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### Indefinite detention of people with cognitive and psychiatric impairment in Australia Submission 59

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## **Indefinite detention of people with cognitive and psychiatric impairment in Australia Submission 59**

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## **Submission to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia**

**Dr Linda Steele, Lecturer, School of Law University of Wollongong, 18 April 2016**

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1. Thank you for the opportunity to make a submission to the Senate Community Affairs References Committee Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia ('the Inquiry').

### **Introduction and Recommendations**

2. This submission is focused on six recommendations to the Senate Community Affairs References Committee ('the Committee') which relate to the Committee's approach to the Inquiry as a whole. These recommendations are:
  - a. That the Committee consider indefinite detention *as well as* other legal regimes for detention, regulation and intervention in relation to people with cognitive and psychiatric impairment.
  - b. That the Committee acknowledge and address the disability-specific and fundamentally discriminatory nature of indefinite detention and other legal regimes of detention, regulation and intervention applicable only to people with cognitive and psychiatric impairment.
  - c. That the Committee acknowledge and address the indefinite cycling of individuals with cognitive and psychiatric impairment in and out of multiple episodes of detention, regulation and intervention over their life course, across jurisdictions and across institutional and physical spaces.
  - d. That the Committee not merely fine-tune indefinite detention (e.g. reform from indefinite to definite periods of detention, reform from punishment/regulation in confined spaces to punishment/regulation in the community) but instead question the very existence of all disability-specific regimes of detention, regulation and intervention (e.g. forensic punishment, forced mental health treatment, sterilisation), and all associated legislative regimes (e.g. forensic mental health law, civil mental health law, guardianship law).

- e. That the Committee not only focus on indefinite detention or on various legal regimes of detention, regulation and intervention in abstract but instead consider indefinite detention by reference to embodied individuals with cognitive and psychiatric impairment who are subjected to indefinite detention and other legal regimes of detention, regulation and intervention, with the ultimate aim of determining how to reduce detention, regulation and intervention of actual, material, embodied individuals with cognitive and psychiatric impairments over their life course.
  - f. That the Committee develop a strategy for ‘transitional justice’<sup>1</sup> that addresses prohibiting and making legally actionable future instances of such discriminatory detention, regulation and intervention as well as developing a system to recognize, remedy and remember past instances of these practices when they were still lawful.<sup>2</sup>
3. These recommendations impact on the Committee’s approach to the terms of reference, including:
- a. Term of reference (e) on human rights: not focus on a pre-Disability Convention procedural justice mental incapacity approach to human rights in relation to indefinite detention (i.e. how can the procedures for existing forms of disability-specific detention, regulation and intervention be enhanced to ensure more ‘fairness’, ‘transparency’ and ‘accountability’) but instead begin from the starting point of the human right to equality and non-discrimination and be concerned with whether these disability-specific regimes of detention, regulation and intervention should exist at all.
  - b. Term of reference (g) on ‘interface of disability services, support systems, the courts and corrections systems’: not only focus on the ‘interface’ but on the the interrelationship between these systems and institutions, including across simultaneous and/or successive legal orders of detention, regulation and intervention and how ‘therapeutic’ or ‘community-based’ services and systems

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<sup>1</sup> See, e.g., Carolyn Frohmader and Therese Sands, Australian Cross Disability Alliance (ACDA) Submission to the Senate Community Affairs References Committee Inquiry into Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, August 2015.

<sup>2</sup> See, eg, Hege Orefellen, ‘Hege Orefellen on Reparations’, *Campaign to Support CRPD Absolute Prohibition of Commitment and Forced Treatment*, <https://absoluteprohibition.wordpress.com/2016/02/06/hege-orefellen-on-reparations/>, accessed 27 March 2016.

might mask the discriminatory, punitive, violent and marginalising effects of some legal regimes of detention, regulation and intervention.

- c. Term of reference (h) on access to justice: not only focus on accessing justice to ensure best outcomes in the current disability-specific regimes, but how the denial of legal capacity which is embedded in the very legislative frameworks providing for these disability-specific regimes of detention, regulation and intervention is itself a systematic and fundamental denial of access to justice for people with cognitive and psychiatric impairment as a group, and hence whether realising access to justice requires abolition of disability-specific mechanisms that discriminatorily deny legal capacity. Access to justice also extends to access to remedies for violence, disablement and discrimination experienced during detention, regulation or intervention – particularly where this occurs in institutional spaces which have traditionally been excluded from full legal protection (either explicitly by law or de facto).
  - d. Term of reference (i) on diversion from the criminal justice system and term of reference (j) on pathways out of the criminal justice system: Not only focus on moving people out of the criminal justice system but instead moving them out of a broader legal network of criminal *and* civil regimes of detention, regulation and intervention, and out of a cycle of successive and interrelated legal orders and episodes of detention, regulation and intervention.
  - e. Definition of ‘indefinite detention’: not limit the definition to architectural forms of detention but extend it to other ways in which the movement of individuals with cognitive and psychiatric impairment might be restricted via non-architectural modes (e.g. chemical restraint and community mental health orders involving treatment which restrict an individual’s movement from within the individual via pharmaceuticals as opposed to placing barriers external to the individual, guardianship orders which structure the life choices of an individual).<sup>3</sup>
4. In support of these recommendations and this approach to the terms of reference, the submission focuses on directing the Senate Committee’s attention to some methodological and foundational issues related to the Inquiry as a whole.

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<sup>3</sup> There is some legal authority for such an expansive and non-architecturally contingent approach to the notion of ‘restraint’ in the tort false imprisonment decision of *Symes v McMahon* [1922] SASR 447.

## **The Discriminatory Status of Disability-Specific Detention, Regulation and Intervention**

5. Indefinite detention in the forensic and civil mental health systems sits among a number of modes of detention, regulation and intervention which apply exclusively to people with cognitive and psychiatric impairment on the basis of their disability. Others include civil mental health treatment pursuant to community treatment orders, being required to live at a certain location pursuant to a guardianship order (and being returned to that location coercively pursuant to police-related retrieval orders), and sterilisation pursuant to the Family Court's welfare jurisdiction. All of these mechanisms are disability-specific because they apply exclusively to people with cognitive and psychiatric impairment on the basis of their mental incapacity and there are no similar legal regimes for individuals without these disabilities. For example, individuals without cognitive or psychiatric impairment who are charged with criminal offences but who are not convicted or are not able to be tried of these offences are free from forced detention or regulation. Similarly, individuals without cognitive or psychiatric impairment who in the view of others require medical treatment but do not themselves wish to have this treatment are free from forced medical intervention.
6. It is vital to the very foundations of the Senate Inquiry that the Committee address the discriminatory nature of indefinite detention and other disability-specific legal regimes of detention, regulation and intervention applicable only to people with cognitive and psychiatric impairments. This requires challenging the natural and self-evident approach to disability in law (and society more broadly) which views differential treatment of people with cognitive and psychiatric impairment as acceptable and necessary. Recent developments in international human rights law by virtue of the United Nations Convention on the Rights of Persons with Disabilities ('Disability Convention') provide a legal basis on which to appreciate the significance of underlying ideas about disability to the possibility and permissibility of indefinite detention and other disability-specific regimes of detention, intervention and regulation.

### Disability Convention approach to disability

7. Historically, people with disability have been subject to lower human rights thresholds by reason of their marginalisation in mainstream international human rights instruments and the existence of disability-specific international human rights instruments. The Disability Convention does not introduce any new human rights for persons with

disabilities but instead aims to enhance recognition of existing human rights in relation to persons with disability. The Committee must be aware of the significance of these shifts brought about by the Disability Convention to the interpretation of human rights vis-à-vis people with cognitive and psychiatric impairment and the lack of continuity of the contemporary approach with the older procedural justice mental incapacity approach. This is central to the direction of the Inquiry as a whole and specifically to term of reference (e).

8. A fundamental shift brought about by the Disability Convention is the redefinition of disability as a fluid, socially contingent concept thus challenging the pervasive medical approach to disability in the earlier procedural justice mental incapacity human rights approach. For example, the Preamble to the Disability Convention states ‘Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’. The Disability Convention’s approach to disability indicates a shift from medicalized notions of disability and a focus on internal, individual pathology epitomized by diagnostic definitions of particular impairments. Instead disability is viewed as a form of social and political difference, and there is an appreciation of the place of medicalization and diagnostic categorization in providing a legitimate basis for the legal and social regulation of people with disability. In seeing *disability* differently, it is possible to see *new forms* of violence and marginalisation against people with disability (previously taken for granted as necessary and benevolent).
9. In light of the Disability Convention’s approach to disability, the Committee could avoid viewing *people with cognitive and psychiatric impairment* as a pre-established category prior to and outside of their analysis of the operation of indefinite detention. Instead, the Committee could consider how the construction of disability as a form of difference has material and legal implications for what law permits to be done to people with cognitive and psychiatric impairment where this is not otherwise possible in relation to people without cognitive and psychiatric impairment. This approach is premised on the recognition that largely invisible and naturalised but deeply embedded and foundational ideas about disability are significant to indefinite detention and to other disability-specific regimes of detention, regulation and intervention. In the specific context of indefinite detention and the indefinite cycling in and out of multiple

legal regimes of detention, regulation and intervention, it is particularly important to contest the idea of disability itself as a fixed and timeless state and appreciate how this idea parallels the acceptability of ongoing and endless period/s of detention, regulation and intervention.

10. The Committee could also challenge the self-evidence of the triad of care, protection and control which underpins the legislative frameworks of indefinite detention and other disability-specific legal regimes of detention, regulation and intervention. This triad rests on a medical construction of disability that views disability in terms of pathology, risk, danger, vulnerability and helplessness and as embedded in the individual and only capable of being managed through therapeutic intervention, intense supervision or physical containment. Moreover, attention could also be given to intersectionality in relation to how discourses related to other dimensions of identity contribute to the constructions of disability which circulate in this triadic rationale (for example the nuances of paternalism specifically in relation to colonialism and Indigenous people with cognitive and psychiatric impairment or patriarchy and women with cognitive and psychiatric impairment).

#### Disability-Specific Legal Regimes as Discriminatory

11. The Disability Convention emphasises non-discrimination and equality, both as a right in itself<sup>4</sup> and a general principle governing its operation as a whole.<sup>5</sup> Article 2 of the Disability Convention defines ‘discrimination’ as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms’.<sup>6</sup> The Disability Convention demands that individuals with disability have the same rights thresholds as other individuals. The interdependency and interconnectedness of all rights in the Disability Convention coupled with the permeation of equality throughout the Convention means that states parties cannot pick and choose human rights if this will result in discrimination and inequality.

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<sup>4</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art 5.

<sup>5</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Preamble, Art 3(b).

<sup>6</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art 2.

12. In the context of the Disability Convention, United Nations human rights bodies have expressed concern about disability-specific legal regimes of detention, regulation and intervention, in particular, forensic detention *and* civil legal mechanisms which enable the deprivation of liberty of individuals on the basis of their disability. They have argued these constitute a breach of the right to freedom from arbitrary deprivation of liberty, freedom from torture and freedom from discrimination.<sup>7</sup> In the context of the Disability Convention, the Office of the United Nations High Commissioner for Human Rights has expressed concern about the discriminatory nature of criminal and civil legal mechanisms which enable the deprivation of liberty of individuals on the basis of their disability, and has gone so far as to suggest the abolition of the defence of mental illness and similar criminal legal mechanisms specific to individuals with cognitive and psychiatric impairment.<sup>8</sup> In its Concluding Observations on Australia, the United Nations Committee on the Rights of Persons with Disabilities (‘the UN Disability Committee’) expressed concern that ‘persons with disabilities, who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that can significantly exceed the maximum period of custodial sentence for the offence’. The UN Disability Committee has specifically urged the Australian Government to end ‘the unwarranted use of prisons for the management of unconvicted persons with disabilities, with a focus on Aboriginal and Torres Strait Islander persons with disabilities’ including by ‘repeal[ing] provisions that authorize involuntary internment linked to an apparent or diagnosed disability.’<sup>9</sup>
13. In light of the Disability Convention, there is a need to explicitly name indefinite detention and other disability-specific legal regimes of detention, regulation and intervention as not merely *for* people with cognitive and psychiatric impairment, but as

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<sup>7</sup> Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, 14<sup>th</sup> sess, 17 August – 4 September 2015, 4[13], [16]; see also Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10<sup>th</sup> session, UN Doc CRPD/C/AUS/CO/1, 21 October 2013, 4–5 [32].

<sup>8</sup> Office of the United Nations High Commissioner for Human Rights, *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities*, UN Doc A/HRC/10/48 (26 January 2009) 15–16 [48]–[49]. See also Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10<sup>th</sup> session, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 4–5 [32].

<sup>9</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10<sup>th</sup> session, UN Doc CRPD/C/AUS/CO/1, 21 October 2013, 5 [31]–[32].

*state-sanctioned, systemic discrimination against* people with cognitive and psychiatric impairment.

14. Yet, the act of naming these legal regimes as discriminatory might be impeded by the legal construction of people with cognitive and psychiatric impairment as ‘abnormal’ and hence so fundamentally and absolutely different to ‘normal’ individuals to be *beyond* comparison and hence discrimination by reason of these legal regimes can never be comprehended – it is simply natural that these individuals could be treated differently.<sup>10</sup> This naturalness is compounded by the depoliticizing effect of disability which can produce this differential treatment as inevitable and even the fault of the individual with cognitive and psychiatric impairment, rather than a political and systemic problem signalling the state’s unjust treatment of people with disability as a group. The potential barriers to naming as discriminatory indefinite detention and other disability-specific legal regimes of detention, regulation and intervention reinforces the point made earlier about the importance of being mindful of the construction of disability in the legal regimes themselves and in the legal, medical and political discourse surrounding the regimes.
15. A further barrier to abolishing these disability-specific legal regimes might be the institutional, disciplinary and (importantly in an increasingly privatized and corporatized context) economic imperatives<sup>11</sup> that support the continuation of these regimes, particularly in relation to the legal, health, medical and disability services involved in the operation of these regimes.

#### Beyond an Architectural Approach to Detention

16. United Nations human rights bodies have also characterized as a breach of the right to legal capacity and the principle of autonomy criminal and civil legal mechanisms which coerce individuals into engaging in non-consensual mental health or other medical treatment, including in the context of court diversion programs or community mental

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<sup>10</sup> Linda Steele, ‘Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence’ (2014) 23(3) *Griffith Law Review* 467.

<sup>11</sup> On the ‘therapeutic industrial complex’ see, e.g., Michelle Chen, ‘How Prison Reform Could Turn the Prison-Industrial Complex Into the Treatment-Industrial Complex’, *The Nation* (20 November 2015) <http://www.thenation.com/article/how-prison-reform-could-turn-the-prison-industrial-complex-into-the-treatment-industrial-complex/>, accessed 29 March 2016.

health.<sup>12</sup> Article 12 of the Disability Convention which places obligations on States Parties to repeal laws which deny legal capacity to people with disability and introduce measures to support individuals with disability to exercise their legal capacity. In its General Comment on Article 12 the UN Disability Committee states that it constitutes discrimination to deny legal capacity on the basis of disability, as do subsequent restrictions on liberty or forced medical or psychiatric treatment based on denial of legal capacity.<sup>13</sup> The UN Disability Committee also noted that the practice of placing individuals in institutional settings without their specific consent, including by substituted decision makers such as through guardianship-based decision making (which, relevantly for present purposes, is utilised in diversionary orders to coerce some individuals to reside at disability-supported accommodation or engage in particular services or treatment), constitutes an arbitrary deprivation of liberty.<sup>14</sup> The UN Disability Committee in its Concluding Observations on the Initial Report of Australia has urged Australia not to introduce diversion programs coercing individuals to engage with mental health services, ‘rather, such services should be provided on the basis of the individual’s free and informed consent’.<sup>15</sup>

17. Therefore, the Committee could resist privileging an architectural or spatial notion of the administration of detention in two respects. One respect is to be mindful of how restraint on movement as well as regulation and intervention occurs in other less architecturally physically restrictive forms. This includes considering how control and regulation *continues* in forensic punishment in the community – including through chemical restraint<sup>16</sup> and the use of disability services to structure life choices.<sup>17</sup> This is particularly in order to prevent ‘reform’ of indefinite detention involving the further expansion of these other less architecturally restrictive forms of intervention and regulation. The second respect is to be mindful of the legal framework of the order

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<sup>12</sup> Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities, 14<sup>th</sup> sess, 17 August – 4 September 2015, 6[21].

<sup>13</sup> Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), 10 [40] – 11 [42].

<sup>14</sup> Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), 10[40].

<sup>15</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Australia, 10<sup>th</sup> session, UN Doc CRPD/C/AUS/CO/1, 21 October 2013, 4 [29].

<sup>16</sup> Erick Fabris, *Tranquil Prisons: Chemical Incarceration under Community Treatment Orders* (University of Toronto Press, 2011).

<sup>17</sup> Linda Steele, *Disability at the Margins: Diversion, Cognitive Impairment and the Criminal Law* (PhD thesis, University of Sydney, Australia, 2014).

enabling the detention, regulation or intervention. This directs attention to the coercion and removal of choice from the individual at the point that the order is made – this is itself a form of restraint of the individual. On a similar point, orders for detention, regulation and intervention in the civil jurisdiction are just as problematic than those in the criminal / forensic jurisdiction if they involve coercion of the individual and are disability-specific.

### **Embodied Individuals’ Indefinite Cycling in and out of Multiple Forms of Detention, Regulation and Intervention**

18. The Committee’s consideration of disability-specific legal regimes of detention, regulation and intervention could not stop at identifying the abstract discriminatory nature of these in relation to hypothetical individuals with cognitive and psychiatric impairment. The Committee could go further to consider the actual operation of and impacts of these discriminatory legal regimes in relation to embodied individuals with cognitive and psychiatric impairment.

### Violent, Distressing and Disabling Effects of Indefinite Detention and Other Disability-Specific Regimes of Detention, Regulation and Intervention

19. Recognition of discrimination is not limited to an abstract sense of being treated differently by law – it needs to be considered in light of the material impacts of this differential legal treatment –e.g. deprivation of liberty, physical segregation and isolation and physical or chemical restraint, as well as the related trauma, distress, and disability. This requires foregrounding the *effects* of indefinite detention on (and only on, by reason of its disability-specific legal scope) *embodied* disabled individuals. For example, Carolyn Frohmader and Therese Sands in their submission to the Senate Inquiry into violence in institutional and residential settings note such impacts in relation to various legal regimes including forced mental health treatment and detention.<sup>18</sup> It is vital that the Inquiry engages with people with lived experience of these regimes to hear their experiences.
20. Reform of law can easily focus on the technical aspects of legal process around the making and review of orders and distance itself from the effects of those orders, which can be seen as a resource or practice issue of administration beyond the ‘law’ or as

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<sup>18</sup> Carolyn Frohmader and Therese Sands, ‘Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings. Sydney’ (Australian Cross Disability Alliance, 2015) 19.

‘one-off’ and not systematized in law itself. Yet scholarship on legal violence<sup>19</sup> links the ‘legal’ act of ordering indefinite detention (and other disability-specific legal regimes of detention, regulation and intervention) to the material effects (notably the violence) that occurs in the course of the individual being detained pursuant to that order. It is important to consider the material effects of indefinite detention as part of what we must account for and respond to when thinking of law reform.

21. Considering the violence of indefinite detention requires looking critically rather than self-evidentially at the material strategies within disability-specific legal regimes of detention, regulation and intervention (i.e. physical restraint, isolation and forced mental health treatment) – both contesting their therapeutic logic which is inextricably linked to disability (i.e. cf the relative ease with which similar strategies done in the context of warfare are viewed by scholars and human rights activists as torture<sup>20</sup>) and contesting the ‘monopoly’<sup>21</sup> that law holds over what forms of violence, restraint and intervention are considered legitimate acts of force (given that these practices are all lawful specifically in relation to people with cognitive and psychiatric impairment<sup>22</sup>).
22. A further aspect of the consideration of the ‘material’ in forensic detention is to think not only of people with cognitive and psychiatric impairment as the *already* and *always* was disabled, but to be mindful of processes of disablement in relation to the disabled subjects of forensic detention. This is not about identifying the etymology or biomedical cause of an individual’s disability but reflecting on how structural factors and geopolitical, economic, political and legal dynamics result in very material, disabling impacts on the body and, further, how individuals marginalized on other bases such as race, gender or class disproportionately become subjected to disablement through acts of violence.<sup>23</sup> In the context of indefinite detention and other disability-

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<sup>19</sup> Robert Cover, ‘Violence and the Word’ (1986) 95 *Yale Law Journal* 1601; Austin Sarat and Thomas R Kearns, ‘Introduction’ in Austin Sarat and Thomas R Kearns (eds), *Law’s Violence* (University of Michigan Press, 1992) 1; in the specific context of disability see Linda Steele, ‘Disability, Abnormality and Criminal Law: Sterilisation as Lawful and Good Violence’ (2014) 23(3) *Griffith Law Review* 467.

<sup>20</sup> On non-consensual medical treatment, detention and restraint of people with disability as torture, see Dinesh Wadiwel, ‘Black Sites: Disability and Torture’, paper presented at *Critical Social Futures: Querying Systems of Disability Support*, Symposium of The Australia Sociological Association, 19 June 2015.

<sup>21</sup> Austin Sarat and Thomas R Kearns, ‘Introduction’ in Austin Sarat and Thomas R Kearns (eds), *Law’s Violence* (University of Michigan Press, 1992) 1, 4.

<sup>22</sup> Linda Steele, ‘Submission to the Senate Community Affairs References Committee, Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability’ (26 June 2015).

<sup>23</sup> Nirmala Erevelles, *Disability and Difference in Global Contexts: Enabling a Transformative Body Politic* (Palgrave Macmillan, 2011).

specific legal regimes of detention, regulation and intervention, this questioning relates to how material practices involved in these regimes can themselves be violent and disabling – mental distress and trauma, as well as physical health issues and risk of head injury.<sup>24</sup> It is also important to consider how certain groups of disabled individuals, such as Indigenous Australians with cognitive and psychiatric impairment might be *more* subjected to indefinite detention, and how this relates to broader relationships between colonization, marginalization and disablement, and additionally for Indigenous disabled women histories of physical and sexual victimization.<sup>25</sup>

23. It is also necessary to question the relationship between the spaces of detention, regulation and intervention and the possibilities for justice in relation to violence and disablement experienced in these spaces. For example, in many jurisdictions individuals in prison have limited protection under domestic violence, victims compensation and civil liability schemes. Moreover, much of the non-consensual interventions in these detention settings are ‘lawful’ violence because they occur pursuant to lawful authority, are consented to by third parties or fall under the defence of necessity.<sup>26</sup> If disablement, distress and violence are systemic effects of indefinite detention then so too is the legal excision of the spaces of detention from protection from these very effects. Speaking of violence against people with disability more broadly, Carolyn Frohmader and Therese Sands argue that violence against people with disability has been largely ‘detoxified’ and more readily seen as something less than a crime (e.g. a workplace issue, an administrative complaint) or even beneficial to the individual (e.g. as necessary medical treatment or discipline).<sup>27</sup>

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<sup>24</sup> See, e.g., Beth Ribet, ‘Naming prison rape as disablement: A critical analysis of the *Prison Litigation Reform Act*, the *Americans with Disabilities Act*, and the imperatives of survivor-oriented advocacy’ (2010) 17(2) *Virginia Journal of Social Policy and the Law* 281.

<sup>25</sup> Eileen Baldry, Ruth McCausland and Leanne Dowse et al, *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* (University of New South Wales, Australia, October 2015).

<sup>26</sup> Linda Steele, ‘Submission to the Senate Community Affairs References Committee, Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability’ (26 June 2015).

<sup>27</sup> Carolyn Frohmader and Therese Sands, ‘Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings. Sydney’ (Australian Cross Disability Alliance, 2015) 19.

24. Thus, the Committee could develop a strategy for ‘transitional justice’<sup>28</sup> that addresses prohibiting and making legally actionable future instances of such discriminatory detention, regulation and intervention as well as developing a system to recognize, remedy and remember past instances of these practices when they were still lawful.<sup>29</sup> This might involve thinking beyond disability to how law (both international and domestic legal frameworks) have dealt with mass atrocities, historical injustices and state-sanctioned violence in relation to other marginalized groups. This system must not only focus on the individuals and institutions administering these practices, but also address how to make the state and law account for their complicity. Consideration should also be given to fully extending domestic violence, civil liability and victims compensation protections to institutional spaces such as prisons and mental health facilities.

#### The Indefinite Subjection to Detention, Regulation and Intervention

25. People with cognitive and psychiatric impairment are subjected to a range of lawful non-consensual forms of detention, regulation and interventions in their bodies (including in the context of indefinite detention) which would be unlawful if done on people without disability who withheld their consent.<sup>30</sup> In the criminal justice context, research led by Eileen Baldry and Leanne Dowse et al on the MHDCD dataset<sup>31</sup> establishes that Indigenous Australians with cognitive and psychiatric impairment who are in the criminal justice system as alleged offenders experience ongoing criminalisation and punishment across their life, which for many individuals generally begins in childhood. Moreover, their research highlights the significance to this ongoing criminalisation and punishment of disability and Indigeneity, compounded by dynamics such as marginalisation, institutional failure, victimisation and lack of appropriate supports, as well as colonialism, historical injustices and intergenerational

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<sup>28</sup> See, e.g., Carolyn Frohmader and Therese Sands, Australian Cross Disability Alliance (ACDA) Submission to the Senate Community Affairs References Committee Inquiry into Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings, August 2015.

<sup>29</sup> See, eg, Hege Orefellen, ‘Hege Orefellen on Reparations’, *Campaign to Support CRPD Absolute Prohibition of Commitment and Forced Treatment*, <https://absoluteprohibition.wordpress.com/2016/02/06/hege-orefellen-on-reparations/>, accessed 27 March 2016.

<sup>30</sup> Linda Steele, Submission to the Senate Community Affairs References Committee, Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (26 June 2015).

<sup>31</sup> See generally *Australians With MHDCD in the CJS Project* (29 June 2012) Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System <<http://www.mhdc.d.unsw.edu.au/australians-mhdc-d-cjs-project.html>>.

trauma. Moreover, their research emphasises the contribution of the criminal justice system, including incarceration and community-based interventions, to the ongoing criminalisation and punishment.<sup>32</sup>

26. This research signals the need to give attention to how specific, embodied individuals across their life course are subjected to *different* forms of regulation and intervention, including forensic and conventional criminal punishment and civil forms of regulation (e.g. community or supervised treatment orders, involuntary mental health treatment, guardianship orders). This includes considering how multiple distinct legal orders (e.g. a definite period of forensic detention, followed by an indefinite period of in-patient mental health treatment) might overcome any ‘limitations’ to punishment achieved by reforms to specific forms of punishment. For example, in the United Kingdom the Law Commission noted in its recent review of unfitness that while there is no indefinite detention in the *forensic* mental health system, this practice can continue de facto through continued use of *civil* mental health laws enabling indefinite detention.<sup>33</sup> In light of this, the Committee could also consider whether abolishing indefinite detention in the forensic mental health context might result in greater use of civil means of detention or non-consensual medical treatment such as guardianship orders or community treatment orders. This is particularly the case where *civil* orders might be seen as *better than* or even *more empowering than* ‘punitive’ criminal regulation. Disability related discourses of therapy can render some forms of detention as alternatives to detention seem more palatable, or even some forms of *indefinite* detention seem more palatable.<sup>34</sup>
27. A focus only on ‘indefinite’ detention presents a risk that legal temporality will mask other temporal dimensions which are more conducive to appreciating the material impacts of detention, regulation and intervention. The ‘indefinite’ detention of ‘indefinite detention’ refers to one period of court ordered sentence, the *legal* structuring of the temporality of punishment, which encourages us to see punishment in terms of isolated legal sentences distinct from each other and disembodied from the

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<sup>32</sup> Eileen Baldry, Ruth McCausland and Leanne Dowse et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, October 2015).

<sup>33</sup> The Law Commission, *Unfitness to Plead* (Report, The Law Commission, UK, Law Com no 364, 12 January 2016).

<sup>34</sup> In the context of civil supervised treatment orders see also concerns raised by Claire Spivakovsky, ‘Making Dangerousness Intelligible in Intellectual Disability’ (2014) 23(3) *Griffith Law Review* 389.

individuals subjected to them. This focus on isolated and abstracted periods of detention masks consideration of how disability-specific legal regimes of detention, regulation and intervention impact on individuals *over time*: its lasting effects, the compounding effects of multiple episodes, and cycling in and out and multiple regimes. A further risk of focusing narrowly on indefinite detention is that it is that this obscures a larger political question of whether disability-specific interventions should operate at all and larger political questions about incarceration and criminalisation. This is particularly important given that, as a group embodied disabled individuals in the forensic mental health system are also likely to be subjected to multiple periods of incarceration and other forms of punishment across their lives are subjected to multiple periods.<sup>35</sup>

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<sup>35</sup> Linda Steele, *Disability at the Margins: Diversion, Cognitive Impairment and the Criminal Law* (PhD thesis, University of Sydney, Australia, 2014).