The Law Society
OF WESTERN AUSTRALIA
The **voice** of the **legal profession** in Western Australia

BRIEFING PAPER

MENTALLY IMPAIRED ACCUSED

THE ESSENTIAL MEMBERSHIP FOR THE LEGAL PROFESSION

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Issues

Unfitness to stand trial

Western Australia has a particularly unsatisfactory regime for dealing with accused persons who are unfit to stand trial. The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA), does not place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial.[1] It does not provide for any process of review. The person is detained at the 'Governor's pleasure'.[2]

For example, Marlon Noble was charged in 2001 with sexual assault offences that were never proven because he was never fit to be tried. He spent 10 years in gaol before the allegations were shown to have no substance. Rosie Anne Fulton was held in Kalgoorlie prison for over 18 months charged with crimes related to a motor vehicle. She was found unfit to stand trial due to her cognitive impairment, and was held in a Kalgoorlie prison because there was no other suitable accommodation available.[3]

Indefinite sentences

The *Sentencing Act 1995* (WA), section 98[4] provides for indeterminate sentences. In *Chester v The Queen*,[5] referring to s662(a) of the *Criminal Code* (the predecessor to the current provision), the High Court in a joint judgement said:

> *the stark and extraordinary nature of punishment by way of indeterminate detention, the term of which is determinable by executive, not by judicial decision, requires that the sentencing judge be clearly satisfied by cogent evidence that the convicted person is a constant danger to the community.*[6]

Robert Lindsay[7] points out that:

> *Section 98 of the Sentencing Act, 1995 (WA) continued the same "stark and extraordinary nature of punishment" without judicial review being available at the instigation of a prisoner (unlike all other states). The Sentence Administration Act 2003 (WA) states that even where the Parole Board recommends release, there is no obligation upon the Minister to advise the Governor in Executive Council to release;*[8] *that the rules of natural justice, including the duty of procedural fairness, do not apply to acts of the Governor, the Minister or the Prisoners Review Power Board under the relevant parts of the legislation;*[9] *and that there is no requirement for reasons for a decision on parole eligibility to be given to a person serving a term of indefinite imprisonment.*[10]

Preventative detention should have the following features identified by Deane J in *Veen (No2)*:[11]

> *such a statutory system (of preventive restraint) could, one would hope, avoid the disadvantages of indeterminate prison sentences by being based on periodic orders for continuing detention in an institution other than a gaol and provide a guarantee of regular and thorough review by psychiatric and other experts. The courts will impede rather than assist the introduction of such an acceptable system if, by disregarding the limits of conventional notions of punishment, they assume a power to impose preventive indeterminate gaol sentences in a context which lacks the proper safeguards which an adequate statutory system must provide and in which, where no non-parole period is fixed, the remaining hope of future release ultimately lies not in the judgement of experts but in the exercise of a ministerial discretion to which political considerations would seem to be relevant. I say 'by disregarding the limits of conventional notions of punishment' for the reason that to increase a sentence of imprisonment by reason of a propensity, flowing from abnormality of mind, to commit further offences is to punish a person for that abnormality of mind and not for what he has done.*

As Lindsay points out:[12]

> The West Australian legislation, unlike other states, has none of the features Deane J refers to. Indefinite term orders, under s662(a) of the *Criminal Code* and now s98 of the *Sentence*

Administration Act 1995 (WA), are not subject to statutory safeguards nor periodic orders for continuing detention; these laws do not allow for detention in an institution other than a gaol; nor is there a guarantee of regular and thorough review by psychiatric and other experts; and these laws do depend on the exercise of a ministerial discretion, untrammelled by any statutory power of judicial review, to which political consideration would seem to be relevant.

Proposed reforms

Determination of unfitness

Laws and legal frameworks affecting people involved in court proceedings in Western Australia should be reformed to reflect the National Decision-Making Principles proposed by the Australian Law Reform Commission[13] (set out in the Appendix) and to facilitate Australia's compliance with art 12 of the United Nations Convention on the Rights of Persons with Disability (CRPD).[14]

The criteria for unfitness should focus on the defendant's ability to make rational decisions in order for a person to effectively participate in a trial.

It is noted that the test in *R v Presser* of the 'ability to challenge jurors' incorporates an ability to both rationally understand and exercise that right.

Insofar as rational decision-making is retained in the criteria for unfitness, it should adopt the approach of the Law Commission of England and Wales, in its 2010 Consultation Paper, *Unfitness to Plead*, which provides that a defendant should be found unfit to stand trial if he or she is unable:

- to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial,
- to retain that information,
- to use or weigh that information as part of decision making process, or
- to communicate his or her decisions.[15]

There are combinations of factors that impair a person's decision-making ability in the context of navigating through criminal proceedings, including people with low literacy and numeracy skills, people from diverse ethnic backgrounds, including Indigenous peoples etc.

It is important that mechanisms are implemented to ensure that defendants who would otherwise be determined to be unfit to stand trial are provided with adequate supports[16] to be able to stand trial for the following reasons:

- to ensure that innocent people are not pleading guilty (or being advised to plead guilty) in order to avoid the consequences of unfitness;[17] and
- defendants, found unfit to stand trial, who are placed on supervision orders are unable to have their supervision orders revoked because they continue to breach the conditions of the order.[18]

Limits on detention

The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) should be amended to place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial.

The period of detention should not exceed the period which a court determines the individual would have been detained if convicted, bearing in mind all the circumstances which the court would have taken into account in sentencing the individual. The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) should be amended to provide that a custody order must not be made unless the statutory penalty for the alleged offence includes imprisonment or detention. Such an order should not be permitted to run for longer than the alleged offences, if proved, would justify.[19]

The Courts should be empowered to regularly conduct a periodic review of detention orders, for defendants deemed unfit to stand trial ideally every six months[20] or automatically every two years.[21]

Sections 16(5) and 19(4) of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) should be amended to enable a court to make a supervision release order for a person deemed unfit to stand trial; and regularly review such orders. Such supervision should include support programmes and supervision in a safe, therapeutic environment, rather than detention.[22]

APPENDIX

Australian Law Reform Commission National Decision-Making Principles

1. Every adult has the right to make decisions that affect their life and to have those decisions respected.
2. Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.
3. The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.
4. Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.

Recommendations

Determination of unfitness

1. Laws and legal frameworks affecting people involved in court proceedings in Western Australia should be reformed to reflect the National Decision-Making Principles proposed by the Australian Law Reform Commission[23] (set out in the Appendix) and to facilitate Australia's compliance with art 12 of the United Nations Convention on the Rights of Persons with Disability (CRPD).[24]
2. The criteria for unfitness should focus on the defendant's ability to make rational decisions in order for a person to effectively participate in a trial.
3. It is important that mechanisms are implemented to ensure that defendants who would otherwise be determined to be unfit to stand trial are provided with adequate supports[25] to be able to stand trial for the following reasons:
   - to ensure that innocent people are not pleading guilty (or being advised to plead guilty) in order to avoid the consequences of unfitness;[26] and
   - defendants, found unfit to stand trial, who are placed on supervision orders are unable to have their supervision orders revoked because they continue to breach the conditions of the order.[27]

Limits on detention

1. The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) should be amended to place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial.
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NOTES

1. *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 19. Similarly in the Northern Territory, the *Criminal Code 1983* (NT), Schedule 1, s 43ZC provides that supervision orders for persons found not fit to stand trial are 'for an indefinite term'; in Victoria, custodial supervision orders are for an indefinite period, although the *Crimes (Mental Impairment and Unfitness to Tried) Act 1997* (Vic), S 28 also requires the court to set a 'nominal term' for the purposes of review, generally equivalent to the maximum term of imprisonment available for the offence.
2. *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) s 35.
3. Australian Human Rights Commission, *'Send Rosie Anne Home'* www.humanrights.gov.au/news/stories/send-rosie-anne-home; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* http://www.alrc.gov.au/publications/7-access-justice/unfitness-stand-trial [7.53].
4. Replacing section 662(a) of the *Criminal Code* (WA).
5. [1988] 165 CLR 611.
6. At 618.
7. "The Forgotten Prisoners: Punishment Without End": *Brief*, September 2009: Law Society of Western Australia, p 7.
8. *Sentence Administration Act (WA) 2003* ss18(2) & 27(3).
9. Section 115.
10. Section 114.
11. *Veen v The Queen (No.2)* [1987–8] 164CLR 465, at 495.
12. *Ibid,* p 10.
13. *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper, May 2014 ("ALRC"). See also Law Council of Australia submission to ALRC, July 2014.
14. See ALRC, para 2.4. Australia ratified the CRPD in July 2008 and the Optional Protocol in 2009. The CRPD entered into force for Australia on 16 August 2008, and the Optional Protocol in 2009. [ALRC p 28, para 2.4 DP].
15. ALRC, proposal 7-1.
16. See ALRC, p 163.
17. The Anti-Discrimination Commissioner (Tasmania) observed that as a result of being determined unfit to stand trial, a person may 'end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts'. They 'will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed'. [see ALRC DP p159, para 7.16].
18. The ALRC Discussion Paper, at p160, para 7.17, states that: In some cases, the defendant's interests may not be served in being found unfit to stand trial if the outcome is that he or she is put on a supervision order, particularly for less serious offences. Such defendants may later be unable to have their supervision orders revoked because they continue to breach the conditions of the order or commit offences. Further, they remain at risk of the order being varied from non-custodial to custodial if they continue to pose a danger to the community. A person who is able to understand the process involved in a plea of guilty will often be better off being dealt with by a criminal sanction, rather than being placed on an indefinite supervision order.
19. Recommendation 23 made by Amnesty International in the report: "There is always a brighter future": Keeping Indigenous kids in the community and out of detention in Western Australia; ALRC, para 7-3.
20. As occurs in Queensland; or by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted: ALRC, para 7-3.
21. In Victoria, the *Crimes (Mental Impairment and Unfitness to Tried) Act 1997* (Vic) provides judges with the flexibility to decide how often to review, or further review, custodial supervision orders. The VLRC has recommended that legislation should require regular, automatic review of each custodial supervision order at an interval of no longer than every two years: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 431.
22. Amnesty report, recommendation 23.
23. *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper, May 2014 ("ALRC"). See also Law Council of Australia submission to ALRC, July 2014.
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