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

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## **Senate Community Affairs References Committee**

**7 July 2016**

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## Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the Senate Community Affairs References Committee (the Committee) Inquiry into the indefinite detention of people with a cognitive and psychiatric impairment (CPI) in Australia (the Inquiry).
2. This submission focuses on the following terms of reference for the Inquiry:
  - a. *the impact of relevant Commonwealth, state and territory legislative and regulatory frameworks, including legislation enabling the detention of individuals who have been declared mentally-impaired or unfit to plead.*
  - b. *access to justice for people with cognitive and psychiatric impairment, including the availability of assistance and advocacy support for defendants.*
3. Key recommendations of this submission include that:
  - the Commonwealth Government with the cooperation of states and territories conduct a national audit of people held in indefinite detention across jurisdictions following a finding of unfitness to stand trial, enter a plea to a charge or not guilty by reason of mental illness;
  - the Commonwealth Government, with the cooperation of states and territories, conduct a national audit of people held in indefinite detention following a finding of unfitness to stand trial, unfitness to enter a plea to a charge or not guilty by reason of mental illness;
  - the Commonwealth Government address the difficulty in obtaining accurate data on the prevalence of Aboriginal and Torres Strait Islander people with CPI in indefinite detention;
  - the Commonwealth Government implement appropriate screening procedures for people who may have CPI who come in contact with the criminal justice system from the time of arrest to incarceration;
  - a working group be established, as recommended by the Law Crime and Community Safety Council, to collate existing data across jurisdictions and develop resources for national use on the treatment of people with a CPI who have been found unfit to plead or not guilty by reason of mental illness;
  - consideration be given to amending the *Crimes Act 1914* (Cth) to provide a test for unfitness to stand trial in the manner recommended by the ALRC, but with an express requirement for rational decision-making abilities;
  - consideration be given to the application of the special hearing provisions under the Mental Health Act in New South Wales across all jurisdictions to ensure consistency in laws governing people with CPI who come into contact with the criminal justice system;
  - in circumstances where a determination is made that a person is ineligible to stand trial, state and territory laws should provide for:
    - a. limits on the period of detention that can be imposed; and

b. regular periodic review of detention orders.

- In those circumstances, if the person is a threat or danger to themselves or the public, they should be placed in the care of mental health authorities, rather than enter the criminal justice system. The framework for detention and supervision orders should be flexible enough to ensure that people transition out of the criminal justice system, in a way consistent with principles of community protection and least restriction of rights;
- all governments invest in methods to ensure the detection and treatment of FASD and other disabilities which can potentially lead to adverse outcomes in the criminal justice system, particularly for Indigenous Australians;
- the Inquiry consider the impact of insufficient funding for legal assistance services on the capacity of people with CPI to access legal assistance services; and
- the Council of Australian Governments commit to a national target for 'closing the gap' in the rates of imprisonment of Aboriginal and Torres Strait Islander peoples.

## Introduction

4. People affected by CPI are disproportionately represented in the criminal justice system. The Australian Human Rights Commission estimated that people with a CPI are three to four times more likely to be in prison than their non-disabled counterparts in New South Wales.<sup>1</sup> Similarly, a report based on a survey of prisoners in Western Australia found that 63 per cent of the women and 40 per cent of the men met the criteria for a current diagnosis of mood disorder, anxiety disorder, post-traumatic stress disorder and/or eating disorder.<sup>2</sup>
5. This submission discusses the indefinite detention in prison of people accused of an offence who are mentally unfit to stand trial or who have been found by a court not guilty on account of unsoundness of mind.
6. The question of 'mental unfitness to stand trial' does not go to criminal responsibility at the time an alleged offence was committed.<sup>3</sup> Rather, it relates to the accused's mental condition at the time they are involved in court proceedings and generally involves determining whether the accused has sufficient mental capacity to understand the court proceedings brought against them.<sup>4</sup>
7. Similarly, people with CPI who have been found not guilty on account of unsoundness of mind cannot be found criminally culpable.

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<sup>1</sup> Australian Human Rights Commission, 'People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System', August 2013, 3

<<https://www.humanrights.gov.au/sites/default/files/document/publication/Cost%20benefit%20analysis.pdf>>.

<sup>2</sup> Sophie Davison, et al, 'Mental health and substance use problems in Western Australian prisons: Report from the Health and Emotional Wellbeing Survey of Western Australian Reception Prisoners, 2013', Western Australian Department of Health, 2015

<<http://www.health.wa.gov.au/crc/outcomes/docs/MH%20Substance%20Use%20WA%20Prisons.pdf>>.

<sup>3</sup> Department of the Attorney General (Western Australia), 'Review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (Final Report)', April 2016, 6.

<sup>4</sup> Ibid.

8. As such, laws in all jurisdictions<sup>5</sup> affecting people with CPI who are unfit to stand trial, or have been found not guilty on account of unsoundness of mind, are “distinct from other legislation in the area of criminal law,” because they are “not intended to simply proscribe and punish offending behaviour.”<sup>6</sup> Rather, their central purpose is to strike an appropriate balance between protecting the safety of the community and safeguarding the rights and needs of persons with CPI who have been charged with offences.<sup>7</sup>
9. The Law Council notes that the indefinite detention of people with CPI has been the subject of several recent reports across Australia and overseas.<sup>8</sup>
10. The Law Council welcomes the current inquiry given the disproportionate representation of people with a CPI in the criminal justice system across Australian jurisdictions.
11. The Law Council acknowledges contributions from the New South Wales Bar Association (NSWBA), the Law Society of South Australia (LSSA), the Law Society of Western Australia, and the Law Council’s National Criminal Law Committee.

## Detention must not be arbitrary

12. Article 9 of the International Covenant on Civil and Political Rights (‘ICCPR’) recognises the right to liberty and security of the person and provides:

*No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*<sup>9</sup>

13. The United Nations Human Rights Committee has noted, in the context of Article 9(1) of the ICCPR, that arbitrariness includes elements of inappropriateness, injustice or lack of predictability.<sup>10</sup>
14. In Victoria, s 21(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) states that a “person must not be subjected to arbitrary arrest or detention”.

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<sup>5</sup> See *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Mental Health (Forensic Provisions) Act 1990* (NSW); *Criminal Law (Mentally Impaired Accused) Act 1996* (WA); *Criminal Code 1899* (Qld) and *Mental Health Act 2000* (QLD); *Criminal Law Consolidation Act 1935* (SA); *Crimes Act 1900* (ACT); *Criminal Code Act* (NT); *Criminal Justice (Mental Impairment) Act 1999* (TAS).

<sup>6</sup> Department of the Attorney General (Western Australia), ‘Review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (Final Report)’, April 2016, 6.

<sup>7</sup> Ibid.

<sup>8</sup> See Department of the Attorney General (Western Australia), ‘Review of the *Criminal Law (Mentally Impaired Accused) Act 1996* (Final Report)’, April 2016; Law Commission of England and Wales of England and Wales, ‘Unfitness to Plead’, 13 January 2016; Australian Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws (Final Report)’, August 2014; New South Wales Law Reform Commission, ‘People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences (Final Report)’, 2013; Human Rights Commission, “Equal before the law”: Towards disability justice strategies’, February 2014.

<sup>9</sup> ICCPR art 9(1); see also art 9(4).

<sup>10</sup> *Van Alphen v The Netherlands*, Communication No. 305/1988, UN Doc CCPR/C/39/D/305/1988 (1990); *A v Australia*, Communication No. 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997); *Spakmo v Norway*, Communication No. 631/1995, UN Doc CCPR/C/67/D/631/1995 (1999). See also: *Manga v Attorney-General* [2000] 2 NZLR 65 at [40]-[42] (Hammond J).

15. The Victorian Human Rights Commission stated that the Charter requires the Victorian Government, public servants, local councils, Victoria Police and other public authorities to act compatibly with human rights, and to consider human rights when developing policies, making laws, delivering services and making decisions.<sup>11</sup>
16. The Law Council's *Policy Statement on Principles Applying to Detention in Criminal Law Context* states that "'arbitrariness' is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice, lack of predictability and due process of law. For example, arbitrariness may result from a law which is vague or allows for the exercise of powers in broad circumstances which are not sufficiently defined."<sup>12</sup>
17. The indefinite detention of people with a CPI who have been determined unfit to stand trial may amount to 'arbitrariness', particularly where the individual does not pose a risk of harm to themselves or to the community. The Law Council supports an individual assessment of the necessity of detention for each person, taking into consideration their individual circumstances, to avoid detention being arbitrary. Further, a person should only be held in a detention facility (other than a correctional facility) if they are assessed as posing an unacceptable risk of harm to the community, or themselves, and if that risk cannot be met in a less restrictive way.
18. The Law Council is advised that defendants, once found to lack legal capacity and consigned to a 'mental health facility' (often within the prison system), have little prospect of demonstrating a change in capacity and effectively remain in custody for an indeterminate period. The indefinite detention of people with a CPI in correctional centres may have a detrimental impact on the people concerned and may be inconsistent with Australia's international human rights obligations.<sup>13</sup>

## National audit of people held in indefinite detention

19. The 2008 Northern Territory Ombudsman's report found that 'at present there is no quantitative or qualitative data which would reliably indicate the level of mental health and disability needs among NT prisoners.'<sup>14</sup>
20. In April 2016, the Northern Territory Corrections Minister reportedly confirmed that there were currently sixteen people in the Northern Territory in indefinite detention following a finding of unfitness to stand trial,<sup>15</sup> with thirteen individuals being held in

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<sup>11</sup> See Victorian Equal Opportunity and Human Rights Commission, 'Victoria's Charter of Human Rights and Responsibilities', <<http://www.humanrightscommission.vic.gov.au/index.php/the-charter>>.

<sup>12</sup> Law Council of Australia, 'Policy Statement: on Principles Applying to Detention in Criminal Law Context', June 2013 <[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final\\_PDF\\_18\\_Oct\\_13\\_Criminal\\_Detention\\_Principles.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Final_PDF_18_Oct_13_Criminal_Detention_Principles.pdf)>.

<sup>13</sup> See ICCPR art 9(1), which prohibits arbitrary detention; ICCPR art 7, which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment; ICCPR art 2(a), which provides that accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; and United Nations Convention on the Rights of Persons with Disabilities art 15 which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

<sup>14</sup> Northern Territory Ombudsman, 'Women in prison: Report of the Investigation into complaints from women prisoners at Darwin Correctional Centre, Darwin, Northern Territory' 2008, 166.

<sup>15</sup> Stephanie Zillman, 'Indefinite detention of cognitively and mentally impaired people inquiry labelled 'predictable'', ABC News (online) 10 April 2016 <<http://www.abc.net.au/news/2016-04-10/unfit-to-plead-in-the-nt-inquiry-labelled-predictable/7314268>>.

Darwin and Alice Springs corrections facilities, and a further three in a secure care facility next to Alice Springs jail.<sup>16</sup>

21. It is reported that in Victorian, 42 per cent of male prisoners and 33 per cent of female prisoners have a confirmed Acquired Brain Injury (ABI) compared with 2 per cent of the general population.<sup>17</sup>
22. Concerns about the indefinite detention of people with a CPI has led to a call by the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, and the then Disability Discrimination Commissioner, Graeme Innes, for an audit of people held in indefinite detention after being found unfit to stand trial.<sup>18</sup>
23. A 2013 report based on a paper presented at the AHRC and University of New South Wales roundtable on 'Access to Justice in the Criminal Justice System for People with Disability', found that 'it is still difficult to quantify how many people currently in prison have mental health disorders and/or cognitive impairment. This is due to the difficulty of assessing remand and short-term prisoners for these conditions as well as a lack of routine identification of people for specialist assessments'.<sup>19</sup>
24. The Law Council recommends that the Commonwealth undertake a national audit of people held in indefinite detention (including those found unfit to stand trial, found unfit to enter a plea to a charge or found not guilty on account of unsoundness of mind) to ensure that people with a CPI are not imprisoned for undetermined periods, particularly if they do not pose an unacceptable risk to themselves or the community.
25. Further, Aboriginal and Torres Strait Islander people are significantly over-represented in the criminal justice system, and a large proportion of those imprisoned are believed to have undiagnosed or untreated CPI.<sup>20</sup> Despite this, there has been a lack of critically informed evidence, analysis and co-ordinated policy and service response on this most pressing human rights issue.<sup>21</sup>
26. There are significant challenges in obtaining accurate data on the prevalence of CPI in Indigenous communities. Lack of access to medical professionals for diagnosis is one difficulty, as well as misdiagnosis of certain disorders, and under-diagnosis of others due to cultural bias in testing.<sup>22</sup>
27. The Law Council notes that the collection of data on the reasons for high rates of Indigenous imprisonment is inconsistent and not sufficiently qualitative. This may be due in part to the lack of procedures to identify people with CPI, particularly Aboriginal and Torres Strait Islander people.

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<sup>16</sup> Ibid.

<sup>17</sup> Martin Jackson, et al, 'Acquired brain Injury in the Victorian Prison System, Corrections Victoria Research Paper', Series Paper No. 4, Melbourne, 2011  
<[http://assets.justice.vic.gov.au/corrections/resources/36d7e731-e819-4ed3-972d-269b829b952d/acquired\\_brain\\_injury\\_in\\_the\\_victorian\\_prison\\_system.pdf](http://assets.justice.vic.gov.au/corrections/resources/36d7e731-e819-4ed3-972d-269b829b952d/acquired_brain_injury_in_the_victorian_prison_system.pdf)>.

<sup>18</sup> Australian Human Rights Commission, 'Jailed without conviction: Commissioners call for audit', Latest News (online), 13 March 2014, <<https://www.humanrights.gov.au/news/stories/jailed-without-conviction-commissioners-call-audit>>.

<sup>19</sup> Australian Human Rights Commission, 'People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System', August 2013, p 4.

<sup>20</sup> Eileen Baldry, et al, 'A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system', UNSW, Sydney, 2015, 15  
<[https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a\\_predictable\\_and\\_preventable\\_path\\_2nov15.pdf](https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a_predictable_and_preventable_path_2nov15.pdf)>.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid 16.



28. The Law Council supports the recommendation by the University of New South Wales (UNSW) that improved identification, assessment and referral processes and pathways for Aboriginal and Torres Strait Islander young people with cognitive impairment are required urgently.<sup>23</sup>
29. The Law Council is also seeking Commonwealth commitment to establish a national data collection and evaluation capability on indigenous justice and imprisonment, with a particular focus on Indigenous people with CPI, to assist in addressing increasing rates of indigenous imprisonment.
30. On 3 December 2015, following a National Symposium on 'Indigenous Imprisonment' hosted by the Law Council, the Law Council released a Communique<sup>24</sup> calling on the Council of Australian Governments to:
- Implement screening processes for all Indigenous youths and adults arrested by police to identify impairments and any reasonable treatment and rehabilitation required to minimise their prospects of reoffending; and
  - Ensure a continuum of support for Indigenous Australians with cognitive impairments and mental health disorders, including culturally relevant early intervention and support, diversion from detention and pathways out of prison into supported accommodation programs and appropriate services.

**Recommendation:**

- That the Commonwealth Government, with the cooperation of states and territories, conduct a national audit of people held in indefinite detention following a finding of unfitness to stand trial, unfitness to enter a plea to a charge or not guilty by reason of mental illness.
- the Commonwealth Government address the difficulty in obtaining accurate data on the prevalence of Aboriginal and Torres Strait Islander people with CPI in indefinite detention.
- the Commonwealth Government implement appropriate screening procedures for people who may have CPI who come in contact with the criminal justice system from the time of arrest to incarceration.

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<sup>23</sup> Eileen Baldry, et al, 'A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system', UNSW, Sydney, 2015, 9  
<[https://www.mhdcad.unsw.edu.au/sites/www.mhdcad.unsw.edu.au/files/u18/pdf/a\\_predictable\\_and\\_preventable\\_path\\_2nov15.pdf](https://www.mhdcad.unsw.edu.au/sites/www.mhdcad.unsw.edu.au/files/u18/pdf/a_predictable_and_preventable_path_2nov15.pdf)>.

<sup>24</sup> Law Council of Australia, 'Indigenous Imprisonment Symposium: Communique', Media Release, 3 December 2015, <[http://www.lawcouncil.asn.au/lawcouncil/images/1556\\_--\\_Indigenous\\_Imprisonment\\_Symposium\\_communique.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/1556_--_Indigenous_Imprisonment_Symposium_communique.pdf)>.



## Treatment

31. The imprisonment of people with a CPI following a determination of unfitness to stand trial, an outcome following a special hearing (the objective and procedures for special hearings are discussed on page 11 of this submission), or a finding of not guilty by reason of mental illness raises a number of issues, including:
- a. problems with providing appropriate therapeutic treatment and services;
  - b. the potentially detrimental effect of the correctional centre environment on those with a CPI; and
  - c. difficulty providing programs involving monitored re-integration into the community.<sup>25</sup>
32. Greater access to appropriate therapeutic treatment and services for people with a CPI avoids the use of prisons as alternative accommodation options for people with a CPI.
33. On 5 November 2015, the Law, Crime and Community Safety Council, agreed to establish a working group to collate existing data across jurisdictions and develop resources for national use on the treatment of people with a CPI who have been found unfit to plead or not guilty by reason of mental illness.<sup>26</sup>

### Recommendation:

- The Law Council supports the establishment of a working group, as recommended by the Law Crime and Community Safety Council, to collate existing data across jurisdictions and develop resources for national use on the treatment of people with a CPI who have been found unfit to plead or not guilty by reason of mental illness.

## Unfitness to stand trial test

34. Legislation dealing with a person's fitness to stand trial in criminal proceedings is lengthy and complex, and differs between the states and territories.<sup>27</sup>
35. At the Commonwealth level, the Crimes Act 1914 (Cth) does not define, or provide a test for, 'fitness to be tried', other than noting that it includes 'fit to plead'.<sup>28</sup> The issues relevant to identifying fitness are identified in *R v Pritchard*.<sup>29</sup> The common law has been modified to various extents by the relevant legislation in each jurisdiction.<sup>30</sup>

<sup>25</sup> Department of the Attorney General (Western Australia), 'Review of the Criminal Law (Mentally Impaired Accused) Act 1996 (Final Report)', April 2016, [216].

<sup>26</sup> Law, Crime and Community Safety Council, 'Draft Communique', 5 November 2015, <<https://www.ag.gov.au/About/CommitteesandCouncils/Law-Crime-and-Community-Safety-Council/Documents/5-November-2015-LCCSC-Communique.pdf>>

<sup>27</sup> Australian Human Rights Commission and DLA Piper, 'Background Paper on Access to Justice for People with Disability in the Criminal Justice System', 2013, 57.

<sup>28</sup> *Crimes Act 1914* (Cth) s 16.

<sup>29</sup> (1836) 7 Car & P 303; 173 ER 135.

<sup>30</sup> Australian Human Rights Commission and DLA Piper, 'Background Paper on Access to Justice for People with Disability in the Criminal Justice System', 2013, 57.

36. In reviewing Commonwealth laws concerning legal capacity, the ALRC recommended reform of the ‘unfitness to stand trial’ test,<sup>31</sup> accompanied by the provision of limits on detention and periodic reviews where detention is required.<sup>32</sup> It did so to “avoid unfairness and maintain the integrity of criminal trials, while ensuring that people with disability are entitled to equal recognition before the law, and to participate fully in legal processes.”<sup>33</sup>
37. The Law Council supports consideration being given to amending the unfitness to plea test in the manner recommended by the ALRC. The ALRC recommended that the Crimes Act should be amended to provide that a person cannot stand trial if the person cannot be supported to:
- understand the information relevant to the decision that they will have to make in the course of the proceedings;
  - retain that information to the extent necessary to make decisions in the course of the proceedings;
  - use or weigh that information as part of the process of making decisions; or
  - communicate the decisions in some way.
38. However, the Law Council considers that ALRC’s preferred test should be amended to require that a person be capable of ‘rational’ decisions. The ALRC did not support this view on the basis that some level of rationality is implicit in the requirement of understanding, using and weighing information.<sup>34</sup> However, the Law Council prefers an express requirement rather than relying upon implications. In this regard, the Law Council notes an example provided by the Law Commission of England and Wales to illustrate that a person may be able to understand, retain, and communicate a decision they have made but may still fall short of making a rational decision:

*A defendant, A (who has paranoid schizophrenia), has a good understanding of the trial process and understands the purpose of the proceedings and the roles played by the different parties. A is also able to instruct his representative and could give evidence. However, as a result of his highly delusional state he is convinced that if he pleads not guilty he will be destroyed by the devil. He has no insight into his condition and insists on pleading guilty to an assault charge even though the evidence suggests that he may have acted in lawful self-defence. Under the current test the defendant would be likely to be found fit to plead.*<sup>35</sup>

**Recommendation:**

- Consideration be given to amending the *Crimes Act 1914* (Cth) to provide a test for unfitness to stand trial in the manner recommended by the ALRC, but with an express requirement for rational decision-making abilities.

<sup>31</sup> Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws’, Report No 124, 2014, recommendation 7-1, 200.

<sup>32</sup> Ibid recommendation 7-2, 206.

<sup>33</sup> Ibid [7.13].

<sup>34</sup> Ibid [7.47].

<sup>35</sup> Law Commission of England and Wales of England and Wales, ‘Unfitness to Plead’, 13 January 2016, vol 1, p 62.

## Special hearings

39. Criminal proceedings in the NSW Supreme and District Courts relating to 'persons affected by mental health disorders' is governed by Part 2 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (the Mental Health Act). If an accused person is found unfit to be tried for an offence, the person is referred to the NSW Mental Health Review Tribunal (MHRT).<sup>36</sup> If the NSW MHRT determines that an unfit person will not or has not become fit within 12 months,<sup>37</sup> and the DPP advises that proceedings against that person are to continue,<sup>38</sup> then the court conducts a special hearing.<sup>39</sup> A special hearing gives a person who is unfit to be tried the opportunity to be acquitted of the offence. Pursuant to s 21(1) of the Mental Health Act, a special hearing is to be conducted as 'nearly' as possible as if it were a trial of criminal proceedings.<sup>40</sup>
40. The prosecution must prove guilt according to the requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to the offence charged.<sup>41</sup> The defendant may raise any defence available in criminal proceedings,<sup>42</sup> is entitled to give evidence,<sup>43</sup> and must have legal representation.<sup>44</sup>
41. The Law Council is advised that the special hearing provisions in the New South Wales Mental Health Act may provide a useful model for adoption by other states and territories to ensure consistency across all Australian jurisdictions in laws governing people with CPI who come into contact with the criminal justice system.
42. The Law Council is advised that if a person is found guilty of an offence based on the limited evidence available at a special hearing, the sentence imposed should be the same as they would have received had they been fit to plead and pleaded guilty. The Law Council is further advised that the length of sentence should never exceed the maximum penalty for the offence.

### Recommendation:

- Consideration be given to the application of the special hearing provisions under the Mental Health Act in New South Wales across all jurisdictions to ensure consistency in laws governing people with CPI who come into contact with the criminal justice system.

<sup>36</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 14(a).

<sup>37</sup> *Ibid* s 47(5)(b).

<sup>38</sup> *Ibid* s 19(1)(a).

<sup>39</sup> *Ibid* s 19(1) (b).

<sup>40</sup> *Ibid* s 21(1).

<sup>41</sup> *Ibid* s 19(2).

<sup>42</sup> *Ibid* s 21(3)(c).

<sup>43</sup> *Ibid* s 21(3)(d).

<sup>44</sup> *Ibid* s 21(2). This section provides that at 'a special hearing, the accused person must, unless the Court otherwise allows, be represented by an Australian legal practitioner and the fact that the person has been found unfit to be tried for an offence is to be presumed not to be an impediment to the person's representation'.

## Limits on detention

43. Some jurisdictions do not place limits on the period of detention or the period of custody orders for persons detained following a finding of unfitness to stand trial. For example:

- in Western Australia, the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) (the WA Act), does not place limits on the period of custody orders for persons detained after being found not mentally fit to stand trial;<sup>45</sup>
- in the Northern Territory, the *Criminal Code* (NT) provides that supervision orders for persons found not fit to stand trial are ‘for an indefinite term’;<sup>46</sup> and
- in Victoria, custodial supervision orders are for an indefinite period, although the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMI Act) also requires the court to set a ‘nominal term’ for the purposes of review.<sup>47</sup>

## New South Wales

44. The MHRT in New South Wales has held that the imposition of a limiting term carries with it an element of punishment and that the purposes of a limiting term should be equated with the purpose of punishment.<sup>48</sup> Punishment of a person who has not been tried according to law is problematic.

45. The NSWBA submitted that for these State provisions concerning forensic patients to operate fairly there must be adequate treatment, support and supervision of mentally ill persons at all stages of the criminal justice process. The imposition of limiting terms therefore also needs to be dependent upon there being adequate support, care and treatment being made available for forensic patients who are subject to such orders.

46. Under s 74(e) of the Mental Health Act, when considering whether to release a forensic patient who is the subject of a limiting term, the NSW MHRT must consider “whether or not the patient has spent sufficient time in custody.”

47. The NSWBA has expressed concern that the NSW MHRT may not release a forensic patient unless it is satisfied that:

- a. the safety of the patient or any member of the public will not be seriously endangered by the patient’s release; and
- b. other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.

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<sup>45</sup> While the WA Act does not place limits on the period of custody orders, the Mentally Impaired Accused Review Board (the statutory body in Western Australia that is responsible for mentally impaired accused who are subject to a custody order) plays a central role in the management, supervision and release frameworks for persons detained after being found unfit to stand trial or not guilty by reason of mental illness under Part 5 and 6 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA).

<sup>46</sup> *Criminal Code Act 1983* (NT) sch 1, s 43ZC.

<sup>47</sup> *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27.

<sup>48</sup> *In the Case of Mr Adams* [2013] NSW MHRT 1, available at <[http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/\[2013\]%20NSWMHRT1.pdf](http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/[2013]%20NSWMHRT1.pdf)>.

48. If “other care of a less restrictive kind” is not available, forensic patients may be kept in custody for longer than is justified – particularly given that the patient has not been found guilty at a trial according to law.
49. The NSWBA has advised that the risk that a forensic patient may be kept in custody for longer than is justified persists even beyond the expiry of the limiting term if treatment is not available.

## South Australia

50. In South Australia, Part 8A of the *Criminal Law Consolidation Act 1935* (SA) (the CLC Act) deals with mental impairment regarding mental incompetence to commit an offence and unfitness to stand trial. It also provides for the setting of limiting terms for supervision (detention or release on conditional licence).
51. The setting of a limiting term is fixed by approximation of the sentence that would have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established.
52. The LSSA submitted that fixing limiting terms, according to the sentence that would have been imposed without consideration of the nature and duration of treatment is problematic since it may be a form of punishment rather than striving to strike a balance between protecting the safety of the community, and safeguarding the rights and needs of persons with CPI.
53. The LSSA considers that Part 8A of the CLC Act, however, means that persons found to be mentally incompetent or unfit for trial are not arbitrarily and indefinitely detained and that such persons are subject to review during the limiting term. The LSSA submitted that as such Part 8A of the CLC Act provides a degree of certainty and protection to defendants and the community.

### Recommendations:

- State and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for:
  - a. limits on the period of detention that can be imposed; and
  - b. regular periodic review of detention orders.
- If the person is a threat or danger to themselves or the public at that time, they should be placed in the care of mental health authorities, rather than enter the criminal justice system. The framework for detention and supervision orders should be flexible enough to ensure that people transition out of the criminal justice system, in a way consistent with principles of community protection and least restriction of rights.

## Indigenous Australians

54. Indigenous people with mental and cognitive disability are significantly over-represented in the criminal justice system.<sup>49</sup> Recently, the Indigenous Australians with Mental Health Disorders and Cognitive Disability in the Criminal Justice System (IAMHDCD) Project by UNSW found that:

*Indigenous Australians with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways. Although this also applies to non-Indigenous people with mental and cognitive disabilities who are highly disadvantaged, the impact on Indigenous Australians is significantly greater across all measures and experiences gathered in the studies across the project.*<sup>50</sup>

55. Foetal Alcohol Spectrum Disorders (FASD) are more prevalent in indigenous communities, difficult to diagnose and significantly impact an individual's cognitive or psychiatric functioning. In 2010, the National Indigenous Drugs and Alcohol Committee stated that:

*Limited research has investigated the relationship between FASD and contact with the criminal justice system in Australia. The limited Australian literature, complemented by international research, indicates that FASD should be considered at every stage of the criminal justice system, from offending behaviour, through to court proceedings, as well as throughout incarceration and post-release.*<sup>51</sup>

56. The Law Council recommends that all governments invest in methods to ensure the detection and treatment of FASD and other disabilities which can potentially lead to adverse outcomes in the criminal justice system, particularly for Indigenous Australians.
57. The Law Council supports the proposals in the Australian Medical Association's (AMA) 2015 Report Card on Indigenous Health which provides a detailed examination of Indigenous incarceration, and makes a number of important recommendations to government, such as adopting an integrated approach to reducing imprisonment rates and improving health through much closer integration of Aboriginal Community Controlled Health Organisations other services and prison health services across the pre-custodial and post-custodial cycle.<sup>52</sup>
58. The 2015 Report Card on Indigenous Health builds on calls in the AMA's 2006 Indigenous Health Report Card by recommending that governments:
- a. set a national target for closing the gap in the rates of imprisonment of Aboriginal and Torres Strait Islander peoples; and

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<sup>49</sup> Eileen Baldry, et al, 'A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system', UNSW, Sydney, 2015, 9 <[https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a\\_predictable\\_and\\_preventable\\_path\\_2nov15.pdf](https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a_predictable_and_preventable_path_2nov15.pdf)>; Australian Human Rights Commission, 'People with mental health disorders and cognitive impairment in the criminal justice system: cost benefit analysis of early support and diversion', August 2013, 3.

<sup>50</sup> Baldry et al, **above n 50**, 148.

<sup>51</sup> NIDAC, 'Addressing Foetal Alcohol Spectrum Disorder in Australia, Submission to Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities' 2012, 10.

<sup>52</sup> See Australian Medical Association, '2015 AMA Report Card on Indigenous Health - Closing the Gap on Indigenous Imprisonment Rates', November 2015, <<https://ama.com.au/2015-ama-report-card-indigenous-health-closing-gap-indigenous-imprisonment-rates>>.



- b. adopt a justice reinvestment approach to fund services that will divert individuals from prison as a major focus.

59. The Law Council considers that the adoption of justice targets to reduce imprisonment rates of Aboriginal and Torres Strait Islander peoples should be agreed and adopted by the Council of Australian Governments as a matter of priority.

**Recommendations:**

- All governments invest in methods to ensure the detection and treatment of FASD and other disabilities which can potentially lead to adverse outcomes in the criminal justice system, particularly for Indigenous Australians.
- The Council of Australian Governments commit to a national target for 'closing the gap' in the rates of imprisonment of Aboriginal and Torres Strait Islander peoples.

## Legal assistance services funding

60. The Law Council considers that inadequate funding by successive governments for legal assistance services has undermined the capacity of legal assistance providers to meet the legal needs of specific and vulnerable target groups.
61. People with disability, including CPI, are identified by the Legal Australia-Wide (LAW) Survey report<sup>53</sup> experience very high levels of unmet legal need. The LAW survey found that people with a disability had significantly higher prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems across a broad range of legal areas.<sup>54</sup>
62. In light of these findings the Law Council strongly recommends that the Inquiry consider the impact of insufficient funding for legal assistance services on the capacity of people with disability, particularly, CPI to access legal assistance services.
63. The Law Council supports the recommendation by the UNSW report that more resourcing should be provided for Legal Aid and Aboriginal and Torres Strait Islander Legal Services to allow relationship building with a client to establish their background and any indication of mental or cognitive disability.<sup>55</sup>

<sup>53</sup> NSW Law and Justice Foundation, 'Report of the Legal-Australia-Wide Survey', 2012, <<http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>>.

<sup>54</sup> The Legal Australia-Wide (LAW) Survey categorised 'legal problems' into 12 groups as follows: accidents, consumer, credit/debt, crime, employment, family, government, health, housing, money, personal injury and rights.

<sup>55</sup> Eileen Baldry, et al, 'A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system', UNSW, Sydney, 2015, 165 <[https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a\\_predictable\\_and\\_preventable\\_path\\_2nov15.pdf](https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a_predictable_and_preventable_path_2nov15.pdf)>.



Recommendations:

- Law Council recommends that the Inquiry consider the impact of insufficient funding for legal assistance services on the capacity of people with CPI to access legal assistance services.

## Conclusion

64. The Law Council considers there is an urgent need to address factors leading to the indefinite detention of people with CPI across Australia and to end the practice as soon as possible. This submission recommends that the Commonwealth, States and Territories, as appropriate:

- carry out a national audit on the number of people held in indefinite detention;
- implement appropriate screening procedures for people who may have CPI, who come in contact with the criminal justice system;
- establish a working group to collate existing data across jurisdictions and develop resources for national use on the treatment of people with CPI;
- amend the *Crimes Act 1914* (Cth) to provide a test for unfitness to stand trial in the manner recommended by the ALRC but with an express requirement for rational decision-making abilities;
- enact uniform special hearing provisions, similar to those under the *Mental Health (Forensic Provisions) Act 1990* (NSW) in New South Wales across all jurisdictions to ensure consistency in laws governing people with CPI who come into contact with the criminal justice system;
- establish procedures for regular and independent review of the reasonableness and necessity of ongoing detention and ensure all decisions relating to the detention of people with CPI, without charge or conviction, are subject to judicial review across all Australian jurisdictions;
- in circumstances where there is a determination that a person is unfit to stand trial, state and territory laws provide for:
- limits on the period of detention that can be imposed; and
- regular periodic review of detention orders.
- establish a framework for detention and supervision orders to ensure that people transition out of the criminal justice system, in a way consistent with principles of community protection and least restrictive of rights;
- amend the *Crimes Act 1914* (Cth) to provide a test for unfitness to stand trial in the manner recommended by the ALRC, with an express requirement for rational decision-making abilities;
- invest in methods to ensure the detection and treatment of FASD and other disabilities, which can potentially lead to adverse outcomes in the criminal justice system, particularly for Indigenous Australians;

- through the Council of Australian Governments, commit to a national target for 'closing the gap' in the rates of imprisonment of Aboriginal and Torres Strait Islander peoples; and
- inject substantial additional funding for legal assistance services to ensure they are resourced to assist those with disability, particularly, CPI.

65. As illustrated in this submission, the indefinite detention of people with CPI gives rise to a range of complex legal issues that must be addressed to ensure that an appropriate balance is struck between protecting the safety of the community, and safeguarding the rights and needs of persons with CPI, who come in contact with the criminal justice system.

66. The Law Council would be pleased to elaborate on any of the matters raised in this submission and to provide evidence in any further public hearings conducted by the Committee.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.