



## Convention on the Rights of Persons with Disabilities

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### Committee on the Rights of Persons with Disabilities

#### Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 7/2012\* \*\*

<i>Communication submitted by:</i>	Marlon James Noble (represented by counsel, Phillip French)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	12 April 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 9 August 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	2 September 2016
<i>Subject matter:</i>	Right to enjoy legal capacity on an equal basis with others
<i>Procedural issues:</i>	Admissibility <i>ratione temporis</i> , exhaustion of domestic remedies, victim status
<i>Substantive issues:</i>	Access to court, mental and intellectual disability, exercise of legal capacity, deprivation of liberty, discrimination on the ground of disability, restrictions of rights
<i>Articles of the Convention:</i>	5 (1), 12, 13, 14 (1) (b), 14 (2) and 15
<i>Articles of the Optional Protocol:</i>	1 and 2

\* Adopted by the Committee at its sixteenth session (15 August-2 September 2016).

\*\* The following members of the Committee participated in the examination of the communication: Mohammed Al-Tarawneh, Danlami Umaru Basharu, Monthian Buntan, María Soledad Cisternas Reyes, Theresia Degener, Diane Kingston, Stig Langvad, László Gábor Lovász, Martin Babu Mwesigwa, Carlos Alberto Parra Dussan, Safak Pavey, Ana Peláez Narváez, Coomaravel Pyaneandee, Silvia Judith Quan-Chang, Jonas Ruskus, Damjan Tatić and You Liang.

An individual opinion by Committee member Damjan Tatić is annexed to the present Views.

GE.16-17471(E)



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1. The author of the communication is Marlon James Noble, an Aboriginal national of Australia, born on 11 February 1982. He has a mental and intellectual disability and claims to be a victim of violations by Australia of his rights under articles 5 (1), 12, 13, 14 (1) (b), 14 (2) and 15 of the Convention. The Optional Protocol entered into force for Australia on 19 September 2009. The author is represented by counsel, Phillip French.

## **A. Summary of the information and arguments submitted by the parties**

### **Facts as submitted by the author**

2.1 In October 2001, when he was 19 years old, the author was charged with two counts of sexual penetration of a child under the age of 13 and three counts of indecently dealing with a child aged between 13 to 16, pursuant to sections 320 and 321 of the Western Australian Criminal Code of 1913. Those offences carried a maximum penalty of 20 and 7 years' imprisonment respectively. The author was arrested, taken into custody at Hakea Prison, a correctional centre operated by the Western Australian Department of Corrective Services, and refused bail.

2.2 In early 2002, the author appeared before the Court of Petty Sessions in Perth. He was remanded in custody for assessment of his intellectual impairment. On 18 July 2002, he appeared before the District Court of Western Australia on indictments for both charges. The prosecution put before the Court an expert report indicating that the author may be unfit to plead to the charges. The prosecutor viewed the report as inconclusive. The prosecution and the defence joined in an application to the Court for a further psychiatric assessment of the author to be conducted pursuant to section 12 of the Mentally Impaired Defendants Act of 1996. The prosecutor submitted to the Court that the assessment should be made under that section so that it could be conducted without the author's consent. The application was granted and after the hearing, the author was remanded in custody at Hakea Prison.

2.3 At a further hearing on 2 September 2002 before the District Court of Western Australia, the prosecutor advised the Court that the author had been assessed by a psychiatrist, but that only a preliminary report had been received. The prosecution therefore sought an adjournment, which was granted. The author was again remanded in custody at Hakea Prison. The author next appeared before the District Court on 25 October 2002, when the decision was taken to conduct a fitness to plead hearing on 24 January 2003. On that date, three psychiatrists' reports were presented: two concluded that the author was unfit to plead, and one recommended further assessment. The last report noted that the author appeared to understand the nature of the charges against him, and that he had expressed the intention to plead not guilty. While the prosecution and the defence did not formally concede that the author was not fit to plead, both advised the Court that such a finding was possible. The Court reserved its decision. In the meantime, the author was remanded in custody at Hakea prison.

2.4 The author appeared again before the District Court of Western Australia, around 7 March 2003. He submits that all court records of that appearance were lost or destroyed.<sup>1</sup> The Court found that the author was unfit to plead and was made subject to a custody order pursuant to sections 16 and 19 of the Mentally Impaired Defendants Act. The author did not therefore have the opportunity to plead not guilty, and the Court made no finding of guilt. Responsibility for oversight of the author's custody order was vested in the Mentally Impaired Defendants Review Board, which determined that the author was to be detained in

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<sup>1</sup> Counsel submits that he was advised of the above by the Registrar's office, District Court of Western Australia on 15 March 2013.

custody at Greenough Regional Prison.<sup>2</sup> He remained there from March 2003 to 10 January 2012, when he was released on a conditional release order. Taking into account the 17 months he served on remand, the author was detained together with convicted detainees for 10 years and 3 months. Although the maximum period of imprisonment for the offences with which he was originally charged was 20 years and 7 years respectively, the author argues that under the general procedure, he would probably have been sentenced to a term of imprisonment not exceeding 2 to 3 years.<sup>3</sup> Additionally, the time he served in custody prior to sentencing would have been taken into account in the calculation of his time in prison.

2.5 In 2009, the Review Board permitted the author overnight stays outside prison, subject to full supervision. On 3 September 2010, when the author returned from one such leave, the prison authorities required him to undertake a urine drug screening test. The initial screen was reported as positive for amphetamine. However, a later gas chromatograph and mass spectrometry test certified that no illicit drugs were detected. Despite the contradictory results, the author was charged on 7 October 2010 with using an illicit drug, and his home leave was suspended. The incident was subject to an independent inquiry, conducted on behalf of the Premier of Western Australia. As a result, the author's home leave was reinstated, but he received no apology or compensation.<sup>4</sup>

2.6 On 20 June 2010, a forensic psychologist undertook a further assessment of the author's intellectual functioning. He concluded that the author was capable of standing trial on the condition that he had access to appropriate assistance. The author's legal representative therefore sought orders from the District Court of Western Australia to the effect that the author was fit to plead, and that within 42 days, an indictment or a discontinuance be presented by the prosecution for the offences with which the author had originally been charged. The hearing took place on 20 September 2010. The Western Australian Director of Public Prosecutions advised the Court that he did not intend to proceed with any further prosecution of the author because: (a) the substantial time he had already spent in custody far exceeded any reasonable term of imprisonment should he be convicted of all charges; and (b) there were very limited prospects of securing a conviction on the charges because of the low quality of the evidence available. The author's legal representative pressed his application for an order that the author was fit to plead. On 5 November 2010, the Court dismissed the application on the basis that it did not have jurisdiction. Formal reasons for the decision were published by the Court, but they have allegedly been lost or destroyed.<sup>5</sup>

2.7 On 22 November 2011, the Review Board recommended to the Western Australian Attorney-General that the author be conditionally released into an accommodation support service. The Western Australian Governor adopted the recommendation of the Board and on 10 January 2012 the author was released from custody subject to 10 conditions.<sup>6</sup>

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<sup>2</sup> A correctional centre administered by the Western Australian Department of Corrective Services.

<sup>3</sup> The author refers to a report of the Western Australian Department of the Attorney General, Court Services Statistics: Adult Court Records, 2003, according to which, in 2003, the median sentence imposed upon conviction in the category of offence with which he was charged was 24 months, the average sentence being 30 months.

<sup>4</sup> A copy of the inquiry report dated 7 June 2011 was provided.

<sup>5</sup> Counsel submits that he was advised of the above by the Registrar's office, District Court of Western Australia on 15 March 2012.

<sup>6</sup> The conditions were: (a) to engage in programmes as directed by the supervising officer; (b) not to be in possession of or use any illicit substance including cannabis; (c) not to consume alcohol; (d) to undergo regular and random testing for all illicit substances and alcohol as directed by the supervising officer; (e) not to have any direct or indirect contact with the alleged victims; (f) not to have any contact with any female children under the age of 16 years unless supervised by an adult previously

2.8 The author submits that his communication relates to facts that continued after the entry into force of the Optional Protocol for the State party. In particular, he remained subject to civil detention; he was incarcerated in Greenough Regional Prison from 19 September 2009 to 10 January 2012; and since 10 January 2012, he has been subject to civil detention in the community. He is also still deprived of the opportunity to enter a plea of not guilty and to test the evidence that was presented against him, and is therefore still presumed guilty.

2.9 The author contends that he has exhausted all available and effective domestic remedies. In March 2003, the District Court of Western Australia determined that he was unfit to plead to the charges against him. In August 2010, the author applied to the Court to enter a plea of not guilty, but the Court determined that it did not have jurisdiction to deal with that application. In September 2010, the Western Australian Director of Public Prosecutions determined that he would not instigate further prosecution against the author, who can therefore not bring his case before any other court. The Review Board periodically conducted reviews of the author's case and could have recommended that the Governor of Western Australia release him unconditionally. It did not do so, despite the evidence that the author has been subjected to a gross miscarriage of justice. The author contends that the High Court has determined that the Australian legislation providing for preventive detention under the Mentally Impaired Defendants Act is constitutionally valid.<sup>7</sup> A claim that the Act is constitutionally invalid therefore has no chance of success before national jurisdictions.

### **The complaint**

3.1 The author submits that the State party violated his rights under articles 5 (1), 12, 13, 14 (1) (b), 14 (2) and 15 of the Convention.

3.2 The author submits that the Mentally Impaired Defendants Act constitutes a discriminatory status-based law in violation of article 5 (1) of the Convention. He considers that once a person is found unfit to plead, and if the presiding judicial officer is satisfied that the accused person will not become mentally fit to stand trial within six months of that finding, the judge must make an order either quashing the indictment or dismissing the charge without deciding the defendant's guilt. The judge then has the possibility to release the defendant or, as in the author's case, to make a custody order in his or her respect. The decision to make a custody order will be taken having regard to the following factors: (a) the strength of the evidence against the defendant; (b) the nature of the alleged offence and the alleged circumstances of its commission; (c) the defendant's character, antecedents, age, health and mental condition; and (d) the public interest.<sup>8</sup> No limits exist as to the duration of the custody order,<sup>9</sup> and once declared unfit to plead, the defendant has no possibility of exercising his or her legal capacity before the courts. He or she is therefore prevented from pleading not guilty and from testing the evidence against him or her. Persons who do not have cognitive impairments are protected from such treatment.

3.3 The author submits that he has continued to be dealt with as "unfit to plead", in violation of his right to enjoy legal capacity on an equal basis with others. He also submits that he continues to be deprived of the reasonable accommodation he requires to exercise

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approved by the supervising officer; (g) any overnight stays away from the primary residence must be pre-approved by the Mentally Impaired Defendants Review Board; (h) not to change address without the prior approval of the Mentally Impaired Defendants Review Board; (i) to submit to breath testing as requested by the police; and (j) not to enter licensed premises.

<sup>7</sup> The author refers to *Fardon v. Attorney General (Queensland)* (2004) 210 ALR 50.

<sup>8</sup> See Criminal Law (Mentally Impaired Defendants) Act 1996 (Western Australia), sect. 19 (5).

<sup>9</sup> *Ibid.*, sect. 19.

his legal capacity, to effectively enter a plea of not guilty and to have the evidence against him tested, in violation of articles 12 (3) and 13 (1) of the Convention.

3.4 He further submits that he has been deprived of his liberty pursuant to the Mentally Impaired Defendants Act, while in view of the state of the evidence in his case, it is unlikely that he would have been convicted for the offences with which he was charged. Had he been convicted, he would probably have been released from prison within 3 years. Instead, he was imprisoned together with convicted criminals for more than 10 years, and now remains subject to very restrictive civil detention in the community. The author concludes that he has been deprived of his liberty on the basis of his disability, and that this situation amounts to a violation of article 14 (1) (b) of the Convention.

3.5 The author submits that he remains deprived of his liberty, but has not been convicted for any offence, in violation of article 14 (2) of the Convention.

3.6 He alleges that while he was in prison, he was at significant risk of harm from other prisoners, and that he now remains subjected to conditions that impose unjustifiable restrictions on his liberty, in violation of his rights under articles 14 (2) and 15 of the Convention.

#### **State party's observations on admissibility and the merits**

4.1 On 4 April 2014, the State party submitted its observations on admissibility and the merits of the communication. It considers that under article 2 (f) of the Optional Protocol, the temporal mandate of the Committee is applicable only in respect of events that occurred on or after 19 September 2009, when the Optional Protocol entered into force for Australia.<sup>10</sup> It therefore considers that events that occurred prior to 19 September 2009 are referred to by way of background information only.

4.2 The State party accepts the facts as stated by the author. Nonetheless, it reports that copies of the transcripts of the 2003 proceedings have been retained by the Western Australian Department of Corrective Services.<sup>11</sup>

4.3 The State party reports that the author was declared unfit to stand trial on 7 March 2003 by the District Court of Western Australia, pursuant to section 9 of the Mentally Impaired Defendants Act. On 11 March 2003, the Court decided to make a custody order under section 19 of the Act, resulting in the transfer of the author to prison, under the supervision of the Review Board. No formal written reasons for those decisions were published, but the transcripts reveal that neither decision was made lightly. The judge stated that the author met "practically all of the criteria" of section 9 of the Mentally Impaired Defendants Act, namely that he is unable to understand: (a) the nature of the charge; (b) the requirement to plead to the charge or the effect of the plea; (c) the purpose of a trial; or (d) the right to challenge jurors. He is also unable to follow the course of the trial and to understand the substantial effect of evidence presented by the prosecution in the trial, or to properly defend the charge.

4.4 Having reached that conclusion, the Court had to quash the indictment and determine whether a custody order should be made. The District Court heard detailed arguments from the Crown and from the author's legal representative. The judge noted certain discrepancies in accounts from the complainants and other witnesses. Nonetheless, he concluded that such inconsistencies are not unusual in child sexual abuse cases, and that

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<sup>10</sup> The State party refers to the Committee's jurisprudence in communication No. 6/2011, *McAlpine v. United Kingdom of Great Britain and Northern Ireland*, Views adopted on 28 September 2012, para. 6.4.

<sup>11</sup> The State party provided the Committee and the author's counsel with a copy of the documents.

the evidence disclosed a prima facie case.<sup>12</sup> The judge observed that all the alleged offences involved young children and were serious. He regarded the author's case as a matter of concern, given the expert psychiatric evidence reflecting the fact that the author lacked the ability to control his impulses.<sup>13</sup> The judge noted that the author had a record of numerous criminal convictions for offences that had become gradually more serious.<sup>14</sup> He described the author's situation in his home town as "chaotic" and highlighted the fact that the previous attempts by government agencies to provide management and care for the author had failed.<sup>15</sup>

4.5 In that context, the judge acknowledged that an assessment of the public interest was a difficult task, especially since in the absence of "declared places"<sup>16</sup> under the Mentally Impaired Defendants Act, the only options were to release the author or imprison him. The judge considered that the public interest had to be determined by the seriousness of the alleged offences and the level of risk that the type of alleged behaviour would reoccur.<sup>17</sup> The judge concluded that public safety must be put first, notwithstanding his "deep concern" that prison was not the appropriate environment for the author.<sup>18</sup> He made a custody order, following which the indictment was quashed, meaning that the charges against the author were dismissed.

4.6 The author was initially remanded in custody at Hakea Prison on 18 February 2003. He was transferred to Greenough Regional Prison on 26 May 2003, "closer to his support networks and to enhance his relationship and cultural links with the Aboriginal community in the region". He remained there until his release on 10 January 2012, with the exception of two short placements at Casuarina Prison to facilitate his participation in prison programmes.

4.7 The State party recalls that in 2010, the author unsuccessfully sought orders from the District Court that he was fit to plead. After an initial directions hearing on 20 September 2010, the author's application was examined on 4 November 2010.

4.8 The orders sought by the author turned on the question of how the Court's powers under the Mentally Impaired Defendants Act should be construed once a defendant was made subject to a custody order. The argumentation presented required the Court to find that the author was still "committed" to the Court despite the indictments against him being quashed.<sup>19</sup> In a written decision dated 5 November 2010, the judge concluded that the Court did not have the jurisdiction to make the orders because the author was not a person committed to the Court on a charge.

4.9 The State party reports that the Review Board has a statutory obligation to report to the Western Australian Attorney General about an accused in custody pursuant to the Mentally Impaired Defendants Act within eight weeks of the establishment of a custody order. It must also do so on written request from the Attorney General and, in any case,

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<sup>12</sup> See *The Queen v. Marlon James Noble* (1261 of 2002), transcript of proceedings before District Court Judge Nisbet at the District Court of Western Australia, 7 March 2003, pp. 37-38.

<sup>13</sup> *Ibid.*, p. 38.

<sup>14</sup> *Ibid.*, pp. 32 and 38.

<sup>15</sup> *Ibid.*, p. 39.

<sup>16</sup> A "declared place" is a dedicated facility for the detention of persons under the Mentally Impaired Defendants Act in a manner appropriate to their needs and circumstances.

<sup>17</sup> See *The Queen v. Marlon James Noble* (1261 of 2002), pp. 39-40.

<sup>18</sup> *Ibid.*, p. 40.

<sup>19</sup> An accused is "committed" to a court following a hearing at which a judge determines that there is sufficient evidence for the person to proceed to trial.

annually.<sup>20</sup> When reporting to the Attorney General, the Review Board must recommend whether an accused should be released.<sup>21</sup>

4.10 Statutory reviews and reports into the author's case were undertaken on eight occasions during his detention.<sup>22</sup> Interim reviews were conducted, relying on expert medical reports that all outline reasons to recommend against the author's release, including his vulnerability, the risk to the community and the lack of available support services. The reports recommended a gradual release programme for the author.

4.11 The medical reports state that the author resided in Greenough Regional Prison largely without incident and engaged in a variety of education and training programmes. However, several clinical psychologists' reports expressed ongoing concern about the author's "eagerness to please" leaving him "potentially vulnerable to coercion in the presence of negative peer influences"<sup>23</sup> and "to manipulation and exploitation".<sup>24</sup> That conclusion prompted concern among medical experts that "the author's intellectual disability is such that he will need continual 24-hour care and support while in the community."<sup>25</sup> The reports also expressed concern about the author's "impulsive and opportunistic"<sup>26</sup> behaviour and his "aggressive, unpredictable outbursts".<sup>27</sup>

4.12 Several medical experts concluded that, if released, the author would be at a high risk of committing an offence.<sup>28</sup> The Review Board suggested that "the gradual extension of the author's home leave is also considered an essential aspect of his rehabilitation as it avoids placing him under too much stress".<sup>29</sup> However, the Board considered that it could not recommend his immediate conditional release because of the limited availability of trained supervisors and carers to support him.<sup>30</sup>

4.13 The author was released on 10 January 2012, subject to 10 conditions. Since the formal submission of the communication in July 2012, the author's case has been reviewed three times. On 11 January 2013, the Review Board conducted a progress review. It recommended that there be a relaxation of the author's conditions to allow him to visit cafes and restaurants, which was accepted by the Governor in Executive Council. An overnight absence from his primary residence was also approved. On 23 April 2013, the author's annual statutory review took place. The Review Board recommended that the condition requiring the author to attend all programmes mandated by his supervising officer be removed, and that he be permitted overnight stays away from his primary residence if supported by a carer, without the need for the Review Board's pre-approval. The Governor endorsed the recommendations in July 2013. On 14 January 2014, another statutory review took place. No changes were made.

4.14 As regards the author's allegations under article 14 (2) of the Convention, the State party considers that since his release into the community, he is no longer in detention. To

<sup>20</sup> See Criminal Law (Mentally Impaired Defendants) Act 1996 (Western Australia), sect. 33 (2).

<sup>21</sup> The decision is taken in consideration of the factors set out in sect. 33 (3) of the Criminal Law (Mentally Impaired Defendants) Act 1996 (Western Australia).

<sup>22</sup> Reports on the author's case were provided on 22 May 2003, 20 August 2004, 19 August 2005, 16 January 2007, 16 April 2008, 15 March 2010, 12 May 2011 and in December 2011.

<sup>23</sup> See Mentally Impaired Defendants Review Board Western Australia, *Report to the Attorney General: Marlon James Noble*, December 2011, p. 9.

<sup>24</sup> *Ibid.*, p. 10.

<sup>25</sup> *Ibid.*, May 2011.

<sup>26</sup> *Ibid.*, *Sixth Statutory Report*, 15 March 2010, p. 7.

<sup>27</sup> *Sixth Statutory Report*, p. 6 (quoting a 2003 report).

<sup>28</sup> See Mentally Impaired Defendants Review Board Western Australia, *First Statutory Report: Marlon James Noble*, 22 May 2003, p. 2.

<sup>29</sup> *Sixth Statutory Report*, p. 6.

<sup>30</sup> *Ibid.*, December 2011, p. 23; *ibid.*, May 2011, p. 11.

the extent that the author's claim relates to his circumstances prior to his release in January 2012, the State party submits that the claim is inadmissible for failure to exhaust domestic remedies. The author's detention was mandated by decision of the Governor in Executive Council, acting on recommendations of the Review Board, under the Mentally Impaired Defendants Act. The decisions of the Review Board are subject to judicial review, by application to the Supreme Court of Western Australia. Decisions of similar statutory bodies have been challenged under Western Australian law to determine whether they were taken according to law. Since guarantees relating to article 14 (2) are directed exclusively to the lawfulness of detention as a matter of domestic law, judicial review of the author's detention would have been an effective remedy. The possibility of an application for judicial review of the Review Board's decisions in relation to the author was specifically discussed during the 2010 District Court proceedings. The author's legal representative responded that an application for judicial review was being prepared, but that the author preferred to have the issue of his fitness to plead dealt with by a court. The State party is not aware that any such application has been lodged, and the author therefore failed to exhaust available domestic remedies. It submits that no breach of article 14 (2) arises because at all times during the author's detention, he was entitled to bring an application for judicial review, seeking to determine the lawfulness of his detention on the basis of the Review Board's recommendations.

4.15 The State party considers that the author's allegations relating to access to justice are inadmissible because they lack substantiation and are without merits. No civil or criminal proceedings are under way against the author. He is not charged with any offences because the indictment against him was quashed "without deciding the guilt or otherwise of the accused". He is therefore not presumed guilty, and there are no witnesses to examine, or evidence to test, since no criminal charges remain against him.

4.16 The State party considers that the author's allegations in relation to his treatment in prison are inadmissible or lack merit because the author makes a general assertion that he was at risk of harm, without specific claims. The records of the Western Australian Department of Corrective Services indicate that there were two minor altercations between the author and other prisoners on 7 October 2005 and 21 September 2007. Both incidents were successfully mediated and neither resulted in serious injury to the author. Prison authorities also identified that the author required additional support and monitoring on account of his status as an Aboriginal person with an intellectual disability. He was accordingly managed under the Support and Monitoring System, and participated in the Prisoner Risk Assessment Group. As a Disability Services client, the author was also placed on the Total Offender Management System and received one-on-one counselling. He also had culturally specific counselling and completed a cognitive skills intervention and an intellectual disability programme in 2003 and 2004.

4.17 As to the author's allegations under article 14 (2) of the Convention, the State party submits that he is not an "accused" person and therefore the obligation of separation from convicted persons does not arise. In the alternative, the State party submits that it has fulfilled the obligation of separation to the extent required, taking into account its reservation to article 10 (2) of the International Covenant on Civil and Political Rights, which provides that the principle of segregation is accepted as an objective to be achieved progressively.

4.18 The State party does not contest the admissibility of the author's allegation relating to his wrongful conviction of a prison offence. When the error was discovered, the author's home leave was immediately reinstated and upgraded, allowing two 48-hour overnight stays a week. The conviction was also administratively set aside. Following the incident, the Special Counsel to the Premier conducted an independent inquiry and acknowledged that the author's conviction was wrongful. The Western Australian Department of



Corrective Services also conducted an internal review and made seven recommendations to modify the testing procedures for prison offences. Six of the recommendations are being implemented, and training programmes on prison offence prosecutions have been developed. The State party acknowledges that the error clearly caused the author frustration and distress, but it considers that it does not amount to degrading treatment and punishment.

4.19 The State party considers that the author's allegations that the conditions imposed on his release amount to arbitrary detention or degrading treatment are inadmissible, because the author is no longer detained, and he has failed to exhaust domestic remedies that could result in an alteration of the conditions to which he objects. In the alternative, Australia submits that the allegations lack merit, as the conditions imposed on the author are reasonable and appropriate to permit his reintegration, while protecting the safety of the community.

4.20 Regarding the author's allegation that the Mentally Impaired Defendants Act violates article 5 of the Convention, the State party submits that the Act does not treat persons any differently because of their disabilities, but provides for the differential treatment of people found "unfit to stand trial". The State party acknowledges that the Act is likely to disproportionately affect those who may meet those criteria for reasons associated with a disability. However, it considers that such differential treatment is legitimate, as endorsed by many United Nations treaty bodies,<sup>31</sup> and that article 5 of the Convention should be interpreted in accordance with that approach.

4.21 The State party submits that the Act also aims at protecting the community.<sup>32</sup> Legislation providing for specific procedures, including custody orders for those who are found unfit to plead, is a standard feature of other jurisdictions in Australia<sup>33</sup> and abroad.<sup>34</sup> Once an individual has been made subject to a custody order pursuant to the Act, periodic reviews are conducted by the Review Board.<sup>35</sup> Detailed reports are prepared by a senior advisory officer, including a recommendation as to whether the person should be released.<sup>36</sup>

4.22 The Act also provides safeguards to ensure that decisions are made by an independent and well-informed judicial body; that an accused person who is found unfit to stand trial can still be released at the court's discretion; and that decisions under the Act can be appealed. The framework therefore provides a reasonable and proportionate method to

<sup>31</sup> The State party refers to the jurisprudence of the Human Rights Committee in communication No. 983/2000, *Love et al. v. Australia*, Views adopted on 25 March 2003, para. 8.2. It also refers to the Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 13; Committee on the Elimination of Racial Discrimination, general recommendations No. 32 (2009) on the meaning and scope of special measures in the Convention, para. 8, No. 14 (1993) on article 1 (1) of the Convention, para. 2, and No. 30 (2005) on discrimination against non-citizens, para. 4, and the concluding observations of the Committee concerning the thirteenth and fourteenth periodic reports of Australia (CERD/C/AUS/CO/14), para. 24; Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, para. 12; Committee on the Elimination of Discrimination against Women, communication No. 12/2007, *G.D. and S.F. v. France*, decision of inadmissibility adopted on 4 August 2009, para. 12.15.

<sup>32</sup> See Lord Bingham Chief Justice in *R. v. Antoine* (1999), p. 227. See also the speech of Lord Bingham in *R. v. H. and SSHD* (2003) in Peter Bartlett and Ralph Sandland, *Mental Health Law: Policy and Practice* (Oxford, Oxford University Press, 2007).

<sup>33</sup> See Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Victoria), sect. 26 (2), Criminal Law Consolidation Act 1935 (South Australia), sect. 269O, and Criminal Code Act 1983 (Northern Territory), sect. 43ZA.

<sup>34</sup> The State party refers to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 of the United Kingdom, sect. 3 (2) and schedule 2.

<sup>35</sup> *Ibid.*, pp. 4 and 7.

<sup>36</sup> *Ibid.*, sects. 33 (3) and (5).

achieve the Act's objectives relying on reasonable and objective criteria that are not linked to disability.

#### **Author's comments on the State party's observations**

5.1 On 25 June 2015, the author submitted additional information. He submits that he has been in civil detention for more than 13 years and remains subjected to restrictions and to deprivation of liberty.

5.2 The author rejects the State party's characterization of the temporal scope of the Committee's mandate. He refers to the jurisprudence of the Human Rights Committee, according to which "the Committee ... cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations".<sup>37</sup> The author considers that the same interpretation should apply to his case.

5.3 The author considers that his detention is arbitrary because it is based on his disability, in violation of article 14 (1) (b). If he did not have a disability, he could not have been placed in indefinite detention. If acquitted, he would have been released from custody immediately and unconditionally.

5.4 The author submits that his detention is arbitrary because: (a) it is subject to the discretion of the Government, given that pursuant to sections 24 and 35 of the Mentally Impaired Defendants Act, once a custodial supervision order is made, the person is detained until released by an order of the Governor of Western Australia. The Governor exercises discretion in accordance with the recommendations of the Executive Council, which in turn acts on the advice of the Minister of Health; (b) it is unjust, given that the author has not been convicted for the offences with which he was charged and has not had the opportunity to properly test the evidence on which the charges were based; (c) it is disproportionate, given that if the author had been found guilty of the offences with which he was charged, he would have been sentenced to 2 to 3 years' imprisonment, after which he would have been released unconditionally; and (d) it is punitive, given that the author required and continues to require social support and assistance. However, his incarceration and his continuing civil detention do not reflect the "least invasive" or "least restrictive" ways of dealing with his needs.

5.5 The author submits that the conditions of his detention in Greenough Regional Prison were exactly the same as those of convicted prisoners, while he was supposed to be detained solely for the purpose of treatment, care and rehabilitation. That punitive perspective was also reflected in the intervention of the Review Board, which recommended to the Minister for Health that the author's detention continue for 9 years from the time the Court made him subject to a custodial supervision order on 11 March 2003, up to the time he was made subject to a conditional release order on 10 January 2012, regardless of the fact that the alleged victims of the offences had publicly withdrawn their initial statements against the author.

5.6 The author considers that according to the State party, his detention was temporary, pending the availability of a place in a specialized facility. No places became available and his prolonged incarceration with convicted persons was humiliating and degrading. The author notes that the Western Australian Government suspended its decision to build two so-called "disability justice centres". It instead built one such facility with the capacity to

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<sup>37</sup> The State party refers to Human Rights Committee, communication No. 520/1992, *Könye and Könye v. Hungary*, decision of inadmissibility adopted on 7 April 1994, para. 6.4

incarcerate 10 people with a high level of security. The author fears that once the facility is operational, the Review Board will revoke his conditional order and detain him there.<sup>38</sup>

5.7 With respect to the State party's reference to the programmes available to support individuals with cognitive impairments in the criminal justice system, the author submits that no such programmes have been made available to him and that their existence is irrelevant to the human rights violations he alleges.

5.8 As regards the State party's contentions relating to the law reform, the author notes that the Mentally Impaired Defendants Act 1996 has not been reformed since he submitted his communication. He reiterates that the Act provides for treatment of persons with disabilities that is different from that of other accused persons on the basis of disability, and that his treatment never constituted legitimate differential treatment, but was in fact aggravated illegitimate detrimental treatment.

5.9 The author argues that the State party's submissions are based on the assumption that he committed the offences with which he was charged, which he did not. It could not be established that he presents a continuing danger to the public, but he has been stigmatized and dealt with as if he did.

5.10 With respect to the State party's contention that legislation similar to the Mentally Impaired Defendants Act exists in other jurisdictions, the author considers that that does not indicate that such legislation serves a legitimate purpose. Rather, it is one of the most serious and pervasive forms of violation of the rights of persons with disabilities and should be urgently reformed.

5.11 The author submits that following the quashing of his indictment, he applied to the District Court of Western Australia for the determination of his mental fitness. The application was heard by the Court on 4 November 2010 and rejected on 5 November 2010.<sup>39</sup> As to the State party's submission that the author could have appealed the District Court's decision to the Western Australian Court of Appeal, the author considers that that would have been futile; he would have needed to demonstrate that the District Court's decision was in error, while it was legally correct under the Mentally Impaired Defendants Act. As to a possible arguable claim for judicial review, it would have been limited to challenging the exercise of the Review Board's discretion to make recommendations to the Minister of Health or the Governor of Western Australia regarding his release. As they are not required to accept the Review Board's recommendations, any potential judicial review could not provide the author with an enforceable domestic remedy.

5.12 The author considers that the Mentally Impaired Defendants Act does not impose any obligation on the Court to contemplate the reasonable accommodations that could enable an accused person with an intellectual disability or mental illness to stand trial and receive a fair trial. The author considers that, owing to the failure to accord him fair guarantees as regards the offences with which he was charged in October 2002, he continues to be treated as if he had committed the offences, without giving him the capacity to challenge that assumption.

5.13 In relation to the risk of harm in prison, the author submits that the assaults he faced were serious. He was subjected to frequent acts of violence and abuse from other prisoners, apparently not recorded by prison authorities. Owing to their frequency, the offences made him more vulnerable; his disability prevented him from protecting himself and that situation amounted to inhuman and degrading treatment.

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<sup>38</sup> The author refers to the Review Board's letter to him dated 22 November 2011, which states that "the Board considers that placement in a declared place is a more appropriate accommodation option for you in view of your needs and considering the risk factors".

<sup>39</sup> See *The State of Western Australia v. Noble*, No. 2 (2010), District Court of Western Australia.

5.14 The author considers that as a result of his wrongful conviction for an alleged use of drugs, he was confined to prison and deprived of leave for a period of six months. He was subsequently exonerated, but he received no apology or other remedy, and was instead referred to the Australian National Child Offender Register, which he considers particularly degrading and humiliating.

5.15 The author argues that at all times, he remained in custody, and that the conditions of his conditional release amount to a deprivation of liberty. Additionally, under section 37 of the Mentally Impaired Defendants Act, a new custodial supervision order with immediate effect could be imposed by the Review Board if it considered that the author had breached any of the conditions of his release, bypassing the usual legal processes applicable to persons without disabilities.

#### **State party's additional observations**

6.1 On 23 February 2016, the State party submitted additional observations on the author's comments, reiterating its view that the Committee's temporal mandate applies in respect of events occurring on or after 19 September 2009. The State party does not consider that the facts of the present communication constitute a continuing violation.<sup>40</sup>

6.2 The State party submits that the author has never been in civil detention since his release from custody on 10 January 2012, and that he has resided in the community since then. The author's conditional release order is subject to regular review by the Review Board, which has been satisfied with the author's compliance. The State party does not have any plans to cancel the author's release order or to place him in custody.

6.3 The State party indicates that in 2015, Western Australia opened a disability justice centre to provide additional detention options for persons with disabilities who have been found unfit to stand trial. On 30 November 2015, the Mental Health Act 2014 came into force. It introduced protections in relation to the use of involuntary treatment powers, and new rights for families and carers. The Western Australian Government has also concluded the review of the Mentally Impaired Defendants Act and intends to table the final report and recommendations in 2016.

## **B. Committee's consideration of admissibility and the merits**

### **Consideration of admissibility**

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of the Committee's rules of procedure, whether the case is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.

7.3 The Committee notes that the State party submits four sets of arguments relating to the admissibility of the author's claims under articles 1 and 2 (e), (d) and (f) of the Optional Protocol, which it will examine separately.

7.4 Firstly, the Committee notes that according to the State party, the author's claims relating to the events occurring before the entry into force of the Optional Protocol should be held inadmissible *ratione temporis*. The Committee also notes the author's argument that

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<sup>40</sup> The State party refers to the jurisprudence of the Human Rights Committee in communication No. 2021/2010, *E.Z. v. Kazakhstan*, decision of inadmissibility adopted on 1 April 2015, para. 7.4.

some of the events that occurred before the entry into force of the Optional Protocol fall within the competence of the Committee insofar as they constitute a continuing violation. The Committee recalls that under article 2 (f) of the Optional Protocol, the Committee shall consider a communication inadmissible when “the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the State party concerned unless those facts continued after that date”. The Committee also recalls that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations.<sup>41</sup>

7.5 In the present case, the Optional Protocol entered into force for the State party on 19 September 2009. The Committee notes that the author was first detained in October 2001 on charges of sexual assault. From 2002, the author was maintained in custody during the assessment of his intellectual impairment, which lasted until March 2003, when the District Court of Western Australia found that the author was unfit to plead and was made subject to a custody order. After that date and until January 2012, the author remained detained. The author’s detention therefore clearly continued after the entry into force of the Optional Protocol for the State party, and the author’s claim under article 14 (1) (b) is within the Committee’s competence *ratione temporis*.

7.6 As regards the Committee’s competence *ratione temporis* to examine the author’s allegations under articles 12 and 13 in relation to the consequences of the declaration that the author was unfit to plead, the Committee notes that the District Court of Western Australia first adopted that decision in March 2003. The Committee also notes that the decision was reiterated de facto by the authorities of the State party, including through the decision of the District Court of Western Australia of 5 November 2010; while the Court dismissed the application of the author’s legal representative for an order that he was fit to plead not on the merits, but on lacking jurisdiction, it left no option for the author to exercise his legal capacity before the courts. The author therefore continued to be deprived of the opportunity to plead not guilty and to have the evidence against him tested after the entry into force of the Optional Protocol for the State party. In view thereof, the Committee concludes that it is competent *ratione temporis* to consider this part of the communication.

7.7 Secondly, the Committee notes the State party’s arguments relating to the lack of exhaustion of domestic remedies. In this regard, the Committee first notes that according to the State party, the author’s allegations relating to the fact that he was not able to exercise his legal capacity (art. 12 (2) and (3)) and that he did not have access to justice (art. 13 (1)) should be considered inadmissible because the author could have appealed the District Court’s decision of 5 November 2010 to the Western Australian Court of Appeal, but did not do so. The Committee also notes the author’s argument that for his appeal to have any chance of success, he would have had to demonstrate that the District Court’s decision was in error, while in fact it was adopted in compliance with the Mentally Impaired Defendants Act. The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success.<sup>42</sup> Taking into account the clear wording of the relevant sections of the Act, the Committee concludes that no additional effective remedies were available to the author and that his claims under articles 12 (2) and (3) and 13 (1) are admissible under article 2 (d) of the Optional Protocol.

7.8 The Committee then notes the State party’s argument that the author’s claim under article 14 (2) relating to his conditions of detention should be considered inadmissible insofar as he failed to exhaust domestic remedies that could have resulted in an alteration of the conditions to which he objects. The Committee also notes that the author does not

<sup>41</sup> See *Könye and Könye v. Hungary*, para. 6.4.

<sup>42</sup> See Human Rights Committee, communication No. 941/2000, *Young v. Australia*, Views adopted on 6 August 2003, para. 9.4.

contest this statement and that the information provided does not reflect that he submitted any complaint to the competent national jurisdictions in that regard. The Committee therefore concludes that this part of the author's communication is inadmissible under article 2 (f) of the Optional Protocol.

7.9 Thirdly, the Committee notes the State party's submission that part of the author's allegations should be considered inadmissible under article 1 of the Optional Protocol. In this regard, the Committee notes the State party's argument that the author's allegation according to which the Mentally Impaired Defendants Act violates article 5 of the Convention should be considered inadmissible because it relates to the general legal framework and should therefore be addressed by the Committee through a general comment or in its consideration of State parties' reports. The Committee recalls that an individual complaint may not contest a law or practice in theoretical terms by *actio popularis*.<sup>43</sup> However, in the present case, the Committee finds that the author has sufficiently substantiated the fact that the Act has had a direct impact on the enjoyment of his rights and therefore considers his claim under article 5 (1) of the Convention admissible.

7.10 Fourthly, the Committee notes the State party's argument that some of the author's allegations should be considered inadmissible for lack of substantiation and lack of merits under article 2 (e) of the Optional Protocol. In this regard, the Committee notes the State party's argument that the author's claim relating to the alleged violations of his rights under article 15 of the Convention are not substantiated. The Committee also notes the author's submission that while he was in prison, he was at significant risk of harm from other prisoners who subjected him to frequent acts of violence and abuse, that the assaults he faced were serious, and that because of their frequency, they made him more vulnerable and that his disability prevented him from protecting himself. The Committee further notes that, according to the author, these offences amounted to inhuman and degrading treatment, and apparently remained unrecorded by the prison authorities. In view thereof and taking into account the specific circumstances of the case, the Committee considers that the author sufficiently substantiated his allegations under article 15 for the purpose of admissibility and concludes that they are admissible under article 2 (e) of the Optional Protocol.

7.11 Accordingly, and in the absence of other obstacles to admissibility, the Committee declares the communication admissible as far as it concerns the author's claims under articles 5 (1) and (2), 12 (2) and (3), 13 (1), 14 (1) (b) and 15. The Committee therefore proceeds to the consideration of these allegations on the merits.

### **Consideration of the merits**

8.1 The Committee has considered the present communication in the light of all the information that it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of the Committee's rules of procedure.

8.2 As regards the author's complaint under article 5 of the Convention, the Committee notes his submission that the Mentally Impaired Defendants Act is discriminatory as it applies only to persons with cognitive impairment, and provides for their indefinite detention without any finding of guilt when they are charged with criminal offences, while persons without cognitive impairments are protected from such treatment through the application of the rules of due process and fair trial. The Committee also notes that, according to the State party, the Act is not discriminatory, but provides for legitimate differential treatment of certain persons with disabilities, subject to safeguards to ensure that it is proportionate to its aims.

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<sup>43</sup> See, for example, Human Rights Committee, communication No. 1746/2008, *Goyet v. France*, decision of admissibility adopted on 30 October 2008, para. 6.3.

8.3 The Committee recalls that under article 5 (1) and (2) of the Convention, States parties must ensure that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law, and must take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination. The Committee also recalls that discrimination can result from the discriminatory effect of a rule or measure that is not intended to discriminate, but that disproportionately affects persons with disabilities.<sup>44</sup> In the present case, the Committee notes that the Mentally Impaired Defendants Act is intended to address the situation of persons with psychosocial and intellectual impairments who are found unfit to stand trial on the basis of mental impairment. The issue before the Committee is therefore to assess whether the differential treatment provided under the Act is reasonable or whether it results in discriminatory treatment of persons with disabilities.

8.4 The Committee notes that under the Act, once the person is found unfit to plead, he or she can be maintained in custody for an unlimited period of time. He or she will be presumed to remain not mentally fit to stand trial until the contrary is found. In the meantime, the person has no possibility to exercise his or her legal capacity before the courts. In the present case, the author was charged in 2001 with sexual offences that were never proven. In March 2003, he was declared unfit to plead. A custody order was made and the author was detained at Greenough Regional Prison until 10 January 2012, when he was placed in an accommodation support service. The Committee notes that throughout the author's detention in prison, the whole judicial procedure focused on his mental capacity to stand trial without giving him any possibility to plead not guilty and to test the evidence against him. The Committee also notes that the State party did not provide the author with the support or accommodation he required to exercise his legal capacity, and did not analyse which measures could be adopted to do so. As a result of the application of the Act, the author's right to a fair trial was instead fully suspended, depriving him of the protection and equal benefit of the law. The Committee therefore considers that the Act resulted in discriminatory treatment of the author's case, in violation of article 5 (1) and (2) of the Convention.

8.5 As regards the author's allegations under articles 12 (2) and (3) and 13 (1) of the Convention, the Committee notes the author's submission that the decision that he was unfit to plead deprived him of the possibility to exercise his legal capacity to plead not guilty and to test the evidence against him, thereby amounting to a violation of article 12 (2) and (3) of the Convention. The Committee recalls that under article 12 (2), States parties have the obligation to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Under article 12 (3), States parties have the obligation to provide access to the support that persons with disabilities may require to exercise their legal capacity. The Committee also recalls that under article 13 (1), States parties must ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations.

8.6 In the present case, the decision that the author was unfit to plead because of his intellectual and mental disability resulted in a denial of his right to exercise his legal capacity to plead not guilty and to test the evidence against him. Furthermore, no adequate form of support was provided by the State party's authorities to enable him to stand trial and plead not guilty, despite his clear intention to do so. He therefore never had the opportunity to have the criminal charges against him determined and his status as an alleged sexual offender potentially cleared. The Committee considers that while States parties have a certain margin of appreciation to determine the procedural arrangements to

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<sup>44</sup> See communication No. 10/2013, *S.C. v. Brazil*, decision of inadmissibility adopted on 2 October 2014, para. 6.4.

enable persons with disabilities to exercise their legal capacity,<sup>45</sup> the relevant rights of the person concerned must be respected. That did not happen in the author's case, as 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. In view thereof, the Committee considers that the situation under review amounts to a violation of the author's rights under articles 12 (2) and (3) and 13 (1) of the Convention.

8.7 As to the author's allegations relating to his detention, the Committee reaffirms that liberty and security of the person is one of the most precious rights to which everyone is entitled. In particular, all persons with disabilities, and especially persons with intellectual and psychosocial disabilities, are entitled to liberty pursuant to article 14 of the Convention.<sup>46</sup> In the present case, the Committee notes that, following the decision of the District Court of Western Australia of March 2003 according to which the author was declared unfit to plead, he was detained in prison without having been convicted of any offence, and after all the charges against him were quashed in application of the Mentally Impaired Defendants Act. The Committee also notes the State party's submission that the competent authorities adopted that decision because of the lack of available alternatives and support services, even though they considered that prison "was not the appropriate environment for the author" (see para. 4.5 above). The author's detention was therefore decided on the basis of the assessment by the State party's authorities of potential consequences of his intellectual disability, in the absence of any criminal conviction, thereby converting his disability into the core cause of his detention. The Committee therefore considers that the author's detention amounted to a violation of article 14 (1) (b) of the Convention according to which "the existence of a disability shall in no case justify a deprivation of liberty".

8.8 The Committee notes that the author was released from prison into an accommodation support service on 10 January 2012 under 10 conditions. Without entering into a detailed analysis of the conditions, the Committee considers that, as they were decided as a direct consequence of the detention of the author, which is found to be in violation of the Convention, the conditions also amount to a violation of article 14 (1) (b).

8.9 As regards the author's allegations under article 15 of the Convention, the Committee recalls that, at the time of the events that gave rise to the present communication, the author was detained in custody. In such a situation, the Committee emphasizes that States parties are in a special position to safeguard the rights of persons deprived of their liberty owing to the extent of the control that they exercise over those persons,<sup>47</sup> including to prevent any form of treatment contrary to article 15 of the Convention and to safeguard the rights established under the Convention. In this context, State party authorities must pay special attention to the particular needs and possible vulnerability of the person concerned, including because of his or her disability. In the present case, the Committee notes the author's allegations that he was subjected to frequent acts of violence and abuse, that his disability prevented him from protecting himself against such acts, and that the State party authorities did not take any measures to sanction or prevent them or to protect the author therefrom. Additionally, the Committee notes that the author was detained for more than 13 years, without having any indication as to the duration of his detention. His detention was deemed indefinite in so far as, in compliance with section 10 of the Mentally Impaired

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<sup>45</sup> See communication No. 5/2011, *Jungelin v. Sweden*, Views adopted on 2 October 2014, para. 10.5.

<sup>46</sup> See the Committee's guidelines on article 14 of the Convention on the right to liberty and security of persons with disabilities, adopted during its fourteenth session (2015), para. 3.

<sup>47</sup> See Committee against Torture, communication No. 456/2011, *Guerrero Larez v. Bolivarian Republic of Venezuela*, decision adopted on 15 May 2015, para. 6.4; Committee on Enforced Disappearances, communication No. 1/2013, *Yrusta v. Argentina*, Views adopted on 11 March 2016, para. 10.5.



Defendants Act, “an accused found under this part to be not mentally fit to stand trial is presumed to remain not mentally fit until the contrary is found”. Taking into account the irreparable psychological effects that indefinite detention may have on the detained person, the Committee considers that the indefinite detention to which he was subjected amounts to inhuman and degrading treatment.<sup>48</sup> The Committee therefore considers 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.

8.10 In the light of the above, the Committee concludes that the State party has failed to fulfil its obligations under articles 5 (1) and (2), 12 (2) and (3), 13 (1), 14 (1) (b) and 15 of the Convention.

### C. Conclusion and recommendations

9. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under articles 5 (1) and (2), 12 (2) and (3), 13 (1), 14 (1) (b) and 15 of the Convention. The Committee therefore makes the following recommendations to the State party:

- (a) Concerning the author, the State party is under an obligation to:
  - (i) Provide him with an effective remedy, including reimbursement of any legal costs incurred by him, together with compensation;
  - (ii) Revoke immediately the 10 conditions of the author’s release order, replacing them with all necessary support measures for his inclusion in the community;
  - (iii) Publish the present Views and circulate them widely in accessible formats so that they are available to all sectors of the population;
- (b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In this regard, the Committee refers to the recommendations contained in its concluding observations (CRPD/C/AUS/CO/1, para. 32) and requires the State party to:
  - (i) Adopt the necessary amendments of the Mentally Impaired Defendants Act (Western Australia) and all equivalent or related federal and state legislation, in close consultation with persons with disabilities and their representative organizations, ensuring its compliance with the principles of the Convention and with the Committee’s guidelines on article 14 of the Convention;
  - (ii) Ensure that adequate support and accommodation measures are provided to persons with mental and intellectual disabilities to enable them to exercise their legal capacity before the courts whenever necessary;
  - (iii) Ensure that appropriate and regular training on the scope of the Convention and its Optional Protocol, including on the exercise of legal capacity by persons with intellectual and mental disabilities, is provided to staff of the Review Board, members of the Law Reform Commission and Parliament, judicial officers and staff involved in facilitating the work of the judiciary.

<sup>48</sup> See Alfred de Zayas, “Human rights and indefinite detention”, *International Review of the Red Cross*, vol. 87, No. 857 (March 2005), pp. 19-20.

10. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee within six months a written response, including information on any action taken in the light of the present Views and recommendations of the Committee.

## Annex

### **Individual opinion of Committee member Damjan Tatić (partly dissenting)**

1. I agree with the Committee that the author's allegations pertaining to articles 5 (1) and (2), 14 (1) (b) and 15 of the Convention are admissible under the Optional Protocol. I also agree with Committee's view that the State party has failed to fulfil its obligations under articles 5 (1) and (2), 14 (1) (b) and 15 of the Convention. Furthermore, I agree with the Committee's conclusions and recommendations to the State party pertaining to its duties in relation to full implementation of these articles.

2. I am less persuaded, however, by the Committee's treatment of admissibility *rationae temporis* of allegations pertaining to articles 12 and 13. I am of the view that on 5 November 2010, the District Court of Western Australia did not examine the author's claims on the merits and all decisions relating to the author's capacity to plead not guilty occurred before the entry into force of the Optional Protocol for the State party. I consider that the decision of the District Court did not in any way reinforce the previous court decisions, taken prior to the entry into force of the Optional Protocol for the State party. Therefore, I am of the view that the author's allegations pertaining to articles 12 and 13 of the Convention are inadmissible *rationae temporis*.

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