Fitness to Stand Trial and Disability Discrimination: An International Critique of Australia

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In *Noble v Australia* (2016) the United Nations Committee on the Rights of Persons with Disabilities determined that Australia was in violation of a series of its obligations under the United Nations Convention on the Rights of Persons with Disabilities. The decision was a response to a communication brought by an Indigenous man, Marlon Noble, who had been found unfit to stand trial, had not had the opportunity to plead not guilty, and had been detained in a prison for over a decade. This article reviews the reasoning in the decision, the subsequent response by the Australian government and an inquiry into Western Australia's fitness to stand trial legislation. It argues that reform is urgently required in jurisdictions that fail to accord procedural fairness and suitable assistance to persons whose disabilities may preclude their meaningful participation in the criminal justice system.

Key words: disability; discrimination; fitness to stand trial; intellectual disability; United Nations Committee on the Rights of Persons with Disabilities.

Introduction

Fitness to stand trial is a threshold issue in the criminal justice system. The performance of courts in ensuring that persons who are unfit to participate meaningfully in the trial process are not coerced into standing trial constitutes a yardstick against which the integrity of a criminal justice process can be measured. As Heydon J in *Eastman v DPP (ACT)*¹ held in 2003, the rule preventing an accused person from being tried unless fit to plead is 'among the key rules of criminal procedure which seek to ensure that a successful prosecution case rests on reliable evidence. If the accused is not fit to plead to stand trial, there can be no trial'. To similar effect, in the same case, Gaudron J concluded that:

If a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead, or, if that issue is not determined in the manner which the law requires, 'no proper trial has taken place [and the] trial is a nullity.' To put the matter another way, there is a fundamental failure in the trial process.²

In 2017, Gooding et al.³ usefully drew attention to the potential for breach of accused persons' rights under the United Nations Convention on the Rights of Persons with Disabilities, if those with disabilities are deprived of rights such as those to equal recognition before the law, access to justice and liberty and security of the person by laws in relation to fitness to stand trial that are fundamentally defective or discriminatory.

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A significant reason why a person may be unfit to stand trial is if they suffer from a cognitive impairment, such as an intellectual disability that precludes their capacity to understand the trial process, to appreciate what the evidence is against them and to be able to give evidence to the court. However, intellectual disability and mental illness are not coterminous with unfitness to stand trial; the question is the extent of the shortfall in necessary understanding that follows from disability – put another way, the extent to which they are deprived of the capacity to participate meaningfully in the trial process.⁴

In Australia, most jurisdictions (the ACT, NSW, the Northern Territory, South Australia and Victoria) have processes whereby if a person is determined to be unfit to stand trial, a ‘special hearing’ is convened to determine whether they have a defence to the charge – either that they did not commit the criminal act or a defence of mental impairment.⁵ In *Subramaniam v The Queen*,⁶ the High Court held that the purpose of a special hearing 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.

However, the option for a special hearing does not exist in either Western Australia or Queensland.⁷ This article reviews the ramifications of an important critique of Western Australia’s fitness to stand trial system by the United Nations Committee on the Rights of Persons with Disabilities (‘the Committee’) in relation to a Western Australian Indigenous man, Marlon Noble. It then identifies the responses of the Australian federal government and of Western Australia to the

Committee’s decision and reflects on the measures that need to be taken to restore this aspect of the integrity of Australia’s criminal justice system.⁸

The Facts Relating to Marlon Noble

Marlon Noble was born on 11 February 1982. He is an Indigenous man from the Northern Territory of Australia with cognitive impairment caused by meningitis during his infancy. The circumstances of Marlon Noble became highly publicised in part through his being the subject of a well-known documentary, ‘Held Without Trial’⁹ but also because of an energetic and tenacious campaign to secure his release,¹⁰ coverage by the Law Report on the ABC¹¹ and public support from the Australian Medical Association.¹²

When 19 years of age, Noble was charged with two counts of sexual penetration of a child under 13 years, and three counts of indecent dealing with a child between the ages of 13 to 16 years, pursuant to sections 320 and 321 of the Western Australian Criminal Code 1913. He was arrested, taken into custody and denied bail. In 2002 he was remanded in custody by the Perth Court of Petty Sessions for assessment of his cognitive impairment and later in 2002 appeared on indictment for both charges in the District Court of Western Australia. The prosecution placed before the District Court an expert report which indicated that Noble may not be fit to plead to the charges, and the prosecution and defence joined in an application that he be further psychiatrically assessed pursuant to section 12 of the Criminal Law (Mentally Impaired Defendants) Act 1996 (WA) (‘the MID Act’).

In January 2003, reports by three psychiatrists were presented at a fitness hearing: two concluded that Noble was unfit to plead as a result of cognitive difficulties stemming from his meningitis during infancy, and one recommended further assessment, noting that he 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 Noble was not fit to plead, both advised the court that such a finding was possible. The court found him unfit and made him subject to a custody order pursuant to sections 16 and 19 of the MID Act. This occurred without him having any opportunity to plead not guilty and without any finding of guilt – there was no facility for such options.

Under the MID Act, responsibility for oversight of Noble's custody order vested in the Mentally Impaired Accused Review Board ('the Review Board'), which determined that Noble should be detained in custody at the correctional centre of Greenough Regional Prison. He remained there from March 2003 until January 2012, when he was released on a conditional release order. Taking into account the 17 months he served on remand, Noble was detained together with convicted prisoners for a period of 10 years and 3 months. He argued that, although the maximum period of imprisonment for the offences with which he was charged was 20 and 7 years respectively, he would probably have been sentenced to a term of imprisonment not exceeding 2 to 3 years had he been permitted to plead guilty. He also pointed out that, had he been sentenced in the orthodox way, the time he served in custody prior to sentencing would have been taken into account in the calculation of his time in prison.

In 2009, the Review Board permitted Noble overnight stays outside prison, subject to full supervision. In September 2010, Noble returned from leave and was required to undertake an initial urine drug screening test which was reported as positive for amphetamine. However, a later gas chromatograph mass spectrometry test certified that no illicit drugs were detected. Despite these contradictory results, Noble was charged with using an illicit drug, and his 'home leave' was suspended. This incident was subject to an independent inquiry, conducted on behalf of the

Premier of Western Australia.¹³ As a result, Noble's home leave was reinstated, but he received no apology or compensation.

In June 2010, a forensic psychologist undertook a further assessment of Noble's intellectual functioning. He concluded that Noble was capable of standing trial if he was given appropriate assistance. This led Noble's legal representative to seek orders from the District Court of Western Australia to the effect that Noble was fit to plead, and that within 42 days, an indictment or a discontinuance be presented by the prosecution for the original offences. A 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 Noble because the substantial time he had already spent in custody far exceeded any reasonable term of imprisonment should he be convicted of all charges; and because there were very limited prospects of securing a conviction on the charges because of the low quality of the evidence available. Noble's legal representative pressed his application for an order that Noble was fit to plead but in November 2010 the court dismissed the application on the basis that it did not have jurisdiction. Formal reasons for this decision were published by the court, but were lost or destroyed.

In November 2011, the Review Board recommended to the Western Australian Attorney-General that Mr Noble be released conditionally into an accommodation support service. The Western Australian Governor adopted the recommendation of the Board, and in January 2012 Noble was released from custody subject to 10 conditions. Since the communication was formally lodged in July 2012, Noble's case was reviewed three times. In January 2013, the Review Board conducted a progress review and recommended that there be a relaxation of Mr Noble's conditions to allow him to attend cafes and restaurants; this was accepted by the Governor in Executive Council. An overnight absence from his primary residence was also approved. In April

2013, Mr Noble's annual statutory review took place, and the Review Board recommended that the condition requiring Mr Noble to attend all programs 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 a need for the Review Board's pre-approval. The Governor endorsed these recommendations in July 2013. In January 2014, a further statutory review took place but no change was introduced. In late 2014, Mr Noble was permitted interstate travel to attend the Line In the Sand Summit, an event that was convened to consider solutions to the problems that Mr Noble's case has raised.¹⁴

The Noble Communication

In July 2012, Noble filed a Communication under the Optional Protocol to the Convention on the Rights of Persons with Disabilities, to which Australia became a signatory in 2009. The Protocol enables a person to make a communication seeking a ruling from the United Nations Committee on the Rights of Persons with Disabilities against a State party. He asserted that Australia had violated his rights under articles 5(1), 12, 13, 14(1)(b), 14(2) and 15 of the Convention.

In particular, Mr Noble argued that the MID Act constituted a discriminatory status-based law in violation of article 5(1) of the Convention which provides that:

1. States Parties recognize 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.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to

ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Mr Noble asserted 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 after that finding, the judge is obliged to make an order either quashing the indictment or dismissing the charge without deciding the guilt of the accused. His position was that the judge can then release the accused or make a custody order in relation to them, having regard to the following factors:

- (a) the strength of the evidence against the accused;
- (b) the nature of the alleged offence and the alleged circumstances of its commission;
- (c) the accused's character, antecedents, age, health and mental condition; and
- (d) the public interest.

No limits exist as to the duration of the custody order, and the accused declared unfit to plead has no possibility to exercise his/her legal capacity before the courts. He/she is therefore prevented from pleading not guilty and from testing the evidence presented against him/her. People who do not have cognitive impairments are protected from such conduct.

Contentions of Noble

It was submitted on behalf of Noble that his communication related 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 September 2009 until January 2012; and since January 2012 he had been subject to civil detention in the community. He argued that he remained deprived of the opportunity to enter a plea of not guilty and to test the evidence that was presented against him, and therefore he remained presumed guilty. He contended that he had exhausted all available and effective domestic remedies.¹⁵

A key argument advanced on behalf of Noble was that the MID Act constituted a discriminatory status-based law in violation of article 5(1) of the Convention. It was argued for Noble that his detention was arbitrary because it was based on his disability, in violation of article 14(1)(b); if he did not have a disability, he would not have been placed in indefinite detention and if he had been acquitted, he would have been released from custody immediately and unconditionally.

Noble submitted that his detention had been arbitrary because: firstly, it was subject to the discretion of the executive government. Pursuant to sections 24 and 35 of the MID Act, once a custodial supervision order was made, the affected person was detained until released by an order of the Governor of Western Australia. This was a discretion exercised in accordance with the recommendations of the Executive Council, which in turn acts on the advice of the Minister of Health. Secondly, he argued the detention was unjust because he had not been convicted for the offences with which he was charged and had not had the opportunity to test the evidence upon which those charges were based. Thirdly, he argued the detention was disproportionate because if Noble had been found guilty of the offences with which he was charged, he would have been sentenced to two to three years' imprisonment, after which he would have been released unconditionally. Finally, Noble argued that his detention was punitive because he required, and continued to require, social support and assistance. However, his incarceration and his continuing civil detention did not reflect the 'least

invasive' or 'least restrictive' options of dealing with his needs.

Noble submitted that his conditions of detention at Greenough 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.¹⁶ This punitive perspective was also reflected in the intervention of the Review Board: it recommended to the Minister for Health that Noble continue to be detained for nine years from the time the Court made him subject to a custodial supervision order in March 2003, up to the time he was made subject to a conditional release order in January 2012, while the alleged victims of the offences had publicly withdrawn their initial statements against him.

Noble argued that, although the State party asserted his detention was temporary, pending the availability of a place in a specialised facility, this had not happened, and his prolonged incarceration with convicted persons was humiliating and degrading. He asserted that the Western Australian Government suspended its decision to build two 'disability justice centres' and instead built one such facility to incarcerate 10 people with a high level of security. He articulated a fear that once this facility was operational, the Review Board would detain him there.

With respect to the State party's reference to the programs available to support individuals with cognitive impairments in the criminal justice system, Noble submitted that none had been made available to him and that their existence was irrelevant to the human rights violations he alleged.

Noble argued that his treatment never constituted a legitimate differential treatment, but an aggravated, illegitimate, detrimental one. He also contended that the State party's submissions were based on the assumption that he committed the offences with which he was charged, which he claimed not to have done. He asserted that it could not be established that he presented a continuing danger

to the public, but he had been stigmatised and dealt with as if he was a danger to the public.

Noble accepted that legislation similar to the MID Act exists in other jurisdictions, but asserted that this did not indicate that such legislation served a legitimate purpose: 'It is rather one of the most serious and pervasive forms of violation of the rights of persons with disability and should be urgently reformed' (at [5.10]).

Decision of the Committee

The Committee¹⁷ found that throughout Noble's detention he was not given any possibility to plead not guilty and test the evidence submitted against him, and that the government had not provided Noble with the support or accommodation he required to exercise his legal capacity: 'As a result of the application of the MID Act, the author's rights to a fair trial were instead fully suspended, depriving him of the protection and equal benefit of the law'.¹⁸ This meant that the MID Act had resulted in discriminatory treatment of Noble in violation of article 5(1) and (2) of the Convention.

In addition, the Committee concluded that Noble was unfit to plead because of his intellectual and mental disability which resulted in a denial of his right to exercise his legal capacity to plead not guilty and test the evidence presented against him. It found that:

No adequate form of support was provided by State party's authorities to enable him to stand trial and plead non-guilty, despite of his clear intention to do so. He therefore never had the opportunity to have his 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 enable persons with disabilities to exercise their legal capacity ... [t]his 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 fair trial.¹⁹

This meant that Noble's rights under articles 12(2)–(3) and 13(1) of the Convention had been violated.

The Committee found that Noble's detention was decided on the basis of the assessment by the government 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'. This led the Committee to conclude that Noble'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'.²⁰ It also found that, as the conditions subject to which Noble was released were determined upon as a direct consequence of his detention, they too were in violation of article 14(1)(b) of the Convention.²¹

In respect of Noble's contention that his article 15 rights had been violated by reason of the conditions of his detention, the Committee emphasised the vulnerability of persons with a disability in the penal system and stated that: 'State party authorities must pay special attention to the particular needs and possible vulnerability of the person concerned ... In the present case, the Committee notes the author's allegations that he was subject to frequent incidents of violence and abuse, that his disability prevented him from protecting himself against such acts, and that State party authorities did not take any measure to sanction and prevent them, or to protect the author therefrom'.²² Taking into account the fact that Noble's detention was indefinite, and in fact extended for a period in excess of 10 years, and the 'irreparable psychological effects that such indefinite detention can have on the detained person', the Committee concluded that the detention to which Noble was subject amounted to inhuman and degrading treatment in breach of article 15 of the Convention.

The Committee made the following recommendations to the State party, Australia:

- (a) Concerning Mr Noble: the State party is under an obligation:
 - (i) To provide him with an effective remedy, including reimbursement of any legal costs incurred by him, together with compensation.
 - (ii) To revoke immediately the 10 conditions of Mr Noble's release Order replacing them with all necessary support measures for his inclusion in the community.
 - (iii) To publish the Committee's Views and circulate them widely in accessible formats so that they are available to all sectors of the population.
- (b) General measures: the State party is under an obligation to take measures to prevent similar violations in the future. In this regard, the Committee refers to its recommendations as contained in paragraph 32 of its concluding observations and requires the State party:
 - (i) To adopt the necessary amendments of the MID Act (WA), and all equivalent or related Federal and state legislations, in close consultation with persons with disabilities and their representative organizations, ensuring its compliance with the principles of the Convention and the Committee's Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities;
 - (ii) To ensure that adequate support and accommodation measures are provided to persons with mental and intellectual disability to enable them to exercise their legal capacity before the courts whenever necessary;
 - (iii) To 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 the Parliament, judicial officers and staff involved in facilitating the work of the judiciary.

The Committee also required the State party to submit a written response to the Committee within six months including information as to any action taken in the light of the views and recommendations of the Committee.

The State Party Response

In 2017, the Australian government, the State party, provided its response, identifying that the decision of the Committee had been published on the Attorney-General's Department website.²³ It maintained that Australia:

acknowledges its obligations under the Convention on the Rights of Persons with Disabilities (the Convention) and takes its obligations under international human rights law seriously. Australia is committed to ensuring that any deprivation of liberty of persons with disabilities is lawful, non-arbitrary and on an equal basis with others. Australia, including the Western Australian Government, is also committed to providing persons with disabilities with adequate support and reasonable accommodations to enable them to exercise their legal capacity before the courts in a way that prevents abuse and is consistent with the rights of an accused under international human rights law (at [3]).

It recorded that the Western Australian Government acknowledged that there were significant failures in the way Noble was dealt with and with the operation of the MID Act and that it 'deeply regrets the period of time during which [Noble] was detained under the provisions of the MID Act and is committed to continuing to provide the author with support, with a view to him living independently in the community' (at [5]). However, it then repudiated each of the Committee's findings of violation of Noble's rights.

The Australian government noted that the Optional Protocol required the Committee to consider a communication inadmissible when the facts which were the subject of the communication occurred prior to the entry into force of the Protocol for the State party concerned, unless those facts continued after the date. It denied that this was the case and contended that the views of the Committee were contrary to well-established principles of international law. It also argued that Noble had failed to exhaust his domestic remedies and that his claim that he had been subjected to frequent and serious incidents of violence and abuse had been insufficiently substantiated.

The Australian government noted that the position of the Committee was based upon the position that the judicial procedure to which Noble had been subject focused on his mental capacity to stand trial without giving him any possibility to plead not guilty and test the evidence against him, and upon the position that Noble was not provided with the support he needed to exercise his legal capacity. It was this which led it to conclude that there had been a violation of article 5(1) and (2) in that he had failed to receive a fair trial and had been deprived of the protection and equal benefit before the law. The Australian response asserted that the MID Act:

- (a) constitutes legitimate differential treatment
- (b) does not differentiate on the basis of disability but on the basis of mental capacity
- (c) preserves the fair trial rights of Western Australian persons with mental impairments, and
- (d) is a form of reasonable accommodation (at [23]).

It reiterated its view that the MID Act was 'legitimate differential treatment, not discrimination' and therefore was consistent with Australia's obligations under article 5: 'The principle of legitimate differential treatment allows State Parties to treat particular groups

differently, provided specific criteria are met' (at [24]). It contended that the role of the Review Board in continuing Noble's matter (even as of 2017) constituted suitable periodic review of his circumstances. It denied that the MID Act prevented Noble from pleading not guilty: 'Were the author to have been tried, he would have been unable to understand the nature of the charge, the requirement to plead to the charge or the effect of the plea. As for testing the evidence against him, the author was found to be unable to understand the purpose of a trial, to exercise the right to challenge jurors, to follow the course of the trial, to comprehend the substantial effect of evidence presented by the prosecution in the trial or to properly defend the charges against him' (at [27]).

The federal government argued that Noble would not have been assisted by the making of any adjustments, so limited was his capacity to understand the criminal trial, the charges against him and the pleading process. Pointedly, it observed that the Committee had not identified the types of measures which it considered should have been provided and submitted that the Committee should provide guidance on the measures that could have been implemented to assist Noble to exercise his capacity consistently with article 5 of the Convention (at [31]). It also rejected the finding that Australia had violated Noble's rights under articles 12(2), 12(3) and 13 of the Convention on the basis that it was proper to limit the right to exercise legal capacity in a way that is not discriminatory, the particular limitation in respect of Noble was justifiable, no relevant support would have assisted Noble and the obligation in article 13 to ensure access to justice is premised on the efficacy of the relevant accommodations. It placed emphasis on the fact that under the MID Act, decisions that a person is not mentally fit to stand trial are reviewable, as are decisions imposing custody orders and the decisions of the Review Board (at [42]).

The Australian government reiterated its view that the detention of Noble was

appropriate and ensured fair treatment of Noble consistently with article 12(4) of the Convention and helped to 'achieve a safe and secure environment for all Western Australians by protecting the public and minimising violence in the community' (at [47]). It argued that the decision of the District Court of Western Australia in 2003 to impose a custody order on Noble was made after a careful weighing and balancing of relevant factors, was not arbitrary and had been subject to periodic review.

The federal government noted that Noble was 'regularly apprised of the length of time for which he would be detained in the knowledge that when the next review occurred the Review Board would reconsider the necessity of his detention' (at [57]). It asserted that torture requires severe pain or suffering, whether physical or mental and that, while cruel, inhuman or degrading treatment or punishment engages a lower threshold of harm, it still requires severity of treatment. It contended that the Committee had failed to apply these thresholds. In light of the fact that it disagreed that it had breached the Convention, it declined to pay reimbursement of legal costs for Noble, pay compensation or immediately revoke conditions on his conditional release order and all necessary support measures for his inclusion in the community. Nevertheless, it stated that the Government of Western Australia was committed to providing Noble with 'support through the various agencies overseeing his case with a view to helping him to live independently in the community. The Government of Western Australia will give due consideration, on its merits, to any further request for assistance' (at [60]). It noted that the Western Australian government was committed to a suite of reforms to the MID Act on the basis of its review.

Review of the Western Australian Legislation

The Department of the Attorney-General tabled its review on the Criminal Law

(Mentally Impaired Accused) Act 1996 (WA) in April 2016.²⁴ There had been expectations that the report would recommend fundamental changes to the MID Act to address issues raised by the Noble communication. In 2015, Western Australia's Chief Justice, Wayne Martin, observed that there had been notorious cases in which people found unfit to stand trial had been detained in custody for longer than they would had they been convicted: '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'.²⁵ He expressed the view: 'I think there is much to be said for having an independent judicial officer continuing to review whether detention is necessary for the protection of the community, in much the same way we conduct regular reviews of people under the dangerous sexual offender legislation'.²⁶

However, the review did not recommend the implementation of a special hearing system or substantive change to indefinite detention of persons found unfit to stand trial. It concluded that:

any trial process requiring the participation of an accused who is mentally unfit to stand trial would be intrinsically flawed. The Report notes that while there appears to be some merit in expanding on the requirement for the Court to consider the strength of the evidence against the accused, requiring an accused who has been found unfit to stand trial to undergo a trial process cannot be justified by the limited potential benefits of introducing such a system. Rather, concerns in respect of the proper consideration of the case against the accused should be addressed by requiring the Court to conduct an inquiry into whether, on the facts before it, there is a case to answer.

The review proposed substantial retention of the definition of unfitness, subject to an amendment to include additional criteria

regarding the ability of an accused person to instruct counsel, to decide whether to give evidence and to give evidence if they wish to do so (Recommendation 6). It proposed that judges be enabled to make orders to facilitate an accused person to participate in proceedings with appropriate support: 'This should include a non-exhaustive list of special measures which the court may consider putting in place' (Recommendation 8).

The review recommended expansion of the disposition options for juvenile mentally impaired accused found not guilty by reason of unsound mind or who are mentally unfit to stand trial. It also proposed that in addition to the existing power to cancel conditional release orders and leave of absence orders, the Review Board be provided with the power to affirm, amend or suspend the order (Recommendation 30). Controversially, it proposed that absent the 'ready availability of sufficient secure places in either hospital or a declared place', prison should be retained as a place of custody (Recommendation 23). It also concluded that there was insufficient basis for recommending changes to mandatory custody orders in light of the key objective of ensuring community safety. The review concluded that the introduction of a fixed-term custody order (based on the sentence of an unimpaired offender who has been convicted) was problematic from the perspective of community safety, in light of the risk that a mentally impaired accused may be released before they are ready to reintegrate into the community:

the indefinite custody order would appear to be preferable since it recognises that the time an individual accused requires to safely reintegrate into the community varies from person to person. This is consistent with both the community protection and therapeutic objectives of the *Criminal Law (Mentally Impaired Accused) Act 1996*.

As such, the Report makes no recommendation to change the current arrangements in respect of the indefinite nature of custody

orders. However, given the high level of stakeholder engagement in this issue, it is recommended that a working group be established specifically to review the operation of indefinite custody orders under the Act (Recommendation 16).

The report did not take up the submissions of the Law Society of Western Australia²⁷ which had argued that:

- The criteria for unfitness to stand trial should focus on the ability of the defendant to make rational decisions in order to participate effectively in a trial.
- Mechanisms should be implemented to ensure that defendants who would otherwise be determined unfit to stand trial are provided with adequate supports to be able to stand trial.
- The MID Act should be amended to place limits on the period of custody orders for persons detained after being found unfit to stand trial.
- The period of detention for a person found unfit to stand trial should not exceed the period which the court determines the person would have been detained if convicted.
- Courts should be empowered to conduct regular periodic reviews of detention orders for defendants determined to be unfit to stand trial, ideally every six months or automatically every two years.
- The MID Act should be amended to enable a court to make a supervision release order for a person determined unfit to stand trial and regularly review such orders: 'Such supervision should include support programmes and supervision in a safe, therapeutic environment, rather than detention'.

The Western Australian Association for Mental Health lamented that the review did not effectively address the MID Act's 'most serious human rights abuses'.²⁸

Human rights concerns regarding the incarceration of Indigenous Australians with cognitive disability had also previously been addressed by the Australian Human Rights Commission in its Report on Malcolm Morton, Christopher Leo, Kerry Doolan and Anthony Jabaltjari Scotty.²⁹ These four men had been imprisoned after 'special hearings' under the equivalent Northern Territory legislation. When ordering Leo's imprisonment, the Chief Justice of the Northern Territory said:

Custody in a gaol is quite inappropriate for people like Mr Leo and they cannot receive the necessary treatment and support that should be available to them and would be available to them if an appropriate facility to house these people existed in the Territory. The need for that facility is acute and growing rapidly.³⁰

However, the Chief Justice also noted, in ordering Mr Doolan's imprisonment, that while residence in a correctional centre was 'not the ideal locality for Mr Doolan and others like him', it was 'the only practical solution' at the time his custodial supervision order was made because a suitable residential facility had yet to be constructed. The Northern Territory had previously acknowledged that an appropriate, safe and therapeutic environment oriented toward rehabilitation and community reintegration was needed.

The Community Affairs References Committee Report

In November 2016, the Community Affairs References Committee of the Australian Senate tabled its report on 'Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia'.³¹ It expressed the view 'that there is potentially a large group of people who, in the normal course of events would be found unfit to plead, but in an effort to avoid indefinite detention in prison are choosing to plead guilty, even to crimes they have not committed. The committee is concerned that these people's cognitive and/or

psychiatric impairments are being criminalised and that they are not being provided with access to appropriate supports' (at [3.31]). It recommended that 'appropriate resources should be allocated to expand these programs to reach all people likely to be subject to forensic orders' (at [3.38]).

It recommended that the Council of Australian Governments (COAG) ensure a consistent legislative approach with respect to limiting terms for forensic patients in all Australian jurisdictions (Recommendation 17) and that the Western Australian and Northern Territory governments transition forensic patients currently held in prison to the relevant secure care forensic facility in each state as a matter of urgency (Recommendation 26).

Conclusions

The critique by the United Nations Committee on the Rights of Persons with Disabilities of the systems which enabled Marlon Noble to be detained in a Western Australian prison for over a decade after being found unable to stand trial for sexual assaults is far from standing on its own. Social Justice Commissioner Mick Gooda observed that: 'The conditions attached to his release read like a lifetime punishment but it is for someone who has never been found guilty of anything. For example, he is not allowed to stay anywhere other than his own place without the permission of the West Australian Mentally Impaired Accused Review Board, something which will prevent him from travelling to visit the grave of his mother who was murdered while he was in jail unless he has the Board's permission'.³² Gooda argued that: 'We can never give Marlon Noble back the years wasted in prison but we must give him the chance to clear his name and change the laws and the system to make sure people with disabilities are not locked away in prison for lengthy periods for crimes for which they have never been convicted'.³³ Similarly, Disability Discrimination Commissioner Graeme Innes has asserted that the law needs to be

reformed so that what happened to Mr Noble never happens to anyone ever again: ‘Marlon Noble lost a decade of his life due to Western Australia’s laws on the treatment of people with cognitive disabilities facing criminal charges’.³⁴

There are significant numbers of persons, mostly Indigenous, in the same kind of plight as Marlon Noble. Disability Commissioner McEwin has expressed the view that there may be 30–40 Indigenous people languishing in Western Australian and Northern Territory prisons.³⁵ The First Peoples Disability Network Australia estimates the number as possibly higher.³⁶

Troublingly, though, the response of both the federal and Western Australian State governments has been obdurate. Neither has accepted the legitimacy of the concerns raised by the Committee and neither has committed to legal process reform. Rather, the two governments have acknowledged the existence of criticisms but either persisted in repudiating the reasoning behind them or advocated adherence to the substance of the current Western Australian legislation and the practices deriving from it.

It is significant that the criticisms from the prestigious United Nations Committee were searing, even including a finding that the practice of retaining a person with intellectual disability in prison long-term amounted to inhuman and degrading conduct in violation of Australia’s obligation under the United Nations Convention on the Rights of Persons with Disabilities. This went further than a finding of ‘mere’ disability discrimination and constitutes a landmark and embarrassing castigation of human rights practices in Australia. That the federal government should choose to stand with the Western Australian government in rejecting such concerns and rejecting the moral authority of the United Nations Committee on the Rights of Persons with Disabilities places Australia in the category of States that are not prepared to commit in substance to the protection of their citizens’ human rights. It is difficult to accept that such practices are consistent

with the United Nations Convention on the Rights of Persons with Disabilities and, in particular, with modern international approaches to the treatment of persons with intellectual disabilities.

Notes

1. (2003) 214 CLR 318 at [114].
2. (2003) 214 CLR 318 at [62].
3. P Gooding and others, ‘Unfitness to Stand Trial and the Indefinite Detention of Persons of Persons with Cognitive Disabilities in Australia: Human Rights Challenges for Proposals for Change’ [2017] Melbourne University Law Review 816.
4. See I Freckelton, ‘Fitness to Stand Trial in Australia’ in W Brookbanks and R Mackay (eds), *Fitness to Plead: International and Comparative Perspectives* (OUP, Oxford 2018, in press).
5. 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.
6. (2004) 79 ALJR 116 at [40].
7. However, see the recommendations for such a procedure in Law Reform Commission of Western Australia, *The Criminal Process and Persons Suffering from Mental Illness*, WALRC 69 (WALRC, Perth, 1991), at [4.10]. See also S O’Toole, J O’Leary and BD Watt, ‘Fitness to Plead in Queensland’s Youth Justice System: The Need for Pragmatic Reform’ (2015) 39(1) Criminal Law Journal 40.
8. See too P Keyzer and D O’Donovan, ‘Imprisonment of Indigenous People with Cognitive Impairment: What Do Professional Stakeholders Think? What Might Human Rights-Compliant Legislation Look Like?’ (2015) 22 Indigenous Law Bulletin 16; W Brookbanks and R Mackay (eds), *Fitness to Plead: International and Comparative Perspectives* (OUP, Oxford 2018, in press).
9. Documentary Australia Foundation, ‘Held Without Trial – The True Story of Marlon Noble’ <<http://www.documentaryaustralia.com.au/films/817/held-without-trial—the-true-story-of-marlon-noble>>, accessed 20 October 2017.

10. This campaign was led by 'Unfinished Business' <<http://unfinishedbusiness.net.au/portfolio/marlon-noble-2/>>, accessed 20 October 2017 and the Aboriginal Disability Justice Campaign, now Australians for Disability Justice, and the First Peoples Disability Network. In September 2012, M Sotiri, P McGee and E Baldry published a report called 'No End in Sight: The Imprisonment, and Indefinite Detention of Indigenous Australians with a Cognitive Impairment', on behalf of the Aboriginal Disability Justice Campaign. A constitutional challenge to the Western Australian and Northern Territory equivalent laws was explored. In 2014 a summit was held in Melbourne called 'The Line in the Sand' to develop policy responses to the problem. See P Keyzer and D O'Donovan, 'Imprisonment of Indigenous People with Cognitive Impairment: What do Professional Stakeholders Think? What Might Human Rights-Compliant Look Like?' (2016) 8 Indigenous Law Bulletin 17; see also F McGaughey, T Tulich and H Blagg, 'UN Decision on Marlon Noble Case: Imprisonment of an Aboriginal Man with Intellectual Disability Found Unfit to Stand Trial in Western Australia' (2017) 42 Alternative Law Journal 67; P Keyzer, J Johnston and M Pearson (eds), *Courts and the Media in the Digital Era: Challenges in the Era of Digital and Social Media* (Halstead Press, Sydney 2012).
11. The Law Report, 'Marlon Noble' (22 March 2011) <<http://www.abc.net.au/radionational/programs/lawreport/marlon-noble/3007682>>, accessed 20 October 2017.
12. M Ridley, 'Doctors Call for Release of Disabled Prisoner' *The West Australian* (26 September 2011) <<https://thewest.com.au/news/australia/doctors-call-for-release-of-disabled-prisoner-ng-ya-149710?r=1>>, accessed 20 October 2017.
13. See R Cock QC, Special Counsel to the Premier, 'Report to the Minister for Corrective Services on Mr Marlon Noble' (7 June 2011) <[http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3813779a43f34a6e5328b2e6482578f000254715/\\$file/3779.pdf](http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3813779a43f34a6e5328b2e6482578f000254715/$file/3779.pdf)>, accessed 20 October 2017.
14. See Keyzer and O'Donovan (n).
15. Since *Tillman v Australia* (2010/No 1637), it has been accepted that if a person's appeal within the Australian court system is regarded to be doomed to fail, in the opinion of a senior counsel and a professor of law, that this will be relevant to the Committee's conclusion that the complainant has exhausted their domestic remedies. To hold that a person must exhaust their human remedies in the High Court, which has no jurisdiction to enforce human rights principles beyond those enshrined in statute, would require litigants to advance human rights cases that are doomed to fail. To do that would require Australian lawyers to engage in unethical behaviour.
16. In *Fardon v Australia* (2010/No 1629), the United Nations Human Rights Committee held that detention of a person in prison without a prior finding of criminal guilt was arbitrary detention and therefore contrary to Article 9 of the International Covenant on Civil and Political Rights.
17. *Noble v Australia* (September, 2016) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Noble-v-Australia-Views-of-2-September-2016.PDF>>, accessed 20 October 2017. It comprised Mohammed Al-Tarawneh, Danlami Umaru Basharu, Mnthian 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. There was also an individual opinion by Committee member Damjan Tatić.
18. *Noble v Australia*, Decision by the United Nations Committee on the Rights of Persons with Disabilities, 2 September 2016 at [8.4].
19. *Noble v Australia* at [8.6].
20. *Noble v Australia* at [8.7].
21. *Noble v Australia* at [8.8].
22. *Noble v Australia* at [8.9].
23. <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>>, accessed 20 October 2017.
24. <[http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914071ad16451df7e0990bf48257f8e000e532a/\\$file/4071.pdf](http://www.parliament.wa.gov.au/publications/tabledpapers.nsf/displaypaper/3914071ad16451df7e0990bf48257f8e000e532a/$file/4071.pdf)>, accessed 20 October 2017.
25. "'Urgent Need" for Law Change as Mentally-Impaired Accused Detained Indefinitely, WA Chief Justice Wayne Martin Says' *ABC News* (10 July 2015) <<http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010>>, accessed 20 October 2017.
26. "'Urgent Need'" (n 25).

27. <<https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/Law-Society-Briefing-Papers-Mentally-Impaired-Accused.pdf>>, accessed 20 October 2017.
28. WAAMH, 'Government's CLMIA Review Report Does Not Fare Well Against Reform Priorities' <<https://waamh.org.au/news/governments-clmia-review-report-does-not-fare-well-against-reform-priorities.aspx>>, accessed 20 October 2017.
29. Australian Human Rights Commission, 'Notice under s29 of the Australian Human Rights Commission Act 1986 (Cth)' <<http://www.pwd.org.au/documents/adjc/2014/140829-Notice%20s29.pdf>>, accessed 20 October 2017.
30. *The Queen v Leo* [2009] NTSC 61.
31. <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/IndefiniteDetention45/~/_media/Committees/clac_ctte/IndefiniteDetention45/report.pdf>, accessed 20 October 2017.
32. Australian Human Rights Commission, 'Marlon Noble Must be Given a Chance to Clear His Name' (9 January 2012) <<https://www.humanrights.gov.au/news/stories/marlon-noble-must-be-given-chance-clear-his-name-2012-news>>, accessed 20 October 2017.
33. Australian Human Rights Commission (n 32).
34. Australian Human Rights Commission (n 32).
35. A McEwin, 'Equal Before the Law? How the Criminal Justice System is Failing People with Disability' (27 September 2016) Australian Human Rights Commission <<https://www.humanrights.gov.au/news/speeches/equal-law-how-criminal-justice-system-failing-people-disability>>, accessed 20 October 2017; see too Australian Human Rights Commission (n 32); G Georgatos, 'Marlon Noble, Rosie Anne Fulton – But What About the Others?' *The Stringer* (23 March 2014) <<http://thestringer.com.au/marlon-noble-rosie-anne-fulton-but-what-about-the-others-6945#.WYBnd62B2L8>>, accessed 20 October 2017 and see also Emma Henderson and Nicole Shackleton, 'Minority Rights Advocacy for Incarcerated Indigenous Australians: The Impact of Article 27 of the ICCPR' (2016) 41 *Alternative Law Journal* 244–48.
36. 'Australia Violated Rights of an Intellectually Disabled Man: UN Committee' PM (23 September 2016) <<http://www.abc.net.au/pm/content/2016/s4544613.htm>>, accessed 20 October 2017.

Disclosure Statement

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