Unfitness to Stand Trial: The Indefinite Detention of Persons with Cognitive Disabilities in Australia and the United Nations Convention on the Rights of Persons with Disabilities

6

Piers Gooding,*
Sarah Mercer,**
Eileen Baldry*** and
Anna Arstein-Kerslake****

Unfitness to stand trial laws in Australia potentially help accused persons with cognitive disabilities avoid unfair trials – in particular by avoiding proceedings in which they cannot participate. Yet such laws can create a separate and lesser form of justice that undermines due process rights and substantive equality. Moreover, unlike those tried and convicted, persons deemed unfit to stand trial may be indefinitely detained, potentially for longer than would follow a typical trial. Unequal treatment of this kind appears to violate fundamental rights enshrined in domestic and international human rights law; namely, rights to equal recognition before the law, access to justice, and liberty and security of the person. This article briefly outlines these issues with particular consideration of Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD'). It also outlines a program of formal support being developed for accused persons with cognitive disabilities in three Australian jurisdictions by researchers at the University of Melbourne and the University of New South Wales.

I INTRODUCTION

Laws on unfitness to stand trial – despite being framed as protective in nature – can have adverse consequences for accused persons with cognitive disabilities.[1] Unfitness to stand trial laws allow courts to determine that a person cannot participate in or understand the criminal trial proceedings brought against him or her. A number of high-profile cases

* Dr Piers Gooding is a Post-Doctoral Research Fellow at the Melbourne Social Equity Institute and Disability Research Initiative, University of Melbourne.

** Ms Sarah Mercer is a JD graduate of the Melbourne Law School and Research Assistant at the Melbourne Social Equity Institute for the Unfitness to Stand Trial project.

*** Eileen Baldry is a Professor of Criminology and Academic Chair, NSW Equity, Diversity and Inclusion Board at UNSW and a Chief Investigator for the Unfitness to Stand Trial project.

**** Dr Anna Arstein-Kerslake is a lecturer at the Melbourne Law School, Founding Director of the Human Rights Law Clinic, and Academic Co-ordinator of the Disability Research Initiative at the University of Melbourne. She is also a Chief Investigator for the Unfitness to Stand Trial project.

1. The term 'cognitive disabilities' is used broadly here to refer to mental health-related disability, intellectual disability, acquired brain injury, communication disabilities, etc. Although not used in the *UNCRPD*, this term is increasingly used elsewhere in the disability and human rights field. See, eg, Anna Arstein-Kerslake, 'An Empowering Dependency: Exploring Support for the Exercise of Legal Capacity' (2014) 18 *Scandinavian Journal of Disability Research* 1; Eileen Baldry et al, 'A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System', (IAMHDCD Project Report, UNSW, October 2015) 31.

have highlighted the laws' potentially inequitable outcomes. For example, a 14-year-old Indigenous teenager from Western Australia, 'Jason', was reported to have been detained for over 11 years after he was found unfit to stand trial for a charge of manslaughter.[2] Comparable sentences for juvenile detention were three to four years following conviction.[3] In 2014, the Australian Human Rights Commission reported that the Commonwealth and Northern Territory governments violated the rights of two Indigenous men who were detained indefinitely in the Alice Springs Correctional Centre after being found unfit to plead.[4]

Law reform efforts across Australia in recent years have sought to address concerns with unfitness to stand trial laws.[5] One factor influencing these efforts is Australia's ratification of the *UNCRPD*[6] in 2007. A common recommendation of reformers, drawing upon the *UNCRPD*, is to introduce formal support for accused persons with disabilities to enhance participation in criminal proceedings.

A number of initiatives are underway to develop such support, including a cross-jurisdictional research initiative that aims to develop solutions in law, policy and practice to assist accused persons with cognitive disabilities at risk of being unable to participate in criminal

2. `"Urgent Need" For Law Change as Mentally-Impaired Accused Detained Indefinitely, WA Chief Justice Wayne Martin Says' *ABC News* (online), 10 July 2015 <http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010>.
3. See, eg, *R v S (a child) (No 2)* (1992) 7 WAR 434; *R v T (a child)* (1993) 17 MVR 100.
4. *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80.
5. Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* (2014); New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences,* Report No 138 (2013); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws,* Report No 124 (2014). See also Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (2013); Department of the Attorney General (WA), `Review of the Criminal Law (Mentally Impaired Accused) Act 1996' (Final Report, Department of the Attorney General (WA), April 2016).
6. Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) 3–5; Victorian Law Reform Commission, above n 5, 30; New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No 135 (2012) 34; Department of the Attorney General (WA), above n 5, 73–4.

proceedings.[7] The project is being led by researchers at the University of Melbourne and the University of New South Wales, in partnership with community legal centres in three Australian jurisdictions. The project has a strong focus on the provision of assistance to Indigenous accused persons with cognitive disabilities who are disproportionately subject to unfitness to stand trial determinations.

II UNFITNESS TO STAND TRIAL: KEY ISSUES

Unfitness to stand trial laws have been described as having the purposes of protecting 'the integrity of a criminal trial (and, arguably, the criminal law itself)' which would 'be prejudiced if the defendant does not have the ability to understand and participate in a meaningful way'.[8] Australian unfitness to stand trial laws are framed as a protective measure to shield an accused with cognitive disabilities from unfair trials,[9] while at the same time ensuring efficient proceedings (by diverting the person to relevant services), and seeking community protection.[10]

The unfitness to stand trial doctrine has been adopted in every Australian jurisdiction.[11] The current test for unfitness was articulated in the case of *R v Presser*,[12] which has since been codified into legislation in most jurisdictions or incorporated implicitly through the common law.[13]

7. Melbourne Social Equity Institute, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Impairments: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (17 November 2015) The University of Melbourne <http://socialequity.unimelb.edu.au/research/projects/disability-and-mental-health/unfitness-to-plead>.
8. Australian Law Reform Commission, Report No 124, above n 5, 73.
9. Thomson Reuters, *The Laws of Australia* (at 1 November 2013) 9 Mental Impairment (Insanity) and Fitness to Plead, '3 Fitness to be Tried' [9.3.1950].
10. Department of the Attorney General (WA), above n 5, 36 [54]. Here it is considered to be the paramount purpose of the unfitness to stand trial scheme.
11. *Crimes Act 1900* (ACT) pt 13; *Crimes Act 1914* (Cth) pt IB div 6; *Mental Health (Forensic Provisions) Act 1900* (NSW) pt 2; *Criminal Code Act* (NT) sch 1 pt 2A div 3; *Mental Health Act 2000* (Qld) pt 6; *Criminal Law Consolidation Act 1935* (SA) pt 8A Div 3; *Criminal Justice (Mental Impairment) Act 1999* (Tas) pt 2; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) pt 2; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) pt 3.
12. [1958] VR 45.
13. See *Crimes Act 1900* (ACT) s 311; *Crimes Act 1914* (Cth) Pt IB Div 6; *Criminal Code Act* (NT) s 43J; *Criminal Law Consolidation Act 1935* (SA) s 269H; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 9; *R v Taylor*

Unfitness to Stand Trial
Piers Gooding, et al

The test considers the accused person's ability to:

1. Understand the nature of the charge;
2. Plead to the charge and exercise the right of challenge;
3. Understand the nature of the proceedings;
4. Follow the course of the proceedings;
5. Understand the substantial effect of any evidence that may be given in support of the prosecution; and
6. Make a defence or answer the charge.[14]

The Australian Law Reform Commission raised concerns that the *Presser* criteria did not take into account the 'possible role of assistance and support for defendants'.[15] This recommendation was echoed by the New South Wales Law Reform Commission[16] and the Victorian Law Reform Commission.[17] While the test of unfitness is largely the same throughout Australia, jurisdictions differ in the alternative procedures that follow, including options for disposition.

A *Procedures after a finding of unfitness*

Once a determination of unfitness has been made, most jurisdictions[18] provide 'special hearings' to test the merits of the charge against the accused. 'Special hearings' are essentially truncated trials designed to ensure that an individual's liberty is not restricted without proper

[2014] SASCFC 112 [9]; *Kevasarajah v R* (1994) 181 CLR 230, 243–5; *R v Gallagher* [2012] NSWSC 484 [11]; *Berg v DPP (Qld)* [2015] QCA 196 [54].

14. *Kesavarajah v R* (1994) 181 CLR 230, 245.
15. Australian Law Reform Commission, Discussion Paper No 81, above n 6, 163 [7.32].
16. New South Wales Law Reform Commission, *Criminal Responsibility and Consequences*, above n 5, 35.
17. Victorian Law Reform Commission, above n 5, 87 [3.116], 89.
18. Australian Capital Territory, New South Wales, Victoria, South Australia, Tasmania and Northern Territory. *Crimes Act 1900* (ACT) s 316; *Mental Health (Forensic Provisions) Act 1900* (NSW) s 21; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 16; *Criminal Law Consolidation Act 1935* (SA) s 269M; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16; *Criminal Code Act 1983* (NT) s 43W.

basis.[19] At the Commonwealth level there is no provision for 'special hearings', although the judge must consider that a prima facie case has been established.[20] Queensland and Western Australia do not require 'special hearings'. In Queensland the accused person is referred to a mental health court.[21] In Western Australia however, before making a custody order, the judge needs only to be satisfied that it is appropriate to do so having regard to, among other factors, 'the strength of the evidence against the accused'.[22] However, this often involves only cursory consideration of the evidence.[23]

In all jurisdictions, even those seen as having the most up-to-date laws, concerns have been raised that the procedures following a finding of unfitness to stand trial do not secure due process rights on an equal basis with others.[24] Potential disadvantages include a lack of the full range of defences and less opportunities to test the prosecution's case.[25] In New South Wales, for example, an accused person with cognitive disabilities, who is determined to be unfit to stand trial, is assumed to have pleaded not guilty in relation to the charge which removes the benefits of entering an early guilty plea in sentence mitigation.[26]

19. See, eg, *Mental Health (Forensic Provisions) Act 1900* (NSW) s 19. In *Subramaniam v R* (2004) 211 ALR 1, 12 [40], the High Court explained that the purpose of these hearings is:

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

20. *Crimes Act 1914* (Cth) s 20B(3).
21. *Mental Health Act 2000* (Qld) s 257.
22. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(6)(a), 19(5)(a).
23. *Western Australia v Tax* [2010] WASC 208 [3] (Martin CJ)*; Western Australia v Stubley [No 2]* [2011] WASC 292 [19].
24. See Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment' (Report, Aboriginal Disability Justice Campaign, September 2012); Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) 23 *Griffith Law Review* 357, 370–88.
25. Anna Arstein-Kerslake et al, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' *Human Rights Law Review* (forthcoming); Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' *Melbourne University Law Review* (forthcoming).
26. Kerri Eagle and Andrew Ellis, 'The Widening Net of Preventative Detention and the Unfit

B *Dispositions*

Dispositions available following a finding of unfitness to stand trial differ between jurisdictions. Dispositions include custodial orders or non-custodial supervision orders. Non-custodial supervision orders often include conditions aimed at rehabilitation through medical treatment, counselling and other forms of service provision.

Custodial orders vary considerably across Australia. Some jurisdictions allow for indefinite detention 'until released by order of the Governor'[27] (Western Australia) or a mental health tribunal (Tasmania and Queensland),[28] while others provide for 'nominal terms' (Northern Territory and Victoria),[29] where the accused is brought back after a specified term for 'major review'.[30] The third model of custodial disposition is a limiting term (New South Wales and South Australia),[31] which is based on 'the best estimate of the sentence the court would have considered appropriate' had they been tried and 'found guilty of that offence'.[32] This seemingly avoids the potential for indefinite detention on the basis of impairment and the risk that an innocent accused would prefer to plead guilty than face indefinite detention.[33] However, even in New South Wales, health authorities may apply for extensions of custodial orders,[34] meaning the spectre of indefinite detention remains.

Uniquely, the Commonwealth unfitness to stand trial law was drafted with the express intention of abolishing indefinite detention,[35] and ap-

for Trial' (2016) 90 *Australian Law Journal* 172.

27. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 24(1).
28. Tasmania and Queensland. See *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37; *Mental Health Act 2000* (Qld) s 200.
29. *Criminal Code Act 1983* (NT) s 43ZG; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 28(1).
30. *Criminal Code Act 1983* (NT) s 43ZG; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 35.
31. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 269O(2).
32. Ibid s 23(1)(b).
33. Suzie O'Toole, Jodie O'Leary and Bruce D Watt, 'Fitness to Plead in Queensland's Youth Justice System: The Need for Pragmatic Reform' (2015) 39 *Criminal Law Journal* 40, 42.
34. See *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1.
35. Commonwealth, *Parliamentary Debates*, House of Representatives, 5 October 1989, 1603 (Robert Brown, Minister for Land Transport and Shipping) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=-CHAMBER;id=chamber%2Fhansardr%2F1989-10-05%2F0124;query=Id%3A%22chamber%2Fhansardr%2F1989-10-05%2F0000%22>.

pears to provide for a truly definite term that must not exceed the maximum period that could have been imposed following conviction of the original charge.[36] However, judicial scrutiny of this provision is lacking.

III REFORM TRENDS: PROCEDURAL FAIRNESS, SUBSTANTIVE EQUALITY AND ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

Law reform commissions and other commentators have recognised that an ideal outcome for accused persons with disabilities is to proceed to the normal criminal trial process whenever possible. The Australian Human Rights Commission has stated that a full trial is 'best not just for the defendant, but also for those affected by an offence and society more generally'.[37] Further:

> It is in a defendant's interests to participate in the full trial process because it includes procedural protections, but also because of the adverse consequences if found unfit to stand trial, including the real risk of indefinite detention.[38]

The Commission made a series of recommendations in its submission to a 2016 Senate *Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment In Australia* ('the Inquiry').[39] The Inquiry marks a recent addition to increasing law and policy reform activity related to disability in Australia in recent years. The *UNCRPD* is an important driver in this trend, and can be seen to have given greater impetus and legitimacy to the national focus on disability.

Concerns have been raised that unfitness to stand trial laws across Australia contravene a number of articles of the *UNCRPD* by virtue of creating a separate and lesser form of justice for persons with cognitive disabilities.[40] It is outside the scope of this brief article to detail these

36. *Crimes Act 1914* (Cth) s 20BC(2).
37. Australian Human Rights Commission, Submission No 6 to the Senate Community Affairs References Committee, *Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, March 2016, 16–17 [62].
38. Ibid 17 [62].
39. Ibid 5–6.
40. Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, CRPD/C/AUS/CO/1 (21 October 2013) 4 [31]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Brazil*, UN Doc CRPD/C/BRA/CO/1 (29 September 2015) 4 [30].

concerns, which have been elaborated upon elsewhere.[41] In summary, concerns have been raised that unfitness to stand trial laws violate the prohibition of discrimination on the basis of a disability,[42] the right to equal recognition before the law,[43] the right of access to justice,[44] and the right to liberty and security of the person.[45] The forced medical treatment that can follow findings of unfitness may also violate a number of rights set out in the *UNCRPD*.[46]

The United Nations Committee on the Rights of Persons with Disabilities, an independent body of experts appointed by 'States Parties' to the *UNCRPD* to monitor the implementation of the *UNCRPD,* has released a statement calling on States Parties such as Australia to remove declarations of unfitness to stand trial from their criminal laws.[47] The Committee raised particular concerns with provisions permitting indefinite detention on the basis of disability.[48]

The positive obligations set out in the *UNCRPD* dovetail with calls to increase support measures to enable persons with disabilities to access justice on an equal basis with others.[49] These obligations include the

41. See Piers Gooding et al, `Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40(3) *Melbourne University Law Review* (forthcoming); Piers Gooding, Sarah Mercer, Bernadette McSherry and Anna Arstein-Kerslake, `Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings in Australia – Avoiding the Pitfalls of Unfitness to Stand Trial Laws' (forthcoming); Anna Arstein-Kerslake, Piers Gooding, Louis Andrews and Bernadette McSherry, `Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (forthcoming).
42. *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) arts 2, 3, 5.
43. Ibid art 12.
44. Ibid art 13.
45. Ibid art 14.
46. Ibid arts 14, 17, 25.
47. Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, CRPD, 14th sess (adopted 17 August–4 September 2015) [16]. See also Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Ecuador*, UN Doc CRPD/C/ECU/CO/1 (27 October 2014) [29(b)]; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Republic of Korea*, UN Doc CRPD/C/KOR/CO/1 (29 October 2014) [28].
48. Committee on the Rights of Persons with Disabilities, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities*, CRPD, 14th sess (adopted 17 August–4 September 2015) [20].
49. See also Stephanie Ortoleva, `Inaccessible Justice: Human Rights, Persons with

provision of support to exercise legal capacity[50] and 'procedural and age-appropriate accommodations' to access justice on an equal basis with others.[51] Such 'positive liberties' give greater impetus to courts to modify proceedings and provide supports to improve accessibility. As noted, the current test for unfitness to stand trial does not incorporate a requirement to ensure supports to 'optimise' a person's fitness to stand trial, as has been recommended by the Australian Law Reform Commission, the Victorian Law Reform Commission and the New South Wales Law Reform Commission.[52] The Victorian Law Reform Commission noted that '[t]he importance of support measures in the unfitness to stand trial process was one of the strongest themes to come out of the Commission's review' of the issue.[53] Further, support measures can 'optimis[e] an accused's fitness where they might otherwise be unfit'[54] and yet 'support measures … are not necessarily considered, provided or available'.[55] Importantly, no such support measures have been evaluated in Australia.

While unfitness to plead applies to persons with cognitive disabilities accused of indictable offences, a form of indefinite detention can be imposed on people accused of lesser offences. Roseanne Fulton experienced this form of detention (indefinite remand) for driving offences. Indigenous Australians experience this type of detention disproportionately.[56]

IV THE UNFITNESS TO STAND TRIAL PROJECT'S SUPPORTED DECISION-MAKING MODEL

Researchers at the University of Melbourne and the University of New South Wales have collaborated with several community legal

Disabilities and The Legal System' (2011) 17 *ILSA Journal of International & Comparative Law* 282; Eilionoir Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons with Disabilities* (Ashgate, 2015) 11–16.

50. *UNCRPD* art 12(3).
51. Ibid art 13.
52. See New South Wales Law Reform Commission, *Criminal Responsibility and Consequences*, above n 5, 20–1 [2.22]–[2.28]; Victorian Law Reform Commission, above n 5, 89 [3.124]–[3.125]; Australian Law Reform Commission, Report No 124, above n 5, 199–200 [7.35]–[7.40].
53. Victorian Law Reform Commission, above n 5, 89 [3.124].
54. Ibid.
55. Ibid 89 [3.125].
56. Sotiri, McGee and Baldry, above n 23; Baldry, above n 23, 370–88.

centres across Australia to develop and evaluate a model of support for accused persons with cognitive disabilities at risk of being deemed unfit to stand trial ('Unfitness to Stand Trial project').[57] The project aims to analyse the social, legal and policy issues that lead to unfitness to stand trial determinations and indefinite detention. The project will have a specific focus on Indigenous people, who are disproportionately affected by unfitness to stand trial laws. Not only are Aboriginal and Torres Strait Islanders over-represented in the criminal justice system, they are also more likely to experience cognitive disabilities. The Australia-wide incarceration rate for Aboriginal and Torres Strait Islander prisoners aged 18 years and over is 27 per cent, whereas the total Aboriginal and Torres Strait Islander population aged 18 years and over in 2015 was approximately two per cent of the Australian population aged 18 years and over.[58]

The researchers will make recommendations for law and policy, including proposals for good practice models in supported decision-making for accused persons with disabilities. As noted, despite recommendations from three major law reform agencies to introduce formal support for accused persons with cognitive disabilities to prevent unfitness determinations,[59] no such measures have been implemented in any Australian jurisdiction. This project seeks to address this gap. It will develop and implement a support program, working within three community legal centres – namely, the Intellectual Disability Rights Service (New South Wales), the Victorian Aboriginal Legal Services (Victoria), and the North Australian Aboriginal Justice Agency (Northern Territory) – to provide assistance to accused persons with cognitive disabilities at risk of being deemed unfit to stand trial or being unable to participate in proceedings against them. This practical research will be combined with an investigation into the broader requirements of international human

57. This project is jointly funded by Commonwealth, state and territory governments under the National Disability Special Account, administered by the Department of Social Services on behalf of the Commonwealth, state and territory Research and Data Working Group.
58. Australian Bureau of Statistics, '4517.0 – Prisoners in Australia' (11 December 2015) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~7>.
59. See New South Wales Law Reform Commission, Report No 138, above n 5, 35 [2.86] (recommendation 2.2); Victorian Law Reform Commission, above n 5, 89 [3.126] (recommendation 18); Australian Law Reform Commission, Report No 124, above n 5, 17 (recommendation 7–1).

rights law on unfitness to stand trial laws, and ways to improve procedural protections and substantive equality for persons with disabilities in the criminal justice system.

V CONCLUSION

At a minimum, Australia's obligations under international human rights law require the availability of effective support for accused persons at risk of being deemed unfit to stand trial or being unable to participate in proceedings against them due to disability. Such steps will facilitate equal recognition before the law, access to justice and freedom from deprivation of liberty on the basis of disability. The Unfitness to Stand Trial project will offer evidence-based law and policy reform recommendations to better ensure participation by persons with disabilities in the criminal justice system on an equal basis with others.