

Part 8A of the Criminal Law Consolidation Act (SA) 1935:

**Does It Provide Adequate Protection Against
Indefinite Detention for People with Mental
Impairment?**

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1. Introduction

The mental impairment provisions contained in Part 8A of the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*') were introduced through the *Criminal Law Consolidation (Mental Impairment) Amendment Bill 1994* (SA).¹ The purpose of this reform was to address significant shortcomings in the previous legal framework, particularly in dealing with individuals who lacked the mental competence to commit an offence or the fitness to stand trial, including the use of "Governor's Pleasure" detention.²

Prior to the Amendment, where a person was found unfit to stand trial or lacking mental competence, courts could impose supervision orders of an indefinite duration.³ There are many issues and international violations with indefinite detention, which would be discussed in the later sections. Under the Amendment, when a person was found to have a mental impairment under Part 8A, they would not be found guilty of the offence, the court may order supervision order or release on license or release unconditionally, depending on whether the objective elements were established and the safety of the community at large.⁴

i. How indefinite detention breached the obligations from UNCRPD

Indefinite detention has attracted considerable international criticism. Australia is a party to the *United Nations Convention on the Rights of Persons with Disabilities* ('*UNCRPD*'), adopted in 2006 to promote and protect the equal enjoyment of human rights by persons with disabilities.⁵ In particular, art 14(1)(b) requires States parties to ensure that persons with disabilities are not deprived of their liberty unlawfully or arbitrarily, and that the existence of disability alone must never justify a deprivation of liberty.⁶ Indefinite detention arguably contravenes this provision, as individuals with cognitive impairments may be detained for extended periods despite never being found guilty, resulting in a disproportionate deprivation of liberty.

Further, art 15 obliges States Parties to prevent cruel, inhuman, or degrading treatment or punishment.⁷ The UN Committee has found that detaining individuals with cognitive

¹ *Criminal Law Consolidation Act 1935* (SA) Part 8A ('*CLCA*'); *Criminal Law Consolidation (Mental Impairment) Amendment Bill 1994* (SA).

² South Australia, *Parliamentary Debates*, Legislative Council, 3 August 1994, 398 (Hon K T Griffin, Attorney-General) ('*Parliamentary Debates*').

³ *Ibid.*

⁴ *CLCA* (n 1) s 269UA(7).

⁵ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*UNCRPD*').

⁶ *Ibid* art 14(1)(b).

⁷ *UNCRPD* (n 5) art 15.

disabilities in secure facilities or prisons for longer than the maximum sentence applicable upon conviction may amount to such treatment.⁸

This issue is illustrated by the case of “Mr Leo” (pseudonym), an Aboriginal man arrested for assault while experiencing psychosis.⁹ After being found unfit to stand trial, he was initially detained for 12 months.¹⁰ However, following a review, his detention was extended, and he ultimately spent five years and ten months in a maximum-security prison, nearly six times longer than the likely sentence if convicted.¹¹ During this time, he was reportedly subjected to violence from other prisoners and frequent, prolonged solitary confinement.¹² The UN Committee concluded that Australia breached art 14(1)(b) by detaining Mr Leo on the basis of his disability, and art 15 due to the inhumane and degrading conditions of his detention.¹³

This essay will examine the effectiveness of Part 8A in fulfilling Australia’s international obligations under the UNCRPD, and whether the current regime provides adequate protection for individuals with mental impairment, particularly in addressing the issue of indefinite detention. This essay argues that although Part 8A represents a significant improvement from the former “Governor’s pleasure” regime through the introduction of limiting terms, further reform is necessary to ensure the legislation can fully achieve its intended protective purpose and safeguard the rights of individuals with mental impairment.

⁸ Australia Human Rights Commission, *Indefinite detention of people with cognitive and psychiatric impairment in Australia* (16 March 2016) 25-27 (*‘Indefinite detention’*).

⁹ ‘Leo v Australia (CRPD, 2019)’, *Remedy Australia* (Web Page), <<https://remedy-australia.au/cases/41/>>.

¹⁰ See *Ibid.*

¹¹ See *Ibid.*

¹² See *Ibid.*

¹³ ‘Cases violating CRPD art 14(1)(b)(3)’, *Remedy Australia* (Web Page), <<https://remedy-australia.au/cases/violation/45/>>

2. *Indefinite detention: Background and Problems*

Indefinite detention existed in South Australia prior to the introduction of Part 8A of the CLCA. Part 8A sought to address the indefinite nature of detention through the introduction of a “limiting term,” which places a maximum period on the length of time a person may be detained.¹⁴ However, questions remain regarding the effectiveness of the current South Australian regime and whether the limiting term adequately addresses concerns relating to Australia’s international obligations under Arts 14(1)(b) and 15 of the UNCRPD.¹⁵ These issues will be examined in the following section.

The problems associated with indefinite detention extend beyond breaches of international obligations. They also reflect broader systemic failures in protecting the legal rights of people with disabilities. This concern remains evident in jurisdictions such as Queensland and Tasmania, where the continued use of the “Governor’s Pleasure” regime has attracted criticism for enabling indefinite detention. In both jurisdictions, there is no fixed maximum period of detention, and release decisions are largely determined by the executive government¹⁶, with community safety often prioritised over the rights and liberty of the individual.¹⁷ In Queensland, the Mental Health Court may impose a non-revocation period of up to 10 years, during which the relevant tribunal cannot revoke the order.¹⁸ In Tasmania, individuals subject to a restriction order must apply for discharge in order to secure their release.¹⁹ The only way for the Court to revoke these orders is by reviewing the order periodically or upon review.²⁰

A significant issue with indefinite detention is that the Australian system often fails to provide adequate support and treatment to reduce the risks posed by individuals with cognitive or mental impairments, and hence they would never be fit to the standard to be release.²¹ In many scenarios, people with cognitive disability might place under prison or facility that was not built to have a proper care and support their recoveries.²² The Australian Human Rights

¹⁴ CLCA (n 1) s 269O(2)

¹⁵ UNCRPD (n 5) art 14(1)(b) & 15.

¹⁶ Melbourne University Law Review, *Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change* (Report No. 3, 2017) 851-852.

¹⁷ Ibid.

¹⁸ *Mental Health Act 2000* (Qld) s 137.

¹⁹ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 26.

²⁰ *Mental Health Act 2000* (QLD) ss 200, 203; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 34, 37.

²¹ *Indefinite detention* (n 8) 21-22.

²² Sophie Yates, Caroline Doyle, Shannon Dodd, ‘Incarcerated people with disability don’t get the support they need – that makes them more likely to reoffend’, *UNSW Sydney* (Web Page 2022) <<https://www.unsw.edu.au/newsroom/news/2022/07/incarcerated-people-with-disability-dont-get-the-support-they-ne>>.

Commission has noted that the uncertainty and indefinite nature of detention can have severe psychological consequences for detainees, which in turn make them less likely to be released.²³

Concerns regarding indefinite detention may also discourage defendants from raising defence of mental impairment or unfitness to stand trial. The Commission reported that some accused persons may choose to plead guilty or proceed to trial, even where fitness is genuinely in question, because doing so may result in a fixed sentence and a known release date.²⁴ In contrast, being found unfit to stand trial could expose them to indefinite detention without certainty as to when they will be released.

Consequently, without an effective limiting term, the protective purpose of mental impairment provisions may be undermined. Rather than safeguarding vulnerable individuals within the criminal justice system, the law may pressure defendants to stand trial despite lacking the capacity to fully understand court procedures or exercise their legal rights.

²³ *Indefinite detention* (n 8) 21-22.

²⁴ *Ibid* [11.52].

3. The history and purpose of Part 8A CLCA

The purpose of introducing Part 8A into CLCA was to clarify the legal consequences for an alleged offender who is found unfit to stand trial or not guilty by reason of mental impairment. It also sought to remove the indefinite detention that previously existed under the “Governor’s Pleasure” regime in South Australia. To address this issue, Part 8A requires courts to impose a “limiting term” when making supervision orders.²⁵

Under s 269O(2), the limiting term must reflect the period of imprisonment that would likely have been imposed if the defendant had been convicted of the offence, without taking the defendant’s mental impairment into account, as stated in Note 1.²⁶ The limiting term must not exceed the maximum penalty available for the offence. This principle was reinforced by Duggan J in *Question of Law Reserved (No 1)*, who emphasised that the limiting term should operate as a safeguard against indefinite detention.²⁷

In addition, the court may vary or revoke a supervision order at any time during the limiting term upon application by a party with a sufficient interest in the matter.²⁸ In *R v Sumner*²⁹, the court considered the time that the defendant has spent in jail before the trial, and decided to vary the limiting term to a shorter period. They further emphasised the need for consistency in setting limiting terms, including consideration of any time the defendant had already spent in custody, such as time spent on remand or refused bail.³⁰ This approach aims to prevent unfair overlap between periods of custody and supervision. Furthermore, where evidence demonstrates that the defendant can safely be released on licence, the court should consider revoking the supervision order during the limiting term.³¹

Overall, it appears that Part 8A was designed to create a more structured and rights-focused framework for dealing with defendants with mental impairments. By introducing limiting terms and allowing supervision orders to be reviewed or revoked, the regime seeks to balance community protection with the prevention of indefinite detention and the protection of individual liberty.

²⁵ *CLCA* (n 1) s 269O.

²⁶ *Ibid* s 269O(2).

²⁷ *Macgregor v Police* (2015) SASC 107, [17]; *Question of Law Reserved (No 1)* [2023] SASCA 109, Duggan J.

²⁸ *CLCA* (n 1) s 269P(1).

²⁹ (2010) SASC 43.

³⁰ *Ibid* [37]-[39].

³¹ See *Ibid*.

4. Does Part 8A serves its purpose

As discussed above, concerns have been raised about Australia’s compliance with its international obligations under Arts 14(1)(b) and 15 of the UNCRPD³² under the former “Governor’s Pleasure” regime. The introduction of limiting terms under Part 8A was intended to address these concerns by requiring courts to impose a maximum period for detention, thereby removing the indefinite nature of detention.³³ In this respect, the South Australian model appears to better align with the obligations imposed by the UNCRPD.

The limiting term mechanism arguably supports the objective of Art 14(1)(b) by ensuring that a person cannot be detained indefinitely and by allowing the court to vary or revoke a supervision order at any time during the limiting term where the individual satisfies the conditions for release on licence or unconditional release. This creates a degree of procedural protection against ‘arbitrary detention’. However, concerns remain regarding the operation of continuing supervision orders (‘CSO’), which may undermine the intended protection against indefinite detention. Although the limiting term places a formal cap on detention, the possibility of ongoing supervision beyond that period raises questions about whether the regime fully satisfies the requirements of Art 14(1)(b).

Additionally, under Part 8A, the Minister may order that a defendant be detained in prison where no suitable alternative placement is available.³⁴ This raises potential concerns under Art 15 of the UNCRPD, particularly where the period of detention has been extended through CSO, and the person has to continue to serve in prison.³⁵ Prisons are generally not designed to provide appropriate therapeutic treatment or support for individuals with mental impairments, and such environments may hinder rehabilitation and recovery.³⁶ Consequently, detention in prison settings may increase the likelihood of ongoing supervision and prolonged deprivation of liberty.

These concerns have also been recognised internationally. In both 2013 and 2019, the CRPD Committee expressed concern that persons with disabilities found unfit to stand trial in Australia may be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, often for periods exceeding the maximum custodial sentence applicable

³² *UNCRPD* (n 5) art 14(1)(b) & 15.

³³ *CLCA* (n 1) s 269O(2).

³⁴ *Ibid* s 269NG(2)(b).

³⁵ *Indefinite detention* (n 8) 25-27.

³⁶ Australian Human Rights Commission, *Current issues and good practices in prison management* (Report, 16 November 2023) 10.

to the alleged offence.³⁷ While Part 8A represents a significant improvement on the former “Governor’s Pleasure” regime, it remains necessary to critically examine the practical operation of the framework to determine whether it genuinely fulfils its protective purpose and adequately safeguards the rights and dignity of persons with disabilities.

i. Continuing supervision order

Where a defendant remains subject to a supervision order, the Minister may apply to the Supreme Court for a continuing supervision order (‘CSO’) while the defendant is still liable to supervision.³⁸ Upon such an application, the court must direct one or more legally qualified medical practitioners to examine the defendant and provide reports regarding the defendant’s diagnosis, prognosis, and suggested treatment plan.³⁹

The court may impose a CSO if satisfied, on the balance of probabilities, that the defendant would “pose a serious risk to the safety of the community or a member of the community” if left unsupervised.⁴⁰ A CSO may involve either ongoing detention or release on licence subject to conditions determined by the court.⁴¹ Unlike ordinary supervision orders under Part 8A, CSO is not subject to a limiting term, although relevant parties may apply to vary or revoke the order.⁴²

This raises significant concerns regarding the underlying purpose of Part 8A, which was intended to remove the indefinite nature of detention under the ‘Governor-Pleasure’ regime.⁴³ Allowing courts to impose a CSO after the expiry of a limiting term risks reintroducing indefinite detention in practice. This concern becomes more significant when considering the broad standard for imposing a CSO and the impact that detention environments may have on an individual’s rehabilitation and recovery, which would be discussed in the following sections. Where individuals are detained in unsuitable facilities, such as prisons, their ability to recover

³⁷ Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, 10th sess, UN Doc CRPD/C/AUS/CO/1, (21 October 2013), [31]; Committee on the Rights of Persons with Disabilities, *Concluding observations on the second and third periodic reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, (15 October 2019), [27–28].

³⁸ *CLCA* (n 1) s 269UA(1).

³⁹ *Ibid* s 269UA(4).

⁴⁰ *Ibid* s 269(7).

⁴¹ *Ibid* s 269UB(1).

⁴² *Ibid* s 269UC.

⁴³ *Parliamentary Debates* (n 2).

and safely reintegrate into the community may be adversely affected, thereby increasing the likelihood of ongoing supervision and prolonged deprivation of liberty.

It could become the risk of institutional inertia where treating practitioners and relevant agencies are aware that a forensic patient's limiting term may be extended, thereby reducing the urgency to facilitate meaningful rehabilitation or transition into less restrictive environments.⁴⁴ Consequently, individuals may remain within the forensic system for extended or indefinite periods, not necessarily because they continue to pose a serious danger, but because of systemic inadequacies in treatment, support, and accommodation services.

iii. The Standard for Continuing Supervision Order

As discussed above, the court may impose a CSO where the defendant is considered to “pose a serious risk to the safety of the community or a member of the community.”⁴⁵ This reflects a threshold commonly applied to high-risk offender regimes, which are designed to prevent potential harm to the community. Such regimes typically apply to serious sexual offenders, violent offenders, terror suspects,⁴⁶ and individuals regarded as unable or unwilling to control dangerous behaviour.⁴⁷

However, an important distinction exists (as illustrated in Table 1). Extended supervision orders (ESOs) for high-risk offenders are imposed after an individual has been found guilty and always towards the end of serving their sentence.⁴⁸ By contrast, individuals subject to CSOs under Part 8A may not have been convicted at all due to findings of mental impairment or unfitness to stand trial. Despite the absence of criminal responsibility, the law applies a comparable risk-based standard to justify ongoing restrictions on liberty, raising concerns as to fairness and potential discrimination against persons with disabilities.

Further concerns arise from the differing statutory safeguards between ESOs and CSOs. Under the *Criminal Law (High Risk Offenders) Act*, the scope for imposing an ESO is narrowly confined. The court must be satisfied that the person meets the definition of a “high risk offender”⁴⁹ and poses an appreciable risk to community safety if unsupervised.⁵⁰ The

⁴⁴ Royal Commission, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Final Report*, (Report No 8 2023) 144 (*‘Royal Commission’*).

⁴⁵ *CLCA* (n 1) s 269(7).

⁴⁶ *Criminal Law (High Risk Offenders) Act 2015* (SA) ss 7(3)(a)-(d) (*‘CL(HRO)A’*).

⁴⁷ *Sentencing Act 2017* (SA) Division 5.

⁴⁸ *CL(HRO)A* (n 46) s 7(2).

⁴⁹ *Ibid* s 7(4)(a).

⁵⁰ *Ibid* s 7(4)(b).

assessment must also be supported by medical or psychological evidence and guided by specific statutory criterias.⁵¹

By contrast, Part 8A provides limited guidance on how courts should assess whether a person poses a “serious risk” to the community.⁵² Although courts are required to consider medical and professional reports, the legislation provides little direction regarding the weight to be given to such evidence or the manner in which competing assessments should be evaluated. This broad judicial discretion creates the potential for inconsistency in decision-making and prolonged restrictions on the liberty of individuals who have not been convicted of an offence.

Comparison Table of Extended Supervision Orders & Continuing Supervision Orders

Extended Supervision Orders	Continuing Supervision Orders
<p>ESO for high-risk offenders</p> <ul style="list-style-type: none"> imposed after an individual has been found guilty towards the end of serving their sentence (12 months) 	<p>CSO for people with mental impairment</p> <ul style="list-style-type: none"> Imposed regardless the person has not been convicted at all towards the end of serving their sentence (12 months)
<p>Must meet the threshold of “high-risk offender”</p> <ul style="list-style-type: none"> Apply to serious sexual offenders, violent offenders, terror suspects,¹ and individuals regarded as unable or unwilling to control dangerous behaviour² <p>AND poses an appreciable risk to community safety if unsupervised</p>	<p>No threshold</p> <p>The Court must satisfy the person will pose a serious risk to the community or a member of the community if unsupervised</p>
<p>The “appreciable risk” is guided by specific statutory criteria Criminal Law (High Risk Offenders) Act 2015 (SA) s 7(3)</p> <p>(3) The Supreme Court must, before determining whether to make an extended supervision order, direct that 1 or more prescribed health professionals examine the respondent and report to the Court on the results of the examination, including—</p> <ol style="list-style-type: none"> if the respondent is a serious sexual offender—an assessment of the likelihood of the respondent committing a further serious sexual offence; or if the respondent is a serious violent offender—an assessment of the likelihood of the respondent committing a further serious offence of violence; or if the respondent is a terror suspect—an assessment of the likelihood of the respondent committing a terrorist offence, or otherwise being involved in a terrorist act, or committing a serious offence of violence; or if the respondent is a person referred to in paragraph (cb) of the definition of high risk offender in section 5 (or was such a person when first subjected to an extended supervision order)—an assessment of the likelihood of the respondent committing any prescribed offence. 	<p>Serious risk is not defined in CLCA</p> <p>No statutory criteria = create a board judicial discretion</p> <ul style="list-style-type: none"> Court is required to consider medical and professional report before imposing CSO: s 269UA CLCA However, the legislation provides little to no direction regarding the weight to be given to such evidence or the way the court should interpret and evaluate these assessments.

¹ *Criminal Law (High Risk Offenders) Act 2015 (SA)* ss 7(3)(a)-(d) ('CL(HRO)A').
² *Sentencing Act 2017 (SA)* Division 5.

Table 1: comparison table of ESO and CSO (from the presentation to Office of the Public Advocates)

The uncertain and expansive nature of the CSO framework may therefore undermine the protective purpose of Part 8A and raise concerns under Article 14 of the UNCRPD.⁵³ In particular, it risks subjecting individuals with disabilities to ongoing deprivation of liberty based on uncertain assessments of future risk, despite the absence of a criminal conviction.

⁵¹ *Ibid* s 7(6).

⁵² *Ibid* s 269UA(7).

⁵³ *UNCRPD* (n 5) art 14.

iii. Detention in prisons

When the court makes a supervision order, they could order the individual to be placed under detention order and the individual will be in custody of the Minister and the Minister may give directions for the custody, supervision, and care of the defendant the Minister considers appropriate.⁵⁴ In some cases, the Minister may direct that a defendant be kept in custody in a prison if there is no practicable alternative.⁵⁵ However, many jurisdictions have lack of adequate facilities capable of providing both the necessary level of security and the specialised treatment and support services required for individuals found unfit to stand trial or not guilty by reason of mental impairment.⁵⁶ The individuals may then be held in correctional centres despite prisons being fundamentally ill-suited to address their therapeutic and rehabilitative needs.⁵⁷

As mentioned, person may become subject to a CSO where the court considers that they pose a serious risk to the community if left unsupervised.⁵⁸ Nevertheless, detaining mentally impaired individuals in prison environments may ultimately be counterproductive, as such conditions can further distance them from achieving the level of stability and rehabilitation necessary for unconditional release. The custodial environment may adversely affect an individual's psychological wellbeing, hinder the effective monitoring of deterioration in their condition, and significantly restrict access to appropriate therapeutic interventions and support services.⁵⁹ It is indicated that practices such as physical, mechanical, and chemical restraints, as well as prolonged solitary confinement, are frequently used to manage behaviour in prisons.⁶⁰ Such practices may exacerbate existing mental impairments and contribute to further psychological harm.

Where individuals do not receive adequate treatment, rehabilitation, and support while detained, their continued detention may become a consequence of systemic failures rather than any

⁵⁴ *CLCA* (n 1) s 269NG(1).

⁵⁵ *Ibid* s 269NG(2)(b).

⁵⁶ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) xxiii-xxiv; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Report No 28 (2014) 415; see also *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80.

⁵⁷ *Ibid*.

⁵⁸ *CLCA* (n 1) s 269(7).

⁵⁹ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013) 298.

⁶⁰ See *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (2012) 97.

ongoing danger they pose to the community.⁶¹ In this sense, the extension of a patient's forensic status may operate as a substitute for deficiencies in available services, care, and treatment.⁶²

All of these practices may amount to cruel, inhuman, or degrading treatment and are inconsistent with Art 15 of UNCRPD particularly where individuals are subjected to prolonged detention and restrictive practices without adequate treatment in assisting their rehabilitation. Also, it could be a breach of Art 14(1)(b) where individuals remain detained primarily because of inadequate facilities and systemic shortcomings, the deprivation of liberty risks becoming arbitrary rather than genuinely necessary for purpose of providing individual support and community protection.

⁶¹ *Royal Commission* (n 44) 144.

⁶² 'Statement of Todd Davis', 15 January 2021, at [76].

6. *Discussion*

Across Australia, there is significant consistency in the standard applied by courts when determining the release of a defendant, with the primary consideration centred on “community safety.”⁶³ This essay acknowledges that criminal law serves an important protective function, and that community safety should not be undermined, even in cases involving individuals with mental impairment. In this sense, the imposition of a CSO following the expiration of a limiting term is not inherently problematic.

Rather, the concern lies in the broader operation of the legislative framework and how its various elements interact to create a potentially negative cyclical system. Unlike high-risk offender regimes, there is no clear statutory threshold limiting the application of CSO to particular categories of offending, such as serious violent offences. Similarly, the legislation provides little guidance on what constitutes a “serious risk,” leaving courts with broad discretion and limited direction in practice.

This issue is further exacerbated by the Minister’s power to detain individuals with mental impairment in prison facilities. Without proper treatment and support in these facilities, individuals may struggle to meet the standard required for release, thereby increasing the likelihood that supervision orders will continue to be imposed or extended.

Consequently, the problem is not solely the existence of CSO itself, but the way the framework operates as a negative cycle: limited legislative guidance leaves courts without clear standards, while inadequate detention conditions reduce the individual’s ability to demonstrate recovery or reduced risk. Together, these factors may contribute to ongoing arbitrarily restrictions on liberty for individuals who have not been found criminally guilty due to their mental impairment⁶⁴, and the ongoing nature of detention due to systematic failure could be cruel, inhuman, or degrading punishment.⁶⁵

⁶³ *CLCA* (n 1) s 269UA; *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 No 12* (NSW) s 33(3); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 35; *Criminal Code Act 1983* (NT) s 43ZG(6); *Mental Health Act 2000* (QLD) s 204; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 34; *Mental Health Act 2015* (ACT) s 180(3); *Criminal Law (Mental Impairment) Act 2023* (WA) s 74.

⁶⁴ Breach of UNCRPD (n 5) art 14(1)(b).

⁶⁵ Breach of UNCRPD (n 5) art 15.

7. Conclusion

This essay has discussed the effectiveness of Part 8A in fulfilling Australia's international obligations under the UNCRPD, particularly in addressing the issue of indefinite detention for individuals found unfit to stand trial or not guilty due to mental impairment.

This essay has argued that, although Part 8A represents a significant improvement through the introduction of limiting terms, periodic review mechanisms, and greater procedural safeguards, substantial concerns remain regarding the operation of CSO, the detention of individuals with mental impairment in prison environments, and the lack of legislative guidance surrounding concepts such as "serious risk." The essay further argued that these issues may unintentionally create a cycle in which individuals struggle to satisfy release standards due to broader systemic failures, including inadequate therapeutic support and unclear legal thresholds.

However, it is important to acknowledge that this remains a relatively underdeveloped area of law and policy, with limited research examining the broader practical operation of the legislation and the interaction between its various mechanisms in practice. Greater research is therefore necessary to assess the long-term impact of Part 8A on individuals with mental impairment and whether the framework genuinely reduces the risk of indefinite detention.

Accordingly, this essay urges Australia to continue reviewing and reforming these legislative regimes to ensure greater clarity, stronger safeguards, and improved access to appropriate treatment and support for individuals subject to Part 8A. Such reforms are necessary to ensure that the objectives of the Act, as well as the principles underpinning the UNCRPD, can be effectively achieved in practice.

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