

**UNFITNESS TO STAND TRIAL AND THE  
INDEFINITE DETENTION OF PERSONS WITH  
COGNITIVE DISABILITIES IN AUSTRALIA:  
HUMAN RIGHTS CHALLENGES AND  
PROPOSALS FOR CHANGE**

PIERS GOODING,<sup>\*</sup>  
BERNADETTE MCSHERRY,<sup>\*\*</sup>  
ANNA ARSTEIN-KERSLAKE,<sup>†</sup> AND  
LOUIS ANDREWS<sup>‡</sup>

*Adverse consequences facing accused persons found unfit to stand trial in Australia have been well-publicised in recent years. Those found unfit may face indefinite detention in prison or other secure settings — potentially for longer than if they had been convicted and sentenced. Indigenous people with cognitive disabilities appear to face particular disadvantage in this area of criminal law. Reform initiatives have brought attention to the issue, as has the coming into force of the United Nations Convention on the Rights of Persons with Disabilities. Under the UNCRPD, unfit to stand trial laws may currently violate the rights of persons with disabilities to equal recognition before the law, access to justice, and liberty and security of the person. Particular concerns have arisen from the call for equal recognition of legal capacity and the right to support to exercise legal capacity on an equal basis with others. This article will consider the demands of the UNCRPD on unfit to stand trial laws in Australia in the broader context of disadvantage facing persons with cognitive disabilities in criminal law.*

<sup>\*</sup> BA (Hons) (Melb), PhD (Monash); Research Fellow, Melbourne Law School, The University of Melbourne.

<sup>\*\*</sup> BA (Hons), LLB (Hons), LLM (Melb), GradDipPsych (Monash), PhD (York); Adjunct Professor, Melbourne Law School, the University of Melbourne, and Faculty of Law, Monash University, Foundation Director, Melbourne Social Equity Institute, The University of Melbourne.

<sup>†</sup> BA (San Diego), JD (CUNY), PhD (NUI); Lecturer, Melbourne Law School, The University of Melbourne.

<sup>‡</sup> BA (CSU), JD (Melb); Research Assistant, Melbourne Law School, The University of Melbourne.

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## I INTRODUCTION

In 2015, a young Western Australian man, ‘Jason’, was reported to have been detained for over 11 years following a finding that he was unfit to stand trial for a charge of manslaughter.<sup>1</sup> The young man, who cannot be identified because he was 14 years old when he was charged, had allegedly crashed a stolen car that resulted in the death of his 12-year-old cousin. Jason entered juvenile detention in 2003 and later moved to adult prison, where he remains at the time of writing. An opposition legal affairs spokesman in Western

<sup>1</sup> “‘Urgent Need’ for Law Change as Mentally-Impaired Accused Detained Indefinitely, WA Chief Justice Wayne Martin Says”, *ABC News* (online), 10 July 2015 <<http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010>>.

Australia reported that if Jason had been convicted and sentenced for his original charge, he could have expected to face a jail term of between four and eight years.<sup>2</sup>

Other cases also highlight the adverse consequences of Australia's laws relating to unfitness to stand trial.<sup>3</sup> In 2014, the Australian Human Rights Commission determined that the rights of two Indigenous men were violated multiple times while they were detained indefinitely in the Alice Springs Correctional Centre after being found unfit to stand trial.<sup>4</sup> Two years earlier, Rosie Anne Fulton was deemed unfit to stand trial following alleged driving offences, and spent 21 months detained in Kalgoorlie Prison.<sup>5</sup> Marlon James Noble was also found unfit to stand trial in Western Australia in relation to alleged sexual assaults.<sup>6</sup> In 2010, the alleged victims informed prosecutors Mr Noble had never assaulted them.<sup>7</sup> He was incarcerated for nearly a decade,<sup>8</sup> and remains on an indefinite, non-custodial supervision order at the time of writing. In late 2016, Mr Noble's case was heard by the United Nations Committee on the Rights of Persons with Disabilities ('CRPD Committee'). The CRPD Committee took account of 'the irreparable psychological effects that indefinite detention may have on the detained person' and considered

<sup>2</sup> Nicolas Perpitch, 'Indefinite Jailing: Call for Review as Indigenous Driver Involved in Fatal Crash Remains in Prison', *ABC News* (online), 17 September 2014 <<http://www.abc.net.au/news/2014-09-16/call-for-review-of-incarceration-of-former-teen-fatal-driver/5748090>>.

<sup>3</sup> The term 'unfitness to plead' is used in some jurisdictions and reflects terminology stemming from 19<sup>th</sup> century English common law. This article uses the term 'unfitness to stand trial' to reflect the fact that a person must be considered fit at each stage of criminal proceedings, not just at the plea stage.

<sup>4</sup> *KA v Commonwealth* [2014] AusHRC 80, 3 [4], 44 [273].

<sup>5</sup> John Stewart, 'Intellectually Impaired Aboriginal Woman Rosie Fulton to Be Freed after 21 Months in Jail with No Conviction', *ABC News* (online), 26 June 2014 <<http://www.abc.net.au/news/2014-06-25/aboriginal-woman-in-jail-without-conviction-to-be-freed/5550790>>.

<sup>6</sup> Australian Human Rights Commission, 'Aboriginal Man with Intellectual Disability Languishes in WA Prison for a Decade' (Media Release, 18 March 2011) <<https://www.humanrights.gov.au/news/media-releases/2011-media-release-aboriginal-man-intellectual-disability-languishes-wa-prison>>. Mr Noble was detained indefinitely 'until released by an order of the Governor' pursuant to the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(1).

<sup>7</sup> Colleen Egan, 'Marlon Noble "Victims" Don't Recall Sex Crimes', *The West Australian* (Perth), 18 April 2011, 3.

<sup>8</sup> ABC Television, 'Sexual Assault Charges against WA Man in Doubt', *Lateline*, 18 April 2011 (Karen Barlow) <<http://www.abc.net.au/lateline/content/2011/s3195017.htm>>.

‘that the indefinite detention to which [Mr Noble] was subjected amounts to inhuman and degrading treatment.’<sup>9</sup>

According to the Australian Law Reform Commission (‘ALRC’), one of the justifications for unfitness to stand trial laws is that ‘the integrity of a criminal trial (and, arguably, the criminal law itself) would be prejudiced if the defendant does not have the ability to understand and participate in a meaningful way.’<sup>10</sup> The unfitness to stand trial doctrine was largely incorporated into modern law as a humanistic measure to protect accused persons with disabilities, offer a mechanism to test the prosecution, and divert individuals to relevant treatment. In practice, however, findings of unfitness to stand trial can lead to ‘extremely deleterious consequences’,<sup>11</sup> to use Ian Freckelton and Hugh Selby’s term, which includes indefinite detention of persons with cognitive disabilities for longer than if they had been convicted and sentenced following trial.<sup>12</sup> This risk may create an incentive for even innocent people ‘to plead (or be advised to plead) guilty, in order to avoid the consequences of [a finding of] unfitness.’<sup>13</sup> Martin CJ of the Supreme Court of Western Australia, in an extra-judicial comment, observed that:

Lawyers do not invoke the legislation, even in cases in which it would be appropriate because of the concern that their client, might end up in detention, in custody, in prison, for a lot longer period than they would if they simply plead guilty to the charge brought before the court ...<sup>14</sup>

Law reform initiatives at the Commonwealth, state and territory levels have brought attention to the issue,<sup>15</sup> and a Senate inquiry has been completed.<sup>16</sup> At

<sup>9</sup> CRPD Committee, *Views Adopted by the Committee under Article 5 of the Optional Protocol, Concerning Communication No 7/2012*, 16<sup>th</sup> sess, UN Doc CRPD/C/16/D/7/2012 (10 October 2016) 17 [8.9] (‘*Noble v Australia*’) (citations omitted).

<sup>10</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 73 [3.45] (‘*ALRC Equality, Capacity and Disability Report*’).

<sup>11</sup> Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Lawbook, 4<sup>th</sup> ed, 2009) 770.

<sup>12</sup> *ALRC Equality, Capacity and Disability Report*, above n 10, 196 [7.21].

<sup>13</sup> *Ibid* 196 [7.20].

<sup>14</sup> “‘Urgent Need’ for Law Change as Mentally-Impaired Accused Detained Indefinitely, WA Chief Justice Wayne Martin Says”, above n 1.

<sup>15</sup> See, eg, Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) (‘*VLRC Unfitness Report*’); New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) ch 7 (‘*NSWLRC Criminal Responsibility Report*’); ALRC *Equality, Capacity and Disability Report*, above n 10, 194–210. See also Law Reform Committee, Parliament of Victoria, *Inquiry into*

the international level, Australia's unfitness to stand trial laws have been criticised by both the United Nations' Human Rights Council and its CRPD Committee.<sup>17</sup> The CRPD Committee, in its judgment on the case of Mr Noble, determined that he had been discriminated against on the basis of disability under West Australian law because he 'had no possibility and was not provided with adequate support or accommodation to exercise his rights to access to justice and a fair trial',<sup>18</sup> which constituted a violation of his right to equal recognition before the law.<sup>19</sup> Similar concerns have been raised domestically by the Australian Human Rights Commission.<sup>20</sup> However, there is a notable gap in legal scholarship on the practical and theoretical implications of reforming unfitness to stand trial laws according to international human rights law.<sup>21</sup>

The United Nations *Convention on the Rights of Persons with Disabilities* ('UNCRPD')<sup>22</sup> came into force on 3 May 2008 and bolstered calls to ensure procedural fairness and substantive equality for accused persons with

*Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2013) 236–40; Attorney-General's Department (WA), *Review of the Criminal Law (Mentally Impaired Accused) Act 1998: Final Report* (2016) 73–7 ('WA Report').

<sup>16</sup> Senate Community Affairs References Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016).

<sup>17</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31<sup>st</sup> sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016) 23 [136.192], [136.194]–[136.196]; CRPD Committee, *Concluding Observations on the Initial Report of Australia*, 10<sup>th</sup> sess, 12<sup>th</sup> mtg, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 4–5 [31]–[32] ('*Concluding Observations on the Initial Report of Australia*'). The CRPD Committee is mandated under art 36(1) of the United Nations *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('UNCRPD') to provide recommendations to 'states parties'. 'States parties' refers to signatory nations to the UNCRPD.

<sup>18</sup> *Noble v Australia*, UN Doc CRPD/C/16/D/7/2012, 15–16 [8.6].

<sup>19</sup> *Ibid.*

<sup>20</sup> Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) 26–7.

<sup>21</sup> Notable exceptions include: Ian Freckleton, 'Indefinite Detention in Australia: The Ongoing Risk of Governor's Pleasure Detention' (2014) 21 *Psychiatry, Psychology and Law* 469; Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 *Griffith Law Review* 434; Piers Gooding and Charles O'Mahony, 'Laws on Unfitness to Stand Trial and the UN *Convention on the Rights of Persons with Disabilities*: Comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122.

<sup>22</sup> United Nations *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

disabilities in criminal law. The ALRC, in its major review on *Equality, Capacity and Disability in Commonwealth Laws*, recommended that laws on eligibility to stand trial be reformed in line with the *UNCRPD*.<sup>23</sup> A major concern raised by the ALRC was that people found unfit to stand trial 'will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed.'<sup>24</sup> This concern relates to a potential violation of art 12 of the *UNCRPD*. Article 12 requires states parties to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life',<sup>25</sup> and 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'<sup>26</sup>

Related articles in the *UNCRPD* call for rights to access to justice on an equal basis with others, to enjoy liberty and security of the person, and to be free from cruel, inhuman or degrading treatment.<sup>27</sup> These provisions require formal procedural accommodations to make court proceedings accessible for accused persons with cognitive disabilities,<sup>28</sup> and to ensure dispositions are on an equal basis with others.

There are tensions between the demand of the *UNCRPD* for equal participation of persons with disabilities in legal processes, and unfitness to stand trial laws which create separate processes that operate in a 'protective' manner<sup>29</sup> (in part, to achieve substantive equality). This article will consider these tensions through a comparative analysis of laws on unfitness to stand trial throughout Australia, including consideration of national and international law reform trends in this area of law.

The article will be divided into four parts. Part II will consider the function and purpose of unfitness to stand trial laws, the broader disadvantage experienced by persons with disabilities in Australian criminal law, and the demands of international human rights law in this area of law. Parts III, IV

<sup>23</sup> ALRC *Equality, Capacity and Disability Report*, above n 10, 200–1.

<sup>24</sup> Ibid 196 [7.21], quoting Anti-Discrimination Commissioner (Tas), Submission No 71 to ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, January 2014, 42.

<sup>25</sup> *UNCRPD* art 12(2).

<sup>26</sup> Ibid art 12(3).

<sup>27</sup> Ibid arts 13–15.

<sup>28</sup> See NSWLRC *Criminal Responsibility Report*, above n 15, 32–3 [2.75]–[2.79], 35 (recommendation 2.2); VLRC *Unfitness Report*, above n 15, 89 [3.123]–[3.126] (recommendation 18); ALRC *Equality, Capacity and Disability Report*, above n 10, 199–201 [7.35]–[7.40] (recommendation 7-1).

<sup>29</sup> Thomson Reuters, *The Laws of Australia* (at 1 November 2013) [9.3.1950].

and V will consider the implications of the *UNCRPD* in the three main aspects of unfitness to stand trial laws:

- 1 the criteria for determining unfitness;
- 2 the ‘special hearing’ or alternative procedures following such determinations; and
- 3 the disposition of a person found unfit to stand trial.

Part VI argues that Australian laws governing unfitness to stand trial in their current form are incompatible with the *UNCRPD*. We will consider options for reform that would bring unfitness to stand trial laws into greater alignment with the *UNCRPD* and its demand for equal rights to procedural due process and substantive equality for persons with cognitive disabilities.

## II BACKGROUND: UNFITNESS TO STAND TRIAL AND THE DEMANDS OF HUMAN RIGHTS

### A *Laws that Govern Unfitness to Stand Trial*

The long-standing English doctrine of ‘unfitness to plead’ has been incorporated into every Australian jurisdiction,<sup>30</sup> as it has in most common law jurisdictions. While the law and procedures differ between jurisdictions, the key features are broadly consistent.

The requirement that a defendant be fit to be tried is applicable in all courts, including local courts and Magistrates’ Courts. Legislative provisions for unfitness to stand trial rules tend to also apply to higher courts. In New South Wales, for example, the *Mental Health (Forensic Provisions) Act 1990* (NSW) prescribes procedures that follow a finding of unfitness in the District Courts and Supreme Courts; the Act does not apply to the local courts.<sup>31</sup> Similarly, in Victoria the Magistrates’ Court does not have jurisdiction to hear fitness cases,<sup>32</sup> and in the Northern Territory and Queensland fitness to stand

<sup>30</sup> *Crimes Act 1914* (Cth) pt IB div 6; *Crimes Act 1900* (ACT) pt 13; *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 2; *Criminal Code Act 1983* (NT) sch I pt IIA div 3 (‘*Criminal Code* (NT)’); *Mental Health Act 2000* (Qld) ch 7 pts 4, 6; *Criminal Law Consolidation Act 1935* (SA) pt 8A div 3; *Criminal Justice (Mental Impairment) Act 1999* (Tas) pt 2; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) pt 2; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) pt 3.

<sup>31</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 4.

<sup>32</sup> *CL (A Minor) v Lee* (2010) 29 VR 570. For example, in Victoria, if the question of fitness to stand trial is raised for an indictable offence triable summarily in the Magistrates’ Court, ‘the

trial regimes exclude the local courts.<sup>33</sup> However, in the Australian Capital Territory, South Australia, Tasmania and Western Australia, legislation sets out procedures and powers regarding unfitness to stand trial for both courts of summary jurisdiction and the higher courts.<sup>34</sup>

The legal test of a person's fitness to stand trial is effectively the same throughout Australia, and is drawn from the Victorian case of *R v Presser* ('*Presser*').<sup>35</sup> The test was based on principles elucidated in the English case of *R v Pritchard*,<sup>36</sup> and requires that the accused be able to:

- 1 'understand the nature of the charge';
- 2 'plead to the charge and to exercise the right of challenge';
- 3 'understand the nature of the proceedings';
- 4 'follow the course of the proceedings';
- 5 'understand the substantial effect of any evidence that may be given in support of the prosecution'; and
- 6 'make a defence or answer the charge.'<sup>37</sup>

In the majority of Australian jurisdictions, the *Presser* criteria are enshrined in statute.<sup>38</sup> New South Wales and Queensland implicitly incorporate these

matter must be uplifted to a higher court for an investigation of unfitness and if appropriate, a special hearing': Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Consultation Paper No 17 (2013) 56 [4.20] ('*VLRC Consultation Paper*'). The Victorian legislation defines 'court' to mean the Supreme Court and County Court and restricts the definition to the Magistrates' Court in relation to requesting certificates of available services for certain orders: *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 3 (definition of 'court'), 47.

<sup>33</sup> See *Criminal Code* (NT) s 43L; *Mental Health Act 2000* (Qld) s 256.

<sup>34</sup> *Crimes Act 1900* (ACT) pt 13 divs 13.1–13.2, 13.6; *Criminal Law Consolidation Act 1935* (SA) pt 8A (see especially at s 269A(1) (definition of 'judge')); *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 4(1), pt 2; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) pt 3.

<sup>35</sup> [1958] VR 45, 48 (Smith J).

<sup>36</sup> (1836) 7 C & P 303, 304; 173 ER 135, 135 (Alderson B).

<sup>37</sup> *Kesavarajah v The Queen* (1994) 181 CLR 230, 245 (Mason CJ, Toohey and Gaudron JJ).

<sup>38</sup> *Crimes Act 1900* (ACT) s 311; *Criminal Code* (NT) s 43J; *Criminal Law Consolidation Act 1935* (SA) s 269H; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 6; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 9. For South Australia, see also *R v Taylor* [2014] SASCFC 112 (30 October 2014) [9] (Stanley J).

criteria through the common law.<sup>39</sup> Under the Commonwealth regime, the relevant state or territory criteria are applied.<sup>40</sup>

Although the test is substantially similar across the board, the *outcomes* of a finding of unfitness vary considerably within and between jurisdictions. The main divergence between *jurisdictions* relates to: first, the testing of the prosecution case; and secondly, the disposition of the accused. Outcomes can include acquittal, indefinite detention in prisons with no judicial scrutiny of the facts, ‘special hearings’<sup>41</sup> that could lead to non-custodial supervision orders, or detention for a fixed term in a forensic facility.

The first major difference regards the testing of the prosecution case. Six Australian jurisdictions provide for ‘special hearings’.<sup>42</sup> Special hearings are essentially truncated trials designed to ensure that an individual’s liberty is not restricted without a proper basis.<sup>43</sup> In all jurisdictions with special hearings, the Crown must prove the physical elements of the offence(s) to the criminal standard.<sup>44</sup> At the Commonwealth level, the *Crimes Act 1914* (Cth) does not provide for a special hearing, although the prosecution must still establish a

<sup>39</sup> See especially *R v Gallagher* [2012] NSWSC 484 (10 May 2012) [11] (Beech-Jones J); *Berg v DPP (Qld)* [2016] 2 Qd R 248, 267 [54] (Flanagan J).

<sup>40</sup> *Judiciary Act 1903* (Cth) s 68(1). See also *Kesavarajah v The Queen* (1994) 181 CLR 230, 243 (Mason CJ, Toohey and Gaudron JJ); *ALRC Equality, Capacity and Disability Report*, above n 10, 205–6 [7.66]–[7.70].

<sup>41</sup> In England and Wales, special hearings are known as ‘trials of the facts’: see *Criminal Procedure (Insanity and Unfitness to Plead) Act 1991* (UK) ch 25.

<sup>42</sup> Special hearings can occur in the Australian Capital Territory, New South Wales, the Northern Territory, South Australia, Tasmania and Victoria: see *Crimes Act 1900* (ACT) ss 315C–319A; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19; *Criminal Code* (NT) pt IIA div 4; *Criminal Law Consolidation Act 1935* (SA) ss 269M–269N; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 15; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) pt 3.

<sup>43</sup> See, eg, *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19(2). In *Subramaniam v The Queen* (2004) 211 ALR 1, 12 [40], the High Court noted that the purpose of these hearings is:

first ... to see that justice is done, as best as it can be in the circumstances, to the accused person and the prosecution. She is put on trial so that a determination can be made of the case against her. The prosecution representing the community has an interest also in seeing that justice be done. A special hearing gives an accused person an opportunity of being found not guilty in which event the charge will cease to hang over her head, and if she requires further treatment that it may be given to her outside the criminal justice system.

<sup>44</sup> However, the Tasmanian system is slightly unusual. The criminal standard of proof applies: *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16(1). However, the Act appears to reverse the onus of proof. Under s 18(2), an accused can be detained following a finding of unfitness if ‘a finding *cannot be made* that the defendant is not guilty of an offence’ (emphasis added).

prima facie case against the accused.<sup>45</sup> Western Australia and Queensland do not provide for special hearings, or an alternative means of putting the Crown to proof.

The second major difference between jurisdictions regards disposition. Most jurisdictions permit a court or tribunal to elect between a custodial order and a 'community-based' supervision order.<sup>46</sup> Supervision orders are typical for less serious offences and involve ordering a person to reside in a secure setting, or a highly restrictive setting within the community. A person's supervision order may be revoked because he or she breaches the conditions of the order or commits offences. An order may also be varied from non-custodial to custodial if a person is deemed to pose a danger to others.

Forms of custodial order differ considerably between jurisdictions. For example, some jurisdictions indefinitely detain unfit accused 'at the Governor's pleasure'.<sup>47</sup> Although this concept has been abolished in most Australian jurisdictions,<sup>48</sup> Western Australian law holds that those subject to a custodial order are detained 'until released by an order of the Governor'.<sup>49</sup> In Queensland and Tasmania, the same discretionary power is granted (respectively) to a mental health tribunal and court.<sup>50</sup> In other jurisdictions, a custodial order operates more like a sentence imposed after conviction and expires on a pre-determined date.<sup>51</sup>

<sup>45</sup> *Crimes Act 1914* (Cth) s 20B(3).

<sup>46</sup> See, eg, *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(2); *Criminal Code* (NT) s 43ZA(1); *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 18(2); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 26(2).

<sup>47</sup> See, eg, *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(1). This basis for detention has origins in the 13<sup>th</sup> century Court of Chancery where jurors in England were responsible for determining guilt while punishment was determined by the King. This occurred, according to Walker, 'not because the jury or justices were at a loss but because it was not for them to interfere with the normal course of the law by excusing [the accused] from the automatic penalty for his felony': Nigel Walker, *Crime and Insanity in England* (Edinburgh University Press, 1968) vol 1, 24. As Don Grubin has noted, after the 13<sup>th</sup> century, rationality became 'the rudder which would steer them into trial, or onto the rocks of a now more formalised indefinite containment awaiting the King's Pleasure': Don Grubin, *Fitness to Plead in England and Wales* (Psychology Press, 1996) 23.

<sup>48</sup> In Victoria, for example, it was abandoned with the introduction of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 78. See also Freckelton, 'Indefinite Detention in Australia: The Ongoing Risk of Governor's Pleasure Detention', above n 21, 473.

<sup>49</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(1).

<sup>50</sup> See below Part V(A).

<sup>51</sup> New South Wales and South Australia use this model: see below Part V(C).

There is no clear set of justifications for the existence of unfitness to stand trial laws, but broadly speaking, the doctrine is characterised as ‘protective’.<sup>52</sup> The laws are premised on the notion that a person should not be put on trial if they are unable to understand the legal process and the case against them.<sup>53</sup> Reasons to enable findings of unfitness to stand trial include avoiding inaccurate verdicts and unfair trials, upholding the ‘moral dignity’ of the trial process, ensuring the community is protected from dangerous individuals, provision of appropriate treatment and supports that contribute to the successful rehabilitation of mentally impaired accused, and ensuring efficient court proceedings.<sup>54</sup> Arlie Loughnan has also observed that because punishment is based on the notion of the offender as ‘a rational and responsible agent’, it would be a ‘travesty’ to punish someone who ‘cannot understand what is being done to him or her, or why it is being done, or how it relates to the past offence’.<sup>55</sup>

Despite the differences in the procedures following a finding of unfitness, it is argued that each jurisdiction in Australia may produce adverse consequences that undermine due process and substantive equality. These adverse consequences are discussed in Parts III, IV and V. The next section looks more closely at disadvantages that may be experienced by persons with cognitive disabilities in the criminal justice system.

### B *Disability and Disadvantage in the Criminal Law*

The term ‘persons with cognitive disabilities’ is here used to refer to persons with intellectual disabilities, Alzheimer’s, dementia, autism, multiple sclerosis, mental health issues, acquired brain injuries and so on.<sup>56</sup> The New South

<sup>52</sup> Thomson Reuters, above n 29, [9.3.1950].

<sup>53</sup> Grubin, above n 47, 12.

<sup>54</sup> See generally *ibid* 15; *VLRC Unfitness Report*, above n 15, 29 [2.101]; Law Commission (England and Wales), *Unfitness to Plead*, Consultation Paper No 197 (2010) 3–5 [1.9]–[1.14] (*‘Law Commission Consultation Paper’*); Western Australia, *Parliamentary Debates*, Legislative Council, 5 November 1996, 7771–3 (Peter Foss, Attorney-General); *WA Report*, above n 15, 30 [28].

<sup>55</sup> Arlie Loughnan, ‘Contemporary Comment: Reforming the Criminal Law on Mental Incapacity’ (2013) 25 *Current Issues in Criminal Justice* 703, 706, quoting R A Duff, *Trials and Punishments* (Cambridge University Press, 1986) 27.

<sup>56</sup> The term ‘cognitive disabilities’ is increasingly used elsewhere in the disability and human rights field: see, eg, Anna Arstein-Kerslake, ‘An Empowering Dependency: Exploring Support for the Exercise of Legal Capacity’ (2016) 18 *Scandinavian Journal of Disability Research* 77; Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015).

Wales Law Reform Commission distinguishes between ‘cognitive’ and ‘mental health’ impairments.<sup>57</sup> However, for the sake of simplicity, we will refer to ‘cognitive disabilities’ to encompass a range of conditions, including severe mental health issues which may affect cognition, though we will distinguish particular impairments where needed to highlight specific issues. Article 1 of the *UNCRPD* refers to these forms of disability with reference to ‘those who have long-term physical, *mental*, *intellectual* or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’<sup>58</sup>

According to the New South Wales Law Reform Commission, there is ‘clear evidence of over-representation of people with cognitive and mental health impairments at all stages of the criminal justice system’,<sup>59</sup> a view expressed elsewhere in Australia.<sup>60</sup> Although there are significant issues with data collection, the Commission’s views echo a growing body of international research suggesting people with cognitive disabilities are significantly over-represented as suspects, accused persons and offenders in the criminal justice systems of Western, high-income countries.<sup>61</sup> A 2013 Victorian parliamentary inquiry, for example, reported that people with an intellectual disability were ‘anywhere between 40 and 300 per cent more likely’ to be jailed than people without an intellectual disability.<sup>62</sup> The Victorian Department of Justice reported that 42 per cent of male prisoners and 33 per cent of female prisoners had an ‘acquired brain injury’, compared to just 2.2 per cent of the general population.<sup>63</sup> In New South Wales, Kathryn Vanny and colleagues considered

Cognitive disability itself is a contested notion and we acknowledge that labels of cognitive disability can often be based on problematic testing and/or discriminatory labeling.

<sup>57</sup> New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No 135 (2012) 134–5 [5.114]–[5.120] (*‘NSWLRC Diversion Report’*).

<sup>58</sup> *UNCRPD* art 1 (emphasis added).

<sup>59</sup> *NSWLRC Diversion Report*, above n 57, 11 [2.5].

<sup>60</sup> See, eg, Law Reform Committee, Parliament of Victoria, above n 15, 11; Office of the Public Advocate (Queensland), Submission No 45 to Senate Legal and Constitutional Affairs References Committee, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, March 2013, 3.

<sup>61</sup> See eg, Jill Peay, ‘Imprisoning the Mentally Disordered: A Manifest Injustice?’ (Working Paper No 7/2014, London School of Economics and Political Science, 2014) 6–9; Stephanie Ortoleva, ‘Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System’ (2011) 17 *ILSA Journal of International and Comparative Law* 281, 307–8.

<sup>62</sup> Law Reform Committee, Parliament of Victoria, above n 15, 14.

<sup>63</sup> Martin Jackson et al, ‘Acquired Brain Injury in the Victorian Prison System’ (Corrections Research Paper No 4, Department of Justice, 4 April 2011), 22. See also Peter W Schofield

60 accused adults appearing before four local courts in Greater Sydney, and found that people with ‘intellectual disability and/or cognitive impairment’ were over-represented in the local courts, wherein the proportion of participants who met standardised measures of these disabilities were between three and four times the rate in the general population.<sup>64</sup> Regarding severe mental health issues, the Australian Institute of Health and Welfare reported in 2012 that 38 per cent of prison entrants disclosed that they had been told at some point in their life by a doctor, psychiatrist, psychologist or nurse that they had a mental health disorder, including drug and alcohol abuse.<sup>65</sup> Further, 46 per cent of ‘prison discharges’ reported that they had been told they have a mental health condition, including drug and alcohol abuse.<sup>66</sup>

In this context, the adverse consequences of unfitness to stand trial laws appear to create particular disadvantage for Aboriginal and Torres Strait Islander people.<sup>67</sup> Aboriginal and Torres Strait Islander people are both overrepresented in the criminal justice system,<sup>68</sup> and are more likely to experience cognitive disabilities compared to non-Indigenous people.<sup>69</sup> Data

et al, ‘Traumatic Brain Injury among Australian Prisoners: Rates, Recurrence and Sequelae’ (2006) 20 *Brain Injury* 499.

<sup>64</sup> K A Vanny et al, ‘Mental Illness and Intellectual Disability in Magistrates Courts in New South Wales, Australia’ (2009) 53 *Journal of Intellectual Disability Research* 289, 290, 293–4.

<sup>65</sup> Ingrid Johnston and Jenna Pickles, *The Health of Australia’s Prisoners 2012* (Australian Institute of Health and Welfare, 2013) 35.

<sup>66</sup> *Ibid.*

<sup>67</sup> See, eg, Baldry et al, above n 56, 164, 167; Harry Blagg, Tamara Tulich and Zoe Bush, ‘Diversionary Pathways for Indigenous Youth with FASD in Western Australia: Decolonising Alternatives’ (2015) 40 *Alternative Law Journal* 257; First Peoples Disability Justice Consortium, Submission No 39 to Senate Community Affairs References Committee, *Indefinite Detention of People with Cognitive Disabilities in Australia*, April 2016, 40–51.

<sup>68</sup> The Australia-wide percentage of prisoners identifying as Aboriginal or Torres Strait Islander is 27 per cent, whereas the total Aboriginal and Torres Strait Islander population aged 18 years and over in 2016 was approximately two per cent of the Australian population aged 18 years and over: Australian Bureau of Statistics, *Prisoners in Australia, 2016* (ABS Catalogue No 4517.0, Australian Bureau of Statistics, 8 December 2016).

<sup>69</sup> Mindy Sotiri and Jim Simpson, ‘Indigenous People and Cognitive Disability: An Introduction to Issues in Police Stations’ (2006) 17 *Current Issues in Criminal Justice* 431, 433. Reportedly high rates of fetal alcohol spectrum disorders (‘FASD’) in some Indigenous communities, which can cause cognitive disability, also presents significant challenges in relation to disability and equal recognition before the law: see Legislative Assembly Select Committee on Action to Prevent Foetal Alcohol Spectrum Disorder, Parliament of the Northern Territory, *The Preventable Disability* (2015) 21–7. Harris and Bucens reported in 2003 that the prevalence rate of fetal alcohol syndrome — which is the perhaps the most well-known of the conditions falling under the FASD category — was 1.87 to 4.7 per 1000 births among Indigenous Australians in the Top End of the Northern Territory, compared to 0.68 to 1.7 per 1000 total births for the overall population: K R Harris and I K Bucens, ‘Prevalence of Fetal Alco-

on the relative incarceration rates of Indigenous people with cognitive disabilities are limited, although research by Eileen Baldry and colleagues indicates that they were more likely than their non-Indigenous counterparts to come into contact with police, receive convictions and go to prison.<sup>70</sup> Baldry and colleagues' research highlights the disadvantage of all persons with cognitive disabilities in the Australian criminal justice system, indicating *heightened* disadvantage affecting Indigenous people with cognitive disabilities. Unsurprisingly, therefore, evidence suggests Indigenous people are overrepresented among those indefinitely detained following a finding of unfitness to stand trial. Mindy Sotiri and colleagues reported in 2012 that all nine people on indefinite supervision orders in Western Australia were Indigenous, as were 11 of 33 people found unfit to stand trial or 'unsound of mind' under the jurisdiction of the Western Australian Mentally Impaired Accused Review Board.<sup>71</sup> Mick Gooda, the 2010–16 Aboriginal and Torres Strait Islander Social Justice Commissioner, stated of Aboriginal and Torres Strait Islander people that '[w]e have high rates of unresolved intergenerational trauma, which has led to disability, alcohol-related disability, brain injury and mental health issues'.<sup>72</sup> Gooda's statement highlights a view of Indigenous disadvantage and disability that is contingent on political, economic and social factors. Similarly, the *UNCRPD* is underpinned by a view of disability which looks to external barriers — whether physical or attitudinal — to a

hol Syndrome in the Top End of the Northern Territory' (2003) 39 *Journal of Paediatrics and Child Health* 528, 530. Fetal alcohol syndrome is just one of the conditions falling under the FASD umbrella so it is likely FASD rates are higher still: Legislative Assembly Select Committee on Action to Prevent Foetal Alcohol Spectrum Disorder, Parliament of the Northern Territory, *The Preventable Disability* (2015) 21 [2.1]–[2.2]. See also Ian Freckelton, 'Fetal Alcohol Spectrum Disorders, Expert Evidence and the Unreliability of Admissions during Police Interviews' (2016) 23 *Psychiatry, Psychology and Law* 173.

<sup>70</sup> Baldry et al, above n 56, 31–5. Indigenous people with cognitive disabilities are also more likely to enter the criminal justice system at a younger age than non-Indigenous Australians with cognitive disabilities, according to Baldry and colleagues. See also Sotiri and Simpson, above n 69, 434; Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment' (Report, Aboriginal Disability Justice Campaign, September 2012) 22–3.

<sup>71</sup> Sotiri, McGee and Baldry, above n 70, 24. The Mentally Impaired Accused Review Board is responsible for periodic reviews of ongoing detention under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33. It is the Board that ultimately recommends the release of a person from a custodial order following a finding of unfitness to stand trial.

<sup>72</sup> 'Fact Check: Amnesty International Claim on "Shocking" Indigenous Child Incarceration Rates Checks Out', *ABC News* (online), 19 June 2015 <<http://www.abc.net.au/news/2015-06-17/fact-check-indigenous-children-incarceration-rates/6511162>>.

person's participation on an equal basis with others.<sup>73</sup> This 'social model' or 'human rights' model of disability can be contrasted with the 'medical model', which locates disability within the individual, in terms of pathology.<sup>74</sup>

An analysis of the reasons for the over-representation of persons with cognitive disabilities in the criminal justice system, and particularly Indigenous people with disabilities, would require examining the complex interplay of colonialism, disability and disadvantage. Suffice to say that reforming the legal and policy framework of unfitness to stand trial regimes is not a panacea for inequality experienced by Indigenous people with disabilities, even as it presents an opportunity to ensure procedural due process and substantive equality in one significant area of the law facing accused persons with cognitive disabilities.

### *C Human Rights and the Demand for Equal Recognition before the Law*

Australia has ratified the *UNCRPD*, which has been a key driver in unfitness to stand trial law reform efforts in recent years.<sup>75</sup> Article 2 of the *UNCRPD* articulates a key challenge in calling for accessibility measures for persons with disabilities in the form of '*necessary and appropriate* modification and adjustments' while also avoiding 'to the greatest extent possible ... the need for adaptation or specialized design.'<sup>76</sup> The need to balance these imperatives frames the more explicit requirements of the *UNCRPD*'s operative articles. The primary articles relevant here refer to rights to equal recognition before the law (art 12), access to justice (art 13), and liberty and security of the person (art 14), though concerns can also be raised regarding the right to freedom from torture or cruel, inhuman or degrading treatment or punishment.

Article 12 of the *UNCRPD* recognises the right to equal recognition before the law, and has gained particular attention in debates about unfitness to stand

<sup>73</sup> See Rosemary Kayess and Phillip French, 'Out of Darkness into Light? Introducing the *Convention on the Rights of Persons with Disabilities*' (2008) 8 *Human Rights Law Review* 1, 24.

<sup>74</sup> *Ibid* 5.

<sup>75</sup> See *ALRC Equality, Capacity and Disability Report*, above n 10, 5–7; *VLRC Unfitness Report*, above n 15, 30 [2.102], 31 [2.108]; *NSWLRC Diversion Report*, above n 57, 32–3 [3.26]–[3.29]; *WA Report*, above n 15, 74–5 [218]–[219].

<sup>76</sup> *UNCRPD* art 2 (definitions of 'reasonable accommodation', 'universal design') (emphasis added).

trial laws.<sup>77</sup> The right to equal recognition contained in art 12 is not new, and reflects ‘parent’ rights in pre-existing United Nations Conventions.<sup>78</sup> However, this restated right is accompanied by innovative features in the *UNCPRD* for application in the disability context.<sup>79</sup> In particular, states parties are directed to ‘recognize that persons with disabilities enjoy legal capacity on an equal basis with others *in all aspects of life*’ and to ‘take appropriate measures to provide access by persons with disabilities to the *support they may require in exercising their legal capacity*.’<sup>80</sup> Accordingly, art 12 establishes that all people have legal capacity regardless of disability (and regardless of mental functioning),<sup>81</sup> and includes the obligation on states parties to ensure equality before the law. Article 12(4) further provides that states parties must ‘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.’ Significantly, those measures must ‘respect the *rights, will and preferences* of the person.’<sup>82</sup> This language shifts the focus from an individual’s objectively determined ‘best interests’ to his or her subjective wishes.

The meaning of ‘support to exercise legal capacity’ has been the subject of considerable debate.<sup>83</sup> Importantly, the term ‘legal capacity’ as used in the *UNCPRD* is different from ‘mental capacity’. The two are typically conflated in domestic law. However, mental capacity is concerned with the decision-making skills of a person. These may vary from person to person, depending

<sup>77</sup> See *ALRC Report*, above n 10, 39 [2.15]; Law Commission (England and Wales), *Unfitness to Plead*, Report No 364 (2016) vol 1, 101 [3.176]–[3.178] (*‘Law Commission Report’*).

<sup>78</sup> See especially *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 6 (*‘UDHR’*); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 16 (*‘ICCPR’*).

<sup>79</sup> CRPD Committee, *General Comment No 1 — Article 12: Equal Recognition before the Law*, 11<sup>th</sup> sess, UN Doc CRPD/C/GC/1 (19 May 2014) (*‘General Comment No 1 on Art 12’*).

<sup>80</sup> *UNCPRD* arts 12(2)–(3) (emphasis added).

<sup>81</sup> See, eg, Eilíonóir Flynn and Anna Arstein-Kerslake, ‘Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity’ (2014) 10 *International Journal of Law in Context* 81.

<sup>82</sup> *UNCPRD* art 12(4) (emphasis added).

<sup>83</sup> The key debates are canvassed in Piers Gooding, ‘Navigating the “Flashing Amber Lights” of the Right to Legal Capacity in the United Nations *Convention on the Rights of Persons with Disabilities*: Responding to Major Concerns’ (2015) 15 *Human Rights Law Review* 45. See also Flynn and Arstein-Kerslake, above n 81; Penelope Weller, ‘Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice’ (2014) 23 *Griffith Law Review* 498.

on external factors, including social and environmental factors.<sup>84</sup> Legal capacity, on the other hand, as it is understood in international human rights law, concerns the right to be a person before the law and to act on that legal personhood (that is, to exercise legal agency).<sup>85</sup> As such, legal capacity can be viewed as a 'portal' to other rights and has been described by the CRPD Committee as the 'key to accessing meaningful participation in society.'<sup>86</sup>

Scholarly literature on art 12 of the *UNCRPD* has paid little attention to the denial of legal capacity that occurs in findings of unfitness to stand trial in the criminal law. Significantly, art 12 encourages legal systems to abandon the emphasis on identifying the point at which a person is unable to make decisions and express his or her will and preferences, in order to restrict the exercise of legal capacity as a result;<sup>87</sup> and instead to consider the supports that may be put in place to ensure the exercise of legal capacity.<sup>88</sup> Indeed, the CRPD Committee has interpreted art 12 to require the abolition of incompetency determinations altogether,<sup>89</sup> an interpretation that has been described by some as impractical.<sup>90</sup> The abolition of incompetency determination would appear to include the *Presser* criteria, which are considered in greater detail in Part III. In short, the CRPD Committee views legal capacity as an absolute, inviolable right: impairment 'must never be grounds for denying legal capacity or any of the rights provided for in article 12.'<sup>91</sup> The focus, again, must be on identifying and implementing the supports necessary to help an individual exercise his or her right to equal recognition before the law.<sup>92</sup>

Articles 13 and 14 of the *UNCRPD* are also noteworthy. Article 13 obliges states parties to ensure persons with disabilities enjoy access to justice on an

<sup>84</sup> *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 3 [13].

<sup>85</sup> See especially Bernadette McSherry, 'Legal Capacity under the *Convention on the Rights of Persons with Disabilities*' (2012) 20 *Journal of Law and Medicine* 22, 23.

<sup>86</sup> *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 3 [13].

<sup>87</sup> Gooding and O'Mahony, above n 21, 136.

<sup>88</sup> See, eg, Flynn and Arstein-Kerslake, above n 81; Gooding, above n 83; John Dawson, 'A Realistic Approach to Assessing Mental Health Laws' Compliance with the *UNCRPD*' (2015) 40 *International Journal of Law and Psychiatry* 70, 74.

<sup>89</sup> *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 4 [15].

<sup>90</sup> See, eg, Dawson, above n 88, 72–3; Joseph Dute, 'Should Substituted Decision-Making Be Abolished?' (2015) 22 *European Journal of Health Law* 315, 318; Melvyn Colin Freeman et al, 'Reversing Hard Won Victories in the Name of Human Rights: A Critique of the General Comment on Article 12 of the UN *Convention on the Rights of Persons with Disabilities*' (2015) 2 *Lancet Psychiatry* 844.

<sup>91</sup> *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 2–3 [9].

<sup>92</sup> *Ibid* 4 [16].

equal basis with all others, ‘including through the provision of procedural and age-appropriate accommodations’, and training for those working in the justice system. Such accommodations would serve ‘to facilitate [the] effective role [of persons with disabilities] as direct and indirect participants, including as witnesses, in all legal proceedings’.<sup>93</sup> Failure to provide such accommodations may amount to discrimination under art 5 (equality and non-discrimination) given the definition of ‘discrimination on the basis of disability’ encompasses failure to provide ‘reasonable accommodation’.<sup>94</sup> Article 13 is closely related to art 12,<sup>95</sup> and the CRPD Committee has stated that ‘[t]he recognition of the right to legal capacity is essential for access to justice in many respects.’<sup>96</sup> In order to enforce a person’s legal rights against another, or to defend himself or herself in legal proceedings — including criminal proceedings — an individual must be recognised as the holder of legal rights, with the associated legal agency to exercise those rights.

Article 14 has particular relevance to disposition under unfitness to stand trial regimes, as it contains a right to liberty and security of the person, as well as a prohibition on unlawful or arbitrary deprivation of liberty.<sup>97</sup> Article 14(1)(b) contains an important disability-specific prohibition: ‘that the existence of a disability shall in no case justify a deprivation of liberty.’ This limb of art 14 was the subject of considerable debate during the drafting negotiations.<sup>98</sup> Some states parties, including Australia, advocated strongly for the view that art 14 forbade detention *solely* on the basis of disability but not

<sup>93</sup> UNCRPD art 13(1).

<sup>94</sup> Ibid art 2 (definition of ‘reasonable accommodation’). See also Ortoleva, above n 61, 317–20; Eilionóir Flynn and Anna Lawson, ‘Disability and Access to Justice in the European Union: Implications of the United Nations *Convention on the Rights of Persons with Disabilities*’ in Lisa Waddington, Gerard Quinn and Eilionóir Flynn (eds), *European Yearbook of Disability Law* (Intersentia, 2009) vol 4, 7, 24–5.

<sup>95</sup> Flynn and Lawson, above n 94, 26–7.

<sup>96</sup> *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 10 [38].

<sup>97</sup> UNCRPD art 14(1). Article 14 restates ‘parent rights’ in the ICCPR and UDHR, but does so for the context of disability: see ICCPR art 9(1); UDHR art 3.

<sup>98</sup> See Rehabilitation International, *Daily Summary of Discussion at the Fifth Session of the Ad Hoc Committee* (2005) United Nations Enable, 26 January 2005 (afternoon session), 27 January 2005 (afternoon session) <<http://www.un.org/esa/socdev/enable/rights/ahc5summary.htm>>; Rehabilitation International, *Daily Summary of Discussion at the Seventh Session of the Ad Hoc Committee* (2006) United Nations Enable, 18 January 2006 (afternoon session), 19 January 2006 (morning session) <<http://www.un.org/esa/socdev/enable/rights/ahc7summary.htm>>.

detention on the basis of disability *combined with another justification*.<sup>99</sup> On this view, detention because of disability among other factors — for example, community protection — is justifiable, and accused persons such as ‘Jason’ in Western Australia could be formally detained on the basis of their conduct, not their disability. However, the CRPD Committee has adopted a broader interpretation of art 14 whereby deprivation of liberty is prohibited ‘on the basis of actual or perceived impairment *even if* additional factors or criteria are also used to justify the deprivation of liberty.’<sup>100</sup> Further, the CRPD Committee has stated that:

declarations of unfitness to stand trial and the detention of persons based on that declaration is [sic] contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.<sup>101</sup>

Setting aside this particular limb of art 14 (which will be further discussed in Part V), it is worth noting that art 14 as a whole — as with art 13 — is closely intertwined with art 12. When ratifying the *UNCRPD*, Australia made a declaration affecting art 12, indicating that it interprets the *UNCRPD* to allow for decisions to be made on behalf of a person with disability, and to allow for compulsory treatment, where it is ‘necessary, as a last resort and subject to safeguards’.<sup>102</sup> Australia’s declaration has been criticised by a number of commentators, including the ALRC, the CRPD Committee and a coalition of disability representative organisations who compiled a 2012 national report on Australia’s compliance with the *UNCRPD*.<sup>103</sup> Violations of *UNCRPD* rights

<sup>99</sup> Rehabilitation International, *Daily Summary of Discussion at the Fifth Session of the Ad Hoc Committee*, above n 98, 26 January 2005 (afternoon session).

<sup>100</sup> CRPD Committee, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 14<sup>th</sup> sess (September 2015) [7] (emphasis added) <[www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc](http://www.ohchr.org/Documents/HRBodies/CRPD/GC/GuidelinesArticle14.doc)>. See also CRPD Committee, *Report of the Committee on the Rights of Persons with Disabilities on Its Twelfth Session*, 12<sup>th</sup> sess, UN Doc CRPD/C/12/2 (5 November 2014) annex IV 14.

<sup>101</sup> CRPD Committee, *Report of the Committee on the Rights of Persons with Disabilities on Its Twelfth Session*, 12<sup>th</sup> sess, UN Doc CRPD/C/12/2 (5 November 2014) annex IV 15. See also Minkowitz, above n 21, 447–9; Gooding and O’Mahony, above n 21, 133–4.

<sup>102</sup> United Nations, *Multilateral Treaties Deposited with the Secretary-General*, UN Doc ST/LEG/SER.E/26 (1 April 2009) vol I, 461.

<sup>103</sup> See ALRC Report, above n 10, 56–7 [2.91]–[2.97]; *Concluding Observations on the Initial Report of Australia*, UN Doc CRPD/C/AUS/CO/1, 2 [8]–[9]; Civil Society Report Project Group, ‘Disability Rights Now: Civil Society Report to the United Nations Committee on the

often go hand-in-hand: disability is used to justify the denial of legal capacity through the removal of procedural safeguards, which in turn leads to deprivation of liberty. As such, the CRPD Committee has stated that:

The denial of the legal capacity of persons with disabilities and their detention in institutions against their will, either without their consent or with the consent of a substitute decision-maker ... constitutes arbitrary deprivation of liberty and violates articles 12 and 14 of the Convention.<sup>104</sup>

The right to be free from torture or cruel, inhuman or degrading treatment or punishment (*UNCRPD* art 15) may also be violated by the indefinite detention of accused persons found unfit to stand trial. Article 15 directs that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' and requires states parties to 'take all effective legislative, administrative, judicial or other measures to prevent' such treatment. The CRPD Committee, which heard an individual complaint about the indefinite detention of Marlon Noble under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), commented that the 'indefinite character of the author's detention and the repeated acts of violence to which he was subjected during his detention amount to a violation of article 15 of the Convention by the State party'.<sup>105</sup>

Under art 26 of the *Vienna Convention on the Law of Treaties*,<sup>106</sup> a Convention is 'binding upon the parties to it and must be performed by them in good faith.' Article 27 further provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.' However, while the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) amended certain statutes to reflect some of the articles of the *UNCRPD*, Australia has not incorporated the *UNCRPD* fully into domestic law and appears unlikely to do so.

Nevertheless, Australia has acceded to the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* ('*Optional Protocol*'),<sup>107</sup> a separate treaty which establishes a complaint mechanism where individuals who have

Rights of Persons with Disabilities' (Report, August 2012) 69–70 [185]–[189] <<http://www.ahrcentre.org/news/2012/10/19/433>>.

<sup>104</sup> *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 10 [40].

<sup>105</sup> *Noble v Australia*, UN Doc CRPD/C/16/D/7/2012, 17 [8.9].

<sup>106</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>107</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2518 UNTS 283 (entered into force 3 May 2008).

exhausted their domestic remedies without success can allege violations of their *UNCRPD* rights. This mechanism allowed Marlon Noble's case to be heard before the CRPD Committee.<sup>108</sup>

The Commonwealth government has not enacted comprehensive human rights legislation, a point that has attracted criticism at the national and international level.<sup>109</sup> The Commonwealth human rights framework presently emphasises aspirational commitments regarding human rights 'education', 'engagement' and 'protection'.<sup>110</sup> At state and territory level, two legislative human rights Charters have been introduced: the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT). Relevant provisions of these instruments may be interpreted according to '[i]nternational law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right'.<sup>111</sup> However, at present, neither Victorian nor the Australian Capital Territory courts have referred to these instruments with regard to unfitness to stand trial determinations. Certainly, both Charters affirm the right of all persons deprived of liberty to be treated 'with humanity and with respect for the inherent dignity of the human person'.<sup>112</sup> Developments in international human rights law, particularly under the *UNCRPD*, may well invite reconsideration by courts in the Australian Capital Territory and Victoria on the issue of unfitness to stand trial laws.

Having set out relevant articles of the *UNCRPD*, Part III considers their implications with respect to the three major aspects of unfitness to stand trial

<sup>108</sup> See *ibid* art 1.

<sup>109</sup> At the national level, see, eg, Andrea Durbach, 'A Missed Opportunity: The Foregone Conclusion of a National Human Rights Consultation' (2010) 7(17) *Indigenous Law Bulletin* 21; Human Rights Law Centre, 'Delay on Stronger Anti-Discrimination Laws Met with Extreme Disappointment' (News Release, 20 March 2013) <<http://hrlc.org.au/delay-on-stronger-anti-discrimination-laws-met-with-extreme-disappointment/>>, citing Attorney-General's Department (Cth), *Human Rights and Anti-Discrimination Bill 2012: Exposure Draft Legislation* (2012). At the international level, see, eg, Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31<sup>st</sup> sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016) 16 [136.70]–[136.73], in which Indonesia, Iceland, Turkey and Canada urged for a human rights Act with others requesting other amendments of Australian laws to make them consistent with human rights.

<sup>110</sup> Commonwealth, *Australia's Human Rights Framework* (2010) <<http://apo.org.au/node/21053>>.

<sup>111</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(2); *Human Rights Act 2004* (ACT) s 31(1).

<sup>112</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22(1); *Human Rights Act 2004* (ACT) s 19(1).

laws: the criteria for determining unfitness; the testing of the prosecution case and the disposition of the accused.

### III THE CRITERIA FOR UNFITNESS TO STAND TRIAL

As the test for unfitness to stand trial is relatively consistent across jurisdictions (unlike processes following a determination, including disposition), most concerns with the *Presser* criteria<sup>113</sup> apply throughout Australia. Hence a thematic approach will be taken, focusing on three major concerns with the *Presser* criteria, which have been criticised on a number of fronts.<sup>114</sup> First, the criteria have been described as being too broad by failing to incorporate a requirement to consider whether support and assistance could help the accused to optimise fitness to stand trial. Secondly, the criteria can be seen to be *under* inclusive, where some people do not meet the criteria for unfitness and must proceed to trial but nevertheless may be unable to effectively participate. Finally, in what is perhaps the most challenging critique, the criteria for unfitness to stand trial have been criticised as *inherently* discriminatory by activating a separate legal process specific to persons with disabilities in violation of art 12 of the *UNCRPD*.

#### A *The Test Fails to Consider Support to 'Optimise Fitness'*

One major concern with the *Presser* test is that it does not sufficiently take into account the 'possible role of assistance and support for defendants',<sup>115</sup> including a failure to consider the capacity of courts to be accessible to people with disabilities.<sup>116</sup> Thus, the ALRC recommended a reformulation of the test 'to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to

<sup>113</sup> See above nn 35–40 and accompanying text.

<sup>114</sup> Other criticisms include concern about the arbitrary and subjective application of the test. Freckelton has argued that the provision of clear guidelines to clinical experts for what constitutes unfitness would be one way to address the issue of arbitrariness and subjectivity: Ian Freckelton, 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) 19 *International Journal of Law and Psychiatry* 39, 54–5. Similarly, the VLRC recommended that the Victorian government establish an expert advisory panel to determine 'whether guidelines should be developed or experts should undergo training on applying the test for unfitness to stand trial, and if so, the content of the guidelines or training': *VLRC Unfitness Report*, above n 15, 99 (recommendation 23).

<sup>115</sup> *ALRC Equality, Capacity and Disability Report*, above n 10, 199 [7.35].

<sup>116</sup> *VLRC Consultation Paper*, above n 32, 66–8 [4.60]–[4.73].

play such a role at all.<sup>117</sup> In contrast, the Attorney-General's Department of Western Australia rejected the claim that the test must incorporate consideration of the role of supports, although it did recommend a separate provision to allow the court to order procedural changes to support accused persons suspected of being unfit to stand trial.<sup>118</sup>

All previously noted law reform initiatives across Australia have recommended some form of court-based support to optimise the participation of accused persons at risk of being deemed unfit to plead,<sup>119</sup> regardless of whether it is incorporated into the test itself. The Victorian Law Reform Commission ('VLRC') noted that '[t]he importance of support measures in the unfitness to stand trial process was one of the strongest themes to come out of the Commission's review' of the issue.<sup>120</sup> Such support measures can 'optimis[e] an accused's fitness where they might otherwise be unfit.'<sup>121</sup> Importantly, the VLRC found that such 'support measures ... are not necessarily considered, provided or available',<sup>122</sup> raising concerns that failure to provide support measures denies accused persons the right to enter a plea and have the allegations against them tested.<sup>123</sup> This concern fits with the art 12(3) *UNCRPD* obligation on states parties to provide persons with disabilities with 'the support they may require in exercising their legal capacity', as well as the art 13(1) requirement for 'provision of procedural and age-appropriate accommodations' to access justice on an equal basis with others.

There remain a number of ways under existing Australian laws for courts to promote the use of supports and accommodations to modify, and make accessible, court proceedings — even if they may be underutilised or overlooked.<sup>124</sup> Legislation pertaining to evidence provides one avenue for improv-

<sup>117</sup> *ALRC Equality, Capacity and Disability Report*, above n 10, 192 [7.4].

<sup>118</sup> *WA Report*, above n 15, 50–1 [118]–[119] (recommendation eight). Similarly, the Victorian Law Reform Commission recommended specific amendments to the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic), such that 'in determining whether a person is unfit to stand trial, the court must consider the extent to which modifications can be made to the hearing process to assist the accused to become fit to stand trial': *VLRC Unfitness Report*, above n 15, 89 (recommendation 18).

<sup>119</sup> See *NSWLRC Criminal Responsibility Report*, above n 15, 35 (recommendation 2.2); *VLRC Unfitness Report*, above n 15, 89 (recommendation 18); *ALRC Equality, Capacity and Disability Report*, above n 10, 200–1 (recommendation 7–1).

<sup>120</sup> *VLRC Unfitness Report*, above n 15, 89 [3.124].

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid* 89 [3.125].

<sup>123</sup> Minkowitz, above n 21, 446. See also Gooding and O'Mahony, above n 21, 128.

<sup>124</sup> See *VLRC Unfitness Report*, above n 15, 89 [3.125].

ing court accessibility. The ‘special witnesses’ provision in s 106R of the *Evidence Act 1906* (WA), for example, was advanced by the Attorney-General’s Department of Western Australia as a means to improve accessibility for accused persons. Supports include: appointing a support person approved by the court to assist the accused person; or the accused person being provided with a communication assistant when giving evidence.<sup>125</sup>

The *Evidence Act 2008* (Vic) provides some scope for accommodations within existing law in assessing witness competence,<sup>126</sup> which could be applied to accused persons. The Victorian Equal Opportunity and Human Rights Commission made specific recommendations to clarify what is meant by ‘appropriate means’ of communication under s 31 of the *Evidence Act 2008* (Vic) so as to expand accommodation options.<sup>127</sup> It recommended that the Judicial College of Victoria amend the *Uniform Evidence Manual* to clarify that people with communication disabilities are eligible for such accommodations.<sup>128</sup> The Australian Human Rights Commission echoed similar recommendations, calling for all states and territories to implement similar protections.<sup>129</sup>

Australian case law also demonstrates that courts are willing to treat the availability of support as a critical factor in determining whether someone is unfit to stand trial. It is even arguable that a common law principle has emerged whereby the *Presser* criteria have evolved to require a consideration of this support. For example, in *R v Fisher*, Refshauge J reviewed the authorities and identified the following ‘principle’:

Where steps can reasonably be taken to accommodate the difficulties of the accused, including adjournments, ‘one-on-one’ assistance to follow the proceedings, insistence on brief, clear questions to the accused if he or she is examined on oath, an opportunity for the accused to narrate his or her version of events

<sup>125</sup> *WA Report*, above n 15, 50 [118].

<sup>126</sup> *Evidence Act 2008* (Vic) ss 13, 30–1.

<sup>127</sup> Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime — Research Findings* (2014) 115.

<sup>128</sup> *Ibid.*

<sup>129</sup> See Nance Haxton, ‘Laws Improving Rights for Intellectually Disabled Should Be National, Human Rights Commission Says’, *ABC News* (online), 30 July 2015 <<http://www.abc.net.au/news/2015-07-30/push-to-nationalise-new-sa-laws-for-intellectually-disabled/6660724>>.

without interruption and the like the implementation of these will mean the accused is not unfit to plead.<sup>130</sup>

Examples of case law indicate that such ‘accommodations’ have played a decisive role in outcomes. In *GAE v Western Australia*, for example, a psychiatrist gave evidence that, while a professional communicator would not be of assistance, a family member or colleague would be a suitable supporter.<sup>131</sup> Wager DCJ found GAE fit to plead and allowed his sister to help defence lawyers communicate with her brother.<sup>132</sup> The Court was also told that GAE could better follow proceedings if parties used short sentences, simple terms and repetition of key issues.<sup>133</sup> However, the application of such accommodations is arguably ad hoc. A more formalised, systematic application of procedural accommodations, which a number of law reformers have identified are missing,<sup>134</sup> could be achieved through the training of judicial officers and greater statutory protections for support persons to assist accused persons at risk of being deemed unfit to plead, amongst other measures.

### B *The Test Is Too Narrow*

A second major concern is that the *Presser* test is under-inclusive insofar as some accused persons, particularly those with mental health issues, may meet eligibility to stand trial criteria despite concerns they cannot participate in proceedings. The VLRC, for example, questioned whether ‘the current criteria are suitable for people with a mental illness’ who may presently stand trial despite being unable to make decisions concerning the proceedings against them, and hence will not receive a fair trial.<sup>135</sup> Similarly, the ALRC stated that the test, ‘by focusing on intellectual ability, generally sets too high a threshold for unfitness and is inconsistent with the modern trial process’, and in

<sup>130</sup> (2011) 210 A Crim R 199, 205 [29], citing *Kesavarajah v The Queen* (1994) 181 CLR 230, 246 (Mason CJ, Toohey and Gaudron JJ); *R v Smith* [2008] NSWDC 23 (12 March 2008) [36] (Norrish DCJ); *R v Tuigamala* [2007] NSWSC 493 (15 May 2007) [22] (Studdert J).

<sup>131</sup> [2015] WADC 5 (23 January 2015) [31] (Wager DCJ).

<sup>132</sup> *Ibid* [42].

<sup>133</sup> *Ibid* [33]. See also *R v JG* [2014] ACTSC 120 (7 May 2014) [14] (Burns J); *R v Haines* [2013] NSWSC 1609 (4 November 2013) [25] (Price J).

<sup>134</sup> See above n 119 and accompanying text.

<sup>135</sup> *VLRC Unfitness Report*, above n 15, 70 [3.22]. This view was shared by the Law Commission, which raised concerns that the test in England and Wales set ‘too high a threshold’ for a finding of unfitness: *Law Commission Consultation Paper*, above n 54, 27 [2.43], 32 [2.60].

particular, ‘the test is difficult to apply to defendants with mental illness because the criteria were not designed for them.’<sup>136</sup>

To address these concerns, the ALRC recommended simplifying the test and shifting the focus to *decision-making ability* rather than intellectual ability.<sup>137</sup> To do so, it recommended applying what could be described as a ‘functional mental capacity’ test, in line with typical mental capacity assessments in other areas of law, such as guardianship or health law. Recommendation 7-1 states:

The *Crimes Act 1914* (Cth) should be amended to provide that a person cannot stand trial if the person cannot be supported to:

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
- (b) retain that information to the extent necessary to make decisions in the course of the proceedings;
- (c) use or weigh that information as part of the process of making decisions; or
- (d) communicate the decisions in some way.<sup>138</sup>

The Attorney-General’s Department of Western Australia proposed similar amendments.<sup>139</sup> The Western Australian Supreme, District and Children’s Courts reported to the Department that a focus on decision-making capacity would improve the assessment compared to the *Presser* requirement to understand specific aspects of the proceedings.<sup>140</sup> The Law Commission of England and Wales also recommended changes so as to focus on the defendant’s ‘capacity to participate effectively in a trial’.<sup>141</sup> A defendant would ‘lack capacity’ if ‘the defendant’s *relevant abilities* are not, taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged.’<sup>142</sup> Those ‘relevant abilities’ resemble the *Presser* criteria<sup>143</sup> but would give greater scope for the court to apply the test. Apply-

<sup>136</sup> ALRC *Equality, Capacity and Disability Report*, above n 10, 197 [7.23], citing VLRC *Consultation Paper*, above n 32, 59 [4.32]; *Law Commission Consultation Paper*, above n 54, 27 [2.43].

<sup>137</sup> ALRC *Equality, Capacity and Disability Report*, above n 10, 201 [7.41]–[7.42].

<sup>138</sup> *Ibid* 200–1 (recommendation 7.1).

<sup>139</sup> See *WA Report*, above n 15, 49 [108].

<sup>140</sup> *Ibid* 46 [98].

<sup>141</sup> *Law Commission Report*, above n 77, vol 1, 67 [3.35].

<sup>142</sup> *Ibid* vol 2, 16 cl 3(2) (emphasis added).

<sup>143</sup> See *ibid* vol 2, 16 cl 3(4).

ing functional mental capacity would allow assessment at different stages of the trial depending on the relevant task. A number of law reformers have proposed that decision-making capacity to plead guilty, for example, might be guided by an alternative list of functional factors, which were not as onerous as the *Presser* criteria. For example, the Law Commission proposed a secondary test for a guilty plea, which was consistent with — and indeed, inspired by — a 2014 recommendation of the VLRC.<sup>144</sup>

The proposal to include *more* people among those deemed unfit would diverge from the *UNCRPD* emphasis on moving away from alternative legal processes for people with disabilities. By employing a decision-making capacity test, this proposal would also move in a different direction to the demands of art 12, which indicates — at least according to the CRPD Committee — that incompetency determinations are themselves a discriminatory barrier for people with disabilities, as we will discuss in the next section.

### C *The Test Is Inherently Discriminatory*

The third major criticism of the unfit test — and one very much arising from the *UNCRPD* — is that the very process of testing and declaring mental incompetency, regardless of whether the *Presser* test or a decision-making capacity assessment is used, is discriminatory.<sup>145</sup> As Christopher Slobogin has written:

the [*UNCRPD*] calls on signatory states to abolish the special defense of insanity and other doctrines based solely on mental disability. According to the [*UNCRPD*], the mental disability predicate to these doctrines must be eliminated.<sup>146</sup>

In the context of unfit to stand trial laws, that predicate might be explicit (for example, ‘because the person’s mental processes are disordered or impaired’)<sup>147</sup> or implicit (where assessment merely considers a person’s decision-making *ability*, without regard to a diagnosed impairment). Both

<sup>144</sup> *Law Commission Report*, above n 77, vol 1, 94 [3.146]–[3.147], 95–6 [3.153]–[3.155], citing *VLRC Unfitness Report*, above n 15, 80–1 [3.71]–[3.84].

<sup>145</sup> See Christopher Slobogin, ‘Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the *Convention on the Rights of Persons with Disabilities* on the Insanity Defense, Civil Commitment, and Competency Law’ (2015) 40 *International Journal of Law and Psychiatry* 36; Minkowitz, above n 21, 445.

<sup>146</sup> Slobogin, above n 145, 38.

<sup>147</sup> *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 6(1).

options, according to the CRPD Committee, contravene the *UNCRPD*. The CRPD Committee has directed countries to abandon the emphasis on identifying the point at which a person should be deemed unfit to plead, and instead places an obligation on states parties to provide support to exercise legal capacity.<sup>148</sup> For the CRPD Committee, disability ‘must never be grounds for denying legal capacity or any of the rights provided for in article 12.’<sup>149</sup> This directive remains the case *even* where resulting declarations of unfitness, such as the *Presser* test, serve to activate procedural safeguards for accused persons with disabilities. The CRPD Committee released a statement in 2015 calling on states parties to remove declarations of unfitness to stand trial from their criminal laws. The CRPD Committee stated:

The Committee has established that declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it [sic] deprives the person of his or her right to due process and safeguards that are applicable to every defendant. *The Committee has also called for States parties to remove those declarations from the criminal justice system.*<sup>150</sup>

Elsewhere, the CRPD Committee recommended that ‘the declaration of unfitness to stand trial be removed from [South Korea’s] criminal justice system in order to allow due process for persons with disabilities on an equal basis with others.’<sup>151</sup> The CRPD Committee likewise directed Ecuador to:

refrain from declaring persons with disabilities unfit to stand trial when they are accused of an offence so that they are entitled to due process, on an equal basis with others, and that the general guarantees of criminal law and procedure are observed ...<sup>152</sup>

These recommendations do not appear to be contingent on the person being detained — the issue is the declaration *per se*. The comments of the CRPD

<sup>148</sup> See generally Gooding and O’Mahony, above n 21.

<sup>149</sup> *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 2–3 [9].

<sup>150</sup> CRPD Committee, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities*, 14<sup>th</sup> sess (September 2015) [16] (emphasis added).

<sup>151</sup> CRPD Committee, *Concluding Observations on the Initial Report of the Republic of Korea*, 12<sup>th</sup> sess, UN Doc CRPD/C/KOR/CO/1 (29 October 2014) 5 [28].

<sup>152</sup> CRPD Committee, *Concluding Observations on the Initial Report of Ecuador*, 12<sup>th</sup> sess, 165<sup>th</sup> mtg, UN Doc CRPD/C/EQU/CO/1 (27 October 2014) 5 [29].

Committee suggest that, irrespective of the mode of detention, declarations of unfitness to stand trial, even those based on decision-making ability or functional mental capacity assessments, are inconsistent with the terms of the *UNCRPD*. On this interpretation, no Australian unfitness to stand trial laws are compliant.

However, this facet of the *UNCRPD* has been largely overlooked in recent Australian law reform efforts concerned with unfitness to stand trial laws, with the notable exception of the ALRC. Yet ultimately, the ALRC rejected the CRPD Committee call to abolish assessments of functional mental capacity.<sup>153</sup> The ALRC has stated:

[I]t is not practicable to completely do away with some functional tests of ability that have consequences for participation in legal processes. For example, the integrity of a criminal trial (and, arguably, the criminal law itself) would be prejudiced if the defendant does not have the ability to understand and participate in a meaningful way. It may also breach the person's human rights by denying them a fair trial, implicating arts 12 and 13 of the CRPD. The ALRC considers that, with appropriate safeguards, and a rights emphasis, there is no 'discriminatory denial of legal capacity' necessarily inherent in a functional test — provided the emphasis is placed principally on the support necessary for decision-making ...<sup>154</sup>

Australian law reform endeavours in the civil law context which have considered the challenge of the *UNCRPD* to incompetency declarations have also endorsed the use of functional mental capacity assessments.<sup>155</sup> Only a small number of commentators have explored the possibility of extricating mental capacity assessments from the common law system.<sup>156</sup>

Overall, then, the *Presser* test can be criticised from a number of different perspectives. What this means in relation to options for law reform is taken up in Part VI. The next Part turns to a critical analysis of procedures following a finding of unfitness to stand trial.

<sup>153</sup> ALRC *Equality, Capacity and Disability Report*, above n 10, 74 [3.47]–[3.48] (citations omitted).

<sup>154</sup> *Ibid.*

<sup>155</sup> See, eg, VLRC, *Guardianship*, Report No 24 (2012) 109 [7.76]–[7.77], 122 (recommendation 27(a)); Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Substitute Decision-Making for People Lacking Capacity* (2010) 34 [4.56].

<sup>156</sup> See Gooding, above n 83, 60–1; Anna Arstein-Kerslake and Eilionóir Flynn, 'The General Comment on Article 12 of the Convention on the Rights of Persons with Disabilities: a roadmap for equality before the law' (2016) 20(4) *The International Journal of Human Rights* 471.

#### IV SPECIAL HEARINGS AND OTHER PROCEDURES FOLLOWING A FINDING OF UNFITNESS TO STAND TRIAL

The emphasis on equal participation of persons with disabilities in legal processes under the *UNCRPD* implies states parties must provide accessibility measures to persons with disabilities, and ensure that they enjoy due process standards on an equal basis with non-disabled people. These provisions raise concerns about special hearings and similar procedures following a determination that an accused person is unfit to stand trial. Concerns centre on two key questions. First, to what extent does such a procedure mirror an ordinary criminal trial? Secondly, how rigorously must the evidence against the accused person be tested? In Australia, as previously noted, the answers to these questions vary from jurisdiction to jurisdiction, but all can be viewed as producing adverse consequences which undermine *UNCRPD* requirements for equal recognition before the law for persons with cognitive disabilities.

##### *A Availability of Special Hearings to Test the Case against the Accused*

Two jurisdictions — Queensland and Western Australia — do not provide for special hearing procedures to test the evidence against the accused found unfit to stand trial. In Queensland, proceedings against a person are either stayed until they become fit for trial,<sup>157</sup> or discontinued altogether.<sup>158</sup> Significantly, a different procedure applies where the Mental Health Court is considering whether the accused was ‘unsound of mind’ at the time the alleged offence was committed, or whether the doctrine of diminished responsibility applied. If unsoundness of mind at the time of the offence is the critical issue, then the law puts the prosecution to proof.<sup>159</sup> If, however, unfitness to stand trial is the issue, the law does not require the same scrutiny.

Similarly, Western Australia does not require special hearings. Before making a custody order, the judge must be satisfied it is appropriate to do so having regard to, among other factors, ‘the strength of the evidence against the accused’.<sup>160</sup> However, this process does not necessarily involve the taking and careful scrutiny of evidence. For example, in *Western Australia v Tax*, Martin CJ appears to have satisfied this requirement simply by being told, from the bar table, that there were potential issues relating to identification

<sup>157</sup> *Mental Health Act 2000* (Qld) s 280.

<sup>158</sup> *Ibid* s 283.

<sup>159</sup> *Ibid* s 268.

<sup>160</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(6)(a), 19(5)(a).

and alibi evidence.<sup>161</sup> In *Western Australia v Stubley [No 2]*, McKechnie J considered that the prosecution case was ‘objectively strong’ because the High Court had recently ordered a re-trial, rather than deciding to quash the conviction.<sup>162</sup> The level of scrutiny required to satisfy a judicial officer of ‘the strength of the evidence against the accused’ may therefore be of a lesser standard than the usual standard of proof for criminal trials.

In Queensland and Western Australia, the fundamental right of an accused to meet the case against them is given little — if any — recognition. The special hearing procedures developed in other jurisdictions go some way towards ensuring that persons with cognitive disabilities are still entitled to basic procedural safeguards, although significant concerns remain.

### B Standard of Proof

States and territories aside from Western Australia and Queensland all provide procedures for testing the prosecution case. In most, the hearing is conducted as near as possible to a criminal trial.<sup>163</sup> Although the usual criminal standard of proof applies in most of these cases,<sup>164</sup> there remain discrepancies. For example, the *Crimes Act 1914* (Cth) can be seen to require a less rigorous standard of proof than for a criminal trial. The applicable procedure for federal offences requires the prosecution to establish ‘a prima facie case that the person committed the offence’.<sup>165</sup> A prima facie case will be made out ‘if there is evidence that would ... provide sufficient grounds to put the person on trial in relation to the offence’.<sup>166</sup> The process is therefore akin to a committal proceeding, and lacks the procedural safeguards of a criminal trial, again raising concerns about equality in recognition before the law, access to justice, and, where custodial orders are applied, regarding deprivations of liberty.

<sup>161</sup> [2010] WASC 208 (18 June 2010) [3].

<sup>162</sup> [2011] WASC 292 (24 October 2011) [19].

<sup>163</sup> See, eg, *Crimes Act 1900* (ACT) s 316(1); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(1); *Criminal Code* (NT) s 43W(1); *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16(1); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 16(1).

<sup>164</sup> See, eg, *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16(1).

<sup>165</sup> *Crimes Act 1914* (Cth) s 20B(3).

<sup>166</sup> *Ibid* s 20B(6).

It is also noteworthy that the prosecution in special hearings is often only required to prove the physical elements of the offence.<sup>167</sup> What is not included is the fundamental presumption that ‘an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every [serious] offence’.<sup>168</sup> In England and Wales, the Law Commission expressed concerns about the suspension of this fundamental principle of criminal law in the ‘trial of the facts’ process (which is analogous to Australia’s special hearings).<sup>169</sup> As the Law Commission noted, it is not always possible or desirable to separate the physical and mental elements of an offence: for example, subjective elements may be an integral part of offences involving obtaining sexual gratification, and intention also plays a significant role in possession-based crimes.<sup>170</sup> The Law Commission recommended reforming the trial of the facts hearing process to require proof of all elements, physical and mental.<sup>171</sup>

### C Qualified Verdicts

The requirement generally stands that the offence must be proven beyond reasonable doubt in special hearings.<sup>172</sup> In New South Wales, the judge or jury is entitled to reach that level of satisfaction on ‘the limited evidence available’.<sup>173</sup> This term has been interpreted as ‘recognition of the fact that a person who is unfit to be tried is not able to participate in a special hearing to the same extent as an accused person can in a normal criminal trial’.<sup>174</sup> In *Subramaniam v The Queen*, the High Court identified a number of ways in which the evidence may be limited: the accused may be unable to give

<sup>167</sup> See, eg, *Crimes Act 1900* (ACT) ss 317, 335(2)(b); *Criminal Law Consolidation Act 1935* (SA) s 269M(B).

<sup>168</sup> *Sherras v De Rutzen* [1895] 1 QB 918, 921 (Wright J). The word ‘serious’ was added here to exclude cases of absolute or strict liability. For a discussion of when the presumption will be displaced, see generally *He Kaw Teh v The Queen* (1985) 157 CLR 523.

<sup>169</sup> Under a trial of the facts, the Crown must prove that the accused ‘did the act or made the omission’: *Criminal Procedure (Insanity) Act 1964* (UK) ch 25 s 4A(2). The House of Lords interpreted this to cover only the physical elements of the offence: *R v Antoine* [2001] 1 AC 340, 350–1 (Lord Bingham CJ), 375–6 (Lord Hutton).

<sup>170</sup> *Law Commission Report*, above n 77, vol 1 142–3 [5.10]–[5.13], 147 [5.28].

<sup>171</sup> *Ibid* vol 1, 163 [5.85]. Under this system, failure to prove one of those elements would result in an acquittal or a ‘special verdict’ akin to a successful insanity defence.

<sup>172</sup> See, eg, *R v Aller* [2015] NSWSC 178 (24 February 2015) [1] (Hidden J); *R v Thomas* [2015] NSWSC 537 (8 May 2015) [5] (Hulme J).

<sup>173</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 22(1).

<sup>174</sup> *R v Thomas [No 2]* [2015] NSWSC 561 (14 May 2015) [1] (Hulme J).

evidence, for example, or may find it difficult to effectively instruct counsel.<sup>175</sup> In these circumstances, despite the qualified nature of the verdict, the standard of proof remains the same.

However, in Tasmania, where special hearings are nominally required to hold the normal criminal onus and standard of proof (again, which must occur 'as nearly as possible' to normal criminal trials),<sup>176</sup> a court may nevertheless make a custodial or treatment order if 'a finding cannot be made that the defendant is not guilty of the offence charged'.<sup>177</sup> A literal reading of this provision suggests that in order for the accused to secure an unconditional acquittal, the special hearing jury must make a positive finding that the accused is not guilty. The Tasmanian Supreme Court has suggested that a qualified finding is accordingly available 'if the jury concluded beyond reasonable doubt, on the evidence before it, that the accused *appeared to be guilty*'.<sup>178</sup> It is not clear what it means for an accused to 'appear to be guilty', but this ruling raises concerns about the integrity of the presumption of innocence.

Verdicts of guilt, qualified by the finding that a person is unfit to plead, are aimed at arriving at an approximation of the truth of what occurred, while recognising the disadvantages faced by accused persons with cognitive disabilities. However, unequal treatment seems to occur where these verdicts condone a different standard of proof or a different approach to the probative value of prosecution evidence. Once again, the principles of non-discrimination and equality under the *UNCRC*, including arts 12, 13 and 14, direct that accused persons with cognitive disabilities are entitled to the same procedural safeguards as other accused persons.

#### D Defences

Just as an accused person is entitled to have the Crown prove the allegations against him or her, he or she is also entitled to raise any available defences. With the exception of the defence of mental impairment, the prosecution must disprove these defences.<sup>179</sup> However, in South Australia, once an accused

<sup>175</sup> (2004) 211 ALR 1, 12–13 [40].

<sup>176</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16(1).

<sup>177</sup> *Ibid* s 17(d) (emphasis added).

<sup>178</sup> *Tasmania v Bosworth* (2005) 13 Tas R 457, 463 [16] (Crawford J) (emphasis added).

<sup>179</sup> *Woolmington v DPP (UK)* [1935] AC 462, 481 (Viscount Sankey LC). See generally Paul Ames Fairall and Stanley Yeo, *Criminal Defences in Australia* (LexisNexis, 4<sup>th</sup> ed, 2005)

person has been deemed unfit to stand trial, the person is barred from raising any potential defences. South Australian courts must determine whether the accused committed the 'objective elements of the offence' and may not consider whether his or her conduct is 'defensible'.<sup>180</sup> The term 'defensible' is defined as whether, 'on the trial of the offence to which the proceedings relate, a defence might be found to exist'.<sup>181</sup> This removal of a procedural safeguard available to other accused persons can be seen to undermine the principle of 'equality of arms' behind the adversarial justice system, and equal recognition and access to justice provisions of the *UNCRPD*.

In England and Wales, the House of Lords adopted a similar approach to this South Australian legislation in *R v Antoine*, holding that accused persons were not permitted to raise defences in a trial of the facts in the absence of 'objective evidence'.<sup>182</sup> However, in its 2015 report, the Law Commission recommended reversing this position and allowing full defences to go to the trial of the facts jury on the same basis as regular trials.<sup>183</sup> It noted that the *R v Antoine* approach had the capacity 'arbitrarily to disadvantage an unfit defendant in comparison with a fit defendant in the same situation'.<sup>184</sup>

Arguing that the requisite fault element has not been established may also be unavailable to accused persons deemed unfit to plead in all Australian jurisdictions except Victoria.<sup>185</sup> As noted, special hearings typically involve a judge or jury assessing whether the accused engaged in the conduct (or committed the 'objective elements') that constitute the charged offence,<sup>186</sup> rather than any requisite fault elements. It appears to be assumed that, if an accused is presently unfit to stand trial, then he or she must have been incapable of forming the required fault element.

Not being able to raise the same defences or dispute the fault elements of a crime during the special hearing again conflicts with the requirements of the *UNCRPD* in relation to the principles and articles discussed above.

273–4 [13.52]; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) chs 4–6.

<sup>180</sup> *Criminal Law Consolidation Act 1935* (SA) ss 269M(B)(3), 269N(A)(3).

<sup>181</sup> *Ibid* s 269A(1) (definition of 'defensible').

<sup>182</sup> [2001] 1 AC 340, 376–7 (Lord Hutton).

<sup>183</sup> *Law Commission Report*, above n 77, vol 1, 174 [5.127].

<sup>184</sup> *Ibid* vol 1, 150 [5.36].

<sup>185</sup> For Victoria, see *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 16.

<sup>186</sup> See, eg, *Crimes Act 1900* (ACT) s 317; *Criminal Law Consolidation Act 1935* (SA) ss 269M(B), 269N(A).

## V DISPOSITION: CUSTODIAL ORDERS

Having outlined criteria for testing unfitness, and the procedures that follow, this Part turns to custodial orders following a finding of unfitness to stand trial, and particularly provisions which allow for indefinite detention. However, it should be noted that serious concerns have also been raised about supervision orders and their potentially adverse consequences for accused persons or offenders with disabilities.<sup>187</sup> For example, Judith Cockram, who tracked 843 offenders with intellectual disabilities in Western Australia over 10 years, has argued that supervision orders for offenders with intellectual disabilities offer, in many cases, 'little prospect of rehabilitation for the offender, with the focus generally being on the care and supervision of the resident, and an absence of specialist habilitative programs.'<sup>188</sup> More generally, there is a paucity of research on the impact of non-custodial supervision orders. There are some notable exceptions to this research gap, including studies which have raised concerns that the schemes may perpetuate unfounded notions of risk and community safety in relation to intellectual disabilities,<sup>189</sup> and may not give sufficient weight to the environmental causes of difficult behaviour,<sup>190</sup> which may lead to the application or maintenance of indefinite supervision orders. It is outside the scope of this article to look at supervision orders in depth.<sup>191</sup> Instead, we will focus on custodial orders.

<sup>187</sup> See, eg, *VLRC Unfitness Report*, above n 15, ch 11; Judith Cockram, 'Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability' (2005) 30 *Journal of Intellectual and Developmental Disability* 3, 9–10.

<sup>188</sup> Cockram, above n 187, 10.

<sup>189</sup> Kelley Johnson and Sue Tait, 'Throwing Away the Key: People with Intellectual Disability and Involuntary Detention' in Kate Diesfeld and Ian Freckelton (eds), *Involuntary Detention and Therapeutic Jurisprudence: International Perspectives on Civil Commitment* (Ashgate, 2003) 505, 517, 524.

<sup>190</sup> Paul Ramcharan et al, 'Experiences of Restrictive Practices: A View from People with Disabilities and Family Carers' (Final Research Report, Office of the Senior Practitioner, May 2009) 11 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/experiences-of-restrictive-practices-report>>.

<sup>191</sup> For further information, see, eg, Lois Bedson, Magdalena McGuire and Bryan Walkinshaw, 'Supervised Treatment Orders in Practice: How are the Human Rights of People Detained under the *Disability Act 2006* Protected?' (Report, Office of the Public Advocate (Vic), August 2010) <<http://www.publicadvocate.vic.gov.au/our-services/publications-forms/52-supervised-treatment-orders-in-practice-how-are-the-human-rights-of-people-detained-under-the-disability-act-2006-protected?path=;> Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in Relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (2008) <[http://www.idrs.org.au/pdf/historic/enabling\\_justice.pdf](http://www.idrs.org.au/pdf/historic/enabling_justice.pdf)>.

There are essentially four unfitness detention models in Australia: traditional ‘Governor’s pleasure’ detention; nominal terms; limiting terms and the fixed term approach. The implications of international human rights law for each model will be considered in turn.

#### A ‘Governor’s Pleasure’ Detention

Western Australia and Queensland effectively retain traditional ‘Governor’s pleasure’ detention models, while Tasmania uses a modified version of this model. Disposition is discretionary, in the sense that courts can decide whether to make a custodial order or release the accused person.<sup>192</sup> However, if the court decides to proceed with a custodial order,<sup>193</sup> that order is indefinite. The term of an individual’s detention effectively rests with administrative decision-makers.

In Western Australia, the discretion is exercised — at least nominally — at the vice-regal level, with the Governor acting on the recommendation of the Mentally Impaired Accused Review Board.<sup>194</sup> In Queensland, the power to release an individual from a custodial order rests with an administrative tribunal: the Mental Health Review Tribunal.<sup>195</sup> In both cases, power essentially lies with the executive branch of government, guided by certain criteria that typically involve risk assessment.<sup>196</sup>

The Tasmanian scheme differs from traditional ‘Governor’s pleasure’ detention: while custodial orders are to be reviewed at least annually by the

<sup>192</sup> *Mental Health Act 2000* (Qld) s 288; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 18(2); *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(5), 19(4). Courts in Tasmania also have other options: *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 18(2)(b)–(e). In Queensland, if a person is deemed unfit to stand trial where the unfitness is not of a permanent nature, detention for involuntary treatment is required. *Mental Health Act 2000* (Qld) s 288(3).

<sup>193</sup> Jurisdictions use different terminology to label broadly similar orders. Western Australia has ‘custody orders’ and Tasmania has ‘restriction orders’. Queensland has two separate subspecies of custodial order, ‘forensic orders’ and ‘disability forensic orders’, recognising the different needs of people with intellectual impairments and people with severe mental health issues: Queensland Health, *Mental Health Act 2000 Resource Guide* (2016) 7-3.

<sup>194</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(3).

<sup>195</sup> *Mental Health Act 2000* (Qld) ss 203(1), 207, 293.

<sup>196</sup> For example, in deciding whether to revoke a disability forensic order, the Queensland Tribunal must consider the individual’s alleged crimes, as well as any risk-taking behaviour displayed while subject to the forensic order: *ibid* s 203(6A). In Western Australia, the Board must comment on ‘the degree of risk that the release of the accused appears to present to the personal safety of people in the community’: *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(5)(a).

Mental Health Tribunal,<sup>197</sup> Tasmanian law places the final decision in the hands of the Supreme Court.<sup>198</sup> The term of detention remains indefinite and, unlike other Australian jurisdictions, the detention is *not* subject to a nominal or limiting term, which is discussed below.

Certain safeguards apply to indefinite custodial orders. For example, in Western Australia the Mentally Impaired Accused Review Board is required to assess the detainee's suitability for release every 12 months,<sup>199</sup> and in Queensland, forensic order patients are assessed every six months.<sup>200</sup> However, unlike the limiting and nominal term systems in place in other jurisdictions, no attempt is made to tie the custodial order to any definite term resembling a sentence of imprisonment which might otherwise be imposed by a court.

Despite its lingering presence in some jurisdictions, the 'Governor's pleasure' model has been widely criticised as harsh and arbitrary.<sup>201</sup> Indeed, the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) was created with the principal aim of reforming the Governor's pleasure scheme. Introducing the Bill in 1997, then Attorney-General Jan Wade described Governor's pleasure detention as an 'antiquated and unjust' system which:

does not provide for the evidence against persons who have been found unfit to plead to be tested, but rather provides that the court must immediately order that they be detained at the Governor's pleasure; it is inappropriate that release decisions are made by the executive and may therefore potentially be subject to political considerations.<sup>202</sup>

Those criticisms could apply with equal force to the Western Australian system today, and (to a lesser extent) the Queensland system,<sup>203</sup> both of which clearly deviate from the *UNCRPD* by establishing separate processes with

<sup>197</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37.

<sup>198</sup> *Ibid* ss 24, 26.

<sup>199</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(2)(d).

<sup>200</sup> *Mental Health Act 2000* (Qld) s 200(1)(a).

<sup>201</sup> See, eg, Chester Porter, 'At the Governor's Pleasure' (1994) 26 *Australian Journal of Forensic Sciences* 25; Sophie Delaney, 'Controlling the Governor's Pleasure — Some Gain, Some Pain' (1998) 72(1) *Law Institute Journal* 46.

<sup>202</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 185.

<sup>203</sup> It is accepted that in Queensland, where the decision is solely left to a quasi-judicial arm of the executive, the Mental Health Review Tribunal, the potential for political interference diminishes.

lesser safeguards to deprive the liberty of accused persons with disabilities deemed unfit to plead.

### B *Nominal Terms*

The second form of disposition used in Australian jurisdictions is the ‘nominal term.’ Under this approach, after finding that an accused is unfit to stand trial and should not be released unconditionally, a nominal term is set.<sup>204</sup> Importantly, these dispositions still amount to indefinite detention, as is the case in legislation in the Northern Territory and Victoria.<sup>205</sup> The effect of a nominal term is simply to bring the matter back before a court for what is known as a ‘major review’.<sup>206</sup> As the end of the nominal term approaches, a court is asked to decide whether the custodial order should be continued. Major reviews apply a rebuttable presumption that the accused must be released at the end of the nominal term, unless they pose a serious risk to the public.<sup>207</sup> It is worth noting that this approach is broadly consistent with the way serious sex offenders are treated under preventative detention laws,<sup>208</sup> with the significant difference that the sex offender laws require proof of a conviction for a relevant offence.<sup>209</sup>

The Northern Territory and Victoria take slightly different approaches to fixing a nominal term. In Victoria, the length of the term is largely prescribed by statute. For example, the nominal term for murder is 25 years, while for a serious offence other than murder the nominal term is the maximum term applicable to that offence.<sup>210</sup> In the Northern Territory, the court is required to fix a term:

<sup>204</sup> *Criminal Code* (NT) s 43ZG(1)–(4B); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 28(1).

<sup>205</sup> *Criminal Code* (NT) s 43ZC; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27(1).

<sup>206</sup> *Criminal Code* (NT) s 43ZG(5)–(7); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 35.

<sup>207</sup> *Criminal Code* (NT) s 43ZG(6); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 35(3)(a)(i). In Victoria, the presumption is that a custodial order must be varied to a non-custodial order; while in the Northern Territory, the presumption favours unconditional release for all types of order.

<sup>208</sup> See *Serious Sex Offenders Act 2013* (NT) s 31(1); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 35(1).

<sup>209</sup> *Serious Sex Offenders Act 2013* (NT) s 22(1)(a); *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 4.

<sup>210</sup> *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 28(1).

equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged.<sup>211</sup>

The advantage of the Northern Territory system is that it more closely reflects the approach that a court would take when sentencing an accused after a finding of guilt.

Nominal terms, coupled with a rebuttable presumption in favour of release at the end of the specified period, seem immediately preferable to traditional 'Governor's pleasure' detention. This is particularly true where the court nominating the term is encouraged to approach its task as a sentencing exercise (though some commentators call for the extrication of a criminal sentence from what they argue is a therapeutic matter, as we will discuss shortly). The nominal term is designed to safeguard against arbitrary detention, and make sure that individuals are not 'lost in the system'.<sup>212</sup> Yet ultimately, the term remains indefinite and can effectively lead to a sentence of far longer than would otherwise be imposed upon conviction.<sup>213</sup>

The VLRC has recommended significant reforms to the nominal term model used in Victoria.<sup>214</sup> One of its major concerns was that the legislatively-defined terms use the maximum penalty as a yardstick. In its submission to the VLRC, Forensicare, which provides adult forensic mental health services in Victoria, described this use of maximum penalty as 'unfair and misleading' as 'it would be highly unusual to have the maximum sentence imposed if convicted.'<sup>215</sup> However, there was considerable support during the consultation process for disassociating major reviews from a criminal sentence, and focusing instead upon the progress and needs of the individual.<sup>216</sup> The VLRC's proposal for a system of five-year 'progress reviews' ultimately reflects these therapeutic and 'protective' aims,<sup>217</sup> raising immediate conceptual tensions with the equality and rights-based focus of the *UNCRPD*.

The CRPD Committee has criticised therapeutic aims in criminal law 'according to which persons considered "unfit to stand trial" on account of

<sup>211</sup> *Criminal Code* (NT) s 43ZG(2).

<sup>212</sup> *VLRC Unfitness Report*, above n 15, 361 [10.118].

<sup>213</sup> *Ibid* 364 [10.127], 367 [10.150].

<sup>214</sup> *Ibid* 369 (recommendation 84).

<sup>215</sup> *Ibid* 364 [10.127] (citations omitted).

<sup>216</sup> *Ibid* 364 [10.13]–[10.135].

<sup>217</sup> See *ibid* 368 [10.155]–[10.156].

their impairment are not punished but are sentenced to treatment.<sup>218</sup> For the CRPD Committee, regimes under which people are effectively ‘sentenced to treatment’ should be ‘replaced by formal criminal sanctions for offenders whose involvement in crime has been determined.’<sup>219</sup> This point is likely to generate controversy, where commentators such as the VLRC seek a just outcome by creating alternative hearings with a therapeutic emphasis (in contrast to equal process, which has the potential to create unjust outcomes). However, this approach is expressly criticised by the CRPD Committee, even as it still promotes a range of non-custodial options for courts to consider when ‘sentencing offenders whose involvement in crime has been determined’.<sup>220</sup>

The concerns raised by the VLRC recommendations draws the discussion back to the question of whether special hearings themselves could be considered to amount to accessibility measures or procedural accommodations. This question is discussed below.

### *C Limiting Terms*

The third Australian model of custodial disposition is the ‘limiting term’ used in New South Wales and South Australia. This approach most closely resembles a criminal sentence imposed following conviction. After a finding of unfitness and a special hearing, if the court makes an order for detention, it must set a limiting term. this should be:

the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence.<sup>221</sup>

Significantly, under a limiting term, an individual ceases to be a forensic patient when the term expires,<sup>222</sup> and is accordingly entitled to leave any forensic facility in which they were detained. Health authorities may apply for

<sup>218</sup> CRPD Committee, *Concluding Observations on the Initial Report of Denmark*, 12<sup>th</sup> sess, 169<sup>th</sup> mtg, UN Doc CRPD/C/DNK/CO/1 (30 October 2014) 5 [34].

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b). This is also the procedure in South Australia: *Criminal Law Consolidation Act 1935* (SA) s 269O(2).

<sup>222</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 52(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 269O(3).

extensions of custodial orders,<sup>223</sup> but barring this prospect there is an end in sight. The fixing of an end date seemingly complies with the *UNCRPD*-based prohibition of indefinite detention on the basis of impairment.<sup>224</sup> It also avoids the real risk, noted previously, that an accused will choose to plead guilty because the certainty of a fixed sentence is preferable to detention with no end in sight.<sup>225</sup>

The limiting term model has been the subject of criticism by law reform commentators who focus on a therapeutic approach. For example, the VLRC contemplated the introduction of limited terms in place of the nominal term system,<sup>226</sup> yet concluded that indefinite detention should remain a feature of the law of unfitness to stand trial, and argued that this position was ‘consistent with the therapeutic focus of the [Act]’.<sup>227</sup> The VLRC added that:

Such orders are also consistent with the principle of community protection underlying the [Act] that recognises that the recovery of a supervised person should proceed on a gradual basis so that their risk can be managed to a point where they can ultimately be reintegrated into the community.<sup>228</sup>

Once, again, the VLRC’s pursuit of a therapeutic approach contrasts with that of the *UNCRPD*. Such a therapeutic or ‘welfarist’ approach has characterised disability law and policy throughout the 20<sup>th</sup> century and has been the subject of longstanding critiques, many of which, according to Quinn and Degener, were incorporated into the process leading towards the *UNCRPD*.<sup>229</sup>

<sup>223</sup> For New South Wales, see generally *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1.

<sup>224</sup> See *Concluding Observations on the Initial Report of Australia*, UN Doc CRPD/C/AUS/CO/1, 4 [31]; CRPD Committee, *Concluding Observations on the Initial Report of Brazil*, 14<sup>th</sup> sess, 226<sup>th</sup> mtg, UN Doc CRPD/C/BRA/CO/1 (29 September 2015) 4 [30].

<sup>225</sup> See above Part I. See also Suzie O’Toole, Jodie O’Leary and Bruce D Watt, ‘Fitness to Plead in Queensland’s Youth Justice System: The Need for Pragmatic Reform’ (2015) 39 *Criminal Law Journal* 40, 42.

<sup>226</sup> *VLRC Unfitness Report*, above n 15, 360 [10.107]–[10.113].

<sup>227</sup> *Ibid* 360 [10.111].

<sup>228</sup> *Ibid*.

<sup>229</sup> Theresia Degener and Gerard Quinn, ‘A Survey of International, Comparative and Regional Disability Law Reform’ in Mary Lou Breslin and Silvia Yee (eds), *Disability Rights Law and Policy: International and National Perspectives* (Transnational Publishers, 2002) 3.

#### D Fixed Terms

The Commonwealth, and the Australian Capital Territory ('ACT'), take an approach to detention following a finding of unfitness which is different to other Australian jurisdictions, and appear to go a step further toward equality rights than is the case with limiting terms. Section 20BC of the *Crimes Act 1914* (Cth) provides that, if a court determines that a person is unfit to be tried and will not become fit to be tried within 12 months, the court may order that the person be detained in a hospital (but only if treatment is available, and the individual agrees to be transferred to a hospital) or other place (including a prison).<sup>230</sup> However, the individual can only be detained for a specified period 'not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.'<sup>231</sup> For the ACT, similarly, if the court makes a custody order and the court would have imposed imprisonment if the hearing were a normal criminal hearing, it must indicate a sentence that would have been appropriate,<sup>232</sup> and the person cannot be detained for longer than this term.<sup>233</sup>

A person detained under these laws may in fact be released before his or her specified period expires. The Commonwealth Act requires that the Attorney-General review the individual's ongoing detention every six months.<sup>234</sup> That review must involve a consideration of medical evidence, as well as any representations made by or on behalf of the detained individual.<sup>235</sup> In the ACT, a tribunal must review the detention on a monthly basis.<sup>236</sup>

These provisions are anomalous because, alone among the Australian jurisdictions, they appear to provide for a truly definite term. Unlike the limiting term systems in New South Wales and South Australia, authorities cannot apply to have the fixed term extended. Like a sentence of imprisonment, they give the individual the certainty of a release date. Yet unlike a term of imprisonment, they also (at least in theory) cater for consideration of the person's support needs, and the appropriateness of early release, through periodic reviews.

<sup>230</sup> *Crimes Act 1914* (Cth) s 20BC(2).

<sup>231</sup> *Ibid.*

<sup>232</sup> *Crimes Act 1900* (ACT) ss 301, 305.

<sup>233</sup> *Mental Health Act 2015* (ACT) s 183.

<sup>234</sup> *Crimes Act 1914* (Cth) s 20BD(1).

<sup>235</sup> *Ibid* s 20BD(2).

<sup>236</sup> *Mental Health Act 2015* (ACT) s 180(2)(b).

The Commonwealth unfit laws were introduced in 1989 with the express intent of abolishing indefinite detention. When introducing the Bill, then Minister for Land Transport and Shipping Support Robert Brown stated:

this Bill also provides an innovative and humanitarian regime to deal with the difficult and frequently overlooked problem of mentally ill and intellectually disabled persons who come into contact with the criminal justice system. The existing legislation only provides limited options to deal with a person who has been charged with an indictable Federal offence where there is a finding of unfitness to be tried or not guilty on the grounds of mental illness. One of the most serious criticisms of the existing law is that a person may be kept in custody indefinitely, without any statutory requirement that his or her case be reviewed. Moreover, a person found unfit to be tried is kept in custody indefinitely without even a prima facie case being established that he or she committed the alleged offence.<sup>237</sup>

Section 20BC of the *Crimes Act 1914* (Cth) has received little judicial attention. The Act and its extraneous materials give no guidance as to how a judge is to fix the period of detention, beyond stating that it cannot exceed the maximum penalty available for the offence charged.

However, the statutory language is identical to that in s 20BJ of the same Act, which concerns detention following acquittal on the grounds of mental impairment. The New South Wales Court of Appeal and the Victorian Supreme Court have interpreted that provision as requiring that the length of the period of detention should be fixed 'by reference to the sentence which would have been imposed if the person had been found guilty'.<sup>238</sup> That is, the Act implicitly requires that the judge treat the process of fixing a period of detention as if it were a sentencing exercise. If the accused had been charged with multiple offences, then the principle of totality applies as it would in a typical sentencing process.<sup>239</sup> Hunt CJ at CL, sitting on the New South Wales Court of Criminal Appeal, described this as the 'only logical approach' to s 20BJ.<sup>240</sup>

<sup>237</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 5 October 1989, 1603.

<sup>238</sup> *R v Goodfellow* (1994) 33 NSWLR 308, 311 (Hunt CJ at CL), quoted in *R v Robinson* (2004) 11 VR 165, 168 [16] (Kellam J).

<sup>239</sup> *R v Goodfellow* (1994) 33 NSWLR 308, 311.

<sup>240</sup> There is some uncertainty in the case law considering s 20BJ, as to how the accused's impairment may be relevant to the term fixed. In *R v Goodfellow* (1994) 33 NSWLR 308, it was said the approach outlined above 'would necessarily exclude any account being taken of that person's mental illness or any state of mind aggravated by that mental illness': at 311. Taken on its face, this statement suggests that a court fixing a term under s 20BJ (and by

Little is known about how s 20BC is applied in practice.<sup>241</sup> However, the identical language of s 20BJ strongly suggests that the two provisions should be interpreted consistently. If this is the case, s 20BC (alongside the ACT system) may prove to be the legal scheme that, at least regarding disposition within the current schemes, goes furthest in upholding *UNCRPD* requirements for equal recognition before the law by fixing terms on an equal basis with others.

## VI DISCUSSION: ACCESSIBLE JUSTICE OR DIFFERENTIAL TREATMENT?

This Part turns to an examination of whether or not Australian laws governing unfitness to stand trial are incompatible with the *UNCRPD*, and particularly art 12.

Any separate adjudication system that holds different and *lesser* procedural protections, or different available verdicts and dispositions, will diverge from the *UNCRPD* obligation for equal recognition before the law and corollary rights to access justice, liberty and security of the person, and potentially even the right to be free from cruel, inhuman and degrading treatment.<sup>242</sup> From this perspective, all Australian laws on unfitness to stand trial appear to violate the *UNCRPD*. However, the question remains as to whether these discrepancies could be remedied by reforming the regime in ways discussed throughout this article — essentially by bringing together the best features of each jurisdiction and introducing widely-endorsed law reform recommendations (such as making available all defences and improving court accessibility).

extension s 20BC) may not consider the mitigatory impact of a mental health or cognitive impairment operating *either* at the time of the offence or at the time of trial. However, as Kellam J noted in *R v Robinson* (2004) 11 VR 165, 171 [25], ignoring an impairment which may lie ‘at the root of the [alleged conduct] ... is artificial indeed’. His Honour said:

I have grave difficulty in undertaking the notional process of establishing what sentence of imprisonment would have been imposed upon Mr Robinson had he been found guilty of the offences in question without any consideration of the nature of his mental illness or his state of mind at the time of the offence.

Kellam J concluded when fixing a term he was obliged to consider the nature of the offence and the culpability of the offender, including any impairment operating *at the time of the offence* which might have a bearing on the offender’s culpability: at 173 [31].

<sup>241</sup> *ALRC Report*, above n 10, 208 [7.81].

<sup>242</sup> These obligations are found in *UNCRPD* arts 12–15: see above Part II(C) for discussion.

The *UNCPRD* has been interpreted as promoting a shift away from ‘adaptation or specialized design’<sup>243</sup> and toward equality and ‘universalism’.<sup>244</sup> According to Rosemary Kayess and Phillip French, ‘universalism’ refers to ‘radical modification of the social norm to reflect human diversity.’<sup>245</sup> Certainly, the *UNCPRD* articles discussed above imply a prohibition of separate processes for people with disabilities in criminal law.

On the other hand, the *UNCPRD* requires states parties ‘[t]o undertake ... development of universally designed goods, services, equipment and facilities ... to meet the specific needs of a person with disabilities’.<sup>246</sup> This provision along with art 13 on access to justice could be interpreted as encompassing the view that in some rare cases, the interests of justice require some modification of the trial process in order to secure the right to a fair trial for individuals who cannot participate independently, even with the provision of supports tailored to his or her needs. Yet how far and to what extent can this modification occur? At what point is the balance tipped from accommodation to ‘disabling’ adaptation? In considering this question, the Law Commission of England and Wales observed:

Understandably, no disability rights academic particularly welcomed the suggestion that there may be a small group of defendants in criminal cases who will be unable, no matter the assistance provided, to participate effectively in trial. However, all acknowledged that this is liable to occur and that public protection concerns would require ongoing criminal proceedings in some form in some cases.<sup>247</sup>

Anna Lawson and Rebecca Parry have suggested that the alternative trial process proposed by the Commission — which was similar to the special hearings available in most Australian jurisdictions — could itself be considered an ‘accommodation’ of the type demanded by the *UNCPRD*.<sup>248</sup> Rosemary Kayess reportedly suggested that the Commission’s proposals would not necessarily contravene the *UNCPRD*, especially if ‘all appropriate efforts were

<sup>243</sup> *UNCPRD* art 2 (definition of ‘universal design’).

<sup>244</sup> Kayess and French, above n 73, 10. See also Gerard Quinn, ‘A Short Guide to the *United Nations Convention on the Rights of Persons with Disabilities*’ in Gerard Quinn and Lisa Waddington (eds), *European Yearbook of Disability Law* (Intersentia, 2009) vol 1, 89.

<sup>245</sup> Kayess and French, above n 73, 10.

<sup>246</sup> *UNCPRD* art 4(1)(f) (emphasis added).

<sup>247</sup> *Law Commission Report*, above n 77, vol 1, 100 [3.171].

<sup>248</sup> See *ibid* vol 1, 100 [3.172].

made to give effect to the will and preference of the defendant and if he or she was involved in, for example, the selection of his or her representative.<sup>249</sup>

Given arts 4(1)(f) and 13, it seems premature to argue that the *UNCRPD* could not accommodate some kind of modified process for situations where a person cannot independently participate, instruct counsel, and so on. Further, it would be misguided (and counterproductive) to suggest therapeutic approaches are antithetical to rights-based efforts to secure equal recognition before the law. A wide range of therapeutic measures, including sex education programs, psychiatric treatment and speech pathology, could all fall within the remit of disability-based support, accommodation and accessibility. The emphasis within the *UNCRPD* of ensuring rights 'on an equal *basis* with others' encompasses obligations to ensure substantive equality, not mere equal treatment.<sup>250</sup> The duty of states parties to provide accommodation and support for persons with disabilities (or, in other words, resources) in all areas of life, affirms this point. What then would it take to move toward the universal design of unfitness to stand trial laws in Australia? The recommendation by the ALRC that the *Presser* test should include explicit consideration of whether or not supports could be provided to achieve fitness to stand trial, would go some way to ensuring 'support to exercise legal capacity' and 'procedural and age-appropriate accommodations'.<sup>251</sup> Rectifying the lack of formal supports available for accused persons at risk of being deemed unfit to stand trial represents a relatively simple means to better secure equal recognition before the law under current legal schemes. On this point, a cross-jurisdictional project is underway to explore what types of support are effective for accused persons with cognitive disabilities at risk of being deemed unfit to plead.<sup>252</sup> Both case law and statute provide grounds for creating 'procedural accommodations' for making court proceedings accessible, which provide a framework for providing formal support to accused persons under current law.<sup>253</sup>

<sup>249</sup> *Ibid* vol 1, 100 [3.173].

<sup>250</sup> *UNCRPD* Preamble para (e).

<sup>251</sup> *Ibid* art 7.

<sup>252</sup> Bernadette McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Impairments: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community*, Melbourne Social Equity Institute, The University of Melbourne <<http://socialequity.unimelb.edu.au/research/projects/disability-and-mental-health/unfitness-to-plead>>.

<sup>253</sup> See above Part III(A).

However, it is noteworthy that both the ALRC proposal and current frameworks for ensuring court support appear to fall short of the CRPD Committee's directives because they are predicated on a view that some people need to be deemed ineligible to stand trial in order to initiate a special hearing and uphold the right to a fair trial. Taking a pure reading of the *UNCPRD*, this differentiation on the basis of disability is unacceptable. Reconciling this dilemma may require a new threshold to identify when an accused person cannot participate in criminal proceedings to the extent of being able to instruct counsel, enter a plea, express wishes and/or challenge claims made against him or her,<sup>254</sup> from which an intensive support process might be activated. It is possible that 'universal design' in this area of law is harder to achieve in the adversarial system of common law compared to the inquisitorial approach of civil law systems which are predominant in Europe. For example, under civil law systems, there is less concern given to 'equality of arms' because of the inquisitorial role of the judge, which would address one of the main justifications for holding separate, special hearings under common law. However, this is not to suggest that common law jurisdictions such as Australia cannot achieve universal design in unfitness laws, as noted previously. Instead, it is to suggest that civil law and other non-adversarial systems, including restorative practices in common law jurisdictions, may prove a fruitful line of inquiry in this field of law reform.<sup>255</sup>

Any alternate procedures for the 'hard cases' noted above, where ongoing criminal proceedings are required under common law, would need to satisfy the following points to meet *UNCPRD* requirements:

- the same standard of proof and probative value of prosecution evidence as with typical trials;
- the same presumption of innocence, with the associated requirement for proof of all elements;

<sup>254</sup> See Anna Arstein-Kerslake et al, 'Human Rights and Unfitness to Plead: The Demands of the *Convention on the Rights of Persons with Disabilities*' (2017) *Human Rights Law Review* (forthcoming); Melbourne Social Equity Institute and Hallmark Disability Research Initiative, Submission No 5 to Senate Community Affairs References Committee, *Indefinite Detention of People with Cognitive Disabilities in Australia*, 21 March 2016, 7, 9.

<sup>255</sup> We have briefly explored, elsewhere, the potential lessons from addressing unfitness to plead issues in civil law systems: see Arstein-Kerslake et al, above n 254. See also Michaël van der Wolf et al, 'Understanding and Evaluating Contrasting Unfitness to Stand Trial Practices: A Comparison between Canada and the Netherlands' (2010) 9 *International Journal of Forensic Mental Health* 245, 248–9; Liselotte van den Anker, Lydia Dalhuisen and Marije Stokkel, 'Fitness to Stand Trial: A General Principle of European Criminal Law?' (2011) 7(3) *Utrecht Law Review* 120, 124–6.

- availability to the accused of all defences; and
- proceedings against the accused to be based on his or her ‘rights, wishes and preferences’ (and not his or her ‘best interests’).<sup>256</sup>

This list is by no means exhaustive, but provides a bare minimum set of assessment criteria by which *UNCRPD* compliance could be considered in Australia and elsewhere. Other considerations might include identifying whether or not support measures are culturally appropriate, particularly given findings of unfitness to stand trial in the Australian context disproportionately affect Aboriginal and Torres Strait Islander people with cognitive disabilities. On a more symbolic point, a terminological change from ‘special’ to a term such as ‘facilitated’, ‘supported’, or ‘assisted’, might offer an appropriate change, in step with trends in disability policy away from concepts of vulnerability and ‘specialness’ towards universal design and acceptance of disability as a norm of human diversity. Rethinking terms such as ‘unfit to stand trial’ might also help in this regard.

Regarding disposition, the CRPD Committee has repeatedly condemned the use of indefinite detention following findings of unfitness to stand trial. Accordingly, the *UNCRPD* compels the abolition of indefinite detention of persons with disabilities in Australian unfitness to stand trial laws. On this view, the indefinite and nominal terms used in Western Australia, Queensland, Tasmania, Victoria and the Northern Territory are inconsistent with the *UNCRPD*. A question arises over whether the New South Wales and South Australian limiting terms can truly be characterised as ‘definite’. While they do automatically expire, they may also be extended — potentially indefinitely. The decision to seek an extension is made either directly by, or with the input of, health officials.<sup>257</sup> It seems inevitable that a decision to extend a custodial order will be made on the partial basis of disability, in violation of art 14. It is arguable therefore that limiting terms, although improving on indefinite terms, also do not comply with the *UNCRPD*.

The fixed terms in s 20BC of the *Crimes Act 1914* (Cth) and the ACT legislation are in a different category: they offer a definite term which cannot be extended. It may have been that in 1989 the Commonwealth Parliament inadvertently created a model of detention following an unfitness declaration which places greater emphasis than other Australian jurisdictions on equality

<sup>256</sup> This could include, where necessary, action to be taken according to the ‘best interpretation of a person’s will and preference’: *General Comment No 1 on Art 12*, UN Doc CRPD/C/GC/1, 5 [21].

<sup>257</sup> See *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1 cls 5(b), 6(5)(a).

rights over welfarist and therapeutic concerns, and moves closest toward the spirit of the subsequent *UNCRPD*.

Given the requirement of the *UNCRPD* for ‘necessary and appropriate’ modifications, it would seem that there is a need for a broader range of sentencing options following findings of guilt. Options would need to apply to all people, but incorporate consideration of the specific needs of people with disabilities. Judith Cockram, arguing in the context of accused persons with intellectual disabilities, has advocated that:

It is critical that an appropriate range of non-custodial options be put in place which would enable the judiciary to make findings of guilt or innocence, and where guilty, to provide an appropriate sentencing response. Of great concern is the fact that without the further development of models of non-custodial sentences, the sentencing needs of offenders with an intellectual disability will continue to be hidden — either by incarceration, or through the use of restrictive bail or dismissal orders. Hidden forms of incarceration include placement in institutions, coerced placements, or offenders remaining in prison beyond the completion of their minimum sentence due to a lack of appropriate alternatives.<sup>258</sup>

These concerns are likely to be relevant to all accused persons with cognitive disabilities, whether related to intellectual disability, acquired brain injury or severe mental health issues. Courts and corrections authorities are likely to welcome options for addressing the support needs of persons with disabilities both within custodial settings and elsewhere.

## VII CONCLUSION

‘Jason’, Rosie Anne Fulton and Marlon Noble are all Indigenous people with cognitive disabilities and their experiences outlined in Part I can be seen in the context of broader disadvantage faced by persons with cognitive disabilities and Aboriginal and Torres Strait Islander people in Australia. Addressing widespread disadvantage in the criminal justice system would require comprehensive change, including in processes of diversion and pre-trial preparations as well as in post-sentencing and prison release. This ambitious task is part of the broader *UNCRPD* remit to uphold ‘[r]espect for difference and acceptance of persons with disabilities as part of human diversity and

<sup>258</sup> Cockram, above n 187, 10.

humanity'.<sup>259</sup> Some law reform trends in Australia are already heading in the direction of compliance with the *UNCRPD*. For example, the ALRC has recommended abandoning a 'best interests' approach to laws concerned with equality and legal capacity for adults with disabilities, and instead promoted an equality-based framework, which prioritises the 'will, preferences and rights' of the person.<sup>260</sup>

In the context of unfitness to stand trial laws, the logic that a human rights approach might mean pushing *more* people with cognitive disabilities through typical criminal trials seems counter-intuitive. Reasonable concerns can be raised that greater formal equality in criminal proceedings may increase substantive inequality.<sup>261</sup> However, *UNCRPD* compliance also requires a range of positive measures to be taken, including procedural accommodations and measures to alter typical criminal process to ensure accessibility. It seems premature to suggest that the *UNCRPD* requires the repeal of special hearings, and it would be misguided to position the 'protective' aims of unfitness to stand trial laws in diametric opposition to rights-based efforts to secure equal achievement before the law.

Moving towards a universally accessible justice system is not only likely to benefit people with disabilities, but also others for whom participation in court proceedings may be hindered. Such barriers may be caused by inaccessible legal language, and accused persons' limited education, history of trauma, physical health problems, or drug and alcohol use. For its part, the Australian government has committed to 'improving the way the criminal justice system treats people with cognitive disability who are unfit to plead'.<sup>262</sup> The recommendations set out in this article are offered to accelerate the aim for equal procedural rights and substantive equality for persons with disabilities in criminal law.

<sup>259</sup> *UNCRPD* art 3(d).

<sup>260</sup> *ALRC Report*, above n 10, 75–7 [3.50]–[3.57].

<sup>261</sup> Peter Bartlett, 'The United Nations *Convention on the Rights of Persons with Disabilities* and *Mental Health Law*' (2012) 75 *Modern Law Review* 752, 776.

<sup>262</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 31<sup>st</sup> sess, Agenda Item 6, UN Doc A/HRC/31/14 (13 January 2016) 29 [141].