Chapter 2

Forensic or criminal orders—statistics, legislation and reviews

Introduction

2.1 As noted in Chapter 1, there are two common pathways by which a person with a cognitive or psychiatric condition may find themselves in indefinite detention:

- a forensic or criminal mental health order;[1] or
- a civil route via a scheduled order under mental health, disability or guardianship frameworks (the more common pathway).[2]

2.2 Part A (Chapter 2–6) of this report deals with people subject to forensic orders. This chapter provides background on the forensic pathway and how people end up indefinitely detained in prison; who and how many are being indefinitely detained in prison; and a summary of the relevant legislation and reviews recently conducted on this issue.

How do people end up in indefinite detention

2.3 When a person with a cognitive or psychiatric condition is alleged to have committed a crime, there is provision in all states and territories for that person to declare themselves or be declared 'unfit to stand trial'. People who are deemed unfit to stand trial may become subject to a forensic or criminal order. The court, or mental health review tribunal, will assess that person's risk to themselves or others and the need for ongoing treatment, and will impose forensic orders to detain the person in a prison, hospital, mental health care facility or prison hospital for mental health treatment. In some cases they may be allowed to live in the community in a designated location.[3]

2.4 During the 1990s, most jurisdictions amended laws that allowed for the indefinite detention of people with mental impairment found unfit to plead. Three jurisdictions, South Australia (SA) the Australian Capital Territory (ACT) and the Commonwealth, require the court to set a limiting term for supervision orders, beyond

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1 A forensic or criminal mental health detention order can be placed on an individual alleged to have committed a crime who is deemed 'unfit to plead' or 'unfit to stand trial'.

2 A person may be scheduled or involuntarily detained under a state or territory mental health act for their safety, the safety of others or for recovery purposes. Similar orders can also be given under state and territory disability and guardianship frameworks, and these are more generally for issues around cognitive impairment.

3 Forensic or criminal orders can be issued for those those alleged to have committed a crime and who are found unable to plead or not guilty by reason of mental incapacity ('unfit to plead'). A mental health review board or tribunal oversees forensic or criminal mental health orders in all states and territories except for South Australia.

which the defendant's detention or supervision may not extend. Other jurisdictions have mechanisms for reviewing and potentially revoking supervision orders:

- Victoria (VIC) and the Northern Territory (NT)—court sets a date for a major review of the defendant's situation, where it is presumed (in the absence of evidence to the contrary) that the level of supervision will be reduced;
- Queensland (QLD), Tasmania (TAS) and Western Australia (WA)—provide for periodic reviews by a mental health review board or tribunal, which may result in orders being varied or revoked;
- New South Wales (NSW)—provides that the defendant may only be released when it is considered safe to do so.[4]

2.5 Three jurisdictions (WA, Victoria and NT) still allow, at least nominally, for indefinite detention. Legislation governing the detention of people with cognitive impairment or intellectual disability found unfit to plead has been the subject of recent reviews in WA, Victoria, NSW and SA. These reviews are outlined later in this chapter.

2.6 Part A of this report will focus primarily on the jurisdictions of WA and the NT, where indefinite detention is still provided for under current legislation. Although Victoria still has provision for indefinite detention, it is unlikely to become an issue in this state for two reasons. Firstly, Victoria has forensic disability services where people subject to forensic orders can be placed to receive treatment in a secure environment. The second reason is that Victorian courts have a range of other orders that can be applied when someone is deemed 'unfit to plead'. This chapter will examine a number of each jurisdictions to provide points of comparison.

2.7 Most states provide for a Mental Health Tribunal or equivalent to review forensic orders on a regular basis. The details for each state and territory are outlined later in this chapter.

Statistics

2.8 The committee has received evidence which 'estimates that there are at least 100 people detained across Australia without conviction in prisons and psychiatric units under mental impairment legislation; and that at least 50 people from this group would be Aboriginal and Torres Strait Islanders'.[5] The most up-to-date official statistics for involuntary detention for those held under involuntary forensic orders in prisons and the community are summarised below in Table 2.1.

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4 Sentencing Advisory Council of South Australia, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), November 2014, p. 133, http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia (accessed 11 January 2015).

5 Louis Andrews et al, 'New project to tackle the detention of Aboriginal and Torres Strait Islander people with disabilities', *Croakey Online*, 6 January 2016, http://croakey.org/new-project-to-tackle-the-detention-of-aboriginal-and-torres-strait-islander-people-with-disabilities/ (accessed 8 January 2016).

Table 2.1: Numbers of forensic detention orders issued by jurisdiction and the facility type

		Involuntary forensic or criminal orders			
State	**Year**	**Inpatient**	**Correctional facility**	**Outpatient**	**TOTAL**
NSW	2014–15[6]	269[7]	51	128	448
ACT	2014–15	UKn	1	UKn	UKn
VIC	2014–15	105	UKn	0	105
TAS	2014–15	10	UKn	22	33
SA	2014–15	42	8	383	UKn
WA	2014-15	6	15	19	40
NT	2016	7	13	16	36
QLD	2014–15	781	UKn	0	UKn

Source: NSW Mental Health Review Tribunal, *2014/15 Annual Report*; Tasmanian Mental Health Tribunal, *Annual Report 2014–15*; Victorian Mental Health Tribunal, *2014/15 Annual Report*; Queensland Director of Mental Health, *Annual Report 2014–2015;* South Australian Chief Psychiatrist, *Annual Report 2014-15*; Western Australian Mentally Impaired Accused Review Board (MIARB), *2014/15 Annual Report*; Northern Territory Department of Correctional Services, *Annual Statistics 2013–14*, p. 16; Law Council of Australia, *Submission 72*, pp 6–7; Christopher Knaus, 'Mentally ill man sent to prison because there's "nowhere else for him to go"', *The Canberra Times*, 8 January 2016; Barriers 2 Justice, *Submission 67*; NT Government, *Submission 75*, Appendix A.

2.9 A more in-depth breakdown of these statistics for each state and territory follows.

Northern Territory

2.10 There are 16 people on forensic (custodial supervision) orders in the NT, with 13 of those people held within the Darwin and Alice Springs Corrections Centre. Five of these people reside in the Secure Care Facility in Alice Springs (adjacent to the prison) and one person lives in the cottages (adjacent to the Darwin Correctional Precinct. Both the Cottages and the SCF are operated by the NT Department of Health (Office of Disability).[8]

6 More up-to-date statics are provided by the NSW Government which indicate that there are 412 forensic prisoners in total. However, this data does not provide a breakdown of outpatients.

7 This includes 51 involuntary orders for people receiving treatment in a hospital on the campus of a correctional facility.

8 NT Government, *Submission 75*, Appendix A.

2.11 The NT Government has recently opened (September 2015) the new Darwin Correctional Precinct (DCP) which includes a 36-bed secure Complex Behaviour Unit (CBU).[9]Although this facility is housed in a corrections environment (different to the WA Bennett Brook Centre), and is operated by the NT Correctional Services.

2.12 All of these facilities will be discussed in more detail later in the report.

Western Australia

2.13 In WA, the Mentally Impaired Accused Review Board (MIARB) is charged with reviewing and making orders for people found 'unfit to plead'.[10] As of 30 June 2015, there were 40 people who are held on 'custody orders' under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). The numbers of mentally impaired accused has increased since 2010–2011 (32–40 people), with numbers of those being held in prison fluctuating up and down during this period (15–18 people). The numbers of those on conditional release in the community has also increased during this period (8–22 people).[11] Table 2.5 provides a breakdown of the places of custody where these people are held.

Table 2.2: Place of custody as at 30 June 2015 for mentally impaired accused in Western Australia

Authorised Hospital	Prison	Juvenile Detention Centre	Declared Place	Not in Custody
6	15	0	0	19
15%	37.5%	0	0	47.5%

Source: MIARB, *2014/15 Annual Report*, p. 23.

2.14 The Bennett Brook Disability Justice Centre (DJC)—WA's first 'declared place'—was opened in 2015 with beds for 10 people 'accused but not convicted of a

9 See: http://www.nt.gov.au/infrastructure/projects/dcp/index.shtml . This facility accommodates male and female offenders with mental health issues; people who have been found unfit to plead or are not guilty of an indictable offence due to mental impairment; offenders placed on a custodial supervision order or prisoners with severe disabilities. A range of security, treatment, life skills, rehabilitation and recreational options which are tailored to individual needs and promoting realistic expectations of successful reintegration into the community are available. The facility provides a range of low, medium and high dependency male and female accommodation, as well as 'step down' cottage accommodation.

10 WA Mentally Impaired Accused Review Board (MIARB), *Mentally Impaired Accused Review Board: About us*, http://www.miarb.wa.gov.au/A/about_us.aspx?uid=3762-9988-8324-2583 (accessed 3 November 2016).

11 MIARB, *2014/15 Annual Report*, pp 27–28, http://www.miarb.wa.gov.au/_files/MIARB_Annual_Report_2014_15.pdf (accessed 11 December 2015).

crime and have been deemed by a court as unfit to plead because of their disability'.[12] The DJC will be discussed in more detail later in the report.

New South Wales

2.15 The NSW Mental Health Review Tribunal (MHRT) reviews all forensic patients 'usually every six months'.[13]

2.16 As of March 2016, there were 412 forensic patients in NSW. Of these, 235 are held in a medium security facility or in the community; 106 are held in a forensic hospital; and 71 are held in a correctional facility. Eighteen of this group are on limited terms for up to 5 years. Only the Supreme Court of NSW can extend a limited term if it is 'satisfied that a person poses an unacceptable risk of serious harm to others, and that risk cannot be adequately managed by less restrictive means'.[14]

2.17 In NSW, there were 448 forensic or correctional patients on 30 June 2015. These numbers have steadily increased since 1996. Of these, 218 are living in a hospital or mental health care facility; 128 people in the community; 51 in a correctional facility; and 51 in a prison hospital on the campus of a correctional facility in a secure environment with other prisoners. In comparison, this is an increase from 30 June 2014 when 32 people were held as forensic or correctional patients in correctional facilities. Of the 51 people held in a correctional facility, 36 were housed at the Metropolitan Remand and Reception Centre which houses prisoners on a temporary basis (that is, up to a few months) until an alternate location is found.[15]

Tasmania

2.18 The Tasmanian Mental Health Tribunal (TMHT) may make, vary, renew or review an 'involuntary' treatment order under the *Mental Health Act 2013* (Tas). In the 2014–15 period, the TMHT reviewed 11 forensic restriction orders and found that in all cases that the person should not be detained in a secure mental health facility. The TMHT also reviewed 21 supervision orders and found that in 10 of these cases, supervision in the community was required. There were no reviews conducted on transfers from a prison to a secure mental health facility. It is not clear whether each of these cases were different people or individuals being reviewed multiple times.

2.19 It is also not clear whether there are any Tasmanians held on forensic orders in prisons. It should also be noted that as the TMHT must review all restriction and

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12 WA Disability Services Commission, *Bennett Brook Disability Justice Centre: Questions and Answers*.

13 NSW Mental Health Review Tribunal, http://www.mhrt.nsw.gov.au/forensic-patients/forensic-procedures.html and http://www.mhrt.nsw.gov.au/the-tribunal/

14 NSW Government, *Submission 66*, pp 2–3.

15 NSW Mental Health Review Tribunal, *2014/15 Annual Report*, p. 43, http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/MHRT%20Annual%20Report%202015.pdf (accessed 11 December 2015).

supervision orders every 12 months, this would also indicate that there are no Tasmanians held in secure mental health facilities under forensic orders.[16]

Victoria

2.20 The Victorian Mental Health Tribunal (VMHT) reviews all 'involuntary' mental health patients.

2.21 In Victoria, a 'security patient is a patient who is subject to either a Court Secure Treatment Order or a Secure Treatment Order'. The VMHT is required to review these patients within 28 days of a patient entering a designated secure mental health service and thereafter every six months. A security patient cannot be held under an order longer than the term of their imprisonment would have been had the order not been made. If the VMHT determines that a patient should not be a security patient, 'they are returned to prison custody for the duration of their term'.[17]

2.22 In 2014–15, the VMHT 'made 105 determinations in relation to security patients'. In 101 of these cases, the VMHT determined that person should remain a security patient.[18]

Queensland

2.23 The QLD Mental Health Tribunal (QMHT) reviews Forensic Orders within 6 months of the orders being made by the Mental Health Court.[19] In 2014–15, the QMHT confirmed most Forensic Orders with the majority being confirmed with limited community treatment (1396) and confirmed (40). A small minority of cases were revoked (77). A flowchart describing 'entry into the Forensic Mental health system' for QLD can be found below in Figure 2.1.[20]

16 Tasmanian Mental Health Tribunal, *Annual Report 2014–15*, pp 10–11 and 16–17.

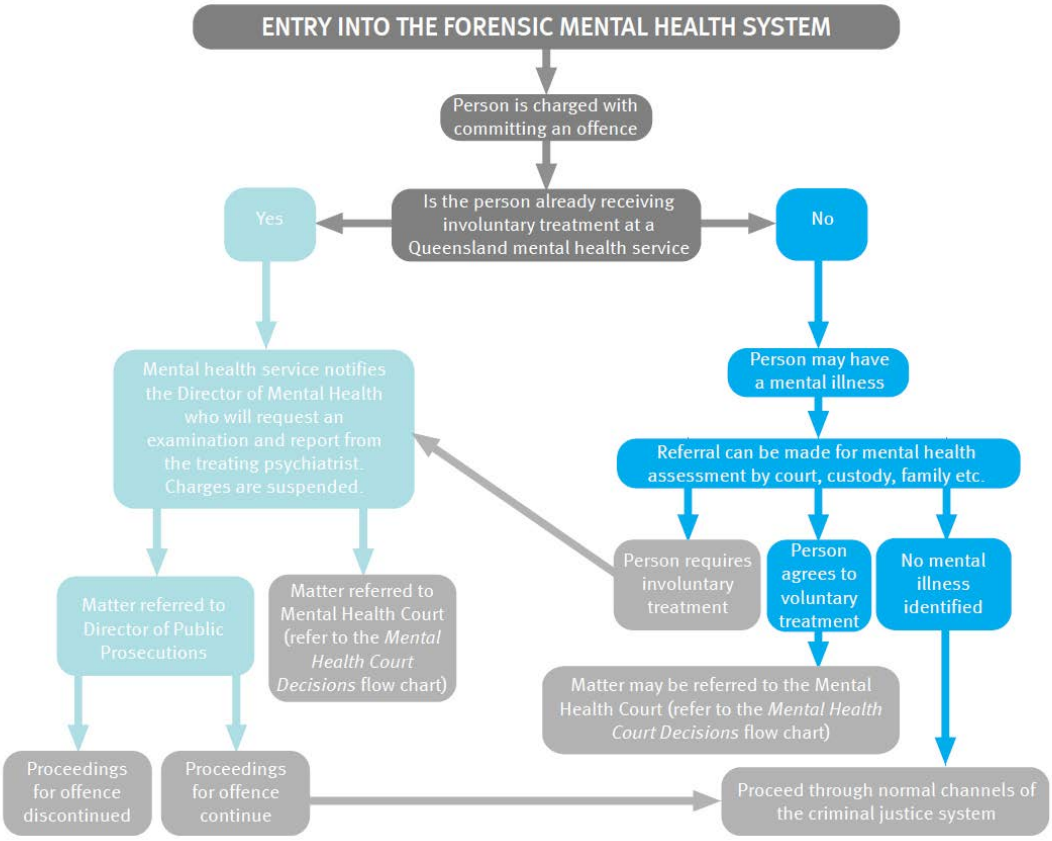
17 Victorian Mental Health Tribunal, *2014/15 Annual Report*, p. 9.

18 Victorian Mental Health Tribunal, *2014/15 Annual Report*, p. 23.

19 The Mental Health Court's 'role is to decide whether or not the person facing court was of unsound mind at the time of the alleged offence, and also whether or not the person is fit to plead'. This is a unique institution with a unique role that is only seen in Queensland.

20 Queensland Mental Health Tribunal, *Annual Report 2014–15*, pp 10, 19–20. Queensland is the only state to have a dedicated Mental Health Court. See also: https://www.health.qld.gov.au/forensicmentalhealth/media/default.asp

Figure 2.1: Entry into the Queensland Forensic Mental Health System



Source: Queensland Department of Health, 'Entry into the Forensic Mental Health System.

2.24 There were 781 patients with Forensic Orders (increased from 741) in QLD in 2014–15 with 132 new Forensic Orders being made. A special sub-category of Forensic Orders called the special notification forensic patient (SNFP) was created in 2008 to capture patients charged with serious crimes such as 'unlawful homicide, attempted murder, dangerous operation of a motor vehicle involving the death of another person, rape or assault with the intent to commit rape'. There were 139 SNFP in 2014–15.[21] In addition to forensic patients, there were an additional 43 classified patients who were transferred involuntarily from court, remand centre or correctional facility for treatment in a secure mental health facility. It is not clear whether any of the Forensic Order patients in QLD are currently being detained in prison.

2.25 The committee received evidence in Brisbane from Mr Joseph Briggs QC which highlighted the practice of defendants of unsound mind being encouraged to plead guilty as a means to avoid indefinite detention. In one example, a defendant was sentenced to over 15 years, despite being a likely forensic patient.[22] This practice will be discussed further in Chapter 3.

21 Queensland Director of Mental Health, *Annual Report 2014–2015*, pp 27–28.

22 Mr Joseph Briggs, Barrister, Designated Counsel to the Queensland Mental Health Court, Legal Aid Queensland, *Committee Hansard*, Brisbane, 23 March 2016, p. 3.

South Australia

2.26 The South Australian Civil and Administrative Tribunal (SACAT) has the power to review and make certain orders relating to the involuntary treatment and detention of people with mental illness.[23]

2.27 According to SACAT, of those on forensic or criminal mental health orders, 383 were receiving care in the community whilst 42 were detained and receiving treatment as an inpatient.[24] Eight people on forensic orders were being held in prison as of July 2015.[25]

Australian Capital Territory

2.28 Although there are no formal statistics, there is anecdotal evidence of at least one person being held in an ACT prison on a court order.[26]

A comment on official statistics

2.29 The committee notes that official statistics on the issue of indefinite detention are largely piecemeal and inconsistent between the states. It is often difficult to drill down into data sets due to insufficient detail. In some cases, no statistics are publicly available at all. As there is no one-stop shop for statistics in this area this chapter has used statistics from two sources—the Australian Institute of Health and Welfare (AIHW) and each of the states' and territories' mental health review board or tribunal. The numbers are not exactly the same—close but not exact—as they sometimes cover different periods of time and sometimes include or exclude certain types of data. State and territory corrections departments do not maintain a public register of the numbers of people being held on a forensic or criminal mental health order.

2.30 The Law Council of Australia (Law Council) reiterated the NT Ombudsman's comments from 2008 where it was noted 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'.[27]

2.31 At a recent meeting, the Council of Australian Governments (COAG) Law, Crime and Community Safety Council (LCCSC) acknowledged the lack of consistent statistics in this area and agreed to:

> establish a working group to collate existing data across jurisdictions and develop resources for national use on the treatment of people with cognitive

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23 SACAT, *Mental health*, http://www.sacat.sa.gov.au/types-of-cases/mental-health (accessed 16 January 2016).

24 South Australian Chief Psychiatrist, *Annual Report 2014-15*, pp 16, 19.

25 Barriers 2 Justice, *Submission 67*, p. 2.

26 Christopher Knaus, 'Mentally ill man sent to prison because there's "nowhere else for him to go"', *The Canberra Times*, 8 January 2016, http://www.canberratimes.com.au/act-news/mentally-ill-man-sent-to-prison-because-theres-nowhere-else-for-him-to-go-20160108-gm1rvs.html (accessed 11 January 2016).

27 Law Council of Australia (Law Council), *Submission 72*, p. 6.

disability or mental impairment unfit to plead or found not guilty by reason of mental impairment.[28]

2.32 In correspondence to the committee, the Attorney-General's Department (AGD) noted that 'existing gaps, or unavailability of data have made it challenging to assess the current situation in Australia regarding the experience of people with cognitive disability or mental health impairment in the criminal justice system to date'. The AGD also noted that the working group has drafted a 'National Statement of Principles Relating to Persons Unfit to Plead or Found Not Guilty by Reason of Cognitive or Mental Health Impairment' (National Principles). A draft of the National Principles has been provided to the LCCSC in October 2016. The LCCSC will further consider the data collection project and whether to endorse the National Principles at its first meeting in 2017.[29]

2.33 The committee notes this preliminary move by COAG as the first steps to better understanding and reducing the prevalence of indefinite detention of people with a cognitive or psychiatric impairment in Australia.

Who are the people indefinitely detained?

2.34 The majority of people who are indefinitely detained on forensic orders predominantly share the following characteristics:

- they are predominantly Aboriginal and Torres Strait Islander persons;
- they have been prescribed the forensic order in WA and NT; and
- they have a cognitive impairment or cultural communication barrier or hearing loss.

2.35 Aboriginal and Torres Strait Islander peoples are currently held indefinitely in prison on forensic orders (and in prison more generally) at a disproportionately higher rate than their non-indigenous counterparts. In WA, Aboriginal and Torres Strait Islander peoples comprise 34 per cent of people subject to forensic orders, despite making up less than 4 per cent of the total population.[30]

2.36 Further evidence suggests that as many as 50 per cent of the people currently detained indefinitely without charge in prison are Aboriginal and Torres Strait Islander peoples.[31] As noted earlier in this chapter, currently there is a lack of data on

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28 COAG Law, Crime and Community Safety Council, 'Draft Communique', 5 November 2015, p. [3].

29 Additional Information, Civil Law Unit, Attorney-General's Department, received 8 November 2016.

30 Western Australian Mentally Impaired Accused Review Board (MIARB), *2014/15 Annual Report*, p. 20. See: ABS 3238.0.55.001, *Estimates of Aboriginal and Torres Strait islander Australians*.

31 Louis Andrews et al, 'New project to tackle the detention of Aboriginal and Torres Strait Islander people with disabilities', *Croakey Online*, 6 January 2016, http://croakey.org/new-project-to-tackle-the-detention-of-aboriginal-and-torres-strait-islander-people-with-disabilities/ (accessed 8 January 2016).

the prevalence of indefinite detention in Australia. In its submission to the committee, the Law Council highlighted that Aboriginal and Torres Strait Islander peoples with mental and cognitive disabilities are forced into the criminal justice system early in life in the absence of alternative pathways'.[32]

2.37 Later chapters will examine in more detail the challenges that Aboriginal and Torres Strait Islander peoples face.

Cognitive impairments

2.38 As noted in Chapter 1, cognitive impairment is a broad descriptor for a wide range of conditions that can result in profound limitations in undertaking core daily living activities such as self-care, mobility and communication. Cognitive impairments are permanent conditions which can be acquired as a result of traumatic brain injury or through substance abuse (Foetal Alcohol Spectrum Disorders (FASD)), or can be genetic conditions that people are born with such as downs syndrome. As also noted in Chapter 1, cognitive impairments do not improve as such; however, behaviour can be improved through the use of behavioural management plans and supports.

2.39 The Law Council identifies FASD as a cognitive disorder that is more prevalent in Aboriginal and Torres Strait Islander communities, especially in the Northern Territory and Western Australia. Aboriginal and Torres Strait Islander peoples disproportionately experience two types of cognitive impairment: FASD; and hearing loss and communication barriers.[33]

Foetal Alcohol Spectrum Disorders

2.40 FASD is 'an umbrella term used to describe a range of physical and cognitive, behavioural and neurodevelopmental abnormalities that result from exposure to alcohol in utero'.[34] In its submission, the Australian Medical Association (AMA) notes that:

> The symptoms and behaviours relating to FASD increase the likelihood that impacted individuals will come into contact with the criminal justice system (particularly those that are undiagnosed). This includes, but is not limited to: low impulse control, inappropriate reactions to loud and or frightening noises, inappropriate sexual behaviour and being easily convinced to engage in criminal activities.[35]

2.41 People with FASD 'are more vulnerable to suggestion than other young people, will struggle to learn from the consequences of their actions, and are more

32 Law Council, *Submission 72*, p. 14.

33 Law Council, *Submission 72*, p. 14.

34 Australian Medical Association, *Submission 12*, p. 5.

35 AMA, *Submission 12*, p. 5.

inclined to confess to things they haven't done without awareness of the consequences'.[36]

2.42 FASD is not easily identifiable and, in many cases, remains undiagnosed. The Telethon Kids Institute notes in its submission that an Australian FASD diagnostic instrument—which they developed, under contract to the Department of Health—did not exist until mid-2016. As a consequence, FASD has been misunderstood and under-diagnosed in Australia.[37]

2.43 People with FASD are often unaware that they have broken the law or not complied with a court order such as paying fines resulting in ongoing interactions with the criminal justice system.[38] Non-compliance with administrative requirements of the court such as the non-payment of a fine as a result of poor cognitive functioning can lead to imprisonment.

2.44 High rates of FASD and poor cognitive functioning flow into the high prevalence of people with FASD in court, with the Chief Justice of WA acknowledging that FASD:

> is an increasing problem in our courts. It is one of those conditions that are almost certainly chronically underdiagnosed … It is a condition that is inherently likely to put them in conflict with the justice system.[39]

2.45 There are a range of concerning statistics relating to those with FASD including that:

- juveniles with FASD are 19 times more likely to be incarcerated;
- prisoners with FASD are far more likely to be recidivist;
- 60 per cent of the people with FASD over the age of 12 have criminal histories; and
- prisoners with FASD are prone to exploitation, higher rates of victimisation, are highly vulnerable to sexual abuse by other prisoners and tend to repeat those behaviours in the community following their release from prison.[40]

2.46 People with FASD engaging with the criminal justice system are likely to travel down one of two pathways:

- They remain undiagnosed and are assumed by the court to have normal cognitive functioning. They participate in court proceedings on that basis with no additional support. If convicted, they are incarcerated.

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36 Amnesty International Australia, *Submission 38*, p. 3.

37 Telethon Kids Institute, *Submission 45*, p. 3.

38 AMA, *Submission 12*, p. 5.

39 Amnesty International Australia, *Submission 38*, p. 2. In the mainly Aboriginal and Torres Strait Islander community of Fitzroy Crossing in northern WA, 12 per cent of children have been diagnosed with FASD.

40 Disability Rights Advocacy Service, *Submission 37*, p. 2.

- They are diagnosed with FASD, are found to be unfit to be tried and are indefinitely detained.[41]

2.47 In both cases, an individual with a serious cognitive impairment is imprisoned, usually not appropriately supported and likely to interact significantly with the criminal justice system for the rest of their life.

2.48 Mr Peter Collins, of the Aboriginal Legal Service of WA agreed noting that nearly all Aboriginal and Torres Strait Islander peoples alleged offenders have undiagnosed cognitive and/or psychiatric impairments.

> In my estimation, 95 per cent of Aboriginal people charged with criminal offences appearing before the courts have either an intellectual disability, a cognitive impairment or a mental illness. The overwhelming majority of those are undiagnosed and, therefore, untreated. If they go to jail it is almost impossible to conceive of them being diagnosed in jail; therefore, they are untreated. If you receive a community-type sanction, if you are from a regional or remote area, you will go to a place where you do not receive any meaningful interventions to deal with your problem.[42]

Hearing loss and communication barriers

2.49 Nearly 12 per cent of Aboriginal and Torres Strait Islander people have a disease of the ear with at least 7 per cent reporting some form of hearing loss. This equates to nearly double the rate of the non-indigenous population.[43]

2.50 People with hearing loss face many challenges when communicating with the dominant verbal form of English, especially if a person is not competent in signing. As Ms Jodi Barney, a certified Aboriginal Disability Cultural Safety Trainer, noted in her evidence, access to signing training and cultural differences may play a large factor in a person's capacity to communicate.

> It takes a long time to sit with a client to find out how they communicate. For example, they may be on Larrakia country but they might come from Kalkarindji or Maningrida. So I need to find exactly what signing systems they are using, where they are in their development and then work with the hearing members of that community to ensure that they follow a process. Often when we see Aboriginal men and women who are incarcerated with a high prevalence of hearing loss or deafness they are deemed unfit to plea because they have no communication strategy or no communication at all.[44]

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41 Professor Harry Blagg et al., *Submission 8*, p. [13]. In Western Australia, diagnosis with FASD triggers indefinite detention in a prison or a declared place under the CLMIA Act 1996. Such a person cannot be taken to a secure mental health unit unless they have a treatable mental illness.

42 Mr Peter Collins, Director, Legal Services, Aboriginal Legal Service of WA, *Committee Hansard*, Perth, 19 September 2016, p. 16.

43 ABS 4727.0.55.001—Australian Aboriginal and Torres Strait Islander Health Survey: 2012–13, November 2013.

44 Ms Jodi Barney, Deaf Indigenous Community Consultancy, *Committee Hansard*, Melbourne, 29 April 2016, p. 49.

2.51 Hearing loss, in itself, can present many challenges for a person when communicating with others. These challenges are significantly larger when hearing loss is combined with an intellectual disability and/or cultural differences.[45]

2.52 The North Australian Aboriginal Justice Agency (NAAJA) has noted its concern 'about the lack of culturally appropriate responses by service providers working with Aboriginal people with cognitive and psychiatric impairment', highlighting the lack of 'NT Indigenous-specific cognitive tests; or culturally relevant materials for psycho-education'.[46] Culturally appropriate responses will be discussed further in Chapter 5.

General prison population—observations on cognitive and psychiatric impairment and the use of mandatory sentencing

2.53 This report will focus primarily on people with cognitive and psychiatric impairment who are held indefinitely in prison, however, the committee will highlight two observations about the general prison population—the rates of cognitive and psychiatric impairment in the general prison population and the use of mandatory sentencing.

Cognitive and psychiatric impairment in the general prison population

2.54 The overwhelming majority of prisoners with cognitive and psychiatric impairments are detained as the result of being found guilty of an offence with a custodial sentence imposed. This section will identify trends that will provide a broader context to this inquiry.

2.55 There are high rates of cognitive and psychiatric impairment in the general prison population. In its submission to the committee, the NSW Mental Health Commission noted that 'three quarters of NSW prisoners have been told they have a mental illness at some point in their lives'.[47] The Australian Lawyers Alliance made the following observation:

> Estimates of the proportion of individuals in prisons with cognitive impairment or intellectual disabilities ranging from 8 to 20 per cent in New South Wales, to a national figure of 12 per cent of prisoners having an intellectual disability (IQ less than 70) and a further 30 per cent having a borderline intellectual disability (IQ 70–80).[48]

2.56 In addition to the previous statistics, the Australian Institute of Health and Welfare indicated that 38–50 per cent of prisoners may have an acquired brain injury compared to 9–17 per cent in the general population.[49]

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45 See: Chatter Matters Tasmania, *Submission 54*, p. [4].

46 The North Australian Aboriginal Justice Agency (NAAJA), *Submission 60*, p. 10.

47 NSW Mental Health Commission, *Submission 21*, p. 4.

48 Australian Lawyers Alliance, *Submission 33*, p. [5].

49 Australian Lawyers Alliance, *Submission 33*, pp [5–6].

2.57 Mr Peter Collins of the Aboriginal Legal Service of Western Australia estimated that '95 per cent of Aboriginal people charged with criminal offences appearing before the courts have either an intellectual disability, a cognitive impairment or a mental illness'.[50] There is a disproportionate representation of Aboriginal and Torres Strait Islander peoples in the general prison population. Aboriginal and Torres Strait Islander peoples make up 27 per cent of prisoners yet comprise only 2 per cent of the total Australian population. In addition, there has been a '95% increase in the rate of Aboriginal and Torres Strait Islander peoples imprisonment rates between 2004–2015, while the non-indigenous rate rose by 27% over the same period.[51] Compounding these numbers is that Aboriginal and Torres Strait Islander peoples are 1.7 times more likely to live with a disability than the general Australian population. FASD is discussed earlier in this chapter and has a special significance to Aboriginal and Torres Strait Islander peoples.[52]

2.58 One of the concerns raised in evidence to the committee is the lack of access to mental health and other therapeutic services and supports for people with a cognitive or psychiatric impairment in prison.[53] Queensland Advocacy Incorporated noted the determinants that drive these trends:

> People with intellectual and psychiatric impairments are in watch houses, courts, remand centres, jails and forensic facilities because they are disadvantaged in myriad ways…vulnerability, disempowerment and marginalisation—which translate into unemployment, homelessness, poverty and social isolation—are strongly linked to crime for people with an intellectual, cognitive and psychiatric impairment.[54]

Mandatory sentencing

2.59 One of the impediments to the diversion of mentally and cognitively impaired people from the justice system is the requirement for courts to impose mandatory sentencing for certain offences under certain circumstances. In most Australian jurisdictions, mandatory sentencing requirements exist for people convicted of certain serious and/or violent crimes. For example, in WA, a person must receive a mandatory sentence for 'repeat adult and juvenile offences convicted of residential burglary, grievous bodily harm or serious harm to a police officer'. In the NT, a similar requirement exists for 'murder, rape and offences involving violence'.[55]

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50 Mr Peter Collins, Director, Legal Services, Aboriginal Legal Service of Western Australia, *Committee Hansard*, Perth, 19 September 2016, p.16.

51 National Aboriginal and Torres Strait Islander Legal Services, *Submission 34*, p. 8. See also: NSW Mental Health Commission, *Submission 21*, pp 4–5; Australian Lawyers Alliance, *Submission 33*, p. [6].

52 National Aboriginal and Torres Strait Islander Legal Services, *Submission 34*, pp 6–7.

53 NSW Mental Health Commission, *Submission 21*, p. 4.

54 Queensland Advocacy Incorporated, *Submission 7*, p.6.

55 Law Council, *The mandatory sentencing debate*, http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate (accessed 2 June 2016).

2.60 This inquiry is not going to examine the broader deficiencies inherent in mandatory sentencing provisions for violent and serious crime; however, the committee is concerned about the mandatory sentencing framework in Western Australia which imposes custodial sentences for adult and juvenile offenders convicted of non-violent offences including residential burglary. There have been a number of prominent instances in recent years where the sentence imposed has not been proportionate to the crime committed, which included:

- a 16 year old with one prior conviction received a 28 day prison sentence for stealing 1 bottle of spring water;
- a 17 year old first time offender received a 14 day prison sentence for stealing orange juice and "Minties";
- a 15 year old Aboriginal boy received a 20 day mandatory sentence for stealing pencils and stationery worth less than $100. He died while in custody; and
- an Aboriginal woman and first time offender who received a 14 day prison sentence for stealing a can of beer.[56]

2.61 Mr Shane Duffy, Chief Executive Officer of the Aboriginal and Torres Strait Islander Legal Service (ATSILS) told the committee that mandatory sentencing deprives the courts of discretion and the 'ability to take into account a person's disability when determining an appropriate sentence'.[57] The Western Australian Association for Mental Health noted that mandatory imprisonment of people with mental health issues deprives them of access to the more appropriate option of 'contemporary mental health treatment and support'.[58] Further:

> As a period of imprisonment imposed under minimum mandatory sentencing laws will usually be relatively short, prisoners are unlikely to receive the supports or the accommodations they need in prison and will be separated from the supports and accommodations that they might receive in the community.[59]

2.62 The other significant impact that mandatory sentencing has on a person is that it provides a gateway to a life spent in and out of prison. Once a person has entered prison, it is highly likely that they will continue to spend periods of time in prison for the rest of their life.[60] Research collated by the Australian Institute of Criminology found that 'a strong relationship existed between "sterner punishments and higher levels of re-offending"' and that 'even a relatively short term in custody on remand was found to significantly increase subsequent offending (64.3 per cent) compared to

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56 Law Council, *The mandatory sentencing debate*.

57 Mr Shane Duffy, CEO, ATSILS, *Committee Hansard*, Brisbane, 23 March 2016, p. 42.

58 Western Australian Association for Mental Health, *Submission 27*, p. 13.

59 Mr Shane Duffy, CEO, ATSILS, *Committee Hansard*, Brisbane, 23 March 2016, p. 42.

60 Australian Bureau of Statistics, ABS 4517.0, *Prisoners in Australia 2014*. Nearly 60 per cent of prisoners are repeat offenders.

being placed on remand at home at home (36.6 per cent)'. Life in prison plays a significant role in criminal socialisation and normalisation that leads to higher rates of re-offending and incarceration.[61]

2.63 A review of the Western Australian *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) was recently conducted. In its response to this review, the WA Government acknowledged the concern raised by most submitters that mandatory sentencing (custody) orders may be viewed as potentially unfair to an accused. However, the government was reluctant to make any changes to these requirements due to the 'paramount consideration of community safety'.[62]

2.64 Members of the roundtable held during the Melbourne public hearing for this inquiry agreed that the repeal of mandatory sentencing should be a priority for the Western Australian government.[63] In its 2015–16 Annual Report, the Mental Health Advocacy Service has highlighted mandatory sentencing as an ongoing systemic problem, recommending that:

> An amendment to the mandatory sentencing laws to exclude people who were mentally unwell at the time of their alleged offence is needed. This law remains unchanged.[64]

Relevant legislation and reviews

2.65 The next section will outline the regulatory and legal framework relevant to this inquiry, including the Commonwealth's international obligations under the United Nations *Convention on the Rights of Persons with Disabilities* (Disability Convention). As a signatory to the Disability Convention, the Commonwealth is responsible to ensure that the treatment of people with disability in Australia is compatible with the provisions of the Convention. This section will also highlight a number of recent reviews and rulings that have been conducted or made at a national and state/territory level; and the legislative changes that have resulted or have been recommended to result from these reviews.

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61 Mark Lynch, Julieanne Buckman, Leigh Krenske, *Youth Justice: Criminal Trajectories*, Australian Institute of Criminology, September 2003, No. 265, p. 2, http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi265.pdf (accessed 2 June 2016).

62 Western Australian Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996: Final Report*, April 2016, pp 11–12.

63 Dr Glenn Jessop (Policy Manager, Jesuit Social Services) & Dr John Chesterman (Director of Strategy, Victorian Office of the Public Advocate), *Committee Hansard*, Melbourne, 29 April 2016, pp 3 & 6. Also, see: Ms Carly Warner, EO, NATSILS, *Committee Hansard*, Melbourne, 29 April 2016, p. 12.

64 WA Mental Health Advisory Service, *2015–16 Annual Report*, p. 75.

International obligations

United Nations—International Covenant on Civil and Political Rights and Convention on the Rights of Persons with Disabilities

2.66 The right to liberty and security is a fundamental human right. Under Article 9 of the United Nations (UN) *International Covenant on Civil and Political Rights*:

> Everyone has the right to liberty and security of person. 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.[65]

2.67 Furthermore, under Article 15, 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence'.[66]

2.68 Under Article 14 of the UN Disability Convention, Australia is obliged to ensure that people with disabilities, on an equal basis with others:

> (a) Enjoy the right to liberty and security of person;
>
> (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.[67]

Commonwealth responsibility for disability standards

2.69 As a signatory to the Disability Convention, the Commonwealth has a responsibility to ensure that it uphold the rights of people with disability according to the Disability Convention. The Aboriginal Disability Justice Campaign (ADJC) noted that it has been working with a number of people with disability subject to indefinite detention to lodge complaints with the UN Disability Committee.

> [W]e have been lodging complaints with the Australian Human Rights Commission and with the United Nations regarding breaches of various conventions that are occurring. The Commonwealth is the respondent to those actions because it is the signatory to the conventions. We hope that might provide some incentive to the Commonwealth to start thinking more in national terms and frameworks, and perhaps in supportive legislation and so forth.[68]

2.70 The committee is aware of a number of pending cases before the UN Disability Committee that relate to people with disability subject to indefinite

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65 *International Covenant on Civil and Political Rights*, Article 9, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed 15 December 2015).

66 *International Covenant on Civil and Political Rights*, Article 15.

67 *United Nations Convention on the Rights of Persons with Disabilities*, Article 16, http://www.un.org/disabilities/convention/conventionfull.shtml (accessed 21 August 2015).

68 Mr Ian McKinlay, Spokesperson, Aboriginal Disability Justice Campaign, *Committee Hansard*, Melbourne, 29 April 2016, p. 14.

detention.[69] A recent ruling by the Disability Committee on Mr Marlon Noble is described later in this chapter.

2.71 In its submission, the ADJC noted that the NT's 'legislative or executive power can be affected by inconsistent Commonwealth regulation'. ADJC goes further noting:

> It is very readily apparent that the [NT] needs support and assistance to address the human rights issues identified in this [submission]. If the [NT] cannot adequately address the human rights issues identified in this [submission] and the communications incorporated in it, then the Commonwealth should intervene directly to ensure that the human rights issues are addressed consistent with domestic and international law.[70]

Report on Australia—United Nations Committee on the Rights of Persons with Disability

2.72 In its concluding observations on Australia's first report on the Disability Convention (October 2013), the UN Committee on the Rights of Persons with Disabilities (UN Disability Committee) expressed particular concern that:

> …persons with disabilities, who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that can significantly exceed the maximum period of custodial sentence for the offence. It is equally concerned that persons with disabilities are over-represented in both the prison and juvenile justice systems, in particular women, children and Aboriginal and Torres Strait Islander peoples with disability.[71]

2.73 The UN Disability Committee recommended that Australia, 'as a matter of urgency':

> (c) Ends the unwarranted use of prisons for the management of un-convicted persons with disabilities, with a focus on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention;
>
> (d) Establishes mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate supports and accommodation;
>
> (e) Reviews its laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, and repeal

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69 See: http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Tablependingcases.aspx

70 Aboriginal Disability Justice Campaign, *Submission 76*, pp 4–5.

71 United Nations Committee on the Rights of Persons with Disabilities (UN Disability Committee), *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, 4 October 2013, p. 5. See: Attorney-General's Department, Convention on the rights of persons with disabilities, http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/UnitedNationsConventionontherightsofpersonswithdisabilities.aspx (accessed 24 September 2016).

> provisions that authorize involuntary internment linked to an apparent or diagnosed disability.[72]

2.74 The UN Disability Committee expressed further concern that 'a person can be subjected to medical interventions against his or her will, if the person is deemed to be incapable of making or communicating a decision about treatment' and recommended that Australia:

> …repeal all legislation that authorises medical interventions without free and informed consent of the persons with disabilities concerned, and legal provisions that authorize commitment of individuals to detention in mental health services, or the imposition of compulsory treatment either in institutions or in the community via Community Treatment Orders (CTOs).[73]

2.75 The 2012 *Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (Civil Society Report), prepared by Australian disability support organisations, argued that the detention in prison of people with disability found not guilty or unfit to plead, especially those with cognitive impairment, is due to 'the lack of alternative and appropriate accommodation and support options' and is most prevalent in QLD, WA and the NT among Aboriginal and Torres Strait Islander communities.[74] The Civil Society Report recommended:

> That Australia ensures that legislative, administrative and policy frameworks that deprive people with disability of their liberty and impact on their security are fully consistent with the CRPD.
>
> That Australia, as a matter of urgency, ends the unwarranted use of prisons for the management of unconvicted people with disability, with a focus on Aboriginal and Torres Strait Islander people with disability, by establishing legislative, administrative and support frameworks that comply with the CRPD.
>
> That Australia establishes mandatory guidelines and practice to ensure that people with disability who are deprived of their liberty in the criminal justice system are provided with appropriate supports and accommodation.
>
> That Australia amends legislation in relation to crime to include the specific (statutory) offence of deprivation of liberty.[75]

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72 UN Disability Committee, *Concluding observations*, p. 5.

73 UN Disability Committee, *Concluding observations*, p. 5.

74 Disability Representative, Advocacy, Legal and Human Rights Organisations (DRALHRO), *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, pp 85–86, http://www.pwd.org.au/issues/crpd-civil-society-shadow-report-group.html (accessed 24 September 2015).

75 DRALHRO, *Disability Rights Now*, p. 89.

Ruling on Mr Marlon Noble's case—United Nations Committee on the Rights of Persons with Disabilities

2.76 In January 2012, Mr Marlon Noble, an Aboriginal man from Western Australia was released from prison with strict bail conditions—including regular drug testing and overnight home detention—after nearly a decade behind bars. During and since that time, Mr Noble has not had the opportunity to legally challenge the allegations against him. Mr Noble submitted his case to the UN Disability Committee for its consideration. In September 2016, the committee made a ruling on this case, and noted that:

> throughout Mr. Noble's detention, "the whole judicial procedure focused on his mental capacity to stand trial without giving him any possibility to plead not guilty and test the evidence submitted against him."
>
> "He therefore never had the opportunity to have the criminal charges against him determined and his status as an alleged sexual offender cleared," the Committee members found, highlighting that the charges were never proven. In addition, the authorities did not provide adequate support to enable him to stand trial and plead not guilty.[76]

2.77 The UN Disability Committee has called on all Australian governments to work together to 'provide Mr Noble with an effective remedy and immediately revoke the 10 conditions of his release'. The committee also noted that 'Australia is obliged to take measures to prevent similar violations' through amending state and territory legislation, in particular, the Western Australian *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

2.78 Correspondence to the committee from the Attorney-General's Department notes that the department is working closely with the WA Government in preparing a response; however, the department did not indicate how it would respond.[77]

Reviews of forensic and criminal mental health legislation

2.79 During the 1990s, most jurisdictions amended laws that allowed for the indefinite detention of people with mental impairment found unfit to plead. Three jurisdictions (SA, ACT and Cth) require the court to set a limiting term for supervision orders, beyond which the defendant's detention or supervision may not extend. Other jurisdictions have mechanisms for reviewing and potentially revoking supervision orders:

- Victoria and NT—court sets a date for a major review of the defendant's situation, where it is presumed (in the absence of evidence to the contrary) that the level of supervision will be reduced;

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76 United Nations Office of the High Commissioner, *Australia urged to amend laws that lead to people with mental disabilities being detained indefinitely*, 23 September 2016, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20566&LangID=E (accessed 13 October 2016).

77 Correspondence from Mr Andrew Walter, Assistant Secretary, Civil Law Unit, Attorney-General's Department, 8 November 2016.

- QLD, Tasmania and WA—provides for periodic reviews by a mental health review board or tribunal, which may result in orders being varied or revoked;
- NSW—provides that the defendant may only be released when it is considered safe to do so.[78]

2.80 Three jurisdictions (WA, Victoria and NT) still allow, at least nominally, for indefinite detention. Legislation governing the detention of people with cognitive impairment or intellectual disability found unfit to plead has been the subject of recent reviews in WA, Victoria, NSW and SA. These reviews are outlined below.

2.81 A mental health review board or tribunal oversees forensic or criminal mental health orders in all states and territories except for SA. The review of these orders is conducted by the relevant law court.

National

2.82 In 2014, three major reviews were undertaken at a national level to examine the issue of involuntary forensic detention of people with psychiatric and cognitive impairments. These are:

- *Equality, Capacity and Disability in Commonwealth Laws* (Australian Law Reform Commission).
- *Equal Before the Law: Towards Disability Justice Strategies* (Australian Human Rights Commission).
- *Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others* (Australian Human Rights Commission).

2.83 This section will also briefly discuss the *National Seclusion and Restraint Project*.

Review—Equality, Capacity and Disability in Commonwealth Laws (Australian Law Reform Commission)

2.84 The Australian Law Reform Commission's (ALRC) 2014 report on equal recognition and legal capacity for people with disability under Commonwealth legal frameworks, *Equality, Capacity and Disability in Commonwealth Laws*, noted a wide range of concerns about the processes and outcomes of unfitness determinations. The ALRC recommended that state and territory laws governing determinations that a person is ineligible to stand trial should provide for 'limits on the period of detention

78 Sentencing Advisory Council of South Australia, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), November 2014, p. 133, http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia (accessed 11 January 2016).

that can be imposed' and 'regular periodic review of detention orders'.[79] The ALRC agreed that:

> …limits on the period of detention should be set by reference to the period of imprisonment likely to have been imposed, if the person had been convicted of the offence charged. If they are a threat or danger to themselves or the public at that time, they should be the responsibility of mental health authorities, not 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.[80]

2.85 The ALRC noted that the *Commonwealth Crimes Act 1914* contains a series of safeguards to limit how long a person may be detained, including:

- judicial discretion in determining unfitness to plead and alternatives to custody;
- limiting terms of detention to a period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged; and
- regular periodic reviews of detention.[81]

2.86 However, the ALRC highlighted that these safeguards are not consistently applied across jurisdictions. In particular, WA, the NT and Victoria do not set time limits for detention under custody orders.[82] The ALRC described WA's review mechanism as 'inadequate' as there is no provision in the legislation for review; instead the person is detained 'at the Governor's pleasure'.[83]

2.87 At the time of writing, there has not been a government response to this report.[84]

Review— Equal Before the Law: Towards Disability Justice Strategies (Australian Human Rights Commission)

2.88 In February 2014, the Australian Human Rights Commission (AHRC) published a report, *Equal Before the Law: Towards Disability Justice Strategies*, found that 'indefinite detention of people with disabilities is a persistent issue and of

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79 Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws*, Law Reform Commission Report 124, August 2014, p. 206, https://www.alrc.gov.au/publications/equality-capacity-disability-report-124 (accessed 15 December 2015).

80 ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, p. 210.

81 ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, pp 207–208.

82 ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, pp 208–209.

83 ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, p. 209.

84 ALRC, 'Modelling Supported decision making in Commonwealth Laws—The ALRC's 2014 report and making it work', 20 October 2016.

grave concern'.[85] The AHRC recommended that each jurisdiction should develop 'holistic, over-arching' disability justice strategies, that included provision that:

> Where a person who has been found unfit to plead is to be held in detention, demonstrate that all reasonable steps have been taken to avoid this outcome.[86]

2.89 In March 2014, in response to revelations of Rosie Ann Fulton's case in WA and the NT, the Disability Discrimination Commissioner, Graeme Innes and Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, called for the NT and WA Governments to conduct an audit of all people being held in prison who had not been found guilty of a crime.[87]

2.90 At the time of writing, there has not been a government response to the AHRC report.

Inquiry— Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others (Australian Human Rights Commission)

2.91 In 2014, the AHRC conducted an inquiry into complaints made by four Aboriginal men with intellectual disability held in the maximum security Alice Springs Correctional Centre in the NT. Three of the men were found unfit to stand trial due to their disability, and the fourth was found 'not guilty by reason of insanity' and all were placed on custodial supervision orders. The men were detained in the maximum security prison as, until March 2013, there were no other places in the NT where people subject to a custodial supervision order could be committed to custody.[88]

2.92 Each of the men had spent a significant amount of time in detention that far exceeded the amount of time they would have been detained had they been found guilty of the offence:

- Mr KA—detained for over four years and still in detention;
- Mr KB—detained for almost six years (12 month term of imprisonment if found guilty);

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85 Australian Human Rights Commission (AHRC), *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, p. 30, https://www.humanrights.gov.au/ our-work/disability-rights/publications/equal-law (accessed 15 December 2015).

86 AHRC, *Equal Before the Law*, p. 37.

87 AHRC, 'Jailed without conviction: Commissioners call for audit', 13 March 2014, https://www.humanrights.gov.au/news/stories/jailed-without-conviction-commissioners-call-audit (accessed 15 December 2015).

88 AHRC, *KA, KB, KC and KD v Commonwealth of Australia (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department): Report into arbitrary detention, inhumane conditions of detention and the right of people with disabilities to live in the community with choices equal to others*, [2014] AusHRC 80, p. 3, https://www.humanrights.gov.au/our-work/legal/publications/ka-kb-kc-and-kd-v-commonwealth-australia (accessed 21 March 2016).

- Mr KC—detained for four and half years (12 month term of imprisonment if found guilty);
- Mr KD—detained for over 18 years and still in detention.[89]

2.93 The AHRC found that the detention of the four men was contrary to Australia's obligations under the *International Covenant on Civil and Political Rights* and *Convention on the Rights of Persons with Disabilities*. The Commission found that the Commonwealth Government had failed in its obligations under international law to:

> …take measures to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges.[90]

2.94 The AHRC made seven recommendations for the Commonwealth to cooperate with the NT government to provide improved accommodation options and other support services for people with intellectual disabilities. This included a recommendation that eligibility for the National Disability Insurance Scheme (NDIS) be extended to the complainants and other persons found unfit to plead and held in detention.[91]

2.95 In response to the inquiry, the Commonwealth Government argued that the issue of detention is a matter for state and territory governments and disagreed with the AHRC's interpretation of Australia's human rights obligations that the Commonwealth has a responsibility to act. The Commonwealth argued that the report fell outside of the Commission's jurisdiction and therefore it did not engage with the inquiry's recommendations.[92]

Review—Access to Justice Arrangements (Productivity Commission)

2.96 In 2014, the Productivity Commission released its report into Access to Justice Arrangements. Part of this report focused on the difficulties that some people have in understanding and navigating the legal system, particularly for disadvantaged groups with complex legal needs, such as people with disability. This report made a number of recommendations to improve accessibility for people with disability.[93]

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89 AHRC, *KA, KB, KC and KD v Commonwealth of Australia*, p. 3.

90 AHRC, *KA, KB, KC and KD v Commonwealth of Australia*, p. 4.

91 AHRC, *KA, KB, KC and KD v Commonwealth of Australia*, pp 49–52.

92 AHRC, *KA, KB, KC and KD v Commonwealth of Australia*, pp 52–53.

93 Productivity Commission, *Access to Justice Arrangements*, Inquiry Report Overview, No. 72, 5 September 2014, pp 41–42, http://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf (accessed 28 November 2016). See also: Appendix 4 of this report for the full recommoendations relevant to this inquiry.

National Seclusion and Restraint Project

2.97 In 2015, with the agreement of all Australian Governments, the National Mental Health Commission (NHMC) commenced 'a project to look at best practice in reducing and eliminating the seclusion and restraint of people with mental health issues and to help identify good practice approaches'.

2.98 In May 2015, the NHMC released a report and a position paper that highlighted the following principles for adoption by COAG to reduce the use of seclusion and restraint:

> - jurisdictional agreement on definitions for seclusion, physical restraint, mechanical restraint and chemical restraint that is then reflected in jurisdictional legislation
> - targets and reporting frameworks that ensure that we have consistent, national data that give an accurate and meaningful account of what's really going on
> - a national approach to the regulation of seclusion and restraint that includes:
>   - standards and guidelines to support national consistency in approach to reducing the use of seclusion and restraint
>   - inclusion of a standard specifically addressing restrictive interventions in the next revision of the National Safety and Quality Health Service Standards
>   - national monitoring and reporting on seclusion and restraint across jurisdictions and services.
>
> In addition, the Commission considers that research into the prevention and safe management of behavioural emergencies involving people experiencing mental health difficulties, in all settings, is essential.[94]

Western Australia

2.99 In April 2014, the Office of the Inspector of Custodial Services (Inspector) in WA released a report on indefinite detention under the *Criminal Law (Mentally Impaired Accused) Act 1996*. The Inspector found that the Western Australian system for managing mentally impaired accused is 'unjust, under-resourced and ineffective'[95] and made a series of recommendations, including giving greater flexibility to the

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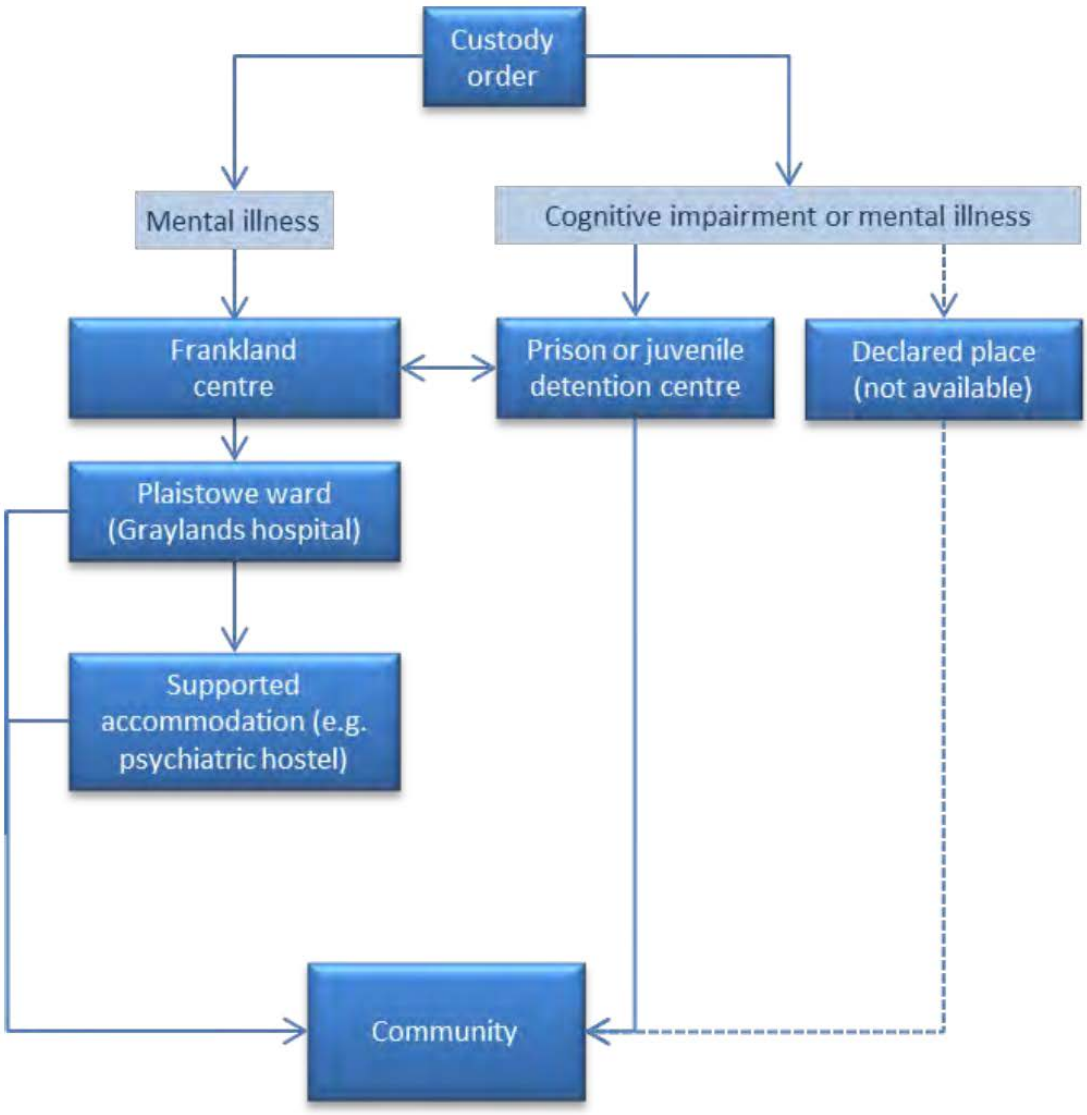
94 National Mental Health Commission, *Position Statement on seclusion and restraint in mental health*, May 2015, http://www.mentalhealthcommission.gov.au/media/123607/Position%20Statement%20seclusion%20and%20restraint%20FINAL%20ENDORSED%2020%20MAY%202015%20(D15-676981).PDF (accessed 11 January 2016).

95 Office of the Inspector of Custodial Services in Western Australia, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, April 2014, p. iii, http://www.oics.wa.gov.au/reports/mentally-impaired-accused-custody-orders-guilty-incarcerated-indefinitely/ (accessed 17 December 2015).

courts to make community based alternatives to custody orders for people found unfit to stand trial.[96]

2.100 The Inspector highlighted that unlike other jurisdictions, the courts in WA have only two options if a person is found unfit to plead: either unconditional release or a custody order.[97] These pathways are outlined in Figure 2.2.

Figure 2.2: Custody options for people held under the WA *Criminal Law (Mentally Impaired Accused) Act 1996*



Source: Office of the Inspector of Custodial Services in Western Australia, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, April 2014, p. 5. It should be noted that the 'declared place'—the Bennett Brook Disability Justice Centre—is now complete and operational.

96 *Mentally impaired accused on 'custody orders'*, p. 10.

97 *Mentally impaired accused on 'custody orders'*, p. 8.

2.101 The Inspector was also critical of the 'executive discretion' model of review and release procedures for people on custody orders. Unlike other jurisdictions, in WA, decisions about leaves of absence, conditional release or unconditional release require approval from the Governor, based on recommendations from the Attorney-General. The Inspector recommended that the parliament consider vesting this decision making power in either the courts of an independent body such as the Mentally Impaired Accused Review Board or the Mental Health Review Board.[98]

2.102 The Inspector further highlighted the lack of support services for people with mental impairment, including the shortage of forensic mental health beds and lack of a 'declared place' to detain and treat people with mental impairment.[99] The first 'declared place' in WA was opened by the Chief Justice of WA, the Hon Wayne Martin AC, on 4 August 2015.[100] The Bennett Brook Disability Justice Centre provides residential care for up to 10 people deemed to be 'mentally impaired accused'.[101]

2.103 In September 2014, the WA Attorney-General, the Hon Michael Mischin MLC, released a discussion paper on the operation of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (CLMIA Act).[102] The WA Attorney-General's Department noted in its *Annual Report 2014-15* that two interim reports were completed on the review following extensive consultation with key stakeholders.[103]

2.104 In April 2016, the WA Attorney-General released a final report looking at the CLMIA Act. The Act was assessed against its key objectives, identified as:

- the paramount safety of the community, and
- the fair and equitable treatment of mentally impaired accused, consistent with the principle of least restriction.[104]

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98 *Mentally impaired accused on 'custody orders'*, pp 10–12.

99 *Mentally impaired accused on 'custody orders'*, p. 29.

100 WA Supreme Court, 'Speeches: Opening of the Bennett Brook Disability Justice Centre by the Hon Wayne Martin AC, Chief Justice of Western Australia', 4 August 2015, http://www.supremecourt.wa.gov.au/S/speeches_2015.aspx (accessed 15 December 2015).

101 WA Disability Services Commission, Bennett Brook Disability Justice Centre, http://www.disability.wa.gov.au/reform1/reform/disability-justice-centre/ (accessed 15 December 2015).

102 Attorney-General, Western Australia, 'Mentally impaired accused paper released', Media Statement, 25 September 2014, https://www.mediastatements.wa.gov.au/Pages/Barnett/2014/09/Mentally-impaired-accused-paper-released.aspx (accessed 15 December 2015).

103 Department of the Attorney General, Western Australia, *Annual Report 2014-15*, 'Services to Government', http://www.ar.dotag.wa.gov.au/R/reviews.aspx?uid=1305-2232-3428-1256 (accessed 15 December 2015).

104 Department of the Attorney General, Western Australia, Review of the Criminal Law (Mentally Impaired Accused) Act 1996: Final Report, p. 6.

2.105 The report made 35 recommendations. These focused on refining definitions of mental illness and impairment, improving tests of mental fitness to stand trial, securing a tangible increase in the level and quality of support provided for the accused, and enhancing procedural fairness.

2.106 Whilst the report noted that prison is 'often not an ideal place for mentally impaired accused', the WA Attorney-General held that—citing community safety as the primary consideration and in the absence of suitable alternatives—prison should continue to be used as a place of custody under the CLMIA Act.

2.107 The report made no recommendations in respect to the indefinite nature of custody orders, but did, however, acknowledge concerns and recommend that a working group be established and tasked with reviewing the operation of indefinite custody orders.[105]

Northern Territory

2.108 As noted earlier in this chapter, like WA, the NT is a jurisdiction where indefinite detention can still nominally occur. Mental impairment and unfitness to be tried are provided for by Part IIA of the *Criminal Code Act* (NT). There have been no significant reviews of these provisions in recent times.

2.109 Mental impairment is defined as being when the 'accused did not know the nature and quality of their conduct, did not know the conduct was wrong or was not able to control their actions…as a consequence of mental impairment'. Unfitness is defined 'by reference to the ability of a person to understand the charges and proceedings, and to instruct their counsel'. Under both of these defences, the court must declare a person liable to supervision (custodial or non-custodial) order or that they are released unconditionally.[106]

2.110 Ostensibly, the over-riding principle that a court should consider when imposing a supervision order is that 'restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community'.[107] However, the experience of people subject to a custodial supervisory order, has often been that 'custody means jail' or 'custody by default', partly resulting from a lack of suitable alternatives to prison. In its submission, NAAJA noted that:

> a lack of suitable alternatives to prison—for example, supported accommodation for people with high needs–leaves courts with little option but to remand a person in custody, or to commit them to prison under a supervisory order.[108]

105 Department of the Attorney General, Western Australia, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996: Final Report,* pp 6–17.

106 North Australian Aboriginal Justice Agency, *Submission 60,* pp [2–4].

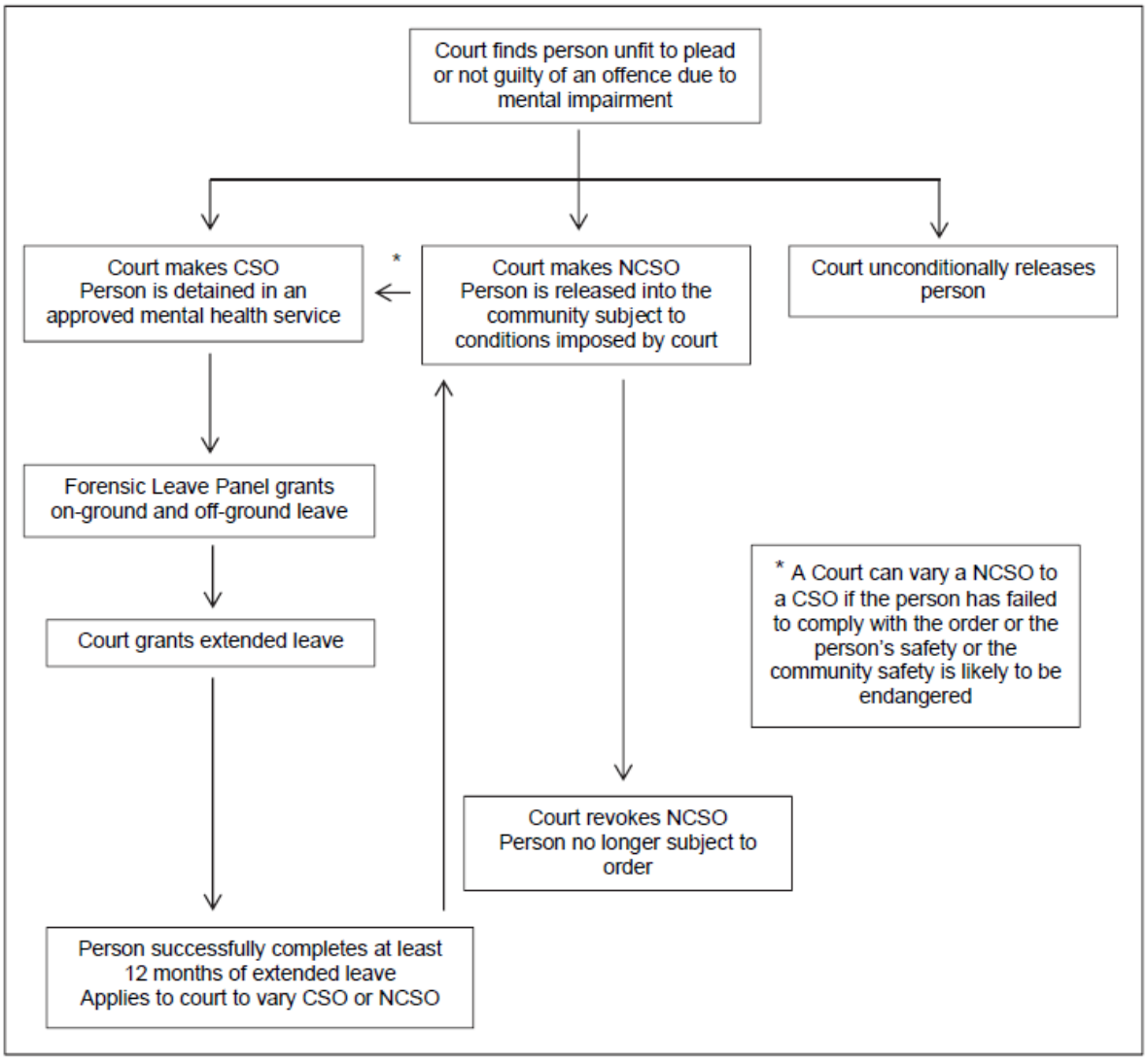
107 NAAJA, *Submission 60,* p. [4].

108 NAAJA, *Submission 60,* p. [45].

Victoria

2.111 Unlike WA, Victorian legislation provides the court with powers to make a number of different orders following the determination of unfitness to plead on the basis of mental impairment. These powers were introduced following a legislative review in 1997 that recognised that previous provisions enabling defendants to be detained indefinitely were unjust. These powers are outlined in Figure 2.3 and include Custodial Supervision Orders (CSOs) and Non-Custodial Supervision Orders (NCSOs).

Figure 2.3: Options for treatment of persons found unfit to stand trial in Victoria under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*



Source: Victorian Parliament Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*, March 2013, p. 244.

2.112 In March 2013, the Victorian Parliament Law Reform Committee (Law Reform Committee) reported on its *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*.[109] The Law Reform Committee suggested that people with an intellectual disability or cognitive impairment experience a number of significant disadvantages that may increase the likelihood that they will come into contact with and be overrepresented in the criminal justice system.[110] The Law Reform Committee made a series of recommendations aimed at:

- improving data collection on people with an intellectual disability or cognitive impairment and their interactions with the justice system;
- clarifying definitions of mental impairment;
- improving awareness by and guidance for the community and justice system personnel (including police, lawyers and courts) in working with people with intellectual disability or cognitive impairment; and
- ensuring adequate, accessible and effective services and supports are available for people with intellectual disability or cognitive impairment in the community and during their transitions through the justice system.[111]

2.113 Under the Victorian *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), a custodial supervision order commits the person into either an 'appropriate place' (i.e. an approved mental health service or residential service) or prison. A person cannot be committed into custody in an appropriate place unless they are assessed as having an intellectual disability or a mental illness. Custodial supervision orders are for an indefinite period; however, the Act contains safeguards setting nominal periods after which the court must review the order.[112]

2.114 In June 2014, the Victorian Law Reform Commission (VLRC) completed its review of the operation and application of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).[113] The review supported the retention of indefinite supervision orders, noting:

> They are consistent with the therapeutic—not punitive—focus of the CMIA [Crimes Mental Impairment Act]. The duration of an order should be based

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109 Parliament of Victoria Law Reform Committee, *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers*, March 2013, http://www.parliament.vic.gov.au/57th-parliament/lawreform/article/1461 (accessed 7 January 2015).

110 Law Reform Committee, *Inquiry into access to and interaction with the justice system*, p. xxi.

111 Law Reform Committee, *Inquiry into access to and interaction with the justice system*, p. xxi.

112 Law Reform Committee, *Inquiry into access to and interaction with the justice system*, pp 245–246.

113 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Review of the CMIA)*, 21 August 2014, http://www.lawreform.vic.gov.au/all-projects/crimes-mental-impairment (accessed 7 January 2016).

> on the time required to ensure protection of the community and the recovery and progression of a person along a process of gradual reintegration. An indefinite order allows the risk assessment to occur throughout the period of supervision, rather than at the time the order is made.[114]

2.115 As an additional safeguard, the VLRC recommended replacing the nominal terms for reviews of indefinite orders with five year 'progress reviews', noting that this would ' clarify and promote transparency in this area of the law'.[115]

2.116 Acknowledging that people with an intellectual disability who are subject to supervision orders 'may also be subject to detention and restrictions on their liberty', the VLRC recommended that the department responsible for every person subject to a supervision order prepare a treatment plan. It supported similar recommendations by the Victorian Law Reform Committee relating to departmental oversight, noting that people may be treated differently according to which department they are supervised by, particularly those in prison supervised by the Department of Justice:

> There will be difficulties in requiring that a treatment plan is provided for people who are supervised by the Department of Justice because compulsory treatment cannot be provided to people in a prison environment. This is a significant problem, which has also been recognised in other jurisdictions such as the Northern Territory and Western Australia.[116]

New South Wales

2.117 In 2012, the NSW Law Reform Commission released two reports on people with cognitive and mental health impairments in the criminal justice system.[117] The first report focussed on opportunities to enhance diversion at all stages of the criminal justice system, consistent with the NSW Government's priorities under the *NSW 2021 plan*.[118] Like the VLRC it identified the need for improved data collection and clarification of definitions of mental impairment. The *Diversion* report recommended improving the services available for people with mental impairment and justice

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114 Victorian Law Reform Commission, *Review of the CMIA*, p. xxxiii.

115 Victorian Law Reform Commission, *Review of the CMIA*, p. xxxiv.

116 Victorian Law Reform Commission, *Review of the CMIA*, p. 438.

117 NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system*, http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx (accessed 8 January 2016).

118 NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135, June 2012, http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx (accessed 8 January 2016).

system personnel to divert people from the court system where possible, particularly for young people.[119]

2.118 The second report focussed on issues of criminal responsibility, fitness to plead and management of forensic patients.[120] The *Criminal responsibility and consequences* report recommended some minor changes regarding the decision making functions, powers and procedures of the Mental Health Review Tribunal (MHRT).[121]

2.119 Under the NSW *Mental Health (Forensic Provisions) Act 1990* (NSW), courts cannot set a limiting term for supervision orders for defendants found not guilty by reason of mental illness. The person is subject to the supervision of the MHRT and may only be released if and when either:

> (i) the MHRT makes order for the person's unconditional release; or (ii) the person is released subject to time-limited conditions, and the time specified for compliance with those conditions expires.[122]

2.120 The processes available to the NSW courts following a finding of not guilty by reason of mental illness are outlined in Figure 2.4.

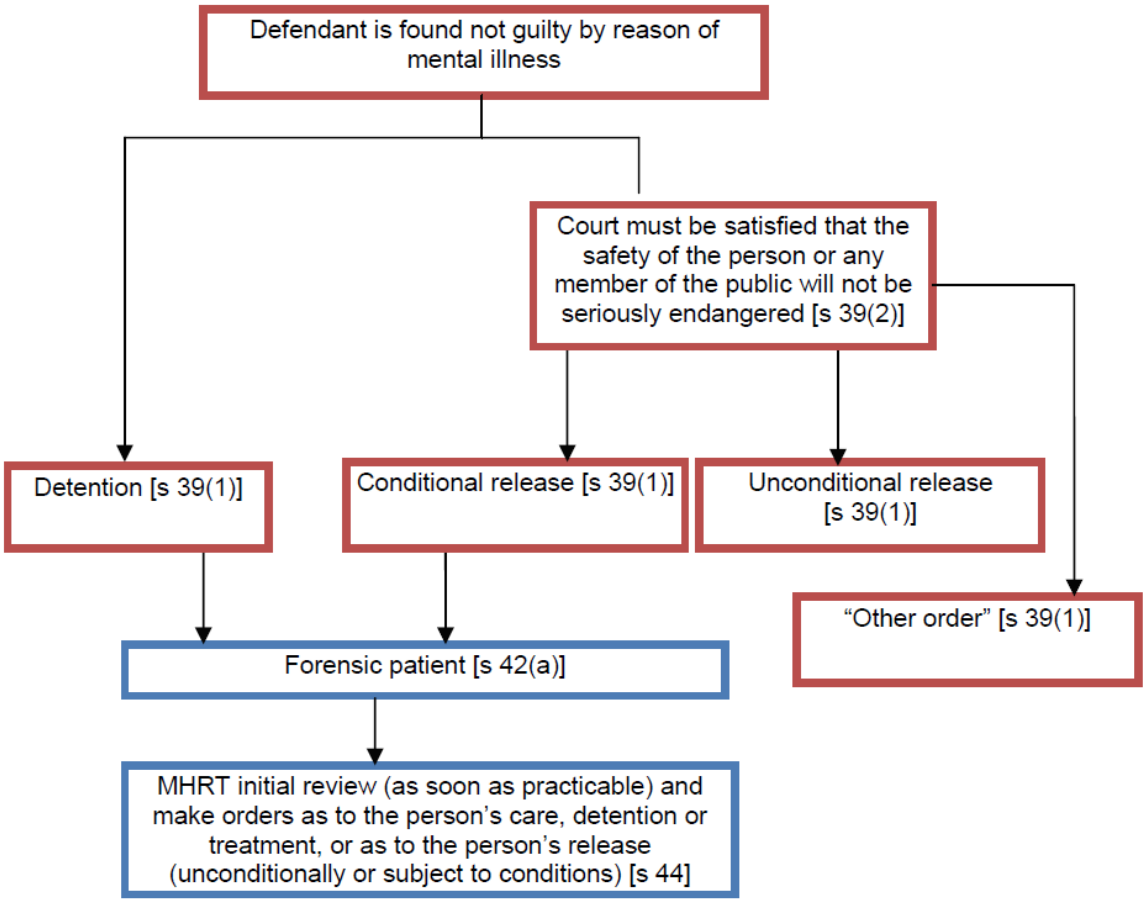
119 NSW Law Reform Commission, *Diversion*, pp xxvii–xxxiv.

120 NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences (Criminal responsibility)*, Report 138, May 2013, http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem/lrc_peoplewithcognitiveandmentalhealthimpairmentsinthecriminaljusticesystem.aspx (accessed 8 January 2016).

121 NSW Law Reform Commission, *Criminal responsibility*, p. xxii-xxiii.

122 *Mental Health (Forensic Provisions) Act 1990* (NSW) s 51(1).

Figure 2.4: NSW court processes following a finding of not guilty by reason of mental illness



Source: NSW Law Reform Commission, *Criminal responsibility*, p. 160.

2.121 The NSW Law Reform Commission recommended that limiting terms be introduced for defendants found to be not guilty by reason of mental illness who the court would have sentenced to imprisonment, whereby the court must set a limiting term which should be the length of the sentence of imprisonment that would have been imposed had that person been found guilty at a normal trial. A person should then cease to be a forensic patient at the expiry of the limiting term, if not released earlier by the MHRT.[123]

2.122 The NSW Law Reform Commission noted that a 'significant consequence' of this recommendation would be that people found to be not guilty by reason of mental illness would no longer be at risk of being detained indefinitely. Justification for time limits included that it would:

- provide an important protection for forensic patients;

123 See: Recommendation 7.2, NSW Law Reform Commission, *Criminal responsibility*, pp 180–181.

- be fair, and would not provide for forensic patients to be detained or managed within the forensic system for longer than they would have been detained following conviction; and
- support raising pleas of not guilty by reason of mental illness in appropriate cases so that people enter the forensic system rather than the correctional system.[124]

2.123 The NSW government adopted recommendation 11.1 from this report which provides for the Supreme Court to be able 'to revoke an extension order if circumstances change significantly so that the order is no longer necessary'.[125]

South Australia

2.124 In 2014, the Sentencing Advisory Council of South Australia (Sentencing Council) released its report on the operation of Part 8A of the *Criminal Law Consolidation Act 1935* (SA) relating to the defence of mental incompetence and associated legal processes.[126]

2.125 In South Australia, if a defendant is found unfit to plead, they are found not guilty by 'reason of mental impairment' and subject to special powers of the court. These powers enable to court to either release the defendant unconditionally or make a supervision order that may commit the defendant to detention or release under conditions. The court must specify a limiting term for which the defendant may be subject to supervision and/or detention, which should be equal to the length of the sentences that would have been imposed if the defendant had been convicted of the offence.[127]

2.126 The Sentencing Council supported retaining the current limiting term system with reference to the term of imprisonment that would have been imposed if the defendant had been convicted. The Sentencing Council recommended that, consistent with the *Crimes Act 1914* (Cth), the court should be given additional powers to impose conditional bonds on defendants for less serious offences.[128] The Sentencing Council also recommended that a working group be established to consider the viability of establishing a mental health review tribunal or board, similar to other

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124 NSW Law Reform Commission, *Criminal responsibility*, p. xx.

125 See: Recommendation 11.1, NSW Law Reform Commission, *Criminal responsibility*, p. xxv; *Mental Health (Forensic Provisions) Act 1990*, Division 2, s. 7(1)(2).

126 Sentencing Advisory Council of South Australia, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), November 2014, http://www.agd.sa.gov.au/about-agd/what-we-do/services-government/sentencing-advisory-council-south-australia (accessed 11 January 2016).

127 Sentencing Advisory Council of South Australia, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), p. 6.

128 Sentencing Advisory Council of South Australia, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), p. 9.

jurisdictions, to assist in the supervision of people with mental impairment under supervision orders, including operating 'step-up and 'step-down' services.[129]

Concluding comments

2.127 This chapter has provided a legislative and statistical background to forensic orders in most Australian jurisdictions. This chapter has shown that there is not a consistent approach across the jurisdictions with regard to forensic legislation and practices. The next chapter will focus on some of the legislative differences which have resulted in the high rates of indefinite detention in WA and the NT. The committee is concerned that accurate statistics on the numbers of forensic patients held in prison do not appear to be available. The committee notes the work being undertaken by COAG in this regard and looks forward to the establishment and ongoing maintenance of a centralised register.

2.128 This chapter has also examined the types of cognitive impairment—including the high prevalence of FASD and cultural communication issues—and highlighted the high proportion of Aboriginal and Torres Strait Islanders peoples amongst those detained. These are trends which are mirrored in the general prison population. The next chapter will further examine this particularly in relation to the need for screening and diagnostic services in courts, and the need for specialist courts to help identify and divert some of these people from the criminal justice system.

2.129 Although many of forensic patients are being indefinitely detained under state and territory legislation, this chapter has outlined the Commonwealth's responsibility for disability standards as a signatory to the Disability Convention. The Commonwealth has an obligation to uphold its responsibilities under the convention.

2.130 This chapter has also summarised a number of reviews which relate to forensic patients. These reviews have raised the need for limiting terms and increasing the options for the judiciary when imposing forensic orders which will be discussed further in the next chapter.

129 Sentencing Advisory Council of South Australia, *Mental impairment and the law: A Report on the operation of Part 8A of the Criminal Law Consolidation Act 1935* (SA), p. 13.