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International Covenant on Civil and Political Rights

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Human Rights Committee

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

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

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

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

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

Facts as submitted by the author

2.1 The author submits that he is Indigenous Australian and identifies as Pitjantjatjara. He experienced a traumatic childhood and has cognitive and intellectual impairments, owing to a development disorder and substance abuse, and paranoia and associated delusions. He has a long history of hospital admissions for both medical and psychiatric treatment, including for aggressive behaviour.

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

2.3 On 15 October 1996, he was found not guilty on grounds of "insanity" on each count of the indictment. Pursuant to section 382 (2) of the Criminal Code Act of the Northern Territory as in force at the time, the Supreme Court ordered that the author be kept in strict custody in Alice Springs Correctional Centre, until the Northern Territory Administrator's pleasure was known.

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

2.5 On 15 June 2002, the Criminal Code Act was amended by the Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act 2002 (Act No. 11, 2022), with the insertion of part IIA, entitled "Mental impairment and unfitness to be tried". Among other provisions, part IIA provides for custodial or non-custodial supervision orders where an accused person has been found not guilty of an offence by reason of "mental impairment". As of that date, on the basis of the transitional provisions in section 6 of the Amendment Act, the author, having been acquitted on account of "insanity" under the repealed provisions and ordered to be kept in safe custody during the Administrator's pleasure, 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 of the Criminal Code Act.

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

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

[1] The author explains that, under section 6 (3) of the Amendment Act, when a person becomes subject to custodial supervision under section 6 (2) of that Act, the appropriate person in relation to that supervised person must, within six months of the Act's entry into force, prepare and submit to the Supreme Court a report of a kind described in section 43ZJ of the amended Criminal Code Act and the Court must conduct a review under section 43ZH.

[2] The author explains that, under section 43ZG of the Criminal Code Act, the Supreme Court, when it makes a supervision order, must fix a term during which it is to be in force that is equivalent to the period of imprisonment or supervision that would, in the Court's opinion, have been the appropriate sentence if the supervised person had been found guilty of the offence. Three to six months before the expiry of this term, the Court must conduct a review to determine whether to release the supervised person from the order, or to confirm or vary the supervision order. However, given that the author became subject to custodial supervision by virtue of section 6 (2) of the Amendment Act, meaning

author states that section 43ZK of the Criminal Code Act provides that an annual report should be submitted to the Court, which may, if it considers it appropriate, conduct a review. The supervised person may also request a review. However, if the Court does not order a review, the author does not have the opportunity to contest the conclusions set out in the report. The author underlines that the annual reports filed with the Court since 2003 did not result in any improvements in the conditions of his detention.

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

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

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

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

Complaint

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

3.2 In particular, the author asserts that his continued detention is arbitrary, in breach of article 9 of the Covenant,[5] as it is based on his mental impairment rather than on a criminal conviction. He explains that the legislation in question applies only to persons with mental impairments and provides for their indefinite detention even when they are found not guilty of the charges against them. Accordingly, this legislative regime is discriminatory. In

that formally speaking no custodial supervision order was ever made, the Court found that the mandatory elements of a supervision order pursuant to section 43ZG of the Criminal Code Act, – namely, the fixing of the term of the order and the mandatory review thereof shortly before its expiry – were not applicable in the author's case.

[3] The State party asserts that, in the author's case, both the Public Guardian and a community guardian appointed under the Adult Guardianship Act 1988 are applicable.

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

[5] The author also cites article 14 of the Convention on the Rights of Persons with Disabilities.

addition, the author claims that the authorities have failed to provide suitable accommodation in a secure care facility adequate to his needs as a result of his disabilities. In this respect, he submits that pursuant to section 43ZA of the Criminal Code Act, the Supreme Court must not make a custodial supervision order committing the accused person to custody in a prison unless it is satisfied that there is no practicable alternative given the circumstances of the person. Nevertheless, since no alternatives are available in the Northern Territory, the Court had no other option than to order the author's detention in a maximum-security correctional facility. The author alleges that maximum-security facilities are inappropriate for the rehabilitation of non-convicted individuals with mental impairments and that legitimate ends could be certainly achieved by less intrusive means. Furthermore, he asserts that his detention is disproportionate because it is not required to be reviewed at regular intervals.[6] He reiterates that the Court confirmed in 2007 that the only mandatory review of his custodial supervision order had occurred on 10 September 2003, and that the legislation only provides for the submission of reports on an annual basis.

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

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

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

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

[6] The author refers to the Committee's general comment No. 8 (replaced by general comment No. 35 (2014)) and *Rameka et al. v. New Zealand* (CCPR/C/79/D/1090/2002).

[7] The author refers to *Brough v. Australia* (CCPR/C/86/D/1184/2003).

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

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

State party's observations on admissibility and the merits

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

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

4.3 The State party confirms that following a psychiatric assessment in 2015, the author was transferred to Darwin Correctional Centre and began a staged transition to the Cottages, a therapeutic facility, where he became a full-time resident on 7 February 2017.[11] According to the author's periodic report dated 24 May 2017, since moving to the less restrictive environment at the Cottages, the author had presented as a model resident with exemplary behaviour. Nevertheless, despite his strong progress, the 2017 periodic report contained the recommendation not to transfer him to a less restrictive setting until a complete review of his risk profile had been completed. However, the Northern Territory Department of Health is considering the author's suitability to return to the Alice Springs secure care facility for the purpose of reuniting him with his family and country.

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

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

4.6 As regards the author's claims of discrimination, the State party is of the position that insofar as any practices or policies were discriminatory, the author was free to submit a complaint of discrimination to the Anti-Discrimination Commissioner of the Northern Territory, under the Anti-Discrimination Act 1992. The State party submits that, while acts done pursuant to legislation or to a court order are exempt from the scope of this Act, it appears reasonably arguable that it would apply to certain aspects of the author's case as he was the recipient of goods, services and facilities. The Commissioner also has the power to make binding orders. Although the Commissioner also has inquiry power to examine

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

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

[12] The State party refers to the Committee's general comment No. 21 (1992), para. 10.

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

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

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

4.9 The State party submits that the author has not provided any evidence to support his claim that he was subjected to ill-treatment by prison staff, and it therefore invites the Committee to declare this part of the complaint inadmissible. In any event, when it comes to the merits of his claims under articles 7 and 10 (1) of the Covenant, the State party notes that the conditions of the author's detention have not caused him to suffer severe pain and suffering such to constitute torture. The State party contests the binding nature of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), and further contests the claim that the author's detention in a correctional centre, taken alone, constitutes a violation of his rights. It notes in this respect that the Complex Behaviour Unit at Darwin Correctional Centre is purpose-built and operates with a strong therapeutic focus. In addition, the operation of the Alice Springs secure care facility has provided an invaluable

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

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

alternative to Alice Springs Correctional Centre. While the State party acknowledges that prolonged solitary confinement may constitute a violation of the Covenant, the author, contrary to his statements, was not held in solitary confinement between 1995 and 2002 for up to 23 hours per day. Although he was indeed isolated from the main prison population for an extended period, his segregation was necessary owing to security concerns following a number of violent incidents involving the author and other prisoners. During this period, he was able to interact with other inmates in the Protection Unit, and had recreational periods for two to four hours each day.[15] Even though the author was at times against his removal from the Protection Unit, in 2002 he was eventually relocated upon the recommendation of medical practitioners, who became concerned about his mental deterioration given his lack of interaction with others. As a result, the author was moved to the High Support Unit, which offers a safe, predictable environment with a higher ratio of staff to inmates and more flexibility around security conditions than for the main prison population. Accordingly, the State party is of the view that the conditions of the author's detention and his treatment do not constitute a violation of articles 7 and 10 (1) of the Covenant.

4.10 Regarding the alleged violations of articles 17 and 23 of the Covenant, the State party asserts that the author has provided no information or evidence about his level of family engagement or interaction prior to his detention. Similarly, none of the evidence provided by the author demonstrates that the State party has arbitrarily or unlawfully interfered with his family life, or failed to protect his family as the natural and fundamental group unit of society. In the absence of further evidence revealing treatment contrary to articles 17 (1) and 23 (1), the author has failed to substantiate these allegations, which should therefore be declared inadmissible.

4.11 Regarding the merits of the above claims, the State party notes that records indicate that the author had scarce contact with his family, owing to his former institutional admissions, even prior to his detention in Alice Springs Correctional Centre. Nevertheless, in 2013, a total of 11 of the author's family members were supported on multiple occasions to visit him in Alice Springs Correctional Centre. In 2014, when the author was residing in the secure care facility, he participated in programmes that his sister also attended.[16] Following the author's initial reunification with family, he reportedly had limited contact with his family in 2015 while he was still in Alice Springs. From 2005, the author also had contact with his compatriots through the elders visiting programme. Accordingly, insofar as there has been interference with the author's right to family life during his time in Alice Springs, it should be deemed lawful under articles 17 (1) and 23 of the Covenant. Regarding the author's family life in Darwin Correctional Centre, the State party notes that the author's transfer to Darwin had been necessitated by his condition and, as such, must be deemed lawful and reasonable in the circumstances. Furthermore, in view of the fact that the author had had limited contact with his family members even before his transfer to Darwin, his relocation did not impose on him an excessive burden within the meaning of the cited articles.

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

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

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

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

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

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

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

5.4 Regarding his claims under article 10 (3) of the Covenant, the author notes that the distinction that the Committee draws in paragraph 10 of its general comment No. 21 (1992), referred to by the State party, is between convicted persons and persons on remand. The intention of this paragraph was not to exclude the application of article 10 (3) to prisoners in preventive detention, which would deprive this growing circle of vulnerable detainees from important guarantees under the Covenant, such as access to rehabilitation. As regards the substance of his claims, the author repeatedly contests the State party's position that significant therapeutic and disability support has been provided to him. He notes that he has not been given access to documents supporting these claims.[18] He further reiterates that a maximum-security prison environment is inappropriate for his therapeutic needs and notes that the State party's statement regarding his limited prospects for rehabilitation is contradicted in other parts of its observations. He stresses that, despite its aims, the legislation in question has had the impact of incarcerating and punishing the author, a person with mental illness, for over 20 years, primarily because the State party has failed to provide the resources for practicable alternatives to prison. He notes that neither he nor his guardian has the power to apply for a variation or revocation of the custodial supervision order. The author contests the effectiveness of guarantees allegedly built into the legislative scheme because the Supreme Court's power to vary a custodial supervision order, upon receipt of a report, is dependent on the availability of an alternative placement, which is lacking in the region. The author also notes that the State party's submission seems to create the impression that the Court conducts a review every 12 months. Periodic reporting, however, does not equate to annual reviews. In addition, the right to appeal is limited to the imposition of the supervision order and cannot concern its terms, including the lack of regular mandatory reviews.

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

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

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

State party's additional observations

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

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

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

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

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

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

6.7 With regard to articles 17 (1) and 23 (1) of the Covenant, the State party maintains that article 17 is not intended to cover relationships that were non-existent at the time of the alleged breach.[20] The State party contests the author's assertion that his guardian has been effectively frozen out of decision-making concerning the author's situation. The Solicitor for the Northern Territory provides regular information to the author's legal representative at the North Australian Aboriginal Justice Agency. The Office of Disability, in the Northern Territory Department of Health, most often liaises with the Public Guardian on the understanding that he will inform and communicate with the community guardian and make joint decisions as required. It further rejects the claims regarding the author's move to Darwin and maintains that detention has an inherent impact on a person's ability to engage with friends and family. The State party has not arbitrarily or unlawfully interfered with the

[19] In order to implement the Supreme Court's orders, an individual management plan was developed for the author in 2003. The author was then transferred from the Protection Unit, rejoining the main population of the prison, and then to the secure care facility. In 2004 and 2005, he was managed each weekday by the positive behaviour support unit, and participated in activities that included socializing with other inmates, visits from relatives, and daily walks. The author demonstrated improvement in the management of behavioural triggers, resulting in fewer incidents of physical aggression.

[20] The State party refers to the following: Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd revised ed. (Kehl am Rhein, N.P. Engel, 2005), p. 394; and *A.S. et al. v. Canada* (CCPR/C/12/D/68/1980).

author's family life in the present case. As evidenced by his transition from a custodial to a non-custodial supervision order, he has continued to excel since his transfer to Darwin, into accommodation that is more suited to his complex mental health and behavioural needs while being the least restrictive environment as practically possible.

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

Issues and proceedings before the Committee

Consideration of admissibility

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

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

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

7.4 The Committee considers that the author's claims that are based on the Convention on the Rights of Persons with Disabilities fall outside of the scope of the Covenant and are thus inadmissible for incompatibility *ratione materiae* with the Covenant, under article 3 of the Optional Protocol.

7.5 The Committee is mindful of the State party's position that the author's claims under article 10 (3) are incompatible with the provisions of the Covenant because the article 10 (3) concerns convicted persons only, whereas the author was found not guilty and has a different

[21] Northern Territory Government, Department of the Attorney General and Justice "Northern Territory Aboriginal Justice Agreement 2021–2027", August 2021; Attorney General's Department, "National statement of principles relating to persons unfit to plead or not guilty by reason of cognitive or mental health impairment", 9 August 2019.

[22] For example, *C. v. Australia*, para. 7.3.

legal status to convicted persons. The Committee notes that the author contests this argument. Having assessed the parties' submissions, the Committee considers that the scope of protection afforded under article 10 (3) of the Covenant extends to inmates with mental illness whose criminal responsibility could not be established owing to their mental impairment. An interpretation to the contrary would render the protection under article 10 (3) illusory for a particularly vulnerable group of detainees, even though the guarantees enshrined in this provision are of special importance to them on account of their condition. The Committee is therefore of the view that the author's claim under article 10 (3) is not incompatible with the provisions of the Covenant.[23]

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

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

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

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

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

[23] For example, *Fardon v. Australia* (CCPR/C/98/D/1629/2007), para. 7.4, and CCPR/C/CHE/CO/4, paras. 38 and 39.

Consideration of the merits

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

8.2 Regarding the author's claims under article 9 of the Covenant, the Committee takes note of the author's claim that his detention was arbitrary because for the majority of his detention, the authorities have failed to provide him with suitable accommodation in a secure care facility adequate to his disabilities. The Committee takes note of the author's position in this respect that the prison environment is inappropriate for the rehabilitation and care of non-convicted individuals with mental impairments. Furthermore, the Committee is mindful of the author's statement that owing to the indefinite term of his custodial supervision order and the lack of mandatory reviews thereof at regular intervals, his deprivation of liberty became disproportionate. The Committee observes that the State party contests the claim that the author's detention was arbitrary, because it was based on objective and reasonable grounds. In addition, the State party noted that the Supreme Court reviewed the author's case regularly, that a behavioural support plan was drawn up and that less stringent measures were applied whenever the author's situation allowed for it.

8.3 The Committee recalls its jurisprudence indicating that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.[24] In the present case, the Committee notes that the author's custodial supervision order appears to be similar in nature to a sentence of security detention or preventive detention (that is, indefinite detention until release by the Parole Board).[25] The Committee finds that the principles established in its jurisprudence concerning such detention are relevant for the purposes of its consideration of the present case.[26] In this regard, when States parties impose security detention (sometimes known as administrative detention or internment) not in contemplation of prosecution on a criminal charge, the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty. If, under the most exceptional circumstances, a present, direct and imperative threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions.[27]

8.4 In the present case, the Committee observes that the initial period of the author's deprivation of liberty in Alice Springs Correctional Centre was based on the decision of the Supreme Court dated 15 October 1996 pursuant to section 382 (2) of the Criminal Code Act of the Northern Territory as in force at the time. This was followed by the decision of the Administrator dated 27 September 2001, in which the Administrator ordered that the author be detained in the same facility. Part IIA of the Criminal Code Act came into force on 15 June 2002 and, pursuant to the transitional provisions in section 6 of the Amendment Act, the author, having been acquitted on account of "insanity" under the repealed provisions and ordered to be kept in safe custody during the Administrator's pleasure, 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 of the Criminal Code Act. At this juncture, the Committee notes that there is no reason for it to doubt the domestic authorities'

[24] For example, *Gorji-Dinka v. Cameroon* (CCPR/C/83/D/1134/2002), para. 5.1; and *Sotnik v. Russian Federation* (CCPR/C/129/D/2478/2014), para. 7.3.

[25] For example, *Dean v. New Zealand* (CCPR/C/95/D/1512/2006), para. 1.

[26] *Dean v. New Zealand*, para. 7.4; *Miller and Carroll v. New Zealand*, para. 8.5; and general comment No. 35 (2014), para. 12.

[27] General comment No. 35 (2014), para. 15.

assessment that the author had mental impairments and that, owing to his condition, his case fell within the scope of the above-mentioned specific legislation.

8.5 However, the Committee notes that, with the entry into force of the Amendment Act, no formal order was made about the author's custodial supervision. Although the Supreme Court conducted a review in August 2003, pursuant to section 6 (3) of the Amendment Act, and a judgment was delivered on 10 September 2003, this happened with a six-month delay. Furthermore, contrary to section 43ZG of the Criminal Code Act, no term was fixed for the supervision order, and a mandatory review should have been conducted towards the end of that term.[28] Although the Court found in 2007 that despite these deficiencies, the 2003 decision had been in accordance with the applicable provisions of the law, the Committee observes that as a result of this interpretation, there was never a minimum duration set for the author's custodial supervision and the only mandatory review occurred in 2003. The Committee notes that, while reports must still be submitted to the Court at regular intervals, it is nonetheless up to the Court to decide whether to conduct a review. Up to that point, the procedures are not adversarial, meaning that important guarantees of habeas corpus under article 9 (4) of the Covenant, such as access to information and the right to challenge evidence, are lacking. Even though hearings of the evidence seem to have taken place in the present case, the hearings date back to 2014 only, and no information has been presented to the Committee to suggest that the author was heard on these occasions.

8.6 As regards the place of the author's detention, the Committee concurs with the position taken by the European Court of Human Rights that there must be some relationship between the grounds for the deprivation of liberty and the place and conditions of detention.[29] In this respect, the Committee stresses that the author was detained in high-security prison facilities from August 1995 to 7 February 2017, except for a short period in 2013/14. Although the Committee recognizes the importance of a fair balance between the individual's interests and public safety and that experts have regularly informed the Supreme Court of the author's situation, it is not possible for the Committee to accept the State party's argument that the author in the present case was receiving appropriate care at all times, even when he was not in secure care facilities, which are undisputedly better suited to accommodate his needs. The Committee notes that the Supreme Court, in its 2003 decision, was particularly clear on this point, finding that the resources available in Alice Springs Correctional Centre were not appropriate for the custody and care of the author. This finding was confirmed by the Australian Human Rights Commission in 2014. While the Committee takes note with great appreciation of the improvement in the conditions of the author's detention whenever he was placed in a secure care facility, and the efforts of all those involved in the author's care – including the implementation of a support plan, eventually leading the Supreme Court to change his supervision from custodial to non-custodial – it considers at the same time that these developments may not account for the unlawfulness of the periods spent in a maximum-security prison environment over such a long term. The Committee observes that the alleged lack of resources may not exempt the State party from its obligations in this respect.

8.7 The Committee considers that it is generally for the organs of States parties to review and evaluate facts and evidence, unless it can be established that the evaluation was clearly arbitrary or otherwise amounted to a denial of justice. However, on the basis of the material before it, the Committee is of the view that the State party has failed to demonstrate that the otherwise legitimate aims of the author's custodial supervision could not have been achieved by less intrusive means than his continued detention in high-security prison facilities, particularly as the State party had a continuing obligation under article 10 (3) of the Covenant to take meaningful measures for the author's reformation throughout the period of nearly 20 years during which he was in a high-security prison environment. In view of the above, the Committee deems that the author's detention was arbitrary and, as such, run counter to

[28] The Supreme Court, later examining whether this was a mistake, in its 2007 decision noted that the 2003 decision was not a supervision order within the meaning of section 43ZA (1) of the Criminal Code Act, and therefore that there was no requirement for a mandatory review towards the expiry of the term. The Court found, however, that no problem had resulted because a review had already been conducted pursuant to the transitional provisions in section 6 of the Amendment Act.

[29] For example, *L.B. v. Belgium*, Application No. 22831/08, Judgment, 2 October 2012, para. 93; and *Ashingdane v. United Kingdom*, Application No. 8225/78, Judgment, 28 May 1985, para. 44.

the guarantees of article 9 (1) of the Covenant. The Committee therefore finds a violation of article 9 (1) of the Covenant. Furthermore, the Committee finds that the author's inability to challenge the existence of substantive justification for his continued detention for preventive reasons was in violation of his rights under article 9 (4) of the Covenant.[30]

8.8 In the light of these findings and with due regard to the fact that the author's claims, to a large extent, relate to the insufficiency of purported reformation and rehabilitation services throughout the majority of his custodial supervision, the Committee also finds a separate violation of article 10 (3) of the Covenant.

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

8.10 The Committee takes note of the author's claim under articles 17 (1) and 23 of the Covenant, in particular that he had limited contact with his family in Alice Springs Correctional Centre and that opportunities for such contact further deteriorated when he was transferred to Darwin. The Committee is mindful of the State party's submission that in 2013, a total of 11 of the author's family members were supported on multiple occasions to visit him, and that while he was residing in the secure facility in Alice Springs, he was able to participate in programmes with his sister. In this connection, the Committee first observes that there is insufficient information before it to conclude that the circumstances of the author's transfer to Darwin indeed placed a disproportionate burden on his family life, in view of the fact that the aim of the author's transfer seems to have been to find a suitable facility for his therapeutic treatment, as evidenced by his subsequent and gradual progress. The Committee therefore limits its consideration to the period of the author's detention in Alice Springs Correctional Centre. In this regard, the Committee observes that, as exemplified by the measures taken in 2013 and 2014, certain measures were available in the State party's arsenal to facilitate the author's contact with his family. The Committee notes that such support was provided to the author at the time, regardless of the State party's objection that article 17 of the Covenant is not intended to cover relationships that were non-existent at the time of the alleged breach. Nevertheless, the Committee observes that there is no information before it to suggest that any similar measures had been taken prior to 2013, even though they could have been particularly beneficial to the author. In the absence of any information concerning this particularly long period (from August 1995 to 2013), the Committee considers that the author's grievances went beyond the burden that is inherent in detention, and finds that there has been a violation of article 17 of the Covenant. In the light of this finding, the Committee decides not to examine the same claims under article 23 of the Covenant.

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

[30] *Rameka et al. v. New Zealand*, para. 7.2.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obliged, inter alia, to provide adequate compensation and appropriate measures of satisfaction to the author for the violations suffered. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.