with convicted offenders amounted to violations of article 15 of the Convention.[57]

Australia's unfit-to-plead regimes

All Australian state, territory and federal jurisdictions have unfit-to-plead regimes.[58] While these laws vary between jurisdictions, their very premise of declaring an individual 'unfit to plead' is contrary to international human rights law, as most recently reaffirmed by the *UN Access to Justice Guidelines* discussed above.[59]

Australia has defended the differential treatment of persons with disabilities within its legal system by stating that unfit-to-plead regimes are 'subject to safeguards'[60] and only used as a 'last resort'.[61] However, it is clear from the experiences of Mr Noble, and more recently Messrs Leo and Doolan, that any safeguards as may exist are inadequate.

Unfit-to-plead regimes assess the capacity of an individual to effectively participate in a criminal trial. This is generally a two-step process which establishes: (a) if the accused has an impairment; and (b) if that impairment affects their mental capability to make functional decisions in a specified way.[62] If a court is satisfied that an individual does

---

[54] See for eg, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27(1); *Criminal Code Act 1983* (NT), s 43ZC, *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 35(1).
[55] UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2008), *Interim Report to the General Assembly*, para. 38.
[56] *Noble v Australia*, para. 8.9.
[57] *Doolan v Australia*, para. 8.10; and *Leo v Australia*, para. 8.10.
[58] See *Criminal Law (Mentally Impaired Accused) Act 1996* (WA);
Criminal Code Act 1983 (NT), Part IIA;
Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic);
Mental Health (Forensic Provisions) Act 1990 (NSW);
Criminal Law Consolidation Act 1935 (SA), Part 8A;
Criminal Justice (Mental Impairment) Act 1999 (Tas) and *Mental Health Act 2013* (Tas);
Mental Health Act 2016 (Qld);
Crimes Act 1900 (ACT) and *Mental Health Act 2015* (ACT); and finally,
Crimes Act 1914 (Cth), Part IB.
[59] *UN Access to Justice Guidelines*, Principle 1.2(e).
[60] Australia, 'State Party Report under the LOIPR' (Report to CRPD Committee, 2019) [187].
[61] *Ibid,* para, 17.
[62] A. Arstein-Kerslake, P. Gooding, L. Andrews & B. McSherry (2017), 'Human rights and unfitness to plead: The demands of the Convention on the Rights of Persons with Disabilities', *Human Rights Law Review*, vol. 17, 399, 403.

not have the mental capability to make functional decisions in a specified way, it will declare an individual 'unfit-to-plead' or 'mentally impaired'.

These assessments are discriminatory because they deny legal capacity *on the basis of* disability/decision making skills. Flynn and Arstein-Kerslake observe that disability is almost always a threshold factor for unfit-to-plead mental capacity assessments.[63] Even in instances where this test appears neutral with regard to whether or not someone has an intellectual disability,[64] it still indirectly discriminates against persons with intellectual disabilities because evidence suggests that they are disproportionately affected by these assessments.[65] This denial of legal capacity as a result of mental impairment is a discriminatory denial of access to justice.[66]

The UN Access to Justice Guidelines require that governments:

> "Ensure that constructs such as 'cognitive incapacity' and 'mental incapacity' as determined, for instance, by functional or mental status assessments, are not used to restrict a person's right to legal capacity."[67]

Purported safeguards fail international minimum standards

Supposed safeguards are built into the unfit-to-plead regimes of Australian jurisdiction – among them special hearings, terms of detention and periodic review of detention. But none of these is adequate to guarantee the rights of people with disabilities.

In most Australian jurisdictions, if someone is declared 'unfit to plead', the facts of the case and the subsequent verdict are determined in a 'special hearing', rather than a criminal trial.[68] Special hearings differ between Australian jurisdictions. In most, they are conducted 'as nearly as possible' to a criminal trial.[69] However, these alternative proceedings often forgo some of the procedural safeguards of a criminal trial.[70] For instance, in the Northern Territory, lawyers are given the power to exercise an 'independent discretion' to act in their client's 'best interests' without instructions.[71] This is problematic because it removes legal capacity from persons and relies on substituted decision-making concerning their 'best interests', rather the individual's own will and preferences supported through reasonable accommodations (supported decision-making).[72] It denies their right to make their own choices of how to defend themselves.[73]

---

[63] E. Flynn & A. Arstein-Kerslake (2014), 'Legislating personhood: Realising the right to support in exercising legal capacity', *International Journal of Law in Context,* vol. 10, 81, 87.
[64] See eg, *Criminal Code Act 1983* (NT), s 43J.
[65] See CRPD Committee (2014), *General Comment No. 1*, para. 9.
[66] CRPD Committee (2014), *General Comment No. 1*, para. 15.
[67] *UN Access to Justice Guidelines*, n.20, Principle 1.2 (c).
[68] Noting WA and Queensland do not even conduct special hearings.
[69] See e.g., *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 16(1); *Crimes Act 1900* (ACT), s 316(1); *Mental Health (Forensic Provisions) Act 1990* (NSW), s 21(1); *Criminal Code 1983 (NT),* s 43W(1); and *Criminal Justice (Mental Impairment) Act 1999* (Tas.) s 16(1).
[70] See B. O'Carroll (2015), 'Double standards: Standards of proof for persons found unfit for trial', *Journal of Law and Medicine*, vol. 22, p871.
[71] *Criminal Code 1983* (NT), s 43W(1).
[72] See CRPD Committee (2014), *General Comment No. 1*, para. 27. See also *UN Guidelines on Access to Justice*, p10.
[73] *UN Access to Justice Guidelines*, Guideline 5.2(f).

As well as lacking the procedural safeguards of a trial, persons who undergo a special hearing, such as Messrs Leo and Doolan, are never declared 'guilty' or 'not guilty' and are therefore not provided with the same sentencing options and limiting terms that defendants in criminal trials are granted.[74] Consequently, special hearings amount to differential treatment of persons with disabilities and a denial of their right to legal capacity, violating articles 5, 12 and 13 of the CRPD.[75] This was affirmed most recently in the *UN Access to Justice Guidelines*, which require that states repeal or amend regimes which commit, 'without the *full due process* of law, defendants with disabilities to prison … for a definite or indefinite term… based on perceived dangerousness or need for care.'[76] Principle 5 also requires that substantive and procedural safeguards are applied on an equal basis, which is not assured under the current Australian regime.[77]

In Western Australia, an individual found 'unfit to plead' and subsequently detained is held in detention indefinitely at the Governor's discretion.[78] Northern Territory supervision orders also allow indefinite terms, although initially subject to 'nominal terms'.[79] Upon completion of the length of time set by the nominal term, the court must conduct a major review and decide whether to continue the supervision order.[80] In the Northern Territory, the nominal term of imprisonment is equivalent in length to the sentence that would have been handed down had the accused been found guilty.[81] Unlike the 'limiting term' model used in other state jurisdictions,[82] upon expiry of the 'nominal term' the supervision order may remain in force and the individual is not freed.

Mr Noble was imprisoned indefinitely at the WA Governor's discretion for a duration of 10 years and three months. He spent a further 13 years after his release subject to 'very restrictive' conditions. In WA, the Mental Health Review Board provides written reports to the Minister when someone deemed unfit to plead is detained.[83] The report must include a recommendation as to whether the detained individual should be released and must be made within eight weeks of the custody order and again at least once a year.[84]

Under the NT regime, Mr Leo was indefinitely detained for more than nine years while Mr Doolan spent four years and nine months in a high-security prison and then three years in the 'high-security, prison-like facility' nearby. Each of these instances occurred without conviction and manifest the 'extreme' risks of persons with disabilities being discriminated against and denied their right to exercise legal capacity.[85]

In the NT, the 'appropriate person' must submit a report to the court at intervals of no longer than 12 months until the supervision order is revoked.[86] Upon receiving a report

[74] See eg, *Noble v Australia*, paras 8.4-8.6; *Doolan v Australia*, paras 8.2 & 8.7; *Leo v Australia*, paras 8.2 & 8.7.
[75] See eg, *Noble*, *Leo* and *Doolan.* See also UN International Principles and Guidelines (n 20).
[76] *UN Access to Justice Guidelines*, Guideline 1.2 (m), (emphasis added).
[77] *UN Access to Justice Guidelines*, Principle 5.
[78] *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 35(1).
[79] *Criminal Code Act 1983* (NT), s 48ZC.
[80] *Ibid*, s 43ZG.
[81] *Ibid*, s 43ZG(2).
[82] Such as in New South Wales and South Australia.
[83] *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 33.
[84] *Ibid*, s 33(2)(a).
[85] *UN Access to Justice Guidelines*, p6.
[86] *Criminal Code Act 1983* (NT), s 43ZK; 'appropriate person' defined in s 43A.

the court has the discretion to consider whether the individual *may* be released from the supervision order.[87] But the court retains the right to confirm the order.[88]

On paper, periodic review provisions may seem to act as a check against individuals being detained longer than necessary. However, it is clear from the experiences of Messrs Noble, Doolan and Leo that a period of detention with a discretionary expiration is unsatisfactory, no matter the review process. In *Noble*, due to the restrictive provisions of the *Criminal Law (MID) Act 1996* (WA), when conducting a review the court only had the option of continuing a custodial supervision order or granting unconditional release.[89]

It is clear that Australia's unfit-to-plead provisions, by their very nature, contravene international human rights law and should be repealed.

The NDIS and the criminal justice system

The NDIS does not provide support within the criminal justice system to assist people with disabilities to exercise legal capacity.[90]

The NDIS also lacks culturally appropriate tools and supports, including interpreters, for Aboriginal and Torres Strait Islander people to access support.[91]

Given the over-representation of Aboriginal and Torres Strait Islander people with intellectual and psychosocial disabilities in the criminal justice system, we propose that the NDIS could provide a rights-based solution, affording persons with disabilities the reasonable accommodations they need for a fair trial.[92]

Conclusion

To conclude, Australia's state, territory and federal unfit-to-plead regimes are irreconcilable with international human rights law. The 2020 *UN Access to Justice Guidelines* confirm this. Australia, as a State party to the CRPD, is obliged to ensure that all its jurisdictions conform to the treaty. The federal government must implement nationwide reform that ensures the accommodation and protection of the rights of persons with disabilities. This will prevent the violations that occurred to Messrs Noble, Doolan and Leo from being repeated.

Ultimately, Remedy Australia recommends that the Royal Commission call on the federal, state and territory governments to fully remedy the cases of *Noble*, *Doolan* and *Leo* by implementing all measures recommended by the CRPD Committee. Our further recommendations appear on page two.

Thank you for this opportunity to contribute to the Royal Commission.

---

[87] *Ibid*, s 43ZH.
[88] *Ibid*, s 43ZH(3)(a).
[89] *Noble v Australia*, para. 2.9.
[90] Joint Standing Committee on the National Disability Insurance Scheme, 'Chapter 5: The provision and continuation of services for NDIS participants in receipt of forensic disability services', para. 5.13.
[91] *Ibid*, paras 5.34 & 5.39.
[92] See also N. Biddle, F. Al-Yaman, M. Gourley, M. Gray, J.R. Bray, B. Brady, L.A. Pham, E. Williams, & M. Montaigne (2014), *Indigenous Australians and the National Disability Insurance Scheme* (Canberra, Australian National University Press), pp103 & 124.