**Case summary:[[1]](#footnote-1) *Manuway (Kerry) Doolan v Australia***

Case code: [CRPD/C/22/D/18/2013](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2f22%2fD%2f18%2f2013&Lang=en)

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Provisions of the Optional Protocol: 2

Keywords: Institutionalization of person with psychosocial disability; right to enjoy legal capacity on an equal basis with others

Decision: The State party has failed to fulfil its obligations under articles 5, 12, 13, 14 and 15 of the Convention.

Full decisions in [English](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiXdyxfsUw0Uwnk5uW2OiRQFNq7SkIL9xYzgS3l%2fRyUZCE8mvdz3IOJPSfwKTi6xCyCbdxCwyXmLIKKyNrj2SMe9%2b2WlfzwGP30tGLgOoRSjGQWVCINApglGVBVRLHhKFA%3d%3d), [French](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiXdyxfsUw0Uwnk5uW2OiRQFNq7SkIL9xYzgS3l%2fRyUZCE8mvdz3IOJPSfwKTi6xCyR5nmB7WbFmbMIfsATa8si6igG9rb8mphyJTUIQ7g%2fNS5LcpAMmEnlBRRRy78MlYg%3d%3d), [Spanish](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiXdyxfsUw0Uwnk5uW2OiRQFNq7SkIL9xYzgS3l%2fRyUZCE8mvdz3IOJPSfwKTi6xC%2f5K5UpGSnNKoHVkibi1Iz6bZndoPJRPSbqrzMn%2feE2KkS8AU7LEB6NG59KqqrrIJQ%3d%3d), [Arabic](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiXdyxfsUw0Uwnk5uW2OiRQFNq7SkIL9xYzgS3l%2fRyUZCE8mvdz3IOJPSfwKTi6xC4znslZPI2FUtWpeqmO3ElxNXEMgSH5AR3OOEfdJQfgn9zLLPj7seCLP2PXgvUKWHQ%3d%3d), [Russian](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiXdyxfsUw0Uwnk5uW2OiRQFNq7SkIL9xYzgS3l%2fRyUZCE8mvdz3IOJPSfwKTi6xC8aHnk8chp1ul%2bIPSnY%2bG%2fPaMc3DNQgXsWBH5KVQeZdrpgQTDwXxZRRVXSDH1Dolbg%3d%3d), [Chinese](http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsiXdyxfsUw0Uwnk5uW2OiRQFNq7SkIL9xYzgS3l%2fRyUZCE8mvdz3IOJPSfwKTi6xCyLq%2flrSTemBOPLGz71gzDkMuwZSx3KeVrE7iRWtI5nsxBsfMChsYFq5OKsxZjDxug%3d%3d)

Facts

The author is an Aboriginal national of Australia with psychosocial disability who was living in a temporary supported accommodation of the Northern Territory (NT) in 2008 when he experienced a psychotic episode, threatened a support worker and damaged state property.

He was arrested, charged with assault and damage to property, remanded in custody, and incarcerated in a high security section of a Correctional Centre. After a jury determined the author was not guilty given his impairment, in May 2009 the NT Supreme Court ruled that he was “unfit to stand trial” and declared him liable to supervision and custody in a high security section of such Centre. In October 2009, the Court placed him under a Custodial Supervision Order and fixed 12 months for the author to be in custody within prison. The author returned to the Correctional Centre and remained there until April 2013, having spent four years and nine months in custody and in prison (almost five times the period he would have served had he been convicted). For this time, he was held in maximum security, confined in isolation for long periods, and provided with limited access to mental health services, which deteriorated his health and social functioning. In June 2010, the Court ordered him to remain in custody even if he had served 22 months. In April 2013, he was transferred to a custodial facility and in February 2017 relocated to community residence.

The complaints

The author claimed that his rights under article 5 (in conjunction with 14 and 15) were violated since up to 2013 he was committed to indefinite custody without having been convicted of an offence. He also contended that the NT Criminal Code and the NT Disability Services Act are discriminatory, since the former only applies to persons with disability and the latter allowed for his detention in a “secure facility” to provide involuntary treatment.

It further claimed violations to articles 12 and 13 (5, 14, 15 and 19) since he was held in custody for five times more than the regular period, the Court had determined him unfit to stand trial for not having legal capacity, he was subjected to custody and didn’t receive support and adjustments to exercise his legal capacity and be enabled to challenge charges.

Regarding article 14 (and 5), the author claimed violations since his deprivation of liberty was arbitrarily based on his disability, disproportionate, and based upon his Aboriginal origins. He contended that the Court had decided there was no alternative to committing him, since he was a poor Aboriginal homeless without family.

Regarding articles 19 and 28 (and 15), the author claimed that in custody he was held with convicted persons and was denied adequate housing in the community as alternative.

Regarding articles 15, 19 and 26, the author claimed that conditions of detention were harsh and unreasonable, and that he was mostly detained in maximum-security isolation. He claimed being subject to involuntary treatment and not being provided with behaviour support programs or social, daily living, and communication skills. Regarding article 25, he claims there was a lack of adequate services for his effective treatment and support.

State Party’s observations on admissibility and the merits

The State considered that the author failed to exhaust all domestic remedies under article 2(d) of the OP, since he never complained to the Anti-Discrimination Commissioner. It also claimed that the author never challenged the Court’s finding that he was not fit to stand trial nor complained discrimination under the Anti-Discrimination Act if he required special accommodation to allow him to exercise his legal capacity. For the State, both findings that the author was subject to supervision and liable for Custodial Supervision Order could have been challenged, but the author’s representative never disputed that the author required a high level of care and supervision requiring accommodation. The State further claimed that the author’s claim of discrimination in relation to his Aboriginal status was inadmissible since the non-discrimination principle under the CRPD only covers discrimination based on disability. It also considered that the author failed to provide evidence of his rights under article 25 and has did substantiated his claims under articles 26 and 28.

Regarding article 5, the State insisted that the NT Criminal Code does not treat persons differently but provides for the differential treatment of people found “unfit to stand trial.” While it admitted that the Code is likely to disproportionately affect those who meet disability criteria, such differential treatment is legitimate under international law and Article 5 should be interpreted accordingly.

Regarding article 12, the State considered that author did not provided information on the measures he required to exercise legal capacity. It claimed that the NT justice system provides equal access to services, buildings, and information, together with the opportunity of making complaints. For the State, the rights of article 13 had also been ensured to the author as a legal counsel legally represented him throughout proceedings and he had guardian appointed on his behalf.

Regarding Article 14, the State agreed that detention based on disability alone would be contrary to the Convention, but not in relation to the author’s special circumstances. It insisted that article 14 should be interpreted consistently with the International Covenant on Civil and Political Rights. While the State accepts persons with cognitive impairments are more likely to suffer from Custodial Supervision Orders, this was a legitimate differential treatment for specific persons with disabilities such as Indigenous persons since there is no other practicable alternative for them which will ensure their safety or the safety of the rest of the community. Moreover, according to the State, the prohibition against arbitrary detention does not mean that persons with disability, cannot be detained at all or cannot be made subject to indefinite custody orders where such detention is based on sound, objective justifications and supported by appropriate safeguards.

As to the violation of article 15, the State considers that, while it is undesirable for persons who are not accused to be detained in correctional centres, exceptional circumstances may warrant detention as there is an unavailability of places in specialised facilities. It held that the author did not prove that the decline in his condition was caused by the care received and that evidence from psychologists suggested that constant care was necessary to support him. It argued that the fact that he was not always separated from persons convicted did not violate article 15 and that certain treatment and care may, from time to time, be administered involuntarily (such as medication on an emergency basis). It claimed that, as per its interpretive declaration to the CRPD, involuntary treatment is lawful when administered in a reasonable, necessary and proportionate manner and as a last resort; and that time in custody alone did not breach article 15 since the author could be eligible to receive other care.

Regarding article 26, the State contested the lack or inadequate rehabilitation services since they were available to the author at the Correctional Centre, including through medical and psychological assessments, support, occupational therapy, and community access.

Finally, it argued that article 28 does not require the State to provide housing on demand and that, even though the author expressed a desire to be accommodated in the community, his rights were not breached because accommodation in the community would result in a reduction in the quality of care, supervision and disability-related services for him.

Author’s comments on the State party’s submission

For the author, while the Anti-Discrimination Act prohibits discrimination on the ground of disability, it cannot invalidate other laws of the NT. He notes he had also complained to the Human Rights Commission, which found that his rights under articles 14(1), 19, 25, 26(1) and 28(1) were violated and made recommendations that the Government ignored.

As to the possibility of appealing his declaration of unfitness to stand trial, the author contended that the NT Criminal Code is a discriminatory law based on disability since it does not provide for adjustments for his culpability to be determined taking into account his cognitive impairment. He finally argued that being found not guilty due to his psychosocial disability led to confinement in detention facilities for a longer period and that provisions of the Criminal Code did not constitute legitimate differential treatment for the protection of the community from a danger since this was only applied to persons with cognitive impairments.

State party’s additional observation

The State noted that, in January 2016, the author was relocated from the Secure Care Facility to a community residence and that, since February 2017, he lives in a house where he receives full time assistance. It also argues that in May 2017, the author’s Custodial Supervision Order was formally varied to a Non-Custodial Supervision Order, which permits his return to the Secure Care Facility if his behaviour deteriorates. Finally, it held that the author is still subjected to a Guardianship Order whereby the Office of the Public Guardian and the Community Guardian are to be consulted for all health and accommodation matters.

Committee’s consideration of admissibility

The Committee noted the State’s arguments relating to the lack of exhaustion of domestic remedies and the authors’ arguments contending that the Anti-Discrimination Act is not a fundamental law that can invalidate other laws. It also noted the author’s complaints before the Human Rights Commission had not led to any response and that it cannot be considered an effective remedy since its recommendations are not enforceable. Accordingly, the complaint under article 5 is admissible under article 2(d) of the Optional Protocol.

Regarding article 12, 13 and 14, the Committee noted that the author never appealed the Supreme Court’s finding that he was unfit to stand trial (article 12), requested special accommodation (article 13), or challenged the custodial supervision orders (article 14). However, the Committee recalls its jurisprudence establishing that domestic remedies do not need to be exhausted if they have no prospect of success and notes the author’s argument that he would have had to demonstrate that the Court’s decisions were in error, while in fact they were adopted in compliance with the law. Noting that this appreciation relies on the law itself and does not correspond to a question of its interpretation or application, the Committee considered that no additional effective remedies were available to the author and that his claims under articles 12, 13 and 14 were admissible under article 2(d) of the OP.

Third, the Committee recalled that all possible grounds of discrimination and their intersections must be considered, including indigenous origin. Nonetheless, it also noted that the author failed to explain the extent to which his aboriginal origin impacted on the violations and thus he failed to substantiate such claim for admissibility. Finally, the Committee considered that the author had sufficiently substantiated his claims under articles 5,12,13,14,15,19,25,26 and 28 and declared the communication admissible.

Committee’s consideration of the merits

The Committee recalled that under article 5(1) and (2), States must ensure that all persons are equal before and under the law and are entitled without discrimination to its equal protection and benefit. It clarified that discrimination may result from the effect of a rule or measure that does not intend to discriminate, such as the NT Criminal Code, under which a person found unfit to stand trial can remain in custody for an unlimited time.

The Committee noted that procedures never focused on the author’s mental capacity to stand trial and he was not supported to exercise his legal capacity or given the chance to plead not guilty. Recalling General Comment No. 6, it considered that the NT Criminal Code resulted in discriminatory treatment of the author’s case, in violation of article 5(1) and (2) of the Convention. Recalling that the CRPD recognizes the right not to be obliged to live in a particular arrangement on account of disability, the Committee noted that, since the author lived in a Security Care Facility until February 2017 when he was relocated to a community residence without consultation, article 5 had been violated as institutionalization as a condition for treatment constitutes unequal treatment and discrimination.

The Committee recalled that a person’s disability must never be a ground for denying legal capacity and that States must provide access to the support she might require to exercise legal capacity. It also noted that article 13(1) requires States to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations. Considering that the declaration of “unfitness to stand trial” resulted in a denial of the author’s right to exercise his legal capacity, to plead not guilty, and to test the evidence against him and that no adequate form of support or accommodation was provided to enable the author exercise legal capacity, the Committee considered that the situation under review amounted to a violation of the author’s rights under articles 12(2) and (3) and 13(1).

The Committee noted that the declaration of unfitness to stand trial had derived in the committal of the author to custody in prison. Considering the detention was decided based on the assessment of potential consequences of the author’s disability, the Committee ruled that disability was the core reason of his detention and thus violated article 14(1)(b).

The Committee emphasized that States are in a position to safeguard the rights of detainees and that failure to provide reasonable accommodation when they are persons with disabilities might breach article 15(2). It noted that the author was held in isolation, not separated from convicted offenders, and subjected to involuntary treatment. Considering the effects that indefinite detention may have, it considered that the author’s custody amounted to inhuman and degrading treatment. Regardless of whether violence from other prisoners was proven, the indefinite character of custody, detention without conviction, periodic isolation, involuntary treatment, and placement with convicted offenders violated article 15.

Considering the State’s submission that periodic reviews concluded that no alternative to custody was available to the author, but also that he was finally granted the possibility of living in a community residence, the Committee considered that the issue concerning article 19 had become moot. Finally, it ruled that information provided to it did not enable it to find violations of articles 25, 26 and 28.

Conclusion

The Committee concluded the State had violated articles 5, 12, 13, 14 and 15 and:

(a) Concerning the author, the Committee recommended the State to:

(i) Provide him with effective remedy, including legal costs and compensation.

(ii) Publish and circulate the views on this case widely in accessible formats.

(b) In general, the Committee required the State to take measures to prevent similar violations and, by referring to its concluding observations, added it should:

(i) Amend the NT Criminal Code and all equivalent or related legislation, in close consultation with persons with disabilities and ensuring its compliance with the CRPD.

(ii) Ensure adequate support and procedural accommodations to persons with intellectual and psychosocial disabilities to enable them to exercise their legal capacity before the courts.

(iii) Allow the exercise of the right to live independently and be included in the community by creating community residences to replace institutionalization.

(iv) Ensure training on the CRPD to judicial and administrative staff.

1. This case 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, consult IDA’s factsheet available on [IDA’s disability rights litigation website.](http://www.internationaldisabilityalliance.org/en/disability-rights-litigationhttp%3A/www.internationaldisabilityalliance.org/en/disability-rights-litigation)  [↑](#footnote-ref-1)