



Public hearing 11 – Recommendations arising from past inquiries

Overview

This document provides an overview of key recommendations arising from past reports and inquiries that relate to Public Hearing 11 of the Royal Commission. Public Hearing 11 will inquire into:

- aspects of long term and indefinite incarceration of people with cognitive impairment under forensic custody orders;
- how the criminal justice system can, and sometimes does, criminalise disability;
- factors which can contribute to people with cognitive impairment coming into contact with the criminal justice system, and to then cycling in and out of the system;
- the overrepresentation of First Nations people with cognitive impairment within the criminal justice system;
- the impact that appropriate diversion from the criminal justice system; and
- the provision of supports to people with disability, can have in reducing contact with the criminal justice system and in moving away from criminalisation of disability.

The key recommendations identified below come from past reports, across all Australian jurisdictions.

Summary of key recommendations

The following section provides an overview of some of the key recurring recommendations from past reports and inquiries made to respond to what the authors of those past reports considered to be the systemic failures that people with disability experience in the criminal justice system.

Principle of least restriction

Reports recommended that governments ensure that people with cognitive impairment who have not been convicted of an offence are detained as a measure of last resort, for the shortest appropriate period of time, and in the least restrictive appropriate environment. If there is a less restrictive alternative that would achieve the same aim, then that alternative should be applied.¹

Early intervention and prevention

Reports recommended that governments should focus on increasing resources for targeted prevention and early intervention approaches and programs that ensure people who are at high risk of coming into contact with the criminal justice system are identified and provided appropriate support, including mental healthcare and housing.²

Cost benefits of early intervention and prevention

A number of reports noted economic savings through providing early support and diversion.³ The benefits of a justice reinvestment approach has also been a frequent theme and there have been many recommendations made around this.⁴

Justice reinvestment to address the drivers of crime and incarceration

Several reports recommend the establishment of an independent justice reinvestment body to promote the reinvestment of resources from the criminal justice system to local community development initiatives to address the drivers of crime and incarceration, and to provide expertise in the methodology of justice reinvestment.⁵

Reports have identified the following factors as drivers of incarceration: changes to justice policies and practices, social and economic factors such as poverty, levels of substance abuse, unemployment and levels of social and community inclusion.⁶ A multiplicity of other combining factors, such as disrupted family backgrounds, family violence, abuse, misuse of drugs and alcohol, and unstable housing may also contribute to the comparatively high rates of imprisonment of people with cognitive and psychosocial disability.⁷

Diversionsary programs and pathways

Some reports recommended that, given the strong economic case for early intervention and prevention, governments should ensure there is legislative availability for alternative, non-custodial sentencing options and diversionsary programs. Diversionsary programs should be accessible, disability-responsive and provide culturally appropriate support services, especially in rural, regional and remote areas.⁸

Screening / diagnosis

Some reports recommended improved screening and identification of disability across all stages of the justice system.⁹ The strategy should be applied at multiple points throughout the criminal justice system including first contact with police, courts, prisons and related facilities. Mental health information obtained from screening and assessment should be used to inform service provision in custody, as well as transition planning for the individual upon release.

Legislative reform

Another strong theme in reports was the need to reform fitness to plead / unfitness to stand trial laws, noting that their application may result in the indefinite detention of people with disability.¹⁰

Some reports also found that incentives exist for innocent people to plead (or be advised to plead) guilty, in order to avoid the consequences of unfitness including the possibility of indefinite detention.¹¹ The ALRC observed that where people plead guilty in order to avoid indefinite detention they enter the criminal justice system instead of the forensic mental health system and often do not receive necessary treatment or care. This could affect the likelihood of recidivism and runs counter to legal principles that underpin fair trials and access to justice.¹²

Ensuring limitation periods and regular periodic review of detention orders

Some reports recommended that State and territory laws should provide for limitation periods and regular periodic review of detention orders.¹³

Increasing sentencing options and alternatives to mandatory sentences

Reports recommended repealing mandatory or presumptive sentencing options,¹⁴ and ensuring that there are that alternative sentencing options and greater support for those assisting First Nations people with cognitive disability and psychosocial disability through the court system, particularly where an individual is found to be unfit to plead/stand trial.¹⁵

Several reports recommended reforming sentencing laws to include a requirement to consider Aboriginality in sentencing courts, so as to take into account unique systemic and background factors affecting First Nations people.¹⁶ The Senate Standing Committee (2013) noted the NT Chief Magistrate provided evidence that showed the imprisonment rate was 50 per cent higher under mandatory sentencing laws.¹⁷

Reforming bail laws

Some reports made recommendations around reforming bail laws across Australia to ensure bail authorities consider any issues that arise due to a person's cultural background, including Aboriginality, ties to family and place, and cultural obligations.¹⁸

The Australian Law Reform Commission (ALRC) noted that Victoria's Bail Act includes such a provision.¹⁹ The ALRC also noted key case law developments on bail being granted after taking into account community, family and cultural ties.²⁰

Restrictive practices in custodial settings

Within custodial settings, reports have highlighted examples of inappropriate use of restrictive practices and seclusion, which violates the human rights of a person with disability.²¹ The impact of such treatment is compounded for people with disability who have been declared unfit to stand trial, when detention can be indefinite.²²

Several reports have expressed concern about the shortage of safeguards regulating the use of solitary confinement.²³ The Australian Human Rights Commission (AHRC) recommended the Australian Government adopt national principles for inspection, and conditions in detention.²⁴ These principles should use a human rights-based approach and form a national foundation for the prevention of ill treatment in all places where individuals can be deprived of their liberty.²⁵

Oversight and monitoring

The AHRC recommended the adoption of national principles that guide how detention inspections should take place by the bodies performing the national preventative mechanism function (National Inspection Principles)²⁶ and national principles regarding minimum conditions of detention to protect the human rights of detainees (National Conditions Principles).²⁷

These principles should include complaints processes and consequences for unlawful or improper conduct, the use of restrictive practices, and the protection of marginalised detainees including people with disability.²⁸

Disability training, education and awareness

Several reports recommended that governments should take steps to ensure regular disability training, education and awareness raising initiatives for justice system personnel who are likely to have close contact with people with disability, including police, legal practitioners, judiciary and corrections officers. People with disability including First Nations people, should be involved in developing training resources. Training should include consideration of trauma-informed and recovery-orientated approaches within the justice system.²⁹

Training of the judiciary in particular has been a reoccurring recommendation.³⁰ The Law Council of Australia recommended the National Judicial College of Australia or the Australasian Institute of Judicial Administration should continue to support the development of training for the judiciary regarding the practical application of therapeutic jurisprudence in diverse areas of judging, including in both mainstream courts and specialist courts.³¹

Ensuring disability-responsive and culturally appropriate responses

Several reports recommended that State and territory governments should invest in accessible, disability-responsive and culturally appropriate responses, including the provision of culturally appropriate accommodation and other culturally responsive supports and services, particularly in rural, regional and remote areas. These services should be trauma-informed and designed, developed and delivered by First Nations organisations where possible. Services should also be connected to culturally-capable mental healthcare and psychosocial supports in the community for First Nations people upon release from correctional facilities.³²

Increasing available, alternative accommodation options

Some reports have recommended that governments should allocate resources to ensure that people who have been found unfit to plead/stand trial have access to alternative accommodation options that are sustainable, stable, secure, rehabilitative and individualised, and offer appropriate and joined-up services.³³

Provision of throughcare

Some reports have recommended the development and funding of a Throughcare Framework to deliver adequate planning for release including, safe and stable accommodation, access to physical and mental health support, access to substance abuse programs, assistance with education and/or employment and a comprehensive wraparound approach facilitated by cross-agency involvement.³⁴

Role of supports

Some reports have found that support persons and or communication assistants / intermediaries can improve the accessibility of proceedings and may reduce the need for unfitness to stand trial proceedings.³⁵

Some reports have recommended that a support person or guardian should be made available or appointed to people with cognitive disability during the trial process to assist them to navigate the justice system and prevent them being found unfit to plead, where they can understand trial processes with appropriate support. Where a person with a cognitive disability is detained or questioned, there should be a formal requirement to provide an interpreter service, communication support worker or appointment of a guardian or advocate, particularly when concerning First Nations people.³⁶

Community supports

Several reports have recommended increased community mental health supports and the availability of secure supported accommodation in the community to transition people back into the community.³⁷

NDIS eligibility for people found not guilty by reason of mental illness or unfit to plead

Reports have also raised the need to identify and link NDIS services for people post-release.³⁸ Some reports have recommended that governments should ensure that there is automatic eligibility to participating in the NDIS for people found not guilty by reason of mental illness or unfit to plead.³⁹

Coordinated government approach

Several reports have recommended that governments should adopt comprehensive, whole-of-government strategies or initiatives that clarify accountability pathways, responsibilities for specific patient cohorts and resourcing models to match this. This strategy should identify the expected role relationships between forensic services and the other parts of the mental health treatment system, the disability service system including the NDIS, access to community mental health services and disability support services in remote communities and primary care services in the corrections environment.⁴⁰

These principles should include complaints processes and consequences for unlawful or improper conduct, the use of restrictive practices, and the protection of marginalised detainees including people with disability.⁴¹

Data collection

Several reports have recommended that governments should lead a coordinated and sustained effort to improve data collection about the interaction between people with disability and the justice system, to ensure policy and law reform is evidence-based. Relevant gaps include access and use of courts and tribunals, the legal profession and the legal assistance sector, to improve justice sector data consistency and reliability to ensure that it is useful and readily available for planning and monitoring. Data should be disaggregated, including on the basis of race, gender identity, intersex status, age, disability, socioeconomic status and family responsibilities.⁴²

Recent inquires

There have been a number of relevant inquiries recently undertaken on justice and forensic mental health system in Australia. The Productivity Commission (Cth) released its Mental Health report in 2020, which included looking at how to improve mental health outcomes for people in the criminal justice system.⁴³

In December 2019, the Tasmania Law Reform Institute released its Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead.⁴⁴ This report examined indefinite forensic orders and reforming the test of fitness to stand trial.

The Northern Territory government commissioned a Review of Forensic Mental Health and Disability Services within the Northern Territory.⁴⁵ This independent review made findings and recommendations on the Northern Territory Health services provided to people in contact with the criminal justice system who have a mental health problem or a cognitive impairment.

In Queensland, there have been a number of inquiries since 2018. The Queensland Ombudsman's investigative report, The Forensic Disability Service Report found a wide range of problems in the care of people detained at the Forensic Disability Service including the length of detention, their care during detention, the lack of adequate programs and the use of seclusion and other regulated behaviour controls.⁴⁶ The Queensland Government's report on Section 157:

Review of the operation of the Forensic Disability Act 2011 similarly recommended enhancing the care and support of Forensic Disability Service clients, as well as enhancing safeguards and oversight.⁴⁷ The Queensland Productivity Commission's Inquiry into Imprisonment Recidivism considered the problem of imprisonment and recidivism in Queensland.⁴⁸ The Queensland Anti-Discrimination Commission's Women in Prison 2019: A human rights consultation report focused on the law, policy, and practices pertaining to the detention of women in Queensland against the benchmark of international human rights standards.⁴⁹

Victorian Ombudsman's report, Investigation into the Imprisonment of a woman found unfit to stand trial, investigated the experience of a woman who was imprisoned for 18 months after being assessed as unfit to stand trial.⁵⁰ The Royal Commission into Victoria's Mental Health System report was due to be tabled in parliament on 5 February 2021 but has been delayed due to the COVID situation in Victoria.

Human Rights Watch have also released two recent reports into abuse against people with disability in prisons in Australia.⁵¹

Current inquiries

There a number of current inquiries across Australia looking at issues relevant to the justice work of the Royal Commission.

For example, the Northern Territory Law Reform Committee is undertaking an Inquiry into Mandatory Sentencing and Community-based sentencing alternatives. The Final report is due 30 March 2021.

The terms of reference for the Victorian Legislative Council Legal and Social Issues Committee's Inquiry into Victoria's justice system includes examining various issues associated with the operation of Victoria's justice system. This includes factors influencing Victoria's growing remand and prison population, strategies to reduce rates of criminal recidivism, and an examination of how to ensure judicial officers have knowledge and expertise in sentencing, dealing with offenders and understanding recidivism and causes of crimes. The final report is due 28 February 2022.

CRPD Committee recommendations

In its concluding observations on Australia's combined second and third periodic reports, the United Nations Committee on the Rights of Persons with Disabilities (CRPD Committee) expressed its serious concerns about laws that result in the arbitrary and indefinite detention of people with disability and that such laws disproportionately affect First Nations people with disabilities and people with cognitive and/or psychosocial disability.⁵²

The CRPD Committee expressed concern that legislation still views people with disability as being unfit to plead and about the commitment of people with psychosocial and cognitive disability to custody, often indefinitely or for periods longer than those imposed in criminal convictions.⁵³

The CRPD Committee was also concerned at the absence of national data disaggregated by disability at all stages of the criminal justice system, including data on the number of people found unfit to plead who are committed to custody in prison or other facilities.⁵⁴

The CRPD Committee made a number of recommendations to improve access to justice for people with disability:

- Bring all state, territory and federal legislation, including criminal laws and policies, in compliance with the Convention to ensure due process guarantees for all persons with disabilities and ensure a review of the legal situation of persons whose equal recognition before the law is restricted and who have been declared unfit to stand trial.⁵⁵
- Address the overrepresentation of young Aboriginal and Torres Strait Islander persons in the juvenile justice system and implement the recommendations contained in *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.⁵⁶
- Eliminate substitute decision-making, provide gender and culture-specific individualized support, including psychosocial support, for persons with disabilities in the justice system, make information accessible and provide community-based sentencing options.⁵⁷
- Ensure that training modules on working with persons with disabilities and the Convention are incorporated into mandated training programmes for police officers, prison officers, lawyers, judicial officers, judges and court staff.⁵⁸
- Collect data disaggregated by disability, age, gender, location and ethnicity at all stages of the criminal justice system, including on the number of persons unfit to plead who are committed to custody in prison and other facilities.⁵⁹

In relation to the indefinite detention of people with disability, the CPRD Committee made the following recommendations:

- Repeal any law or policy and cease any practice or custom that enables the deprivation of liberty on the basis of impairment and that enables forced medical interventions on persons with disabilities, particularly First Nations people with disabilities.⁶⁰
- Implement the recommendations contained in the Senate Community Affairs References Committee 2016 report *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*.⁶¹
- Stop committing persons with disabilities to custody and for indefinite terms or for terms longer than those imposed in criminal convictions.⁶²
- Collect data on the number of persons indefinitely detained and on the number of such persons detained on an annual basis, disaggregated by the nature of the offence, the length of the detention, disability, Aboriginal and other origin, sex, age and jurisdiction, with the aim of reviewing their detention.⁶³

The CRPD Committee has also expressed its serious concerns about the reported abuse of young First Nations people with disability by other prisoners and prison staff and the use of prolonged seclusion.⁶⁴ Human Rights Watch's (HRW) submission to the CRPD Committee in July 2019, ahead of its review on Australia, highlighted some of the problematic confinement conditions for persons with disabilities.⁶⁵ HRW found that prisoners with cognitive and/or psychosocial disabilities are disproportionately represented in all solitary confinement units

across all prisons visited in Australia.⁶⁶ HRW also documented several cases where the psychological condition of people with cognitive or psychosocial disabilities deteriorated after spending time in a detention unit.⁶⁷

The CRPD Committee recommended the introduction of policies and measures to protect persons with disabilities, including young First Nations people with disabilities and persons with cognitive or psychosocial disabilities, from abuse by fellow prisoners and prison staff and ensure that persons with disabilities cannot be held in solitary confinement.⁶⁸

Recent legislative reforms and policy developments

Disability Justice Strategies

The AHRC's 2014 report, *Equal before the law – Towards Disability Justice Strategies*, recommended the development of Disability Justice Strategies in each state and territory.⁶⁹ Disability Justice Strategies sets actions to implement and promote access to justice for people with disability, based on appropriate communication, early intervention and diversion, increased service capacity and support, effective training, enhanced accountability and monitoring and better policies and frameworks.⁷⁰ Disability Justice Strategies should be linked to the National Disability Strategy and the National Disability Agreement.

On Friday 4 December 2020, Disability Ministers from across Australia issued a Statement of Continued Commitment to the National Disability Strategy. The statement is a commitment to continue efforts under the National Disability Strategy to uphold the rights of people with disability between the expiry of the current Strategy at the end of 2020, and the finalisation of the new National Disability Strategy in 2021.⁷¹ Public consultations on the new National Disability Strategy closed on 18 December 2020.

Most jurisdictions have since 2014 taken steps to create something akin to a 'Disability Justice Strategy'. Each plan is not directly linked to this report but has the goal of enhancing equal access to justice. Currently each jurisdiction is at a different stage of implementation:

- The **Australian Capital Territory** launched a Disability Justice Strategy 2019-2029 in August 2019.⁷² The First Action Plan under the Strategy is now under implementation.⁷³
- The **South Australian** Government had a Disability Justice Plan 2014-2017.⁷⁴
- The **Western Australian** Government has *A Western Australia for Everyone: State Disability Strategy 2020-2030*⁷⁵ and Action Plan.⁷⁶
- In **Queensland**, there has been movement towards something resembling a Disability Justice Plan.⁷⁷ Queensland also has a Disability Service Plan 2020-21.⁷⁸
- In **New South Wales**, there is no specific disability justice strategy however Section 12 of the *Disability Inclusion Act 2014* (NSW) requires each public authority to develop a Disability Inclusion Action Plan (DIAP). The NSW Department of Communities and Justice has recently released the Disability Inclusion Action Plan 2020 – 2024.⁷⁹
- In **Victoria**, the Department of Justice and Community Safety has a Disability Action Plan 2019-2022.⁸⁰

- **In Tasmania**, the Department of Justice had a Disability Justice Plan for the period 2017-2020.⁸¹
- The **Northern Territory** does not appear to have developed a targeted Disability Justice Strategy to date, but does have a Northern Territory Mental Health Strategic Plan 2019-2025⁸²

The development of Disability Plans in all Australian jurisdictions has been recommended by other inquiries to improve the integration between health and justice sectors.⁸³ In November 2020, the Productivity Commission's mental health report included a recommendation to improve mental health outcomes for people in the justice system.⁸⁴ This recommendation included an action point for state and territory governments to develop disability justice strategies and to establish health and justice partnerships to ensure that people with mental illness are better supported to participate in the justice system.⁸⁵

In its concluding observations on Australia's combined second and third periodic reports, the CRPD Committee recommended the development of nationally consistent disability justice plans across governments to ensure that persons with disabilities, particularly those whose reasonable and procedural accommodations are not adequately met, are supported in accessing the same legal protections and redress as the rest of the community.⁸⁶

Recent legislative reforms

New South Wales

The *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (**the new Act**) has been passed by Parliament to improve the forensic mental health system for victims and for people with mental health impairments and/or cognitive impairment. This Act replaces the *Mental Health (Forensic Provisions) Act 1990* (**MHFPA**). These changes will commence in early 2021.

Changes include:

- modernising the language of the MHFPA—the new Act does not include language such as 'suffering' and 'disease of the mind' to describe mental illness,
- creating definitions for mental health impairment and cognitive impairment, giving courts a consistent standard to determine whether a person comes within the remit of the new Act,
- creating a statutory test to determine whether a person is fit to stand trial in the District Court or Supreme Court of New South Wales,
- changing the special verdict in the higher courts from 'not guilty by reason of mental illness' to 'act proven but not criminally responsible because of mental health impairment or cognitive impairment',
- listing statutory factors for Magistrates to consider when deciding whether to divert defendants charged with less serious crimes in the Local Court. The list will include whether the defendant is likely to endanger the safety of any victim or the community, and

- altering existing processes within the forensic mental health system so that it is more efficient, transparent and clearer for all participants.

The legislative changes are to take effect from early 2021.⁸⁷

Northern Territory

There are two primary pieces of legislation in the Northern Territory relevant to mental health and the forensic system: Part 10 of the *Mental Health and Related Services Act 1998* (MHRS Act) and the *Criminal Code Act 1983*. The former legislation relates to court procedures for 'summary offences' in the Local Court, while Part IIA of the latter legislation provides for 'mental impairment and unfitness to be tried' including court supervision orders and the defence of mental impairment.⁸⁸ The Northern Territory has released a discussion paper for the *Mental Health and Related Services Act 1998* Review, which will close on 31 May 2021.⁸⁹ Part 5 of the paper is dedicated to Forensic provisions and was jointly developed by the Department of Health and the Department of the Attorney General and Justice.⁹⁰ It is also worth noting that a review into the Disability Services Act 1993 was reported to be due to commence before the end of 2020.⁹¹

The paper highlights multiple areas for potential reform in MHRS Act, including areas highlighted by the Northern Territory Law Reform Committee's report such as the issues with section 77 process and outcomes. Criticisms that have arisen in respect of the provision includes the fact that a person with a mental illness that may have led them to engage in criminal conduct may be released without any supervision and/or treatment and there is a general perception that a s77 order 'may amount to letting a person evade responsibility for their actions.'⁹² The Northern Territory accordingly has noted the recommendations made by the Northern Territory Law Reform Committee (NTLRC) on reforming section 77 however is yet to implement these recommendations and is considering how to implement the recommendations as part of the current review of the mental health legislation.⁹³

Furthermore, the Northern Territory Government is also considering reforms to Part IIA of the Criminal Code which hasn't been reviewed since it was first introduced in 2002.⁹⁴ Proposed reforms include amendment to s43ZC which provides that a supervision order must be for an indefinite term as well as further consideration as to whether management of orders should be transferred from the legal system by establishment of a Tribunal to supervise and monitor of the status of long terms orders.⁹⁵

Victoria

The *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2020* (VIC) had its second reading moved in the Legislative Assembly on 18 March 2020.

The objectives of the bill are to implement reforms to modernise and strengthen the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (VIC) ('CMIA'), to improve the supervision and management of people found unfit to stand trial or not guilty because of mental impairment. The reforms aim to ensure that the CMIA operates consistently with its underlying principles, as identified by the Victorian Law Reform Commission in a 2014 report to Parliament.⁹⁶

Queensland

The *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Bill 2020* (QLD) was introduced on 19 May 2020 and passed on 25 May 2020. The Act makes temporary amendments to the Disability Services Act 2006 to give immunity to service providers who lock

gates, doors, or windows to ensure resident compliance with a Public Health Direction,⁹⁷ and also to the Forensic Disability Act 2011 clarifying the powers of the Forensic Disability Service to refuse visitors and suspend leave to the community.⁹⁸

Other recent legislation of note that has been passed is the *Mental Health Act 2016* (Qld) which supersedes the Mental Health Act 2000. The 2016 Act is aimed at improving the health of persons that do not have capacity for consent and forensic patients. For further details on the different and comparable aspects of each Act, Queensland Health have prepared a [table of comparison](#).

Following introduction of the *Mental Health Act 2016* (QLD), the Queensland Mental Health Commission conducted research on the processes outlined in the Act to protect human rights for people being treated involuntarily for a mental illness in hospital and community settings and whether its implementation went beyond a statement of patients' rights and principles.⁹⁹

The research concluded the introduction of the Mental Health Act 2016 resulted in significant positive changes for strengthening human rights including treating people in a less restrictive way, introducing the role of Independent Patient Rights Advisers and promoting the use of Advance Health Directives and aligns the Act more closely to the requirements of the United Nations Convention of the Rights of Persons with Disabilities.¹⁰⁰ The study also identified areas for improvement including cultural change to support stronger focus on patient rights and greater training to support the work of Independent Patient Rights Advisers.¹⁰¹

Western Australia

A review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) was undertaken by the WA Department of the Attorney-General in 2016.¹⁰² It is understood from records of parliamentary debate that the drafting of a bill to replace the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) is currently in progress¹⁰³ and the new bill, once completed, 'will broadly align with the national principles' (the National Statement of Principles relating to Persons Unfit to Plead).¹⁰⁴

Other Western Australian legal developments

On 29 July 2020, a WA Supreme Court challenge was lodged by Human Rights Lawyer Dr Hannah McGlade, together with Perth-based firm Roe Legal, against the prolonged solitary confinement of three First Nations men with disability. Dr McGlade alleged that two of the men were placed in solitary confinement for almost two months following a serious incident in June 2020, while a third man was held for almost six weeks. The practice of prolonged solitary confinement is part of WA Corrective Services' disruptive prisoner policy (DPP policy), which was introduced in mid-2019 as an attempt to prevent dangerous inmates from influencing others. Since the lodgement of the action, the DPP policy has been revoked and is under review.¹⁰⁵

South Australia

The *Statutes Amendment (Attorney-General's Portfolio) Bill 2020* (SA) passed both houses on 24 September 2020 and is awaiting assent by the Governor. The bill amends section 269X of the *Criminal Law Consolidation Act 1935* (SA) regarding the detention of a defendant before court proceedings are completed. When a defendant's mental competence or fitness to stand trial is being investigated, the bill allows courts to order detention in custody until the investigation ends. The bill also proposes that defendants who are involuntary inpatients at a treatment centre but who are released before their mental competence investigation ends should be detained in custody as if awaiting trial or sentencing.

National Statement of Principles relating to Persons Unfit to Plead

In November 2015, the Law, Crime and Community Safety Council (now the Council of Attorneys-General) agreed to establish a cross-jurisdictional working group on the treatment of people with cognitive or mental health impairment unfit to plead or found not guilty by reason of mental impairment. As part of this process, the working group developed the National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment (the National Principles).¹⁰⁶

The preamble to the National Principles provides that the principles recognise the rights of persons with cognitive or psychosocial disability, and seek to identify safeguards throughout legal processes and during the period in which a person who is unfit to plead or not guilty by reason of cognitive or psychosocial disability is subject to orders.¹⁰⁷ The National Principles have been advanced as “best practice principles” to ensure that treatment is tailored, inclusive and recovery oriented, with agencies and service providers collaborating to provide coordinated care.¹⁰⁸

The Principles are understood to be read together with other principles and frameworks including but not limited to the National Framework for Recovery-oriented Mental Health Services, the National Forensic Mental Health Principles, and the National Framework for Reducing and Eliminating the Use of Restrictive Practices.¹⁰⁹

All states and territories have considered the National Principles and as of August 2019 they have been endorsed by the Australian Capital Territory, Queensland, New South Wales, the Northern Territory, Western Australia, Victoria and Tasmania.¹¹⁰ South Australia has advised that while they remain broadly supportive of the objectives of the National Principles, their foremost consideration is the protection of the community. South Australia has not endorsed the National Principles, stating they are inconsistent with their current legislative provisions, policies and procedures.¹¹¹

The states and territories who have provided endorsement will implement the National Principles in the context of their own legislation, policy and procedures.¹¹² The Australian Government has committed to reviewing the National Principles in five years, in consultation with state and territory jurisdictions, to ensure they remain relevant and continue to represent best practice.¹¹³

Response to the National Principles¹¹⁴

New South Wales implementation status

In NSW, the Mental Health Review Tribunal (MHRT) welcomed the National Statement in its 2018/19 Annual report and outlined the principles are relevant to forensic mental health care.

The MHRT annual report indicated some of the principles were inconsistent with the Mental Health (Forensic Provisions) Act 1990 (MHFPA) but the review and revision of the MHFPA would hopefully align with the principles.

The report suggested practical ways NSW forensic systems could improve the meeting of principles including:

For forensic patients with cognitive impairment, there is a noticeable lack of appropriate detention facilities and step down accommodation, which results in people spending their limiting terms in custody. As has been mentioned in previous annual reports, the NDIS is not the solution to this

impasse and investment by the NSW Government will be needed to meet the standards set out in the National Statement.

The Tribunal is a member of the Cognitive Impairment Subcommittee, led by NSW Health and formed to assist with the implementation of forensic mental health reforms, which is looking at addressing the issue of adequate care for patients with cognitive impairment through the establishment of a cross-agency framework. The framework aims to strengthen the support, management and supervision of individuals with cognitive impairment in contact with the criminal justice system.

Northern Territory update

A 2017 article reported that the Northern Territory was facing heavy criticism as a defendant with severe cognitive impairment faced having his matter adjourned for a several months due to the Department of Health requiring the time to produce its mental health report.¹¹⁵ Justice Kelly indicated that this was not the first time a matter in the Northern Territory that a defendant had to wait for a report and Justice Graham Hiley similarly indicated that he has had to adjourn two Alice Springs matters due to reports not being available. The Criminal Lawyers Association of NT noted that the impact of this delay results in the ongoing incarceration of people who may otherwise may be able to be subject to supervised conditional orders.

In response, the Attorney General and Minister for Health, Ms Fyles MP stated as follows:

"This year, the Northern Territory Government agreed to adopt the National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment ('National Principles').

As Attorney-General and Minister for Health, I have my departments working together to deliver best practice policies and treatment in line with the National Principles.

Significant work is already underway to assess current resources, future resourcing needs and potential statutory and other reforms that may be required to implement the National Principles.

This also includes looking at important recommendations made in 2016 reports by a Senate Committee and by the Northern Territory's Law Reform Committee."¹¹⁶

OPCAT Implementation

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.¹¹⁷

The aim of the OPCAT inspection system is to identify practices that can cause mistreatment of people in detention, so that governments can prevent human rights abuses (including torture) from occurring or worsening.¹¹⁸ OPCAT expressly recognises a link between inspecting places of detention and improving the situation of those detained.¹¹⁹

Under Article 3 of OPCAT, States Parties must 'set up, designate or maintain at the domestic level' a National Preventative Mechanism (NPM). Article 17 makes clear that one or multiple bodies can carry out this NPM function. Under the Australian Government's approach, the state and territory governments are responsible for determining which body or bodies will perform the NPM function in their respective jurisdictions, and how they will carry out their work.¹²⁰

In February 2017, the then Attorney-General asked Australia's Human Rights Commissioner to lead a consultation process with civil society and others on how OPCAT should be implemented

in Australia.¹²¹ In June 2020, the report titled *Implementing OPCAT in Australia* was published by the AHRC.

The AHRC recommended that the Australian Government should adopt national principles that guide how detention inspections should take place (National Inspection Principles)¹²² and national principles regarding minimum conditions of detention to protect the human rights of detainees (national Conditions Principles).¹²³

¹ See NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report 138, May 2013, recommendation 8.3; Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia: Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others*, AusHRC 80, September 2014, recommendation 3.

² See Productivity Commission, *Mental Health*, Final Report, November 2020, recommendation 21 (action 21.1); Law Council of Australia, *The Justice Project*, Final report, Recommendations and Group Priorities, August 2018, recommendations 5.1, 5.2, 5.8, 5.9; Human Rights Law Centre & Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, 2017, recommendation 1; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report, December 2017, recommendations 4.1 and 4.2. The NT Ombudsman also recommended that the NT Government pilot and evaluate local approaches to crime prevention and community safety in disadvantaged communities with the aim of reducing reoffending and increasing community safety: Northern Territory Ombudsman, *Women in prison II – Alice Springs Women's Correctional Facility, Investigation report*, May 2017, recommendations 2 and 3; see also Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, 2013, recommendations 6, 7, 8.

³ See Australian Human Rights Commission, *Equal before the law – Towards Disability Justice Strategies*, February 2014, pp 13-14; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013; Law Council of Australia, *The Justice Project*, Final report, Part 1 – 'People with disability', August 2018.

⁴ See Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, 2016, recommendation 24; Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, 2013, recommendation 6; Australian Human Rights Commission, *Equal before the law – Towards Disability Justice Strategies*, February 2014, pp 13-14; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report, December 2017, recommendation 4.1, 4.2.

⁵ See Australian Human Rights Commission, *Equal before the law – Towards Disability Justice Strategies*, February 2014, pp 13-14; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final report, December 2017, p 126 [4.4] and recommendations 4.1, 4.2; Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, recommendation 24; Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, 2013, recommendations 6, 8; Northern Territory Ombudsman, *Women in prison II – Alice Springs Women's Correctional Facility*, Investigation report, May 2017, recommendation 2; Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, August 2019, recommendation 30.

⁶ See Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, 2013, [2.1]; NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135, June 2012, [0.6].

⁷ See Senate Select Committee on Mental Health, *A national approach to mental health – from crisis to community*, March 2006, [13.26]; NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135, June 2012, [0.6].

⁸ See Law Council of Australia, *The Justice Project*, Final report, Part 1 – ‘People with disability’, August 2018, recommendation 4.14; Northern Territory Ombudsman, *Women in prison: Report of the investigation into complaints from women prisoners at Darwin Correctional Centre*, April 2008, recommendation 52; Human Rights Law Centre & Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment*, 2017, recommendation 12; Northern Territory Ombudsman, *Women in prison II – Alice Springs Women’s Correctional Facility*, Investigation report, May 2017, recommendations 4 and 5. The Senate Community has previously noted the strong economic case for early intervention and prevention: Senate Community Affairs References committee, Parliament of Australia, *Indefinite Detention of people with cognitive or psychiatric impairment in Australia 2016*, at [5.70]-[5.81]; NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135, June 2012, recommendations 8.1 to 8.6, 9.1 to 9.9, 10.1 to 10.8; Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, 2013, recommendation 3.

⁹ See Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, recommendation 10; Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, Final report, November 2017, recommendation 15.1; See Productivity Commission, *Mental Health*, Final report, November 2020, recommendation 21 (action 21.4); NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135, June 2012, recommendations 7.1 to 7.7; NSW Law Reform Commission, *People with an intellectual disability and the criminal justice system*, Report 80, December 1996, recommendation 51.

¹⁰ See Law Council of Australia, *The Justice Project*, Final report, Part 1 – ‘People with disability’, August 2018, pp 5-6, 67-76; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth laws*, August 2014, [7.20], [7.70] and recommendations 7-1, 7-2; West Australia Government Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*, Final report, April 2016; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final report, December 2017, p 340 [10.70].

¹¹ See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth laws*, August 2014, [7.20]; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report, December 2017, p 341 [10.73].

¹² Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report, December 2017, p 341 [10.73].

¹³ See Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth laws*, August 2014, recommendation 7-2; Law Council of Australia, *The Justice Project*, Final report, Part 1 – ‘People with disability’, August 2018, p 84 (recommendation); Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report, December 2017, recommendation 10-5; Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, recommendation 17; NT Law Reform Committee, *Report on the interaction between people with Mental Health issues and the Criminal Justice System*, May 2016, recommendation 18.

¹⁴ See Senate Community Affairs References committee, Parliament of Australia, *Indefinite Detention of people with cognitive or psychiatric impairment in Australia*, November 2016, at [5.61] and recommendation 18; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report, December 2017, recommendation 8-1.

¹⁵ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women’s Voices)*, December 2020, p 184.

¹⁶ See Australian Human Rights Commission, *Wiyi Yani U Thangani (Women’s Voices)*, December 2020, p 184; Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final Report, December 2017, recommendation 6-1; Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Report 94, 2006, recommendations

36, 37; Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4, 2015, recommendation 18.

¹⁷ Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, 2013, p 10.

¹⁸ See Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final report, December 2017, recommendations 5-1, 5-2; Human Rights Law Centre & Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, 2017, recommendations 15, 18. See also NSW Law Reform Commission, *Bail*, Report 133, April 2012.

¹⁹ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final report, December 2017, p 166 [5.76]-[5.81].

²⁰ Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Final report, December 2017, p 168 [5.82]-[5.86].

²¹ See Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, p 26; Australian Human Rights Commission, *Equal before the Law – Towards Disability Justice Strategies*, Report, February 2014, p 37; Law Council of Australia, *The Justice Project*, Final report, Part 1 – ‘People with disability’, August 2018, p 72; Human Rights Watch, *“I Needed Help, Instead I Was Punished” – Abuse and Neglect of Prisoners with Disabilities in Australia*, Report, February 2018, p 5; Australia OPCAT Network, ‘The Implementation of OPCAT in Australia’, *Submission to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD)*, January 2020, p 78; Australian Capital Territory Human Rights Commission, *Commission initiated review of allegations regarding Bimberi Youth Justice Centre*, March 2019, p 40; Queensland Ombudsman, *The Forensic Disability Service Report: An investigation into the detention of people at the Forensic Disability Service*, August 2019, p 18, 19; Australian Human Rights Commission, *Equal Before the Law; Towards Disability Justice Strategies*, Final report, February 2014, p.30.

²² Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, p 26.

²³ See Northern Territory Ombudsman, *Women in prison: Report of the investigation into complaints from women prisoners at Darwin Correctional Centre*, April 2008, p 192; Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, p 51; Queensland Department of Communities, Disability Services and Seniors, *Section 157: Review of the Operation of the Forensic Disability Act 2011*, July 2018, p 28-29.

²⁴ Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, recommendations 12, 13.

²⁵ Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, p 50.

²⁶ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, recommendation 12.

²⁷ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, recommendation 13.

²⁸ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, recommendation 13.

²⁹ See Human Rights Law Centre & Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, 2017, recommendation 16; Law Council of Australia, *The Justice Project*, Final report, Part 1 – ‘People with disability’, August 2018, p 83 (recommendation); Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, Final report, November 2017, recommendation 20.3; Hamburger et al, *Report of the Review of the Northern Territory Department of Correctional Services*, July 2016, recommendations 39 to 49, 161; NSW Law Reform Commission, *Report 80 - People with an intellectual disability and the criminal justice system*, December 1996, recommendation 41.

³⁰ See Law Council of Australia, *The Justice Project*, Final report, Recommendations and Group Priorities, August 2018, recommendation 4.15; Human Rights Law Centre & Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, recommendation 16; Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, recommendation 1; Victorian Parliament Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an Intellectual Disability and their families and carers*, 2013, recommendations 26 and 27.

³¹ Law Council of Australia, *The Justice Project*, Final report, Recommendations and Group Priorities, August 2018, recommendation 4.15.

³² See; Law Council of Australia, *The Justice Project*, Final report, Part 1 – ‘People with disability’, August 2018, p 84 (recommendation); NT Law Reform Committee, *Report on the interaction between people with Mental Health issues and the Criminal Justice System*, May 2016, recommendation 18; McGrath et al, *Review into forensic mental health and disability services in the NT*, January 2019, recommendations 18, 19.

³³ See Law Council of Australia, *The Justice Project*, Final report, Recommendations and Group Priorities, August 2018, recommendation 5.9; Northern Territory Ombudsman, *Women in prison: Report of the investigation into complaints from women prisoners at Darwin Correctional Centre*, April 2008, recommendation 47; Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia: Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others*, AusHRC 80, September 2014, recommendation 2; Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, recommendations 16, 32; McGrath et al, *Review into forensic mental health and disability services in the NT*, January 2019, recommendations 1(h) and 3(a); NSW Legislative Council Select Committee on Mental Health, *Mental Health Services in NSW*, December 2002, recommendations 109, 110, 111.

³⁴ See Northern Territory Ombudsman, *Women in prison: Report of the investigation into complaints from women prisoners at Darwin Correctional Centre*, April 2008, recommendation 43; Hamburger et al, *Report of the Review of the Northern Territory Department of Correctional Services*, July 2016, recommendations 36, 37, 38; Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, final report, November 2017, recommendation 24.1; See Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia: Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others*, AusHRC 80, September 2014, recommendation 4.

³⁵ See Law Council of Australia, *The Justice Project*, Final report, Part 1 – ‘People with disability’, August 2018, p 76; Victorian Parliament Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an Intellectual Disability and their families and carers*, 2013 , recommendations 24 and 25; NSW Law Reform Commission, *Report 138 People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, May 2013, at [0.10] and recommendation 2.2.

³⁶ See Australian Human Rights Commission, *Equal Before the Law; Towards Disability Justice Strategies*, Final Report, February 2014, action 4.1, Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia: Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others*, AusHRC 80, September 2014, recommendation 6; NSW Law Reform Commission, *Report 80 - People with an intellectual disability and the criminal justice system*, December 1996, recommendations 8 and 9; Victorian Parliament Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an Intellectual Disability and their families and carers*, 2013 , recommendations 24 and 25; NSW Law Reform Commission, *Report 138 People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, May 2013, recommendation 2.2.

³⁷ See Law Council of Australia, *The Justice Project*, Final report, Recommendations and Group Priorities, August 2018, recommendation 5.9; Northern Territory Ombudsman, *Women in prison: Report of the investigation into complaints from women prisoners at Darwin Correctional Centre*, April 2008, recommendation 47; Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia: Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others*, AusHRC 80, September 2014, recommendations 2 and 4; Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016 recommendations 16 and 32; McGrath et al, *Review into forensic mental health and disability services in the NT*, January 2019, recommendations 1(h) and 3(a).

³⁸ See UnitingCare West and Wungening Aboriginal Corporation, *The NDIS and access for Aboriginal and/or Torres Strait Islander people interfacing with the criminal justice system*, Final report, May 2020, recommendations 1, 5, 6 and 7; Joint Standing Committee on the National Disability Insurance Scheme, *The provision of services under the NDIS for people with psychosocial disabilities related to a mental health*

condition, August 2017, recommendations 22, 23 and 24; Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism*, Summary Report 2019, p 28; Australian Human Rights Commission, *Equal before the law: Towards Disability Justice Strategies*, February 2014, p 31; Human Rights Watch, *'I needed help but instead I was punished': Abuse and neglect of prisoners with disabilities in Australia*, February 2018, p 89 (Additional recommendations); Queensland Department of Communities, Disability Services and Seniors, Section 157: Review of the Operation of the Forensic Disability Act 2011, July 2018, recommendation 29.

³⁹ See McGrath et al, *Review into forensic mental health and disability services in the NT*, January 2019, recommendation 9; Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia: Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others*, AusHRC 80, September 2014, recommendation 7. The Senate Community References Committee recommended that the Joint Standing Committee on the National Disability Insurance Scheme conduct an inquiry into the issue of eligibility and access to the NDIS for people held in prisons and the criminal justice system more broadly: Senate Community Affairs References Committee, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, recommendation 25; Human Rights Watch, *'I needed help but instead I was punished': Abuse and neglect of prisoners with disabilities in Australia*, February 2018, p 89 (Additional recommendations).

⁴⁰ See McGrath et al, *Review into forensic mental health and disability services in the NT*, January 2019, recommendations 3, 15; Hamburger et al, *Report of the Review of the Northern Territory Department of Correctional Services*, July 2016 recommendation 161; Productivity Commission, *Mental Health*, Final Report, November 2020, recommendation 21; Law Council of Australia, *The Justice Project*, Final report, Recommendations and Group Priorities, August 2018, recommendation 7.7; Northern Territory Ombudsman, *Women in prison II – Alice Springs Women's Correctional Facility, Investigation report*, May 2017, recommendation 1; NT Law Reform Committee, *Report on the interaction between people with Mental Health issues and the Criminal Justice System*, May 2016, recommendation 21; NSW Law Reform Commission, *Report 135. People with cognitive and mental health impairments in the criminal justice system: Diversion*, June 2012, recommendation 7.6; NSW Law Reform Commission, *Report 80 - People with an intellectual disability and the criminal justice system*, December 1996, [10.38]-[10-50] and recommendation 48; NSW Legislative Council Select Committee on Mental Health, *Mental Health Services in NSW*, December 2002, recommendations 1 and 119.

⁴¹ Australian Human Rights Commission, *Implementing OPCAT in Australia*, 2020, recommendation 13.

⁴² See McGrath et al, *Review into forensic mental health and disability services in the NT*, January 2019, recommendation 17; Law Council of Australia, *The Justice Project*, Final report, Recommendations and Group Priorities', August 2018, recommendation 7.8; See Human Rights Law Centre & Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, 2017, recommendation 2; NSW Law Reform Commission, *Report 135. People with cognitive and mental health impairments in the criminal justice system: Diversion*, June 2012, recommendations 4.1 and 7.7; Senate Standing Committee on Legal and Constitutional Affairs, *Value of a justice reinvestment approach to criminal justice in Australia*, 2013, recommendation 1.

⁴³ Productivity Commission, *Mental Health*, Final report, November 2020.

⁴⁴ Tasmania Law Reform Institute, *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead*, December 2019.

⁴⁵ McGrath et al, *Review into forensic mental health and disability services in the NT*, January 2019.

⁴⁶ Queensland Ombudsman, *The Forensic Disability Services Report*, August 2019.

⁴⁷ Queensland Department of Communities, *Disability Services and Seniors, Section 157: Review of the operation of the Forensic Disability Act 2011*, July 2018.

⁴⁸ Queensland Productivity Commission, *Inquiry into imprisonment and recidivism*, August 2019.

⁴⁹ Anti-Discrimination Commission Queensland, *Women in Prison 2019: A human rights consultation report*, 2019.

⁵⁰ Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial*, Investigation report, October 2018.

⁵¹ Human Rights Watch, *'He's never coming back': People with disabilities dying in Western Australia's prisons*, September 2020 and Human Rights Watch, *'I Needed Help, Instead I was Punished': Abuse and Neglect of Prisoners with Disabilities in Australia*, 2018.

⁵² UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 27(a).

⁵³ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, paras 25(c) and 27(c).

⁵⁴ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, paras 25(f) and 27(d).

⁵⁵ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 26(c).

⁵⁶ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 26(d).

⁵⁷ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 26(e).

⁵⁸ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 26(f).

⁵⁹ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 26(g).

⁶⁰ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 28(a).

⁶¹ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 28(b).

⁶² UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 28(c).

⁶³ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 28(d).

⁶⁴ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 29(b).

⁶⁵ Human Rights Watch, 'Human Rights Watch Submission on Australia to the Committee on the Rights of Persons with Disabilities (CRPD) 22nd Session', 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*, 29 July 2019.

⁶⁶ Human Rights Watch, *'I Needed Help, Instead I Was Punished': Abuse and Neglect of Prisoners with Disabilities in Australia*, 2018.

⁶⁷ Human Rights Watch, 'Human Rights Watch Submission on Australia to the Committee on the Rights of Persons with Disabilities (CRPD) 22nd Session', 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*, 29 July 2019, 5.

⁶⁸ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 30(b).

⁶⁹ Australian Human Rights Commission, *Equal before the law – Towards Disability Justice Strategies*, February 2014, p 32.

⁷⁰ Australian Human Rights Commission, *Equal before the law – Towards Disability Justice Strategies*, February 2014, p 32.

⁷¹ The National Disability Strategy - December 2020 update, *Department of Social Services*, website, 16 December 2020.

<https://www.dss.gov.au/disability-and-carers/a-new-national-disability-strategy>

⁷² Disability Justice Strategy 2019-2029: A Strategy to address unequal access to justice in the ACT, ACT Government, 2019. See also: ACT Government, *Towards Disability Justice for the ACT: Summary of Research and Consultations*, 2019.

⁷³ First Action Plan 2019 – 2023, Disability Justice Strategy, ACT Government, 2019.

⁷⁴ Disability Justice Plan 2014 – 2017, SA Attorney-General's Department, 2014.

⁷⁵ A Western Australia for Everyone: State Disability Strategy 2020 – 2030, Government of Western Australia, Department of Communities, 2020.

⁷⁶ A Western Australia for Everyone: State Disability Action Plan 2020 – 2030, Government of Western Australia, Department of Communities, 2020.

⁷⁷ Disability Service Plan 2020 - 2021, QLD Department of Justice and Attorney General, 2020.

⁷⁸ Disability Services and Seniors: Disability Service Plan 2020-2021, QLD Department of Communities, 2020.

⁷⁹ Disability Inclusion Action Plan 2020 - 2024, NSW Department of Communities & Justice, 2020.

⁸⁰ Disability Action Plan Framework 2019 - 2022, Victorian Department of Justice and Community Safety, 2019.

⁸¹ Disability Justice Plan for Tasmania 2017 - 2020, Tasmanian Department of Justice, 2017. The Department of Justice also has a Disability Action Plan 2019 which contains a 'broad range of initiatives across the Department of Justice to remove barriers and to enable our clients and staff with disability to enjoy the same rights and opportunities as other Tasmanians'.

⁸² Northern Territory Mental Health Strategic Plan 2019-2025, Northern Territory Department of Health, 2019-2025. The Plan outlines several relevant areas of focus in providing appropriate services to people with mental illness as well as people with psychosocial disability.

⁸³ See Law Council of Australia, *The Justice Project*, Final report, Part 1 – 'People with disability', August 2018, recommendation 7.7; Productivity Commission, *Mental Health*, Final Report, November 2020, recommendation 21; Senate Community Affairs References committee, Parliament of Australia, *Indefinite Detention of people with cognitive or psychiatric impairment in Australia*, November 2016, recommendation 2.

⁸⁴ Productivity Commission, *Mental Health*, Final Report, November 2020, recommendation 21.

⁸⁵ Productivity Commission, *Mental Health*, Final Report, November 2020, action 21.7.

⁸⁶ UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the combined second and third reports of Australia (Advanced Unedited Version)*, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019, para 26(b).

⁸⁷ Forensic Mental Health Reforms, *NSW Department of Communities & Justice*, website, 29 June 2020.

<https://www.justice.nsw.gov.au/Pages/Reforms/forensic-mental-health.aspx#2018ForensicMentalHealthReforms:VictimFocussed>

⁸⁸ Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, p 100.

⁸⁹ Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, 2020, p 7.

⁹⁰ Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, p 99.

⁹¹ Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, p 101.

⁹² Hunyr, J & Swift, M, 'A Judge Short of a Bench; Mental Impairment and Fitness to Plead in the NT Legal System', 2011, page 9. A paper presented at the Criminal Lawyers Association Northern Territory Conference at Sanur, Bali n 30 June 2011, and cited in Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, p 105.

-
- ⁹³ Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, p 105.
- ⁹⁴ Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, p 111.
- ⁹⁵ Northern Territory Government, *Discussion Paper for the Mental Health and Related Services 1998 Review*, 2020, p 112.
- ⁹⁶ Victorian Law Reform Commission, *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 – Report*, tabled in Parliament 21 August 2014.
- ⁹⁷ *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* (QLD), [Part 5, Division 1](#).
- ⁹⁸ *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* (QLD), [Part 5 Division 2](#).
- ⁹⁹ Queensland Mental Health Commission, *Overview: Human Rights protection frameworks for people being treated involuntarily for a mental illness*, October 2019.
- ¹⁰⁰ Queensland Mental Health Commission, *Overview: Human Rights protection frameworks for people being treated involuntarily for a mental illness*, October 2019, p19.
- ¹⁰¹ Queensland Mental Health Commission, *Overview: Human Rights protection frameworks for people being treated involuntarily for a mental illness*, October 2019, p14.
- ¹⁰² WA Department of the Attorney-General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, Final report, April 2016.
- ¹⁰³ Western Australia, *Western Australian Parliamentary Debates (Hansard)*, Legislative Council, 17 September 2019, p 1288. <[https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/FE3F215946C5958E4825847B0019D462/\\$file/C40%20S1%2020190917%20All.pdf](https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/FE3F215946C5958E4825847B0019D462/$file/C40%20S1%2020190917%20All.pdf)>.
- ¹⁰⁴ Western Australia, *Western Australian Parliamentary Debates (Hansard)*, Legislative Council, 17 September 2019, p 1000. <[https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/FE3F215946C5958E4825847B0019D462/\\$file/C40%20S1%2020190917%20All.pdf](https://www.parliament.wa.gov.au/Hansard/hansard.nsf/0/FE3F215946C5958E4825847B0019D462/$file/C40%20S1%2020190917%20All.pdf)>.
- ¹⁰⁵ See Sarah Collard and Penny Timms, 'Prisoners held in solitary confinement for nearly two months challenge WA Government in court', *ABC News online*, ABC News, reported 11 August 2020. <<https://www.abc.net.au/news/2020-08-11/wa-prisoners-held-in-solitary-confinement-legal-challenge/12542654>>.
- ¹⁰⁶ 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, national statement of principles, 9 August 2020. <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/national-statement-of-principles-relating-to-Persons.aspx>>.
- ¹⁰⁷ 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, national statement of principles, 9 August 2020. <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/national-statement-of-principles-relating-to-Persons.aspx>>.
- ¹⁰⁸ 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, national statement of principles, 9 August 2020. <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/national-statement-of-principles-relating-to-Persons.aspx>>.
- ¹⁰⁹ 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, national statement of principles, 9 August 2020, p 2. <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/national-statement-of-principles-relating-to-Persons.aspx>>.
- ¹¹⁰ 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, webpage. <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/national-statement-principles-relating-persons-unfit-plead-or-not-guilty-reason-cognitive-or-mental-health-impairment>>.
- ¹¹¹ 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, webpage. <<https://www.ag.gov.au/rights->

[and-protections/human-rights-and-anti-discrimination/national-statement-principles-relating-persons-unfit-plead-or-not-guilty-reason-cognitive-or-mental-health-impairment](https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/national-statement-principles-relating-persons-unfit-plead-or-not-guilty-reason-cognitive-or-mental-health-impairment)>.

¹¹² 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, webpage. <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/national-statement-principles-relating-persons-unfit-plead-or-not-guilty-reason-cognitive-or-mental-health-impairment>>.

¹¹³ 'National Statement of Principles relating to Persons Unfit to Plead or Not Guilty by Reason of Cognitive or Mental Health Impairment', *Attorney General's Department*, webpage. <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/national-statement-principles-relating-persons-unfit-plead-or-not-guilty-reason-cognitive-or-mental-health-impairment>>.

¹¹⁴ Respondents to the Royal Commission's Criminal Justice System issues paper have raised the lack of transparency around the progression and have asked the Royal Commission to seek an update on the status of implementation of the National Principles.

¹¹⁵ 'Northern Territory justice criticises five-month wait for mental health assessment report', *ABC News online*, ABC News, updated 15 December 2017. <<https://www.abc.net.au/news/2017-12-15/nt-justice-criticises-five-month-wait-mental-health-assessments/9262854>>.

¹¹⁶ 'Northern Territory justice criticises five-month wait for mental health assessment report', *ABC News online*, ABC News, updated 15 December 2017. <<https://www.abc.net.au/news/2017-12-15/nt-justice-criticises-five-month-wait-mental-health-assessments/9262854>>.

¹¹⁷ Julie Bishop and George Brandis, *Improving oversight and conditions in detention*, media release, Parliament House, Canberra, 9 February 2017.

<<https://webarchive.nla.gov.au/awa/20171220020355/http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html>>.

¹¹⁸ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2002, A/RES/57/199 (entered into force 22 June 2006), art 1.

¹¹⁹ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 18 December 2002, A/RES/57/199 (entered into force 22 June 2006), Preamble.

¹²⁰ Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, p 23.

¹²¹ Commonwealth Attorney-General, *Improving oversight and conditions in detention*, media release, Canberra, 9 February 2017, <<https://webarchive.nla.gov.au/awa/20171220014600/http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2017/FirstQuarter/Improving-oversight-and-conditions-in-detention.html>>.

¹²² Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, recommendation 12.

¹²³ Australian Human Rights Commission, *Implementing OPCAT in Australia*, Final report, June 2020, recommendation 13.