Chapter 3

Sentencing and access to justice

I would argue that, just as wheelchair users need ramps to enter banks, people with cognitive disabilities require adjustment to access justice on an equal basis with others. It is not about providing special treatment but more about creating an even playing field.[1]

3.1 The purpose of the next three chapters is to sequentially outline the issues relating to the three stages that a person who is indefinitely detained under a forensic order will undertake.

- Chapter 3 examines a person with cognitive and/or psychiatric impairment's intersection with the criminal justice system where they are brought before a court and subjected to a forensic order.
- Chapter 4 looks at the challenges faced in prison by a person subject to a forensic order.
- Chapter 5 focuses on the challenges transitioning from prison back to the community for people on forensic orders.

Introduction

3.2 As noted above, this chapter outlines the interactions between a person with cognitive and/or psychiatric impairment and the court system. The committee has received considerable evidence raising deficiencies with how the pre-trial and sentencing process currently works for people with cognitive and/or psychiatric impairment. This chapter outlines:

- the current Northern Territory (NT) and Western Australia (WA) legislation for people subject to forensic orders, and highlights the respective elements which lead to indefinite detention;
- the role of limiting terms for forensic orders;
- questions of legal capacity and support to engage with the courts;
- use of screening and diagnostic tools in courts pre-trial; and
- review of forensic orders using specialist courts.

Current sentencing practice that leads to indefinite detention

3.3 There are two prominent cases that have brought the issue of indefinite detention of people with cognitive and/or psychiatric impairment into the public eye—Mr Marlon Noble and Ms Rose Ann Fulton.

---

1 Dr Piers Gooding, Post-Doctoral Researcher, University of Melbourne, *Committee Hansard*, Darwin, 25 October 2016, p. 3.

3.4 As noted in Chapter 2, Mr Marlon Noble, an Aboriginal man from Western Australia, spent nearly a decade behind bars after being found unfit to plead, despite being neither tried nor convicted of the crimes he was alleged to have committed at any stage prior to, or during his incarceration.[2] In January 2012 he was released from prison with strict bail conditions—including regular drug testing and overnight home detention. Despite Mr Noble's release from the confinement of a prison, Mr Noble has still not had the opportunity to legally challenge the allegations against him:

> I'm from Geraldton. I went to prison for the rest of my life. Been there for ten years of my life. No…I am not free. I am out of prison, but I am not free yet.[3]

3.5 This experience is not unique. In March 2014, it was reported that Ms Rosie Ann Fulton, a 23 year old woman, had 'spent the past 18 months in a Kalgoorlie jail without a trial or conviction after she was charged with driving offences'. The magistrate in this case found that Ms Fulton:

> was unfit to plead because she is intellectually impaired—a victim of foetal alcohol syndrome—and has the mental capacity of a young child.
>
> Her legal guardian, former police officer Ian McKinlay, says Ms Fulton ended up on a prison-based supervision order because there were no alternatives in the area at the time.
>
> "At the moment this outcome is almost entirely reserved for Aboriginal, Indigenous Australians," he said.
>
> The Aboriginal Disability Justice Campaign says there are at least 30 Indigenous people in a similar situation around the country.
>
> Western Australia's Inspector of Custodial Services, Neil Morgan, says the state has no option but to incarcerate Ms Fulton as existing options are limited.
>
> "One is a 'declared place', which was always intended to be for people like this. Unfortunately we still don't have any declared places 15 years after the Act came into force," he said.
>
> "The second option is an authorised hospital, and that's only for a person with a treatable mental illness.
>
> "And the third option, which is almost the option of default, is that the person ends up in prison or in a juvenile detention centre."[4]

---

2 Hayley Roman, 'Marlon Noble continues campaign for freedom', *ABC News Online*, http://www.abc.net.au/news/2013-05-08/marlon-noble-attends-film-of-incarceration/4676620 (accessed 10 December 2015).

3 Unfinished Business, *Stories from Australian Aboriginal and Torres Strait Islander People with Disabilities: Marlon Noble*, http://www.unfinishedbusiness.net.au/portfolio/marlon-noble-2/ (accessed 10 December 2015). See also: http://croakey.org/new-project-to-tackle-the-detention-of-aboriginal-and-torres-strait-islander-people-with-disabilities/

3.6 Ms Fulton's adult guardian, Mr Ian McKinlay updated the committee on Ms Fulton's progress since this media report.

> Now I come to the Rosie Anne Fulton case, which I provided details on earlier. As I mention in the document provided, she was born with fetal alcohol brain damage, and this was compounded by a life of abuse. She was dumped by NT health after she ended up in indefinite prison-based supervision in Kalgoorlie. She was forced back into the NT health domain by a media and public outcry. This clearly caused resentment. It was reflected in the denial of a transitional support plan earlier discussed. Instead, she was placed under a clearly designed-to-fail support plan, which has seen her under conviction for 70 per cent of the time since her return to the Northern Territory. She has now lapsed into full-blown chemical addiction, and to all intents and purposes she is back on the streets and at serious risk. Yesterday I found her drunk with facial injuries; she was again bashed overnight and she appeared in court today. This support hides behind a pretence of freedom of choice values that contradicts repeated guardianship court findings that she lacks decision-making capacity. The external pressure needed to compel NT Health to accept responsibility for Rosie Anne has also been needed to maintain even tokenistic levels of commitment, the latest re-engagement prompted by monitoring by the Office of the Prime Minister and Cabinet plus the current Don Dale media coverage.[5]

3.7 The Aboriginal Disability Justice Campaign (ADJC) noted that indefinite detention of people with cognitive and/or psychiatric impairment predominantly occurs in WA and the NT. The next section will explore the legal process that leads to indefinite detention in these jurisdictions.

Northern Territory

3.8 Part IIA of the *Criminal Code Act* (NT) (Criminal Code) provides for alleged offenders to be deemed not guilty by way of mental impairment or unfit to stand trial. There are two key elements within the Criminal Code which lead to the indefinite detention of people with cognitive and psychiatric impairment in prison. Firstly section 43ZC of the Criminal Code provides that any supervision order (custodial or non-custodial) is 'for an indefinite term'.[6] Secondly, section 43ZA(2) of the Criminal Code provides that a 'Court must not make a Custodial Supervision Order committing

---

4 John Stewart, 'Aboriginal woman's jailing highlights plight of intellectually impaired Aboriginal offenders', *ABC News Online,* 13 March 2014, http://www.abc.net.au/news/2014-03-12/intellectually-disabled%C2%A0aboriginal-people-stuck-in-legal-limbo/5316892 (accessed 4 December 2015). See also: '"Urgent need" for law change as mentally impaired accused detained indefinitely', *ABC News Online*, 10 July 2015, http://www.abc.net.au/news/2015-07-10/push-for-mentally-impaired-accused-law-change-in-wa/6611010 (accessed 4 December 2015).

5 Mr Ian McKinlay, *Committee Hansard*, Alice Springs, 26 October 2016, p. 19.

6 NT Government, *Submission 75*, p. 1.

an accused person to custody in a Correctional facility unless the Court is satisfied that there is no practicable alternative'.[7]

3.9 As noted in Chapter 2, the NT is one of the few Australian jurisdictions that still issues forensic orders with indefinite terms of duration. Ostensibly, the NT Supreme Court conducts annual reviews in which it must consider, amongst many things, the risk to any individual or the community if the accused is released. However, this process essentially reverses the onus of decision making from requiring a justification to detain, to requiring a justification to release. This is shown in the release statistics: of the sixty separate people to have had their cases reviewed by the court since 2002, 20 people have been released unconditionally at some point (five of whom were released unconditionally prior to any custodial order). Currently, there are 36 people subject to a custodial or non-custodial supervision order.[8] Despite this review process, more than half of these 36 people remain subject to custodial orders, with the majority living in correctional facilities.

3.10 The committee notes that the Criminal Code provides for the imposition of fixed terms:

> When first making a supervision order, the Court is required is required to fix a term under section 43ZG which is equivalent to the sentence of imprisonment the person would have received if the person had been found guilty of the offence. The court may backdate the term fixed under section 43ZG to when the person was first taken into custody.[9]

3.11 However, the committee also notes that these fixed terms are nominal as the fixed term is only a trigger for a major review. Supervision orders remain an indefinite proposition.[10]

3.12 As noted earlier, the Criminal Code states that a 'practicable alternative' to prison must be sought in the first instance. Again, this reverses the onus from a presumption of release triggered by a timeframe, to a presumption of continued detention unless criteria are met. This is exacerbated by the limited options for a practicable alternative in the NT. There is no dedicated forensic mental health facility in a non-prison environment for people held on custodial supervision orders. Currently, people subject to custodial supervision orders can be held in the Complex Behaviour Unit (within the walls of the Darwin Correctional Precinct), the Secure Care Facility (in Alice Springs), or in prison. Witnesses at the Darwin hearing highlighted the lack of appropriate supported accommodation in the community as the greatest barrier to people on custodial supervision orders being transitioned out of

7 NT Government, *Submission 75*, p. 3.

8 Mr Greg McDonald, NT Government Solicitor, *Committee Hansard*, Darwin, 25 October 2016, pp 26–27. See also: *Answer to Question on Notice No. 1*, NT Government.

9 NT Government, *Submission 75*, p. 4.

10 NT Government, *Submission 75*, p. 4.

indefinite detention in prison.[11] Without practicable alternatives, people with cognitive and/or psychiatric impairments will continue to be indefinitely detained in prisons. Supported accommodation will be discussed in more detail in Chapter 5.

Western Australia

3.13 Similar to the NT legislation, the WA *Criminal Law (Mentally Impaired Accused Act 1996* (CLMIA Act) provides for two pathways for a person found unfit to plead—unconditional release or a custody order. If a custody order is imposed on a person with a cognitive impairment they can either be placed in prison or in a declared place.[12]

3.14 The first, and only declared place in WA—Bennett Brook Disability Justice Centre (DJC)—was completed late last year.[13] Until its completion, the only alternative was prison. Since its opening, two residents have successfully transitioned back into the community; two residents currently live in the DJC; and two prospective residents are being considered for placement in the DJC.[14] This compares with the fifteen people being held in WA prisons on custody orders. Clearly, despite the opening of the DJC, which has a capacity for ten people, there are still significant numbers of people being held indefinitely in prison.

3.15 During its Perth hearing, the committee received evidence highlighting that under the CLMIA Act there is no provision for the judiciary to recommend that an alleged offender deemed unfit to plead is placed directly into a declared place. Placement in a declared place can only occur through a Mentally Impaired review Board (MIARB) review which is held after a custody order has been imposed by the court.[15] This means that the CLMIA Act itself restricts the judiciary from placing people into an appropriate therapeutic environment in the first instance.

3.16 Chief Justice Martin explained the challenges he, and other judicial officers, face when dealing with cases under the CLMIA Act with no third option between unconditional release and prison:

> There was an allegation of inappropriate behaviour of a lower order with children. He was a management risk. It was very low order seriousness offending. He was a management risk. He could be managed in his community, if there were conditions imposed about where he would live and not going near the school and those sorts of things. But I could not

---

11 Ms Vanessa Harris, EO, NT Mental Health Coalition, *Committee Hansard*, Darwin, 25 October 2016, pp 16–17. See also: NAAJA, *Submission 60*.

12 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.

13 Disability Services Commission (WA), *Bennett Brook Disability Justice Centre*, http://www.disability.wa.gov.au/individuals-families-and-carers/for-individuals-families-and-carers/disability-justice-centre/ (accessed 8 November 2016).

14 Dr Ron Chalmers, Director-General, WA Disability Services Commission, *Committee Hansard*, Perth, 19 September 2016, p. 43.

15 Chief Justice Wayne Martin, *Committee Hansard*, Perth, 19 September 2016, p. 6.

> impose those conditions, so I had to either take a punt to lock him up indefinitely, which I was not prepared to do because his behaviour just was not that serious, or take a punt and hope that the community itself would impose those conditions on him. The evidence I got was that the community were aware of his needs. There were a couple of relatives who were going to step up and look after him, and so I took the punt. But we should not have to take a punt in cases like that. We should have had the option of saying, 'I'm not going to put you into custody, but here are the conditions you have to live by, and if you breach those conditions then some action could be taken.'[16]

3.17 More often than not though, courts err in the other direction and impose a custodial sentence:

> The problem is where you do not have any middle ground—it is either unconditional release or custody—you get to custody much quicker than you would if there were some opportunities in the middle.[17]

Legal capacity and support to engage with the court system

3.18 This section discusses how a person with cognitive and/or psychiatric impairment might be empowered to engage with the legal system. The committee examines the concept of legal capacity and the fundamental principle that a person should not have their legal capacity removed simply on the basis of disability.

3.19 As noted earlier in this chapter, the current sentencing practices in the NT and WA remove legal capacity when an 'unfit to plead' ruling is made and this displacement often leads to indefinite detention. In many circumstances, people who would normally be classified as unfit to plead—and their defendants—choose to plead guilty to crimes in order to be sentenced to a defined period as opposed to an indefinite sentence as a forensic patient.

3.20 Evidence was provided to the inquiry about alternative approaches such as specialist support workers to assist someone during the legal process and also the use of specialist courts as a means to better support people with cognitive and psychiatric impairment through the legal process.

Legal capacity

3.21 Legal capacity is defined as 'a person's power or possibility to act within the framework of the legal system'.[18] An element of legal capacity relevant to forensic law is legal standing 'in the sense of being viewed as a person before the law'.[19] The

---

16 Chief Justice Wayne Martin, *Committee Hansard*, Perth, 19 September 2016, p. 4.

17 Chief Justice Wayne Martin, *Committee Hansard*, Perth, 19 September 2016, p. 5.

18 Council of Europe's Commissioner for Human Rights, *Who gets to decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities*, Issue Paper No. 2, 20 February 2012. Referenced in: Professor Bernadette McSherry, 'Mental Health Laws: Where to from here?', *Monash University Law Review*, Vol. 40, No. 1, 2014, p. 186.

19 Professor Bernadette McSherry, 'Mental Health Laws: Where to from here?', *Monash University Law Review*, Vol. 40, No. 1, 2014, p. 186.

practical application of this is described in more detail in chapter 2; however, in essence, legal standing applies to those deemed (by a legal process) as 'unfit to plead' and detained under forensic and criminal orders.

3.22 In a 2014 paper, Professor Bernadette McSherry highlighted the two main mechanisms that displace legal capacity:

> (1) The *status approach* focuses on a certain characteristic of the person in order to find that the person lacks capacity. Hence, having a particular disability—in particular having a severe mental or intellectual impairment—has led to an automatic loss of legal capacity in both terms of legal standing and legal agency.
>
> (2) The *cognitive approach* focuses on assessing the decision-making abilities of the individual concerned. The cognitive approach encompasses the notion of 'mental capacity' or 'mental competence', the latter term being used most often in North America.[20]

3.23 As noted above and in Chapter 2, the legal capacity and legal agency of many people has been, and continues to be, removed on the basis of their cognitive and/or psychiatric impairments, in some cases resulting, in the involuntary detention of these people. However, Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) states that 'State Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.[21] Furthermore, Article 14 of the CRPD states that persons 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.[22]

3.24 As noted previously in this report, state and territory legislation currently allows for people to be involuntarily detained for forensic or mental health reasons on the basis of cognitive and/or psychiatric impairments.

Committee view

3.25 The committee agrees with the evidence that a person's legal standing should not be removed on the basis of a disability. Where possible, participation in the legal process should be encouraged for all people. Support programs which assist and improve such participation are discussed later in this chapter.

---

20 Professor Bernadette McSherry, 'Mental Health Laws: Where to from here?', *Monash University Law Review*, Vol. 40, No. 1, 2014, p. 186.

21 United Nations Convention on the Rights of Persons with Disabilities, Article 12, s. 12, http://www.un.org/disabilities/convention/conventionfull.shtml (accessed 1 March 2016).

22 United Nations Convention on the Rights of Persons with Disabilities, Article 16, http://www.un.org/disabilities/convention/conventionfull.shtml (accessed 21 August 2016).

Outcomes of displacing legal capacity

3.26 Witnesses and submitters, including the NT Government Solicitor, acknowledged the perverse incentive that exists where a person pleads guilty (even to a crime that they have not committed) in order to receive a defined shorter period of time in prison rather than an indefinite period on a custodial supervision order.

> At the early times that part IIA was in place, there was certainly a very severe reluctance on the part of defence counsel to go anywhere near part IIA because of the fear of indefinite incarceration. It is certainly also the case that there have been some persons who have served longer in a correctional facility—I say 'served', although they are not serving a sentence but they have been detained there in custody—than they would otherwise have been there, had they been able to plead guilty.[23]

3.27 The Chief Justice of WA concurred:

> There are very significant implications for criminal practice in this state, in particular individuals who plead guilty despite their impairment or their disability because they do not want to take the risk of being detained in custody indefinitely, possibly for a period longer than they would serve if convicted of an offence on a plea of guilty. As a consequence of that, the legal profession of this state is understandably reluctant to bring clients within the scope of the act. I am sure that there are cases in which proper legal advice is to a client to plead guilty rather than raise the question of the act and take the risk of indefinite detention.

3.28 The Aboriginal Legal Service of WA (ALSWA) agreed, noting that despite 'ethical and professional obligations to clients…we run from fitness to plead at a million miles per hour'.[24] In its submission, Office of the Public Advocate (QLD) provided many examples where the period of time that someone can expect to spend in a forensic facility or indefinitely in prison if they are deemed unfit to plead is sometimes double that of a custodial sentence.[25]

3.29 Submitters have argued that there are many cases where people, with an appropriate level of support, could be expected to engage with the legal system and avoid being deemed unfit to plead. At the committee's Brisbane hearing, Mr Simon Wardale, the Director of Forensic Disability at the Queensland Department of Communities, Child Safety and Disability Services, noted:

---

23 Mr Greg McDonald, NT Government Solicitor, *Committee Hansard*, Darwin, 25 October 2016, pp 26–27. See also: Chief Justice Wayne Martin, *Committee Hansard*, Perth, 19 September 2016, p. 2.

24 Mr Peter Collins, Director, Legal Services, Aboriginal Legal Service of WA, *Committee Hansard*, Perth, 19 September 2016, p. 18.

25 Office of the Public Advocate (Qld), *Submission 36*, pp 13–14.

> I certainly would not doubt the determination of the court, but what I saw was people with very, very mild intellectual disabilities being found unfit to plead.' And also where people are pleading guilty out of expediency.[26]

3.30 The committee received evidence supporting this move away from people being found unfit to plead through the provision of supports:

> Most of the critiques of fitness-to-stand-trial laws across the country—I am thinking particularly of some of the work done out of the University of Melbourne—would basically argue that we should be doing everything we can to minimise the notion of people not being found fit, so we should be adapting our court processes to ensure that we are doing everything possible to get rid of the need for people to be found unfit. I do not think we could say in any way that we are doing everything we can to create environments where we assume capacity and we are supporting people as effectively as possible to plead. Then, once you have a regime that does everything it can to avoid people being found unfit, you have to get rid of these inherent injustices which are always going to create a legal barrier, I suppose, to people navigating the process as they would with someone who did not have a disability.[27]

Committee view

3.31 The committee is concerned that there is potentially a large group of people who, in the normal course of events would be found unfit to plead, but in an effort to avoid indefinite detention in prison are choosing to plead guilty, even to crimes they have not committed. The committee is concerned that these people's cognitive and/or psychiatric impairments are being criminalised and that they are not being provided with access to appropriate supports.

3.32 The next section will examine a range of initiatives that seek to improve participation in the legal system for alleged offenders with cognitive impairment.

Access to justice—Participation in, and support for alleged offenders during legal proceedings

3.33 One of the issues that arises when a court deems a person to be unfit to plead or stand trial, is that consideration is often not given to whether that person is indeed guilty or likely to be found guilty. This next section looks at some of the reasons why providing support and improving participation in legal proceedings for alleged offenders can result in improved outcomes with an examination of examples of such programs. Importantly, improved participation through support may lead to fewer forensic orders, diversion to genuine supported accommodation and therapy, and ultimately, less people being indefinitely detained.

---

26 Mr Simon Wardale, *Committee Hansard*, Brisbane, 23 March 2016, p. 27. See also: Ms Tania Collins, Senior Criminal Legal Officer, Central Australian Aboriginal Legal Aid Service, pp 19–20.

27 Ms Taryn Harvey, CEO, Developmental Disability WA, *Committee Hansard*, Perth, 19 September 2016, p. 26.

3.34 The committee has received evidence suggesting that the current legal process does not support people with cognitive and/or psychiatric impairment to understand what actions they are accused of committing. ALSWA noted that:

> the reflex reaction of so many offenders is to blame someone else: 'It's the victim's fault,' or, 'It's my co-offender's fault.' Things get off on a bad footing from the word go, because that then dovetails into a refusal to accept responsibility, a lack of insight into their offending behaviour, a lack of victim empathy and therefore a lack of remorse. So things are heading south from a sentencing point of view from the word go.[28]

3.35 ALSWA further noted that the presence of an Aboriginal and Torres Strait Islander support worker may lead to improved outcomes as this early point of interaction with the criminal justice system.

> But if you had an Aboriginal person there, either as a support or as the person who is actually doing the report, hopefully there would be some sort of rapport established and the person would not be so reflexively defensive from the word go.[29]

3.36 In its submission, Jesuit Social Services provided a case study from its *Enabling Justice Acquired Brain Injury Project* that illustrates the practical benefits of supporting a person with cognitive and/or psychiatric impairment through the legal process:

> Only after my last offence have I ever got an ITP [Independent Third Party]. So everything prior, I went to court about once a year, every year, since I've been 16 years old… It [having the ITP] changed the ways the police asked the questions. I think they were a lot more softer, softly spoken. Rather than in an interview room by yourself with a police officer and he's very daunting. Knowing that you had an independent third person there, you realise yourself that you're not capable of answering the questions correctly. So you're very slow on answering, double checking, saying to the person, 'Is this what they said? Is this what they want to know?' as you get very daunted.[30]

3.37 A 2009 paper by the Law and Justice Foundation of NSW noted that 'once in the criminal justice and correctional systems, people with cognitive impairment appear vulnerable to extended and repeat incarceration'.[31] There are many barriers to legal assistance and legal processes for people with cognitive and/or psychiatric

---

28 Mr Peter Collins, Director, Legal Services, ALSWA, *Committee Hansard*, Perth, 19 September 2016, p. 21.

29 Mr Peter Collins, Director, Legal Services, ALSWA, *Committee Hansard*, Perth, 19 September 2016, p. 21.

30 Jesuit Social Services, *Submission 53*, p. 20.

31 A. Gray, S. Forell & S. Clarke, 'Cognitive impairment, legal need and access to justice', *Justice Issues*, Paper 10, March 2009, p. 5, http://www.lawfoundation.net.au/ljf/site/articleIDs/2EDD47C8AEB2BB36CA25756F0018AFE0/$file/JI10_Cognitive_impairment.pdf (accessed 1 March 2016).

impairments including the 'intimidating and alienating atmosphere of the courtroom'. Other barriers include:

- cross-examination techniques undermining the confidence and credibility of an offender;
- length and formality of proceedings; and
- participation in proceedings that they do not understand.[32]

3.38 In January 2016, the Law Commission of England and Wales completed its inquiry into "unfitness to plead" laws in the United Kingdom (UK). In its report, it recommended a reform to the test of unfitness whereby:

> the test for capacity to participate effectively in a trial should require the defendant to be able to participate effectively "in the proceedings on the offence or offences charged", and that assessment of the defendant's abilities in that regard should reflect consideration of the actual proceedings.[33]

3.39 Furthermore, it also recommended that intermediary assistance and other assistance mechanisms should be deployed by courts to enable effective participation in court proceedings, where appropriate.[34]

3.40 At the committee's Brisbane hearing, Mr Patrick McGee, Co-ordinator of the ADJC, indicated his support for the UK Law Commission's recommendations:

> [P]eople with cognitive impairments should be provided with the level of support needed to fully participate in the legal process. Where they are unable to participate in the legal process due to their impairment, the process should not be a legal response but rather a social response. Basically, what they said was this: there should be a 'full trial wherever fair and practicable'; 'accurate and efficient identification of defendants who cannot participate effectively in the trial' should occur; there should be 'diversion out of the criminal justice process where appropriate'; there should be 'fair procedures for scrutinising the allegation'; and there should be 'effective and robust community disposals'. Basically, they are saying: 'You know what? If you can't actually participate in the legal process'—which is the design of the mental impairment process—'then you shouldn't be before a court and you certainly shouldn't be detained in jail as a result of that process.'[35]

---

32 A. Gray, S. Forell & S. Clarke, 'Cognitive impairment, legal need and access to justice', *Justice Issues*, Paper 10, March 2009, pp 5–8.

33 Law Commission of England and Wales, *Unfitness to Plead—Volume 1: Report*, 12 January 2016, p. 321. See also: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, May 2014, paragraph 7.17–7.18.

34 Law Commission of England and Wales, *Unfitness to Plead—Volume 1: Report*, 12 January 2016, p. 319.

35 Mr Patrick McGee, Coordinator, Aboriginal Disability Justice Campaign, L Trobe University, *Proof Committee*, Brisbane, 23 March 2016, p. 36

3.41 In its 2013 consultation paper, the Victorian Law Reform Commission described some of the key characteristics of this new test, with the new test requiring an accused person to:

> • *Understand the information relevant to the decisions that they will have to make in the course of the trial*—for example, an accused person with an acquired brain injury who has very low cognitive ability and is unable to understand new or unfamiliar information would be unfit to stand trial.
>
> • *Retain that information*—for example, someone with Attention-Deficit Hyperactivity Disorder (ADHD) who cannot focus and finds it almost impossible to remember any new information given to them would be unfit to stand trial.
>
> • *Use or weigh that information as part of a decision-making process*—for example, an accused person who suffers from paranoid schizophrenia who has a factual understanding of the charge, but indicates to the court that he wants to plead guilty because he sees no point in pleading not guilty as everyone in court is part of a conspiracy, would be unfit to stand trial.
>
> • *Communicate their decisions*—for example, an accused person with autism who is able to understand information and process it but does not acknowledge others, may be unfit to stand trial.[36]

Innovative programs supporting people with cognitive and/or psychiatric impairment in the justice system

3.42 In a previous report, the committee acknowledged the positive work undertaken in South Australia, including by the police, in developing a Disability Justice Plan.[37] This plan is intended to support people with disability in the corrections and court systems, and focus on the needs of people with disability who participate in legal proceedings as a witness or as an alleged offender.

3.43 Notwithstanding this, the committee received evidence from Ms Anna Tree of Dignity for Disability on the need for more resources to properly implement the Disability Justice Plan, including education for all levels of the justice system. Ms Tree also highlighted problems with the use of volunteer workers who assist police and court officials to better recognise and support the needs of people with cognitive and psychiatric impairment in the justice system. Ms Tree argued that programs of this kind require specialist trained professional staff'.[38]

---

36 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper*, June 2013, p. 60.

37 Senate Community Affairs References Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, November 2015, p. 164.

38 Ms Anna Tree, Chief of Staff, Dignity for Disability, *Committee Hansard*, Alice Springs, 26 October 2016, pp 16–17.

3.44 During this inquiry the committee has received evidence on a range of innovative programs which provide supported legal decision making to people with cognitive and psychiatric impairment. These programs and projects are being trialled in some cases or more broadly implemented in others. The most successful characteristics of each of these programs is that they firstly facilitate a better understanding of the legal process and the specific charges that a person is alleged to have committed. A support person can also provide an opportunity to divert people with cognitive and psychiatric impairment away from the criminal justice system to receive therapeutic and other services. Ideally, a support person can provide case management or at least identify the need for a range of supports to be provided co-operatively by the different government departments. This section will focus on several examples of initiatives which provide such support to people with cognitive and/or psychiatric impairment that engage with the court system.

3.45 The University of Melbourne and University of New South Wales have received funding for a two year project (2015–2017) to develop practical and legal solutions to the problem of people with cognitive impairments, including Aboriginal and Torres Strait Islander people with cognitive impairments, being found "unfit to plead" and subject to indefinite detention in Australia. A secondary aim is to better ensure that people with cognitive disabilities can meaningfully participate, on an equal basis with others, in criminal proceedings brought against them.[39] A more detailed explanation of this project and its benefits can be found in Box 3.1.

39 See http://www.socialequity.unimelb.edu.au/projects/unfitness-to-plead-and-indefinite-detention-of-persons-with-cognitive-impairments-addressing-the-legal-barriers-and-creating-appropriate-alternative-supports-in-the-community/ (accessed 1 March 2016).

Box 3.1: Unfitness to plead project

The researchers from the University of New South Wales and University of Melbourne have partnered with the North Australian Aboriginal Justice Agency (NT), the Intellectual Disability Rights Service (NSW), and a Victorian legal aid service to identify Aboriginal and Torres Strait Islander peoples and non-Indigenous people with cognitive impairments charged with a crime and provide support to them. The project is planning to support approximately 20 people (per service) in each jurisdiction.

The objective of this project is to:

- analyse the social, legal and policy issues leading to unfitness to plead findings and indefinite detention in Australia, with a focus on the experiences of Aboriginal and Torres Strait Islander peoples;

- provide and evaluate supported decision-making for up to 60 individuals with cognitive impairments who have been charged with a crime and who may be subject to unfitness to plead processes; and

- recommend options for the reform of unfitness to plead law and policy.

The expected outcomes will be:

- analysis of the differences and similarities in unfitness to plead laws and policy across the Australian states and territories;

- creation of good practice model(s) in supported decision-making in the criminal justice context that can be used in Australia and abroad; and

- creation of recommendations for law and policy reform in compliance with human rights standards.

The support is through a flexible supported decision-making model adapted from a model developed by the South Australian Office of the Public Advocate. The model includes the creation of a role for a 'supporter' for decision-making, with supervision and support being provided by the post-doctoral researcher and the relevant, local legal agency. People with cognitive impairments, including Aboriginal and Torres Strait Islander peoples, are contributing to the development of the supported decision-making model through the advisory panel, which meets for tele-meetings approximately three times per year for the duration of the project. The advisory panel is comprised of Disabled Peoples Organisations representatives, community experts, and academics.

As an example, the support worker will 'coordinate meetings between relevant people and services', pursue 'reports from various government and non-government agencies' and 'assisting a person to attend a psych assessment to see whether or not they are unfit to stand trial or even referring clients to relevant services'.

Sources: Dr Piers Gooding, Postdoctoral Research Fellow, Disability Research Initiative, Melbourne Social Equity Institute, Melbourne Law School, University of Melbourne, *Committee Hansard*, Darwin, 25 October 2016, p. 2; *Submission 5*. The project is funded as part of the Australian Government Department of Social Services, National Disability Research and Development Research Scheme.

3.46 Dr Piers Gooding, a post-doctoral researcher on this project outlined some of the practical supports offered by this project:

> The type of support that they provided to clients with disabilities was varied and included providing communication aids, including plain language materials; sometimes sitting with the person in court and helping them to follow along; or even just providing emotional support for people who were appearing before courts. Sometimes the supporters would call persons to remind them about legal appointments, which was particularly important for some people with cognitive disabilities who could miss appointments, which would cause unnecessary delay. Sometimes

> supporters would remind lawyers and others to speak in plain language, and they would also model what it means to do so.[40]

3.47 Preliminary cost-benefit findings from this pilot program indicate there are significant net financial savings throughout the court process alone in providing a supporter. A normal guilty plea to avoid an unfitness finding in a NT court is estimated to cost $5 619. This compares to an unfitness to plead finding which can cost in excess of $16 000. An actual outcome using a support worker to assist an individual to navigate the court process is estimated to cost $5 068.[41]

Committee view

3.48 It is the committee's view that people with cognitive and/or psychiatric impairments can and should be supported to engage with the court process. There are many successful, but disparate, examples of this type of support. It is the committee's view that appropriate resources should be allocated to expand these programs to reach all people likely to be subject to forensic orders.

Specialist courts and diversion programs

3.49 The committee has heard evidence that some jurisdictions are trialling or have implemented a new approach to diverting people with cognitive and psychiatric impairment through the use of specialist courts, which provide a more 'therapeutic jurisprudence' rather than the traditional punitive approach.[42] Specialist courts are able to better recognise and support the needs of people with cognitive and psychiatric impairment in the justice system. This section examines a number of specialist court examples which are used around the country.

Examples of specialist court programs

3.50 The committee has received significant evidence outlining many different models of specialist courts which are operated around the country, either as pilot programs or on-going elements of the court system in some states.

3.51 In Queensland, the Queensland Mental Health Court (MHC) is part of the Supreme Court of Queensland. Typically, criminal cases can be referred to the MHC 'if it is believed that the alleged offender is mentally ill, was mentally ill, has an intellectual disability, or at the relevant time was deprived of a relevant capacity'. The MHC has two main purposes. One is 'to decide whether an alleged offender was of unsound mind when they committed an offence. The second function is to hear

---

40 Dr Piers Gooding, Postdoctoral Research Fellow, Disability Research Initiative, Melbourne Social Equity Institute, Melbourne Law School, University of Melbourne, *Committee Hansard*, Darwin, 25 October 2016, p. 2.

41 Additional Information, *Unfitness to plead project: Cost-Benefit Analysis of Supporter*, University of Melbourne, October 2016, pp 4–5.

42 Mr Daniel Clements (General Manager, Justice Programs, Jesuit Social Services) & Ms Eleanore Fritze (Senior Lawyer, Mental Health and Disability, Victoria Legal Aid), *Committee Hansard*, Melbourne, 29 April 2016, pp 6–7.

appeals from the Mental Health Tribunal and make inquiries into whether someone is being lawfully detained in authorised mental health facilities.[43]

3.52 Currently in Western Australia, there are two diversionary programs operated as part of the Magistrates Court—the Intellectual Disability Diversion Program (IDDP), and the Specialist Treatment and Referral Team (Start) court.

3.53 The objective of the IDPP is 'to reduce recidivism among the intellectually disabled offender group, to reduce the rate of imprisonment by diversion and appropriate dispositions and to generally improve the ways in which the justice system deals with intellectually disabled offenders'.[44]

3.54 The Start Court is part of the magistrates court in Western Australia. Established in early 2013, this initiative sought 'to provide more options for people in court with mental illness and more capacity for the court to respond in ways that support people whilst addressing their offending behaviour'. This program also operates a similar children's program in the Perth Children's court.[45] Referrals are made from the magistrates court. The Start Court aims to achieve the following:

- To increase an individual's connection with treatment support services and re-engage individuals with the most appropriate services to help manage their mental illness.
- To find a therapeutic solution to address offending behaviour in a manner which helps an individual manage their mental health issues and make positive changes to their life to help reduce the likelihood of future contact with the criminal justice system.
- To increase public safety and ensure those with mental health issues who need help receive it.[46]

3.55 At face value, these two Western Australian programs appear to offer a more tailored approach for people with cognitive and/or psychiatric impairments. However, these programs do not seem to reach out to remote, Aboriginal and Torres Strait Islander communities. In his submission to the committee, Professor Harry Blagg of the University of Western Australia has proposed the concept of mobile needs focused courts that could be developed for, and deployed in remote Kimberley area of WA. These courts would be based in part on the Victorian Koori court model and the Neighbourhood Justice Centre, used in Collingwood. Importantly, this needs based approach 'shifts the focus from processing offenders to identifying solutions and

43 Queensland Courts, *Mental Health Court*, http://www.courts.qld.gov.au/courts/mental-health-court (accessed 16 May 2016).

44 Law Reform Commission of Western Australia, *Court Intervention Programs: Consultation Paper*, p. 105, http://www.lrc.justice.wa.gov.au/_files/Ch03-CIP.pdf (accessed 16 May 2016).

45 Western Australia Department of the Attorney General, *Mental Health Court (Start and Links Courts*, http://www.ar.dotag.wa.gov.au/M/mental_health_court_start.aspx?uid=5761-1625-4607-8265 (accessed 16 May 2016).

46 Magistrates Court of Western Australia, *Start Court*, http://www.magistratescourt.wa.gov.au/S/start_court.aspx (accessed 16 May 2016).

places emphasis on: the co-location of services; a trauma informed practice; a no wrong door approach to treatment; and respect for Aboriginal and Torres Strait Islander knowledge'. The essential components of this type of court are:

- Single magistrate (ideally with a deep understanding of local communities);
- A 'lite' screening tool that can be administered by local social workers and psychologists);
- Rapid entry into a treatment program and provision of necessary supports; and
- The use of 'on-country' alternative punishment options.[47]

3.56 Mr Peter Collins of the ALSWA argued for the introduction of Aboriginal Courts as used in places like Victoria. Mr Collins noted that the:

> whole process of sentencing Aboriginal people without the engagement of Aboriginal people in the process is largely meaningless. People just cycle through the system endlessly and, at the end of the day, as I said earlier, the protection of the community completely falls away. We could really do with Aboriginal sentencing courts in the Supreme Court, in the District Court, in all of the regional circuit courts, in the Magistrates Court—on it goes. And, as part of that, they could have a role with people who are enmeshed in the mentally impaired domain. If we are not going to do that, things will not change, and they will probably get worse.[48]

3.57 The Darwin Magistrates Court (NT) has recently introduced a trial 'mental health list' which ensures that 'all cases which issues of mental impairment or fitness for trial are raised are being referred to the list so that they can be given special consideration and oversight'.[49]

3.58 In its submission to the committee, the Victorian Ombudsman noted the use of the Assessment and Referral Court (ARC) List used in the Melbourne Magistrates Court. The ARC list is used 'to assist defendants on bail experiencing mental illness or cognitive impairment (including ABI), by addressing the underlying causes of their behaviour through facilitating access to treatment and support services'. The Victorian Department of Justice and Regulation noted that its internal independent evaluation of this program found that the ARC List had a 'return on investment of between $2 and $5 for every dollar [spent], when compared to the costs of imprisonment'.[50] The Victorian Ombudsman made the following observation:

> I noted that despite evidence of the results such programs are achieving and their return on investment, the funding historically made available to them

47 Professor Harry Blagg, Dr Tamara Tulich & Ms Zoe Bush, *Submission 8a*, p. [4]. See also: Professor Harry Blagg, Professor of Criminology, University of Western Australia, *Committee Hansard*, Perth, 19 September 2016, p. 28.

48 Mr Peter Collins, Director, Legal Services, ALSWA, *Committee Hansard*, Perth, 19 September 2016, p. 17.

49 NAAJA, *Submission 60*, p. [6].

50 Victorian Ombudsman, *Submission 20*, p. 7.

> has been very limited compared to the spending in the corrections system more broadly.[51]

3.59 The role of specialist courts is not to ignore offending and illegal behaviour; rather, it is to ensure that such behaviour is acknowledged in concert with appropriate therapeutic supports and services, as described by Mr Daniel Clements of Jesuit Social Services (JSS):

> We would probably argue that there is an opportunity to think about restorative practice and restorative processes that support the individual to better understand the impact of the offending on families and on community, and that can work parallel to targeted, purposeful, tailored case management support.[52]

Diversionary options

3.60 In addition to supports for people engaging with the court system, Professor Harry Blagg noted that 'diversionary practices favour the least intrusive option at any point of interaction between an accused person and the justice system'.[53]

3.61 In its submission, JSS also raised diversion programs that utilise restorative justice principles. These approaches 'seek to hold the offenders to account for their actions and to provide them with the opportunity to restore their broken relationship with the victim, the community and in many cases, their own family'.[54] JSS went further and noted:

> The creation of diversion programs targeting people with cognitive impairment at a pre-plea or presentence stage could prevent people entering prison and experiencing isolation from community connections and primary care givers, as well as preventing the harm that many people experience in prison. Diversion programs have the capacity to more effectively prevent further reoffending, by addressing the risk factors that contribute to a person's involvement in the justice system.[55]

3.62 JSS highlighted a comparative analysis of its Youth Justice Group Conferencing diversion program in which 80 per cent of participants had not re-offended after two years as opposed to over half of those sentenced to youth detention who had re-offended.[56]

3.63 During the committee's Brisbane hearing, Mr Simon Wardale highlighted Victoria as having a best practice model for the provision of support and diversionary

---

51 Victorian Ombudsman, *Submission 20*, p. 7.

52 Mr Daniel Clements, General Manager, Justice Programs, Jesuit Social Services, *Committee Hansard*, Melbourne, 29 April 2016, p. 6.

53 Professor Harry Blagg et al, *Submission 8*, p. [13].

54 JSS, *Submission 53*, p. 20.

55 JSS, *Submission 53*, p. 20.

56 JSS, *Submission 53*, p. 20.

services for people with cognitive impairment.[57] Mr Wardale firstly explained the legislative amendment that the Victorian Government undertook, and the policy response that was implemented to complement this change:

> The Sentencing Act in Victoria was amended some time ago to allow community based orders to waive the obligation for community work and require the person with a disability to participate in support and therapeutic programs.
>
> That was a change in the legislation. What happened from a policy perspective then was that the state based disability service department developed the requisite capacity and expertise to make those recommendations and put them before the court. So the court immediately had an option and it was not linked to the significance of the disability, which is where we get our 'unfitness' and 'unsoundness' sorts of determinations, which often result in indefinite detention. I am happy to talk about this in more detail. But in this example it was just a sentencing option available to a magistrate. The legislation was changed and the policy response emerged to be able to facilitate the effective implementation of that legislation.[58]

3.64 Mr Wardale went further, describing the establishment of the Victorian Disability Forensic Assessment and Treatment Service which has provided for the integration of disability, correctional services, and diversionary services for people with cognitive impairment:

> The other thing that happened that I think is a good example of the Victorian system is that the state based disability service department developed a response to offenders with an intellectual disability through the Disability Forensic Assessment and Treatment Service. That is a secure service that is based in Fairfield, and people can find themselves in that service either through sentencing or as a function of the Disability Act. But what that service did as well was outreach clinical support in Marlborough prison and Loddon-Mallee prison, provided case management support as part of both of those outreach options and also established a clinical position that was there to support the various departmental regions across the state that were supporting offenders with an intellectual disability.
>
> So what we had was a hub of expertise created that then interfaced with the correctional system and with regional disability service systems so that we did not have clogged service, if that makes sense, where people went to live but there was nowhere for them to move out to and no effective response to their needs in the community. To my mind, that also underlies some of the challenges with the interface principles as they are currently written in terms of correctional response to people with intellectual disability, because

57 Mr Wardale is currently the Director of Forensic Disability at the Queensland Department of Communities, Child Safety and Disability Services. Previously he has served as the Director of Practice Leadership at the Queensland-based Centre of Excellence for Behaviour Support and as a Regional Senior Practice Advisor with the Victorian Department of Human Services.

58 Mr Simon Wardale, *Committee Hansard*, Brisbane, 23 March 2016, p. 26.

> in Victoria the correctional response is entirely caused by the disability service response.[59]

3.65 Diversionary programs are discussed further in Chapter 5.

Committee view

3.66 The committee has heard evidence of examples of specialist courts and diversion programs throughout this inquiry. Elements of these models could be adapted and utilised in WA and the NT to provide more appropriate supports for people with cognitive and/or psychiatric impairment and as a mechanism to divert these people from the criminal justice system.

3.67 Specialist courts provide one mechanism to divert people with cognitive and/or psychiatric impairments from the criminal justice system to more appropriate therapeutic supported environments. The committee is heartened by the 'mental health list' trials in the Darwin Magistrates Court; however acknowledges that this is not a legislated requirement and hence relies on individual people in the magistrates court to ensure its continuation or expansion. The committee considers that the 'mental health list' is an important initiative with the potential to help ensure that people with cognitive and/or psychiatric impairment are diverted from the criminal justice system, diagnosed and provided with appropriate supports. Consideration should be given to whether this initiative and ones like it could be continued and expanded across the NT, particularly in more remote locations, and implemented in other jurisdictions.

3.68 The committee is concerned by the lack of culturally and locally appropriate court services for regional and remote populations, particularly for Aboriginal and Torres Strait Islander peoples. The IDPP and Start Court initiatives in Perth are an important method for identifying and diagnosing alleged offenders with mental or psychiatric impairment; however, do not reach out to the vast majority of that state. The committee is of the view that remote, mobile courts—as described by Professor Harry Blagg—may be an appropriate way for the criminal justice system to reach out to remote Aboriginal and Torres Strait Islander communities. Such mobile courts could deal with alleged criminal activity in a culturally appropriate way that acknowledges the inappropriateness of any proven negative behaviours and then provides a suitable therapeutic on-country pathway forward.

3.69 Culturally appropriate responses and pathways to country are discussed in more detail in Chapter 5. The role that screening and diagnostic tools can play within the court system as a means to diagnose a person's disability and provide more information to a court officer is discussed in the next section.

Limiting terms

3.70 As noted in Chapter 2, the NT, WA and Victoria (VIC) are the only Australian jurisdictions that do not place limits on detention for those people subject

59 Mr Simon Wardale, *Committee Hansard*, Brisbane, 23 March 2015, p. 26.

to forensic orders. Many submitters and witnesses to this inquiry have highlighted the 'need for limits on the period of detention that can be imposed'.[60]

3.71 Limiting terms was a key recommendation of the Australian Law Reform Commission's report *Equality, Capacity and Disability in Commonwealth Laws*.[61] The North Australian Aboriginal Justice Agency (NAAJA) agreed noting that 'the priority for any legislative change should be the introduction of 'limiting terms', in place of supervision orders. Further, NAAJA argued that 'the length of any term should be dictated by the need to protect the community, balanced against the principle that a person's liberty should be subject to the minimum restriction necessary'.[62]

3.72 The ADJC agreed with the sentiments of this recommendation, noting that limiting terms are a practical alternative to indefinite detention. NSW was cited as an example where limiting terms 'prevents a person found unfit to be tried being imprisoned for longer than if he or she had been convicted of the offence'.[63] The University of Western Australia is also supportive of statutorily prescribed limited terms similar to New Zealand or for 'courts, like on the east coast, who have the ability to say what the best estimate is of the sentence that we would have given someone and then go with that best estimate'.[64]

3.73 As noted earlier in this chapter, all supervision orders in the NT must be handed down with a nominal fixed term. This fixed term forms the timeframe for the first major review of that order; it does not mean removal from prison.[65] As Mr Russell Goldflam, President of the Criminal Lawyers Association of NT noted:

> As an example, I currently act for a client who engaged in conduct contrary to the Northern Territory Criminal Code back in March 2011. He was acutely psychotic at the time. Indeed, he engaged in the conduct while an involuntary patient in the psychiatric ward of the Alice Springs Hospital. He was eventually found not guilty by way of mental impairment and placed on a Part IIA custodial supervision order. The judge fixed a term of three months, being the sentence he would have imposed had my client been convicted of the offence. By that time, he had already served seven months, but he was not released from prison for a further seven months, essentially, because no suitable community-based placement had been arranged or funded. Since then, he has been on a non-custodial supervision order for the last two years and three months, which significantly curtails his freedom. He is not permitted to leave the home he lives in without an

60 Law Council of Australia, *Submission 72*, p. 16. See also: Mr Russell Goldflam, President, Criminal Lawyers Association of the Northern Territory, *Committee Hansard*, Alice Springs, 26 October 2016, p. 2.

61 Australian Law Reform Commission, *Submission 4*, p. [1].

62 NAAJA, *Submission 60*, pp [10–11].

63 Aboriginal Disability Justice Agency, *Submission 76*, p. [3].

64 Dr Tamara Tulich, Lecturer, University of Western Australia, *Committee Hansard*, Perth, 19 September 2016, p. 29

65 *Answer to Question on Notice No. 2*, NT Government.

> escort. Physically and mentally, he is going nowhere. If we can stitch together a robust care plan for him, the judge managing his case has indicated that he will consider discharging my client soon. In the meantime, he has endured 3½ years of restricted liberty for engaging in misconduct which the court found justified a sentence of three months' imprisonment. This is obviously unfortunate and unsatisfactory, and, arguably, unfair. But my client is difficult to manage in the community. He was released on bail some years ago and promptly absconded. While at large, he resumed the sort of conduct that had brought him to the attention of police in the first place. However, in my view, even under the current law, my client could, and should, have had his liberty restored much more quickly. What prevented this was the lack of access to better, more coordinated, more pro-active service providers who work together to positively plan for the restoration of his liberty and not wait for a judge to give them a nudge to do so. That is just one example, but, in my submission, it is illustrative and instructive.[66]

3.74 This circular and frustrating type of evidence has become familiar to the committee throughout this inquiry. Nominally, pathways exist for people in both the NT and WA; however, in practice is leading to poor, unintended outcomes. As it stands now, a person is found unfit to plead and placed on a forensic order; a lack of suitable supported accommodation options results in a person being placed in prison; little or no support services are provided in prison resulting in static or regressive behaviours; regular reviews are conducted, but as that person shows little sign of improvement, they remain in prison—indefinitely detained.

3.75 NAAJA noted that the use of limited terms will 'more clearly place an onus on government to justify continuing any restriction on a person's liberty'.[67] If a government is placed in a position where detention in a prison is no longer an option, that government's efforts will be focused on ensuring that appropriate accommodation is provided in the community prior to the release of that person.

Committee view

3.76 The current legislative approach in WA and the NT is inadequate. In the absence of appropriate supported accommodation options for people on forensic (custodial) orders, a 'custody by default' model is adopted instead.[68] The introduction of limiting terms would drive a shift in these jurisdictions by shifting the onus from the 'custody by default' model to one where government must actively plan where a person will be placed at the end of their limiting term. As such, it is the committee's view that limiting terms could be an effective mechanism to prevent the indefinite incarceration of people with cognitive and/or psychiatric impairment when applied in concert with access to appropriate therapeutic programs whilst in prison.

---

66 Mr Russell Goldflam, President, Criminal Lawyers Association of the NT, *Committee Hansard*, Alice Springs, 26 October 2016, p. 2.

67 NAAJA, *Submission 60*, p. [11].

68 NAAJA, *Submission 60*, p. [7].

3.77 The committee also notes that law reform is required in the NT and WA. Such reform would provide greater flexibility—described as a 'middle ground' by the Chief Justice of WA —to the judiciary when considering and handing down forensic orders and prevent unnecessary incarceration in prison.

Screening and diagnostic tools

3.78 Specialist courts and other diversion programs are only useful when a person's disability is appropriately identified. However, many people with cognitive and/or psychiatric impairment are not aware of their disability at the time they are brought into contact with the criminal justice system. Without refined screening and diagnostic tools, specialist courts and support workers are unable to identify people with a cognitive and/or psychiatric impairment and are unable to identify the specifics of the individual's disability, which can help inform the court and support workers about the needs and the most appropriate pathway for each alleged offender with cognitive and psychiatric impairment. This section looks at the role of screening and diagnostic tools with a specific focus on Foetal Alcohol Spectrum Disorders (FASD).

3.79 The committee has received evidence about the importance of screening and diagnostic tools for use when people first interact with the criminal justice system. This can be at the court or on entry to prison. The aim of these tools is to provide support and diversion for people with cognitive and/or psychiatric impairments. Dr Glenn Jessop from Jesuit Social Services highlighted the importance of:

> …appropriately resourced, accessible and specialised assessment and screening tools at all key points of the justice system…We believe diagnosis and therapeutic support at the earliest opportunity would reduce the likelihood of further contact with the criminal justice system as well as ensuring compliance with Australian human rights obligations.[69]

3.80 Currently, in Victoria, prisoners do not undergo formal screening and assessment for cognitive impairment such as Acquired Brain Injury (ABI)—despite the presence of a diagnostic tool developed by Corrections Victoria. The Victorian Ombudsman submitted:

> In Victoria at present, prisoners are not routinely screened for an ABI at reception. As a result, the responsibility for identifying a prisoner can fall to a number of different staff members, not just specialists. Staff are required to refer prisoners for a screening where they 'suspect' a cognitive impairment based on a prisoner's behaviour or interactions, or where a prisoner discloses that they have an ABI.[70]

3.81 This compares with NSW where 'all adults in custody undergo screening for disability (including cognitive, sensory, physical) and mental illness'. The results of

69 Dr Glenn Jessop, Policy Manager, Jesuit Social Services, *Committee Hansard*, Melbourne, 29 April 2016, p. 4.

70 Victorian Ombudsman, *Submission 20*, p. 3.

these assessments are centrally available to all corrections officers and helps inform daily management and even referrals to the NDIS and state disability services.[71]

3.82 As noted in the previous section on specialist courts, the 'mental health list' at Darwin Magistrate Court provides an initial screening and assessment for offenders by a court-based mental health clinician. This process helps provide an:

> an early indication of possible mental health or cognitive impairment issues and allowing for cases to be more efficiently progressed (for example, by providing a preliminary view that a person may or may not have a defence of mental impairment available).[72]

3.83 More broadly, the Australian Medical Association recommended that screening of all prisoners should also be conducted upon admission to prison 'from a medical practitioner for physical, addiction-related and psychiatric disorders, and potential suicide risk. These screenings should also include 'evaluation of substance use, hearing loss, acquired brain injury, intellectual disability and other cognitive disabilities' as a guide to determine appropriate treatments'.[73] The next section will focus on screening and diagnostics for people with FASD.

Foetal Alcohol Spectrum Disorders

3.84 As described in Chapter 2, 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'.[74] The cognitive impairment caused by FASD can lead to a wide range of behaviours including ones which result in a person being brought into contact with the criminal justice system.

3.85 In its submission, the Law Council of Australia recommended 'that all governments invest in methods to ensure the detection and treatment of Foetal Alcohol Spectrum Disorders (FASD) and other disabilities' which lead to detention, especially for Aboriginal and Torres Strait Islander peoples.[75] Professor Blagg from the University of Western Australia expressed his support for:

> …better diversionary programs that redirect young people with FASD out of the justice system at an early stage. However, on the basis of our research we feel that, to be effective, diversion for Indigenous young people with FASD must involve diversion into Indigenous owned, non-stigmatising, therapeutic alternatives, particularly in the emerging sphere of Indigenous on-country initiatives. So ours is what we call a country centric model… We think some kind of hybrid of the Neighbourhood Justice Centre model in Melbourne and the Aboriginal court would serve to

71 NSW Government, *Submission 66*, pp 11–12.

72 NAAJA, *Submission 60*, p. [6].

73 AMA, *Submission 12a*, p. 6.

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

75 Law Council of Australia, *Submission 72*, p. 15.

> increase the rate of diversion at the front end and also provide much needed services.[76]

3.86 At its Perth hearing, the committee was told an all too common story of undiagnosed FASD by Mr Peter Collins, Director at the ALSWA:

> This was a young boy who was raised by a concerned, devoted grandmother, who lived next door to his natural parents, who were caught in the vortex of acute alcohol and drug abuse, domestic violence and dysfunction. The court reports spoke heartbreakingly of the fact that his parents lived next door to him and months, and sometimes years, would go by when they did not say anything to their young son. Eventually the penny dropped. It took way too long, but he was assessed with a provisional diagnosis of FASD. By then it was too late: he was 17 years old, he had committed some extremely serious offences of violence and was sentenced to a lengthy term of imprisonment. Worse still, he was angry, he was embittered and he was disaffected. The waste of human life was palpable. One of his teachers at the Clontarf college in Kununurra said he was the best junior AFL footballer he had ever seen. He is never going to realise that potential, because he will be behind bars.[77]

3.87 The importance of early diagnosis was underscored by Professor Raelyn Mutch of Telethon Kids Institute at the committee's Perth hearing:

> There is recognition of the need to understand why the child is having problems…Consistently, across the young people that we are meeting, they are running into problems very early on and in primary school. They are being perceived to be naughty rather than understood as having a learning difficulty. If, at that early stage, they were assessed appropriately then that may enable them to be taught through their strengths. And if they were taught through their strengths they would be less likely to fail, because that recognition is not happening at that stage, then they are acting up very early on and failing at high school and disengaging, and then that is when they become engaged with juvenile justice.[78]

3.88 Telethon Kids Institute noted in its evidence to the committee that it has recently completed the development of the first Australian FASD diagnosis tool. Diagnosis of this complex cognitive impairment is the first step in preventing a person with FASD 'having the life trajectory that brings them into early engagement with justice systems and mental health facilities'.[79] Ideally such diagnosis would occur

---

76 Professor Harry Blagg, University of Western Australia, *Committee Hansard*, Perth, 19 September 2016, p. 28.

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

78 Clinical Associate Professor Dr Raewyn Cheryll Mutch, Post-Doctoral Senior Research Fellow and Paediatrician, Telethon Kids Institute, *Committee Hansard*, Perth, 19 September 2016, p. 34.

79 Clinical Associate Professor Dr Raewyn Cheryll Mutch, Post-Doctoral Senior Research Fellow and Paediatrician, Telethon Kids Institute, *Committee Hansard*, Perth, 19 September 2016, p. 32.

prior to a person interacting with the justice system; however, at the very least, comprehensive health, language, cognition and social wellbeing assessments' including FASD screening should be made available 'for all children and youth at their very first point of contact with the juvenile justice system'.[80]

Committee view

3.89 Screening of people with cognitive and/or psychiatric impairments needs to be made a priority, particularly for those with severe impairments such as FASD, to ensure that the judiciary can make early informed choices about diversion and therapeutic treatment for this group of vulnerable Australians. The completion of the FASD diagnosis tool provides an ideal opportunity to provide this as a supported resource to courts, legal aid and other related groups.

3.90 The committee considers that all jurisdictions should adopt the NSW Corrections' approach of regular disability screening tools for disability of all prisoners, both adults and minors. Such a practice would help to ensure that all prisoners with disability are provided with access to therapeutic and other supports appropriate to their needs.

Review of forensic orders

3.91 Currently forensic (custodial) orders are reviewed on a regular basis either by the relevant mental health tribunal in most states, the MIARB in WA, or the Supreme Court in the NT.

3.92 The Chief Justice of WA has argued that—in addition to the legislated introduction of limiting terms— there is a requirement for a 'full, transparent judicial review of risk' similar to the 'dangerous sexual offender legislation in [WA] whereby the court reviews every year the risk that they pose to the community'.[81]

3.93 The WA Inspector of Custodial Services agreed and went further noting that 'dangerous sex offenders' in WA currently have greater protections than people subject to forensic orders. Dangerous sex offenders held on indefinite detention orders are subject to reviews by the WA Supreme Court annually. In order for the order to be extended:

> The court must be satisfied—picking up the Chief Justice's theme—that the risk that that person poses cannot be managed in the community and can only be managed in a custodial setting. If you have a look at the case law there is a very significant body of case law that basically says there is a presumption that the person will be released under community supervision unless there are exceptional reasons based on risk as to why they need to be detained. Every year—I think it is every year, or every two years—it is referred back to the court for another public hearing, legal representation in

80 Clinical Associate Professor Dr Raewyn Cheryll Mutch, Post-Doctoral Senior Research Fellow and Paediatrician, Telethon Kids Institute, *Committee Hansard*, Perth, 19 September 2016, p. 33.

81 Chief Justice Wayne Martin, *Committee Hansard*, Perth, 19 September 2016, p. 5.

> full and all-of-court paraphernalia. It strikes me that that makes an interesting parallel with the mentally impaired accused act.[82]

3.94 The WA Disability Services Commission contended that the review process in place through MIARB occurs 'at least once a year'.[83] Currently, the MIARB reviews (and makes) forensic (custody orders) in Western Australia. One of the criteria to be considered during this process is the 'degree of risk' that a person poses to the community. MIARB must report on each person under its jurisdiction at least once per year.[84] Developmental Disability WA has agreed that this review process does exist; however, submitted that 'it still comes down to who is making that decision every year' and that 'as long as you have the person making that decision not being a court, you are constantly' going to have continued instances of indefinite detention.[85]

3.95 Some submitters have highlighted that the review process is heavily dependent on the reports issued by medical and psychiatric experts. Mr Russell Goldflam of the Criminal Lawyers Association of the NT described a '"tick and flick" approach to annual reports in some cases, and particularly those in which the supervised person has been institutionalised (whether in custody or in the community) for a lengthy period'.[86] Mr Goldflam noted an example where an independent opinion was sought which led to a more favourable outcome:

> If I could go back to the example I mentioned before: the gentleman who was given a three-month term several years ago and is still under an order. This year I have been provided with three reports by health department psychiatrists—I think it was within the last 12 months—and they all say, 'This person should stay on the order.' That probably would have kept going until he died if I had not commissioned a report, which cost the Northern Territory Legal Aid Commission some thousands of dollars, from an independent expert from somewhere else who said, 'No, this person is not a serious risk.' That is why the judge has given an indication that he is considering releasing him. Unless we had taken that proactive step, we were just going to be stuck with this bloke sitting comfortably, but unhappily, in his supported accommodation and never being allowed to go out in the street without a chaperone.[87]

---

82 Professor Neil Morgan, Inspector of Custodial Services, Office of the Inspector of Custodial Services, *Committee Hansard*, Perth, 19 September 2016, p. 9.

83 Dr Ron Chalmers, Director-General, Disability Services Commission, *Committee Hansard*, Perth, 19 September 2016, p. 45.

84 Mentally Impaired Accused Review Board, *Annual Report 2015/16*, pp 13 & 22.

85 Ms Taryn Harvey, CEO, Developmental Disability WA, *Committee Hansard*, Perth, 19 September 2016, p. 26.

86 *Answer to Question on Notice No. 1*, Mr Russell Goldflam.

87 Mr Russell Goldflam, President, Criminal Lawyers Association of the NT, *Committee Hansard*, Alice Springs, 26 October 2016, p. 5.

Committee view

3.96 The committee concedes that a regular review process currently exists in WA and the NT; however, agrees with witnesses that additional protections should be instituted so as to provide people subject to forensic orders at least the same protections as those provided to dangerous sex offenders. It is the committee's view that where a person is subject to a review process that an independent third party appraisal of any professional medical and psychiatric assessments is sought to inform the review process.

Concluding committee view

3.97 The committee acknowledges that forensic patients are not detained with the intention of it being indefinite and prolonged. Nevertheless, as this chapter has shown, there are a range of factors—from legislation to court practice—that converge and ultimately result in forensic patients being indefinitely detained. This chapter has covered substantial and complex terrain focusing on the front-end of the justice system where alleged offenders come into contact with the courts. Notwithstanding the complexity of the issues, the committee considers there are several concrete themes which can be taken from this chapter to provide a pathway forward that will reduce the indefinite detention of forensic patients in prison—these are legislative reform including limiting terms, and supported decision-making and diversionary mechanisms.

Law reform—limiting terms and increasing sentencing options for judiciary

3.98 The committee considers that prison is not a suitable place for forensic patients, and will elaborate on this view in the next chapter. However, as it stands, forensic patients are being indefinitely detained and the committee is interested in mechanisms that prevent this from occurring, regardless of the nature of the detention facility.

3.99 The committee is concerned by reports of people with cognitive and/or psychiatric impairment pleading guilty to avoid the risk of indefinite detention as a forensic patient. There is a need for reforms to address this.

3.100 Limiting terms is one option to prevent indefinite detention. Currently, limiting terms for forensic patients are provided for in all Australian jurisdictions except the NT, WA and Victoria. It is the committee view that limiting terms need to be adopted for forensic patients in these states. Limiting terms become a mechanism that forces government to accept greater responsibility for forensic patients in their care. The committee's support for limiting terms is based on the proviso that appropriate therapeutic support services are provided to forensic patients in prison whilst noting that prison is not the most appropriate place to deliver those services. The committee is also strongly of the view that a limiting term should not become the default period, but rather the maximum period that forensic patients spend in prison.

3.101 The committee considers that specific legislative reform in the NT and WA which expands the options available to a sentencing judge beyond unconditional release and prison will result in less forensic patients being placed in prison. Secure options and transitional placements that both reduce risk to the community and also

provide a therapeutic, non-punitive environment for forensic patients are discussed further in Chapter 5.

Supported decision-making and diversion

3.102 The committee also heard about a number of successful support-worker programs including the unfitness to plead project which assist people to engage with and understand the court process. Importantly, improved participation in legal processes through support may lead to less forensic orders, diversion to genuine supported accommodation and therapy, and ultimately, less people being indefinitely detained. The committee is supportive of such programs being maintained and expanded.

Screening and diagnosis

3.103 The committee agrees with evidence that many alleged offenders are people with undiagnosed cognitive and psychiatric impairments that continue to remain undiagnosed. Appropriate, timely screening and diagnosis mechanisms, such as the new FASD Diagnostic Tool developed by the Telethon Kids Institute, can help inform the courts and other disability and health service providers to divert a person, where appropriate, to identify therapeutic treatments.

Specialist courts

3.104 Specialist courts are another means to intercept and screen people with cognitive and psychiatric impairments, leading to diagnosis and diversion from the criminal justice system. There are excellent examples of such specialist courts which should be adopted and expanded where necessary. The committee also has a strong view that there is a need for such courts to be adapted for remote Aboriginal and Torres Strait Islander communities. The committee highlights the remote, mobile courts—as described by Professor Harry Blagg—as an appropriate way for the criminal justice system to reach out to remote Aboriginal and Torres Strait Islander communities. Such mobile courts could deal with alleged criminal activity in a culturally appropriate way that acknowledges the inappropriateness of any proven negative behaviours and then provide a suitable therapeutic on-country pathway forward. Chapter 5 will further explore culturally appropriate care and pathways to country for Aboriginal and Torres Strait Islanders.