



Australian  
Human Rights  
Commission

# People with Disability and the Criminal Justice System

Submission to the Royal Commission into Violence, Abuse,  
Neglect and Exploitation of People with Disability

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## 1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to provide this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission).
2. The Commission is Australia's National Human Rights Institution, with recognised independent status and roles in United Nations human rights fora. The Commission's purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms. The Commission undertakes a range of policy development and research tasks that aim to promote compliance with Australia's human rights obligations, while also investigating and conciliating complaints of unlawful discrimination and breaches of human rights.
3. The Royal Commission provides an important opportunity to prevent and redress violence, abuse, neglect and exploitation of people with disability. More generally, the Royal Commission has the potential to play a key role in upholding the equality, dignity and autonomy of people with disability and ensuring their full participation and inclusion in Australian society. Ultimately this will benefit all Australians, with and without disability.
4. The Commission emphasises the need to ensure that people with disability are at the centre of all aspects of the Royal Commission's work and that they are provided with adequate support services throughout the process. Particular efforts are needed to ensure that the Royal Commission is accessible to Aboriginal and Torres Strait Islander people with disability, culturally and linguistically diverse (CALD) people with disability, and those from rural, regional and remote areas of Australia. In this regard, the Commission welcomes the development and publication of the Royal Commission's *Accessibility and Inclusion Strategy*.<sup>1</sup>
5. The Commission welcomes the endorsement of a human rights-based approach in the Royal Commission's Terms of Reference. The Commission also welcomes the recognition in the Terms of Reference of the intersectional nature of discrimination and disadvantage, noting that the specific experiences of people with disability are multi-layered and can be influenced by experiences associated with age, sex, gender, gender identity, sexual orientation, intersex status, ethnic origin and race.
6. The Commission is well placed to assist the Royal Commission by providing a human rights framework to guide the development of findings and recommendations within the Terms of Reference. The Commission will provide a number of written submissions on

specific issues raised by the Royal Commission in the course of its work. In addition, the Commission would be happy to appear before the Royal Commission and to provide further clarification on its submissions or other issues of interest to the Royal Commission.

7. This submission addresses the interaction of people with disability with the criminal justice system in Australia, which was the focus of the Royal Commission's *Criminal Justice System Issues Paper*<sup>2</sup> (Issues Paper) released in January 2020. This submission focuses on issues raised by questions two, three, seven and eight of the Issues Paper.
8. The Commission welcomes the selection of criminal justice as the fourth topic of consideration for the Royal Commission. To ensure equality before the law and access to justice for all, the criminal justice system must seek to better understand the lived experience of people with disability. This requires participants across the criminal justice system, from police to judges, prosecutors to prison staff, to be better educated about disability (particularly intellectual and psychosocial disability) and to have options available to accommodate the needs of people with disability. Making accessibility and inclusion a central tenet of justice will have a significant impact on the treatment and prevalence of people with disability in the criminal justice system.
9. This submission provides: an overview of the international and domestic frameworks relevant to the criminal justice system and its interaction with people with disability; an analysis of the rights to equal recognition before the law, access to justice and liberty and security of person for people with disability in Australia; and a number of concrete recommendations to improve Australia's compliance with its international obligations and protect the rights of people with disability who interact with the criminal justice system in Australia.

## 2 Summary of recommendations

- 10. Recommendation 1: The Royal Commission closely consider the CRPD, ICCPR and other relevant international human rights instruments and ensure that its recommendations regarding the criminal justice system align with the Australian Government's obligations under those instruments.**
- 11. Recommendation 2: The Royal Commission identify key issues and appropriate recommendations to be addressed in the implementation of the new National Disability Strategy for beyond 2020 to assist the Australian Government to implement its obligations under international human rights law.**

- 12. Recommendation 3: The Australian Government include in the National Disability Data Asset (NDDA) data relating to the disability, age, gender, location and ethnicity of participants at all stages of the criminal justice system.**
- 13. Recommendation 4: The Australian Government include in the NDDA data on the number of people detained indefinitely, disaggregated by the nature of the offence, length of detention, jurisdiction, disability, sex, age, jurisdiction, and Aboriginal or Torres Strait Islander origin.**
- 14. Recommendation 5: The Australian Government work with state and territory governments to develop and improve disability-specific training for police, lawyers, judicial officers, court staff and prison staff with a view to enhancing understanding of disability, improving supports and diverting people with disability away from the criminal justice system.**
- 15. Recommendation 6: The Australian Government work with state and territory governments to develop effective disability identification and support programs throughout the criminal justice process and ensure that such programs are culturally appropriate for Aboriginal and Torres Strait Islander people with disability.**
- 16. Recommendation 7: The Australian Government work with state and territory governments to develop a nationally consistent supported decision-making framework.**
- 17. Recommendation 8: The Australian Government work with state and territory governments to eliminate substituted decision-making and provide gender and culture-specific individualised support, including psychosocial support, for people with disability in the criminal justice system.**
- 18. Recommendation 9: The Australian Government work with state and territory governments to implement the recommendations of the Senate Community Affairs References Committee in the Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia.**
- 19. Recommendation 10: The Australian Government work with state and territory governments to implement initiatives aimed at ending the indefinite detention of people with disability deemed unfit to plead, including:**
  - (a) stopping the incarceration of people with disability in custody for indefinite terms or for terms longer than those imposed in criminal convictions for the relevant offences**

**(b) providing for time limitations on all liberty-restricting orders imposed on people deemed unfit to plead and creating a body to regularly review the position of all people detained under such orders.**

- 20. Recommendation 11: The Australian Government work with state and territory governments to develop, in consultation with people with disability, nationally consistent disability justice plans to ensure that people with disability are supported in accessing the same legal protections and redress as the rest of the community.**
- 21. Recommendation 12: The Australian Government work with state and territory governments to amend laws, policies and guidelines to prohibit the use of solitary confinement for people with disability in detention.**
- 22. Recommendation 13: The Australian Government work with state and territory governments to develop a national framework to monitor and regulate the use of restrictive practices on people with disability in places of detention.**
- 23. Recommendation 14: The Australian Government work with state and territory governments to implement OPCAT as a matter of urgency.**
- 24. Recommendation 15: The Australian Government include Fetal Alcohol Spectrum Disorder (FASD) on the List of Recognised Disabilities.**
- 25. Recommendation 16: The Australian Government work with state and territory governments to systematically screen children and young people upon entering detention, for all types of disability, including FASD, and to encourage their diversion from a custodial setting to appropriate community-based services.**
- 26. Recommendation 17: The Royal Commission explore the effectiveness of existing independent support person programs and consider their roll out throughout Australia.**
- 27. Recommendation 18: The Royal Commission inquire into the effectiveness of the current NDIS Quality and Safeguards Framework in ensuring a criminal justice pathway for reportable conduct.**
- 28. Recommendation 19: The Australian Government consider the rollout of mandatory rights-based training for disability support staff and other workers employed under and through the NDIS.**
- 29. Recommendation 20: The Australian Government continue to fund and support Community Visitor Schemes throughout Australian states and territories.**

**30. Recommendation 21: The Royal Commission inquire further into the information, resources and supports available to people with disability, in all settings, to report crimes.**

### **3 International & domestic human rights framework**

31. Australia has ratified a range of international human rights instruments that include clear rights and obligations relating to people with disability who interact with the criminal justice system, most notably the *Convention on the Rights of Persons with Disabilities* (CRPD),<sup>3</sup> the *International Covenant on Civil and Political Rights* (ICCPR)<sup>4</sup> and the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).<sup>5</sup> At the domestic level, the *Disability Discrimination Act 1992* (Cth) (DDA) works alongside the *National Disability Strategy* to protect the rights of people with disability in the criminal justice system.<sup>6</sup>

#### **3.1 Convention on the Rights of Persons with Disabilities**

32. Australia ratified the CRPD in July 2008 and its accompanying Optional Protocol<sup>7</sup> in July 2009. The CRPD requires Australia to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all people with disability, and to promote respect for their inherent dignity.

33. The CRPD supports the social model of disability. Article 1 defines ‘persons with disabilities’ as ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’. The CRPD encompasses a broad understanding of disability and recognises that disability is an ‘evolving concept’ resulting from interaction with ‘attitudinal and environmental barriers’.<sup>8</sup>

34. As the CRPD is the most recent international human rights convention and the first international convention to exclusively address the rights of people with disability, it offers valuable guidance for realising the human rights of people with disability in Australia. The CRPD requires States Parties to take positive action, including significant law reform, to implement the underlying principles of the Convention and protect the rights contained within it.

35. The CRPD rights most relevant to the interaction of people with disability and the criminal justice system include:

- Article 9 – the right to accessibility

- Article 12 – the right to equal recognition before the law
- Article 13 – the right to access justice
- Article 14 – the right to liberty and security of person
- Article 15 – the right to freedom of torture or cruel, inhuman or degrading treatment or punishment
- Article 16 – the right to freedom from exploitation, violence and abuse

### **3.2 International Covenant on Civil and Political Rights**

36. Articles 9, 10, 14, 15 and 26 of the ICCPR protect rights pertinent to people with disability engaged with the criminal justice system. In combination, these articles ensure that people with disability are treated fairly and without discrimination by courts, legal practitioners, and law enforcement.

37. Article 26 ensures equality before the law for people with disability. Equality before the law includes both uninhibited access to the law and equal protection by the law.

38. Article 9 ensures the right to liberty and security of person. This right protects people with disability from arbitrary arrest and detention and compels the prompt trial and resolution of criminal proceedings.

39. Further, Article 10 requires those awaiting trial to be detained separately from those who have been convicted, and for the former to be treated humanely and in a manner appropriate to their status as unconvicted persons.

40. Article 14 safeguards the basic principles of justice, including equality before the law, fair and public trial by a competent and impartial tribunal, and the presumption of innocence. Article 14 could also be understood as containing a right to legal aid for people who cannot afford representation.

41. Article 15 protects people from unjust, arbitrary, or indefinite imprisonment.

### **3.3 Optional Protocol to the Convention against Torture, Cruel, Inhuman and Degrading Treatment**

42. Australia is a party to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (CAT).<sup>9</sup> The CAT sets out substantive rules prohibiting torture and other forms of mistreatment.



43. On 21 December 2017, the Australian Government ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).<sup>10</sup> OPCAT provides a means of monitoring how a state is complying with the substantive rules in the CAT in the specific context of places of detention. The treaty aims to prevent torture and other forms of ill treatment by establishing a regime for independent visits of places of detention.<sup>11</sup>
44. OPCAT requires places of detention to be monitored through two complementary types of independent body:
- one or more National Preventive Mechanisms (NPMs), which would be the Australian entity or network of entities responsible for inspections and oversight<sup>12</sup>
  - the United Nations Sub-committee on the Prevention of Torture, which is the United Nations body of independent experts responsible for conducting visits to places of detention in jurisdictions that have ratified OPCAT and providing guidance to NPMs to assist in the performance of their duties.<sup>13</sup>
45. OPCAT has broad application, applying where ‘people are deprived of their liberty’, in a place that falls within the jurisdiction and control of the state, and where the deprivation occurs by virtue of an order of a public authority, or with its consent.<sup>14</sup> It applies to both traditional and non-traditional settings where people with disability may be deprived of their liberty.
46. The Commonwealth Ombudsman has been designated as the NPM for federal places of detention. The Ombudsman will also perform various functions as the NPM co-ordinator for NPMs across all Australian jurisdictions.<sup>15</sup> Under Article 24, upon ratification, States Parties are permitted to make a declaration postponing the implementation of their obligations for a maximum of three years. When Australia ratified OPCAT on 21 December 2017, it also made a declaration invoking Article 24 in relation to its obligations to establish an NPM. The government has recently indicated that it expects the NPM network to be established from January 2022.<sup>16</sup>
47. OPCAT, if implemented effectively, has the potential to identify and prevent mistreatment amounting to torture, cruel, inhuman or degrading treatment that is experienced by people with disability in places of detention.<sup>17</sup>

### **3.4 Standard Minimum Rules for the Treatment of Prisoners**

48. The Standard Minimum Rules for the Treatment of Prisoners, also known as the ‘Nelson Mandela Rules’, set a base level requirement for the treatment of all prisoners.<sup>18</sup> First

adopted in 1955 and revised in 2015, the Nelson Mandela Rules cover not only the treatment of prisoners once imprisoned, but also the sentencing process.

49. Of particular relevance to people with disability are those rules concerned with the provision of healthcare supports in prison,<sup>19</sup> the consideration of disability in the conviction and sentencing process,<sup>20</sup> and the exacerbation of disability caused by solitary confinement.<sup>21</sup>

### 3.5 Other international human rights instruments

50. Australia has also ratified a range of other international human rights instruments that contain important provisions relevant to people with disability. These include:

- the Convention on the Rights of the Child<sup>22</sup>
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>23</sup>
- the International Covenant on the Elimination of All Forms of Racial Discrimination.<sup>24</sup>

51. Australia has agreed to be subject to United Nations complaint mechanisms associated with a number of the abovementioned treaties. These complaint mechanisms, which relate to the ICCPR, ICERD, CEDAW, CRPD and CAT, are distinct from the complaint mechanisms under domestic human rights and anti-discrimination laws.

52. In addition to the above, Australia has endorsed the United National Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>25</sup>

### 3.6 Disability Discrimination Act 1992 (Cth)

53. At the domestic level, the *Disability Discrimination Act 1992* (Cth) (DDA) works alongside other laws and policies to protect the rights of people with disability before the law.

54. The DDA makes disability discrimination unlawful and promotes equal rights, equal opportunity and equal access for people with disability, including with respect to criminal justice. The DDA makes clear that people with disability have a right to access justice and be treated equally before the law.<sup>26</sup>

55. The DDA requires courts, chambers and legal offices to be accessible for people with disability.<sup>27</sup> It also requires the provision of legal services to be performed without discrimination.<sup>28</sup> This may require practitioners and judicial officers to provide relevant

documents in appropriate formats, ensure that necessary interpreters and support staff are available, and offer more flexible scheduling to accommodate a person with disability. The DDA also prohibits harassment on the basis of a person's disability in the course of the provision of legal services.<sup>29</sup>

56. Further, the DDA prohibits discrimination on the ground of disability in the course of administering a Commonwealth law.<sup>30</sup> This is of particular application to public officers such as police, judicial officers, magistrates and registrars.
57. Under the DDA, courts, chambers and legal officers may be required to make reasonable adjustments to accommodate a party or client,<sup>31</sup> subject to the defence of unjustifiable hardship.<sup>32</sup> This may include making structural changes to the built environment (e.g. providing ramps, modifying toilets and ensuring courtrooms and offices are accessible); providing or modifying equipment used for the purposes of giving legal advice or conducting a trial (e.g. providing easy-read documentation, ensuring the presence of an AUSLAN interpreter); or offering more flexible scheduling (e.g. allowing for more frequent breaks in the giving of oral evidence, allowing longer meeting times for briefing and consultation).
58. The DDA also provides people with the right to make a complaint to the Commission about unlawful discrimination on the ground of disability. Where the complaint cannot be resolved by conciliation, the DDA provides the option of pursuing the matter in the Federal Court of Australia, where an enforceable remedy may be granted.<sup>33</sup>

### **3.7 Australian Human Rights Commission Act 1986 (Cth)**

59. The *Australian Human Rights Commission Act 1986* (Cth) provides limited rights in relation to specific international instruments, including the CRPD and the ICCPR.

### **3.8 National Disability Strategy**

60. Following Australia's ratification of the CRPD in 2008, the Commonwealth, state and territory governments developed the *National Disability Strategy* (NDS), a ten-year (2010-2020) national strategic plan to implement the CRPD. The NDS aims to 'ensure that the principles underpinning the Convention are incorporated into policies and programs affecting people with disability, their families and carers'.<sup>34</sup>
61. The NDS was launched in 2011 and has six foundational elements or policy areas:

- **Inclusive and accessible communities:** the physical environment including public transport; parks, buildings and housing; digital information and communications technologies; civic life including social, sporting, recreational and cultural life
- **Rights protection, justice and legislation:** statutory protections such as anti-discrimination measures, complaints mechanisms, advocacy, the electoral and justice systems
- **Economic security:** jobs, business opportunities, financial independence, adequate income support for those not able to work, and housing
- **Personal and community support:** inclusion and participation in the community, person-centred care and support provided by specialist disability services and mainstream services; informal care and support
- **Learning and skills:** early childhood education and care, schools, further education, vocational education; transitions from education to employment; life-long learning
- **Health and wellbeing:** health services, health promotion and the interaction between health and disability systems; wellbeing and enjoyment of life.<sup>35</sup>

62. Regarding the second policy area of the NDS listed above, 'rights protection, justice and legislation', the desired outcome has been identified as: 'People with disability have their rights promoted, upheld and protected'.<sup>36</sup>

63. The Commission notes that a comprehensive review of the NDS is currently being undertaken and a new disability framework is being developed for beyond 2020.

**64. Recommendation 1: The Royal Commission closely consider the CRPD, ICCPR and other relevant international human rights instruments and ensure that its recommendations regarding the criminal justice system align with the Australian Government's obligations under those instruments.**

**65. Recommendation 2: The Royal Commission identify key issues and appropriate recommendations to be addressed in the implementation of the new National Disability Strategy for beyond 2020 to assist the Australian Government to implement its obligations under international human rights law.**

## 4 Australia's obligations under Articles 12, 13 and 14 of the CRPD

66. This section discusses Australia's CRPD obligations to ensure equal recognition before the law (Article 12), access to justice (Article 13) and liberty and security of person (Article 14) for people with disability who interact with the criminal justice system. This helps to identify not only what is required of Australia under international law, but also what strategies could be adopted to fulfil these obligations.

### 4.1 Equal recognition before the law

67. Article 12 of the CRPD recognises that people with disability enjoy the same legal capacity and agency as people without disability, and that States Parties must provide all necessary support to ensure people with disability can exercise that capacity. As such, Australia is obliged to provide appropriate and effective systems by which people with disability are supported to exercise their legal capacity. These systems must be accompanied by safeguards to ensure that the rights, will and preferences of people with disability are carried out accurately, efficiently and respectfully.

68. Equality before the law is a basic requirement for the exercise of many other human rights. The United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) stated in its *General Comment No 1 (2014) on Equal Recognition before the Law* that equality before the law is:

- A basic general principle of human rights protection that is indispensable for the exercise of other human rights. Equality before the law enables people with disability to enforce and safeguard their civil, political, economic, social and cultural rights.
- Of particular significance to people with intellectual or psychosocial disabilities, especially in relation to substitute decision-making schemes and the denial of legal capacity.
- Protected only where both legal standing and legal agency are ensured. Where perceived mental incapacity is used to justify the removal of a person's legal capacity, that person is being unlawfully discriminated against.
- Essential to ensure effective access to justice for people with disability. In order to seek enforcement of their rights and obligations on an equal basis with others, people with disability must be recognised as persons before the law with equal standing in courts and tribunals.<sup>37</sup>

69. The CRPD Committee explained that equal recognition before the law comprises two capacities: (i) the capacity to be a holder of rights; and (ii) the capacity to be an actor under the law. In the drafting of Article 12, there was intense debate over whether the capacity to be an actor under the law would be protected and ensured. Some States argued that certain people with disability (such as those reliant on substituted decision-making schemes) were not qualified to exercise their legal rights on an equal basis with others. Other States (including Australia) and advocacy bodies strongly objected to this notion, arguing that even where a person is under guardianship, they should still maintain a degree of capacity as a basic human right.<sup>38</sup>
70. The CRPD Committee also distinguished between legal capacity and mental capacity. Legal capacity is the ability to hold and exercise legal rights and duties, while mental capacity refers to the decision-making skills of a person.<sup>39</sup> The Committee suggested that the two are often conflated such that where a person is considered to have impaired decision-making skills as a result of their disability, their legal capacity is automatically and wrongfully removed. Legal capacity, according to the CRPD Committee, is an inherent right accorded to all people that is ‘the key to accessing meaningful participation in society’.<sup>40</sup>
71. In the context of the criminal justice system, the right to equal recognition before the law enables defendants, witnesses and jurors with disability to enforce their rights and carry out their respective roles without restriction. In its *General Comment No 1*, the CRPD Committee stated that:
- States Parties must ensure that people with disability have access to legal representation such that they can pursue the protection of their rights in court.<sup>41</sup>
  - People with disability have often been excluded from certain roles in the justice system, including as judges, lawyers, witnesses and members of a jury.<sup>42</sup>
  - To ensure that equal weight is given to complaints and statements made by people with disability, training must be administered to police officers, social workers and other first responders to assist them in recognising people with disability as full persons before the law.<sup>43</sup> Similar training should also be provided to the judiciary to ensure that judicial officers are aware of their obligation to respect the legal capacity of people with disability.<sup>44</sup>
  - The exercise of legal capacity includes the capacity to testify in judicial proceedings. As such, alternative communication methods (including video testimony, professional sign language interpretation and other assistive methods) should be provided.<sup>45</sup>

- States Parties must refrain from detaining people with disability on the basis of a denial of legal capacity and must establish a mechanism to review the circumstances of people with disability who have been detained on that basis.<sup>46</sup>

## 4.2 Access to justice

72. Article 13 of the CRPD requires States Parties to accommodate the active participation of people with disability in the criminal justice system. Access to justice must be ensured for people with disability in all interactions with the criminal justice system, whether as a complainant, witness, juror or defendant.

73. In 2016, the Commonwealth Senate Community Affairs Committee concluded that:

access to justice for people with a disability ... is more than simply providing a wheelchair ramp into a courtroom. It is about fully supporting a person with a disability to appropriately intersect with all aspects of criminal justice systems, including identifying disability, provision of supported decision making and providing appropriate exit mechanisms.<sup>47</sup>

74. In particular, Article 13 requires Australia to:

- Provide procedural and age-appropriate accommodations to facilitate the effective participation of people with disability in all legal proceedings, including preliminary processes. This may require not only physical access to courts and offices,<sup>48</sup> but also access to documents and information, such as the provision of AUSLAN translation or easy-read formatting.<sup>49</sup>
- Promote appropriate training for those involved in the administration of justice, including judicial officers, lawyers, court staff, police and prison staff.<sup>50</sup>

75. The language of Article 13 is broad, referring to any 'procedural and age-appropriate accommodations'. This was a deliberate decision made in the drafting process to ensure that the provision would encompass the requirements of all people with disability, not only those with common or more straightforward support needs.<sup>51</sup>

76. Importantly, Article 13 places a positive duty on States Parties to provide the requisite accommodations to ensure access to justice for people with disability. Unlike reasonable adjustment obligations under the DDA, this duty is not limited by the concept of unjustifiable hardship and, as such, it is owed to all people with disability, even those who require complex and intensive supports.<sup>52</sup>

77. Like Article 12, Article 13 is a 'threshold right' as it provides the means by which a person with disability can claim or protect their other rights and interests.<sup>53</sup> As such, conformity

with Articles 12 and 13 is fundamental to effective compliance with all of the other obligations under the CRPD.

### 4.3 Liberty and security of person

78. Article 14 of the CRPD requires States Parties to ensure that people with disability enjoy the right to liberty and security of the person on an equal basis with others. Where people with disability are deprived of their liberty, this must be lawful, non-discriminatory and in full compliance with the CRPD, including through the provision of any reasonable accommodation that the person requires.

79. Article 14 has been described as ‘one of the most controversial articles in the CRPD’.<sup>54</sup> In part, this can be attributed to the breadth of the provision, which was the subject of considerable debate during the drafting of the CRPD.<sup>55</sup> A number of States Parties, including Australia, campaigned for a narrow construction of the article, whereby only detention solely on the basis of disability would be forbidden.<sup>56</sup> Ultimately, however, the CRPD Committee adopted a broader interpretation, meaning that even where disability is just one of many justifications, the detention will be unlawful.<sup>57</sup>

80. Notably, the CRPD Committee has stated that a denial of legal capacity, such as through substituted decision-making schemes which replace a person’s judgment with that of another, amounts to a ‘deprivation of liberty’ and a violation of Article 14.<sup>58</sup>

81. In 2017, the CRPD Committee released the *Guidelines on the right to liberty and security of persons with disabilities*.<sup>59</sup> The guidelines were intended to provide States Parties with further clarification as to their obligations in relation to Article 14. The following excerpts from the guidelines are relevant to the criminal justice system and the present submission:

- **Absolute prohibition of detention on the basis of impairment:** States Parties must ensure that people with disability are not detained on the grounds of actual or perceived impairment.<sup>60</sup>
- **Protection of people with disability who are deprived of their liberty from violence, abuse and ill-treatment:** States Parties must protect the security and personal integrity of people with disability who are deprived of their liberty, including by eliminating the use of forced treatment, seclusion and various methods of restraint.<sup>61</sup>
- **Detention of people who are unfit to stand trial in criminal justice systems or incapable of criminal liability:** Declarations of unfitness to stand trial and the



detention of people based on such declarations are contrary to Article 14 as they deprive the person of their right to due process and safeguards.<sup>62</sup>

- **Conditions of detention of people with disability:** States Parties must ensure that places of detention are accessible and must provide humane living conditions. People with disability who are sentenced to imprisonment should be entitled to reasonable accommodation.<sup>63</sup> This guideline should be considered in conjunction with OPCAT, particularly the requirement that States Parties introduce systems of monitoring in places of detention.<sup>64</sup>
- **Diversion mechanisms and restorative justice schemes:** Deprivation of liberty in criminal proceedings should apply only as a matter of last resort. Diversion programmes must not involve a transfer to mental health commitment regimes; such services should only be provided on the basis of an individual's free and informed consent.<sup>65</sup>

## 5 Implementation of CRPD Articles 12, 13 and 14 in Australia

82. The Commission is concerned that Australia still has a considerable way to go in fulfilling its obligations in regard to people with disability who interact with the criminal justice system. This section identifies some of the key areas in which the implementation of Articles 12, 13 and 14 is being challenged and makes recommendations for change.

83. In all areas discussed in this submission, the Commission emphasises the need to consult people with disability, including Aboriginal and Torres Strait Islander people with disability, CALD people with disability, and those from rural, regional and remote areas of Australia. This includes regular engagement with peak civil society organisations, such as the First Peoples Disability Network. In this regard, Article 4(3) of the CRPD provides:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.

### 5.1 Inclusion of criminal justice statistics in the National Disability Data Asset

84. This section addresses the absence of national data relating to the involvement of people with disability in the criminal justice system and discusses the need for the inclusion of criminal justice statistics in the National Disability Data Asset (NDDA). This discussion will

address the Issues Paper at large and, more specifically, will seek to answer questions 2A and 2B.<sup>66</sup>

85. Article 31 of the CRPD requires Australia to collect all appropriate data required to give effect to the Convention.

86. In its submission to the CRPD Committee in July 2019, the Commission recommended that the Australian Government, in conjunction with the Office of the National Data Commissioner, develop a national disability data framework to ensure appropriate, nationally consistent measures for the collection and public reporting of disaggregated data across the full range of obligations contained in the CRPD.<sup>67</sup>

87. In September 2019, the Australian Government announced the establishment of a new NDDA, a body of statistics that aims to provide a holistic view of the lived experience of Australians with disability.<sup>68</sup> The Commission welcomes this initiative and reiterates the importance of national data collection and reporting in protecting the rights of people with disability.

88. In the CRPD Committee's Concluding Observations on the combined second and third periodic reports of Australia in October 2019 (2019 Concluding Observations), the CRPD Committee expressed its appreciation for

The endorsement of a new national disability data set bringing together Commonwealth, state and territory data from across multiple sources and systems to provide a more complete picture of the requirements of persons with disabilities.<sup>69</sup>

89. However, the CRPD Committee expressed concern over the absence of national data relating to the involvement of people with disability in the criminal justice system.<sup>70</sup> The Committee subsequently recommended that Australia collect data disaggregated by:

- disability
- age
- gender
- location
- ethnicity,

'at all stages of the criminal justice system'.<sup>71</sup>

90. The CRPD Committee also recommended that Australia collect data on the number of people detained indefinitely on an annual basis, disaggregated by:

- the nature of the offence

- the length of the detention
- disability
- Aboriginal and other origin
- sex
- age
- jurisdiction,

‘with the aim of reviewing their detention’.<sup>72</sup>

91. The Commission reiterates this recommendation and encourages the Australian Government to implement it as a matter of priority. This would assist governments at all levels to introduce measures aimed at preventing violence, abuse, neglect and exploitation from occurring in the criminal justice system,<sup>73</sup> as well as preventing people with disability from coming in contact with the criminal justice system in the first place.<sup>74</sup>

**92. Recommendation 3: The Australian Government include in the NDDA data relating to the disability, age, gender, location and ethnicity of participants at all stages of the criminal justice system.**

**93. Recommendation 4: The Australian Government include in the NDDA data on the number of people detained indefinitely, disaggregated by the nature of the offence, length of detention, jurisdiction, disability, sex, age, jurisdiction, and Aboriginal or Torres Strait Islander origin.**

## **5.2 Overrepresentation of people with disability in the criminal justice system**

94. This section addresses the overrepresentation of people with disability in the criminal justice system and discusses the need for increased knowledge, training and awareness of disability among those who work in this field. This discussion will address the Issues Paper at large and, more specifically, will seek to answer questions 2B and 3A.<sup>75</sup>

95. People with disability, particularly Aboriginal and Torres Strait Islander people with disability, are overrepresented in the criminal justice system in Australia.<sup>76</sup> According to a study conducted by the Australian Institute of Health and Welfare (AIHW), people with disability make up 29% of Australia’s prison population, despite forming only 18% of the general population.<sup>77</sup> While most prison entrants with disability rated their level of restriction as ‘moderate’ (46%), almost 40% said their disability was ‘profound or severe’.<sup>78</sup> The likelihood of ‘profound or severe’ disability was particularly high among prisoners aged 35–44 (45%) and Indigenous prisoners (48%).<sup>79</sup>

96. Children with disability are similarly overrepresented in the juvenile justice system, most notably children with intellectual or psychosocial disability.<sup>80</sup> Children with Fetal Alcohol Spectrum Disorder (FASD) are particularly prevalent in the juvenile justice system.<sup>81</sup> A study conducted by NSW Health and NSW Juvenile Justice in 2016 found that 83% of young people in penal custody in NSW exhibit symptoms consistent with a psychological disorder.<sup>82</sup> That number is even higher (87%) among young Aboriginal people in custody.<sup>83</sup> Further, 18% of young people in custody in NSW have an intellectual disability (IQ <70) and between 39–46% have borderline intellectual disability (IQ 70–79).<sup>84</sup>
97. Aboriginal and Torres Strait Islander children with cognitive disability are also more likely to be charged with a first offence at a younger age than those without cognitive disability. A study conducted in 2012 found that the median age of first police contact for Aboriginal and Torres Strait Islander youth with cognitive disability was 13.8 years of age, which was significantly lower than Aboriginal and Torres Strait Islander youth without disability.<sup>85</sup> A number of factors increase the likelihood of early police contact for these children, such as ‘having complex needs, being unaware of legal processes and exhibiting behaviour that may come to the attention of or be misinterpreted by law enforcement’.<sup>86</sup>
98. The Commission’s research has found that notwithstanding the high number of people with disability in the criminal justice system, the necessary procedural accommodations are frequently not provided.<sup>87</sup> It also found that negative attitudes and a lack of awareness about disability pose a significant barrier to people with disability accessing justice.<sup>88</sup> The failure to provide procedural accommodations, in combination with negative attitudes, can prevent people with disability from accessing protection from police and courts.<sup>89</sup>
99. Once incarcerated, people with disability lose access to many of the support systems that serve, in part, to reduce the risk of harm posed to themselves and others.<sup>90</sup> This may lead to the deterioration of the person’s condition and a higher risk of recidivism. Research conducted in Victoria indicates that people with intellectual disability return to prison at more than twice the rate of people without such disability.<sup>91</sup> A study conducted in NSW revealed similar results, with the rate of recidivism for prisoners with intellectual disability 2.4 times higher for prisoners without prior conviction and 1.48 times higher for prisoners who had previously been convicted.<sup>92</sup>
100. The Commission considers that improved disability-specific training for police, lawyers, judicial officers, court staff and prison staff would enhance understanding of disability, improve supports, and help to divert people with disability away from the criminal justice system.<sup>93</sup>

101. In particular, the Commission notes the crucial role played by police as the first point of contact for people with disability who interact with the criminal justice system. Research indicates that appropriate training of police can divert people with disability away from custody and towards appropriate supports.<sup>94</sup> Without adequate training, however, police may interpret behaviours associated with disability as being dangerous or disruptive,<sup>95</sup> and this may have the effect of propelling people with a disability deeper into the criminal justice system.<sup>96</sup>

102. Police in every Australian state currently receive some form of training or information relating to disability.<sup>97</sup> The Commission recommends that this disability training be further developed with a focus on cautioning and diversionary alternatives to custody, cultural awareness, the impact of cognitive and intellectual disabilities, including FASD, and the effects of trauma, including intergenerational trauma.

103. Further, the Commission considers that Aboriginal and Torres Strait Islander offenders with cognitive disability require improved access to a wide range of services and cultural supports throughout their time in custody. Diversionary programs that are disability specific and culturally appropriate should also be made available to Aboriginal and Torres Strait Islander children and young people.<sup>98</sup>

104. For people with disability who are participants in the National Disability Insurance Scheme (NDIS), coordination between the justice system and the NDIS is crucial to facilitate diversion away from custodial settings. A lack of coordination can result in NDIS participants remaining in prison for longer than necessary.<sup>99</sup> The Commission welcomes the announcement by the Council of Australian Governments (COAG) in October 2019 that NDIS Justice Liaison Officers would be introduced in each state and territory in an effort to improve coordination and support NDIS participants who are in the criminal justice system. COAG also agreed to create targeted resources and training to support the new roles.<sup>100</sup>

**105. Recommendation 5: The Australian Government work with state and territory governments to develop and improve disability-specific training for police, lawyers, judicial officers, court staff and prison staff with a view to enhancing understanding of disability, improving supports and diverting people with disability away from the criminal justice system.**

**106. Recommendation 6: The Australian Government work with state and territory governments to develop effective disability identification and support programs throughout the criminal justice process and ensure that such programs are culturally appropriate for Aboriginal and Torres Strait Islander people with disability.**

### 5.3 Supported decision-making

107. This section addresses the absence of a nationally consistent supported decision-making framework and discusses the need for the Australian Government to eliminate substituted decision-making based on ‘best interests’ models. This discussion will address the Issues Paper at large and, more specifically, will seek to answer questions 3A and 7A.<sup>101</sup>

108. The CRPD requires States Parties to develop systems of supported decision-making in order to allow people with disability to exercise their legal capacity.<sup>102</sup> In practice, this requires Australia to ensure that:

- Appropriate and effective supports are provided to enable people with disability to exercise their legal capacity. Supports must be proportional, respectful and subject to regular review by a competent and impartial authority.<sup>103</sup>
- Capacity supports are accompanied by safeguards that prevent abuse in the form of undue influence or conflict of interest.<sup>104</sup>
- People with disability are equally capable of owning or inheriting property, controlling their own financial affairs, and taking out bank loans, mortgages and other forms of financial credit. People with disability must also be protected from any arbitrary deprivation of their property.<sup>105</sup>

109. This approach is consistent with the social model of disability and affords people with disability greater legal and social autonomy.<sup>106</sup> Further, from a social perspective, supported decision-making has been shown to improve confidence, grow support networks, increase engagement with the community, and give rise to a greater sense of control for people with disability.<sup>107</sup>

110. The development of supported decision-making frameworks is particularly important in the context of the historical and continuing denial of the right to legal capacity through substituted decision-making schemes such as plenary guardianship.<sup>108</sup> These schemes authorise one person to make decisions for another person who has been deemed unable to make that decision for themselves. In cases of plenary guardianship, guardians may not even need to consult their ward before making a decision on their behalf.<sup>109</sup>

111. The National Decision-Making Principles, outlined by the Australian Law Reform Commission (ALRC) in their 2014 report, *Equality, Capacity and Disability in Commonwealth Laws*, also support the notion of supported decision-making as a mechanism by which people with disability can exercise their right to make choices for

themselves.<sup>110</sup> Principle 2, in particular, requires people with disability to have ‘access to the support necessary for them to make, communicate and participate in decisions that affect their lives’.<sup>111</sup>

112. In its 2019 Concluding Observations, the CRPD Committee expressed concern about the lack of progress made to abolish Australia’s guardianship and substituted decision-making regime, particularly in relation to forced psychiatric treatment.<sup>112</sup> The CRPD Committee recommended that Australia implement a nationally consistent supported decision-making framework in accordance with that recommended in the ALRC’s *Equality, Capacity and Disability in Commonwealth Laws* report.<sup>113</sup>
113. The CRPD Committee also expressed concern about the ongoing use of substituted decision-making in the criminal justice system to assist people with disability who are otherwise unable to navigate the system by themselves.<sup>114</sup> To this end, the Committee recommended that Australia eliminate substituted decision-making and provide gender and culture-specific individualised support, including psychosocial support, for people with disability in the justice system.<sup>115</sup>
114. The Commission considers that supported decision making could assist people with disability in accessing protection or justice from the police or the courts<sup>116</sup> and in identifying, disclosing and reporting instances of violence, abuse, neglect or exploitation in the criminal justice system.<sup>117</sup> Accordingly, the Commission urges the Australian Government to implement the CRPD Committee’s recommendations without delay.
- 115. Recommendation 7: The Australian Government work with state and territory governments to develop a nationally consistent supported decision-making framework.**
- 116. Recommendation 8: The Australian Government work with state and territory governments to eliminate substituted decision-making and provide gender and culture-specific individualised support, including psychosocial support, for people with disability in the criminal justice system.**

#### **5.4 Fitness to plead and indefinite detention**

117. This section addresses the capacity barriers that people with disability face in accessing justice and the indefinite detention of people with disability. This discussion will address the Issues Paper at large and, more specifically, will seek to answer questions 2A and 3A.<sup>118</sup>

118. The Commission is concerned that, in some jurisdictions, declarations of unfitness to stand trial may lead to the indefinite detention of people with disability, including children with disability, who have not been convicted of an offence.<sup>119</sup> For example, in Western Australia a person can be indefinitely detained in a custodial setting without trial, if found unfit to plead.<sup>120</sup> Such a person may spend a longer time in detention than if they had pleaded guilty and were sentenced to imprisonment for the offence.<sup>121</sup> Similar issues arise in other jurisdictions.
119. There is no uniform approach to fitness to plead as it relates to people with disability in Australia, and the effect of a finding of permanent unfitness to plead varies from jurisdiction to jurisdiction.<sup>122</sup> The considerable variation between jurisdictions has been noted as a point of concern by the CRPD Committee, which proposed the development of a nationally consistent disability justice plan to ensure that people with disability receive the same support across every jurisdiction.<sup>123</sup>
120. The ALRC has recommended that all state and territory governments provide for limits on the period of detention without conviction that may be imposed and ensure that detention orders are subject to regular periodic review.<sup>124</sup> Such limits should be set by reference to the period of imprisonment likely to have been imposed if the person had been convicted of the offence.<sup>125</sup> Legislation in the ACT,<sup>126</sup> NSW<sup>127</sup> and SA<sup>128</sup> provides that where a person is found unfit to plead and there is a finding of guilt, the court may impose a limiting term representing the time the person must spend in forensic custody. The limiting term generally mirrors the sentence a court would have imposed for the offending conduct.<sup>129</sup> Similarly, the *Crimes Act 1914* (Cth) provides for a maximum limit on detention.<sup>130</sup> The Commission endorses the ALRC's recommendation and calls for its implementation across jurisdictions.
121. Declarations of unfitness to stand trial effectively prevent people with disability from accessing protection or justice from the courts on the same footing as others without a disability.<sup>131</sup> There are no special procedures for children.<sup>132</sup> Children with FASD<sup>133</sup> and those with intellectual<sup>134</sup> or psychosocial disabilities<sup>135</sup> are at particular risk of being held in indefinite detention and are generally overrepresented in the juvenile justice system.
122. The Commission remains concerned by the existence of legislation, policies and practices in several jurisdictions that can lead to the indefinite detention of unconvicted people with disability. The Government is yet to respond to the *Senate Community Affairs References Committee's report Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia*.



123. The Commission welcomes the endorsement in August 2019 of the *National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty By Reason of Cognitive or Mental Health Impairment* (National Statement) by Australian states and territories, with the exception of South Australia. However, the Commission is concerned that the National Statement has not yet been implemented in state and territory legislation, policies and procedures.<sup>136</sup>

124. In the CRPD Committee's Concluding Observations on the combined second and third periodic reports of Australia in October 2019 (2019 Concluding Observations), the Committee expressed serious concern in relation to Australian legislative frameworks, policies and practices that result in the arbitrary and indefinite detention of people with disability.<sup>137</sup> Further, the Committee urged Australia to stop committing people with disability, in particular people with intellectual or psychosocial disability, to custody for indefinite terms.<sup>138</sup> The Commission encourages the Government to implement this recommendation as a priority.

125. In the absence of more appropriate support services,<sup>139</sup> people with disability who are found unfit to plead may be detained indefinitely in prison.<sup>140</sup> Prisons are generally ill-equipped to accommodate people with disability, particularly those who have complex or intensive support needs.<sup>141</sup>

126. Concerningly, knowledge of the risk of indefinite detention among defendants and legal representatives appears to have led some people with disability to plead guilty to crimes they have not committed so as to avoid being detained for an indefinite period.<sup>142</sup> There is at least anecdotal evidence of this practice occurring in the Northern Territory,<sup>143</sup> Western Australia<sup>144</sup> and Queensland.<sup>145</sup> To some extent this is not surprising, given the many examples of cases where the time spent in detention by someone deemed unfit to plead is more than double that of a custodial sentence.<sup>146</sup>

**127. Recommendation 9: The Australian Government work with state and territory governments to implement the recommendations of the Senate Community Affairs References Committee in the Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia.**

**128. Recommendation 10: The Australian Government work with state and territory governments to implement initiatives aimed at ending the indefinite detention of people with disability deemed unfit to plead, including:**

**(a) stopping the incarceration of people with disability in custody for indefinite terms or for terms longer than those imposed in criminal convictions for the relevant offences**

**(b) providing for time limitations on all liberty-restricting orders imposed on people deemed unfit to plead and creating a body to regularly review the position of all people detained under such orders.**

**129. Recommendation 11: The Australian Government work with state and territory governments to develop, in consultation with people with disability, nationally consistent disability justice plans to ensure that people with disability are supported in accessing the same legal protections and redress as the rest of the community.**

## **5.5 The use of seclusion and restraint on people with disability in detention**

130. This section addresses the use of restrictive practices on people with disability in detention and considers appropriate mechanisms to preventing such practices. This discussion will address the Issues Paper at large and, more specifically, will seek to answer questions 2A, 7A, 8A and 8B.<sup>147</sup>

131. ‘Restrictive practices’ are understood as any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability. These primarily include restraint (chemical, mechanical, social or physical) and seclusion.<sup>148</sup> The ALRC noted that:

while restrictive practices are used in circumstances to protect from harm the person with disability or others around them, there are concerns that such practices can also be imposed as a ‘means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support’.<sup>149</sup>

132. In the prison context, ‘seclusion’ primarily refers to the use of solitary confinement, meaning the ‘confinement of prisoners for 22 hours or more a day without meaningful human contact’.<sup>150</sup> Solitary confinement may be used for the punishment, protection, management or treatment of prisoners. Any prisoner may be held in solitary confinement, but research has shown that prisoners with psychosocial or cognitive disabilities are disproportionately overrepresented in solitary confinement regimes.<sup>151</sup>

133. In many cases, solitary confinement is used because prison staff are ill-equipped to deal with the behaviours of people with disability. Rather than provide the necessary support or treatment, it is often easier for the person with a disability to be separated from the other prisoners and confined.<sup>152</sup>

134. The psychological trauma and harm caused by solitary confinement is well documented.<sup>153</sup> According to the United Nations Special Rapporteur on torture, the imposition of solitary confinement ‘of any duration, on persons with mental disabilities is

cruel, inhuman or degrading treatment'.<sup>154</sup> Similarly, the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated that solitary confinement of any person 'may amount to an act of torture' and 'should not be used in the case of ... the mentally disabled'.<sup>155</sup>

135. The CRPD Committee has expressed serious concern about the use of prolonged solitary confinement, particularly of people with intellectual or psychosocial disability, in Australian prisons and the lack of safe channels for making complaints.<sup>156</sup> The limited channels available to people with disability to make a complaint is a significant barrier to the identification and disclosure of violence, abuse, neglect or exploitation.<sup>157</sup> The CRPD Committee recommended the prohibition of solitary confinement for people with disability.<sup>158</sup> The Commission endorses this recommendation and calls for concerted efforts to ensure its implementation across Australia.

136. People with disability are also commonly subjected to other restrictive practices in detention, including physical restraint and forced medical sedation.<sup>159</sup> The Commission's research has found that prisoners with disability have been subjected to a range of harmful practices, including being physically shackled and medically restrained.<sup>160</sup>

137. The use of restrictive practices that are inherently degrading or painful is prohibited under rule 47 of the Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules').<sup>161</sup> Further, the use of any restrictive practice must be 'the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed'.<sup>162</sup> According to the *Guidance Document on the Nelson Mandela Rules* published by the Organization for Security and Co-operation in Europe, the practices prohibited by rule 47 include the use of chains, weighted leg irons, cage or net beds, shackle beds, shackle boards and restraint chairs (with an exception for chairs only fitted with straps or belts).<sup>163</sup>

138. Australian Government guidelines on best practice for corrections require restrictions to be 'the minimum required to maintain safety, security and good order, alongside their human rights'.<sup>164</sup> However, research suggests that these guidelines are not being implemented effectively.<sup>165</sup>

139. The CRPD Committee expressed serious concern about Australian laws, policies and practices that permit the use of psychotropic medications, physical restraints and seclusion and the use of restrictive practices on people with disability, including children, in any setting, including in justice facilities.<sup>166</sup> The CRPD Committee recommended that

Australia establish a nationally consistent legislative and administrative framework for the protection of all people with disability, including children, from such practices.<sup>167</sup>

140. As noted above, with the ratification of OPCAT in 2017, the Australian Government committed to establishing a system of oversight for all places of detention. OPCAT aims to *prevent* ill treatment from occurring in places where people are deprived of their liberty, by establishing a system of unfettered inspections by a network of National Preventive Mechanisms (NPMs) in the federal, state and territory jurisdictions.
141. If implemented effectively, OPCAT will provide an integral oversight mechanism to better identify how practices such as seclusion and restraint are used in respect of people with disability in criminal justice settings, with a view to avoiding the unnecessary and harmful use of such practices. OPCAT creates a preventative, rather than a complaints-based, system of oversight. However, by identifying problematic practices, OPCAT can reduce the resultant risk of violence, abuse, neglect or exploitation.<sup>168</sup> This kind of progress has been made in other jurisdictions that have implemented OPCAT. In New Zealand, for example, the NPM partners identified problematic practices of seclusion and restraint through their OPCAT inspections and then made recommendations that have led to more effective management of these practices.<sup>169</sup>
142. Precisely how OPCAT will be implemented in Australia is still being determined at the federal, state and territory levels. Through its consultations to support OPCAT implementation, the Commission heard from a number of experts and civil society organisations, including those representing people with disability, as to how Australia should fulfil its treaty obligations to better protect people with disability in places of detention.
143. Throughout the consultations, and across different sectors, seclusion and restraint practices were identified as an issue of immediate concern for people with disability in custody. Stakeholders were supportive of the Australian Government ratifying OPCAT and viewed it as an opportunity to better protect human rights in places of detention. Stakeholders made a number of pertinent recommendations, such as ensuring that NPM inspection teams be equipped with relevant expertise of the particular issues people with disability face when deprived of their liberty. Stakeholders also advocated for people with disability to be meaningfully involved in the inspection process and for all NPM and inspection processes to be 'disability aware'.<sup>170</sup>
- 144. Recommendation 12: The Australian Government work with state and territory governments to amend laws, policies and guidelines to prohibit the use of solitary confinement for people with disability in detention.**

**145. Recommendation 13: The Australian Government work with state and territory governments to develop a national framework to monitor and regulate the use of restrictive practices on people with disability in places of detention.**

**146. Recommendation 14: The Australian Government work with state and territory governments to implement OPCAT as a matter of urgency.**

## **5.6 Fetal Alcohol Spectrum Disorder and other commonly undiagnosed disabilities**

147. Fetal Alcohol Spectrum Disorder (FASD) is a set of disorders that may occur when a mother consumes harmful quantities of alcohol at crucial points during pregnancy, potentially resulting in a range of impairments, including brain injury, birth defects and behavioural and mental health issues.

148. It is generally accepted that there is a high prevalence of FASD in people detained in the Australian criminal justice system, despite the sparsity of relevant data on the topic.<sup>171</sup> By way of illustration, a study in Western Australia found that in the Banksia Hill youth detention facility, 89% of inmates had at least one form of severe neurodevelopmental impairment and 36% had FASD.<sup>172</sup>

149. Long-term outcomes for children with FASD are poor. Overseas research suggests that 90% will have mental health problems, 80% will remain unemployed and less than 10% will be able to work independently by the age of 21.<sup>173</sup> Most relevantly, research suggests that 60% of children with FASD will come into aggravated contact with the law.<sup>174</sup>

150. Despite falling within the definition of ‘disability’ for the purposes of the *Disability Discrimination Act 1993* (Cth) and the Australian Bureau of Statistics,<sup>175</sup> as well as within the definition of ‘developmental delay’ for the purposes of the *National Disability Insurance Act 2013* (Cth),<sup>176</sup> FASD is not included on the Australian Government’s list of recognised disabilities.<sup>177</sup> Comprehensive clinical diagnosis of FASD is often difficult, and many individuals remain undiagnosed.<sup>178</sup>

151. People with FASD may be more susceptible to involvement in the criminal justice system because they may:

- be persuaded to admit to crimes which they did not commit
- take responsibility for crimes committed by others in order to win their favour or to please the police

- not understand that some behaviours are wrong
- say they understand their legal rights when in fact they do not
- make a potentially incriminating statement
- panic during encounters with police, running away or resisting arrest
- not understand what it means to be a victim or the importance of testifying.<sup>179</sup>

152. Other commonly undiagnosed disabilities are borderline intellectual disability and acquired brain injury (ABI), which are estimated to affect 25–30%<sup>180</sup> and 40–90%<sup>181</sup> of Australian prisoners respectively.

153. Improvements in the diagnosis of disability, including FASD, would help to ensure that people with disability are diverted from the criminal justice system to appropriate community-based services at an early stage.<sup>182</sup> Similarly, improvements in screening for disability upon entry into detention would enhance the understanding among prison staff of a person’s disability, their behaviours and the supports they may need whilst in the facility.<sup>183</sup>

**154. Recommendation 15: The Australian Government include Fetal Alcohol Spectrum Disorder (FASD) on the List of Recognised Disabilities.**

**155. Recommendation 16: The Australian Government work with state and territory governments to systematically screen children and young people upon entering detention for all types of disability, including FASD, and to encourage their diversion from a custodial setting to appropriate community-based services.**

## **5.7 People with disability as victims of crime**

156. This section discusses the barriers faced by people with disability who interact with the criminal justice system as victims of crime. This discussion will address the Issues Paper at large and, more specifically, will seek to answer questions 7A and 7B.<sup>184</sup>

### **5.7.1 Over-representation of people with disability as victims of crime**

157. There is a lack of disaggregated, reliable and consistent data on the victimisation of people with disability.<sup>185</sup> For this reason, it is difficult to determine the prevalence rates of crime against people with disability.

158. Research conducted by the Victorian Equal Opportunity & Human Rights Commission (VEOHRC) found that people with disability are not accessing the criminal

justice system as complainants at a rate comparable to people without disability.<sup>186</sup> This underrepresentation suggests that either:

- crimes against people with disability are not reported, or
- crimes against people with disability are reported but not pursued through the criminal justice system, or
- disability has not been identified in the victimisation data.<sup>187</sup>

159. Despite the limited data available, national research suggests that people with disability are at an increased risk of victimisation<sup>188</sup> and are significantly overrepresented as victims of crime.<sup>189</sup>

160. People with intellectual disability are ten times more likely to have experienced abuse,<sup>190</sup> and are three times more likely to experience physical assault, sexual assault and robbery than people without disability.<sup>191</sup> Further, research suggests that approximately 90% of Australian women with intellectual disability have experienced sexual abuse, of which 68% will experience that abuse before they reach 18 years of age, typically perpetrated by a carer.<sup>192</sup>

161. According to researchers at the University of New South Wales, Aboriginal and Torres Strait Islander people experience victimisation at a younger age than non-Indigenous people.<sup>193</sup> The factors leading to victimisation include not only a person's disability, but also the interacting and compounding factors of multiple disability and social disadvantage.<sup>194</sup>

162. Notwithstanding the statistics on victimisation, research suggests that a large proportion of crimes against people with disability go underreported.<sup>195</sup> Reasons for underreporting may include:

- police failure to take or pursue a report (see section 5.7.2 below)
- where the crime takes place in a closed setting and/or the victim relies on an offender to assist them in making a report (see section 5.7.3 below)
- where a person lacks information as to how, when and where to report (see section 5.7.4 below).

163. The systemic barriers that people with disability face in reporting instances of victimisation mean that access to justice is denied for some people very early on in the process.

### 5.7.2 The role of police

164. For some people with disability who have experienced violence, abuse, neglect or exploitation, police can represent a significant barrier to the reporting of a crime and/or the subsequent pursuit of a criminal charge.<sup>196</sup> This may occur where police:
- hold negative attitudes, assumptions and stereotypes of people with disability<sup>197</sup>
  - fail to identify disability<sup>198</sup>
  - fail to provide supports and make adjustments<sup>199</sup>
  - treat the violence, abuse, neglect or exploitation as a ‘service incident’.<sup>200</sup>
165. According to research conducted by the VEOHRC, stereotypical or discriminatory attitudes in the police force can prevent crimes from being reported.<sup>201</sup> Examples of negative and discriminatory attitudes in the police force can include: the perception of a person with disability as ‘childlike’<sup>202</sup> or ‘promiscuous’,<sup>203</sup> or the position that people with disability lack credibility or will be unable to cope with the investigation.<sup>204</sup>
166. In the Commission’s 2014 report, *Equal Before the Law: Towards Disability Justice Strategies*, it was noted that police experience difficulty in distinguishing between intellectual disability, psychosocial disability and acquired brain injury.<sup>205</sup> The failure to identify and distinguish between disabilities can result in a failure to provide appropriate supports and to make necessary adjustments.<sup>206</sup>
167. Research suggests that support persons are rarely provided for people with intellectual and psychosocial disabilities when seeking to make a report to police.<sup>207</sup> Of note, independent support person programs are not consistently provided throughout Australian states and territories. Where they are provided, for example in NSW (Justice Advocacy Service)<sup>208</sup> and Victoria (Independent Third Persons),<sup>209</sup> the programs are non-statutory.
168. In some instances, police may refuse to accept or take a report of violence and will instead treat the report of violence as a ‘service incident’.<sup>210</sup> This can occur where the violence occurs in an institutional or service setting. According to research conducted by the VEOHRC, some police officers will advise service providers to conduct an internal investigation prior to the pursuit of a criminal complaint.<sup>211</sup>

### 5.7.3 Underreporting in closed settings

169. Underreporting can also occur when violence, abuse, neglect or exploitation takes place in a closed or congregated setting. A closed or congregated setting may include, but is not limited to, Australian Disability Enterprises (ADE), mental health



facilities, supported group accommodation, educational settings, hospitals or correctional facilities.<sup>212</sup>

170. In closed settings, people with disability have limited access to means of reporting violence.<sup>213</sup> In turn, people with disability may be reliant on carers or staff to assist them in making a report to police.<sup>214</sup> Similar issues can arise where the violence, abuse, neglect or exploitation is perpetrated by a family member.<sup>215</sup>
171. Fear of retribution in the service setting can prevent people with disability from reporting instances of violence, abuse, neglect or exploitation.<sup>216</sup> Studies suggest that the fear of losing supports or housing can dissuade or prevent people with disability from making a report.<sup>217</sup>
172. Where violence does occur in closed settings, research from the VEOHRC suggests that service staff may justify the violence as a function of ‘behaviour management’.<sup>218</sup> Workforce issues such as understaffing, a casualised workforce, minimal training and knowledge of human rights can all contribute to a failure to identify and report abuse.<sup>219</sup>
173. In the 2015 Commonwealth Community Affairs References Committee Senate Report, the Committee recommended that the Australian Government ‘establish a scheme to ensure national consistency in disability worker training, to include... mandatory rights based training to develop core competency skills in recognising and reporting violence, abuse and neglect of people with disability’.<sup>220</sup> While the Commission welcomes the introduction of the *NDIS Quality and Safeguards Framework*,<sup>221</sup> it notes that this recommendation has not been fully implemented.
174. The Australian Government’s strategy to support the development of the NDIS market and workforce was released in 2019.<sup>222</sup> Despite a focus on developing workforce capability, the strategy does not mention mandatory rights based training to develop skills in recognising and reporting violence, abuse and neglect of people with disability.
175. Underreporting can also occur where the service provider fails to report inappropriate or unauthorised use of restrictive practices.<sup>223</sup> Although people with disability are able to approach the NDIS Quality and Safeguards Commissioner directly with a complaint, this overlooks the substantial barriers that people with disability face in knowing where, when and how to report.<sup>224</sup>
176. As research highlights, where a report is made to the NDIS Quality and Safeguards Commission, the *NDIS Quality and Safeguards Framework* provides no clear requirement to ensure criminal justice intervention.<sup>225</sup> Similarly, the *National Disability*

*Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* provide no pathway to ensuring criminal justice intervention where a report of violence, abuse, neglect or exploitation has been made.

177. Importantly, community visitor schemes (CVS) provide people with disability living in closed or service settings with an opportunity to report violence where they would otherwise not have done so. At present, these schemes operate across all Australian states and territories, except Western Australia and Tasmania.<sup>226</sup> The broad role and purpose is to visit people with disability, typically in closed settings, and determine if the person's human rights are being met.<sup>227</sup> Community visitors have a role in both responding to *and* preventing violence.<sup>228</sup>

178. In 2018, the Australian Government reviewed the role and purpose of CVS throughout Australia and released a report titled, the *Community Visitor Schemes Review*. The report recommended that CVS continue to be provided by states and territories, and that where possible, Western Australia and Tasmania should consider implementing a CVS.<sup>229</sup>

#### **5.7.4 Inadequate access to information and normalisation of abuse**

179. Lack of access to information can prevent people with disability from reporting instances of violence, abuse, neglect or exploitation.<sup>230</sup> As research suggests, some people with disability may not identify the harm that they are experiencing as abuse.<sup>231</sup> Where actions are frequently and routinely taken, particularly in the context of supported group accommodation, violence and abuse can become normalised.<sup>232</sup>

180. For example, state and territory legislation permits the use of restrictive practices such as seclusion and restraints (physical, chemical or mechanical) in certain limited circumstances.<sup>233</sup> Where such practices are unauthorised or misused, however, the conduct becomes a reportable incident to the NDIS Quality and Safeguards Commission and must, depending on the conduct, be reported to police.<sup>234</sup> The sanctioned use of restrictive practices in closed settings can make it difficult for people with disability to distinguish when a restrictive practice is no longer legally permissible and instead becomes a crime.<sup>235</sup>

181. In addition to the normalisation of violence, underreporting can occur where people with disability are not supported to build their capacity, knowledge, awareness and understanding of rights and the ways in which to report a crime.<sup>236</sup> As research suggests, people with disability may not be provided with information as to what constitutes abuse and when, where and how to report a crime.<sup>237</sup>

182. Research by the VEOHRC suggests that lack of access to information can present a significant barrier to people with disability reporting crime to the police.<sup>238</sup> As an example, people may not be aware of the phone number to call to make a report to the police.<sup>239</sup>
- 183. Recommendation 17: The Royal Commission explore the effectiveness of existing independent support person programs and consider their roll out throughout Australia.**
- 184. Recommendation 18: The Royal Commission inquire into the effectiveness of the current NDIS Quality and Safeguards Framework in ensuring a criminal justice pathway for reportable conduct.**
- 185. Recommendation 19: The Australian Government consider the rollout of mandatory rights-based training for disability support staff and other workers employed under and through the NDIS.**
- 186. Recommendation 20: The Australian Government continue to fund and support Community Visitor Schemes throughout Australian states and territories.**
- 187. Recommendation 21: The Royal Commission inquire further into the information, resources and supports available to people with disability, in all settings, to report crimes.**

## **6 Appendix A: Case studies**

### **6.1 Fitness to plead and indefinite detention**

188. There have been numerous instances of indefinite detention of people with disability in Australia in the past 20 years. It is important to note that indefinite detention is particularly prevalent among First Nations people with disability. This is reflective of the overrepresentation of both First Nations people and people with disability in custody. Illustrating this intersection, 73% of male First Nations prisoners and 86% of female First Nations prisoners have diagnosed mental health conditions.<sup>240</sup> As such, each of the case studies below concern First Nations people with disability.
189. Marlon Noble is a First Nations man with an intellectual disability who was charged with sexual offences against two girls under the age of 16 in October 2001.<sup>241</sup> Upon being deemed unfit to plead in January 2003, Mr. Noble was moved to a prison in regional Western Australia where he remained until January 2012. Mr. Noble's legal capacity was reviewed eight times in the ten years during which he was incarcerated, but

he was denied release each time owing to a lack of available community support services. Once released, Mr. Noble was subjected to a series of conditions that restricted, among other things, his ability to enter licensed premises, stay overnight away from his primary address and visit his mother's grave.<sup>242</sup>

190. Rosie Fulton is a First Nations woman with Fetal Alcohol Spectrum Disorder (FASD) who was arrested after crashing a stolen car in 2012. Deemed unfit to plead, Ms. Fulton was incarcerated without conviction for almost two years before being moved to a secure care facility in the Northern Territory in 2014.<sup>243</sup> Since returning to Alice Springs, Ms. Fulton has again been imprisoned, this time for assaulting a police officer and disorderly conduct in a police station. Ms. Fulton's recidivism is, according to her guardian, a result of the collapse of the support systems available to her.<sup>244</sup>

191. Christopher Leo is a First Nations man with an intellectual impairment arising from an acquired brain injury, epilepsy and mental illness. In 2007, Mr Leo was arrested and charged with common assault in a circumstance of aggravation following a confrontation with a Council support worker in the Northern Territory. Mr Leo was deemed unfit to be tried, and after a special hearing he was remanded in custody under a custodial supervision order. Despite this order being given a limiting period of twelve months, Mr Leo remained in prison for almost six years. During this time, he was held in maximum security and often isolated in his cell for extended periods.<sup>245</sup>

192. Manuway (Kerry) Doolan is a First Nations man with intellectual and psychosocial impairment who in 2008 was arrested and charged with common assault in a circumstance of aggravation and damage to property in a circumstance of aggravation. Deemed unfit to plead by the Supreme Court of the Northern Territory, a special hearing was held and Mr Doolan was subjected to a custodial supervision order, restricted to a period of twelve months. Contrary to this restriction, Mr Doolan was held in a high security prison for a total of four years and nine months, much of which was spent in isolation and with limited access to the support services required by virtue of his disability.<sup>246</sup>

## **6.2 The use of seclusion and restraint on people with disability in detention**

193. Dylan Voller is a First Nations man with an undiagnosed disability who was severely mistreated in a Northern Territory youth detention centre in 2016.<sup>247</sup> With a history of early trauma, significant behavioural issues and attendance at no less than five schools in three years, Mr Voller was quickly characterised as problematic, dangerous and disruptive.<sup>248</sup> During his time in prison, Mr Voller was restrained, hooded and held in

isolation for extended periods of time. In the years following his initial detention, Mr Voller was incarcerated on several further occasions.<sup>249</sup>

194. John Tjepkema has spent more than 20 years in prison since the 1970s. For most of that time, Mr Tjepkema has had an acquired brain injury (ABI) that has impacted upon his memory and ability to comply with instructions given in prison and on parole. When he sought assistance during his time in prison, Mr Tjepkema was instead held in a psychiatric unit for several months and administered antipsychotic drugs.<sup>250</sup>

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<sup>1</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Accessibility and Inclusion Strategy* (December 2019) <<https://disability.royalcommission.gov.au/about/Documents/accessibility-inclusion-strategy.pdf>>.

<sup>2</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *The Criminal Justice System Issues Paper* (January 2020) <<https://disability.royalcommission.gov.au/publications/Documents/criminal-justice-system-issues-paper.pdf>>.

<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) (CRPD).

<sup>4</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

<sup>5</sup> *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature on 4 February 2003, A/RES/57/199 (entered into force on 22 June 2006) (OPCAT). Australia signed OPCAT on 19 May 2009. On 9 February 2017, the Australian Government announced that it intended to ratify OPCAT, working closely with the states and territories on implementation: Commonwealth Attorney-General, 'Media Release - Improving oversight and conditions in detention', 9 February 2017 <<http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html>>.

<sup>6</sup> It is important to note, however, that Australia's domestic legal framework is not entirely harmonised with the relevant human rights instruments. See, e.g., CRPD Committee, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, CRPD/C/AUS/CO/2-3 (15 October 2019) [5(a)]: 'The Committee is concerned about...[t]he insufficient harmonization of the domestic legal framework with the Convention'.

<sup>7</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008).

<sup>8</sup> CRPD, above n 3, Preamble.

<sup>9</sup> *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>10</sup> OPCAT, above n 5.

<sup>11</sup> *Ibid* Preamble.

<sup>12</sup> *Ibid* Part IV 'National Preventive Mechanisms'.

<sup>13</sup> *Ibid* Part III 'Mandate of the Subcommittee on Prevention of Torture'.

<sup>14</sup> *Ibid* Article 1.

<sup>15</sup> *Ombudsman Regulations 2017* (Cth), Part IV.

<sup>16</sup> Legal and Constitutional Affairs Legislation Committee, Commonwealth Parliament, *Estimates*, 3 March 2020, 96.

- <sup>17</sup> For further details on the implementation process for OPCAT, see Australian Human Rights Commission *OPCAT in Australia: Consultation Paper, Stage 2* (July 2018) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2>>.
- <sup>18</sup> *Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016).
- <sup>19</sup> *Ibid* rr 25, 33, 46(2).
- <sup>20</sup> *Ibid* r 39(3).
- <sup>21</sup> *Ibid* r 45(2).
- <sup>22</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- <sup>23</sup> *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
- <sup>24</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
- <sup>25</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> Sess, 107<sup>th</sup> plenary mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295, Annex, (2 October 2007) 295.
- <sup>26</sup> *Disability Discrimination Act 1992* (Cth) (DDA) ss 23, 24, 29.
- <sup>27</sup> *Ibid* s 23.
- <sup>28</sup> *Ibid* s 24.
- <sup>29</sup> *Ibid* s 39.
- <sup>30</sup> *Ibid* s 29.
- <sup>31</sup> *Ibid* ss 5, 6.
- <sup>32</sup> *Ibid* ss 11, 29A.
- <sup>33</sup> *Ibid* s 131. It is important to note that the Australian Human Rights Commission does not have the power to conduct systemic litigation under the DDA. It is up to individual parties to apply to the Federal Court for a remedy in their particular case.
- <sup>34</sup> Council of Australian Governments, *National Disability Strategy 2010-2020* <[https://www.dss.gov.au/sites/default/files/documents/05\\_2012/national\\_disability\\_strategy\\_2010\\_2020.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf)>.
- <sup>35</sup> *Ibid* 10.
- <sup>36</sup> *Ibid* 36.
- <sup>37</sup> United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 1 (2014) on Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (19 May 2014) [1], [9], [14]-[15], [38].
- <sup>38</sup> Tina Minkowitz, *Legal Capacity as Right, Principle and Paradigm*, World Network of Users & Survivors of Psychiatry (2011).
- <sup>39</sup> Bernadette McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (Report, August 2017) 23.
- <sup>40</sup> CRPD Committee, *General Comment No. 1*, above n 37, [13].
- <sup>41</sup> *Ibid* [38].
- <sup>42</sup> *Ibid* [38].
- <sup>43</sup> *Ibid* [39].
- <sup>44</sup> *Ibid* [39].
- <sup>45</sup> *Ibid* [39].
- <sup>46</sup> *Ibid* [40].
- <sup>47</sup> Senate Community Affairs Committee, *'Indefinite detention of people with cognitive and psychiatric impairment in Australia'* (29 November 2016) [9.10] <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/IndefiniteDetention45/Report/c09](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/Report/c09)>.

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- <sup>48</sup> Frances Gibson, 'Article 13 of the Convention on the Rights of Persons with Disabilities – a right to legal aid?' (2010) 15(2) *Australian Journal of Human Rights* 123, 127.
- <sup>49</sup> *Ibid* 128. See also Bernadette McSherry et al, above n 39, 26-28.
- <sup>50</sup> Eilionóir Flynn, 'Article 13: Access to Justice' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disability: A Commentary* (2018) 400.
- <sup>51</sup> Arlene S. Kanter, *The Development of Disability Rights under International Law* (Routledge, 2015) 230.
- <sup>52</sup> Victoria Legal Aid, 'Article 13 – Access to Justice, *Convention on the Rights of Persons with Disabilities*', Submission to the Office of the High Commissioner for Human Rights, 10 May 2017, 9.
- <sup>53</sup> *Ibid* 8.
- <sup>54</sup> Michael Perlin and Eva Szeli, 'Article 14: Liberty and Security of the Person' in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disability: A Commentary* (2018) 402.
- <sup>55</sup> Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (Ad Hoc CRPD Committee), 5<sup>th</sup> sess (26 January 2005); Ad Hoc CRPD Committee, 5<sup>th</sup> sess (27 January 2005); Ad Hoc CRPD Committee, 7<sup>th</sup> sess (18 January 2006); Ad Hoc CRPD Committee, 7<sup>th</sup> sess (19 January 2006).
- <sup>56</sup> Ad Hoc CRPD Committee, 5<sup>th</sup> sess (26 January 2005).
- <sup>57</sup> UN GAOR, 72<sup>nd</sup> sess, 55<sup>th</sup> plen mtg, UN Doc A/72/55, Annex Guidelines on the right to liberty and security of persons with disabilities (September 2017) [7].
- <sup>58</sup> CRPD Committee, *General Comment No. 1*, above n 37, [40].
- <sup>59</sup> UN GAOR, above n 57.
- <sup>60</sup> *Ibid* [6].
- <sup>61</sup> *Ibid* [12].
- <sup>62</sup> *Ibid* [16].
- <sup>63</sup> *Ibid* [17].
- <sup>64</sup> OPCAT, above n 5, Preamble.
- <sup>65</sup> UN GAOR, above n 57, [21].
- <sup>66</sup> Issues Paper, above n 2, Questions 2A and 2B.
- <sup>67</sup> Australian Human Rights Commission, *Information concerning Australia's compliance with the Convention on the Rights of Persons with Disabilities* (25 Jul 2019), recommendation 64.
- <sup>68</sup> The Hon Stuart Robert MP, 'Data and Digital Council advances National Disability Data Asset and service delivery reform' (Media Release, 6 September 2019).
- <sup>69</sup> CRPD Committee, above n 6, [4(i)]
- <sup>70</sup> *Ibid* [25(f)].
- <sup>71</sup> *Ibid* [26(g)].
- <sup>72</sup> *Ibid* [28(d)].
- <sup>73</sup> Issues Paper, above n 2, Question 2A.
- <sup>74</sup> *Ibid* Question 2B.
- <sup>75</sup> *Ibid* Questions 2A, 2B and 3A.
- <sup>76</sup> Eileen Baldry, 'Disability at the margins: limits of the law', (2014) 23(3) *Griffith Law Review* 370; Australian Human Rights Commission, *Equal before the Law - Towards Disability Justice Strategies* (February 2014) <<https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>>; Law Council of Australia, 'The Justice Project Final Report - Part 1 - People with Disability' (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>; Human Rights Watch, "'I Needed Help, Instead I Was Punished' - Abuse and Neglect of Prisoners with Disabilities in Australia' (Report 6 February 2018) <[https://www.hrw.org/sites/default/files/report\\_pdf/australia0218\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf)>; Bernadette McSherry et al, above n 39, 13-14.
- <sup>77</sup> Australian Institute of Health and Welfare (AIHW), *The health of Australia's prisoners 2018* (2019), 77-78.
- <sup>78</sup> *Ibid* 81.
- <sup>79</sup> *Ibid* 81.

- <sup>80</sup> Law Council of Australia, above n 76.
- <sup>81</sup> Australian Law Reform Commission, 'Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (ALRC Report 133, 28 March 2018) 66 <<https://www.alrc.gov.au/publications/indigenous-incarceration-report133>>; Carol Bower et al, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia' (2018) 8(2) *BMJ* <<http://dx.doi.org/10.1136/bmjopen-2017-019605>>.
- <sup>82</sup> Justice Health & Forensic Mental Health Network, Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report* (November 2017) 65.
- <sup>83</sup> Ibid 65. The introduction to the report (p.1) states: 'In accordance with NSW Health Guidelines, the term "Aboriginal" is used in this report in preference to "Aboriginal and Torres Strait Islander" in recognition that Aboriginal people are the original inhabitants of NSW.'
- <sup>84</sup> Ibid 81; Dianna T. Kenny and Paul K. Nelson, *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs* (2008) 6.3; Leigh Haysom et al, 'Intellectual disability in young people in custody in New South Wales, Australia – prevalence and markers' (2014) 58(11) *Journal of Intellectual Disability Research* 1004, 1010.
- <sup>85</sup> Stephane Shepherd, James Ogloff, Yin Paradies and Jeffrey Pfeifer, 'Aboriginal prisoners with cognitive impairment: Is this the highest risk group?' (2017) 536 *Trends & Issues in Crime and Criminal Justice* 1, Australian Institute of Criminology <<https://aic.gov.au/publications/tandi/tandi536>>, 8.
- <sup>86</sup> Ibid 8.
- <sup>87</sup> Australian Human Rights Commission, above n 76, 2.
- <sup>88</sup> Ibid 8, 20 and 29.
- <sup>89</sup> Issues Paper, above n 2, Question 3A.
- <sup>90</sup> Aboriginal Disability Justice Campaign, Submission No 76 to Senate Community Affairs Committee, Indefinite detention of people with cognitive and psychiatric impairment in Australia (29 November 2016) 3.
- <sup>91</sup> Shasta Holland and Peter Persson, 'Intellectual disability in the Victorian prison system: characteristics of prisoners with an intellectual disability released from prison in 2003-2006' (2011) 17(1) *Psychology, Crime & Law* 25, 34.
- <sup>92</sup> Vivienne Riches, Trevor Parmenter, Michele Wiese and Roger Stancliffe, 'Intellectual disability and mental illness in the NSW criminal justice system' (2006) 29(5) *International Journal of Law and Psychiatry* 386, 389. See also Judith Cockram, 'People With an Intellectual Disability in the Prisons' (2005) 12(1) *Psychiatry, Psychology and Law* 163-173, 167; Judith Cockram, 'Careers of offenders with an intellectual disability: the probabilities of rearrest' (2005) 49(7) *Journal of Intellectual Disability Research* 525, 533.
- <sup>93</sup> Issues Paper, above n 2, Question 2B.
- <sup>94</sup> Ruth McCausland and Eileen Baldry, "I feel like I failed him by ringing the police': Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 302; Eileen Baldry, Damon B. Briggs, Barry Goldson and Sophie Russell, "Cruel and unusual punishment': an inter-jurisdictional study of the criminalisation of young people with complex support needs' (2018) 21(5) *Journal of Youth Studies* 636, 641-642; see also Lily Nothling, 'Teenage girl with cerebral palsy tasered by police at Townsville school', *ABC News* (online, 28 February 2020) <<https://www.abc.net.au/news/2020-02-28/teenage-girl-with-cerebral-palsy-tasered-by-police-in-townsville/12008684>>.
- <sup>95</sup> McCausland and Baldry, above n 94, 302; Baldry, Briggs, Goldson and Russell, above n 94, 641-642; see also Lily Nothling, 'Teenage girl with cerebral palsy tasered by police at Townsville school', *ABC News* (online, 28 February 2020) <<https://www.abc.net.au/news/2020-02-28/teenage-girl-with-cerebral-palsy-tasered-by-police-in-townsville/12008684>>.
- <sup>96</sup> Baldry, Briggs, Goldson and Russell, above n 94, 642.
- <sup>97</sup> New South Wales Police Force, *NSW Police Force 2018-19 Annual Report* (31 October 2019) 92; Victoria Police, *Accessibility Inclusion Strategy and Action Plan 2018-2021* (October 2018) 10; Queensland Police, *Disability Service Plan Progress Report – 1 July 2018 to 30 June 2019 (Year 2)* (2018) 1; South Australia Police, *South Australia Police Disability Access and Inclusion Plan 2017-2020* (July 2017) 7; Western Australia Police Force, *Western Australia Police Force Disability Access and Inclusion Plan 2018-2022* (2018) 5; Tasmanian



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Government Department of Communities, Sport and Recreation and the Tasmanian Government Department of Premier and Cabinet, *'Accessible Island: Tasmania's Disability Framework for Action 2018-2021'* (January 2018) 16.

<sup>98</sup> Shepherd, Ogloff, Paradies and Pfeifer, above n 85, 9.

<sup>99</sup> See, e.g., Victoria Legal Aid, 'Hope for Francis but NDIS system gaps remain' (23 November 2017) <<https://www.legalaid.vic.gov.au/about-us/news/hope-for-francis-but-ndis-system-gaps-remain>>.

<sup>100</sup> Meeting of the COAG Disability Reform Council, Sydney – 9 October 2019, *Communiqué* <[https://www.dss.gov.au/sites/default/files/documents/10\\_2019/communique-drc-9-october\\_2019.pdf](https://www.dss.gov.au/sites/default/files/documents/10_2019/communique-drc-9-october_2019.pdf)>.

<sup>101</sup> Issues Paper, above n 2, Questions 3A and 7A.

<sup>102</sup> CRPD, above n 3, art 12.

<sup>103</sup> *Ibid* art 12[1], [4].

<sup>104</sup> *Ibid* art 12[4].

<sup>105</sup> *Ibid* art 12[5].

<sup>106</sup> Nina A. Kohn, Jeremy A. Blumenthal and Amy T. Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship?' (2012) 117(4) *Penn State Law Review* 1111, 1127, 1142. See also Renata Kokanovic et al, *Options for Supported Decision-Making to Enhance the Recovery of People Experiencing Severe Mental Health Problems* (Report, August 2017).

<sup>107</sup> Margaret Wallace, *Evaluation of the Supported Decision Making Project* (Report, November 2012) 4-5; Christiane Purcal, Trish Hill, Kelley Johnson and Rosemary Kayess, *Evaluation of the Supported Decision Making Phase 2 (SDM2) project: Final report* (Report, May 2017) 27.

<sup>108</sup> United Nations Ad Hoc Committee on a Comprehensive and Integral Convention on the Rights and Dignity of Persons with Disabilities, *General Comment on Article 12* (2009) [7].

<sup>109</sup> Kanter, above n 51, 236.

<sup>110</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 63-86.

<sup>111</sup> *Ibid* 64.

<sup>112</sup> CRPD Committee, *Concluding Observations*, above n 6, [23].

<sup>113</sup> *Ibid* [24(b)].

<sup>114</sup> *Ibid* [25(e)].

<sup>115</sup> *Ibid* [26(e)].

<sup>116</sup> Issues Paper, above n 2, Question 3A.

<sup>117</sup> *Ibid* Question 7A.

<sup>118</sup> *Ibid* Questions 2A and 3A.

<sup>119</sup> Australian Human Rights Commission, 'Information for List of Issues Prior to Reporting - Australia' (June 2017) [33]-[34] <[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1342&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1342&Lang=en)>; Australian Human Rights Commission, 'Information Relating to Australia's Joint Fifth and Sixth Report under the Convention on the Rights of the Child, Second Report on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and Second Report on the Optional Protocol on the Involvement of Children in Armed Conflict' (1 November 2018) [354] <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>>; Australian Law Reform Commission, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (Discussion Paper 84)' (July 2017) <[https://www.alrc.gov.au/publications/indefinite-detention-when-unfit-stand-trial#\\_ftn86](https://www.alrc.gov.au/publications/indefinite-detention-when-unfit-stand-trial#_ftn86)>; Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' 40 *Melbourne University Law Review* 816.

<sup>120</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19; Australian Institute of Criminology, *Diversionary Pathways for Aboriginal Youth with Fetal Alcohol Spectrum Disorder* (28 August 2018) Australian Institute of Criminology 5 <<https://aic.gov.au/publications/tandi/tandi557>>.

<sup>121</sup> Gooding et al, above n 119.

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- <sup>122</sup> *Crimes Act 1914* (Cth) ss 20B, 20BC; *Crimes Act 1900* (ACT) ss 311, 315C, 316, 318-319; *Mental Health Act 2015* (ACT) s 117; *Mental Health (Forensic Provisions) Act 1990* (NSW) ss 14, 16, 19-24, 27; *Criminal Code Act 1983* (NT) ss 43J, 43R, 43X, div 4; *Mental Health Act 2016* (Qld) ss 118, 122, pt 4 divs 2-3; *Criminal Law Consolidation Act 1935* (SA) ss 269H, 269M, 269O; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 14-18; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 6, 18, pts 3, 5; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 12, 19. See also Bernadette McSherry et al, above n 39, 19-21.
- <sup>123</sup> CRPD Committee, *Concluding Observations*, above n 6, [26(b)].
- <sup>124</sup> Australian Law Reform Commission, above n 110, 206-210.
- <sup>125</sup> *Ibid* 210.
- <sup>126</sup> *Crimes Act 1900* (ACT) s 301.
- <sup>127</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b).
- <sup>128</sup> *Criminal Law Consolidation Act 1935* (SA) s 269O(2).
- <sup>129</sup> *Crimes Act 1900* (ACT) s 301, *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b), *Criminal Law Consolidation Act 1935* (SA) s 269O(2).
- <sup>130</sup> The period of detention must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged. See; *Crimes Act 1914* (Cth) s 20BC(2)(b).
- <sup>131</sup> Issues Paper, above n 2, Question 3A.
- <sup>132</sup> Australian Institute of Criminology, above n 120, 5.
- <sup>133</sup> House of Representatives, Standing Committee on Indigenous Affairs, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (June 2015)  
<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Indigenous\\_Affairs/Alcohol/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/Alcohol/Report)>.
- <sup>134</sup> Chris Cunneen et al, 'Juvenile Justice, Young People and Human Rights in Australia', *Current Issues in Criminal Justice* (2016) 28(2) 173, 176.
- <sup>135</sup> *Ibid* 176.
- <sup>136</sup> Australian Civil Society CRPD Shadow Report Working Group, 'Disability Rights Now 2019', Submission to the UN CRPD Committee in response to the List of issues prior to the submission of the combined second and third periodic reports of Australia, 26 July 2019, para 16(a).
- <sup>137</sup> CRPD Committee, *Concluding Observations*, above n 6, [27(a)].
- <sup>138</sup> *Ibid* [28(c)].
- <sup>139</sup> Senate Community Affairs Committee, above n 47, [4.6]; Criminal Lawyers Association of the Northern Territory, Submission No 18 to Senate Community Affairs Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (29 November 2016) 3.
- <sup>140</sup> Issues Paper, above n 2, Question 2A.
- <sup>141</sup> Aboriginal Disability Justice Campaign, above n 90, 4.
- <sup>142</sup> Senate Community Affairs Committee, above n 47, [3.26].
- <sup>143</sup> *Ibid* [3.26].
- <sup>144</sup> *Ibid* [3.27].
- <sup>145</sup> *Ibid* [3.28].
- <sup>146</sup> Office of the Public Advocate (Qld), Submission No 36 to Senate Community Affairs Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (29 November 2016) 13-14.
- <sup>147</sup> Issues Paper, above n 2, Questions 2A, 7A, 8A and 8B.
- <sup>148</sup> Australian Law Reform Commission, above n 110, [8.5].
- <sup>149</sup> *Ibid* [8.11].
- <sup>150</sup> *Standard Minimum Rules for the Treatment of Prisoners*, above n 18, r 44.
- <sup>151</sup> Human Rights Watch, above n 76, 42.
- <sup>152</sup> Senate Community Affairs Committee, above n 47, [4.12].
- <sup>153</sup> Human Rights Watch, above n 76, 42; Jules Lobel and Huda Akil, 'Law & Neuroscience: The Case of Solitary Confinement' (2018) 147(4) *Daedalus, the Journal of the American Academy of Arts and Sciences* 61, 65; Sadie Dingfelder, 'Psychologist testifies on the risks of solitary confinement' (2012) 433(9) *Monitor on Psychology*

- 10; Peter Scharff Smith, 'The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature' (2006) 34(1) *Crime and Justice* 441.
- <sup>154</sup> UN General Assembly, 66<sup>th</sup> sess, 268<sup>th</sup> plen mtg, UN Doc No. A/66/268 (5 August 2011), [77]-[78].
- <sup>155</sup> *Ibid* [32].
- <sup>156</sup> CRPD Committee, *Concluding Observations*, above n 6, [29(b)].
- <sup>157</sup> Issues Paper, above n 2, Question 7A.
- <sup>158</sup> CRPD Committee, *Concluding Observations*, above n 6, [30(b)].
- <sup>159</sup> Aboriginal Disability Justice Campaign, Submission No 159 to Senate Standing Committees on Community Affairs, Parliament Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (25 November 2015) 6.
- <sup>160</sup> Australian Human Rights Commission, above n 76, 29-30.
- <sup>161</sup> *Standard Minimum Rules for the Treatment of Prisoners*, above n 18, r 47.
- <sup>162</sup> *Ibid* r 48.
- <sup>163</sup> OSCE Office for Democratic Institutions and Human Rights and Penal Reform International, *Guidance Document on the Nelson Mandela Rules: Implementing the United Nations Revised Standard Minimum Rules for the Treatment of Prisoners* (Report, August 2018) pp 81-82.
- <sup>164</sup> Government of Australia, *Guiding Principles for Corrections in Australia* (2018) 15.
- <sup>165</sup> Human Rights Watch, above n 76, 33-34; Australian Law Reform Commission, above n 110, 245-246; Aboriginal Disability Justice Campaign, above n 159, 1-6.
- <sup>166</sup> CRPD Committee, *Concluding Observations*, above n 6, [29(a)].
- <sup>167</sup> *Ibid* [30(a)].
- <sup>168</sup> Issues Paper, above n 2, Questions 8A and 8B.
- <sup>169</sup> See Michael White 'The role and scope of OPCAT in protecting those deprived of liberty: A critical analysis of the New Zealand experience' *Australian Journal of Human Rights* (Vol 25, 2019), 44.
- <sup>170</sup> The Commission is due to publish its Final Report on OPCAT implementation in the first half of 2020. For further information, see Australian Human Rights Commission *OPCAT in Australia Consultation Page* (Web Page), <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/opcat-consultation-page>>.
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- <sup>172</sup> Carol Bower et al, above n 81.
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- <sup>175</sup> *Disability Discrimination Act 1995* (Cth) s 4; Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia Summary of Findings 2018* (2019).
- <sup>176</sup> *National Disability Insurance Act 2013* (Cth) s 9.
- <sup>177</sup> Department of Social Services, *Guide to the List of Recognised Disabilities* (2014) <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/benefits-payments/carers-allowance/guide-to-the-list-of-recognised-disabilities>>.
- <sup>178</sup> Australian Institute of Health and Welfare and Closing the Gap Clearinghouse, *Fetal alcohol spectrum disorders: a review of interventions for prevention and management in indigenous communities* (Resource Sheet No. 36, February 2015) <<https://www.aihw.gov.au/getmedia/778f54f3-5618-428f-a094-40c347ed3c7f/ctgc-rs36.pdf.aspx?inline=true>>.
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- <sup>184</sup> Issues Paper, above n 2, Questions 7A and 7B.
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- <sup>203</sup> Ellen Frances Fraser-Barbour, Ruth Crocker and Ruth Walker, 'Barriers and facilitators in supporting people with intellectual disability to report sexual violence: Perspectives of Australian disability and mainstream support providers', (2017) 20(1) *The Journal of Adult Protection* 5, 7.
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- <sup>223</sup> Cadwallader, Spivakovsky, Steele and Wadiwel, above n 212, 265; Issues Paper, above n 2, Questions 7A and 7B.
- <sup>224</sup> Cadwallader, Spivakovsky, Steele and Wadiwel, above n 212, 265.
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- <sup>232</sup> Victorian Equal Opportunity & Human Rights Commission, above n 185, 13.
- <sup>233</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 73Z(4)(f).
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<sup>235</sup> Cadwallader, Spivakovsky, Steele and Wadiwel, above n 212, 260.

<sup>236</sup> Issues Paper, above n 2, Question 7A.

<sup>237</sup> Australia's National Research Organisation for Women's Safety (ANROWS), above n 210, 31.

<sup>238</sup> Victorian Equal Opportunity & Human Rights Commission, above n 185, 34.

<sup>239</sup> *Ibid* 34.

<sup>240</sup> PwC's Indigenous Consulting, 'Indigenous incarcerations: Unlock the facts' (May 2017) 23  
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<sup>241</sup> These charges were later dropped by the WA Director of Public Prosecutions owing to insufficient evidence and low prospects of conviction.

<sup>242</sup> CRPD Committee, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012*, CRPD/C/16/D/7/2012 (10 October 2016).

<sup>243</sup> John Stewart, 'Intellectually impaired Aboriginal woman Rosie Fulton to be freed after 21 months in jail with no conviction', *ABC News* (online at 26 June 2014) <<https://www.abc.net.au/news/2014-06-25/aboriginal-woman-in-jail-without-conviction-to-be-freed/5550790>>; Australian Human Rights Commission, 'Jailed without conviction: Rosie Fulton leaves WA prison' (Media Release, 26 June 2014) <<https://www.humanrights.gov.au/about/news/jailed-without-conviction-rosie-fulton-leaves-wa-prison>>.

<sup>244</sup> Tom Maddocks, 'Rosie Anne Fulton: System has 'failed' intellectually impaired NT woman', *ABC News* (online at 1 July 2016) <<https://www.abc.net.au/news/2016-07-01/carer-says-system-has-failed-rosie-fulton/7560532>>.

<sup>245</sup> CRPD Committee, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 17/2013*, CRPD/C/22/D/17/2013 (30 August 2019).

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<sup>247</sup> 'Dylan Voller's Troubled Past', 7:30 (ABC, 2016).

<sup>248</sup> *Ibid*.

<sup>249</sup> *Ibid*; McCausland and Baldry, above n 94, 291.

<sup>250</sup> Norman Hermant, 'Why many Australians with brain injuries find themselves in the 'revolving door' of prison', *ABC News* (online, 7 February 2020) <<https://www.abc.net.au/news/2020-02-07/life-in-prison-with-an-acquired-brain-injury/11903224>>.