Review of the Defence of Insanity in s16 of the Criminal Code and Fitness to Plead

Submission by the Anti-Discrimination Commissioner (Tas) to Tasmanian Law Reform Institute Review of the Defence of Insanity in s16 of the Criminal Code and Fitness to Plead

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# Introduction

Thank you for providing me with an opportunity to contribute to the Tasmanian Law Reform Institute’s Review of the Defence of Insanity in s16 of the Criminal Code and Fitness to Plead.

Equal Opportunity Tasmania’s interest in these matters relates to the potentially discriminatory impacts of the current arrangements for determining whether a person is unfit to plead and to ensuring that people with disability who are found unfit to plead or are found not guilty by reason of insanity are treated in accordance with the principles outlined in human rights instruments including the *Convention on the Rights of Persons with Disabilities*.

A number of the matters raised in our submission were canvassed in the work that Equal Opportunity Tasmania undertook to develop the *Disability Justice Plan for Tasmania 2017-2020,* including the need for improved arrangements to safeguard the rights of forensic mental health patients.

I would be happy to elaborate on these matters should you wish me to do so.

Sarah Bolt

Anti-Discrimination Commissioner (Tas)

# Rights and obligations under Tasmanian discrimination law

## Protection under discrimination law

The *Anti-Discrimination Act 1998* (Tas) (the ADA) provides that it is unlawful to discriminate against a person on the basis of disability.[[1]](#footnote-1)

Discrimination prohibited under the ADA includes both ‘direct’ and ‘indirect’ discrimination.[[2]](#footnote-2) Section 14 provides that:

(2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute … less favourably than a person without that attribute …

(3) For direct discrimination to take place, it is not necessary –

1. that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
2. that the person who discriminates regards the treatment as unfavourable; or
3. that the person who discriminates has any particular motive in discriminating.

Indirect discrimination is defined in section 15 of the ADA:

(1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –

1. share, or are believed to share, a prescribed attribute; or
2. share, or are believed to share, any of the characteristics imputed to that attribute –

more than a person who is not a member of that group.

(2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

These provisions are broadly equivalent to those found in the *Disability Discrimination Act 1992* (Cth) (the DDA).[[3]](#footnote-3)

Sections 14(3) and 15(2) of the ADA provide that it is not necessary that the person who discriminates is aware that the practice or requirement is discriminatory.

It also unlawful under the ADA to:

engage in conduct that offends, humiliates, intimidates, insults or ridicules on the basis of disability;[[4]](#footnote-4) or

incite, by a public act, hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of disability.[[5]](#footnote-5)

There is no requirement under the ADA for disability to be permanent or to exist at the time the discrimination occurred. Disability is defined broadly under the ADA as follows:

***disability*** means any of the following that presently exists, previously existed but no longer exists, may exist in the future, whether or not arising from an illness, disease or injury or from a condition subsisting at birth:

* + - * 1. a total or partial loss of the person’s bodily or mental functions;
				2. total or partial loss of a part of the body;
				3. the presence in the body of organisms causing or capable of causing disease or illness;
				4. the malfunction, malformation or disfigurement of a part of a person’s body;
				5. disorder, malformation, malfunction or disfigurement that results in the person learning differently from a person without the disorder, malformation, malfunction or disfigurement;
				6. a disorder, illness or disease that affects a person’s thought processes, perceptions of reality, emotions or judgement or that results in disturbed behaviour;
				7. reliance on a guide-dog, wheelchair or other remedial or therapeutic device;

Discrimination is unlawful in specified areas of activity, including employment; education and training; provision of facilities, goods and services; accommodation; membership and activity of clubs; administration of any law of the State or any State program; and/or awards, enterprise agreements or industrial agreements.[[6]](#footnote-6)

## Exceptions

The prohibition of discrimination on the basis of disability under Tasmanian law is, however, subject to a number of exceptions. Exceptions are defences whereby otherwise unlawful conduct is not unlawful if the respondent person or organisation can establish on the balance of probabilities that the circumstances are such that the exception properly applies. A person can still make a complaint about those actions and in those circumstances a respondent wishing to take advantage of the exception will generally be required to prove that the exception applies.

Under the ADA, an exception applies where a respondent can demonstrate that the discrimination was ‘reasonably necessary’ to comply with ‘any law of this State or the Commonwealth’.[[7]](#footnote-7) In addition, in respect of compliance with Commonwealth law, an ‘exemption’ is provided in section 47 of the DDA for ‘anything done … in direct compliance with a prescribed law’.[[8]](#footnote-8) However no Tasmanian laws have been prescribed under this provision of the DDA.

Whilst it is open to the Tasmanian Anti-Discrimination Commissioner under section 6(g) of the ADA to examine any legislation and report to the Minister as to whether it is discriminatory or not, once legislation is in place the extent of the Commissioner’s authority with respect to accepting complaints about actions taken to comply with provisions within those laws is limited by section 24(a), but only where those actions are ‘reasonably necessary’ to achieve compliance. However actions taken in the administration of those laws are open to complaint.

An exception also applies where the discrimination ‘is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute’[[9]](#footnote-9) or is through a ‘program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute’.[[10]](#footnote-10)

## United Nations Convention on the Rights of Persons with Disabilities

The right of people with disability to enjoy legal capacity on an equal basis with others is well recognised in international law.

The *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) ratified by Australia in July 2008 identifies as its purpose: ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all person with disabilities and to promote respect for their inherent dignity’.[[11]](#footnote-11)

In addition to the general principles and obligations contained within the CRPD, Article 12 provides that people with disabilities have legal capacity on the same basis as all other persons and requires that signatories to the Convention take measures to ensure that those rights are able to be exercised. Article 12(4) also requires measures relating to the exercise of legal capacity respect the rights, will and preferences of the person and are proportional and least restrictive:[[12]](#footnote-12)

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 13 requires State parties to provide access to justice for people with disabilities on the same basis with others, including through the provision of adjustments and supports. It also requires the development and delivery of training of those administering the justice system so that they recognise and support people with disability to have effective access to justice:

1. States Parties shall 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, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 14 prohibits unlawful or arbitrary deprivation of liberty and emphasises that disability alone should not be the sole basis on which a person is detained:

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(a) Enjoy the right to liberty and security of person;

(b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation.

Finally, Article 15 requires State parties to ensure that no person with disability is subject to torture or to cruel, inhuman or degrading treatment or punishment:

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

By ratifying the CRPD the Australian government has accepted that people with disability enjoy equal legal capacity on an equal basis with others in all aspects of life and is obliged to take appropriate measures to provide people with disability with the supports they require to exercise this right.

The approach is one in which the emphasis is on supporting people to exercise capacity rather than making an assumption that because of a particular impairment that legal capacity is absent.

In the context of how these principles may be applied in relation to the matters considered by this review, the challenge therefore is to build legal frameworks which reflect this shift toward a social model of disability and to provide the necessary assistance to people with disability to retain their ability to be effective decision makers. It also provides a strong commitment to ensure that people with disability who do come into contact with the justice system are not punished or subject to limits on their liberty and freedom simply because of their impairment.

## International Covenant on Civil and Political Rights (ICCPR)

In addition to provisions contained within the CRPD, the *International Covenant on Civil and Political Rights* (ICCPR) also contains safeguards related to the participation of people with disability in the criminal justice system.[[13]](#footnote-13)

Article 9 requires that all persons (including people with disability) are not deprived of their liberty unlawfully or arbitrarily and Article 10 requires that all persons deprived of their liberty are treated with humanity and with respect for the inherent dignity of the human person, including by provision of reasonable accommodation.

Article 14 of the ICCPR sets out the minimum provisions required to ensure that all persons receive a fair trial:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
	1. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
	2. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
	3. To be tried without undue delay;
	4. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
	5. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
	6. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
	7. Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

## Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Also of relevance in the context of the current inquiry is the Australian Government’s decision in December 2017 to ratify the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).[[14]](#footnote-14)

OPCAT aims to prevent torture and cruel, inhuman or degrading treatment or punishment of people in detention.

The Protocol requires the establishment of preventative based inspection mechanisms responsible for the independent inspection of all places of detention and closed environments in Australia (known as the National Preventative Mechanism, NPM). These preventative mechanisms are empowered to conduct regular unannounced visits to all places where people are deprived of their liberty and to interview detainees or staff of their choosing. The mechanisms are currently being established (or identified in cases where existing bodies are likely to carry out these functions) and it is expected they will be operational in 2020.

The Australian Government has indicated that its primary focus will be on places of detention such as prisons, juvenile detention centres, police cells, closed psychiatric institutions and immigration facilities. However there is capacity to capture a broader range of facilities over time.

The arrangements established to implement OPCAT will provide an important mechanism for assisting in preventing human rights violations of those who are deprived of their liberty. Not only will they assist in ensuring that Australia meets its obligations under the Convention on Torture, they will also assist in bringing to light any cases where other rights (such as those under the CRPD or the ICCPR) are being transgressed. This could include, for example, the failure to provide adequate psychiatric care for those will serious mental illness in detention.

Collectively the provisions of both the CRPD, the IPPCR and the CAT impose obligations relevant to the treatment of people with disability who come into contact with the criminal justice system.

# Protecting rights in law and practice

Whilst people with disability have rights under international, national and State law, in reality it is apparent that those rights are not upheld in all instances.

For many people with disability, the denial of legal capacity deprives them of the ability to make decisions about some of the most fundamental aspects of their life – what treatment they undergo, where they live and whether or not they are subjected to restrictive practices.[[15]](#footnote-15)

Importantly in the context of the current review there is evidence to suggest that it results in people with cognitive and/or psychiatric impairment being detained for indefinite or prolonged periods often well in excess of that which they could expect had they been dealt with under normal court procedures.[[16]](#footnote-16)

Ways in which the concept of capacity are applied is often used in a way that is detrimental to the person involved. Capacity can be removed in circumstances where it is not clear that a rigorous assessment has been made or where the capacity for decision making to be retained with the assistance of aids and supports has not been tested.

This concern was reflected by the Community Affairs References Committee in its report into violence, abuse and neglect against people with disability in institutional and residential settings:[[17]](#footnote-17)

At the heart of the issue of legal incapacity is the concept of decision-making for a number of reasons. First, when decision-making is removed from the hands of a person, it becomes easier for the decision-maker – whether it be parent, carer or departmental officer – to then make decisions on behalf of that individual that may seem ‘to be in their best interests’ but may actually be completely counter to the wishes of that person. Second, in every situation where a person has been forced to cede their own autonomy to another, there is the opportunity for abuse of that decision-making power. Finally, when the erosion of control from people with disability is normalised it makes it easier for society to accept that even those people with disability not subject to legal guardianship order can have their will subverted as happens with the use of restrictive practices or forced medical treatments.

As outlined earlier, underpinning the CRPD is the fundamental principle that people with disability enjoy legal capacity on an equal basis with all others and the obligation to ensure that appropriate steps are taken to provide them with access to the supports they may require to exercise that capacity. This includes recognising that the absence of capacity may be decision-specific, time-specific or support dependent. It also requires measures to safeguard people with disability from abuse in situations where a person is determined to lack capacity.

The Australian Law Reform Commission’s *Final Report into Equality, Capacity and Disability in Commonwealth Laws* recommends the reform of Commonwealth, State and Territory laws and legal frameworks concerning individual decision making.[[18]](#footnote-18) It recommends that these are guided by a set of National Decision Making Principles which reflect the commitment under the CRPD to supported decision making:[[19]](#footnote-19)

**Principle 1: The equal right to make decisions**

All adults have equal right to make decisions that affect their lives and to have those decisions respected.

**Principle 2: Support**

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

**Principle 3: Will, preferences and rights**

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

**Principle 4: Safeguards**

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

We are strongly of the view that reform of law and practice in Tasmania should be guided by these principles.

The Australian Human Rights Commission has highlighted the following as particular areas in need of reform[[20]](#footnote-20):

* The lack of support and procedural accommodations provided in the criminal justice process, and the current test for unfitness to stand trial, are contrary to the obligations to recognise the legal capacity of people with disability, and ensure they have effective access to justice.
* The special hearings people with cognitive and/or psychiatric impairment are subject to in some jurisdictions may be contrary to the right to a fair trial.
* The lack of appropriate and effective limits on the detention orders made against people found unfit to stand trial or not guilty by reason of mental impairment are contrary to the right not to be detained arbitrarily.
* The detention in prisons of people with cognitive and/or psychiatric impairment who have not been convicted is inappropriate and contrary to their right to health, habilitation and rehabilitation, and may expose them to cruel, inhuman or degrading acts.

Each of these issues require both a legal and policy response. Greater understanding is needed in the broader community of the ways in which legal capacity can be supported, strengthened arrangements for the determination of circumstances in which capacity may be lacking and increased focus on the adoption of least restrictive options in circumstances where incapacity is found to exist. More specifically in the context of the criminal justice system recommendations include:

* Amending the test for unfitness to stand trial to require judges to consider whether the accused should effectively participate in a trial if provided with supports and/or modifications.
* Improved training for members of the judiciary on how to determine capacity to stand trial by reference to the supports available.
* The preparation of guidance material (including, for example, through the preparation and adoption of Bench Books) to provide improved certainty and consistency of approach.
* The imposition of effective limits on periods of detention.
* The requirement for regular review of the need for detention.
* The requirement for the development and adoption of plans setting out actions to be taken for the rehabilitation of the offender.
* The establishment of appropriate step down facilities to enable transition to less restrictive environments and eventually release from detention.
* The implementation of preventative mechanisms that enable places of detention to be monitored appropriately, including all places where people with disability are involuntarily detained.

The following sections outline our response to some of the major issues raised in the Paper.

# Dangerous criminal provisions

Whilst ongoing detention in circumstances where an offender represents serious danger to the community may in some circumstances be warranted, it is important to ensure that any procedures for the declaration of a person as a ‘dangerous criminal’ are made in accordance with human rights law.

Article 9(1) of the *International Covenant on Civil and Political Rights (*ICCPR) recognises the right to liberty and security of person other than in circumstances prescribed by law:[[21]](#footnote-21)

**Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

In practice this requires that the procedures for the imposition and discharge of a declaration of a person as a ‘dangerous criminal’ must of themselves be neither arbitrary nor unreasonable.

Whilst EOT appreciates the need to balance public safety concerns, we are supportive of amendment to the dangerous criminal provisions included in the *Sentencing Act* *1997* (Tas) to ensure that the declaration of a person as a dangerous criminal and procedures for discharge of declarations are fair and transparent. This should include uniformity with provisions in other jurisdictions as recommended by the Tasmanian Law Reform Institute, including:[[22]](#footnote-22)

* Ensuring that the threshold for imposition of a dangerous criminal declaration is based on sound legal principles;
* That declarations are only made in circumstances where there is a high degree of evidence that a person represents an ongoing danger to the community;
* That a mandatory list of factors to be considered by the court is identified in legislation;
* The inclusion of provisions mandating periodic review and clear guidelines regarding procedures for seeking discharge of the declaration and factors which should be taken into account when considering an application for discharge; and the
* Capacity to impose pre and post-release conditions including the provision of support to enable reintegration and ongoing management of risks is provided in law.

In addition, to the extent that a person is declared a dangerous criminal on the basis of mental impairment, we consider that provisions should be included in the *Sentencing Act* to enable the making of concurrent orders providing for detention and treatment in an appropriate mental health facility both during the initial period of incarceration and after the substantive sentence has been served.

Article 25 of the CRPD recognises that people with disabilities have the right to the highest attainable standards of health care without discrimination on the basis of disability. In practice this means that people with mental illness should have access to care, treatment and rehabilitation where this is required.

This is particularly important when considering options for the amendment of legislation to allow for the imposition of pre- and post-release conditions.

The recommendation to include a statutory trigger for judicial consideration of the appropriateness of making an order for referral for assessment and subsequent making of a restriction, supervision or treatment order is consistent with this approach.

# Unfitness to Stand Trial

EOT has advocated for appropriate modifications and support to be provided to people with disability who come into contact with the criminal justice system whether as victims, witnesses or defendants. We consider action to assist people with disability participate in the justice system is an essential component of a fair and equitable justice system. It will also give confidence that findings of unfitness to stand trial have been taken as a last resort and on the basis of a fully informed understanding of the circumstances of the particular individual before the court.

Following the release of the Australian Human Rights Commission *Equal Before the Law* report in February 2014[[23]](#footnote-23), EOT worked with government and non-government stakeholders to develop the *Disability Justice Plan for Tasmania 2017-2020* (DJPT) released in December 2017.[[24]](#footnote-24)

A key action identified in the DJPT is the need to ‘improve the justice system’s capacity to recognise an individual’s disability at the earliest opportunity and make available appropriate supports and adjustments to enable them to participate in those services on an equitable basis with others’.[[25]](#footnote-25) Action item 36 of the DJPT commits the Government to review the operation of the fitness to stand trial provisions in the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

Other commitments made under the DJPT relevant to this review include:

* Support for people with disability to make decisions that affect their lives to enable them to exercise their legal rights and participate in legal processes (Action 11).
* Ensure access to advocacy and communication support for people with disability in the justice system (Action 12).
* Enable adjustments to court procedures to accommodate people with disability as victims, witnesses or offenders (Action 20).
* Provide communication assistance for people with disability when it is required (Action 21).
* Develop specialist services and interventions to address the needs of prisoners with disability (Action 29).
* Develop effective partnerships between corrections, health, disability and mental health services to address the particular needs of prisoners with disability (Action 30).
* Ensure that reintegration and release planning take account of particular needs arising from a prisoner’s disability (Action 32).
* Ensure patients subject to forensic orders have access to advocacy support and legal assistance services (Action 35).

Underpinning the approach taken in the DJPT is a rights-based approach which recognises that meaningful participation in the justice system often requires the provision of appropriate adjustments and supports.

It remains our view that there is a need for a more systematic approach across the broader criminal justice system to the identification of disability and the provision of supports and services to people with disability to enable them to effectively participate in the justice system on an equal basis with all other Tasmanians. This should include, for example, making available Easy Read material or video materials aimed at assisting people with cognitive impairment to understand the court system. Adjustment and support should also be provided where required, including access to communication assistance where this is needed.

Of importance in this regard are the recommendations arising from the TLRI 2018 report on *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?[[26]](#footnote-26)* Implementation of a communication assistant scheme for people with communication needs in the criminal justice system has the capacity to significantly improve the ability of people with cognitive impairment to participate in the justice process, including during pre-trial hearings and the trial process itself. Important, however, is the need to ensure that communication specialists are engaged early in the process, including at first point of contact with police and during interaction with legal representatives. Early engagement of supports in this way will help to ensure that a fully informed picture of the ability of the defendant to understand the charge and engage in court proceedings and clear advice is able to be presented to the Court on the nature of the adjustments required to enable the individual to participate in proceedings.

Training of police, prosecutors, the judiciary and other professionals involved in the criminal justice system is also critical, as is the availability of court specialists who are able to advise on the availability of adjustments and how these might be used in the court system. Some jurisdictions have, for example, introduced Bench Books to guide the judiciary on adjusting processes and procedures to ensure that they are inclusive of people with disability.

The availability of Diversion Lists which act to enable Courts to address problems that has led to a person’s appearance before the Court are also critical. Diversionary approaches have the capacity to break the cycle of offending. Benefits of these approaches are, however, dependent on the availability of well-coordinated and integrated service responses to ensure that appropriate clinical and related interventions are made.

Whilst actions identified in the DJPT are not limited to circumstances where an individual is potentially facing a determination of unfit to plead, they are equally relevant in those circumstances and particularly important in the context of considering whether an application for unfitness to stand trial is warranted.

EOT is of the view that adjustments to the processes for engaging with the criminal justice system such as those identified in the DJPT have the capacity to lead to a reduction in the number of people found unfit to stand trial.

## Should unfitness to trial be abolished?

It is clear from the work of Arstein-Kerslake and others that finding of unfitness to plead or unfitness to stand trial risks falling foul of international human rights law, and the provisions of Articles 12, 13, and 14 of the Convention on the Rights of Persons with Disabilities in particular.[[27]](#footnote-27)

In its place there is a view that all persons should be provided with the support necessary to participate in trial processes, including the provision of an advocate capable of reflecting the will and preferences of the defendant in circumstances where capacity may be impaired.

Questions remain, however, regarding whether circumstances will arise when the provision of supports and other adjustments are not enough to enable a person to effectively participate in a trial process and, if so, what the nature of those supports should be.

We agree that there does not seem to be any settled view in the literature in this regard and that whilst improvements to the way in which people with disability are assisted to exercise legal capacity may greatly minimise the circumstances in which a person is deemed unfit to plead, there is likely to remain occasions on which supports will not be enough to guarantee a fair trial.

At its most fundamental, however, without appropriate safeguards any departure from trial procedures whether this is through a declaration of unfitness to trial or other mechanism risk falling foul of Australia’s commitments under the CRPD.

Whilst the Issues Paper does not provide case summaries, given the relatively small number of instances in which individuals were found unfit to plead a review of each case may be of benefit to identify whether the provision of supports were considered to enable the trial to proceed.

## Criteria Governing Assessment

As outlined in the Issues paper, at the core of reviews of fitness to plead provisions is the criteria used to make that assessment.

EOT notes in this regard the work undertaken by the Australian Law Reform Commission to set out criteria relevant to the assessment of fitness to stand trial and is supportive of this approach.

The ALRC recommended that relevant laws be amended to provide that a person cannot stand trial if the person cannot be supported to:[[28]](#footnote-28)

1. Understand the information relevant to the decisions that they will have to make in the course of the proceedings;
2. Retain that information to the extent necessary to make decisions in the course of the proceedings;
3. Use or weigh that information as part of the process of making decisions; or
4. Communicate the decisions in some way.

The effect of this test is to place emphasis on a person’s decision making ability rather than their intellectual ability to understand specific aspects of legal proceedings. It also requires that the assessment of decision-making ability is considered in the context of available supports.

## Approaches for determining fitness to plead in the Magistrates Court

EOT supports the availability of procedures that would expedite dismissal of the charges in relation to summary offences if a Magistrate is satisfied that this is the only possible outcome.

We are concerned to ensure, however, that any presumption made about an accused’s fitness to trial is done on the basis of transparent criteria and isn’t used as a mechanism to undermine the rights of the charged person. Of particular concern, given the capacity to restrict the rights of the accused, would be any authority provided to a Magistrates to place the accused on any restriction or supervision orders in the absence of a proper testing of the issues surrounding the case.

For this reason we consider that the threshold for allowing a Magistrate to exercise discretion to dismiss the charge should be set at a point where the Court is required to be satisfied that there is a real and substantial question about the defendant’s fitness to stand trial.

## Assessment Reports

We are supportive of the approach adopted in Victoria where assessments of fitness to stand trial are undertaken by a multi-disciplinary team, including experts in speech pathology and communications. Reports should include an assessment of whether the provision of supports would assist the defendant to participate in the trial and the nature of the supports that should be provided to enable this to be so.

## Procedures Following a Determination of Unfitness to Stand Trial

Special hearings provide people who have been found unfit to stand trial with a mechanism to have the facts of the case considered and any defences to be raised which may give rise to acquittal.

At the same time, however, they also provide an opportunity for the accused to be found responsible for the crime (a finding cannot be made that the defendant is not guilty of the offence charged) and consequently be subject to a range of forensic orders, including detention. This may result in the person being detained for periods in excess of that which they would receive if the case had gone to trial under the terms of various forensic orders.

Concern has been expressed by the Australian Law Reform Commission[[29]](#footnote-29) and others that special hearings may not constitute a fair trial because of the risk that they contravene Article 14(3) of the ICCPR:[[30]](#footnote-30)

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

Of particular concern are limitations placed on the accused to participate in a meaningful way in proceedings which risks diminishing the ability of the court to test the case against the accused.[[31]](#footnote-31)

As outlined in the Issues paper, an additional problem is that the accused legal representative is required to develop a case on the basis of the ‘best interests’ of the accused, rather than on the basis of their ‘rights, wishes and preferences’, which is contrary to national decision making principles.

There is also concern that the holding of special hearings may compromise the common law principle that a trial not be held when the defendant’s abilities are so limited that the trial would be unfair or unjust.[[32]](#footnote-32) Concern has also been raised that special hearings are limited in the ability to give consideration to matters such as intention and/or understanding of the wrongfulness of the offence.[[33]](#footnote-33)

As outlined by Arstein et al:[[34]](#footnote-34)

Even though many jurisdictions explicitly strive to emulate the trial process as closely as possible, a special hearing is fundamentally not a trial. The procedures are different. The available verdicts are different. Ultimate dispositions – potentially including indefinite detention – are radically different. Therefore, a special hearing may not adequately uphold the CRPD obligations for persons with disabilities to have an equal right to a fair trial.

This view finds support in guidelines prepared by the Committee on the Rights of Persons with Disabilities.[[35]](#footnote-35)

Arnstein et al cite the Committee’s view that ‘persons with disabilities who have committed a crime should be tried under the ordinary criminal procedures, on an equal basis with others and with the same guarantees, although with specific procedural adjustments to ensure their equal participation in the criminal justice system.’[[36]](#footnote-36)

In circumstances where proceedings are required but the accused person cannot participate even with intensive support, Gooding et al has identified the need to meet the following criteria to ensure minimum compliance with the CRPD:[[37]](#footnote-37)

1. The same standard of proof and probative value of prosecution evidence as with typical trials;
2. The same presumption of innocence, with the associated requirements for proof of all elements;
3. The availability of the accused of all defences; and
4. Proceedings against the accused to be based on his or her ‘rights, wishes and preferences’ (and not his or her ‘best interests’).

# Insanity

EOT supports the updating of terminology used within the *Criminal Code* in reference to the defence of insanity. In doing so we recognise that whilst there is a requirement that the law take into account any medical conditions at the time the crime was committed, to refer to all medical conditions under the broad umbrella of ‘insanity’ is inconsistent with modern day understandings and the broad range of conditions (including intellectual impairment) that may have an impact on responsibility for a criminal action.

Section 16 of the *Criminal Code Act 1924* (Tas) currently provides:

(1)  A person is not criminally responsible for an act done or an omission made by him –

(a) when afflicted with mental disease to such an extent as to render him incapable of –

(i) understanding the physical character of such act or omission; or

(ii) knowing that such act or omission was one which he ought not to do or make; or

(b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.

(2)  The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.

(3)  A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.

(4)  For the purpose of this section the term ***mental disease*** includes natural imbecility

As outlined in the Issues paper the use of terms such as ‘mental disease’ and ‘natural imbecility’ has led to a body of case law that is both arbitrary and inaccurate. It has the capacity to, for example, capture actions arising from the side-effects of diabetes such as hyperglycaemia or epilepsy as ‘mental diseases’. Not only is the use of the term ‘mental disease’ inaccurate, in the context of making out an insanity defence it has the capacity to be highly stigmatising.

We are therefore attracted to the approach proposed by the Law Commission in England and Wales in which the defence of ‘insanity’ is replaced by a special defence based on the finding that the accused is not criminally responsible by reason of ‘recognised medical condition’. This would more clearly reflect the broad range of conditions that have previously been captured on the umbrella of ‘insanity’, including cognitive impairment and conditions such as sleep apnoea syndrome or narcolepsy.

The approach would also more directly link to an assessment of relevant capacity at the time the offence was committed.

Use of the concept ‘recognised medical condition’ would also help to raise awareness of the diversity of various disability types and importantly the difference between cognitive impairment (which may include intellectual disability, learning difficulties, acquired brain injury and so on) and psychiatric impairments which are linked to mental illness. In turn this should lead to a broader range of orders beyond those currently available under the forensic mental health system.

As an alternative, clearer and less stigmatising terminology such as ‘mental health impairment’ or ‘cognitive impairment’ should be considered.

We are supportive of the inclusion of statutory definitions covering these concepts. Definitions should be flexible enough, however, to capture evolving understanding of medical conditions. For example, as cognitive impairment associated with dementia evolves a more detailed understanding is developing regarding how of how it can impact on behaviour.

Exclusion of personality disorders risks scoping out some major conditions that might ordinarily be associated with mental health impairment, including paranoia, schizophrenia and/or borderline personality disorder. Accordingly EOT does not support excluding these conditions.

# Disposition: Forensic and Treatment Orders

As outlined in the Issues paper, EOT has previously expressed concern about the options available to the Court on findings of not guilty by reason of insanity or if the defendant cannot be found not guilty of an offence at special hearing after being found unfit for trial.

The underlying principle for those who are held unaccountable for their behavior due to a finding of unfitness to plead or not guilty by reason of insanity should be to provide appropriate treatment and care whilst at the same time addressing the underlying behavior contributing toward criminal activity.

As outlined in the Issues paper, s18 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) provides authority to the court to make one of five orders in circumstances where a finding cannot be made that the person is not guilty of an offence at special hearing or on the grounds of insanity:

**18.   Effect of findings**

(1)  A defendant who is found not guilty of an offence at a special hearing is taken to have been found not guilty at an ordinary trial of criminal proceedings.

(2)  If a defendant is found not guilty of the offence charged on the ground of insanity or on a finding being made to that effect, or a finding cannot be made that the defendant is not guilty of an offence, the court is to –

(a) make a restriction order; or

(b) release the defendant and make a supervision order; or

(c) make a treatment order; or

(d) .  .  .  .  .  .  .  .

(e) release the defendant on such conditions as the court considers appropriate; or

(f) release the defendant unconditionally.

(3)  Despite subsection (2) only the Supreme Court may make a restriction order or supervision order under that subsection.

(4)  A treatment order made under subsection (2)(c), whether before or after the commencement of the *Crimes (Miscellaneous Amendments) Act 2016*, is taken to have been made under Division 2 of Part 3 of Chapter 2 of the Mental Health Act 2013.

Restriction orders in particular risk leading to breaches of human rights. A restriction order requires that the person to whom it applies be admitted to and detained in the Wilfred Lopes Centre until the order is discharged by the Supreme Court. A supervision order releases the person to whom it applies into the community under the supervision of the Chief Forensic Psychiatrist.

Section 37 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Tas) requires that all forensic orders (both restriction and supervision orders) are to be reviewed by the Mental Health Tribunal. Such review must take place within 12 months of the Order being made by the Court and at least once in each period of 12 months after that, unless the order has lapsed due to a specific time limit placed on the order by the Court.

While section 34 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) requires that restrictions on a defendant’s freedom should be kept to the minimum consistent with the safety of the community, the Act does not require the placement of time limits on the period a person may be detained after a restriction order has been made.

Because of this, EOT has previously expressed concern that persons on restriction orders may be detained for periods of time well in excess of those applied to persons committing similar offences whose cases had proceeded through the court.

Statistics compiled for the period 2006–2010 comparing the periods of detention of forensic patients with the median sentence for the same offence suggests that patients placed on restriction orders are likely to be detained in Tasmania for periods well in excess of their sentenced counterparts (other than for the offence of murder).[[38]](#footnote-38)

These and related findings led the Australian Law Reform Commission and others to conclude that there are inadequate safeguards against indefinite detention in some jurisdictions, including Tasmania.[[39]](#footnote-39)

Whilst information provided by the Legal Aid Commission of Tasmania suggests there have been some changes in more recent years, there remains concern that the imposition of a restriction order can in some circumstances result in periods of detention well in excess of the median sentence for similar crimes.

Table 1: Periods of incarceration on restriction orders compared to median sentence

|  |  |  |
| --- | --- | --- |
| **Offence:** | **Period of incarceration of defendant** | **Median sentence** |
| Wounding | 7 years and continuing | 6 months  |
| Murder | 13 years, converted to a supervision order which has run for 8 years and continuing | Head sentence 21 yearsNon-parole period 14 years |
| 2 years, converted to a supervision order which has run for 8 years and continuing |
| 16 years and continuing  |
| Fraud | 2 years and continuing | 12 months |
| Indecent assault | 6 years and continuing | 8 months |
|  | Average term of orders 7.33 years and continuing  |  |

Several approaches are suggested as remedy, including statutory limits on the period of detention.

The Australian Law Reform Commission considers, for example:[[40]](#footnote-40)

… that limits on the period of detention should be set by reference to the period of imprisonment likely to have been imposed, if the person had been convicted of the offence charged. If they are a threat or danger to themselves or the public at any time, they should be the responsibility of mental health authorities, not the criminal justice system. The framework for detention and supervision orders should be flexible enough to ensure that people transition out of the criminal justice system, in a way consistent with principles of community protection and least restriction of rights.

In some jurisdictions, the court is required to set a limiting or nominal term for the person’s detention.[[41]](#footnote-41) In Victoria, the term is generally the maximum penalty available for the crime charged. In NSW and the NT, the nominal term is equal to the length of the sentence of imprisonment that the court would have imposed if the person was found guilty. Importantly, however, in these jurisdictions the limiting or nominal term does not mark the actual limit of detention, it only marks the point at which there is to be a major review of the detention order.

While setting time limits on detention may provide minimal safeguards, the Australian Human Rights Commission emphasises that people who are found unfit to plead or not guilty due to mental impairment have not been found criminally responsible for the crime and it may therefore be inappropriate for them to be detained in accordance with sentencing principles set in place to punish or deter further offending. In the Commission’s view:

Detention should be based on the same criteria as for civil confinement as an involuntary patient under mental health laws, namely if it is necessary for the treatment of the person for their own health and safety, or for the protection of the public.[[42]](#footnote-42)

In practice, however, in some cases despite the issuing of multiple certificates by the Mental Health Tribunal, historically the Supreme Court has been reluctant to discharge restriction orders.[[43]](#footnote-43)

Legal Aid NSW has proposed that, in circumstances where a person is found unfit to plead or is found not guilty by reason of mental impairment and a term of detention is imposed, nominal terms be set equivalent to both a non-parole period and a sentence that would be imposed had the person been found guilty.[[44]](#footnote-44) During the non-parole period, Legal Aid NSW recommends the current position be retained. This would mean that during that period a person could be released from a restriction order only if a certificate is issued by the Mental Health Tribunal and confirmed by the Supreme Court. Thereafter, however, the presumption should be that the person is released in the following sequence:

* conditional release at the completion of the nominal non-parole period; and
* unconditional release at the end of the sentence period.

This approach would not derogate the current powers of the Mental Health Tribunal to issue a certificate that would enable the release of a person conditionally or unconditionally prior to the expiry of their nominal term. Nor would it prevent the Supreme Court from putting in place other orders or conditions to come into effect on release after a nominal non-parole period, such as a treatment order.

It would, however, shift the legal presumption against detention.

Importantly, it would also provide those in detention with identifiable future release dates which they could work toward. It would also satisfy the requirement to introduce improved human rights safeguards for those on restriction orders. Under the present arrangements persons who are detained may express feelings of frustration and hopelessness about the uncertainty of their future, in large part because of the uncertainty of their period of detention. Having no expected future release date gives little motivation to aim for self-improvement or to address the underlying factors contributing toward their original offending behaviour.

## Transition from forensic patient status

The adoption of legislative changes enabling conditional or unconditional release after a fixed period of detention would increase the importance of rigorous release planning, including the identification of community-based support and rehabilitation pathways.

Whereas secure mental health facilities such as the Wilfred Lopes Centre may be successful in addressing acute illness and provide for the needs of high risk patients, there is also a need to provide transitional arrangements that encourage behaviour improvements and enable those who are on restriction orders to transition to community living options.

Ongoing support and risk management is best achieved by a graduated transition from a forensic disability setting to a supported ‘step-down’ option and thereon to eventual release into the community. This would enable the implementation of ongoing risk management arrangements to ensure both the client and the community are safeguarded and that individuals are connected with the appropriate supports and services to meet their individual reintegration needs.

Whilst the Mental Health Tribunal currently has the capacity to determine applications for leave from secure mental health units for patients subject to restriction orders, there are limited options outside of the Wilfred Lopes Centre available for those who would benefit from a more step-wise approach.

What this means in practice is that there are few transitional arrangements between detention and release. Calls have previously been made for a second secure mental health centre similar to a group home for this purpose.[[45]](#footnote-45)

Providing a range of forensic services would require close and cooperative multi-agency collaboration, with independent health and social care services and stakeholders committed to improving services for people with disability. When transitioning clients from facilities such as the Wilfred Lopes Centre to community living options, adequate funding is required for the provision of specialist assessments and maintenance services to provide the requisite interventions to ensure ongoing support and future risk management.

At a minimum, it should be a requirement that through-care plans be developed for all patients on restriction orders. Such plans would identify and support treatment and rehabilitation services, including arrangements to enable the person to transition into progressively less restrictive environments and eventually be reintegrated into the community.

Linkages to funding under the National Disability Insurance Scheme (NDIS) may provide avenues to develop more flexible options for forensic patients ready to be conditionally released to live in the community.

## Suitability of system for people with intellectual or cognitive impairment

The Wilfred Lopes Centre provides specialist mental health treatment for prisoners with mental health issues that require specialist treatment, people who are on remand who require inpatient specialist care, and people who are found unfit to plead or not guilty by reasons of insanity and are under a restriction order.

At the same time, however, the Centre is also in exceptional circumstances used as a place of detention for prisoners with cognitive or intellectual disability and in many cases patients on restriction orders have comorbid diagnoses, including intellectual disability, cognitive disorders, physical disability, substance or alcohol abuse disorders, dementia and/or acquired brain injury.

It is important to note that there are significant differences between acute mental illness and intellectual or cognitive impairment.

The fact that a person who does not have a mental illness or whose mental illness is one factor among a range of diagnoses can be placed on a restriction order has several implications. Not only does this mean that treatment for mental illness may be secondary to other therapeutic needs, it also means that other forensic orders (such as a supervision order which places the person under the responsibility of the Chief Forensic Psychiatrist or a treatment order which makes provision for treatment as specified under the *Mental Health Act 2013* (Tas)) may not be suitable or applicable.

The default position then becomes one where a person is at risk of being detained indefinitely because of a permanent impairment. There are no less restrictive options.

This means that the pathways out of detention are more complex and may require more flexibility during detention and in planning for release.

The underlying principle for those who are held unaccountable for their behavior due to a finding of unfitness to plead should be to provide appropriate treatment and care. In the case of those with intellectual disability, cognitive impairment or other complex needs this may require more extensive treatment and more complex rehabilitation services. In turn this will require better integrated models of clinical and non-clinical service provision and more effective services aimed at transition to living in the community, including community-based accommodation suitable for people with high and complex needs.

These factors raise the question about whether there is a need to provide a greater range of alternatives when imposing restriction orders to enable more flexible options for compulsory treatment and custody for people with cognitive impairment or other intellectual disability.

1. *Anti-Discrimination Act 1998* (Tas) s 16(k). [↑](#footnote-ref-1)
2. *Anti-Discrimination Act 1998* (Tas) s 14(1). [↑](#footnote-ref-2)
3. *Disability Discrimination Act 1992* (Cth) ss 4, 5, 7 and 24. [↑](#footnote-ref-3)
4. *Anti-Discrimination Act 1998* (Tas) s 17(1) as amended in 2013 with effect from 1 January 2014. [↑](#footnote-ref-4)
5. *Anti-Discrimination Act 1998* (Tas) s 19(b). [↑](#footnote-ref-5)
6. *Anti-Discrimination Act 1998* (Tas) s 22 [↑](#footnote-ref-6)
7. *Anti-Discrimination Act 1998* (Tas) s 24. [↑](#footnote-ref-7)
8. *Disability Discrimination Act 1992* (Cth) s 47. [↑](#footnote-ref-8)
9. *Anti-Discrimination Act 1998* (Tas) s 25. [↑](#footnote-ref-9)
10. *Anti-Discrimination Act 1998* (Tas) s 26. [↑](#footnote-ref-10)
11. *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UTS 3 (entered into force 3 May 2008) art. 1 [↑](#footnote-ref-11)
12. *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UTS 3 (entered into force 3 May 2008) art. 12 [↑](#footnote-ref-12)
13. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [↑](#footnote-ref-13)
14. *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) [↑](#footnote-ref-14)
15. Extensive consideration of these matters can be found in the Senate Community Affairs Reference Committee Report into *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and cultural and linguistically diverse people with disability* (November 2015) and the Australian Law Reform Commission’s Equality, Capacity and Disability in Commonwealth Laws: Final Report (ALRC Report 124, August 2014) [↑](#footnote-ref-15)
16. See Australian Human Rights Commission, *Indefinite Detention of people with cognitive and psychiatric impairment in Australia* (Submission 6 to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment, March 2016) [↑](#footnote-ref-16)
17. Extensive consideration of these matters can be found in the Senate Community Affairs Reference Committee Report into *Violence, Abuse and Neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and cultural and linguistically diverse people with disability* (November 2015) and the Australian Law Reform Commission’s Equality, Capacity and Disability in Commonwealth Laws: Final Report (ALRC Report 124, August 2014) p74 [↑](#footnote-ref-17)
18. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) [↑](#footnote-ref-18)
19. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report* (ALRC Report 124, 2014) p11 [↑](#footnote-ref-19)
20. Australian Human Rights Commission, *Indefinite Detention of people with cognitive and psychiatric impairment in Australia* (Submission 6 to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment, March 2016) p 5 [↑](#footnote-ref-20)
21. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Article 9(1) [↑](#footnote-ref-21)
22. Tasmanian Law Reform Institute, *A Comparative Review of National Legislation for the Indefinite Detention of ‘Dangerous Criminals’* (Research paper No. 4, July 2017) [↑](#footnote-ref-22)
23. Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (February 2014) [↑](#footnote-ref-23)
24. Tasmanian Government, *Disability Justice Plan for Tasmania 2017-2020* (Department of Justice, 2017) [↑](#footnote-ref-24)
25. Action 1 [↑](#footnote-ref-25)
26. Tasmanian Law Reform Institute, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* (Final Report No. 123, January 2018) [↑](#footnote-ref-26)
27. A Arnstein-Kerslake, P Gooding, L Andrew and B McSherry ‘Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities’ (*Human Rights Law Review* 17(3) 2017) [↑](#footnote-ref-27)
28. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Law: Final Report* (ALRC Report 124, August 2014) p 200 [↑](#footnote-ref-28)
29. Australian Human Rights Commission, *Indefinite Detention of people with cognitive and psychiatric impairment in Australia* (Submission 6 to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment, March 2016) p 19 [↑](#footnote-ref-29)
30. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 [↑](#footnote-ref-30)
31. Australian Human Rights Commission, *Indefinite Detention of people with cognitive and psychiatric impairment in Australia* (Submission 6 to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment, March 2016) p 19 [↑](#footnote-ref-31)
32. Ibid [↑](#footnote-ref-32)
33. P Gooding, B McSherry, A Arnstein-Kerslake & L Andrews ‘Unfitness to Stand Trial and the Indefinite Detention of Person with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change’ *Melbourne University Law Review* (40, 2017) p 847 [↑](#footnote-ref-33)
34. A Arnstein-Kerslake, P Gooding, L Andrew and B McSherry ‘Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities’ (*Human Rights Law Review* 17(3) 2017) p 415 [↑](#footnote-ref-34)
35. Ibid [↑](#footnote-ref-35)
36. Ibid p 416 [↑](#footnote-ref-36)
37. P Gooding, B McSherry, A Arnstein-Kerslake & L Andrews ‘Unfitness to Stand Trial and the Indefinite Detention of Person with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change’ *Melbourne University Law Review* (40, 2017) p862-863 [↑](#footnote-ref-37)
38. Anita Smith, ‘Out of the Frying Pan – Have changes to the review process for people found ‘unfit to plead’ or ‘not guilty by reason of insanity’ enhanced the liberty of the subject?’ (2010) *Law Letter* 107 [↑](#footnote-ref-38)
39. Australian Law Reform Commission, *Equality, Capacity in Commonwealth Laws: Final Report*, Report No 124 (2014) recommendation 7–1, 210 [↑](#footnote-ref-39)
40. Ibid [↑](#footnote-ref-40)
41. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23; *Criminal Code Act* (NT) s 43ZG; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28 [↑](#footnote-ref-41)
42. Australian Human Rights Commission, Submission No 6 to the Senate Community Affairs Reference Committee, *Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, March 2016, 20 [↑](#footnote-ref-42)
43. Anita Smith, ‘Out of the Frying Pan – Have changes to the review process for people found ‘unfit to plead’ or ‘not guilty by reason of insanity’ enhanced the liberty of the subject?’ (2010) *Law Letter* 107. [↑](#footnote-ref-43)
44. Legal Aid NSW, Submission No 62 to the Senate Community Affairs References Committee, *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia,* April 2016, 8. [↑](#footnote-ref-44)
45. See, Felicity Ogilvie, *Mentally ill prisoners ‘institutionalised’* (23 November 2010) ABC News: The World Today [↑](#footnote-ref-45)