Case summary:[[1]](#footnote-1) *Marlon Noble v Australia*

Case code: CRPD/C/16/D/7/2012

Communication no 7/2012

Date of communication (initial submission): 12 April 2012

Date of adoption of Views: 2 September 2016

Invoked provisions of the Convention: Articles [5](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5), [12](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12), [13](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#13), [14 (1) (b)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#14), [14 (2)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#14) and [15](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#15)

Provisions of the Optional Protocol: Articles [1](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx), [2 (d), (e) and (f)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx)

Keywords: Access to court, mental and intellectual disability, exercise of legal capacity, deprivation of liberty, discrimination on the ground of disability, restrictions of rights

Decision: Violation of Articles [5 (1) and (2)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5), [12 (2) and (3)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12), [13 (1)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#13), [14 (1) (b)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#14), and [15](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#15) of the Convention

Full decision in HTML format (webpage): [Arabic](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTxr0F0gtrDv%2bFkEBaKa3CDbvIoL10aAjPu9gU0zzbB8hyBpwj9IallH34L3zeuOyVc%3d), [Chinese](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTyG9el1UgCDKTW8NMYGcUqMOF%2bxtBl9upURl0qDFV0JUf%2b3%2fZd0E5j7RFzpz9AIAug%3d), [English](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTwAcLKUFW9%2fIJBNclMnXbcbzBjBfaI7Rc%2b4GBn1JSVHGjTwdShqIQrVL8CVzr1q80I%3d), [French](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTxdp6r7Fax1FEfpHZjnEIUbVto87jZDPspHWawFeYqIWCaccH8cP3xXRz7hSsWOWS0%3d), [Russian](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTyXGeSg5DRYnV5RDNLzBcP59kn7fIXmNecOLjquVI4U3MxM%2fSzL6eTp4wGfmDs7his%3d) and [Spanish](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhshZEsQpq2VmlaFuT3ws7ySF0ibEBPqk6YvHXUF0XH5Y9bht%2fHFNoUnI7mHzT9ZNVlI6Q7VMDuFoP9Q6mMnVDhTwpfpftz1%2fDCl1YrLXhsgzyYIndxQz5kvPIq7tBq3JReBykdKEFjdwPaXhgSCH9qyM%3d)

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Facts

The author is Marlon Noble, an indigenous Australian national with intellectual disability. In October 2001, the author was charged with two counts of sexual penetration of a child and three counts of indecently dealing with a child. The author was arrested, taken into custody at Hakea Prison. Between 2002 and 2003, the author appeared before courts in different hearings, after which the author always remained in custody at Hakea Prison.

In the hearings, it was discussed the possibility that the author may be unfit to plead to the charges. In March 2003, the court found that the author was unfit to plead. Nevertheless, the Mentally Impaired Defendants Review Board – in charge of the oversight of the author’s custody order – determined that the author was to be detained in custody at Greenough Regional Prison. He remained there from March 2003 to January 2012, when he was released on a conditional release order. In November 2011, the Review Board recommended to the authorities that the author be conditionally released into an accommodation support service. The author was released subject to 10 conditions in January 2012.

The complaint submitted to the Committee

The author claims that State has breached its obligations under articles [5 (1)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#5), [12](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#12), [13](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#13), [14 (1) (b)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#14), [14 (2)](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#14) and [15](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#15) of the CRPD.

Regarding article 5, he argues that the Mentally Impaired Defendants Act (hereafter, the Act) constitutes a discriminatory status-based law in violation of article 5 (1). He considers that once a person is found unfit to plead, previous compliance with some requirements, the judge then has the possibility to release the defendant or, as in the author’s case, to order his custody. No limits exist as to the duration of the custody order, and once declared unfit to plead, the defendant has no possibility of exercising his or her legal capacity before the courts, in particular to plead not guilty and test the evidence against him or her.

Regarding articles 12 (3) and 13 (1), the author argues that his “unfit to plead” status has meant a violation of his right to enjoy legal capacity. He also submits that he continues to be deprived of the procedural accommodation he requires to exercise his legal capacity, to effectively enter a plea and to have the evidence against him tested.

Regarding article 14 (1) (b), the author argues he has been deprived of his liberty, on the basis of his disability, pursuant to the Act. He points out that it is unlikely that he would have been convicted for the offences with which he was charged and, even in that case, 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 restrictive civil detention in the community.

Regarding articles 14 (2) and 15, the author submits that he remains deprived of his liberty, but has not been convicted for any offence. Furthermore, 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.

State party’s observations on the admissibility and merits

The State considers that under article 2 (f) of the OP, the temporal mandate of the Committee is applicable only in respect of events that occurred on or after September 2009, when the OP entered into force for Australia. The State accepts the facts as stated by the author. Nonetheless, the State reports that the court, deciding about the custody, noted that the author had a record of criminal convictions for offences that had become gradually more serious. The judge concluded that public safety must be put first, notwithstanding his “deep concern” that prison was not the appropriate environment for the author. In March 2003, the court decided to make a custody order, resulting in the transfer of the author to prison.

The State also reports the author’s record of detention and reviews between 2003 and 2012; eight statutory reviews and reports into the author’s case were undertaken during his detention. Interim reviews were conducted, relying on expert medical reports that all outline reasons to recommend against the author’s release, including his vulnerability, high risk of committing an offence, and the lack of available support services. The reports recommended a gradual release programme for the author.

As regards the author’s allegations under article 5, the State submits that the Act does not treat persons any differently because of disability, but provides for the differential treatment of people found “unfit to stand trial”. It considers that such differential treatment is legitimate according to the jurisprudence of UN Treaty Bodies. Moreover, the State submits that the Act also aims at protecting the community, provides safeguards to ensure that decisions are made by an independent and well-informed judicial body, and is based on reasonable and objective criteria that are not linked to disability.

Regarding the author’s allegations under articles 12 and 13, the State considers that the allegations 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. He is therefore not presumed guilty, and there are no witnesses to examine, or evidence to test.

As regards the author’s allegations under article 14 (2), the State considers that, since his release into the community, he is no longer in detention. In relation to the circumstances prior to the author’s release in 2012, the State submits that the claim is inadmissible for failure to exhaust domestic remedies, since judicial review of the author’s detention would have been an effective remedy. Hence, the State 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. Moreover, the State submits that the author is not an “accused” person and therefore the obligation of separation from convicted persons does not arise.

Regarding the author’s allegations under article 15, the State considers that the allegations are inadmissible or lack merit because the author makes a general assertion that he was at risk of harm, without specific claims. The State points out that there were only two minor altercations between the author and other prisoners, and both incidents were successfully mediated and neither resulted in serious injury to the author. Besides, the author had support, through the years, from the Support and Monitoring System, Prisoner Risk Assessment Group, Disability Services, among other programmes.

Furthermore, the State contests the 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 community’s safety.

The author’s comments on the State party’s observations

The author rejects the State party’s characterization of the temporal scope of the Committee’s mandate. Based on the jurisprudence of the Human Rights Committee, the author considers that “A continuing violation is to be interpreted as an affirmation, after the entry into force of the [OP], by act or by clear implication, of the previous violations”.

The author considers that his detention is arbitrary because it is based on disability, in violation of article 14 (1) (b). If he was not a person with disability, he could not have been placed in indefinite detention. In that sense, he considers the detention (a) arbitrary because it is subject to the discretion of the Government; (b) unjust, given that the author has not been convicted for the offences and has not had the opportunity to properly test the evidence; (c) disproportionate, according to the years that he could be in prison if he had been found guilty; and (d) punitive, given that the author requires social support and assistance. Besides, the author submits that the conditions of his detention in Greenough Regional Prison were exactly the same as those of convicted prisoners.

As to the State’s submission that the author could have appealed the District Court’s decision, the author considers that would have been futile. 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 that are not mandatory and, therefore, any potential judicial review could not provide the author with an enforceable domestic remedy. In relation to the risk of harm in prison, the author submits that the assaults he faced were serious, being subjected to frequent acts of violence and abuse from other prisoners.

Issues and proceedings before the Committee

Consideration of admissibility

The Committee ascertains that the same matter has not already been examined by it and has not been or is not being examined under another procedure of international investigation or settlement, as required by [article 2(c) of the OP](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx).

Regarding inadmissibility based on *ratione temporis*, firstly, the Committee notes that the author’s detention clearly continued after the entry into force of the OP for the State, and, therefore, the author’s claim under article 14 (1) (b) is within the Committee’s competence. Secondly, the Committee notes that the author continued to be deprived of the opportunity to plead not guilty and to test the evidence after the entry into force of the OP for the State, hence, the author’s claim under articles 12 and 13 is within the Committee’s competence.

Regarding inadmissibility for non-exhaustion of domestic remedies, firstly, the Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success. 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 OP. Secondly, in relation to the conditions of detention, the Committee notes that the information provided does not reflect that the author 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 OP.

Regarding inadmissibility under article 1 of the OP, the Committee recalls that an individual complaint may not contest a law or practice in theoretical terms by *actio* *popularis*. 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.

Regarding inadmissibility due to failure to sufficiently substantiate claims, the Committee notes the author’s submission that while he was in prison, he was at significant risk of harm from other prisoners. Moreover, according to the author, these offences amounted to inhuman and degrading treatment, and apparently remained unrecorded by the prison authorities. The Committee considers that the author sufficiently substantiated his allegations under article 15 for the purpose of considers them admissible under article 2 (e) of the OP.

Consequently, 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.

Consideration of the merits

Regarding article 5, the issue before the Committee is to assess if the differential treatment provided under the Mentally Impaired Defendants Act is reasonable or whether it results in discriminatory treatment of persons with disabilities. The Committee notes that throughout the author’s detention in prison, the 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 did not provide the author with the support or accommodation he required to exercise his legal capacity. 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.

Regarding articles 12 and 13, 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’s authorities to enable him to stand trial.

Regarding article 14, the Committee notes that the author was detained in prison without having been convicted of any offence, and after all the charges against him were quashed. The author’s detention was decided on the basis of the assessment by the State’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 also notes that the author was released from prison into an accommodation support service under 10 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).

Regarding article 15, the Committee notes that the author was detained for more than 13 years, without having any indication as to the duration of his detention. 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. This indefinite detention, together with the repeated acts of violence to which he was subjected during his detention, amount to a violation of article 15.

Conclusion

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, and recommended:

Regarding the author: To provide the author with an effective remedy, including reimbursement of any legal costs incurred, together with compensation, as well as to Revoke immediately the 10 conditions of the author’s release order, replacing them with all necessary support measures for his inclusion in the community.

As general measures: To take measures to prevent similar violations in the future, including (i) adopting the necessary amendments of the Mentally Impaired Defendants Act and all equivalent or related federal and state legislation, (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, and (iii) ensure that appropriate and regular training on the scope of the Convention and its OP, including on the exercise of legal capacity by persons with intellectual and mental disabilities, is provided to judges, MPs, and staff involved in facilitating the work of the judiciary.

1. This summary has been prepared by the International Disability Alliance. For more information on how to lodge individual communications under the Optional Protocol to the CRPD, visit [IDA’s disability rights litigation website.](http://www.internationaldisabilityalliance.org/es/node/105)  [↑](#footnote-ref-1)