



Australian
Human Rights
Commission

KA, KB, KC and KD v Commonwealth of Australia

[2014] AusHRC 80

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**KA, KB, KC and KD v
Commonwealth of Australia
(Department of Prime Minister
and Cabinet, Department of
Social Services, Attorney-
General's Department)**

Report into arbitrary detention,
inhumane conditions of detention and
the right of people with disabilities to live
in the community with choices equal to
others

[2014] AusHRC 80

Australian Human Rights Commission 2014



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**Australian
Human Rights
Commission**

September 2014

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the complaints made by four Aboriginal men with disabilities, including intellectual disabilities against the Commonwealth of Australia (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department).

I have found that the Commonwealth failed to take measures to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges.

I have found that the failure to take these measures was inconsistent with or contrary to the complainants' rights under articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR) and articles 14(1), 19, 25, 26(1) and 28(1) of the *Convention on the Rights of Persons with Disabilities* (CRPD) (in the case of Mr KB and Mr KC, at least until they were transferred to a secure facility at Kwiynmpe House). I have also found that in the case of Mr KA and Mr KD, the failure to act was inconsistent with article 7 of the ICCPR and article 15 of the CRPD.

In August 2014, I provided a notice to the department under section 29(2)(a) of the AHRC Act setting out my findings. I recommended that the Commonwealth provide a copy of the Commission's findings to the Northern Territory and seek assurances from the Northern Territory that it will take immediate steps to identify alternative accommodation arrangements for each of the complainants so that Mr KA and Mr KD are no longer detained in a prison and Mr KB and Mr KC are progressively moved out of held detention. I also made six systemic recommendations which are outlined in Part 8.2 of the enclosed report.

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By letter dated 26 September 2014 the Commonwealth provided a response to my findings and recommendations. This response is set out in Part 9 of the enclosed report.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink that reads "Gillian Triggs". The signature is fluid and cursive, with a long horizontal stroke at the bottom.

Gillian Triggs
President
Australian Human Rights Commission

1 Introduction to this inquiry

1. This is a report of findings of the Australian Human Rights Commission following an inquiry into complaints by four Aboriginal men with disabilities, including intellectual disabilities. Each of the men was charged with criminal offences allegedly carried out in the Northern Territory.
2. I have directed that the identities of each of the complainants not be published in accordance with section 14(2) of the AHRC Act. For the purposes of this report each complainant whose identity has been suppressed has been given a pseudonym beginning with K.
3. The respondent to the complaints made to the Commission is the Commonwealth of Australia, represented by the Department of Prime Minister and Cabinet (PM&C), the Department of Social Services (DSS) and the Attorney-General's Department (AGD). DSS and PM&C have taken over functions that were the responsibility of the former Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).
4. In the case of the first three complainants, each was found unfit to stand trial due to his disabilities. In relation to Mr KA and Mr KB, a jury in a special hearing returned a qualified verdict of guilty to either the primary offence or an alternative offence. Such a qualified finding does not constitute a basis in law for a finding of guilt to which the offence relates. In relation to Mr KC, a jury in a special hearing returned a verdict of not guilty by reason of mental impairment. In each case, orders were made under Part IIA of the Northern Territory *Criminal Code* (NT Criminal Code)¹ which required each of these three complainants to be incarcerated for a number of years in the Alice Springs Correctional Centre (ASCC). ASCC is the main maximum security prison in the Northern Territory.
5. Mr KA was first detained in ASCC in May 2010 and continues to be detained there.
6. Mr KB was first detained in ASCC in August 2007. If Mr KB had been found guilty of the offence he was charged with, the Court would have imposed a term of imprisonment of 12 months. Instead, Mr KB spent almost 6 years detained in ASCC before being transferred to a secure care facility.
7. Mr KC was first detained in ASCC in August 2008. If Mr KC had been found guilty of the offence he was charged with, the Court would have imposed a term of imprisonment of 12 months. Instead, Mr KC spent more than four and a half years detained in ASCC before being transferred to a secure care facility.
8. The fourth complainant, Mr KD had been tried in relation to a range of serious offences prior to the introduction of the current scheme in Part IIA. He had been found not guilty by reason of insanity in 1996. As required by the then section 382 of the NT Criminal Code, the Court ordered that he be kept in strict custody at the ASCC until the Administrator's pleasure be known. When Part IIA of the NT Criminal Code came into operation in 2002, Mr KD was taken 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. He continues to be detained at ASCC.
9. In the case of each of the complainants, they were detained at ASCC because until March 2013 there was no place in the Northern Territory, other than a maximum security prison, at which people subject to a custodial supervision order under Part IIA of the NT Criminal Code could be committed to custody.
10. In general terms, the men complain that:
 - their detention in the ASCC is or was arbitrary contrary to article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR) and article 14(1) of the *Convention on the Rights of Persons with Disabilities* (CRPD);

- the conditions of their detention are or were inhumane contrary to articles 7 and 10 of the ICCPR and article 15 of the CRPD; and
- the lack of alternatives to detention at the ASCC and the lack of mental health and rehabilitation services at ASCC has resulted in the breach of a number of their rights under other articles of the CRPD.

11. This inquiry was undertaken pursuant to section 11(1)(f) of the AHRC Act.
12. In the original complaints made to the Commission, the complainants raised complaints under articles 2 and 26 of the ICCPR. These complaints alleged a failure by the Commonwealth to use its legislative power, either to override Part IIA of the NT Criminal Code, or to engage in other legislative activities aimed at giving effect to their human rights. These aspects of the complaints were terminated on the basis that they were misconceived. The Commission's inquiry function under section 11(1)(f) of the AHRC Act does not extend to legislative acts. Similarly, complaints by Mr KA based on the *Convention on the Rights of the Child* were terminated on the basis that they were made more than 12 months after the alleged acts. I do not consider these complaints further in this report.
13. The submissions of the Commonwealth departments have emphasised that the Northern Territory Government was responsible for enacting the NT Criminal Code and that the Northern Territory has the primary responsibility for the day to day operation of ASCC. I accept that this is the case. The Commission's function in this matter is to assess whether there have been acts or practices of the Commonwealth (including failures to act) which have been inconsistent with or contrary to the human rights of the complainants.
14. As a result of the inquiry I find that there has been a failure by the Commonwealth to take measures to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges. There was an obligation at international law on the Commonwealth to act. This obligation was consistent with domestic obligations undertaken by the Commonwealth to the Northern Territory. The need for action was well known and had been well known for many years. Specific administrative measures to take this action were provided for by legislation. I find that the failure to act was inconsistent with or contrary to the complainants' rights under articles 9(1) and 10(1) of the ICCPR and articles 14(1), 19, 25, 26(1) and 28(1) of the CRPD (in the case of Mr KB and Mr KC, at least until they were transferred to a secure facility at Kwiynrpe House). I find that in the case of Mr KA and Mr KD, the failure to act was also inconsistent with article 7 of the ICCPR and article 15 of the CRPD.
15. The basis for these findings is set out in more detail below. Section 8 of this report contains my recommendations.

2 Legal framework

2.1 Functions of the Commission

16. Section 11(1) of the AHRC Act identifies the functions of the Commission. Relevantly section 11(1)(f) gives the Commission the following functions:
- to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:
 - (i) where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.
17. Section 20(1)(b) of the AHRC Act requires the Commission to perform the functions referred to in section 11(1)(f) when a complaint in writing is made to the Commission alleging that an act is inconsistent with or contrary to any human right.
18. Section 8(6) of the AHRC Act requires that the functions of the Commission under section 11(1)(f) be performed by the President.

2.2 Scope of ‘act’ and ‘practice’

19. The terms ‘act’ and ‘practice’ are defined in section 3(1) of the AHRC Act in the following way:

act means an act done:

- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth;
- (b) under an enactment;
- (c) wholly within a Territory; or
- (d) partly within a Territory, to the extent to which the act was done within a Territory.

practice means a practice engaged in:

- (a) by or on behalf of the Commonwealth or an authority of the Commonwealth;
- (b) under an enactment;
- (c) wholly within a Territory; or
- (d) partly within a Territory, to the extent to which the act was done within a Territory.

20. In the AHRC Act, 'enactment' means a Commonwealth enactment or a Territory enactment. However, 'Territory' does not include the Australian Capital Territory or the Northern Territory. In its submissions to the Commission, FaHCSIA suggested that the Northern Territory was the 'proper respondent' to the complaints.² To the extent that this submission was based on a reading of paragraphs (b), (c) or (d) of the definition of 'act' or 'practice'³ it was misplaced. Neither the complainants nor the respondents have alleged that the Northern Territory engaged in relevant acts or practices on behalf of the Commonwealth. Accordingly, the Commission's inquiry is focussed on whether there were relevant acts or practices that were undertaken by or on behalf of the Commonwealth or under a Commonwealth enactment.
21. The terms 'act' and 'practice' are used in the AHRC in accordance with their ordinary meanings. That is, the noun 'act' denotes a thing done and the noun 'practice' denotes a course of repeated conduct.⁴ Section 3(3) provides that the reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act.
22. The functions of the Commission identified in section 11(1)(f) of the AHRC Act are only engaged where the act complained of is not one required by law to be taken;⁵ that is, where the relevant act or practice is within the discretion of the Commonwealth, its officers or agents.

2.3 Arbitrary detention

23. The rights and freedoms recognised by the ICCPR and the CRPD are 'human rights' within the meaning of the AHRC Act.⁶
24. Both instruments contain prohibitions on arbitrary detention.
25. Article 9(1) of the ICCPR provides:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
26. The following principles relating to arbitrary detention within the meaning of article 9 of the ICCPR arise from international human rights jurisprudence:
 - (a) lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to a legitimate aim justifying the person's initial detention;⁷
 - (b) arbitrariness is not to be equated with 'against the law'; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;⁸ and
 - (c) detention should not continue beyond the period for which a State party can provide appropriate justification.⁹
27. The United Nations Human Rights Committee (UNHRC) has recently provided some more specific guidance about the detention of people with mental health issues. In a draft General Comment on article 9 of the ICCPR, the UNHRC said:¹⁰

States parties should explain in their reports what they have done to revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. Any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question or preventing injury to others, must take into consideration less restrictive alternatives, and must be accompanied by adequate procedural and substantive safeguards established by law. The procedures should ensure respect for the views of the patient, and should ensure that any guardian or representative genuinely represents and defends the wishes and interests of the patient. States parties must provide programmes for institutionalized persons that serve the purposes that are asserted to justify the detention. Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity. Patients should be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to ensure conditions of detention consistent with the Covenant.

28. Consideration of whether a person is detained in the least restrictive environment is not limited to the range of detention options currently available. Rather, a relevant question is whether the type of detention is appropriate for the person's circumstances. In its Concluding Observations in relation to Canada in 2006, the UNHRC noted its concern about information that, in some provinces and territories, people with mental disabilities or illness remain in detention because of the insufficient provision of community-based supportive housing.¹¹ The Committee made reference to articles 2, 9 and 26 of the ICCPR and recommended that Canada (including all governments at the provincial and territorial level) should increase its efforts to ensure that sufficient and adequate community based housing is provided to people with mental disabilities, and ensure that the latter are not under continued detention when there is no longer a legally based medical reason for such detention.
29. The equivalent provision in the CRPD is article 14(1) which provides:
- States Parties shall ensure that persons with disabilities, on an equal basis with others:
- (a) Enjoy the right to liberty and security of person;
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
30. In the case of the present complainants, it will be necessary to consider whether their prolonged detention in closed detention facilities could be justified as reasonable, necessary and proportionate on the basis of particular reasons specific to each of them.
31. Unlike economic, social and cultural rights which are subject to 'progressive realization' (discussed in paragraphs 55 to 63 below in the context of the CRPD), States have an immediate obligation to respect and ensure the civil and political rights set out in the ICCPR.

2.4 Conditions of detention

32. Both the ICCPR and the CRPD also contain provisions dealing with the conditions of detention and humane treatment of people more generally.
33. Article 7 of the ICCPR relevantly provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The same words are used in article 15 of the CRPD.

34. The UNHRC has considered this issue in the case of a person in immigration detention with mental health issues. In *C v Australia*, the UNHRC found that the administrative detention of the author for a period of more than two years was arbitrary, contrary to article 9(1) of the ICCPR. It was not disputed that the author had developed a psychiatric illness as a result of the protracted period of immigration detention. The Commonwealth was aware for at least the last two years of the author's detention of the psychiatric difficulties he faced. The UNHRC found that:¹²
- the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.
35. Article 10(1) of the ICCPR provides that:
- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
36. Article 10(1) imposes a positive obligation on State parties to take actions to prevent inhumane treatment of detained persons. The article recognises that people deprived of their liberty are a particularly vulnerable group who are entitled to special protection. Establishing a breach of article 10, however, requires something more than the mere fact of deprivation of liberty.¹³
37. The content of article 10(1) has been developed with the assistance of a number of United Nations instruments that articulate minimum international standards in relation to people deprived of their liberty, including:
- the Standard Minimum Rules for the Treatment of Prisoners (the 'Standard Minimum Rules');¹⁴ and
 - the Body of Principles for the Protection of all Persons under Any Form of Detention (the 'Body of Principles').¹⁵
38. The UNHRC has invited States Parties to indicate in their reports the extent to which they are applying the Standard Minimum Rules and the Body of Principles.¹⁶ At least some of these principles have been determined to be minimum standards regarding the conditions of detention that must be observed regardless of a State Party's level of development.¹⁷
39. Article 82 of the Standard Minimum Rules for the Treatment of Prisoners provides:
- (1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
 - (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialized institutions under medical management.
 - (3) During their stay in a prison, such prisoners shall be placed under the special supervision of a medical officer.
 - (4) The medical or psychiatric service of the penal institutions shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.
40. Further, article 10(2)(a) of the ICCPR provides that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Australia has a reservation to article 10(2)(a) to the effect that 'the principle of segregation is accepted as an objective to be achieved progressively'.
41. Each of the present complainants is an unconvicted person but, while detained at ASCC, was accommodated within a general prison population.

2.5 Economic, social and cultural rights under the CRPD

(a) Temporal scope of investigation

42. The CRPD was ratified by Australia on 17 July 2008. On 20 April 2009, the then Attorney-General made a declaration under section 47(1) of the AHRC Act that the CRPD is, for the purpose of that Act, an international instrument relating to human rights and freedoms.¹⁸

43. A preliminary issue relates to the temporal scope of an investigation by the Commission into an alleged breach of the CRPD. The general rule in international law is that treaties do not have a retroactive effect. Article 28 of the Vienna Convention on the Law of Treaties provides that:¹⁹

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

44. In the case of the ICCPR, the UNHRC has held that if the act occurred before the entry into force of the ICCPR, or before the ICCPR entered into force for a particular State, then the State does not have responsibility under the Convention. Nowak notes that the Committee has 'consistently declared communications inadmissible *ratione temporis* in whole or in part when the alleged violations of the Covenant occurred in whole or in part prior to the entry into force of the Covenant'.²⁰

45. Further, in general, complaints to the UNHRC which dealt with acts prior to a State entering into the first Optional Protocol to the ICCPR are inadmissible *ratione temporis*.²¹ The first Optional Protocol is the mechanism by which individuals may make complaints to the UNHRC about alleged violations of the ICCPR. An analogy may be made between the entry into the first Optional Protocol to the ICCPR and a declaration made under section 47(1) of the AHRC Act. In each case, a mechanism is established which allows for individuals to make complaints about alleged violations of human rights under international instruments.

46. In *Könye v Hungary*, the UNHRC noted that it did have jurisdiction to consider complaints about conduct occurring after the ICCPR entered into force but before the entry into force of the first Optional Protocol, provided that the conduct was a 'continuing violation' that started before the first Optional Protocol entered into force for that State and continued after that date:²²

The Committee begins by noting that the States party's obligations under the Covenant apply as of the date of its entry into force for the State party. There is, however, a different issue as to when the Committee's competence to consider complaints about alleged violations of the Covenant under the Optional Protocol is engaged. In its jurisprudence under the Optional Protocol, the Committee has held that it cannot consider alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the State party, unless the violations complained of continue after the entry into force of the Optional Protocol.

A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party.

47. In the case of the present complaints, my view is that I have jurisdiction to consider complaints about acts or practices that may be inconsistent with or contrary to the CRPD where those acts or practices commenced after 17 July 2008 and continued after 20 April 2009. I also have jurisdiction generally to consider acts or practices that may be inconsistent with or contrary to the CRPD where those acts or practices occurred after 20 April 2009, regardless of duration.

48. This time limit is only relevant to the complaints made by Mr KD who was first detained in October 1996. In relation to each of the other complainants, they were detained after 17 July 2008 and their detention was ongoing. In relation to Mr KD, I only consider his detention for the period since 17 July 2008 in relation to the complaints he makes under the CRPD.

(b) Particular articles

49. In addition to the articles of the CRPD identified above, the complainants allege breaches of articles 19, 25, 26(1) and 28(1) of the CRPD.

50. The complaints about two of these articles, namely articles 19 and 28(1), are based directly on the alleged lack of available alternatives to detention in a maximum security prison for people in the Northern Territory who have been found unfit to be tried and/or not guilty of a criminal offence by reason of their mental impairment.

51. In relation to article 19, the complainants allege that they have been deprived of the right to live in the community with choices equal to others. In particular, the complainants allege that:

- they have been committed to indefinite detention in prison without having been convicted of an offence; and
- they have been held in detention due to the lack of availability of appropriate community support services, including accommodation support services.

52. Similar allegations are made in respect of article 28(1). The complainants allege that they have been deprived of the right to an adequate standard of living. In particular, the complainants allege that:

- they have been held in detention due to the lack of availability of appropriate community support services, including accommodation support services.

53. The complaints about the other two articles, namely articles 25 and 26(1), are based on the alleged lack of sufficient services within the prison environment to accommodate their disabilities. These complaints indirectly raise the lack of availability of alternative places of detention where such services could be provided.

54. In relation to article 25, the complainants allege that they have been deprived of the right to the highest attainable standard of health. In particular, the complainants allege that:

- they do not have access, or sufficient access, to mental health services to assist them to deal with the root-cause of their offending and anti-social behaviours; and
- they do not have access, or sufficient access, to allied health services (such as psychology, speech and occupational therapy etc) to assist them with their personal development and to deal with the root-cause of their offending and anti-social behaviours.

55. In relation to article 26(1), the complainants allege that they have been deprived of the right to habilitation and rehabilitation services that would enable them to attain maximum independence, full physical, mental, social and vocational ability and full inclusion in all aspects of life.

(c) **Progressive realisation**

56. Article 4(2) of the CRPD provides that:

With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, **with a view to achieving progressively** the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

(emphasis added)

57. This article makes a distinction between measures that are required to be undertaken immediately, and those that are only required to be undertaken 'progressively' and in accordance with a State's 'available resources' to achieve realisation of particular rights.

58. A similar form of words appears in the *Constitution of the Republic of South Africa*. Sections 26(1) and (2) are in the following form:

Everyone has the right to have access to adequate housing.

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

59. The meaning of these words was considered in the decision of the South African Constitutional Court in *South Africa v Grootboom* (2001) 1 SALR 46 (CC). That case involved a challenge to an order that the appellants, representing all spheres of government responsible for housing, provide certain squatters whose previous accommodation had been bulldozed with adequate basic housing until they obtained permanent accommodation.

60. Justice Yacoob wrote the opinion for the unanimous Constitutional Court. The judgment drew on General Comment 3 made by the Committee on Economic, Social and Cultural Rights.²³ Paragraph 10 of the General Comment noted that States had a 'minimum core obligation' to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in the *International Covenant on Economic, Social and Cultural Rights*. The Court held that the content of a minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question.²⁴

61. In the South African context, the Court held that the measures required by section 26 of the Constitution 'must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means' but that 'the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive'.²⁵

62. The Court held that the national housing program failed to meet the requirements of section 26 because it focussed on medium and long term objectives and made no provision at all for those in desperate need. It held that it was 'essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance'. It was necessary to ensure that 'a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately'.²⁶

63. The relevant parts of General Comment 3 are in the following form:

The principal obligation of result reflected in article 2 (1) is to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. ...

... the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps “to the maximum of its available resources”. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment 1 (1989).

Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

64. These passages suggest that:

- there is an immediate minimum core obligation on a state to ensure that minimum essential levels of economic, social and cultural rights are satisfied;
- the Executive has a degree of flexibility in determining how economic, social and cultural rights are progressively realised (including how public money is spent);
- it will be easier to find a breach of a particular economic, social or cultural right when no provision at all has been made for the achievement of the minimum essential level of the right by the most vulnerable group that is entitled to it.

3 General background

3.1 Mental impairment and unfitness to be tried

65. Part IIA of the NT Criminal Code deals with mental impairment and unfitness to be tried. It was inserted into the Criminal Code in June 2002.
66. The primary purpose of the amendment was to amend the Criminal Code in relation to the defence of insanity and the want of understanding in a person accused of a criminal offence.²⁷ The defence of mental impairment replaced the previous defence of insanity. The provision dealing with the want of understanding in an accused person was replaced with provisions dealing with circumstances in which a person is unfit to be tried for a criminal offence.
67. The defence of mental impairment is made out if the accused was suffering from a mental impairment at the time of the alleged offence and as a result he or she:²⁸
- did not know the nature and quality of the conduct;
 - did not know that the conduct was wrong; or
 - was not able to control his or her actions.
68. If a person is found not guilty because of mental impairment, the court must either declare that the accused person is liable to supervision under Division 5 or order that the accused person be released unconditionally.
69. A person charged with an offence is unfit to stand trial if the person is:²⁹
- unable to understand the nature of the charge against him or her;
 - unable to plead to the charge and to exercise the right of challenge;
 - unable to understand the nature of the trial;
 - unable to follow the course of the proceedings;
 - unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
 - unable to give instructions to his or her legal counsel.
70. If a jury finds that the accused person is unfit to stand trial, the Judge must determine whether there is a reasonable prospect that the accused person might regain the necessary capacity within 12 months.³⁰ If so, then the proceeding must be adjourned. If not, then the court must hold a special hearing. The purpose of a special hearing is to determine whether an accused person who is found not fit to stand trial:³¹
- is not guilty of the offence;
 - is not guilty of the offence because of his or her mental impairment; or
 - committed the offence (or an offence available as an alternative to the one charged).
71. If the jury at a special hearing finds that the accused person is not guilty because of mental impairment, the court must:³²
- declare that the accused person is liable to supervision under Division 5; or
 - order that the accused person be released unconditionally.

72. If the jury at a special hearing finds that the accused person committed the offence (or an available alternative), the finding:³³
- is taken to be a qualified finding of guilt and does not constitute a basis in law for a finding of guilt of the offence to which the finding relates;
 - constitutes a bar to further prosecution in respect of the same conduct and circumstances; and
 - is subject to appeal in the same manner as if it were a finding of guilt at a criminal trial,
- and the court must either declare that the accused person is liable to supervision under Division 5 or discharge the person unconditionally.
73. Two types of supervision orders may be made under Division 5: custodial supervision orders and non-custodial supervision orders. A custodial supervision order may commit the accused person to custody either in a prison or in another place that the court considers appropriate (an ‘appropriate place’).³⁴ 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.³⁵
74. A court must not make a supervision order committing the accused person to custody in an appropriate place unless it has received a certificate from the chief executive officer of the agency administering the *Medical Services Act* (CEO (Health)) stating that facilities or services are available in that place for the custody, care or treatment of the accused person and (since August 2012), if the place is a secure care facility, that the accused person fulfils the criteria for involuntary treatment and care under the *Disability Services Act 1986* (Cth) (Disability Services Act).³⁶
75. If there is no appropriate place certified by the CEO (Health), then the only place for a person to be detained pursuant to a custodial supervision order is in a prison. As a result, the availability of alternatives to prison is of large importance to the way in which this scheme operates in practice.
76. When a court makes a supervision order, the court must fix a term that is appropriate for the offence concerned and specify the term in the order.³⁷ The term is to be equivalent to the period of imprisonment that would have been appropriate if the person had been found guilty of the offence.³⁸ Between six and three months before the expiry of this term, the court must conduct a review (described as a ‘major review’) to determine whether to release the supervised person.³⁹ Following this review, if the court considers that the safety of the supervised person or the public will be or is likely to be seriously at risk if the supervised person is released unconditionally, the court must either confirm the supervision order or vary the supervision order (including whether it is custodial and, if so, where the person is to be detained).⁴⁰ Otherwise, the person is to be released unconditionally.⁴¹
77. Again, if there are serious safety issues for the person concerned or for the public, whether a person who has been committed to prison is able to be released from prison is likely to depend on the availability of appropriate alternatives. In the absence of such alternatives which would allow the supervision order to be varied or revoked, following the review the supervision order may continue for an indefinite term.⁴²
78. The Court will receive periodic reports every 12 months⁴³ and may conduct a review (described as a ‘periodic review’) after considering such a report, if the court thinks it appropriate.⁴⁴

3.2 Alternatives to custody in prison

79. When Part IIA was introduced in 2002, the then Attorney-General for the Northern Territory said that it would abolish the system of detention in prison subject to ‘the Administrator’s pleasure’.⁴⁵ Instead of detention at the will of the executive, the courts would have the role and responsibility of balancing the rights of individuals with the protection of the community. The Supreme Court would be able to determine questions of detention and release. As part of the second reading speech for the Bill introducing Part IIA, the Attorney-General said:⁴⁶

We have moved well past the time of thinking that the mentally ill were incurable lunatics. Modern understanding of mental illness includes compassion, and we should not be punishing people for behaviour that was outside their control. The Administrator’s pleasure system did precisely that, incarcerating a person potentially for the rest of their lives for an action that was brought about by an illness. Modern views also include an understanding that mental illness may be treatable, and that the mentally ill do not have to be incarcerated indefinitely to protect the rest of society.

80. In order for the Supreme Court to exercise its power to impose a custodial supervision order in a place other than a prison, such a place must be made available and certified as suitable.
81. In May 2005, the Northern Territory reported to the Senate Select Committee on Mental Health that there were no long-term forensic mental health facilities in the Territory.⁴⁷ As a result ‘persons found not guilty of a charge due to mental impairment may be subject to a custodial supervision order at a correctional facility’.⁴⁸ Further, there were no specialised units for mentally disordered or other special needs groups within any of the three custodial facilities in the Territory.⁴⁹
82. Summarising the challenges facing people with cognitive disabilities or mental illness in the justice system, the Northern Territory said:⁵⁰

Prisoners with mental illness, acquired brain injury or intellectual disability are housed currently either in maximum security or in the mainstream prison. Given the medium to long-term incarceration of many individuals in this category they would clearly be better accommodated in a more appropriate, safe and therapeutic environment oriented toward rehabilitation and community reintegration. No such environment exists in the NT. Establishing such a facility in a very small jurisdiction would require a substantial capital investment and operational funding.

83. In its report published in 2006, the Senate Select Committee on Mental Health made a number of recommendations, including:⁵¹

Recommendation 59

- 3.50 That state and territory governments aim as far as possible for the treatment of all people with mental illness in the justice system to take place in forensic facilities that are physically and operationally separate from prisons, and incorporate this aim into infrastructure planning, and that the Thomas Embling Hospital in Victoria be used as a model for such facilities.

84. As noted in more detail below (see paragraphs 130 to 134 and 147 to 148), the Supreme Court of the Northern Territory, when required to apply the provisions of Part IIA of the NT Criminal Code in the case of some of the present complainants, has commented that detention in ASCC was 'inappropriate'. This was because in that environment the complainants 'cannot receive the necessary treatment and support that should be available to them and would be available to them if an appropriate facility to house these people existed in the Territory'. The Court described the need for such a facility as 'acute and growing rapidly'.

85. The Commission has long noted the problems associated with people with cognitive disabilities or mental illness being accommodated within the correctional system. In its 2008 report *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, the Commission said:⁵²

The over representation of people with mental illness in the criminal justice system has been the topic of a number of reports and inquiries since the report of [the] *National Inquiry into the Human Rights of People with Mental Illness* (the Burdekin Report) in 1993. Since then, HREOC [now the Australian Human Rights Commission] has released *Not For Service Report: Experiences of injustice and despair in mental health care in Australia* in 2005 that outlines a desperate lack of services and coordination for people with mental illness. Also in 2005, the Senate Standing Committee of Mental Health considered the interaction between mentally ill people and the criminal justice system. In all of these reports, the common theme has been that the lack of mental health and associated services has left people 'consigned to incarceration rather than treatment'.

86. In March 2009, the Northern Territory Government announced \$13.9m capital funding and \$11.4m operational funding per annum for the establishment and operation of secure care services for children and young people with complex needs and adults with cognitive disability. The Government said that:⁵³

These services aim to meet the needs of those clients with a chronic history of severe risk taking behaviour that is likely to cause serious harm to themselves or others who require full-time secure supported accommodation and therapeutic services to gain an effective, sustained change in behaviour to reduce the risk of harm.

Two levels of secure care services have been developed:

- 11 Assessment and Stabilisation beds, co-located within the mental health inpatient settings in the Royal Darwin and Alice Springs hospitals.
- 16 adult beds within the two Secure Care Group Homes located in Darwin and Alice Springs will offer clients intensive support and therapeutic intervention on a medium-to long-term basis.

87. The stabilisation and assessment services are intended to provide short term care. Involuntary admissions to these services on the basis of 'complex cognitive impairment' (as defined in the *Mental Health and Related Services Act* (NT)) are for a maximum of 28 days.

88. The group homes were intended to cater for clients that require medium to longer term stabilisation and therapeutic support. Each home was to contain 8 adult beds. The Northern Territory Department of Health said that:⁵⁴

The group homes will focus on implementing an intensive Individual Support Plan to support the client to reach and maintain a level of stability that will enable them to step-down into a less restrictive care option.

89. In June 2010, before the present complaints were received, the Commission wrote to the Chief Minister of the Northern Territory raising concerns about the need for better protection of the rights of people with cognitive disability and mental illness in the criminal justice system.
90. In September 2010, the Northern Territory Attorney-General and Minister for Justice replied to this letter. Among other things, she said:
- I agree that there should be more options available for custodial supervision orders, and indeed one of the principles of Part IIA of the Criminal Code is that prison is to be of last resort when the Supreme Court (the Court) makes a custodial supervision order. The NT Government is committed to achieving better outcomes for supervised persons and is planning to build a Mental Health and Behavioural Unit with the new NT prison. That unit will be administered by the Department of Health and Families (DHF) and will accommodate some supervised persons in a secure custodial environment.
91. As noted in the following section, it appears that it was not until March 2013 that at least one of the secure care group homes announced four years earlier were operational. The complainants submit that of the two planned secure care group homes, only the home in Alice Springs, known as Kwiyernepe House was ultimately proceeded with. They say that the facility planned in Darwin was not proceeded with as a secure care group home and instead was redeployed as a residential centre for compulsory drug and alcohol treatment.

3.3 Subsequent amendments to the Northern Territory legislation

92. In December 2010, Part IIA of the NT Criminal Code was amended by the *Criminal Code Amendment (Mental Impairment and Unfitness for Trial) Act 2010* (NT). The amendments provided for the Supreme Court to authorise persons approved by the Chief Executive Officer of the Department of Health to use reasonable force and assistance in order to enforce a supervision order in the community.⁵⁵ It appears that one object of these amendments was to allow for non-custodial supervision orders to be used more often.
93. On 6 January 2012, the Chief Executive Officer gave notice in the gazette that he had endorsed the Department of Health Supervision Directions under section 43ZA(2B) of the *Criminal Code Amendment (Mental Impairment and Unfitness for Trial) Act 2010*.⁵⁶ The making of these directions did not result in any of the complainants being released from prison or other secure care facilities into the community.
94. The Disability Services Act was substantially amended by the *Disability Services Amendment Act 2012*. These amendments commenced on 20 August 2012 and created the legislative basis from which to operate the adult secured care group homes.⁵⁷ From this date, the Supreme Court could make (or vary) a custodial supervision order committing a person to custody in a secure care facility. In order to make such an order, the court must receive a certificate from the Chief Executive Officer of the Department of Health stating that facilities or services are available in the secure care facility for the custody, care or treatment of the person and that the person fulfils the criteria for involuntary treatment and care under the Disability Services Act.⁵⁸
95. A person fulfils the criteria for involuntary treatment and care if:⁵⁹
- the person is an adult; and
 - the person has a disability; and
 - the person has a complex cognitive impairment; and
 - the person is engaging in repetitive conduct of high risk behaviour likely to cause harm to himself or herself or to someone else; and

- unless the person receives treatment and care in a secure care facility, the person:
 - i. is likely to cause serious harm to himself or herself or to someone else; or
 - ii. will represent a substantial risk to the general community; or
 - iii. is likely to suffer serious mental or physical deterioration; and
 - the person has the capacity to benefit from goal-orientated therapeutic services in a secure care facility; and
 - the person can participate in treatment and care in a secure care facility; and
 - there is no less restrictive way of ensuring the person receives the treatment and care.
96. On 27 March 2013, the Northern Territory Minister for Health declared Yirra House at Holtze, Darwin and Kwiernpe House at Old Man's Plains, Alice Springs to be secure care facilities under section 72 of the Disability Services Act.⁶⁰ As noted previously, the complainants say that Yirra House in Darwin has been redeployed as a residential centre for compulsory drug and alcohol treatment.
97. Mr KC and Mr KB were transferred from ASCC to Kwiernpe House in April 2013 and June 2013 respectively.

4 Consideration of the circumstances of each of the complainants

98. The background to each of the complainants is taken from their written complaints and from court documents. No party has taken issue with any of the factual material provided to the Commission.

4.1 Mr KA

(a) Background

99. Mr KA is a 23 year old Aboriginal man from the Arrente nation. He was born at Titjikala, a remote Aboriginal community about 120 kilometres from Alice Springs.
100. At the time of his complaint to the Commission, he was incarcerated in G Block of the Alice Springs Correctional Centre (ASCC) pursuant to a custodial supervision order made under Part IIA of the NT Criminal Code. He continues to be detained at ASCC.
101. At the time of his birth his mother had significant cognitive and physical impairments and was unable to care for him. His father appears to have had little or no contact with him up to his death in 2001 when Mr KA was around 10 years old. Mr KA was initially raised by his maternal grandmother.
102. When he was thirteen months old, Mr KA was diagnosed with epilepsy and brain injury. Prior to the age of six years, Mr KA had a number of seizures which required hospitalisation. At the age of six, Mr KA was assessed by a paediatrician as having intellectual impairment and as exhibiting significant behaviours of concern. These behaviours included self-injury, aggression towards other children and adults and leaving supervision without permission which put him at risk of harm.
103. In 1997, Mr KA's grandmother died and he moved to Santa Teresa (also known as Lyentye Apeurte) around 80 kilometres south-east of Alice Springs, to live with a maternal uncle.

104. Over the next 10 years, Mr KA was the subject of six child protection notifications. One of these, in 1999, followed an incident in which it was alleged that he killed and dismembered a puppy. In another incident, it was alleged that he approached and intimidated a person with an axe. This notification resulted in him being found (on an interim basis) to be a child in need of protection pursuant to the *Care and Protection of Children Act* (NT). He was placed in the Boylan Ward of Adelaide's Women and Children Hospital for psychiatric assessment. While there, he was diagnosed as a person with intellectual disability and secondary hypoxia with uncontrolled seizures. His treating psychiatrist recommended increased supervision and support within his community as well as regular periods of respite away from his community. A number of behaviour intervention strategies were also recommended.
105. Mr KA returned to his community and between 2000 and 2005 lived intermittently at Titjikala and Santa Teresa. His current guardian says that during this period no family member was prepared to take specific responsibility for him. A disability support worker noted that Mr KA became the subject of frequent and continuing teasing, ridicule, abuse and rejection.
106. In 2003, the partner of Mr KA's uncle died. From this point, Mr KA lived only with his uncle in a two room house. His guardian says that Mr KA's uncle lived with an unmanaged addiction to alcohol and was not capable of providing Mr KA with a stable home and family environment.

(b) Incident leading to incarceration

107. On or about 17 July 2007, Mr KA stabbed his uncle to death with a knife. Mr KA was 16 years old at the time. The Crown case at trial was that Mr KA had overheard his uncle having a conversation that morning about the possibility of Mr KA arranging a visit to Titjikala so that Mr KA could stay there with an aunt. She had later told Mr KA's uncle that she could not take him. The police found a backpack packed with clothes, keys, a tablet dispenser and a second bag with Mr KA's Nintendo game. The Crown asked the jury to infer that Mr KA expected to be taken to Titjikala and waited all day for his uncle to come home from work to take him there. Instead, his uncle came home drunk. Mr KA became angry when he found out that his uncle was not going to take him to Titjikala and was drunk. Mr KA picked up a knife and stabbed him five times. His uncle fled to his bedroom and locked the door from the inside. He died about 20 minutes later.
108. On 17 November 2009, Mr KA was charged with murder but was found unfit to stand trial in accordance with section 43T of the NT Criminal Code. A special hearing was conducted under Division 4 of Part IIA of the Code. Following the special hearing, the jury returned a qualified verdict of guilty of manslaughter by reason of diminished responsibility. As a result of section 43X(3) of the Code, this finding is taken to be a qualified finding of guilt and does not constitute a basis in law for a finding of guilt of the offence to which the finding relates. The Court ordered that Mr KA was liable to supervision under Division 5 of the Part IIA of the Code.
109. On 22 April 2010, further submissions were made about the appropriate supervision orders to be made. It was uncontested that the Court should make a custodial supervision order pursuant to section 43ZA of the Code, and that Mr KA should be committed to custody in the ASCC, because there was no practicable alternative given Mr KA's circumstances.
110. In fixing the term of the custodial supervision order, the Court took into account evidence from the Acting Manager of the Disability Support Team who noted that:
- [Mr KA] is not able, and is not likely to be able, to manage himself or be managed in the community without an intensive therapeutic Management Plan, including rapid access to custodial officers and restraint as required, to ensure community (or client) safety.

Without this environment, [Mr KA] has demonstrated that he poses an acute risk to others and the community.

111. The Court contrasted this with a report from ASCC about his first two years and 9 months in custody. This report stated that there had been no adverse issues relating to socialising with other prisoners, that Mr KA responds to directions to complete tasks and is participating in general population routines, there has been a vast improvement in the way he interacts with custodial officers, there have been no incidents of self-harming behaviour, and the severity of it is decreasing.
112. A report from an Associate Professor concluded that:
- There are limits to how much improvement we can look forward to, but he has done extremely well so far at ASCC, improving across every category and we should be able to look forward to him eventually being able to manage appropriate supported accommodation in the community over the [next] 4 to 5 years, providing the improvement we see become[s] consolidated.
113. The Court concluded that Mr KA represented a significant danger to the community if he were to be released immediately. Given that his lack of education and social development was a significant factor in his past offending, it was too early to conclude that he would never be able to be safely released into the community.
114. The Court considered that if Mr KA had been found guilty of manslaughter then an appropriate head sentence would have been imprisonment for 12 years from the date he was first incarcerated. An equivalent period was set as a custodial supervision order with a mandatory review scheduled for 3 months before the expiry of this period. However, the Court noted that there would be annual reports to the Court pursuant to section 43ZK of the NT Criminal Code.

(c) Complaints about the nature of incarceration

115. Mr KA complains that the custodial environment of the ASCC presents significant risks to him because of his intellectual impairment and vulnerability to harm from others. He also complains that he does not have sufficient access to habilitation and rehabilitation programs in this environment that are capable of addressing the root cause of his offending behaviours or meeting his disability related needs.
116. On 26 October 2012, Mr KA's guardian reported to the Commission that Mr KA had been isolated in his cell and was banging his head against the hard surfaces of the cell. He reported that on 6 October 2012, Mr KA banged his head until it was bleeding. Mr KA was then restrained by six officers, strapped into a chair and injected with tranquilizers until he was unconscious.
117. Mr KA's guardian provided a copy of an email from the operations manager for NT prisons on 18 October 2012 in relation to the incident on 6 October 2012. After describing the nature of the incident, the operations manager said:
- In consultation with the General Manager of ASCC it is acknowledged you were not consulted over the incident however this was an oversight due to the changes in roles of JBU staff who would ordinarily take on this responsibility. In doing so the GM has agreed to be the contact person directs [sic] to all guardians in future events to prevent a reoccurrence.

Whilst I acknowledge the use of the restraint chair remains contentious in terms of best practice in the management of cognitive impaired persons, the Department of Correctional Services is obligated by its [sic] “duty of care” to prevent persons regardless of their circumstances, from committing self harm. It is unfortunate that such measures are required on Malcolm when an incident like this occurs however the Institution is not equipped with alternative measures to lesson [sic] the risk imposed by these behaviours.

118. Mr KA’s guardian noted that this was the fifth time that he was aware of restraint and seclusion being used on Mr KA. He complained that the ASCC had not communicated with him about the use of these practices and that neither he nor the NT Forensic Disability Unit consent to or support the use of these practices.
119. On 6 November 2013, Mr KA’s guardian noted that as at that date there had been 16 occasions on which Mr KA has been tied to a chair for at least an hour and often two hours at a time and injected with a tranquilizer when he is engaging in behaviours of concern.
120. His legal advocate notes that on an average day, Mr KA spends approximately 16 hours a day in isolation in maximum security and that he has been frequently shackled during periods he is outside his cell.

4.2 Mr KB

(a) Background

121. Mr KB is a 33 year old Aboriginal man from Ernabella in the Northern Territory. He was raised by his mother with two sisters and two brothers in Alice Springs.
122. Mr KB has a chronic acquired brain injury and epilepsy. Medical records suggest that the brain injury is the result of a history of alcohol abuse.
123. The earliest available psychological assessment of Mr KB was in 2007 for the Adult Guardianship Board. The attending psychologist noted that Mr KB had been admitted several times to Alice Springs Hospital for seizures and trauma. He identified evidence of global cognitive impairment and was of the opinion that Mr KB was not able to live independently and required support in all areas of daily living. The psychologist noted that Mr KB had a history of aggression, little insight into his condition and poor judgment regarding his actions.
124. On 30 May 2007, an adult guardian was appointed for Mr KB. On 4 June 2007, Mr KB was referred to Aged and Disability Services within the Northern Territory Department of Health and Families. Based on a report from Aged and Disability Services, it appears that ‘in the absence of resolution on longer term plans’ short term plans were put in place to provide Mr KB with personal care support on weekends through Tangentyere Council.
125. At the time of his complaint to the Commission, Mr KB was incarcerated in the ASCC pursuant to a custodial supervision order made under Part IIA of the NT Criminal Code.
126. In June 2013, Mr KB was relocated from ASCC to Kwiynernpe House. This is described by Mr KB’s legal adviser as ‘a high security prison-like facility located adjacent to [ASCC]’.

(b) Incident leading to incarceration

127. On 15 August 2007, Mr KB assaulted a female employee of Tangentyere Council who knew Mr KB and had been one of a number of people working to assist him.
128. On 2 November 2007, Mr KB appeared before the Supreme Court of the Northern Territory charged with unlawful aggravated assault.
129. On 4 December 2007, the Court found that Mr KB was unfit to stand trial pursuant to section 43T of the NT Criminal Code.
130. On 31 March 2008, a special hearing took place and a jury returned a verdict that Mr KB committed the offence charged. As a result of section 43X(3) of the NT Criminal Code, this finding is taken to be a qualified finding of guilt and does not constitute a basis in law for a finding of guilt of the offence to which the finding relates.

(c) Complaints about the nature of incarceration

131. On 22 December 2008, 16 months after the incident took place, Chief Justice Martin in the Supreme Court of the Northern Territory made a custodial supervision order. In the course of his Honour's reasons, he said:

A number of reports have been provided to me and they disclose that [Mr KB] is suffering from dementia and a number of cognitive deficits. If [Mr KB] was to reside in the community, in order for the community to be safe or at least for the risks to the community to be minimised, very close supervision would be required, particularly to ensure that [Mr KB] was compliant with his medication regime and that matters personal to him were satisfied in order to prevent him from coming to harm. [Mr KB's] history of non-compliance with his medication and his alcohol problem, coupled with his mental state, mean that without the very close supervision and without compliance with his medication regime, he is at high risk of re-offending.

I am required by the Act to keep the restrictions on [Mr KB's] liberty to a minimum that is consistent with the safety of the community. This is yet another case in which an offender with mental disabilities has been required and will be required to be held in prison custody for longer than the offence committed would otherwise require. As counsel have pointed out this morning, if [Mr KB] had pleaded guilty to the offence in the Court of Summary Jurisdiction, he would have received a relatively short sentence and certainly would have been released well before now.

However, because he had been declared liable to supervision, like a number of other offenders who have been declared liable to supervision by reason of their mental state, [Mr KB] faces the prospect of remaining in gaol for far longer than the offence would otherwise merit. As I have said before, this is indeed a most unfortunate situation as, despite the best efforts of those involved in the prison system and our Health Department, custody in a gaol is quite inappropriate for people like [Mr KB] and they cannot receive the necessary treatment and support that should be available to them and would be available to them if an appropriate facility to house these people existed in the Territory. The need for that facility is acute and growing rapidly.

132. The Chief Justice considered that the provisions of the NT Criminal Code left him with no option but to make a custodial supervision order, despite the fact that this would result in Mr KB being placed in a prison environment that was quite inappropriate for him. Although the Act suggested that restrictions on liberty be kept to a minimum, in reality there was no alternative than to impose effectively the maximum available restriction on liberty, and for a period significantly in excess of what would have been imposed had Mr KB been convicted of the offence. The operative factor that led to this result was the lack of an appropriate facility for Mr KB.
133. In October and November 2009, a major review of the custodial supervision order was conducted. The Chief Justice again noted that 'while incarceration in a correctional centre is far from ideal, the appropriate secure facility is not available outside a correctional centre'.
134. A further review of the custodial supervision order was conducted by Blokland J on 29 March 2012 pursuant to section 43ZH of the NT Criminal Code. This involved a review of the custodial supervision orders of both Mr KB and Mr KC (discussed below). His Honour referred to the comments previously made by the Chief Justice about the options available to the Court when imposing a custodial supervision order. His Honour said:
- With respect, I share the concern expressed in His Honour's reasons at that time about the inappropriateness of correctional centres to provide the therapeutic environment needed for both supervised persons [Mr KB and Mr KC]. His Honour's observations with respect to the time spent in custody are, three years later, more pressing.
135. After considering the evidence presented in relation to the review, Blokland J said:
- Broadly, the evidence points to a need to transition both supervised persons to appropriate community care; there is an ongoing need for security and a high level of care; [Mr KC] is more amenable to that process at this time; alternatively, both persons need to be assessed as soon as possible for the Secure Care Facility.
- ...
- As noted by Martin (BR) CJ both persons have spent more time in custody, and at times in a high security unit of a prison, than their crimes would ordinarily merit. Each at times becomes significantly frustrated and desperate. It is of significance that during some periods [Mr KB] may have deteriorated, thus making it more difficult for him to pass through the planned stages to alternative arrangements. Mr Murdock, who closely monitors each of the supervised persons, emphasizes the prison environment is not appropriate. Plans need to be implemented to see that the goal of alternative appropriate arrangements, consistent also with the requirements of the *Criminal Code* can be achieved as soon as possible, respecting the need for incremental change.
136. If Mr KB had been found guilty of the offence he was charged with, Chief Justice Martin would have imposed a term of imprisonment of 12 months. Instead, Mr KB spent almost 6 years detained in ASCC before being transferred to Kwiynrpe House in June 2013.
137. Mr KB complains that the custodial environment of the ASCC presented significant risks to him because of his intellectual impairment and vulnerability to harm from others. He also complains that he does not have sufficient access to habilitation and rehabilitation programs in this environment that are capable of addressing the root cause of his offending behaviours or meeting his disability related needs.
138. Mr KB complains that the conditions at Kwiynrpe House are also inappropriate.

4.3 Mr KC

(a) Background

139. Mr KC is a 24 year old Aboriginal man from the Northern Territory.
140. Mr KC has an intellectual impairment and possibly also an Autism Spectrum Disorder. Since he was 11 years old, Aged and Disability Services within the Northern Territory Department of Health and Families has been involved in his management. He has a moderate to severe cognitive impairment and requires intensive full time care.
141. Mr KC has a history of conduct marked by dangerous impulsive and aggressive behaviour including attacking support staff and threatening them.
142. At the time of his complaint to the Commission, Mr KC was incarcerated in the ASCC pursuant to a custodial supervision order made under Part IIA of the NT Criminal Code.
143. In April 2013, Mr KC was relocated from ASCC to Kwiyernepe House. This is described by Mr KC's legal adviser as 'a high security prison-like facility located adjacent to [ASCC]'.

(b) Incident leading to incarceration

144. On 14 August 2008, Mr KC threatened a carer with a shard of broken glass in the unit in which Mr KC was living. Mr KC also caused damage to property including throwing a coffee table through lounge room windows and smashing the windscreen and rear passenger side windows of a car. The property damage amounted to approximately \$5000.
145. On 8 October 2008, Mr KC appeared before the Supreme Court of the Northern Territory charged with unlawful aggravated assault and unlawful damage to property.
146. On 21 May 2009, the Court found that Mr KC was unfit to stand trial pursuant to section 43T of the NT Criminal Code. It also found that Mr KC was not likely to become fit for trial within the next 12 months.
147. A special hearing took place and a jury returned verdicts of not guilty of each offence by reason of mental impairment.

(c) Complaints about the nature of incarceration

148. On 19 November 2009, 15 months after the incident took place, Chief Justice Martin in the Supreme Court of the Northern Territory made a custodial supervision order. In the course of his Honour's reasons, he said:

At the conclusion of hearing the evidence, I was satisfied that a custodial supervision order was the only appropriate order that could be made and that custody should be in a correctional institution under the control of the Director of Correctional Services. This was the unanimous recommendation of everyone involved and counsel for [Mr KC] did not suggest otherwise. Currently there is no realistic and safe alternative. [Mr KC] requires intensive and constant care 24 hours a day in a secure environment from which he is not able to abscond. Construction of a secure care facility independent of a correctional centre is planned to commence in July 2010 and it is hoped that it will be in practical operation nine months later. Such a facility would be a suitable residential facility for [Mr KC]. However, in the present circumstances, the only practical solution is for [Mr KC] to reside in a correctional centre.

149. The Chief Justice further noted that:
- ... residence in a correctional centre is not the ideal locality for [Mr KC] and others like him. He is not on remand and he is not a convicted offender. He requires special assistance.
150. A further review of the custodial supervision order was conducted by Blokland J on 29 March 2012 pursuant to section 43ZH of the NT Criminal Code. This involved a review of the custodial supervision orders of both Mr KB and Mr KC (discussed in paragraphs 133 to 134 above).
151. If Mr KC had been found guilty of the offence, the Chief Justice would have imposed a term of imprisonment of 12 months. Instead, Mr KC spent more than four and a half years detained in ASCC before being transferred to Kwiynrpe House in April 2013.
152. Mr KC complains that the custodial environment of the ASCC presented significant risks to him because of his intellectual impairment and vulnerability to harm from others. He also complains that he does not have sufficient access to habilitation and rehabilitation programs in this environment that are capable of addressing the root cause of his offending behaviours or meeting his disability related needs.
153. Mr KC complains that the conditions at Kwiynrpe House are also inappropriate.

4.4 Mr KD

154. Mr KD is a 50 year old Aboriginal man who lived in the Central Australian region. He has a severe acquired brain injury. It appears that this injury is the result of substance abuse, in particular petrol and alcohol. This has resulted in an inability to recall previously learned information, and Mr KD is severely impaired in relation to new learning.
155. At the time of his complaint to the Commission, he was incarcerated in the ASCC pursuant to a custodial supervision order made under Part IIA of the NT Criminal Code. He continues to be detained at ASCC.
156. Mr KD is a long term inmate of Northern Territory correctional facilities. He was incarcerated prior to the insertion of Part IIA into the NT Criminal Code in 2002. When those amendments came into effect, he was made subject to a custodial supervision order under Part IIA.
157. On 15 October 1996, Mr KD was found not guilty by reason of insanity on charges of murder, robbery, aggravated assault and attempted sexual intercourse without consent. As required by the then section 382 of the NT Criminal Code, the Court ordered that he be kept in strict custody at the ASCC until the Administrator's pleasure be known.
158. On 27 September 2001, the Administrator ordered that the Director of Correctional Services be responsible for Mr KD's safe custody, and that he be confined in the ASCC and that the *Prisoners (Correctional Services) Act* (except Part XVII) apply as if Mr KD were under a sentence of imprisonment.
159. Part IIA of the NT Criminal Code came into operation on 15 June 2002. Pursuant to savings and transitional provisions in section 6 of the amending Act, Mr KD was taken 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.

160. As required by section 6(3) of the amending Act, Chief Justice Martin in the Supreme Court of the Northern Territory conducted a periodic review of the custodial supervision order in August 2003 pursuant to section 43ZH of the NT Criminal Code. The Chief Justice noted that Mr KD was kept in a normal cell in the protection wing of the maximum security area of the prison. The cell consisted of a solid door normally kept closed and locked while it was occupied by Mr KD, a single bed, a shelf upon which there was a television set and a few scant possessions, an ablutions area and a barred window overlooking barren ground.
161. His Honour referred to evidence from the Chief Executive Officer of the Department of Justice and from others. This evidence satisfied him that, notwithstanding regular review by mental health professionals and their expression of concern as to Mr KD's progressive mental deterioration, there was no evidence that Mr KD received any particular treatment, therapy or counselling for his mental impairment, 'beyond tranquillising when required'.
162. The Chief Justice found that the resources available at the ASCC were not appropriate for the custody and care of Mr KD.
163. In particular, his Honour said:
- He was ordered to be taken into a prison environment where he has been treated as a prisoner as if convicted of committing an offence. His history of aggressive and violent behaviour, pre-dating the orders consequent upon his being found not guilty, continued after his incarceration. By reason of his mental impairment he was not able to control his behaviour which brought about unwarranted attention from other prisoners from time to time and resulted in his being placed under protection. There have also been incidents in which he has exhibited aggressive conduct towards prison officers.
- It is plain that by reason of his disability he was and continues to be unable to live under conditions in a prison where he can associate with other prisoners even subject to usual management and discipline. [Mr KD] has been isolated in a small single cell. The evidence of Mr Williams is that given his potential for aggressive behaviour towards other prisoners and the need for their proper management, the opportunities for [Mr KD] to be permitted outside of his cell are now restricted to two or three hours per day under the current determinations for internal management of the prison. ...
- Authoritarian direction from prison officers which might be expected to be the norm in a prison environment have provoked and is likely to provoke an aggressive response from [Mr KD] arising from his disability.
164. Despite the inherent problems with the prison environment, the Court made an order that [Mr KD] continue to be subject to a custodial supervision order and be committed to custody in a prison. It also ordered that a management plan tendered in evidence be implemented as soon as possible.
165. A crucial factor in the decision to confirm the custodial supervision order, was that 'there are no adequate resources available for his treatment and support in the community outside of prison'.

4.5 Summary of impact of detention at ASCC

166. The complainants make the following submissions about the impact on them of detention in prison.
- The complainants have not been convicted of an offence, but are held in prison and in the case of Mr KB and Mr KC more recently, in a prison-like environment.

- The complainants are susceptible to, and have been the victims of, violence and abuse from other prisoners. Due to their intellectual impairment, they lack avoidance and defensive behaviours that could reduce or prevent this exposure.
- Each complainant is susceptible to engaging in behaviours of concern (self-harm and harm to others). These behaviours are triggered frequently by the prison or prison-like environment exposing the complainants and others to harm, and the complainants to punitive responses to their behaviour from prison authorities.
- The complainants do not have access to habilitation and rehabilitation programmes that will enable them to develop their communication skills, daily living skills and pro-social behaviours. The complainants are institutionalised and dependent and this situation has deteriorated over time. This has critically impaired their discharge from custodial supervision and transfer to community living arrangements.
- Prison-based rehabilitation programmes are not accessible to the complainants because of their cognitive impairment.
- The complainants have been subject to frequent physical, mechanical and chemical restraint. Mr KA has been and is at risk of continuing to be tied to a chair when he is engaging in behaviours of concern, and has been for up to almost 3 hours at a time. Mr KA is frequently sedated by chemical restraint. Mr KA has been frequently and remains at risk of being shackled during those periods he is outside his cell.
- The complainants are, or have been, held in isolation in maximum security for extended periods of time. In Mr KA's case, on an average day, he spends approximately 16 hours a day in isolation in maximum security.

5 Human rights obligations owed by the Commonwealth

167. The respondent to the complaints made to the Commission is the Commonwealth of Australia, represented by the Department of Social Services (DSS), the Department of Prime Minister and Cabinet (PM&C) and the Attorney-General's Department (AGD). DSS and PM&C have taken over functions that were the responsibility of the former Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). Each of FaHCSIA and AGD refused to provide the Commission with information and documents sought in relation to the conduct of the Commission's inquiry. The main objection taken by these departments was not that the Commonwealth does not have human rights obligations to the complainants, but that the Commission does not have jurisdiction to inquire into complaints that those obligations have been breached.
168. I will deal in more detail below with the objection arising out of the nature of the function imposed on the Commission pursuant to section 11(1)(f) of the AHRC Act.
169. While it does not appear that this issue is in dispute, it is worth reviewing the nature of the Commonwealth's human rights obligations. This is important because part of the objection taken by the Commonwealth departments is that to the extent that there are human rights breaches, they arise wholly as result of administrative acts or omissions of the Northern Territory.

5.1 Australia's obligations and its federal structure

170. Pursuant to article 2(1) of the ICCPR, each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant. By ratifying the ICCPR, Australia undertook to respect and ensure the rights set out in that instrument to all individuals within its territory and subject to its jurisdiction.
171. Article 50 of the ICCPR provides that the provisions of the Covenant extend to all parts of federal States without any limitations or exceptions. Prior to the text of article 50 being settled, several federal States including Australia had sought to include a clause which would have limited the responsibility of federal governments for violations of the ICCPR by their constituent states.⁶¹ A typical form of the proposed 'federal clause' provided that with respect to matters falling within the responsibility of constituent states, the responsibility of the federal government would be limited to transmitting the provisions of the Covenant to the responsible authorities with a recommendation that the necessary steps be taken to comply with them.
172. States who objected to the proposed federal clause noted that it would be contrary to the spirit of the Charter and the Universal Declaration of Human Rights, which recognised the principle of the universality of human rights. Moreover, they said that it would result in inequality between federal and non-federal States as regards the obligations which they would assume under the Covenant. Federal States would be placed in a privileged position and would assume fewer and less clear-cut obligations than unitary states.⁶²
173. The ultimate form of article 50 was the result of a counter proposal to the suggestion of a federal clause and was adopted by 8 votes to 7 with 2 abstentions.⁶³
174. When Australia ratified the ICCPR on 13 August 1980, it did so subject to a long general reservation to articles 2 and 50 in the following form:

Australia advises that, the people having united as one people in a Federal Commonwealth under the Crown, it has a federal constitutional system. It accepts that the provisions of the Covenant extend to all parts of Australia as a Federal State without any limitation or exceptions. It enters a general reservation that article 2, paragraphs 2 and 3, and article 50 shall be given effect consistently with and subject to the provisions in article 2, paragraph 2.

Under article 2, paragraph 2, steps to adopt measures necessary to give effect to the rights recognized in the Covenant are to be taken in accordance with each State party's Constitutional processes which, in the case of Australia, are the processes of a federation in which legislative, executive and judicial powers to give effect to the rights recognised in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.

In particular, in relation to the Australian States the implementation of those provisions of the Covenant over whose subject matter the federal authorities exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and the implementation of those provisions of the Covenant over whose subject matter the authorities of the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and where a provision has both federal and State aspects, its implementation will accordingly be a matter for the respective constitutionally appropriate authorities (for the purpose of implementation, the Northern Territory will be regarded as a constituent State).

To this end, the Australian Government has been in consultation with the responsible State and Territory Ministers with the object of developing cooperative arrangements to coordinate and facilitate the implementation of the Covenant.

175. Australia also made a general declaration when ratifying the ICCPR in the following form:
- Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.
176. At the time that the reservation to articles 2 and 50 was made, there were real questions about whether it would be effective to modify Australia's obligations under the ICCPR.⁶⁴ This was for a number of reasons. Although article 50 does not explicitly prohibit a federal reservation, in light of its legislative history such a reservation may well be inconsistent with it.⁶⁵ Further, article 27 of the Vienna Convention on the Law of Treaties provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
177. The more likely legal position was that, despite the term reservation, this was not intended as a derogation from an international obligation but as an explanation of the way in which Australia intended to implement the agreed provisions of the Covenant. As such, the reservation would be merely an 'interpretive declaration' without legal effect.⁶⁶
178. In any event, on 6 November 1984 Australia withdrew its reservation in relation to articles 2 and 50. It maintained the more general declaration reproduced in paragraph 174 above.
179. In the international arena, Australia does not object to its responsibility for the conduct of its constituent States which are in breach of human rights.
180. For example, in 1994 the UNHRC published its views in *Toonen v Australia*, which dealt with provisions of the Tasmanian Criminal Code that criminalised various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private.⁶⁷ Australia did not challenge the admissibility of the communication, despite the fact that it dealt with the laws of Tasmania rather than the laws of the Commonwealth.⁶⁸
181. In 2006, the UNHRC published its views in *Coleman v Australia*, which dealt with provisions of the *Townsville City Council Local Law No 39*.⁶⁹ Mr Coleman had been charged for taking part in a public address in a pedestrian mall without a permit in writing from the town council and convicted in the Townsville Magistrates Court for the delivery of an unlawful address. Appeals against conviction were dismissed. Initially, Australia objected to the admissibility of the communication to the UNHRC on the grounds that the relevant conduct was engaged in by the arresting officer, the Townsville City Council and the State of Queensland, none of whom were parties to the ICCPR.⁷⁰ The UNHRC held that, both on ordinary rules of State responsibility and in light of article 50 of the ICCPR, the acts and omissions of constituent political units and their officers are imputable to the State. As a result, the acts complained of were appropriately imputed to Australia. The Australian Government's response to the communication focussed on whether the restriction on freedom of expression was proportionate, and no longer pressed the admissibility issue.⁷¹
182. The importance of the uniform obligations of Australia under the ICCPR to people within its territory and subject to its jurisdiction was emphasised by the UNHRC in its concluding observations on the third and fourth periodic reports of Australia submitted under article 40 of the ICCPR. The UNHRC said:⁷²

While noting the explanation by the delegation that political negotiations between the Commonwealth Government and the governments of states and territories take place in cases in which the latter have adopted legislation or policies that may involve a violation of Covenant rights, the Committee stresses that such negotiations cannot relieve the State party of its obligations to respect and ensure Covenant rights in all parts of its territory without any limitations or exceptions (art. 50).

The Committee considers that political arrangements between the Commonwealth Government and the governments of states or territories may not condone restrictions on Covenant rights that are not permitted under the Covenant.

183. Article 4(5) of the CRPD adopts the language of article 50 of the ICCPR. It provides that the provisions of the CRPD extend to all parts of federal states without any limitations or exceptions. Australia has not made any reservation to article 4(5) of the CRPD.

5.2 Effective remedy for individual complaints

184. Article 2(3) of the ICCPR provides as follows:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of that State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

185. While there are a number of ways in which people within Australia or subject to its jurisdiction may obtain remedies for breaches of the rights set out in the ICCPR, a major purpose for the establishment of the Commission was to ensure compliance with article 2 and provide for an individual complaints mechanism. When the first Human Rights Commission Bill was introduced in 1977, the then Attorney General said:⁷³

The purpose of this Bill is to establish a Human Rights Commission in Australia. The major purpose of the Commission is to ensure that Commonwealth and Territory laws, acts and practices conform with the International Covenant on Civil and Political Rights. The Bill will give individuals a specific right to complain. ...

The question might be asked whether the obligation that would be imposed by the International Covenant on Civil and Political Rights would require the introduction into Australian law of a Bill of Rights or Bills of Right. In the Government's view no requirement is made in the Covenant for action of this character. It is clear, I think, from the provisions of Article 2 of the Covenant that, while States Parties must provide effective and enforceable remedies for violations of rights recognised by the International Covenant, appropriate measures, other than legislative measures, may be taken. ... Article 2 of the Covenant makes it clear, I think, that an emphasis should be placed on the development of processes to respond to individual complaints. These processes may be provided not only by legislative measures and common law and procedural remedies, but also by remedies of an administrative and executive character. ...

There has also been a movement towards the introduction of legislation on specific matters, such as racial discrimination, discrimination on the grounds of sex or marital status, criminal investigation and invasions of privacy. ... The Commonwealth Government is of the view, however, that supplementary procedures should be established, to operate on a systematic and comprehensive basis, if the obligations in Article 2 of the Covenant are to be fulfilled. The Human Rights Commission proposed by this Bill will play an important role in these supplementary processes.

186. The Government reintroduced the Human Rights Commission Bill in 1981 following the ratification of the ICCPR. The reintroduced Bill expanded the scope of 'human rights' to include the declarations at Schedules 3, 4 and 5 of the current Act, and to include other international instruments declared for the purposes of that Act. This has since included the CRPD. The Bill was passed in the form reintroduced in 1981.
187. The successor to the Human Rights Commission was the Human Rights and Equal Opportunity Commission (HREOC, now called the Australian Human Rights Commission). HREOC took on the Human Rights Commission's role of investigating complaints of breaches of human rights, and was also given responsibility in relation to other areas of discrimination law.

6 Acts or practices of the Commonwealth

6.1 The extent of the Commonwealth's duty

188. The complainants allege that the Commonwealth has engaged in acts or practices, including failures to act, that are inconsistent with or contrary to their human rights. The starting point for analysis is whether the Commonwealth has an affirmative obligation to ensure particular human rights.
189. Article 2(2) of the ICCPR provides that:
- Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized by the present Covenant.
190. This article does not declare particular rights or freedoms, rather, it specifies how those rights and freedoms which are recognised in the ICCPR are to be implemented and by whom. In this sense, the terms of the instrument reflect the Hohfeldian conception that for each right there is a corresponding or reciprocal duty. It also reflects the position of State Parties as the primary subjects of international human rights law.
191. The corresponding clause of the CRPD is article 4, which relevantly provides:
1. State Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
 - (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention; ...

2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum extent of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

192. I have described earlier the immediate applicability of civil and political rights, the obligation of 'progressive realization' of economic social and cultural rights and the minimum core obligation attaching to economic, social and cultural rights. Here, a combination of civil and political rights and economic, social and cultural rights is relied on by the complainants.
193. As to civil and political rights, the complainants have the right under the ICCPR and the CRPD:
- not to be arbitrarily detained;
 - when detained, to be treated with humanity and with respect for the inherent dignity of the human person; and
 - not to be subjected to cruel, inhuman or degrading treatment or punishment.
194. Australia has a corresponding affirmative duty to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to these rights. The Commission's function under section 11(1)(f) does not extend to inquiring into the adoption (or failure to adopt) legislative measures, but does extend to inquiring into the adoption (or failure to adopt) other measures as may be necessary to give effect to these rights.
195. As to economic, social and cultural rights, the complainants have the right under the CRPD:
- to live in the community with choices equal to others;
 - to an adequate standard of living;
 - to the highest attainable standard of health; and
 - to habilitation and rehabilitation services that would enable them to attain maximum independence, full physical, mental, social and vocational ability and full inclusion in all aspects of life.
196. Australia has a corresponding affirmative duty to take legislative, administrative and other measures to the maximum extent of its available resources, with a view to achieving progressively the full realization of these rights. The Commission's function under section 11(1)(f) does not extend to inquiring into the taking (or failure to take) legislative measures, but does extend to inquiring into the taking (or failure to take) administrative and other measures to the maximum extent of the Commonwealth's available resources.
197. In assessing whether the acts or practices of the Commonwealth are inconsistent or contrary to the complainants' economic, social and cultural rights, the Commission will need to evaluate any submission by the Commonwealth that these rights were being progressively realized, but could not be immediately fully realized because of a lack of available resources. While there is some flexibility for States in achieving a full realization of economic, social and cultural rights, there are also immediate obligations to 'take measures' (see CRPD Article 4). Such measures should be deliberate, concrete and targeted as clearly as possible towards meeting the Commonwealth's obligations.⁷⁴ Even where available resources are inadequate, 'the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances'.⁷⁵

198. Further, with respect to the minimum core obligations on States, the Committee on Economic, Social and Cultural Rights has said that:

In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all available resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.⁷⁶

199. Prior to the CRPD coming into force, the Committee on Economic, Social and Cultural Rights published a general comment on the rights of persons with disabilities to economic, social and cultural rights. The Committee said:

The obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.⁷⁷

6.2 Application of duties in the present circumstances

200. The Commonwealth had been specifically alerted to the lack of long-term forensic mental health facilities in the Northern Territory at least as early as 2005. As noted in paragraph 80 above, this formed part of a submission by the Northern Territory to a Commonwealth Senate Select Committee on Mental Health and also formed part of the final report of the Committee. The Northern Territory had submitted that ‘persons found not guilty of a charge due to mental impairment may be subject to a custodial supervision order at a correctional facility’. In fact the *only* place that a person subject to a custodial supervision order could be detained was a correctional facility. There were simply no other available alternatives.

201. The Northern Territory noted the difficulties that it faced as a small jurisdiction in making the necessary investment in capital and operational funding. The Senate Select Committee added that there were additional difficulties given the Territory’s geography and large indigenous population.⁷⁸

202. The problems inherent in detaining people in correctional facilities who were unfit to be tried and/or found not guilty of criminal offences by reason of their mental impairment was well known. It was the subject of numerous reports throughout Australia. For example, in New South Wales:

- The New South Wales Law Reform Commission released a report in 1996 which suggested that the prison environment was inappropriate for people with intellectual disability, who require secure or supervised accommodation with individualised rehabilitative programs.⁷⁹ It recommended the establishment of secure units for unfit forensic patients, and units that focus on care, treatment, instruction and rehabilitation for forensic patients with cognitive impairments found unfit and not acquitted following a special hearing.⁸⁰
- A 2007 Review of the New South Wales Forensic Mental Health Legislation stressed that it was inappropriate to subject forensic patients to the same controls and disciplines in correctional centres as other inmates. It noted that placement in correctional centres had an onerous effect on forensic patients, with ‘drastic effects on liberty, but no value for treatment’.⁸¹

- More recently, the New South Wales Law Reform Commission concluded that forensic patients should not be detained in correctional centres and that the resolution of this issue depends on the provision of resources for facilities for forensic patients. It found that secure facilities are required, but also the range of facilities must be adequate so that forensic patients can be stepped down towards leave and release in a timely fashion. As the Law Reform Commission noted, '[t]hese are matters for government and not outcomes that can be achieved solely by law reform'.⁸²

203. These problems had been specifically addressed in rule 82 of the Standard Minimum Rules for the Treatment of Prisoners (see paragraph 38 above).

204. The Commonwealth has acknowledged the relevance of the Standard Minimum Rules for the Treatment of Prisoners in relation to its compliance with article 10(1) of the ICCPR. In response to recommendation 71 of the Human Rights Council in its report on Australia's Universal Periodic Review, the Commonwealth said:⁸³

States and Territories are responsible for managing and operating prisons and consider that existing legislation and policies ensure humane treatment of prisoners. States and Territories will continue to deliver corrective services in accordance with standard guidelines which comply with the UN Standard Minimum Rules for the Treatment of Prisoners.

205. While this response identifies that the primary domestic responsibility for managing and operating prisons lies with the States and Territories, as noted above the ultimate human rights obligation lies with the Commonwealth, consistently with article 50 of the ICCPR and article 4(5) of the CRPD. I deal in more detail below with arrangements between the Commonwealth and the Northern Territory in relation to the provision of services for people with disability.

206. After Australia ratified the CRPD, it provided an initial report to the Committee on the Rights of Persons with Disabilities on 3 December 2010. Under a heading related to article 14 of the CRPD dealing with the right to liberty and security of the person, Australia recognised that there were 'particular challenges in relation to the treatment of persons with mental illness in both the health and criminal justice context'.⁸⁴

207. Again the emphasis by the Commonwealth in the report was on the responsibility of the States and Territories. Under a heading 'Deprivation of liberty in the criminal justice context', the Commonwealth said:⁸⁵

Where persons with disabilities are deprived of their liberty in the criminal justice context, they benefit from the same procedural guarantees as all other persons deprived of their liberty. Prisons and other places of deprivation of liberty in the criminal justice system are administered by the States and Territories. There are a number of policies and practices in place to accommodate the specific needs of persons with disabilities detained in the criminal justice system. These needs include physical access for persons with physical disabilities and access to information for persons with vision or hearing impairment, or cognitive disability.

208. The Commonwealth's report did not raise the issue of the detention in prisons of persons who were unfit to be tried and/or found not guilty of criminal offences by reason of their mental impairment. In Annexures I and J to the report, the Commonwealth quoted 'examples' from several Australian jurisdictions of the numbers of people with mental illnesses being deprived of their liberty and the numbers of people with disabilities currently awaiting supported accommodation in Australian jurisdictions. Each annexure noted that information 'was not made available by every Australian jurisdiction'. No statistics were included in either Annexure for the Northern Territory. A possible inference from this is that despite the identification of real concerns about the absence of secure care facilities in the Northern Territory, the Commonwealth and the Northern Territory were not in active dialog about the number of people that this affected.

209. As noted in section 2.2 above, the Commission's function of inquiring into acts or practices of the Commonwealth is only engaged where the acts or practices are not required by law to be taken. The relevant act or practice must be within the discretion of the Commonwealth, its officers or agents. A failure to exercise a discretionary power may constitute an act.
210. The complainants have identified two discretionary powers available under Commonwealth enactments which would have permitted Commonwealth Ministers or departments to act in a way that was consistent with the Commonwealth's human rights obligations.
211. In particular, the complainants pointed to the discretionary power of the Commonwealth to fund accommodation support services under the Disability Services Act, and to work with the Northern Territory to develop and implement reforms to improve outcomes for Indigenous people with disability (under the National Disability Agreement).
212. These powers are considered in the following sections.

6.3 Grants of financial assistance under the DSA

213. In relation to the first of those powers, the relevant Minister⁸⁶ has the power under section 10(1) of the DSA to approve the making of a grant of financial assistance to the Northern Territory in relation to the provision of accommodation support services by the Northern Territory to persons included in the target group.
214. 'Accommodation support services' are services to assist persons with disabilities to develop or maintain suitable residential arrangements in the community.⁸⁷
215. The 'target group' includes persons with a disability that is attributable to an intellectual impairment, is permanent or likely to be permanent and results in a substantially reduced capacity of the person for communication, learning or mobility and the need for ongoing support services.⁸⁸
216. Each of the present complainants is a person that falls within the target group. The core of their complaint is that there is or was no alternative accommodation option for them other than accommodation in a maximum security prison. They have claimed that the failure to provide them with alternative accommodation and accommodation support services amounts to a breach of their human rights.
217. Each of the complainants allege that the Commonwealth has failed to use the discretionary powers under the DSA to 'effectively develop and implement appropriate accommodation and other services for the complainant as an alternative to custody in prison'.⁸⁹
218. In addition to accommodation support services, the Minister also has the power under section 9 of the DSA to approve another class of services in respect of which a grant of financial assistance could be made. The only limitation on the class of services that may be approved is that the Minister is satisfied that the provision of the services would further the objects of the DSA set out in section 3 and the principles and objectives formulated under section 5 and comply with the guidelines formulated under section 5 that are applicable to the giving of approvals under section 9.

219. The Commission asked FaHCSIA to provide copies of documents relating to any consideration of providing a grant of financial assistance to the Northern Territory under the DSA subject to conditions to address the issues raised in the complaints. In particular, the Commission asked for documents recording any consideration of assistance for:⁹⁰
- accommodation facilities for the complainants and others in the same situation within the community or at a facility other than a correctional centre;
 - support services for the complainants within the community;
 - support services for the complainants during their detention at the ASCC.
220. The Commission also asked FaHCSIA more generally about whether the Commonwealth had made any other provision for the complainants to give effect to their rights under the articles of the ICCPR and the CRPD identified in their complaints.
221. FaHCSIA informed the Commission that it had decided not to provide a response to these questions because in its view there is no relevant 'act' or 'practice' by the Commonwealth into which the Commission has the power to inquire.⁹¹ The particular arguments raised by FaHCSIA are dealt with in section 7 below.
222. In the absence of a response from FaHCSIA, the Commission is unable to draw an inference that there has been any consideration by the Commonwealth of using the powers available to it under the DSA to address the matters that are the subject of this complaint.
223. In an earlier response, FaHCSIA said:⁹²
- In circumstances where the Northern Territory operates the Alice Springs Correctional Centre and the Commonwealth has no responsibility for conditions of detention, it could only be speculative to say that if the Commonwealth provided particular funding any infringement of the complainants' human rights would not have occurred or would probably not have occurred. It would likewise be speculative to say that there was a relationship between the Commonwealth not having provided particular funding and any breach of the complainants' human rights such that the absence of funding caused the breach.
224. FaHCSIA identified three services provided pursuant to the Targeted Community Care (Mental Health) Program which are funded by the Commonwealth and provided in the Northern Territory. These services aim to assist people with severe mental illness, their families, carers and children at risk of developing mental illness through the provision of accessible and responsive community support services. However, FaHCSIA acknowledged that none of the identified service streams are available to people who are in detention.
225. I provided FaHCSIA and the other respondent departments with a copy of my preliminary view in this matter on 10 June 2014 and invited it again to provide any relevant information or documents about these issues. A joint response was provided to the Commission on 31 July 2014. No submissions were made about any consideration of the exercise of powers pursuant to the DSA.
226. In all of the circumstances, including the responses from FaHCSIA described above, I infer that no consideration was given to providing a grant of financial assistance to the Northern Territory under the DSA subject to conditions to address the issues raised in the complaints. It is clear, at the least, that no financial assistance was in fact provided for these purposes.
227. As to the test for infringement proposed by FaHCSIA in paragraph 222 above, the relevant question for the Commission is whether acts or practices by or on behalf of the Commonwealth (including a failure to do an act) were inconsistent with or contrary to any human right.

6.4 Grants of financial assistance under the FFRA

228. The second set of discretionary powers arises under the *Federal Financial Relations Act 2009* (Cth) (FFRA) and relates in particular to the obligations undertaken by the Commonwealth under the National Disability Agreement made pursuant to that Act. The object of the FFRA is to provide ongoing financial support for the delivery of services by the States and Territories through a number of means.
229. One of these means is the use of ‘national specific performance payments’ under Part 3 of the FFRA. Financial assistance is payable in accordance with section 13 of the FFRA to a State or Territory for the purpose of expenditure on disability services. Financial assistance is payable to a State under this section on condition that the financial assistance is spent on ‘disability services’. Given the general nature of this condition, it is doubtful that this method could be effectively used by the Commonwealth to require that funds be spent on the particular services required by the present complainants.
230. Another means for the provision by the Commonwealth of ongoing financial support for the delivery of services by the States and Territories is the use of ‘national partnership payments’ under Part 4 of the FFRA. Section 16(1) of the FFRA provides:

The Minister may determine that an amount specified in the determination is to be paid to a State specified in the determination for the purpose of making a grant of financial assistance to:

- (a) support the delivery by the State of specified outputs or projects; or
- (b) facilitate reforms by the State; or
- (c) reward the State for nationally significant reforms.

The references to a ‘State’ include the Northern Territory. The Minister responsible for the FFRA is the Treasurer.

231. Section 21 of the FFRA provides that:

In making a determination under this Act, the Minister must have regard to:

- (a) the Intergovernmental Agreement; and

...

- (b) if the determination relates to financial assistance to a particular State – any other written agreement between the Commonwealth and the State that relates to the financial assistance.

The reference to the ‘Intergovernmental Agreement’ is a reference to the Intergovernmental Agreement on Federal Financial Relations that took effect on 1 January 2009, as amended from time to time.

232. The Intergovernmental Agreement is an agreement between the Commonwealth and the States and Territories. It claims to implement ‘a new framework for federal financial relations which will provide a robust foundation for the Parties to: (a) collaborate on policy development and service delivery; and (b) facilitate the implementation of economic and social reforms; in areas of national importance’.⁹³

233. The Commonwealth has undertaken particular obligations pursuant to the Intergovernmental Agreement. Relevantly, clause 19 of the Intergovernmental Agreement provides:

The Commonwealth commits to the provision of on-going financial support for the States' and Territories' service delivery efforts, through:

- (a) general revenue assistance, including the on-going provision of GST payments, to be used by the States and Territories for any purpose;
- (b) National Specific Purpose Payments (SPPs) to be spent in the key service delivery sectors;
- (c) National Health Reform (NHR) Funding; and
- (d) National Partnership payments to support the delivery of specified outputs or projects, to facilitate reforms or to reward those jurisdictions that deliver on nationally significant reform.

The division of these commitments by the Commonwealth reflects the structure of the FFRA. Relevantly, the commitment in (d) above reflects that in Part 4 of the FFRA.

234. The Commonwealth and the States and Territories agree that federal financial relations will be underpinned by a shared commitment to genuinely cooperative working arrangements.⁹⁴ Content is given to this commitment through National Agreements that are appended as Schedules to the Intergovernmental Agreement. These National Agreements record 'mutually agreed objectives, outcomes and outputs and performance indicators' in particular service sectors.⁹⁵

235. One of the National Agreements appended as a Schedule to the Intergovernmental Agreement is the National Disability Agreement. The National Disability Agreement has been amended twice since coming into effect on 1 January 2009, but has consistently provided that:

- All Australian governments are responsible for working together to develop and implement reforms to improve outcomes for Indigenous people with disability.⁹⁶
- The Commonwealth undertakes responsibility for provision of funds to States and Territories to contribute to the achievement of the objective and outcomes.⁹⁷ The 'objective' is that 'people with disability and their carers have an enhanced quality of life and participate as valued members of the community'.⁹⁸ One of the 'outcomes' is that 'people with disability enjoy choice, wellbeing and the opportunity to live as independently as possible'.⁹⁹

236. The National Disability Agreement imposes positive obligations on the Commonwealth to work with the Northern Territory to improve outcomes for Indigenous people with disability, and to provide funds to contribute to reforms that would allow Indigenous people with disability to live as independently as possible. One way in which such reforms could be funded is through a grant of financial assistance under section 16(1) of the FFRA. In making a determination under section 16(1), the Minister must have regard to the National Disability Agreement, including the Commonwealth's obligations under that agreement. A determination under section 16(1) to grant financial assistance to the Northern Territory could be either to facilitate particular reforms or to support the delivery by the Northern Territory of specified outputs or projects.

237. The Commission asked the AGD to provide copies of documents relating to any consideration of a grant of financial assistance under the FFRA to address the issues raised in the complaints. In particular, the Commission asked for documents recording any consideration of assistance for:¹⁰⁰

- accommodation facilities for the complainants and others in the same situation within the community or at a facility other than a correctional centre;
- support services for the complainants within the community;
- support services for the complainants during their detention at the ASCC.

238. The Commission also asked the AGD more generally about whether the Commonwealth had made any other provision for the complainants to give effect to their rights under the articles of the ICCPR and the CRPD identified in their complaints.
239. AGD informed the Commission that it had decided not to provide a response to these questions because of its view there is no relevant 'act' or 'practice' by the Commonwealth into which the Commission has the power to inquire.¹⁰¹ This issue is dealt with in section 7 below.
240. As noted above, I provided AGD and the other respondent departments with a copy of my preliminary view in this matter on 10 June 2014 and invited it again to provide any relevant information or documents about these issues. The joint response provided to the Commission on 31 July 2014, stated that in commenting on the operation of the NDA, the preliminary view did not appear to have regard to the division of responsibilities between the Commonwealth and the States and Territories.
241. The Commonwealth response emphasised that it was the responsibility of State and Territory governments to provide disability services in a manner which most effectively meets the needs of people with disability, their families and carers, consistent with local needs and priorities. However, the response also acknowledged that the Commonwealth was committed to working with the relevant states and territories to find ways to improve the health, community safety, and wellbeing of Indigenous people, particularly those in remote and regional Australia. The Commission has identified above how the commitments by the Commonwealth are reflected in the terms of the Intergovernmental Agreement in general and the NDA in particular.
242. The Commonwealth did not make any submission about whether there had been any consideration by the Commonwealth of using the powers available to it under the FFRA to address the matters that are the subject of this complaint.
243. In an earlier response, the AGD noted that FaHCSIA would provide a response in relation to programs within its portfolio and that the response from the AGD would be limited to its responsibilities. The AGD identified the following steps being undertaken by the Australian Government which it considered relevant to the issues raised in the complaint:¹⁰²

The Australian Government's work to address indigenous disadvantage in the justice sector is guided by the broader Council of Australian Governments (COAG) Closing the Gap agenda as set out in the National Indigenous Reform Agreement (NIRA). The Closing the Gap Agenda takes a multi-faceted approach to addressing Indigenous disadvantage. 'Safe Communities' is one of the seven building blocks to achieving the Closing the Gap targets. The Australian Government is responsible for national coordination under the Safe Communities building block, and for progressing Commonwealth actions in this area.

The National Indigenous Law and Justice Framework (NILJF) has been developed to support COAG's Close the Gap agenda, and in particular the Safe Communities building block. The NILJF is a non-prescriptive agreement between all Australian Governments endorsed by the Standing Council of Attorney's General in November 2009. The NILJF does not confer any powers, functions or discretion to the Commonwealth. The NILJF sets out a national approach to addressing the serious and complex issues that mark the interaction between Aboriginal and Torres Strait Islander peoples and the justice systems in Australia.

Currently, under the NILJF the Commonwealth and State and Territory governments are evaluating a range of Indigenous justice programs to identify what works and why. These evaluations will assist governments and service providers to better target initiatives to address crime and justice issues in Indigenous communities.

...

The Attorney-General's Department also notes that it is working with State and Territory counterparts through a National Justice CEO's Working Group to improve the situation for people with mental illness and/or cognitive disability in contact with, or at risk of contact with, the criminal justice system. This work aims to address concerns raised in numerous reports, including from the Australian Human Rights Commission, that criticise governments for the inappropriate placement of people with a mental illness or cognitive disability in ordinary prisons. Work is being done towards continual improvement at all stages of [the] criminal justice system continuum to support and divert people with mental illness and/or cognitive disability.

244. The National Indigenous Reform Agreement referred to by the AGD is one of the national agreements appended to the FFRA. It is not clear why the AGD did not address the National Disability Agreement, also appended to the FFRA, in its response. It may be that the AGD considered that the National Disability Agreement fell with FaHCSIA's area of responsibility. After receiving the response from the AGD referred to above, the Commission wrote to FaHCSIA asking it to provide details of the powers, functions and discretion FaHCSIA has in relation to the programs and agreements identified by the complainants, including the National Disability Agreement.¹⁰³ FaHCSIA refused to answer this question, citing its view of the Commission's jurisdiction.¹⁰⁴ When the Commission asked the AGD to provide copies of documents relating to any consideration of a grant of financial assistance under the FFRA (see paragraph 236 above), the Commission made the same request to FaHCSIA.¹⁰⁵ The Commission also wrote to Treasury enclosing copies of the letters to the AGD and FaHCSIA, given the Treasurer's responsibilities under the FFRA.¹⁰⁶ FaHCSIA again refused to provide a substantive response to these questions on the basis of its view on the Commission's jurisdiction. The Commission did not receive a reply from Treasury.
245. In all of the circumstances, including the responses from AGD and FaHCSIA described above, I infer that no consideration was given to providing a grant of financial assistance to the Northern Territory under the FFRA to support the delivery by the Northern Territory of specified outputs or projects or to facilitate reforms by the Northern Territory to address the issues raised in the complaints. It is clear, at the least, that no financial assistance was in fact provided for these purposes.

6.5 Other measures

246. The Commission asked each of the AGD and FaHCSIA about whether the Commonwealth had made any other provision for the complainants to give effect to their rights under the articles of the ICCPR and the CRPD identified by them.
247. The AGD's initial response extracted at paragraph 242 above identified two practical steps taken by the Commonwealth which possibly could be relevant to the issues the subject of this complaint.
248. First, the AGD noted that 'under the NILJF the Commonwealth and State and Territory governments are evaluating a range of Indigenous justice programs to identify what works and why. These evaluations will assist governments and service providers to better target initiatives to address crime and justice issues in Indigenous communities.' I invited the AGD to identify which, if any, of the Indigenous justice programs evaluated under the NILJF are directed to the rights of Indigenous people in the Northern Territory who have been found unfit to stand trial by reason of mental impairment and are detained in a correctional facility, and what role the Commonwealth has taken to better target these initiatives to address the issues faced by these people. The Commonwealth declined to respond to this request.

249. Secondly, the AGD noted that it was ‘working with State and Territory counterparts through a National Justice CEO’s Working Group to improve the situation for people with mental illness and/or cognitive disability in contact with, or at risk of contact with, the criminal justice system’. In particular, the AGD said that work was being done ‘towards continual improvement at all stages of [the] criminal justice system continuum to support and divert people with mental illness and/or cognitive disability’. I invited the AGD to provide details of the work that has been done by it through the National Justice CEO’s Working Group in relation to Indigenous people in the Northern Territory who are at the stage where they have been found unfit to stand trial by reason of mental impairment and are detained in a correctional facility. The Commonwealth declined to respond to this request.

6.6 Failure to act

250. The complainants have identified two kinds of administrative acts that the Commonwealth could have undertaken to fulfil its duties under the ICCPR and the CRPD. These are:

- an approval of a grant of financial assistance to the Northern Territory under section 10(1) of the DSA in relation to the provision of accommodation support services; or
- a determination that a national partnership payment be paid to the Northern Territory under section 16(1) of the FFRA for the purpose of making a grant of financial assistance to support the delivery of specified outputs or projects that are consistent with the National Disability Agreement, and in particular to develop and implement reforms to improve outcomes for Indigenous people with a disability.

251. Either of these steps could have been used to assist the Northern Territory to make provision for alternative accommodation arrangements for the complainants and others in similar circumstances, other than accommodation in a maximum security prison. Alternative accommodation arrangements could have prevented the complainants being detained:

- in a place that was inappropriate for them given their disabilities;
- for a period (at least in relation to Mr KB and Mr KC) that was unreasonable or disproportionate to their alleged misconduct;
- in conditions (at least in relation to Mr KA and Mr KD) that appear to have been cruel, inhuman or degrading.

252. For the reasons set out above, I have found that there was a failure by the Commonwealth to act pursuant to either of these available powers. The following sections deal with the implications of these failures for the complainants’ human rights.

(a) Arbitrary detention and conditions of detention

253. The Northern Territory had identified in its 2005 submissions to the Commonwealth Senate Select Committee that people in the complainants’ situation would clearly be better accommodated in a more appropriate, safe and therapeutic environment oriented toward rehabilitation and community reintegration.

254. Further, the individual circumstances of each of the complainants also clearly indicated that detention at ASCC was inappropriate. As noted above, when the Supreme Court of the Northern Territory was called upon to make custodial supervision orders in relation to the complainants, Chief Justice Martin said in relation to Mr KB:

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

255. In the same way, the Chief Justice said that residence in a correctional centre was 'not the ideal locality for Mr KC and others like him' but was 'the only practical solution' at the time his custodial supervision order was made because a suitable residential facility had yet to be constructed.

256. As noted above, the UNHRC has specifically considered questions surrounding the detention of people with mental health issues. It said that any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question or preventing injury to others, must take into account less restrictive alternatives, and must be accompanied by adequate procedural and substantive safeguards established by law.

257. In the cases of Mr KB and Mr KC, they were detained at ASCC for periods many times the period that they would have been detained had they been found guilty of the offences with which they were charged. In the case of Mr KC, he was transferred to a secure care facility at Kwiernpe House after being detained for four and a half years at ASCC in relation to an alleged offence that would have warranted a 12 month custodial sentence if proved. In the case of Mr KB, he was transferred to Kwiernpe House after being detained for 6 years at ASCC in relation to an alleged offence that would have warranted a 12 month custodial sentence if proved. The period of detention was disproportionate to the aim justifying the detention.

258. I find that the detention of each of the complainants at ASCC was inappropriate and, as a result, arbitrary contrary to article 9(1) of the ICCPR and article 14(1) of the CRPD.

259. I note that Mr KB and Mr KC continue to be detained at Kwiernpe House, despite the extraordinary period of time that they were detained at ASCC. While the move to Kwiernpe House is welcome in that it represents a less restrictive environment than maximum security prison, the reasons given in this report should not be construed as endorsing their detention at Kwiernpe House as a mere alternative to ASCC. As set out in section 8 below dealing with recommendations, the Commission expects that the move to Kwiernpe House will be followed by a reassessment of the necessity of this degree of detention for each of Mr KB and Mr KC, with a view to moving them out of detention into progressively less restrictive environments and providing them with assistance to reintegrate into the community.

260. The inappropriateness of maximum security prison for people with mental health issues is relevant both to whether detention was arbitrary (in the sense of inappropriate, unnecessary or disproportionate) and whether the conditions of detention were consistent with the standard required by article 10 of the ICCPR.

261. In particular, as noted above, article 82 of the Standard Minimum Rules for the Treatment of Prisoners provides that 'persons who are found to be insane' shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible. The obligations under article 82 of the Standard Minimum Rules are relevant when considering whether a State has complied with its obligations under article 10(1) of the ICCPR.

262. I find that the complainants were not treated with humanity and with respect for the inherent dignity of the human person contrary to article 10(1) of the ICCPR.
263. Finally, ASCC is a maximum security prison and the complainants have not been convicted of any offence. The complainants' detention at ASCC was contrary to article 10(2)(a) of the ICCPR which required them to be segregated from convicted persons. No submission was made by the Commonwealth as to the relevance of Australia's reservation to article 10(2)(a) to the effect that 'the principle of segregation is accepted as an objective to be achieved progressively'. That is, no submissions were directed to what progress had been made towards this goal. I find that there was a breach of article 10(2)(a) of the ICCPR.

(b) Cruel, inhuman and degrading treatment

264. The impact on Mr KD of custody in a maximum security prison was severe. Chief Justice Martin found that Mr KD was unable to live under conditions in a prison where he can associate with other prisoners even subject to usual management and discipline. The result was that he was isolated in a small single cell and the opportunities for him to be permitted outside this cell were restricted to two or three hours per day. Prolonged solitary confinement of a detained or imprisoned person may amount to a breach of article 7 of the ICCPR.¹⁰⁷ Despite these severe conditions, the custodial order was confirmed because there were no adequate resources available for his treatment and support in the community outside of prison.
265. It appears that Mr KA has been subject to the most severe treatment while in prison, including frequent use of physical, mechanical and chemical restraints, seclusion, and shackles when outside his cell. ASCC appears to have acknowledged that it is not equipped with alternative measures to lessen the risk to Mr KA and others as a result of his behaviour.
266. In November 2013, Mr KA's guardian wrote to responsible officials at ASCC and noted that there had been three incidents in the previous week of behaviour which caused harm to Mr KA and distress to those working around him, and which resulted in him being belted into a restraint chair and chemically restrained. Mr KA's guardian said that this was the sixteenth time that Mr KA had engaged in behaviour of a nature which injured him, caused prison officials to belt him into a restraint chair and inject him with tranquilizers, and resulted in him spending at least one hour and sometimes two hours in this kind of restraint. Mr KA's guardian recognised that the Disability Team and the Corrections Team at ASCC were 'doing as much as they can', but that the environment at ASCC was clearly inappropriate. He asked why Mr KA had not been prioritised for transfer to a secure care facility and was instead still detained in a maximum security prison.
267. I find that the conditions of detention faced by Mr KD and Mr KA amounted to cruel, inhuman or degrading treatment contrary to article 7 of the ICCPR and article 15 of the CRPD.

(c) Economic, social and cultural rights

268. The failure to take available administrative measures directed towards the provision of alternative accommodation arrangements is also relevant to the alleged breaches of the rights under the CRPD to live in the community with choices equal to others (article 19), and to have an adequate standard of living (article 28(1)). As recognised by the New South Wales Law Reform Commission, forensic patients should not be detained in correctional centres; what is necessary is the provision of secure care facilities, but also an appropriate range of facilities so that forensic patients can be stepped down towards leave and release in a timely fashion (see paragraph 201 above).

269. The provision of a secure care facility as an alternative to ASCC, or the provision of other support services, could have addressed the complainants' rights to the highest attainable standard of health (article 25 of the CRPD) by allowing them sufficient access to mental health services to help them deal with the root cause of their anti-social behaviour. The provision of a secure care facility or other support services could also have addressed the complainants' rights to habilitation or rehabilitation services (article 26(1) of the CRPD). In the case of both of these rights, it is clear that the Commonwealth can breach its human rights duties as a result of acts of omission, and that the Commonwealth's duty includes an 'obligation to protect' which requires it to take all necessary measures to safeguard persons from infringement of the right to health by third parties.¹⁰⁸
270. Taking available administrative measures directed towards the provision of alternative accommodation arrangements would also have been consistent with the positive domestic obligations undertaken by the Commonwealth to the Northern Territory under clause 19 of the Intergovernmental Agreement. These obligations include the commitment to the provision of on-going financial support to the Northern Territory to, among other things, contribute to the achievement of an enhanced quality of life for people with disability. These obligations also include the responsibility under the National Disability Agreement to work together with the Northern Territory to develop and implement reforms to improve outcomes for Indigenous people with a disability.
271. Mr KC and Mr KB were transferred to a secure care facility in April and June 2013 respectively. Mr KA and Mr KD are still detained at ASCC. While Mr KB and Mr KC complain about the standard of care at Kwiyeerne House, I do not have enough information about the conditions there to make a determination about whether the accommodation there is inconsistent with or contrary to their human rights. I note, however, that it is a secure facility and as such will involve restrictions on their liberty. As noted above, the Commission expects that the move to Kwiyeerne House will be followed by a reassessment of the necessity of this degree of detention for each of Mr KB and Mr KC, with a view to moving them out of detention into progressively less restrictive environments and providing them with assistance to reintegrate into the community.
272. While the economic, social and cultural rights under the CRPD are rights that are to be achieved progressively, I have found that the Commonwealth has not taken any administrative steps to implement these rights for the present complainants. The present complainants, Aboriginal men with significant intellectual disabilities who have been found unfit to stand trial and/or found not guilty by reason of mental impairment and who have been detained in a maximum security prison for periods from four and a half years to 18 years, fall into one of the most vulnerable groups in Australian society. In all the circumstances, I find that the Commonwealth has failed to satisfy its minimum core obligation in relation to the realization of their economic, social and cultural rights under articles 19, 25, 26(1) and 28(1) of the CRPD.

(d) Conclusions

273. I find that there has been a failure by the Commonwealth to take measures to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people in with intellectual disabilities who are unfit to plead to criminal charges. There was an obligation at international law on the Commonwealth to act. This obligation was consistent with domestic obligations undertaken by the Commonwealth to the Northern Territory. The need for action was well known and had been well known for many years. Specific administrative measures to take this action were provided for by legislation. I find that the failure to act was inconsistent with or contrary to the complainants' rights under articles 9(1) and 10(1) of the ICCPR and articles 14(1), 19, 25, 26(1) and 28(1) of the CRPD (in the case of Mr KB and Mr KC, at least until they were transferred to Kwiyeerne House). I find that in the case of Mr KA and Mr KD, the failure to act was also inconsistent with article 7 of the ICCPR and article 15 of the CRPD.

7 Scope of the Commission's jurisdiction

274. The Commonwealth claims that the Commission does not have jurisdiction to inquire into these complaints because the complainants have not identified a relevant act or practice.
275. The most detailed articulation of this position in the course of the present inquiry was in a submission by FaHCSIA. The focus of the submissions by FaHCSIA was on the meaning of section 3(3)(a) of the AHRC Act which provides that in the AHRC Act, 'a reference to, or to the doing of, an act includes a reference to a refusal or failure to do an act'. Similar arguments were made by the Australian Government Solicitor in an earlier inquiry by the Commission.¹⁰⁹ The reasons given in this report address both the issues raised by FaHCSIA and those earlier raised by the AGS in the previous inquiry.
276. FaHCSIA submits that in order for the Commonwealth to have engaged in an act or practice amounting to a 'refusal or failure to do an act' a number of requirements must be satisfied. Those requirements are:
- there must be non-performance by the Commonwealth of an identifiable administrative act that was due, required or promised (though not necessarily required by law); and
 - the failure must itself be inconsistent with, or contrary to, a human right, and therefore either the Commonwealth's failure itself must breach a human right or there must be a relationship between the Commonwealth's failure to do the act and the breach of human rights by another person such that the failure caused the breach.
277. In support of the first proposition, FaHCSIA relies on some, but not all, relevant definitions given in the *Macquarie Dictionary*. Of those definitions selected, FaHCSIA does not distinguish between the parts which are definitions and the parts which are examples of the use of the definition.
278. For example, FaHCSIA cites the second definition of 'failure' which is set out in the dictionary in the following way:
2. non-performance of something due or required: *a failure to do what one has promised; a failure to appear*
279. It is clear from the original text that the phrase before the colon is the definition and the phrases after the colon are uses of the definition. Yet FaHCSIA suggests that 'according to the ordinary meaning of the word, a failure to do something is not merely an absence of any action, but non-performance of something due, required or promised'. The reference to something 'promised' as an element of the definition is misplaced.
280. The assertion that 'failure' cannot refer to the absence of particular action also seems to ignore the first definition of 'failure' which is set out in the following way:
1. the act of failing; a proving unsuccessful; lack of success: *his effort ended in failure; the campaign was a failure*
- (emphasis added)
281. One of the definitions of 'failing' is:
3. in the absence or default of: *failing payment, we shall sue*
282. The attempt by FaHCSIA's to increase the threshold for what constitutes a 'failure' based on dictionary definitions is unconvincing.

283. Case law suggests that the word 'fail' has a broad range of meanings and that its meaning in a particular statute will depend on context. FaHCSIA refers to *Ingram v Ingram*, in which Jordan CJ said:

where it is provided by statute that certain consequences shall follow if a person fails to do something which is directed to be done, the meaning of the word, 'fail' depends upon the context in which it is found. In some contexts it may mean simply the omission to do the thing in question, irrespectively of any reason which may have existed for his not doing it In other cases it may mean an omission to do the thing by reason of some carelessness or delinquency on his part, but not omission caused by impossibility for which the person in question is not responsible In other cases; it may mean omission to do the thing, but so that omission caused by impossibility arising from some causes is included and from others is excluded.¹¹⁰

284. The case involved an appeal by a husband from a decree *nisi* for dissolution of marriage. The wife had obtained a decree directing the husband to take back or return home to her within 21 days and render to her conjugal rights. Section 11 of the *Matrimonial Causes Act 1899* (Cth) provided that if the respondent fails to comply with such a decree he shall be deemed to have been guilty of desertion without reasonable cause. Chief Justice Jordan (with whom Davidson and Bavin JJ concurred) considered that in the case of section 11 the mere fact that the directions of the decree have not been performed, although supplying evidence of a failure to comply with the decree, does not establish such failure conclusively. If there was evidence that non-performance was due to a supervening event which made it impossible for the husband to comply with the decree then there would not have been a failure.

285. In the present case, there is no suggestion that particular events or circumstances meant that it was impossible for the Commonwealth to undertake the administrative acts identified in section 6 above.

286. FaHCSIA also refers to the judgment of Kirby J in *CBS Productions Pty Ltd v O'Neill* in which his Honour referred to the statements made by Jordan CJ in *Ingram v Ingram* set out above. Justice Kirby said:

Scrutiny of judicial observations on the word 'fails' (or relevant variants of the verb 'to fail') discloses, as one would expect, differing meanings attributed to the word in differing contexts. In some contexts, the courts have been at pains to confine the word to circumstances evincing default or moral blame on the part of the person alleged to have failed. This the Court of Criminal Appeal did in *Deputy Commissioner of Taxation v Ganke* [1975] 1 NSWLR 252. That was a case where a taxpayer was alleged to have 'failed' to furnish information. The court held that mere omission was not sufficient to come within the statutory phrase. In *Goodwin v Bousfield* [1977] 2 NSWLR 733 Nagle J adopted a similar approach because of the penal provisions of the statute there under consideration. ...

On the other hand, an equally lengthy catalogue of cases can be assembled to illustrate the applicability of the words to circumstance where there is absolutely no suggestion of delinquency on the part of the person alleged to have failed, but simply an omission on that person's part to do something required or expected.¹¹¹

287. This suggests that where a statute imposes penalties on a person as a result of a failure, it is more likely that a court would require there to be some default or moral blame on the part of the person who is alleged to have failed. The Commission does not have the power under the AHRC Act to impose penalties if it finds that an act or practice (including a failure to act) was inconsistent with or contrary to any human right. (For this reason the analogies drawn by FaHCSIA later in its submissions to criminal cases are not apposite.) Rather, the only remedy for a person who has made a complaint to the Commission is that the Commission will publish a report of its findings, which may contain recommendations. The recommendations may include the taking of action to remedy or reduce the loss or damage suffered by a person as a result of the act or practice (including a failure to act).
288. Where the substantive remedy for a failure to act is effectively limited to a formal recommendation that action be taken, it could be expected that an overly restrictive view would not be taken of the types of failures which are inconsistent with or contrary to any human right.
289. Such an approach would be consistent with the objects of these provisions of the AHRC Act. One of the purposes of this reporting function is to provide some public accountability where Australia has failed to meet its human rights obligations as a result of administrative acts or omissions. Reports prepared by the Commission under section 29 of the AHRC Act are required to be tabled in Parliament within 15 sitting days after the report is received by the Attorney-General.¹¹²
290. Such an approach would also be consistent with general principles of statutory construction that apply to remedial legislation. These principles were described by Isaacs J in *Bull v Attorney-General (NSW)* in the following way:
- In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.¹¹³
291. One example of this was the construction given to the term ‘services’ in the *Equal Opportunity Act 1984 (WA)* in *IW v City of Perth*. In that case, Brennan CJ and McHugh J said:
- beneficial and remedial legislation, like the Act, is to be given a liberal construction. It is to be given ‘a fair, large and liberal’ interpretation rather than one which is ‘literal or technical’. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural. But subject to that proviso, if the term ‘service’, read in the context of the Act and its object, is capable of applying to an activity, a court or tribunal, exercising jurisdiction under the Act, should hold that that activity is a ‘service’ for the purpose of the Act.¹¹⁴
292. In order for there to be a failure to do an act, there must have been at least a reasonable opportunity to do the act in question. FaHCSIA relies on the case of *Victoria v Commonwealth* which considered the phrase ‘fails to pass’ in section 57 of the Constitution. In that case, a majority of the High Court held that the Senate did not ‘fail to pass’ a Bill transmitted to it on 13 December 1973 when consideration of the Bill was adjourned to the next sitting day. Again, the context of the word ‘fails’ is important. Chief Justice Barwick said:
- Thus, in approaching the meaning of the word ‘fails’ in s. 57, it must be borne in mind that the Senate is both entitled and bound to consider a proposed law and to have a proper opportunity for debate and that its concurrence, apart from the provisions of s. 57, is indispensable to a valid act of the Parliament.

It seems to me that the word 'fails' in s. 57 involves the notion that a time has arrived when, even allowing for the deliberative processes of the Senate, the Senate ought to answer whether or not it will pass the Bill or make amendments to it for the consideration of the House: that the time has arrived for the Senate to take a stand with respect to the Bill. If that time has arrived and the Senate rather than take a stand merely prevaricates, it can properly be said at that time to have failed to pass the Bill.¹¹⁵

293. Similar comments were made by Gibbs J:

If in s. 57 the words 'fails to pass' are understood as equivalent in meaning to 'does not pass', it is necessary in order to give proper sense to the section to imply in it such words as 'within a reasonable time', since the natural implication to be made is that the Senate should have a reasonable opportunity to consider and make a decision upon a Bill before it can be said to fail to pass it. If the words 'fails to pass' are understood as importing some element of fault, exactly the same result is reached; there will be a failure to pass a Bill only when the Senate, having had a reasonable opportunity to pass it, does not do so.¹¹⁶

294. Justice Stephens indicated that the Senate would fail to pass a Bill if its consideration of the Bill was delayed for longer than was necessary for 'the normal processes of deliberation'.¹¹⁷ Justice Mason considered the phrase 'fails to pass' in the following way:

The expression may signify a mere omission to perform, regardless of any fault or delay on the part of the actor, or it may mean an omission to perform which is attributable to fault or delay on his part – see *Ingram v. Ingram*. Neither in point of law nor of English usage is there a general preference for one sense over the other. Always it is the context which determines the sense in which the words are used.

Where there is a duty to perform an act within a prescribed time, a failure to perform the act may be more readily related to a mere omission to perform within that time, regardless of any fault on the part of the body in whom the duty is reposed. But where no such duty is imposed and there is no prescription of the time within which the act is to be performed it is difficult, if not impossible, to conclude that there can be a failure of performance before a reasonable time has elapsed unless the omission to perform is attributable to fault of some kind. ...

The absence of any prescription of the time to be taken by the Senate in the consideration of a Bill points not to the conclusion that there is a failure to pass if the measure is not adopted immediately, but to the conclusion that the Senate was, in conformity with its position in the Parliament and with its responsibilities, allowed reasonable time for deliberation and that after the expiration of that time there is a failure to pass if the measure has not been adopted.¹¹⁸

295. Justices McTiernan and Jacobs JJ dissented on this point of construction.

296. The present case is far different from that of *Victoria v Commonwealth* discussed above. In that case, the plaintiffs unsuccessfully contended that the Senate had failed to pass a Bill when it was not passed by the end of the first day that it was before the Senate. Here, the plaintiffs have been in detention in a maximum security prison for periods from four and a half years to 18 years. There was ample opportunity during this period for the Commonwealth to adopt administrative measures to give effect to their human rights.

297. In circumstances where:

- Australia has international obligations to, among other things, take administrative measures to give effect to the human rights of the complainants;
- it was clear that action was necessary in order to give effect to those rights;
- relevant administrative measures under an enactment were available to the Commonwealth to be taken;
- further assurances had been given by the Commonwealth to the Northern Territory, including that implementing reforms to improve outcomes for Indigenous people with disability was an area of joint responsibility;
- no administrative measures were taken by the Commonwealth within a reasonable period of time;

then it was open to the Commission to find that there had been a failure by the Commonwealth to do an act, and that this failure was inconsistent with or contrary to the human rights of the complainants. The Commission does not suggest that all of these elements will be necessary in every case. In this case they were sufficient to ground the Commission's jurisdiction once the complaints were received.

8 Recommendations

298. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹¹⁹ The Commission may include in the notice any recommendations for preventing a repetition of the act or a continuation of the practice.¹²⁰

299. These recommendations may include a recommendation for either or both of the following:

- the payment of compensation to, or in respect of, a person who has suffered loss or damage as a result of the act or practice;
- the taking of other action to remedy or reduce loss or damage suffered by a person as a result of the act or practice.

300. In this case, when I provided the parties with my preliminary view on the complaints I invited the complainants to make submissions about the kinds of recommendations that they would seek if the Commission formed a final view that an act or practice engaged in by the Commonwealth was inconsistent with or contrary to any of their human rights.

301. I also indicated a number of recommendations that I may consider making.

302. The complainants submitted that two types of recommendations should be made.

303. First, the complainants submitted that the Commission recommend that the Commonwealth pay compensation to each of them. The complainants did not make any submission about the level of compensation to be paid, or how it should be calculated.

304. Secondly, the complainants submitted that the Commission make a number of recommendations about the implementation of the National Disability Insurance Scheme (NDIS) which would apply to both the complainants and to other people in a similar situation. In particular, they sought recommendations in the following form:
- The Commonwealth enter into a bilateral agreement with the Northern Territory to immediately extend eligibility for the NDIS to each of the complainants and to other persons within this population group. The bilateral agreement might be in the form of a specific NDIS ‘trial’. If necessary, this bilateral agreement should provide for 100% Commonwealth funding of the disability-related services and supports to be provided pursuant to this agreement.
 - The National Disability Insurance Agency immediately establish a high level advisory group, constituted by appropriate officials working within the Northern Territory justice system, independent clinical experts, and appropriate representatives of persons with disability to develop appropriate policy and program options to ensure that the NDIS develops supports and services that are capable of realising the human rights of persons in this target group.

8.1 Recommendations for individuals

305. I have considered the submission by the complainants that the Commission should recommend that the Commonwealth pay them compensation. In considering this submission, I have taken into account the nature of the failures to act found in respect of the Commonwealth and the respective responsibilities of the Commonwealth and the Northern Territory in relation to the complainants. In the circumstances of these complaints I have found that the Commonwealth failed to take measures, in accordance with administrative powers available to it, to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges. In making this finding, I recognise that the Northern Territory has the primary responsibility for the conditions in which people in Northern Territory prisons are detained.
306. Given that the failures to act by the Commonwealth in this matter are directed to the systemic issue of whether there were alternative accommodation options and support services available, I consider that the most appropriate recommendations are those that are more directly related to this issue. I have decided in this matter not to make a specific recommendation that the Commonwealth pay the complainants.
307. Mr KA and Mr KD are still detained in ASCC. Mr KB and Mr KC have been moved from ASCC to secure care accommodation in Kwiyermppe House. Their advocate submits that Kwiyermppe House is ‘prison-like’ and is more restrictive than necessary. Mr KB and Mr KC have been in held detention for many times longer than would have been the case had they been found guilty of the crimes with which they were charged. In the case of each of the complainants, I make the following recommendation.

Recommendation 1

The Commonwealth provide a copy of the Commission’s findings to the Northern Territory and seek assurances from the Northern Territory that it will take immediate steps to identify alternative accommodation arrangements for each of the complainants so that Mr KA and Mr KD are no longer detained in a prison and Mr KB and Mr KC are progressively moved out of held detention. These arrangements should be the least restrictive arrangements appropriate to each individual and should include a plan to progressively move each of them into the community along with necessary support services.

8.2 Systemic recommendations

308. I make the following more systemic recommendations addressed to the damage suffered both by the complainants and by others in the Northern Territory in a similar position.

Recommendation 2

The Commonwealth cooperate with the Northern Territory to establish an appropriate range of facilities in the Northern Territory so that people with cognitive impairment who are subject to a custodial supervision order can be accommodated in places other than prisons. This range of facilities should include secure care facilities and supported community supervision. The number of places available in these facilities should be sufficient to cater for the number of people who are anticipated to make use of them.

309. In making this recommendation, I make clear that I am not endorsing long term detention in secure care facilities. While secure care facilities may be necessary in the short term, the use of such facilities needs to be in the context of the following more general recommendations about the treatment of people with cognitive impairment who come into contact with the criminal justice system.

Recommendation 3

The Commonwealth cooperate with the Northern Territory to ensure that people with cognitive impairment who have not been convicted of an offence are detained as a measure of last resort, for the shortest appropriate period of time, and in the least restrictive appropriate environment.

Recommendation 4

The Commonwealth cooperate with the Northern Territory to ensure that when a person with a cognitive impairment is detained under a custodial supervision order, a plan is put in place to move that person into progressively less restrictive environments and eventually out of detention.

310. I consider that it is also important to have clear and consistent standards to ensure that recommendations 3 and 4 are carried out and to ensure that people with cognitive impairment who are detained are treated appropriately and provided with appropriate advice and assistance.

Recommendation 5

The Commonwealth cooperate with the Northern Territory to develop model service system standards for the detention of people with a cognitive impairment.

Recommendation 6

The Commonwealth cooperate with the Northern Territory to ensure that when a person with a cognitive impairment is detained he or she is provided with appropriate advice and support, including the appointment of a guardian or advocate.

311. As noted above, the complainants have made specific submissions about the way in which they say the breaches of their human rights could be addressed through the NDIS. The NDIS is a Commonwealth funded scheme to support people with a permanent and significant disability that affects their ability to take part in everyday activities. Currently, there is one trial site for the NDIS in the Northern Territory, in the Barkly region. The trial in Barkly commenced on 1 July 2014. I understand from material published by the National Disability Insurance Agency that from July 2016, the NDIS will progressively roll out in the Northern Territory and by July 2019, all eligible residents in the Northern Territory will be covered.¹²¹

312. The detail of the operation of the NDIS is beyond the scope of the present inquiry. The Commission makes a number of recommendations above about cooperation between the Commonwealth and the Northern Territory. These recommendations are not prescriptive as to the form in which that cooperation should take. It may be that one way that such cooperation could be effected is through the NDIS. Given that there is an existing framework for cooperation between the Commonwealth and the Northern Territory through the NDIS, I am of the view that consideration should be given to using this framework to give effect to the other recommendations. As the breaches of the human rights of at least Mr KA and Mr KD are continuing, these steps should not await the more general roll out of the NDIS in July 2016.

Recommendation 7

The Commonwealth give consideration to extending eligibility for the NDIS, prior to its more general roll out in July 2016, to each of the complainants and to other persons who have been held in closed detention following a finding that they were unfit to stand trial as a result of their disabilities.

313. The above recommendation is without prejudice to the other systemic recommendations set out above.
314. I invited the Commonwealth to state what action it has taken or is taking as a result of the findings and recommendations in this report.

9 The Commonwealth's responses to my findings and recommendations

315. In August 2014, I provided a notice to the department under section 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaints dealt with in this report.
316. By letter dated 26 September 2014, the Commonwealth provided the following response:

Complaints on behalf of [Mr KA, Mr KB, Mr KC and Mr KD]

Thank you for your letter of 29 August 2014 regarding the Australian Human Rights Commission's findings and recommendations in relation to the complaints lodged on behalf of [Mr KA, Mr KB, Mr KC and Mr KD] against the Commonwealth of Australia.

As noted in my letter of 31 July 2014, whilst the Commonwealth acknowledges that these matters are complex and present particular challenges for State and Territory based service systems, we remain of the view that the complaints do not amount to an 'act' or 'practice' by the Commonwealth into which the Commission has power to inquire into under subsection 11(1)(f) of the *Australian Human Rights Commission Act 1986* (Cth).¹

However, I wish to note two issues regarding the Commission's interpretation of Australia's international human rights obligations and the Commission's findings in relation to the National Disability Insurance Scheme (NDIS).

¹ A matter set out at length in the legal advice provided to the Commission and as set out in the advice from the Australian Government Solicitor attached to the report *Behme v Commonwealth of Australia* [2013] AusHRC 60.

In relation to Australia's international human rights obligations, Australia, comprised of the Commonwealth and the States and Territories, is a party to a range of United Nations international human rights treaties and the Commonwealth and the States and Territories are responsible for compliance with Australia's human rights obligations within their constitutional responsibilities.

It appears from the analysis in the report that the Commission has conflated Australia, as a State Party to a treaty, with the Commonwealth Government. It appears that the Commission has then used this rationale to make adverse findings against the Commonwealth, as somehow being responsible for the actions of State or Territory governments, without due regard for the allocation of responsibilities under the Constitution between the Commonwealth and the States and Territories. The Commonwealth does not accept this analysis.


This approach by the Commission overlooks the legislative underpinnings of the Commission as a creature of Commonwealth law and as such attempts to bring any human rights matter within the jurisdiction of the Commission, based on the rationale that Australia as a whole is responsible for any treaty breach and therefore the Commonwealth Government must be responsible and the Commission must have the jurisdiction to determine this. In the present instance this manifests in the report glossing over the allocation of powers between the Commonwealth and the Government of the Northern Territory to arrive at the view that the Commonwealth is responsible for the Government of the Northern Territory.

As we do not accept such an expansive reading of the Commission's jurisdiction, we have not addressed the merits of the arguments raised in any detail. However, whilst the Commission can arrive at its own views as to what it considers to be Australia's human rights obligations under relevant treaties, the Commonwealth fundamentally disagrees with the Commission's interpretations of Australia's international human rights obligations, particularly in relation to its reliance on jurisprudence from other State's domestic legal systems and other documents which are not binding on Australia.

Lastly, in relation to comments made about the NDIS, it is noted that the NDIS is being rolled out according to bilateral agreements entered into between the Commonwealth and each jurisdiction, including the Northern Territory. On 1 July, a trial commenced in the Barkly Region. How the NDIS is rolled out beyond the trial site is a matter that will be negotiated between the Northern Territory and the Commonwealth. Until further rollout beyond the current trial site, the Government of the Northern Territory remains responsible for disability services beyond the Barkly Region.

Thank you for providing the Commonwealth with the notice of your findings.

317. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

September 2014

- 1 The Northern Territory *Criminal Code* (NT Criminal Code) appears at Schedule 1 to the *Criminal Code Act* (NT).
- 2 Letter from FaHCSIA to the Commission dated 13 September 2012 at [45].
- 3 Letter from FaHCSIA to the Commission dated 13 September 2012 at [12].
- 4 *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208 at 214.
- 5 See *Secretary, Department of Defence v HREOC, Burgess & Ors* (1997) 78 FCR 208.
- 6 The *International Covenant on Civil and Political Rights* (ICCPR) is referred to in the definition of 'human rights' in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). The *Convention on the Rights of Persons with Disabilities* (CRPD) has been declared under s 47(1) of the AHRC Act as an international instrument relating to human rights and freedoms for the purposes of that Act: *Convention on the Rights of Persons with Disabilities Declaration* 2009.
- 7 UN Human Rights Committee, *General Comment No. 31* (2004) at [6]. See also Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (2nd ed, 2004) p 308, at [11.10].
- 8 *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999).
- 9 UN Human Rights Committee, *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/76/D/900/1993 (1997) (the fact that the author may abscond if released into the community with not sufficient reason to justify holding the author in immigration detention for four years); *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002).
- 10 UN Human Rights Committee, *Draft General Comment No. 35, Article 9: Liberty and security of person*, UN Doc CCPR/C/107/R.3 (28 January 2013), at [19].
- 11 UN Human Rights Committee, *Concluding Observations on Canada*, UN Doc CCPR/C/CAN/CO/5 (20 April 2006), at [17].
- 12 UN Human Rights Committee, *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002) at [8.4].
- 13 UN Human Rights Committee, *Jensen v Australia*, Communication No. 762/1997, UN Doc CCPR/C/71/D/762/1997 (2001) at [6.2].
- 14 The Standard Minimum Rules were approved by the UN Economic and Social Council by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. They were adopted by the UN General Assembly in resolutions 2858 of 1971 and 3144 of 1983: UN Doc A/COMF/611, Annex 1.
- 15 The Body of Principles were adopted by the UN General Assembly in resolution 43/173 of 9 December 1988 Annex: UN Doc A/43/49 (1988).
- 16 UN Human Rights Committee, *General Comment No. 21 (Replaces General Comment No. 9 concerning humane treatment of persons deprived of liberty)* (10 April 1992) at [5].
- 17 UN Human Rights Committee, *Mukong v Cameroon*, Communication No. 458/1991, UN Doc CCPR/C/51/458/1991 (1994) at [9.3]; *Potter v New Zealand*, Communication No. 632/1995, UN Doc CCPR/C/60/D/632/1995 (1997) at [6.3]. See also, UN Human Rights Committee, *Concluding Observations on the United States*, UN Doc A/50/40 (3 October 1995) at [285] and [299].
- 18 *Convention on the Rights of Persons with Disabilities Declaration* 2009.
- 19 *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.
- 20 M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed 2005) p 854.
- 21 For example, *Somers v Hungary*, Communication No. 566/1993, UN Doc CCPR/C/57/D/566/1993 (29 July 1996) at [6.2].
- 22 UN Human Rights Committee, *Könye v Hungary*, Communication No. 520/1992, UN Doc CCPR/C/50/D/520/1992 (5 May 1994) at [6.4].
- 23 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The nature of States parties obligations (Art. 2, par.1) (Annex III)*, UN Doc E/1991/23(SUPP) (1 January 1991) at [9]-[12].
- 24 *South Africa v Grootboom* (2001) 1 SALR 46 (CC) at [31].
- 25 *South Africa v Grootboom* (2001) 1 SALR 46 (CC) at [41].
- 26 *South Africa v Grootboom* (2001) 1 SALR 46 (CC) at [66], [68].
- 27 Northern Territory, *Parliamentary Debates*, 14 May 2002, the Hon Dr Toyne, Attorney General and Minister for Justice, second reading speech for the Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Bill.
- 28 NT Criminal Code, s 43C(1).
- 29 NT Criminal Code, s 43J.
- 30 NT Criminal Code, s 43R.
- 31 NT Criminal Code, s 43V.
- 32 NT Criminal Code, s 43X(2).
- 33 NT Criminal Code, s 43X(3).
- 34 NT Criminal Code, s 43ZA(1).
- 35 NT Criminal Code, s 43ZA(2).
- 36 NT Criminal Code, s 43ZA(3) and (4).
- 37 NT Criminal Code, s 43ZG(1).
- 38 NT Criminal Code, s 43ZG(2).
- 39 NT Criminal Code, s 43ZG(5).
- 40 NT Criminal Code, s 43ZG(7).
- 41 NT Criminal Code, s 43ZG(6).

- 42 NT Criminal Code, s 43ZC.
- 43 NT Criminal Code, s 43ZC.
- 44 NT Criminal Code, s 43ZH.
- 45 Northern Territory, *Parliamentary Debates*, 14 May 2002, the Hon Dr Toyne, Attorney General and Minister for Justice, second reading speech for the Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Bill.
- 46 Northern Territory, *Parliamentary Debates*, 14 May 2002, the Hon Dr Toyne, Attorney General and Minister for Justice, second reading speech for the Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Bill.
- 47 Northern Territory, submission to the Senate Select Committee on Mental Health (2005). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/mentalhealth/submissions/~~/media/wopapub/senate/committee/mentalhealth_ctte/submissions/sub393_pdf.ashx (viewed 4 February 2014), p 22.
- 48 Northern Territory, submission to the Senate Select Committee on Mental Health (2005), as above.
- 49 Northern Territory, submission to the Senate Select Committee on Mental Health (2005), as above, p. 23.
- 50 Northern Territory, submission to the Senate Select Committee on Mental Health (2005), as above, p. 23.
- 51 Senate, Select Committee on Mental Health, *A national approach to mental health – from crisis to community* (2006), p 20.
- 52 Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008), p 19.
- 53 Northern Territory, *Parliamentary Debates*, 16 February 2012, the Hon Mr Vatskalis, Minister for Health, second reading speech for the Disability Services Amendment Bill 2012.
- 54 Northern Territory Department of Health, Secure Care Services for Adults, December 2011. At http://www.health.nt.gov.au/Secure_Care_Facilities_and_Services/index.aspx (viewed 17 January 2014).
- 55 Northern Territory, *Parliamentary Debates*, 16 February 2012, the Hon Mr Vatskalis, Minister for Health, second reading speech for the Disability Services Amendment Bill 2012.
- 56 Northern Territory Government Gazette No. G3 (18 January 2012), Notice No. 3/3, page 3, *Criminal Code Amendment (Mental Impairment and Unfitness for Trial) Act 2010*, Department of Health Supervision Directions.
- 57 Northern Territory, *Parliamentary Debates*, 16 February 2012, the Hon Mr Vatskalis, Minister for Health, second reading speech for the Disability Services Amendment Bill 2012.
- 58 NT Criminal Code, s 43ZA(3) and (4).
- 59 *Disability Services Act 1986* (Cth) (Disability Services Act), s 5.
- 60 Northern Territory Government Gazette No. G14 (3 April 2013), Notice No. 10/14, page 4, Disability Services Act, Declaration of Secure Care Facilities.
- 61 M Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary* (2nd ed, 2005), p 808 at [2]; MJ Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), pp 761–766.
- 62 MJ Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), p 763.
- 63 MJ Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), p 766.
- 64 G Triggs, ‘Australia’s Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?’ (1982) 31 *International and Comparative Law Quarterly* 278.
- 65 MJ Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), p 764 referring to UN Doc A/2929, Ch X, §11. Note also that the Kingdom of the Netherlands made its own declaration in response to Australia’s reservation to articles 2 and 50 in the following form:
The reservation that article 2, paragraphs 2 and 3, and article 50 shall be given effect consistently with and subject to the provisions in article 2, paragraph 2, is acceptable to the Kingdom on the understanding that it will in no way impair Australia’s basic obligation under international law, as laid down in article 2, paragraph 1, to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the International Covenant on Civil and Political Rights.
- 66 G Triggs, ‘Australia’s Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?’ (1982) 31 *International and Comparative Law Quarterly* 278 at 292.
- 67 UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992.
- 68 UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992, at [4.1].
- 69 UN Human Rights Committee, *Coleman v Australia*, Communication No. 1157/2003, UN Doc CCPR/C/87/D/1157/2003.
- 70 UN Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992, at [4.1].
- 71 Response of the Australian Government to the views of the Committee in Communication No. 1157/2003 *Coleman v Australia*. At <http://www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/CommunicationNo11572003-AustralianGovernmentResponse.doc> (viewed 12 February 2014).
- 72 UN Human Rights Committee, *Concluding observations on Australia*, UN Doc A/55/40 (24 July 2000), at [516]–[517].
- 73 Commonwealth, House of Representatives, *Parliamentary Debates*, 1 June 1977, the Hon Bob Ellicott, Attorney-General, second reading speech for the Human Rights Commission Bill 1977 (Cth).
- 74 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The nature of States parties obligations (Art. 2, par.1) (Annex III)*, UN Doc E/1991/23(SUPP) (1 January 1991) at [2]. These comments were made in the context of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) but apply equally to the economic, social and cultural rights in the CRPD.
- 75 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The nature of States parties obligations (Art. 2, par.1) (Annex III)*, UN Doc E/1991/23(SUPP) (1 January 1991) at [11].

- 76 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3, The nature of States parties obligations (Art. 2, par. 1) (Annex III)*, UN Doc E/1991/23(SUPP) (1 January 1991) at [10].
- 77 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 5 (1994), Persons with disabilities*, UN Doc E/1995/22(SUPP), E/C.12/1994/20, Annex IV, at [9] p 112.
- 78 Senate, Select Committee on Mental Health, *A national approach to mental health – from crisis to community* (2006), p 346.
- 79 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996) at [11.25]-[11.28].
- 80 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), Recommendation 57.
- 81 G James, *Review of the New South Wales Forensic Mental Health Legislation* (2007) at [3.11] and 11.
- 82 New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report 138 (May 2013) at [10.49]-[10.50].
- 83 Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Australia, Addendum*, UN Doc A/HRC/17/10/Add.1 (31 May 2011) p 5.
- 84 Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties under article 35 of the Convention, Australia* [3 December 2010], UN Doc CRPD/C/AUS/1 (7 June 2012) at [72].
- 85 Committee on the Rights of Persons with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties under article 35 of the Convention, Australia* [3 December 2010], UN Doc CRPD/C/AUS/1 (7 June 2012) at [79].
- 86 At the time of the complaints, the Minister for Families, Housing, Community Services and Indigenous Affairs.
- 87 Disability Services Act, s 7.
- 88 Disability Services Act, s 8.
- 89 For example, the original complaint by Mr KA at [47.2].
- 90 Letter from the Commission to FaHCSIA dated 3 May 2013.
- 91 Letter from FaHCSIA to the Commission dated 1 July 2013.
- 92 Letter from FaHCSIA to the Commission dated 13 September 2012.
- 93 Intergovernmental Agreement on Federal Financial Relations, clause 1.
- 94 Intergovernmental Agreement on Federal Financial Relations, clause 11.
- 95 Intergovernmental Agreement on Federal Financial Relations, clause 10.
- 96 National Disability Agreement, clause 14(d) (from January 2009 to July 2012), clause 16(d) (from July 2012).
- 97 National Disability Agreement, clause 14(d) (from January 2009 to July 2012), clause 15(c) (from January 2009 to July 2012); clause 17(c) (from July 2012).
- 98 National Disability Agreement, clause 14(d) (from January 2009 to July 2012), clause 6 (from January 2009 to July 2012); clause 9 (from July 2012).
- 99 National Disability Agreement, clause 14(d) (from January 2009 to July 2012), clause 7(b) (from January 2009 to July 2012); clause 10(b) (from July 2012).
- 100 Letter from the Commission to AGD dated 3 May 2013.
- 101 Letter from ADG to the Commission dated 3 July 2013.
- 102 Letter from AGD to the Commission (undated, received 7 June 2012).
- 103 Letter from the Commission to FaHCSIA dated 10 July 2012.
- 104 Letter from FaHCSIA to the Commission dated 13 September 2012, page 9.
- 105 Letter from the Commission to FaHCSIA dated 3 May 2013.
- 106 Letter from the Commission to Treasury dated 3 May 2013.
- 107 UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, UN Doc HRI/GEN/1/Rev.9 (Vol. I), p 200 at [6].
- 108 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000), The right to the highest attainable standard of health*, (11 August 2000) UN Doc E/C.12/2000/4 at [49] and [51]. This general comment deals with the equivalent right to health in article 12 of the ICESCR.
- 109 See the Appendix to the Commission's report in *Behme v Commonwealth of Australia* [2013] AusHRC 60.
- 110 *Ingram v Ingram* (1938) 38 SR (NSW) 407 at 410 (internal citations omitted).
- 111 *CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 at 609.
- 112 AHRC Act, s 46.
- 113 *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384.
- 114 *IW v City of Perth* (1997) 191 CLR 1 at 12.
- 115 *Victoria, New South Wales, Western Australia and Queensland v Commonwealth* (1975) 134 CLR 81 at 122.
- 116 *Victoria, New South Wales, Western Australia and Queensland v Commonwealth* (1975) 134 CLR 81 at 148.
- 117 *Victoria, New South Wales, Western Australia and Queensland v Commonwealth* (1975) 134 CLR 81 at 171-173.
- 118 *Victoria, New South Wales, Western Australia and Queensland v Commonwealth* (1975) 134 CLR 81 at 184-185.
- 119 AHRC Act, s 29(2)(a).
- 120 AHRC Act, s 29(2)(b).
- 121 National Disability Insurance Agency website: <http://www.ndis.gov.au/about-us/our-sites> (viewed 25 August 2014).

Further Information

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