United Nations CCPR/C/132/D/2900/2016

International Covenant on Civil and Political Rights

Distr.: General
19 November 2021

Original: English

Advance unedited version

Human Rights Committee

Views adopted by the Committee under the Optional Protocol, concerning communication No. 2900/2016*, **

Communication submitted by:	A.S. (represented by counsel, Patrick Keyzer)
Alleged victims:	The author
State party:	Australia
Date of communication:	8 March 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 16 December 2016 (not issued in document form)
Date of adoption of Views:	2 July… 2021
Subject matter:	Deprivation of liberty of a person with mental disability for an indefinite term and in the absence of regular mandatory reviews
Procedural issues:	Exhaustion of domestic remedies; lack of substantiation; incompatibility *ratione materiae*
Substantive issues:	Cruel, inhuman or degrading treatment or punishment; arbitrary detention; conditions of detention; rehabilitation; family rights; minorities; discrimination on the ground of disability
Articles of the Covenant:	7; 9 (1) and (4); 10 (1) and (3) read alone and in conjunction with articles 2 (1) and 26; article 17 in conjunction with article 23; and article 27
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

* Adopted by the Committee at its 132nd session (28 June–23 July 2021).

** The following members of the Committee participated in the examination of the communication: Tania Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Wafaa Ashraf Moharram, Mahjoub El Haiba, Furuya Shuichi, Kobauyah Tchamdja Kpatcha, Duncan Laki Muhumuza, Carlos Gomez Martinez, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Changrok Soh, Hélène Tigroudja, Imeru Tamerat Yigezu and Gentian Zyberi.

1. The author of the communication is A.S., a national of Australia born in 1963. He claims that the State party has violated his rights under articles 2 (1), 7, 9 (1) and (4), 10 (1), 10 (3), 17 (1), 23 (1), 26 and 27 of the Covenant. The Optional Protocol entered into force for Australia on 25 December 1991. The author is represented by counsel.

Facts as submitted by the author

2.1 The author submits that he is an indigenous Australian and identifies himself as Pitjantjatara. He experienced a traumatic childhood and suffers from cognitive and mental impairments due to a development disorder and substance abuse. He also suffers from paranoia and delusions. He has a long history of hospital admissions both for medical and psychiatric treatment, including for aggressive behaviour.

2.2 On 15 August 1995, the author, at the age of 32, was arrested on the charges of murder, robbery and attempted sexual intercourse without consent, allegedly committed against a woman unknown to him on the same day as his arrest. He was held on remand from the day of his arrest until his trial in October 1996. On 14 October 1996, he was indicted on those charges by the Northern Territory (NT) Supreme Court.

2.3 On 15 October 1996, he was found not guilty on the ground of insanity on each count of the indictment. Pursuant to the then effective s 382(2) of the NT Criminal Code, the Supreme Court ordered that the author be kept in strict custody at Alice Springs Correctional Centre, until the NT Administrator's pleasure was known.

2.4 On 27 September 2001, the Administrator ordered that the author be detained at Alice Springs Correctional Centre, subject to the authority of the Director of Correctional Services.

2.5 On 15 June 2002, the NT Criminal Code was amended by the NT Criminal Code Amendment Act 2002 (the Amending Act). Part IIA was inserted into the Criminal Code, titled "Mental Impairment and Unfitness to Be Tried". Among other things, it provides for the making of custodial or non-custodial supervision orders where a person has been found not guilty of an offence by reason of mental impairment. As of that date, on the basis of the transitional provisions of the Amending Act, the author was deemed to be a supervised person held in custody on the same terms and conditions under a custodial supervision order within the meaning of Part IIA.

2.6 The NT Supreme Court conducted a mandatory review of the author's supervised custody in August 2003 pursuant to s 6(3) and 43ZH of the NT Criminal Code.[1] The Supreme Court found that the resources available at Alice Springs Correctional Centre were not appropriate for the custody and care of the author. Despite the inherent problems with the prison environment, on 10 September 2003, the Supreme Court ordered that, due to his mental impairments and the fact that he could be a risk to himself and society if left unsupervised, the author be kept at Alice Springs Correctional Centre subject to a custodial supervision order. The Supreme Court noted that since there were no adequate resources available for the treatment and support of the author, there was no practicable alternative to incarceration at Alice Springs Correctional Centre.

2.7 The author submits that according to another decision of the NT Supreme Court delivered in 2007, the NT Criminal Code does not require the court to review his custodial supervision order at any other point in the future. In that decision, the NT Supreme Court stated that the only compulsory review of the author's custodial supervision order had taken place in 2003.[2] The author informs that s 43ZK of the NT Criminal Code provides that an

[1] When a person becomes subject to custodial supervision on the basis of the transitional provisions of the Amending Act, a report should be submitted within 6 month of the entry into force of the Amending Act to the court that must conduct a review.

[2] The author explains that when a court makes a supervision order, the court must fix a term that is equivalent to the period of imprisonment that would have been appropriate if the person had been found guilty of the offence. Between six and three months before the expiry of this term, the court must conduct a review to determine whether to release the supervised person or to vary the supervision order. However, given that the author became subject of custodial supervision by virtue of the transitional provisions of the Amending Act and formally speaking no custodial supervision order was ever made, the Supreme Court found that the mandatory elements of a supervision order

annual report should be submitted to the NT Supreme Court and the court may, if it considers it appropriate, conduct a review. The supervised person may also request a review. However, should the court not order a review, the author does not have the opportunity to contest the conclusions set out in the report. The author underlines that the annual reports filed with the NT Supreme Court since 2003 did not result in any improvements in the conditions of his detention.

2.8 In 2013, an independent guardian was appointed for the author.[3] The first and only comprehensive behavioural support plan to facilitate his rehabilitation took effect on 23 December 2013. He successfully progressed through to the final stage and commenced residing fulltime at the Alice Springs secure care facility in mid-2014. However, owing to some incidents, the author was returned to full-time incarceration at Alice Springs Correctional Centre in January 2015 and his support plan had been abandoned.

2.9 On an unspecified date, the author filed a complaint with the Australian Human Rights Commission. In August 2014, the Human Rights Commission issued a report in which it found that the author had been arbitrarily detained and the conditions of his detention also run counter to the Covenant and the Convention of the Rights of Persons with Disabilities (CRPD). Accordingly, it recommended the authorities to take measures to remedy the violations found. Subsequently, the Commonwealth of Australia took note of the Human Rights Commission's report but attributed sole responsibility for the violations to the Northern Territory government.

2.10 The author remained at Alice Springs Correctional Centre until November 2015. He was then transferred to Darwin Correctional Centre, another facility of maximum security where he continued to be detained at the time of the submission of his complaint.

2.11 The author submits that he sought all administrative remedies available to him and that there is no effective judicial remedy to be exhausted at the domestic level. Even if it were possible to bring an action before the High Court of Australia, there would not be a reasonable prospect of success.[4] In this regard, the author notes that if he applied for judicial review of his deprivation of liberty, the application would be struck out with costs ordered against him. Furthermore, the High Court of Australia would have no power to provide remedies that would address the violations claimed, as there is no legislation, Bill of Rights or constitutional provision which could be relied on to remedy the violations set out in the complaint. In addition, since he was only appointed an independent guardian in 2013, he was unable to seek domestic remedies prior to this date.

Complaint

3.1 The author claims that his rights under articles 2 (1), 7, 9 (1) and (4), 10 (1) and (3), 17(1), 23(1), 26 and 27 Covenant have been violated by the State party as a result of his arbitrary detention lasting for an indefinite term in a maximum security prison facility where his needs required by his mental disability cannot be accommodated.

3.2 In particular, the author asserts that his continued detention has been arbitrary in breach of article 9 of the Covenant[5] as it is based on his mental impairment rather than on a criminal conviction. He explains that the impugned laws apply only to persons with mental impairment and provide for their indefinite detention although they were found not guilty of the charges against them. Accordingly, this legislative regime is discriminatory. In addition, the author claims that the authorities have failed to provide suitable accommodation in a secure care facility adequate to his disabilities. In this respect, he submits that pursuant to s

pursuant to s 43 ZA and ZG, namely the fixing of a term for the order and the mandatory review thereof shortly before its expiration were not applicable in the author's case.

[3] The State party informs that the author has both a public guardian and a community guardian appointed under the Adult Guardianship Act 1988.

[4] The author submits two opinions of professors of law confirming the futility of a remedy before the High Court of Australia. These opinions indicate that the legislation authorizing the author's detention is clear and applicable to him; the jurisprudence of the High Court indicated that his detention would be upheld as constitutionally valid; there are no other effective legal remedies available,

[5] The author also relies on article 14 of the CRPD.

43ZA of the NT Criminal Code, the court must not make a custodial supervision order committing the accused person to custody in a prison unless it is satisfied that there is no practicable alternative given the circumstances of the person. Nevertheless, since no alternatives are available in the Northern Territory, the Supreme Court had no option other than order detention in a maximum security correctional facility. The author alleges in this respect that maximum security facilities are inappropriate for the rehabilitation of non-convicted individuals who suffer from mental impairment and that legitimate ends could be certainly achieved by less intrusive means. Furthermore, he asserts that his detention is disproportionate because it should not be reviewed at regular intervals.[6] He reiterates that the Supreme Court confirmed in 2007 that the only mandatory review of his custodial supervision order occurred on 10 September 2003 and that the legislation only provides for the submission of reports on an annual basis.

3.3 In addition, the author submits that the circumstances of his detention amount to torture or cruel, inhuman and degrading treatment and punishment and deprive him of his right to be treated with humanity and inherent dignity contrary to articles 7 and 10 (1) of the Covenant. Regarding the general inappropriateness of the prison setting in a maximum security prison, he notes that between 1995 and 2004, he spent most of his time "locked down" in isolation cells for up to 23 hours per day. He was punished by the correctional staff by locating him in the hottest cell in summer and the coldest cell in winter, as retribution for the actions which led to his detention. He claims that the impacts of extended periods of isolation were exacerbated by his mental impairment and his vulnerable status as an indigenous Australian.[7] He reiterates that the inappropriate nature of the conditions of his detention has been acknowledged by both the NT Supreme Court and the Australian Human Rights Commission.

3.4 The author further alleges a violation of his rights under article 10 (3) in conjunction with articles 2(1) and 26 of the Covenant because the State party has failed to provide him with rehabilitative services. In this context, the author reiterates that his first and only comprehensive behavioural support plan took effect in December 2013 and was eventually abandoned. As there is no security care detention available in the Darwin area (his new place of detention) and no transition plan has been taken to implement rehabilitative services suitable to his needs, there is no indication that he will ever be able to transfer out of a maximum security facility.[8]

3.5 Furthermore, the author contends that the State party violated his rights under article 27, read in conjunction with article 10 (1) of the Covenant since it failed to respect his right to enjoy his own culture throughout the term of his detention. He submits that maintaining a physical, spiritual, and emotional connection to his Country is essential for the mental, social and emotional wellbeing of indigenous Australians. As a result of his transfer to Darwin Correctional Centre, he has lost his particular status as a respected elder at Alice Springs Correctional Centre allowing him to mentor his young fellow countrymen. His situation is further worsened by the fact that he is unable to use his own language in the Darwin area.

3.6 Lastly, the author submits that his transfer to Darwin Correctional Centre amounts to an arbitrary interference with his family life in violation of his rights under article 17 (1), read in conjunction with article 23, of the Covenant, since he is no longer able to receive visits from his family members and has no contact with his imprisoned countrymen, his broader family, incarcerated at Alice Springs Correctional Centre.[9]

[6] The author refers to General Comment no. 8 and the Committee's decision in *Tai Wairiki Rameka et al. v. New Zealand* (CCPR/C/79/D/1090/2002).

[7] The author refers to the Committee's finding of a violation in *Brough v. Australia* (CCPR/C/86/D/1184/2003).

[8] The author refers to article 109 of the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules).

[9] The author in his subsequent submissions seems to base his claims under article 17 and 23 of the Covenant not only on the period he spent in the Darwin Correctional Centre but also in the Alice Springs Correctional Centre.

State party's observations on admissibility and the merits

4.1 On 25 April 2017, the State party submitted its observations on admissibility and the merits. The State party provides the Committee with a detailed description of the impugned law, confirmed the facts of the case and submits some additional information.

4.2 It informs that the author's custodial supervision order has regularly been before the Supreme Court, for periodic reviews.[10] The State party further acknowledges that until secure care facilities became operational in April 2013, there was no other "appropriate place", apart from a correctional facility, within the meaning of the Amending Act. At the same time, the State party notes that the Supreme Court's supervision and orders relating to the care and custody of the author were at all times consistent with experts' recommendations.

4.3 The State party confirms that following a psychiatrics' assessment in 2015, the author was transferred to Darwin Correctional Centre and began staged transition to the Cottages, becoming a full-time resident at that therapeutic facility on 7 February 2017.[11] The author's periodic report dated 24 May 2017 found that, since moving to the less restrictive environment at the Cottages, the author presented as a model resident with exemplary behaviour. Nevertheless, despite his strong progress, the 2017 periodic report did not recommend his transfer to a less restrictive setting until a complete review of his risk profile was completed. The NT Department of Health was considering, however, the author's suitability to return to the Alice Spring secure care facility for the purpose of reuniting him with family and country.

4.4 Regarding the admissibility and merits of the complaint, the State party first submits that the author's claims under the Convention on the Rights of Persons with Disabilities are inadmissible for being incompatible *ratione materiae* with the provisions of the Covenant.

4.5 In relation to the author's claims under article 10 (3) read in conjunction with articles 2 (1) and 26 of the Covenant, the State party contends that the author's claims are incompatible with the provisions of the Covenant because article 10 (3) concerns convicted persons only; however, the author was found not guilty and has a different legal status to convicted persons.[12] In this connection, it notes that supervised persons receive a higher level of treatment, and are monitored by a higher ratio of prison officers than convicted prisoners. It further submits that the author receives significant clinical and therapeutic treatment, together with mental health and disability support. The State party further argues that the author's claims regarding the lack of any rehabilitative purpose of his detention are also inadmissible for lacking sufficient substantiation. In this respect, the State party underlines that the medical evidence suggests that there are limited prospects for his reformation or social rehabilitation. Nonetheless, as stated in the author's most recent periodic report, the NT Office of Disability continues to support the author on a daily basis to develop his independent functional living skills.

4.6 As regards the discriminatory aspect of the above claims, the State party is of the position that to the extent that any practices or policies were discriminatory, it was open to the author to make a complaint of discrimination to the NT Anti-Discrimination Commissioner under the NT Anti-Discrimination Act of 1992. The State party submits that, while acts done pursuant to legislation or a court order are exempt under the cited law, "it appears reasonably arguable" that it would apply to certain aspects of the author's case as he was the recipient of goods, services and facilities. It is further submitted that the Commissioner has the power to make binding orders. Although the Commissioner also has an inquiry power to examine legislation, acts and practices, the State party accepts that, in

[10] For example, hearings were held over the past four years regarding the author's case on 2 June 2017, 19 May 2016, 16 February 2016, 19 November 2015, 9 October 2015, 9 September 2015, 28 July 2015, 20 April 2015, 7 October 2014, 25 June 2014, 27 May 2014 and 27 February 2014.

[11] The Cottages are another specialist forensic disability support facility located on the grounds of the Darwin Correctional Centre. The Cottages are used to support clients who need a higher level of support due to high risk behaviours. Similar to the Alice Springs secure care facility, the Cottages are also operated and managed by the NT Office of Disability. The Cottages are staffed 24 hours a day by disability support workers trained to support clients with disabilities.

[12] The State party refers to General Comment No. 21, para 10.

line with the Committee's jurisprudence,[13] this may not constitute an effective domestic remedy for the purposes of international human rights law. In any event, the State party argues that the author should have exhausted at least one of these remedies and therefore his claims under articles 2 (1) and 26 of the Covenant should be declared inadmissible as per article 5(2)(b) of the Optional Protocol. The State party further notes that the author appears to have conflated articles 2 (1) and 26 and seeks to use article 26, which is a stand-alone right, as an auxiliary argument in relation to his claims about violations of article 10(3) in conjunction with article 2 (1). The State party underlines that in similar cases, the Committee found it unnecessary to examine the same claims under both articles and concludes that the author has failed to substantiate his claims under article 26 of the Covenant.

4.7 Regarding the merits of the above claims, the State party submits that the NT Criminal Code pursues dual legitimate aims, of providing fairness to accused persons unable to understand the proceedings against them, and ensuring the protection of the wider community and for the accused persons themselves. Furthermore, the State party notes that the law under which the author is detained is based on reasonable and objective criteria. In this context, it emphasizes that the author's custodial supervision order was imposed following a finding of not guilty by reason of mental impairment. In addition, the Supreme Court retains considerable discretion in deciding whether or not to impose such an order and the legal standard governing that decision is that persons must be released unconditionally unless "the safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released". The State party submits that the bases on which the author's supervised custody continues, notably, the risks associated with a premature release and his need for care and supervision, are clear, objective and reasonable, and are not defined by reference to disability. Lastly, the State party deems that supervision orders are proportionate means of balancing community and individual safety because they are applied only in limited circumstances as measures of last resort. Furthermore, periodic reports must be submitted to the court to allow it to examine every 12 months the continued necessity of detention. An additional safeguard of the regime is that the accused has the right to appeal against a finding subjecting him/her to custodial supervision.

4.8 The State party does not contest the admissibility of the author's allegations under article 9 of the Covenant but submits that they are without merit. It argues that the prohibition against arbitrary detention does not mean that persons with a disability, including persons with cognitive impairment, cannot be detained at all or cannot be made subject to indefinite custody orders, where it is based on sound, objective justifications and supported by appropriate legal safeguards.[14] The necessity of detention is assessed on objective factors and the NT Supreme Court has regularly reviewed the necessity of the author's continuing detention. Further, the management plan approved by the Supreme Court has clearly evidenced the intentions of all involved with the ultimate goal of achieving the author's move to a less restrictive setting. It further notes the author was and is held in conditions that differ from general correctional centre conditions. The author is now residing full-time outside of a correctional facility and has progressed particularly well since being transferred to Darwin.

4.9 The State party submits that the author has not provided any evidence as to his claim that he had been subjected to ill-treatment by prison staff and it therefore invites the Committee to declare this part of the complaint inadmissible. In any event, when it comes to the merits of his claims under articles 7 and 10 of the Covenant, the State party notes that the conditions of the author's detention have not caused him to suffer severe pain and suffering such to constitute torture. The State party contests the binding nature of the Nelson Mandela Rules and further contests that the author's detention in a correctional centre, taken alone, constitutes a violation of his rights. It notes in this respect that the Complex Behaviour Unit at the Darwin Correctional Centre is purpose built and operates with a strong therapeutic focus. In addition, the operation of the secure care facility in Alice Springs has provided an invaluable alternative to the Alice Springs Correctional Centre. The State party acknowledges that prolonged solitary confinement may constitute a violation of the Covenant, however, contrary to his statements, the author was not held in solitary confinement between

[13] The State party refers to *C. v. Australia* (CCPR/C/76/D/900/1999).

[14] The State party refers to *A. v. New Zealand* (CCPR/C/66/D/754/1997).

1995 and 2002 for up to 23 hours per day. Although he had been indeed kept isolated from the main prison population for an extended period, his segregation was necessary due to security concerns following a number of violent incidents involving the author and other prisoners. During this term, he was able to interact with other inmates on protection, and had recreational periods for 2-4 hours per day.[15] Even though the author was at times against his removal from the Protection Unit, in 2002, he was eventually relocated upon the recommendation of medical practitioners who became concerned about his mental deterioration given his lack of mixing with others. As a result, the author was moved into the High Support Unit, described as offering a safe, predictable environment with higher staff ratio and more flexibility around security conditions. Accordingly, the State party is of the view that the conditions of the author's detention and his treatment do not constitute a violation of articles 7 and 10 (1) of the Covenant.

4.10 Regarding the alleged violation of articles 17 and 23 of the Covenant, the State party asserts that the author has not provided any information or any evidence about his level of family engagement or interaction prior to his detention. Similarly, none of the evidence provided by the author demonstrates that Australia has arbitrarily or unlawfully interfered with his family life, nor failed to protect his family as the natural and fundamental group unit of society. In the absence of further evidence revealing treatment contrary to articles 17(1) and 23(1), the author has failed to substantiate this allegation and should be declared inadmissible.

4.11 Regarding the merits of the above claims, the State party notes that records indicate that the author had scarce contact with his family, due to his former institutional admissions, even prior to his detention in Alice Springs Correctional Centre. Nevertheless, in 2013, a total of eleven of the author's family members were supported on multiple occasions to visit him at Alice Springs Correctional Centre. In 2014, when the author was residing at the secure care facility, he participated in kangaroo tail cook-ups that his sister also attended.[16] Following the author's initial reunification with family, he reportedly had limited contact with his family in 2015 whilst he was still in Alice Springs. Since 2005, the author also had contact with his fellow countrymen through the Elders Visiting Program. Accordingly, to the extent that there has been an interference with the author's right to family life during his time at Alice Springs, it should be deemed lawful under articles 17(1) and 23 of the Covenant. Regarding the author's family life in Darwin Correctional Centre, the State party notes that the author's transfer to Darwin had been necessitated by his condition and as such, it must be deemed lawful and reasonable in the circumstances. Furthermore, in view of the fact that the author had had limited contact with his family members even before his transfer to Darwin, his relocation did not impose on him an excessive burden within the meaning of the cited articles.

4.12 Regarding the author's claim under article 27 of the Covenant, the State party argues that while it acknowledges the centrality of country and connection to the land of indigenous peoples' culture, these considerations cannot override the application of criminal law. In any event, the State party notes that continuous efforts have been made to improve the author's situation in this respect. Notably, community access, and in particular access to cultural activities, is a key component of the author's program. To the extent that the author's rights to enjoy his culture and practice his language have been limited by the terms of his detention, this limitation was lawful, reasonable, necessary and proportionate. Nevertheless, the State party reiterates that, upon the author's request, the NT Department of Health is currently considering transferring him back to central Australia in order to, *inter alia*, reunite the author with his Country provided that this is consistent with the need to effectively regulate his behaviours. The State party therefore considers that the author's claims lack sufficient substantiation and should be declared inadmissible under article 2 of the Optional Protocol.

Authors' comments on the State party's observations on admissibility and the merits

5.1 On 20 July 2018, the author submitted his comments on the State party's observations.

[15] The State party accepts that this is less than the time allowed for other prisoners.

[16] However, the author's sister lost interest over time and the cook-ups were discontinued.

5.2 Regarding the issue of domestic remedies, the author underlines that the State party acknowledged that administrative remedies cannot be considered effective for the purposes of the Optional Protocol. Therefore, the State party has not indicated any effective remedy the author could have made use of. Regarding the ineffectiveness of pursuing an action in the High Court of Australia, the author reiterates his arguments presented in the complaint.

5.3 Regarding the State party's submission in relation to his claims under article 9 of the Covenant, the author reiterates his arguments in his complaint and notes that as regards the issue of proportionality, the Committee has found that the longer detention continues, the heavier the burden is on the State party to ensure rehabilitation and reformation. [17] Furthermore, he repeats that to the extent that any rehabilitative efforts have been implemented, these have been made only very recently. Furthermore, the 2017 periodic report is not available to the author or his guardian, which prevents them from effectively responding to its findings. He repeats that since no court has assessed the ongoing risks posed by him since 2003, the State party is basing its assertion in this respect on very outdated findings. Despite the periodic reports, these assessments have not been particularised and subject to cross-examination in any court of law in breach of the due process guarantee. Lastly, the author notes that he has never suggested that he should be released from custody but that his detention should be appropriate to his condition. The failure to provide alternative facilities and resources should not be erected as an excuse to deprive him of his human rights.

5.4 Regarding his claims under article 10(3) of the Covenant, the author notes that the distinction between prisoners and convicted prisoners in para 10 of General Comment no 21 relates to a distinction between convicted persons and persons on remand. This paragraph, however, was not intended to exclude the application of article 10(3) in case of prisoners in preventive detention, which would deprive this growing circle of vulnerable detainees from important guarantees, such as access to rehabilitation, under the Covenant. As regards the substance of his claims, the author repeatedly contests the State party's position that significant therapeutic and disability support has been provided to him. He notes that he has not been given access to documents supporting these allegations.[18] He further reiterates that a maximum security prison environment is inappropriate for his therapeutic needs and notes that the State party's statement regarding his limited prospects for rehabilitation is contradicted in other parts of its observations. He underlines that despite its aims, the impugned law has had the impact of incarcerating and punishing the author for over 20 years, a person with mental illness, primarily because the State party has failed to provide the resources for practicable alternatives to prison. He further notes that neither he, nor his guardian has the power to apply for a variation or revocation of the custodial supervision order. The author further contests the effectiveness of guarantees allegedly built in the legislative scheme because the court's power of variation, upon receipt of a report, is dependent on the availability of an alternative placement, which is lacking in the region. The author also notes that the State party's submission seems to create the impression that every 12 months a review is carried out by the court. Periodic reporting obligation, however, does not equate to annual reviews. In addition, the right to appeal is limited to the imposition of the supervision order and cannot concern its terms, including the lack of regular mandatory reviews.

5.5 Regarding articles 17 and 23 of the Covenant, the author notes that the State party provided facts relating to his detention in Alice Springs Correctional Centre in 2013 and 2014 that clearly demonstrate the author's ability to connect with family and indigenous community and that the excessive burden placed on his relations before 2013 and as a result of his relocation in 2015 stands true regardless of his pre-detention relationships.

State party's additional observations

6.1 On 31 October 2019, the State party submitted additional observations in relation to the present complaint including documentary evidence to support its position.

[17] The author refers to Miller et al v. New Zealand (CCPR/C/119/D/2502/2014).

[18] The author's guardian confirmed in an affidavit that the State party has not been forthcoming in providing information in relation to the author's situation since his transfer to Darwin.

6.2 First of all, the State party notes that on 7 January 2019, the Supreme Court ordered that the author's custodial supervision order be amended to a non-custodial supervision order. Accordingly, in February 2019, the author moved into a three-bedroom house in an inner suburb in Darwin with disability support workers. The author continues to receive 24-hour support.

6.3 The State party maintains that the author had at least one available effective domestic remedy which he has not exhausted regarding his discrimination claims. It further contests that the author has been incarcerated in a maximum security prison for over 20 years, with no prospect of release. In this respect, the State party reiterates that as soon as alternatives were available, the author was moved out of maximum security prison. It underlines that neither the secure care facility in Alice Springs nor the Cottages are considered to be a maximum security prisons. As concerns the author's current situation, he is no longer being held in custody. Regarding his appeal rights, the State party reaffirms that, contrary to the author's statement, a supervised person, or his guardian, are able to apply to the Court to vary or revoke a custodial supervision order under s 43ZD of the NT Criminal Code. This is in addition to the right to appeal under s 406(3). Furthermore, the State party notes that while an annual report to the court does not constitute a formal review, the Court may conduct a review if it considers it appropriate to do so.

6.4 The State party maintains its position that article 10 (3) does not apply to the author's situation and submits that in any event, it has taken steps to support the author's rehabilitation well before the communication's transmittal to the State party.[19]

6.5 As concerns the author's claims under article 9 of the Covenant, the State party notes that the Committee's views in *Miller and Caroll* do not lend support to the author's claim. It recalls that, contrary to the authors of the cited case, the author of the present case has not been subject to preventative detention following the cessation of a punitive term of imprisonment and reiterates that when the author was detained, he was held in conditions that differed from general correctional centre conditions and was provided with substantial resources to assist his rehabilitation. Referring to the information provided above, it further rejects the author's statement that no court has assessed the ongoing risks posed by the author.

6.6 Regarding articles 7 and 10(1) of the Covenant, the State party submits extensive documentation to substantiate its position that the conditions in which the author was held were human and refers back to the relevant parts of its previous observations.

6.7 In regards to articles 17(1) and 23(1) of the Covenant, it maintains that article 17 is not intended to cover relationships that were non-existent at the time the alleged breach occurred.[20] The State party contests the author's assertion that his guardian has been effectively frozen out of decision making concerning the author's situation. The Solicitor for the Northern Territory provides regular information to the author's legal representative at North Australian Aboriginal Justice Agency. The Office of Disability in the Northern Territory Department of Health most often liaises with the Public Guardian on the understanding that he will inform and communicate with the Community Guardian and make joint decisions as required. It further rejects the claims regarding the author's move to Darwin and maintains that detention inherently has an impact on a person's ability to engage with friends and family but the State party has not arbitrarily or unlawfully interfered with the author's family life in the present case. As evidenced by his transition from a custodial to a non-custodial supervision order, he has continued to excel since his transfer to Darwin into accommodation more suited to his complex mental health and behavioural needs, while being in the least restrictive environment as practically possible.

[19] In order to implement the Supreme Court's orders, in 2003, an individual management plan was developed for the author. The author was then transferred from Protection, to the general population of the prison and then to the secure care facility. In 2004 and 2005, he was managed each week-day by the Positive Behaviour Support Unit, and was participating in activities including socialising with other inmates, visits from relatives, and daily walks. The author demonstrated improvement in the management of behavioural triggers, resulting in fewer incidents of physical aggression.

[20] The State party refers to Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2005) 394 [32] and *A.S. et al v Canada*, (CCPR/C/12/D/68/1980).

6.8 Regarding the author's minority rights under article 27 of the Covenant, the State party reiterates its position that to the extent that the author's rights to enjoy his culture and practice his language have been limited by the terms of his custodial supervision order this limitation was not arbitrary. It further submits information on general measures adopted by the State party to reduce racism, discrimination and unfair treatment across all justice agencies and in all spheres of life.[21]

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 As to the question of exhaustion of domestic remedies, the Committee notes the State party's argument that certain administrative remedies (complaint and inquiry procedure before the NT Anti-Discrimination Commissioner) have not been pursued by the author concerning his claims under article 10 (3) read in conjunction with articles 2 (1) and 26 of the Covenant, in particular as regards the discriminatory aspects of these claims. In this connection, the Committee observes that the State party failed to show that the NT Anti-Discrimination Commissioner would indeed have the power to deal with the author's case in view of the fact that complaints may be submitted only if the discrimination occurred under specific circumstances and the author's case does not necessarily fall within such categories. Likewise, the State party failed to show through concrete examples that even if the Commissioner had decided in favour of the author, be it within the scope of a complaint or an inquiry procedure, such a decision would indeed have a binding rather than a recommendatory effect on the relevant authorities, as suggested by the State party, and that it could provide the author with an effective remedy. The Committee further notes that the author has turned to the Australian Human Rights Commission, which is an administrative avenue, but its recommendations were left unattended by the State party allegedly because of jurisdictional issues. In such circumstances, these remedies cannot be described as ones which would, in terms of the Optional Protocol, be effective.[22] Regarding the judicial avenues, the Committee notes the author's submission supported by legal experts' advice that his case would have no reasonable prospect for success before the High Court of Australia. In the absence of any submission by the State party in this regard contesting the author's assertion, the Committee considers that it is not precluded from considering the communication under article 5 (2) (b) of the Optional Protocol.

7.4 The Committee further considers that to the extent that the author is basing his claims on the Convention on the Rights of Persons with Disabilities, such claims fall outside of the scope of the Covenant and are inadmissible for incompatibility *ratione materiae* with the Covenant, under article 3 of the Optional Protocol.

7.5 In addition, the Committee is mindful of the State party's position that the author's claims under article 10 (3) are incompatible with the provisions of the Covenant because the cited provision concerns convicted persons only; however, the author was found not guilty and has a different legal status to convicted persons. The Committee notes that the author contests this argument. Having assessed the parties' submissions, the Committee considers that the scope of protection afforded under article 10 (3) of the Covenant extends to inmates suffering from mental illness whose criminal responsibility could not be established due to their mental impairment. An interpretation to the contrary would render the protection under article 10 (3) illusionary for a particularly vulnerable group of detainees even though the

[21] Aboriginal Justice Agreement; National Statement of Principles Relating to Persons Unfit to Plead or Found Guilty by Reason of Cognitive or Mental Health Impairment.

[22] See e.g. *C. v. Australia* (CCPR/C/76/D/900/1999), para. 7.3.

enjoyment of the guarantees enshrined in this provision is of special importance to them on account of their condition. The Committee is therefore of the view that the author's claim under article 10 (3) is not incompatible with the provisions of the Covenant.[23]

7.6 Lastly, the Committee takes note of the State party's submission stating that the author has failed to sufficiently substantiate his claims under articles 7, 10(1), 17(1), 23(1), 26 and 27 of the Covenant. As to the author's claims regarding the conditions of his detention, including the lack of access to adequate rehabilitation programs, the Committee notes that for the great part of his custodial supervision, the author was detained in a maximum security prison facility and that he presented a prima facie case as regards his allegation that his detention in a prison environment may not have been in line with the human rights standards stemming from the cited articles. The Committee therefore considers that the author's claims under articles 7 and 10(1) have been sufficiently substantiated.

7.7 As regards the State party's challenge to the admissibility of the author's complaint under article 26 in conjunction with article 2(1) of the Covenant, the Committee underlines that the author was subject to the impugned laws on the ground that he had allegedly committed criminal offences, however, he could not stand trial owing to his mental condition. The Committee notes that none of this has been contested by the author. Furthermore, the Committee recalls that not all differentiation is to be considered discrimination prohibited by the Covenant. Any determination about discrimination requires a comparison with persons who are similarly situated. Given the differences of the situation of persons with mental disabilities in a criminal procedure context, the fact alone that specific domestic laws have been applied to the author is not sufficient to conclude that the author presented a prima facie case of discrimination for the purposes of article 2 of the Optional Protocol. The Committee further notes that the author's claims in this respect are intimately linked to his complaints under articles 7, 9 and 10 of the Covenant and will therefore examine them under these articles. The Committee therefore considers that the author has failed to sufficiently substantiate his claims under article 26 in conjunction with article 2 of the Covenant and finds it inadmissible under article 2 of the Optional Protocol.

7.8 Regarding the author's claims under articles 17(1) and 23(1) of the Covenant, the Committee considers that the author has sufficiently substantiated that there may have been an interference with his family life that goes beyond the burden that is inherent in detention, in as much as it concerns the period of his detention prior to his transfer to Darwin Correctional Centre. As regards his minority rights under article 27 of the Covenant, the Committee considers that the author failed to establish a prima facie case in that the State party had less intrusive means to achieve the aims of his transfer and that the increase of burden on his minority rights went beyond of what is inherent in detention. Accordingly, the Committee considers that the author has failed to sufficiently substantiate his claim under article 27 of the Covenant and his allegations are therefore inadmissible under article 2 of the Optional Protocol.

7.9 The Committee observes that the State party did not contest the admissibility of the author's claims under article 9 of the Covenant on any grounds.

7.10 In view of the foregoing, the Committee considers that the author's allegations under articles 7, 9, 10 (1) (3), 17 (1) and 23 (1) of the Covenant have been sufficiently substantiated for the purposes of admissibility and proceeds with their consideration on the merits.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information submitted to it by the parties, as required under article 5 (1) of the Optional Protocol.

8.2 Regarding the author's claims under article 9 of the Covenant, the Committee takes note of the author's claim that his detention had been arbitrary because for the major part of his detention, the authorities have failed to provide him with suitable accommodation in a

[23] See, e.g. *Robert John Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4; Concluding observations on the fourth periodic report of Switzerland (CCPR/C/CHE/CO/4) paras. 38 and 39.

secure care facility adequate to his disabilities. The Committee notes the author's position in this respect that prison environment is inappropriate for the rehabilitation and care of non-convicted individuals who suffer from mental impairment. Furthermore, the Committee is mindful of the author's statement that owing to the indefinite length of his custodial supervision and the lack of mandatory reviews at regular intervals, his deprivation of liberty had become disproportionate. The Committee observes that the State party contests the arbitrariness of the author's detention because it had been based on objective and reasonable grounds. In addition, the State party noted that the Supreme Court reviewed the author's case regularly, a behavioural support plan was also drawn up and less stringent measures were applied whenever his situation allowed for it.

8.3 The Committee recalls its jurisprudence indicating that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[24] In the present case, the Committee notes that the author's custodial supervision appears to be similar in nature to a sentence of security/preventive detention (indefinite detention until release by the Parole Board)[25] and finds the principles established in its jurisprudence[26] and general comment no. 35 (para. 12) concerning the latter relevant for the purposes of examination of the present case. In this regard, the Committee recalls that when a State imposes security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. A present, direct and imperative threat should be invoked to justify the detention of persons considered to present such a threat. The burden of proof lies on States parties to show that the individual poses such a threat, that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions.

8.4 In the present case, the Committee observes that the initial period of the author's deprivation of liberty at Alice Springs Correctional Centre was based on the decision of the Supreme Court dated 15 October 1996 pursuant to the then effective s 382 of the NT Criminal Code. This was followed by the decision of the Administrator dated 27 September 2001 ordering that the author be confined in the same facility. Part IIA of the NT Criminal Code came into operation on 15 June 2002 and pursuant to the transitional provisions of s 6 of the Amending Act, the author was taken to be a supervised person held in custody on the same terms and conditions under a custodial order within the meaning of Part IIA. At this juncture, the Committee notes that there is no reason for it to doubt the domestic authorities' assessment that the author suffered from mental impairment and that due to his condition, his case fell within the scope of the above-mentioned specific laws.

8.5 However, the Committee notes that with the entry into force of the Amending Law, no formal order had been made about the author's custodial supervision. Although in August 2003 the Supreme Court conducted a review pursuant to s 6(3) and 43 ZH of the Amending Act and a judgment was delivered on 10 September 2003, this had happened with a 6-month delay. Furthermore, contrary to s 43 ZG of the amending Act, no term had been fixed for the supervision order, which was supposed to be followed by a mandatory review towards the end of that period.[27] Although the Supreme Court found in 2007 that despite these

[24] See e.g. *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1; *Sergei Sotnik v. the Russian* Federation (CCPR/C/129/D/2478/2014), para 7.3.

[25] See e.g. *Allan Kendrick Dean v. New Zealand* (CCPR/C/95/D/1512/2006), para. 1.

[26] *Allan Kendrick Dean v. New Zealand* (CCPR/C/95/D/1512/2006), para. 7.4.; Miller et al v. New Zealand (CCPR/C/119/D/2502/2014), para. 8.5.

[27] The Supreme Court, later examining whether this has been a mistake, in its 2007 decision noted that the 2003 decision was not a supervision order within the meaning of s 43ZA(1) and therefore no mandatory review had to take place after the expiry of the term of the supervision order. The Supreme

deficiencies, the 2003 decision had been in line with the applicable provisions of the law, the Committee observes that as a result of this interpretation, there was never a minimum duration set for the author's custodial supervision and the only mandatory review occurred in 2003. The Committee takes note of this information that reports still have to be submitted to the court at regular intervals, it is nonetheless dependant on the court whether to conduct a review and up to that point, the procedures are not adversarial, lacking important guarantees of habeas corpus under article 9(4) of the Covenant, such as access to information and the right to challenge evidence. Even though hearings of evidence seem to have taken place in the present case, these date back only to 2014 and nothing has been put before the Committee to conclude that the author had been heard on these occasions.

8.6 As regards the place of the author's detention, the Committee concurs with the position of the European Court of Human Rights requiring a link between the reason for the deprivation of liberty and the place and conditions of detention.[28] In this respect, the Committee underlines that the author was detained in high security prison facilities from August 1995 to 7 February 2017, except for a short period between May 2013 and January 2014. Although the Committee recognizes the importance of a fair balance between the interests of the individual and public safety and that experts have regularly informed the Supreme Court of the author's situation, it is not possible for the Committee to accept the State party's argument that the author in the present case was receiving appropriate care at all times, even when not placed in secure care facilities undisputedly better suited to accommodate his needs. The Committee notes that the NT Supreme Court, in its 2003 decision, is particularly clear on this point when it finds that the resources available at Alice Springs Correctional Centre were not appropriate for the custody and care of the author. This had been further confirmed by the Australian Human Rights Commission in 2014. While the Committee notes with great appreciation the improvement of the conditions of detention whenever the author was placed in a secure care facility and the efforts of all those involved in the author's care, including the implementation of a support plan eventually leading the Supreme Court to change his custodial supervision to a non-custodial one, it considers at the same time that these developments may not account for the unlawfulness of those periods spent in a maximum security prison environment during such a long term. The Committee observes that the alleged lack of resources may not exempt the State party from its obligations in this respect.

8.7 The Committee refers to its constant jurisprudence that, it is generally for the organs of States parties to the Covenant to review and evaluate facts and evidence, unless it can be established that such evaluation was clearly arbitrary or otherwise amounted to a denial of justice. However, on the basis of the material before it, the Committee is of the view that the State party failed to demonstrate that the otherwise legitimate aims of the author's custodial supervision could not have been achieved by less intrusive means than his continued detention in high security prison facilities, particularly as the State party had a continuing obligation under article 10(3) of the Covenant to adopt meaningful measures for the reformation of the author throughout the nearly 20 years during which he was in high security prison environment. In view of the above, the Committee deems that the author's respective terms of detention, had been arbitrary and as such, run counter to the guarantees of article 9(1) of the Covenant. The Committee therefore concludes for a violation of article 9(1) of the Covenant. Furthermore, the Committee refers to its finding in Rameka[29] and considers that the author's inability to challenge the existence of substantive justification for his continued detention for preventive reasons has been in violation of his right under article 9(4) of the Covenant.

8.8 In the light of these findings and with due regard to the fact that the author's claims, to a large extent, relate to the insufficiency of services purporting reformation and

Court found however that this is not a problem because a compulsory review had already taken place as per the transitional provisions of the Amending Act.

[28] See e.g. *L.B. v. Belgium* (application no. 22831/08) para 93; *Ashingdane v. the United Kingdom* (application no. 8225/78) para. 44.

[29] Tai Wairiki Rameka et al. v. New Zealand (CCPR/C/79/D/1090/2002), para 7.2.

rehabilitation throughout most part of his custodial supervision, the Committee also finds a separate violation of article 10 (3) of the Covenant.

8.9 Furthermore, the Committee takes note of the author's claims regarding his alleged ill-treatment under articles 7 and 10(1) of the Covenant and the information submitted to it by the State party in response to these allegations, namely that the author was held in conditions that differ from those of general correctional centre conditions, that there is no evidence that the author had been ill-treated by staff and that his placement in protective custody had been warranted by security concerns. The Committee considers, however, that these factors do not take away the force of the uncontested allegation regarding the negative impact of the author's custodial supervision whose minimum term remained unknown throughout the term of its effect. Furthermore, the mere fact that the author preferred being isolated instead of placed with ordinary prisoners with an increased exposure to insults does not necessarily render his isolation lawful but is rather indicative of the limited nature of his choices in a prison environment that did not correspond to his pathology. In such circumstances, the Committee considers that the combination of the inappropriate conditions of the author's detention for most of its duration and its indefinite duration in the absence of mandatory reviews in adversarial proceedings, have been cumulatively inflicting serious psychological harm upon him, and constitute treatment contrary to article 7 of the Covenant. In the light of this finding, the Committee will not examine the same claims under article 10 (1) of the Covenant.

8.10 Lastly, the Committee notes the author's claim under article 17(1) and 23 of the Covenant, in particular that he had limited contact with his family in Alice Springs Correctional Centre and that his opportunities further deteriorated by his transfer to Darwin. The Committee is mindful of the State party's submission that in 2013, a total of eleven of the author's family members were supported on multiple occasions to visit the author and while residing at the secure facility in Alice Springs, he was able to participate in programs with his sister. In this connection, the Committee first observes that there is no sufficient information before it to conclude that the circumstances of the author's transfer to Darwin indeed placed a disproportionate burden on his family life in view of the fact that the author's transfer seems to have purported the finding of a suitable facility for his therapeutic treatment as evidenced by his subsequent and gradual progress. The Committee therefore limits its examination to the period of the author's detention at the Alice Springs Correctional Centre. In this regard, the Committee observes that, as exemplified by the measures taken in 2013 and 2014, there have been some measures available in the State party's arsenal to facilitate the author's contact with his family. The Committee notes that such support was provided to the author at the time regardless of the State party's objection that article 17 of the Covenant does not cover relationships that were non-existent at the time the alleged breach occurred. Nevertheless, the Committee observes that there is no information before it that any similar measures had been taken prior to 2013, even though these could have been particularly beneficial to the author. In the absence of any information concerning this particularly long period (from August 1995 to 2013), the Committee considers that the author's grievances went beyond of what is inherent in detention and finds that there has been a violation of article 17 of the Covenant. In the light of this finding, the Committee will not examine the same claims under article 23 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of articles 7, 9 (1) (4), 10 (3) and 17 of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This provision requires that States parties make full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under the obligation, inter alia, to provide adequate compensation and appropriate measures of satisfaction to the author for the violations suffered. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has

undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.