

**RESPONSE OF AUSTRALIA TO THE VIEWS OF THE COMMITTEE ON THE
RIGHTS OF PERSONS WITH DISABILITIES IN COMMUNICATION NO.
7/2012 (NOBLE v AUSTRALIA)**

1. The Australian Government (Australia) presents its compliments to the members of the Committee on the Rights of Persons with Disabilities (the Committee).
2. Australia has given careful consideration to the Views of the Committee in Communication No. 7/2012 (*Noble v Australia*), adopted 2 September 2016 and published 22 September 2016. These Views have been published on the website of the Australian Attorney-General's Department.¹
3. Australia acknowledges its obligations under the Convention on the Rights of Persons with Disabilities (the Convention) and takes its obligations under international human rights law seriously. Australia is committed to ensuring that any deprivation of liberty of persons with disabilities is lawful, non-arbitrary and on an equal basis with others. Australia, including the Western Australian Government, is also committed to providing persons with disabilities with adequate support and reasonable accommodations to enable them to exercise their legal capacity before the courts in a way that prevents abuse and is consistent with the rights of an accused under international human rights law.
4. After giving due consideration to the Views in good faith, the Australian Government advises that Australia respectfully disagrees with a number of the Committee's views that it has violated the author's rights under the Convention as set out below.
5. However, the Western Australian Government acknowledges that there were significant failures in the way the author was dealt with and with the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the MID Act) more generally.² The Western Australian Government deeply regrets the period of time during which the author was detained under the provisions of the MID Act and is committed to continuing to provide the author with support, with a view to him living independently in the community. The Western Australian Government has already undertaken a review of the

¹ Human Rights Communications, Australian Commonwealth Attorney-General's Department website: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>.

² This Western Australian legislation was previously called the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA). As the Committee refers to the legislation as the MID Act in its views, Australia will follow the same approach in its response.

MID Act and will be seeking to implement legislative changes to bring about a fairer and more just system for dealing with mentally impaired accused persons.

Admissibility

6. The Committee found all of the author's claims admissible except for his claim in respect of Article 14(2). Australia respectfully disagrees with the Committee's views on admissibility in respect of Articles 12, 13 and 15.

Admissibility ratione temporis - Articles 12 and 13

7. The Committee formed the view that the author's allegations in respect of Articles 12 and 13 were admissible *ratione temporis* because in the Committee's view the 2003 decision of the Western Australian District Court (District Court) was reiterated *de facto* by Western Australian authorities including the District Court in its 2010 decision. In the Committee's view these decisions meant the author was continuously deprived of the opportunity to plead not guilty and to test the evidence against him even after the entry into force of the Optional Protocol. In the view of the Committee, this part of the author's communication was within the Committee's competence.
8. Australia recalls that Article 2(f) of the Optional Protocol requires the Committee to consider a communication inadmissible when 'the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the State Party concerned unless those facts continued after that date'.
9. Australia recalls that the Convention entered into force generally on 3 May 2008, and for Australia, on 16 August 2008 and the Optional Protocol entered into force generally on the same date as the Convention and for Australia, on 20 September 2009.
10. According to the Committee's Views, a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations.³ Australia respectfully submits that the Committee has failed to substantiate how the actions of Western Australian authorities affirm by act or clear implication the alleged previous violations under Articles 12 and 13.

³ CRPD, *Views adopted by the Committee under Article 5 of the Optional Protocol, concerning communication No. 7/2012*, UN Doc. CRPD/C/16/D/7/2012 (Noble Views), paragraph 7.4; Human Rights Committee, *Konye v Hungary*, Communication No. 520/1992, UN Doc. CCPR/C/50/D/520/1992, 5 May 1994, paragraph 6.4.

11. The Committee's view on admissibility turns on the 2003 decision of the District Court, which occurred five years before the Convention entered into force.
12. Such views are clearly contrary to the well-established principle of international law, codified in the *Vienna Convention on the Law of Treaties*, that a treaty's provisions do not bind a party in relation to any act or fact which took place before the date the treaty entered into force with respect to that State Party, unless a different intention appears from the treaty or is otherwise established.⁴
13. Accordingly the Australian Government repudiates the Committee's Views in respect of admissibility *ratione temporis*.

Failure to exhaust domestic remedies - Articles 12 and 13

14. The Committee determined that the author's claims under Articles 12 and 13 of the Convention were admissible under Article 2(d) of the Optional Protocol. It concluded that no effective remedies were available to the author because it accepted the author's claim that if he were to appeal the 2010 decision of the District Court, the appeal would not have any prospects of success.
15. Australia acknowledges that the requirement to exhaust domestic remedies does not require resort to appeals that objectively have no prospect of success.⁵ However, an author's subjective belief that domestic remedies are futile alone is not sufficient to absolve the author of the requirement to exhaust the remedies.⁶
16. On this basis, Australia disagrees with the Committee's finding that the author's claims under Articles 12 and 13 were admissible because the author did not exhaust domestic remedies.

Failure to substantiate claims – Article 15

17. The Committee found that the author's allegations under Article 15 were sufficiently substantiated because he had submitted that his detention under the MID Act was indefinite, he was subjected to frequent and serious incidents of violence and abuse, the

⁴ *Vienna Convention on the Law of Treaties* [1974] ATS 2, in force generally, and for Australia on 27 January 1980, Article 28.

⁵ *Earl Pratt and Ivan Morgan v Jamaica*, Communications No. 210/86 and 225/87, UN Doc. Supp. No. 40 (A/44/40) at 222, 6 April 1989, paragraph 12.3.

⁶ *R.T. v France*, Communication No. 262/87, UN Doc. CCPR/C/35/D/262/1987, 30 March 1989, paragraph 7.4; *R.L. et al v Canada*, Communication No. 358/89, UN Doc. CCPR/C/43/D/358/1989, 5 November 1991, paragraph 6.4 and *Ludvik Emil Kaaber v Iceland*, Communication No 674/95, UN Doc. CCPR/C/58/D/674/1995, paragraph 6.2.

frequency of these incidents made him more vulnerable, his disability prevented him from protecting himself and prison authorities had not recorded these incidents.

18. Australia notes that the author did not provide any evidence for his allegations and reiterates its original submissions, particularly that prison records showed that the author had only two instances of a minor altercation or disagreement with other prisoners while in prison.⁷
19. On this basis, Australia does not agree with the Committee's view that such claims were admissible.

Merits

Articles 5(1) and (2) – Equality and Non-discrimination

20. The Committee formed the view that Australia violated Articles 5(1) and (2) of the Convention because the MID Act resulted in discriminatory treatment of the author. The Committee observed that discrimination can result from the discriminatory effect of a rule or measure that disproportionately affects persons with disability even when there is no intention to discriminate.⁸ Australia accepts that discrimination under the Convention can occur either directly or indirectly, except where such treatment constitutes legitimate differential treatment. The Committee's view is based on its position that 'the whole judicial procedure focused on his mental capacity to stand trial without giving him any possibility to plead not guilty and to test the evidence submitted against him'.⁹
21. The Committee also took the view that Australia did not provide the author with the support it considers that he required to exercise his legal capacity and that Australia did not consider which measures could be adopted. The Committee therefore concluded that the operation of the MID Act caused the 'author's rights to a fair trial [to be] fully suspended, depriving him of the protection and equal benefit of the law' resulting in a violation of Articles 5(1) and (2) of the Convention.¹⁰
22. Australia acknowledges its obligations under the Convention to ensure all persons are equal before the law and entitled without discrimination to equal protection and equal

⁷ Australian Government Submissions on Admissibility and Merits to the United Nations Committee on the Rights of Persons with Disabilities in Communication No. 7/2012, *Noble v Australia*, dated 14 April 2014 (Australian Government Submissions), paragraphs 58 and 156.

⁸ Noble Views, above n 3, paragraph 8.3.

⁹ Ibid, paragraph 8.4.

¹⁰ Ibid.

benefit of the law, as well as its obligations to promote equality, eliminate discrimination and take all appropriate steps to ensure that reasonable accommodation is provided.

23. However, Australia respectfully disagrees with the Committee's view that Australia has violated the authors' rights under Article 5(1) and (2) of the Convention because the MID Act:
- a) constitutes legitimate differential treatment
 - b) does not differentiate on the basis of disability but on the basis of mental capacity
 - c) preserves the fair trial rights of Western Australian persons with mental impairments, and
 - d) is a form of reasonable accommodation.
24. Australia reiterates its view that the MID Act is legitimate differential treatment, not discrimination,¹¹ and is therefore consistent with Australia's obligations under Article 5 of the Convention. The principle of legitimate differential treatment allows State Parties to treat particular groups differently, provided specific criteria are met.¹²
25. The MID Act is designed to ensure that persons with mental incapacity are not subject to a criminal trial that they could not understand or in which they could not effectively participate. It differentiates between persons fit to stand trial and those unfit to stand trial, on the basis of reasonable and objective criteria, not on the basis of disability.¹³
26. The MID Act also contains numerous safeguards. The Court bears a burden to decide the question of fitness to plead on the balance of probabilities including by considering psychiatric and other expert reports,¹⁴ appeals are allowed in respect of a decision that an

¹¹ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 20, *Non-discrimination in economic, social and cultural rights* (art. 2, para. 2), UN Doc. E/C.12/GC/20, 2 July 2009 (CESCR General Comment No. 20), [13]; Human Rights Committee, *Love v Australia*, Communication No. 932/2000, UN Doc CCPR/C/77/D/983/2001, 25 March 2013, paragraph 8.2; European Court on Human Rights, *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, Judgments of 23 July 1968, paragraph 10; European Court of Human Rights, *Marckx v Belgium*, Application No. 6833/74, Judgment of 13 June 1979, paragraph 33; Inter-American Court of Human Rights, *Advisory Opinion No. 4 'Proposed amendments to the naturalisation provisions of the Constitution of Costa Rica'* OC-4/84 of 19 January 1984, paragraphs 56-57. See also State Practice including 'UN Convention on the Rights of Persons with Disabilities - Norway's Initial Report' available online at <https://www.regjeringen.no/contentassets/26633b70910a44049dc065af217cb201/crpd-initial-report-norway-english-01072015.pdf>, [21].

¹² The justification for differentiation must be reasonable and objective. There must also be a clear and reasonable relationship of proportionality between the aim sought and the measures and their effects.

¹³ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (MID Act), section 9.

¹⁴ *Ibid* section 12(2).

accused is not mentally fit to stand trial¹⁵ and against any custody order imposed under the MID Act.¹⁶ Custody orders are also periodically reviewed.¹⁷ The conditions of Mr Noble's custody order were most recently reviewed by the Mentally Impaired Accused Review Board (the Review Board) in January 2017. At that time, the Review Board resolved to adjourn Mr Noble's matter to 4 August 2017 for further consideration. The various agencies overseeing Mr Noble's treatment have agreed to facilitate a continued reduction in support over the next six months with a view to assisting him to live independently in the community. This approach will be reviewed and considered by the Review Board when it meets to consider Mr Noble's matter in August 2017.

27. Australia respectfully disagrees with the Committee's view that the MID Act prevented the author from pleading not guilty. Were the author to have been tried, he would have been unable to understand the nature of the charge, the requirement to plead to the charge or the effect of the plea.¹⁸ As for testing the evidence against him, the author was found to be unable to understand the purpose of a trial, to exercise the right to challenge jurors, to follow the course of the trial, to comprehend the substantial effect of evidence presented by the prosecution in the trial or to properly defend the charges against him.¹⁹
28. Contrary to the Committee's view that the author's fair trial rights were suspended as a result of the MID Act, the legislation guarantees that individuals who do not understand the nature of the charges against them will not be tried in order to ensure that persons who do not have the capacity or ability to appropriately defend themselves are not found guilty as a result. For a person with severe mental illness,²⁰ for example, to be made to stand trial in such circumstances would be manifestly unfair, given that the accused would not be able to defend himself or herself.²¹ Australia notes the jurisprudence of the European Court of Human Rights that an anti-discrimination provision will be 'violated when States without an objective and reasonable justification fail to treat differently persons whose

¹⁵ Ibid section 12(4).

¹⁶ *Supreme Court Act 1935 (WA)*, section 58.

¹⁷ MID Act, above n13, section 33.

¹⁸ This is as a result of his mental incapacity documented in expert reports thoroughly reviewed by the District Court in 2003. See *The Queen v Marlon James Noble* (1261 of 2002), transcript of proceedings before Nisbet DCJ of the District Court of Western Australia, 7 March 2003, page 17. See also Australian Government Submissions, paragraph 15.

¹⁹ Ibid.

²⁰ Defined in *Mental Health Act 2014 (WA)*, section 6.

²¹ Professor Ian Freckleton, 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) 19(1) *International Journal of Law and Psychiatry* 39, 40.

situations are significantly different'.²² Although Australia acknowledges that such jurisprudence is not binding on the Committee, the principle of legitimate differential treatment applies across a number of United Nations human rights treaties and such human rights treaty bodies have adopted an approach to legitimate differential treatment consistent with that of the European Court of Human Rights.²³

29. As such, contrary to the Committee's conclusion that Australia did not analyse which measures could be adopted, in Australia's view, the MID Act is a measure that meets the criteria²⁴ of being a reasonable accommodation because it operates on a case-by-case basis to enable persons with mental impairment to engage with the criminal justice system while providing for appropriate and effective safeguards to prevent abuse in accordance with the rights of an accused consistent with international human rights law.²⁵ Australia notes the Committee's previous views that States Parties enjoy a margin of appreciation in assessing the reasonableness and proportionality of accommodation measures.²⁶

30. In any event, Australia notes that in some circumstances, other than ensuring that the accused's legal interests are protected through the appointment of counsel, there are no adjustments that can be made that will enable a person who is unfit to stand trial to take part in a fair criminal trial on an equal basis with others.²⁷ The author's capacity to understand the criminal trial, the charges against him or the pleading process would not have been improved by making any adjustments.

²² European Court of Human Rights, *Thilimmenos v Greece*, Application no. 34369/97, Judgment of 6 April 2000, paragraph 44. This decision referred to Article 14 of the *European Convention on Human Rights*, which although differently worded than Article 5 of the Convention is based on the same core principle.

²³ CESCR, General Comment No. 20, above n 12, [13].

²⁴ 'Necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms': Article 2 of the Convention.

²⁵ Article 12(4) of the Convention.

²⁶ Committee on the Rights of Persons with Disabilities, *Australia v Gemma Beasley*, UN Doc. CRPD/C/15/11/2013, 25 April 2016, paragraph 8.4.

²⁷ 'Unfitness to stand trial may inherently compromise the right to equal recognition before the law (and hence a person's access to justice on an equal basis). Yet without a mechanism to identify and accommodate a person who is unable to understand court proceedings [such as unfitness to plead laws], even with the full provision of reasonable accommodations, the accused may be denied a fair trial': Melbourne Social Equity Institute and the Disability Research Initiative, Submission to the Senate Community Affairs References Committee inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia, 21 March 2016. See also '[V]ery few would support the idea that the state never, even as a last resort, has a duty to protect those who are clearly unable to make crucial treatment decisions for themselves': George Szmukler, Rowena Daw and Felicity Callard, 'Mental health law and the UN Convention on the rights of persons with disabilities' (2014) 37(3) *International Journal of Law and Psychiatry* 245, 250.

31. Australia notes that the Committee has not specified the types of measures which it considers that a State Party should provide to a person who does not have, either temporarily or permanently, the capacity to understand the nature of a criminal trial. Australia respectfully submits that the Committee should provide guidance on the type of measures that a State could have implemented to further or better assist an author to exercise his or her legal capacity consistently with Article 5 of the Convention.
32. It remains unclear to Australia what additional support should or could have been provided to the author, noting that the author was legally represented with the assistance of funding from Legal Aid before the District Court in both 2003 and 2010.
33. Finally, the Australian Government reiterates its longstanding concerns with the definitive approach taken by the Committee to capacity which fails to recognise that capacity (as opposed to the right to recognition before the law) is a spectrum.²⁸

Articles 12(2) and (3) and 13 – Legal capacity, access to support to exercise legal capacity, and access to justice

34. The Committee found that Australia violated the author's rights under Articles 12(2) and (3) and 13 of the Convention because 'the decision that the author was unfit to plead because of his intellectual and mental disability resulted in a denial of his right to exercise his legal capacity to plead non-guilty and to test the evidence presented against him'.²⁹ It further considered that 'no adequate form of support was provided by the State party's authorities to enable him to stand trial and plead non-guilty, despite his clear intention to do so'.³⁰ Whilst the Committee accepted that 'States parties have a certain margin of appreciation to determine the procedural arrangements to enable persons with disabilities to exercise their legal capacity', it concluded that the author was 'not provided with adequate support or accommodation to exercise his rights to access to justice and fair trial'.³¹
35. Australia acknowledges its obligations under the Convention to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. It also acknowledges its obligations to take appropriate measures to provide access to

²⁸ Views of the Australian Government on the draft General Comment by the Committee on the Rights of Persons with Disabilities regarding Article 12 of the Convention – Equal Recognition before the Law, paragraphs 9, 10 and 16.

²⁹ Noble views, above n 3, paragraph 8.6.

³⁰ Ibid.

³¹ Ibid.

persons with disabilities to the support they may require in exercising their legal capacity. Australia further acknowledges its obligations under the Convention to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations in order to facilitate their effective role as direct and indirect participants in all legal proceedings.

36. Australia reiterates the terms of its interpretive declaration to Article 12 of the Convention. Australia understands that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.
37. Australia respectfully disagrees with the Committee's view that Australia has violated the author's rights under Articles 12(2) and (3) and 13 of the Convention because in Australia's view:
- a) the Committee has acknowledged that the right to exercise legal capacity in Article 12 can be limited, provided that such limitations are not discriminatory and are reviewable
 - b) Australia had justifiably limited the author's right to exercise legal capacity consistent with the Committee's interpretation of Article 12
 - c) there was no additional support that Australia could have provided to the author which would have been effective in enabling him to exercise his legal capacity, and
 - d) the obligation in Article 13 to ensure access to justice is premised on the efficacy of the relevant accommodations and of the access to justice.
38. In coming to the view that Australia has violated the author's rights, the Committee considered that the author has continually been 'deprived of the opportunity to plead not guilty and to have the evidence against him tested' as a result of the decision of the District Court to declare the author unfit to stand trial in March 2003.³² In response, Australia reiterates its submission to the Committee that the quashing of the indictment against the author in March 2003 means that there are no offences with which the author is charged and against which he could plead. As such, there are no witnesses to examine, nor is there any evidence to test.

³² Ibid, paragraph 7.6.

39. In respect of the Committee's comments on legal capacity, Australia refers to the Committee's General Comment on Article 12,³³ particularly the Committee's acknowledgement that a State may limit this right. It stated that
- when the State denies legal capacity, it must be on the same basis for all persons. Denial of legal capacity must not be based on a personal trait such as gender, race, or disability, or have the purpose or effect of treating such persons differently.³⁴
40. The Committee also noted in its General Comment on Article 12 that State parties must ensure 'that persons who experience interference with their right to legal capacity have the opportunity to challenge such interference (on their own behalf or with legal representation) and to defend their rights in court'.³⁵
41. Australia reiterates its view above that the MID Act does not discriminate on the basis of disability or any other grounds. It does not have the purpose or effect of treating persons with disability differently, except in a manner that is consistent with international human rights law. Instead, the MID Act enables cognitively impaired accused, who experts consider unable to effectively exercise legal capacity, to engage with the criminal justice system. In this respect, Australia notes its view that Article 12 must be interpreted consistently with other human rights contained in the Convention, particularly the right in Article 16 to take all appropriate steps to protect persons with disabilities from all forms of exploitation, violence and abuse.
42. Further, as noted above, decisions made under the MID Act that a person is not mentally fit to stand trial are reviewable, as are decisions imposing custody orders and the decisions of the Review Board.
43. As such, Australia is of the view that the author's right to exercise legal capacity is limited and that Australia has met the criteria on the basis of which such a limitation would be justified.
44. Australia is also of the view that the obligations in Articles 12(3) and 13 are limited to support that is 'required' and 'effective'. Australia submits that the support envisaged by these provisions must be effective in assisting a person with disability to exercise his or her legal capacity and rights. In this respect, Australia highlights the words of

³³ CRPD, *General comment on Article 12: Equal recognition before the law* (General Comment Article 12), UN Doc. CRPD/C/11/4, 25 November 2013, paragraph 12.

³⁴ *Ibid*, para 28.

³⁵ *Ibid*, para 34.

Article 13(1) of the Convention, which as the Committee's views in this matter demonstrate, is connected to Article 12.³⁶ Australia submits that both these obligations have the objective of 'facilitating [an] effective role as direct and indirect participants' for persons with disabilities. Experts determined the author would not have been able to understand the nature of the charge against him or the requirement to plead to the charge, which means that there were no additional measures required by the author that Australia could have instituted to facilitate an effective role for the author in a criminal trial consistently with Articles 12 and 13 of the Convention, especially without creating a significant risk that the author would not be protected from all forms of exploitation, violence and abuse.³⁷

Article 14(1)(b)

45. The Committee found that the author's detention amounted to a violation of Article 14(1)(b) because in the Committee's view the author's disability was used to justify his detention.
46. Australia acknowledges its obligations under the Convention to ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily on an equal basis with others and that any deprivation of liberty is in conformity with the law. Australia also acknowledges its obligation to ensure that the existence of a disability shall in no case justify a deprivation of liberty.
47. Australia respectfully disagrees with the Committee's characterisation of the objectives of the author's detention. Australia reiterates its submissions³⁸ that the objectives of the author's detention under the MID Act were to:
- a) ensure fairness to the author as a person with mental impairment accused of a criminal offence³⁹ consistent with the obligation in Article 12(4) of the Convention
 - b) guarantee the place and extent of the author's custody was determined according to his particular characteristics and needs⁴⁰ consistent with the obligation in Article 5(3) to take steps to ensure reasonable accommodation is provided, and

³⁶ See also General Comment Article 12, above n 33, paragraph 38.

³⁷ Article 16 of the Convention.

³⁸ Australian Government Submissions, paragraphs 86-90.

³⁹ Kevin Prince, Criminal Law (Mentally Impaired Defendants) Bill 1996 (WA), Second Reading Speech, 5 September 1996.

⁴⁰ *Ibid.*

c) achieve a safe and secure environment for all Western Australians⁴¹ by protecting the public and minimising violence in the community.⁴²

48. More specifically, the decision of the District Court of Western Australia of March 2003 to impose a custody order on Mr Noble was made after a careful weighing and balancing of a range of factors set out in the Australian Government Submissions in this matter.⁴³

49. In this respect, Australia notes that the Human Rights Committee in *A v New Zealand* has taken the view ‘that it is for the courts of States parties concerned to review the evaluation of the facts as well as the application of the law in a particular case, and not for the Committee, unless the Courts’ decisions are manifestly arbitrary or amount to a denial of justice’.⁴⁴ *A v New Zealand* is factually analogous to this matter and Australia respectfully submits that the Committee should align its views with those of the Human Rights Committee for the purposes of consistency.

50. The Human Rights Committee found that detention under mental health legislation from 1984 to 1993 was not a violation of the author’s right to liberty under Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR). It came to this conclusion by noting that the author had been assessed under domestic legislation according to objective criteria. The Committee also noted that the author’s committal order was issued according to law, based on an opinion of three psychiatrists.⁴⁵ The periodic review of the author’s situation by psychiatrists and the courts was also a relevant factor in the Committee’s finding that New Zealand had not violated Article 9.

51. Australia reiterates that the decisions of Australian authorities with respect to the author’s detention under legislation were not arbitrary, were made according to law and were reviewed periodically. On the basis of the Human Rights Committee’s reasoning, Australia submits that the author’s detention would not have been found to be a violation of Article 14(1)(b).

⁴¹ Ibid.

⁴² Ibid.

⁴³ Under section 19(5) of the MID Act the four factors to which a judge must have regard before making a custody order are (i) the strength of the evidence against the accused, (ii) the nature of the alleged offence and the alleged circumstances of its commission, (iii) the accused’s character, antecedents, age, health and mental condition, and (iv) the public interest.

⁴⁴ *A v New Zealand*, Communication No. 754/1997, UN Doc. CCPR/C/66/D/754/1997, paragraph 7.3.

⁴⁵ Ibid, paragraph 7.2.

52. Australia also respectfully notes that the Committee's views on the scope of the obligations in Article 14, both with respect to this matter and more generally,⁴⁶ are inconsistent with the views of other human rights bodies about the right to liberty and security of the person.⁴⁷ Australia acknowledges that the Committee is not required to interpret obligations under the Convention consistently with other United Nations human rights bodies but notes the importance of consistency in approach. Australia notes further that the Committee's Guidelines on Article 14, to which the Committee referred in paragraph 8.7 of its Views, were not the subject of any consultation with States Parties. The Guidelines therefore are not reflective of States Parties' views or interpretations of how best to implement obligations under Article 14. On this basis, such Guidelines carry little weight and should not be used to justify the Committee's views on Article 14.
53. Australia further respectfully disagrees with the Committee's reference to 'the absence of any criminal conviction' as justifying its conclusion that Australia violated Article 14(1)(b). It is well-established that a deprivation of liberty need not necessarily arise out of a criminal conviction.⁴⁸ On its face, Article 14(1)(b) prohibits unlawful or arbitrary deprivations of liberty and requires that any deprivation of liberty is in conformity with the law. As Australia submitted to the Committee,⁴⁹ the author's detention was in conformity with the law and was not in any way arbitrary.

Article 15

54. The Committee also found that the author was subject to indefinite detention and that given 'the irreparable psychological effects that indefinite detention may have on the detained person', this amounted to inhuman and degrading treatment and therefore a violation of Article 15 of the Convention.
55. Australia acknowledges its obligations under the Convention to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities,

⁴⁶ See, for example, Committee on the Rights of Persons with Disabilities, 'Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities' 14th session, September 2015.

⁴⁷ *A v New Zealand*, Communication No. 754/1997, UN Doc. CCPR/C/66/D/754/1997, paragraphs 7.2-7.3. See also European Court of Human Rights, *Winterwerp Case v the Netherlands*, Judgment of 24 October 1979, paragraph 37.

⁴⁸ Human Rights Committee, *General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, UN Doc. HRI/GEN/1/Rev.1 at 8, 30 June 1982, paragraph 1; Human Rights Committee, *Womah Mukong v. Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/D/458/1991, paragraph 9.8; Human Rights Committee, *Rameka v New Zealand*, Communication No. 1090/2002, UN Doc. CCPR/C/79/D/1090/2002 (2003), paragraph 7.3.

⁴⁹ Australian Government Submissions, paragraphs 51-56.

on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment. It acknowledges that a State Party should consider the particular needs and possible vulnerability of the person concerned, including because of his or her disability, in taking such measures. In this respect, Australia reiterates its submissions about the additional support and monitoring provided to the author in Western Australia.⁵⁰

56. However, Australia notes the author's claims were based merely on an allegation of harm, for which the author did not provide any evidence. Australia reiterates that the Western Australian Department of Corrective Services' records indicated only two instances of a minor altercation or disagreement with other prisoners during the author's detention.⁵¹

57. In respect of the Committee's comments that the author was detained for 10 years without having any indication as to the duration of his detention, Australia notes that the author's detention was subject to regular periodic reviews in the course of which the Review Board considered whether his detention remained appropriate and necessary. As such, the author was regularly apprised of the length of time for which he would be detained in the knowledge that when the next review occurred the Review Board would reconsider the necessity of his detention.

58. Australia submits that the conduct on the basis of which the Committee has found a violation of Article 15 does not meet the high threshold of harm required. Torture requires 'severe pain or suffering', whether physical or mental.⁵² Cruel, inhuman or degrading treatment or punishment engages a lower threshold of harm but still requires severity of treatment.⁵³ Australia notes that the Committee's approach to Article 15 in its

⁵⁰ Australian Government Submissions, paragraphs 157-160.

⁵¹ Australian Government Submissions, paragraph 156.

⁵² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [1989] ATS 21, entered into force generally on 26 June 1987 and for Australia on 7 September 1989, Article 1. 'Torture' under Article 7 of the ICCPR and under Article 15 of the Convention should be interpreted consistently with the definition in Article 1 of the CAT because of the treaty's universal status: Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 3rd ed, 2010) 217 and 228.

⁵³ The Committee Against Torture has stated that '[i]n comparison to torture, ill-treatment may differ in the severity of pain and suffering': Committee Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: General Comment No 2: Implementation of Article 2 by States Parties* (Thirty-ninth session, 2008) UN Doc CAT/C/GC/2, [10]. See also the Human Rights Committee's statement that 'the Covenant does not contain any definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the

comments on States Parties reports⁵⁴ has been commensurate with this high threshold of harm and respectfully submits that the Committee's Views in this matter should have reflected that threshold.

Recommendations

59. The Committee has recommended that Australia provide a remedy to the author for breaches of the Convention, including reimbursement of legal costs, compensation, immediate revocation of the conditions of his Conditional Release Order and all necessary support measures for his inclusion in the community.
60. As Australia respectfully does not agree with the Committee's view that it has breached the Convention, it is not considered appropriate to implement all of these recommendations. Nevertheless, the Government of Western Australia is committed to providing the author with support through the various agencies overseeing his case with a view to helping him to live independently in the community. The Government of Western Australia will give due consideration, on its merits, to any further request for assistance by the author.
61. In respect of the Committee's recommendation as to reimbursement of legal costs, the Australian Government notes that the author received legal aid assistance for proceedings in Australian domestic courts. The Australian Government is unaware of any legal costs borne by the author.
62. Australia, including the Western Australian Government, will continue to ensure that adequate support and accommodation measures are provided to persons with mental and intellectual disability to enable them to exercise their legal capacity before the courts. In respect of the Committee's recommendation as to providing the author with all necessary support measures for his inclusion in the community, Australia would be grateful for the Committee's guidance on what support measures it would consider to be both necessary and effective in the circumstances.

treatment applied': Human Rights Committee, *General Comment No 20: Article 7* (Forty-fourth session, 1992) UN Doc HRI/GEN/1/Rev.1, [4].

⁵⁴ See, for example, the Committee's comments in relation to correctional therapy in China in its Concluding Observations on the initial report of China, adopted by the Committee at its eighth session (17-28 September 2012), UN Doc CRPD/C/CHN/CO/1, 15 October 2012, paragraph 27 and in relation to the use of experimentation without consent in Hungary in its Concluding Observations on the initial periodic report of Hungary, adopted by the Committee at its eighth session (17-28 September 2012), UN Doc CRPD/C/HUN/CO/1, 22 October 2012, paragraph 30.

63. As noted in paragraph 5, the Western Australian Government has recently concluded a review of the MID Act. The report and recommendations arising from the review of the MID Act were tabled in the Legislative Council of the 39th Western Australian Parliament on 7 April 2016. Work is ongoing to progress a suite of reforms to the MID Act. The Western Australian Government will continue to ensure also that appropriate training is provided to staff of the Review Board, members of the Law Reform Commission and the Parliament, judicial officers and staff involved in facilitating the work of the judiciary.
64. The Australian Government avails itself of this opportunity to renew to the Committee on the Rights of Persons with Disabilities the assurances of its highest consideration.