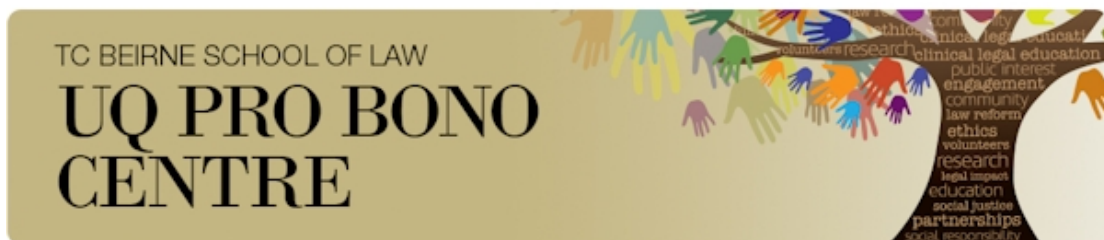


# **Declared unfit to plead**

## **Research Report**

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## Glossary

ACT	The Australian Capital Territory
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
AMHS	Authorised Mental Health Service
ATSI	Aboriginal and Torres Strait Islander
COAG	Council of Australian Governments
Commonwealth	Commonwealth of Australia
ECT	Electro-compulsive therapy
LCA	Law Council of Australia
MHC	Mental Health Court of Queensland
MHRT	Mental Health Review Tribunal
MHT	Mental Health Tribunal
MIARB	Mentally Impaired Accused Review Board of Western Australia
NSWLRC	New South Wales Law Reform Commission
NT	The Northern Territory
OCPQ	Office of the Chief Psychiatrist Queensland
Senate Inquiry	Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia by the Senate Committee on Legal and Constitutional Affairs (References)
UN	United Nations
UNCRPD	United Nations Convention on Rights of Persons with Disabilities
VLRC	Victorian Law Reform Commission

## Qualifications

This report conducts a review of each Australian jurisdiction (with a focus on Queensland) using open-source information including legislation, government and parliamentary reports, reports by law reform bodies, and other primary and secondary sources. Given the limitation of publically available case studies in this area of law, it was difficult for the authors to draw safe conclusions about the degree to which the mental health and disability systems meet community expectations about safeguarding individual rights, as well as the prevalence of indefinite detention. The authors note the importance of refraining from analysis of the law in a vacuum, as this area of law - perhaps more than any other area of law - must be considered in its social, therapeutic, clinical and policy contexts. These contexts fall outside the scope of this report. Regardless we hope this report provides a useful comparative analysis between each Australian jurisdiction.

## Part 1 Introduction

The AHRC insists that, in Australia, ‘indefinite detention of people with disabilities is a persistent issue and of grave concern.’<sup>1</sup> The ALRC Report tabled in Federal Parliament in 2014 documents a wide array of concerns about how people with cognitive disabilities are treated by the justice systems of each Australian jurisdiction.<sup>2</sup> The ALRC Report shed light on particular concerns about the fairness of court processes and the outcomes of unfitness determinations.

In 2016, the United Nations (UN) Committee on the Rights of Persons with Disabilities put Australia under the spotlight when it heard the case of Marlon James Noble, an Indigenous man from Western Australia who was indefinitely detained after a fitness to plead investigation.<sup>3</sup> The UN Committee found that Australia had failed to fulfil its obligations under international law.<sup>4</sup> Noble’s case caused international concern and led the AHRC to call for a national audit of people held in prison after being found unfit to plead.<sup>5</sup> More recently, the Human Rights Watch Report, ‘*I Needed Help, Instead I was Punished*’ released in early 2018 has again put Australia in the spotlight for its breaches of international human rights law and the unfavourable treatment of people with cognitive disabilities in prison.<sup>6</sup>

Due to the problems with Australia’s current statutory reporting mechanisms, it is difficult to estimate how many people in Australia are indefinitely detained. Anecdotally, what seems clear is that people with cognitive impairments who are innocent may plead guilty in situations where doing so means avoiding the risk of receiving either a custodial period longer than they would ordinarily receive for the alleged crime, or in some cases, indefinite detention. Such an incentive is itself a cause for concern and arguably warrants a review of the systems which allow the indefinite detention of people with cognitive impairment.

This report shows how mental health and disability systems interact with the criminal justice systems in each Australian jurisdiction. In particular, the report analyses how State and Territory Governments deal with people who are deemed unfit to plead. With a focus on the approach in Queensland, this report illustrates the constraints on an intellectually or mentally impaired accused being able to fairly challenge allegations of fact made against them in their own defence. This report details the common law test for fitness to plead, the process for trying fitness to plead, the various statutory frameworks for reviewing and reporting on forensic orders and Australia’s obligations under international law towards people with disabilities.

### 1.1 Case study: Marlon Noble

The case of Marlon James Noble illustrates the gravity of the risk of a miscarriage of justice for an accused person who is mentally or intellectually impaired. The case concerned an Aboriginal man who was accused of sexually assaulting two girls in Western Australia in December 2001. In 2002, Noble appeared in court and was held in custody until 2003 when he was declared unfit to stand trial due to cognitive impairment. After this assessment, a custody order was made under the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*. Section 24 of that Act states that a place must be

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<sup>1</sup> Australian Human Rights Commission (AHRC), *Equal Before the Law: Towards Disability Justice Strategies*, (February 2014) <[www.humanrights.gov.au/our-work/disability-rights/publications/equal-law](http://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law)>.

<sup>2</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Final Report*, Report No 124 (2014) 208-209.

<sup>3</sup> UN Convention on the Rights of Persons with Disabilities – CRPD/c/16/D/7/2012 Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No.7/2012

<sup>4</sup> Article 5(1) and (2), 12(2) and (3), 13(1), 14(1)(b) and 15 of the United Nations Convention on the Rights of Persons with Disabilities.

<sup>5</sup> Australian Human Rights Commission, *Jailed without Conviction: Commissioners Call for Audit* (13 March 2014) <[www.humanrights.gov.au](http://www.humanrights.gov.au)>.

<sup>6</sup> Human Rights Watch Report, ‘*I Needed Help, Instead I was Punished: Abuse and neglect of Prisoners with Disabilities in Australia*’ (6 February 2018) <<https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>>.

‘declared’ before it may be used to house people that have been deemed unfit to stand trial. However, due to no such place being ‘declared’ Noble was placed in prison and jailed for ten years. He was released in January 2012 after his case was withdrawn by the Director of Public Prosecutions in Western Australia in 2010, due to the fact that he had been imprisoned for a far greater period of time than he would have been had he been found guilty of the original charges.<sup>7</sup> Crucially, Marlon Noble was never allowed to *test the evidence* against him and yet he effectively served a prison sentence in excess of the statutory sentencing period for crimes that were not proven.

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<sup>7</sup> Australian Human Rights Commission, above n 5.



## Part 2 Test for fitness to plead

While the common law has expounded a test to determine whether a person may be fit to stand trial, the states have supplemented this with legislation to guide the courts in making a determination.

### 2.1 Common Law

At common law, the test for determining the fitness of an accused to stand trial is drawn from *R v Presser* [1958] VR 45.<sup>8</sup> The case concerned the capacity of a teenage accused and whether they could stand trial, after medical reports had indicated that the accused ‘suffered from serious mental defects.’ In concluding that a jury ought to be empanelled to determine the capacity of the accused, Smith J laid out six minimum standards which would need to be met before the accused ‘could be tried without unfairness or injustice to him’ [48].<sup>9</sup> The criteria listed by His Honour were whether the accused has the capacity:

- (1) to understand the nature of the charge;
- (2) to plead to the charge and to exercise the right of challenge;
- (3) to understand the nature of the proceedings, namely, that they are an inquiry as to whether the accused did commit the offence with which he is charged;
- (4) to follow the course of the proceedings;
- (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and
- (6) to make a defence or answer the charge.<sup>10</sup>

The criteria are qualified to ensure their application in ‘a reasonable and common-sense fashion,’ by requiring that an evaluation of an accused’s capacity to follow court proceedings does not extend to an assessment of his capacity to ‘understand the purpose of all the various court formalities.’<sup>11</sup> Nor need an accused be ‘conversant with court procedure or have the mental capacity to make an able defence,’ in order to be held capable of standing trial, but rather the accused must ‘have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel.’<sup>12</sup>

In *Ngatayi v The Queen* (1980) 147 CLR 1, the High Court confirmed the test in *Presser* as the appropriate common law test to be used when evaluating unfitness, and in doing so, further limited the criteria.<sup>13</sup> Barwick CJ clarified that the concept of understanding the nature of trial proceedings ought not extend to an understanding of the law applicable to the trial, but rather constitute a capacity to comprehend ‘the nature of the proceedings to which he or she would be subject if a plea were made or entered.’<sup>14</sup> The phrase ‘the accused need not have the mental capacity to make an able defence’ was held by the majority of the court (per Gibbs, Mason and Wilson JJ) to refer to:

‘...the view that the accused need not have sufficient capacity to make an able defence, or to act wisely or in his own best interest...[T]he section does not mean that an accused

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<sup>8</sup> *R v Presser* [1958] VR 45.

<sup>9</sup> *R v Presser* [1958] VR 44, 48.

<sup>10</sup> *R v Presser* [1958] VR 45.

<sup>11</sup> *R v Presser* [1958] VR 45.

<sup>12</sup> *R v Presser* [1958] VR 45.

<sup>13</sup> *Ngatayi v The Queen* (1980) 147 CLR 1.

<sup>14</sup> *Ngatayi v The Queen* (1980) 147 CLR 1, 4.

can only be tried if he is capable, unaided, of understanding the proceedings so as to be able to make a proper defence. This is self-evident when the incapacity to understand the proceedings is due to an inability to understand the language in which the proceedings are conducted. In such a case, if an interpreter is available the incapacity is removed.’<sup>15</sup>

Therefore, rather than ‘the capacity of the accused to understand the proceedings’ the High Court preferred that trial judges ought not to require ‘a complete understanding [that] may require intelligence of quite a high order...’<sup>16</sup> Reiterating the observation that Smith J’s criteria, the High Court expounded a procedural rather than legal threshold of comprehension. The majority noted:

‘if the accused is able to understand the evidence, and to instruct his counsel as to the facts of the case, no unfairness or injustice will generally be occasioned by the fact that the accused does not know, and cannot understand the law.’<sup>17</sup>

The common law test in *Presser* has been criticised both by the Victorian Law Reform Commission (VLRC) and the New South Wales Law Reform Commission (NSWLRC) for ‘placing undue emphasis on a person’s intellectual ability to understand specific aspects of the legal proceedings and trial process, and too little emphasis on a person’s decision making capacity.’<sup>18</sup> To this extent, the test may be over-inclusive, encompassing many accused persons that may unnecessarily be found incapable of standing trial. Conversely, as the Australian Law Reform Commission (ALRC) pointed out, by requiring determinations of fitness to be made on the basis of strict and narrow criteria, the test could be considered ‘under-inclusive’ requiring some accused persons to stand trial who may not meet the guidelines of the enumerated test but may nevertheless be unable to effectively participate in their trial.<sup>19</sup> As the ALRC noted, ‘by focusing on intellectual ability, generally sets too high a threshold for unfitness’ and that may not adequately protect patients with mental illness who retain the intellectual capacity required to plead under the criteria in *Presser*. Therefore, various law reform bodies recommend that the common law test refocus on a patient’s decision making capacity at the time of the trial, rather than their intellectual competency.<sup>20</sup>

On the other hand, the test has been criticised for failing to consider whether the accused’s fitness could be improved, either through additional support or by modifying the trial process, so as to allow the patient to stand trial.<sup>21</sup> This is also facilitated by legislation in jurisdictions such as Queensland. For example, the Mental Health Court in Queensland recorded three such orders attached to a forensic order (mental health) and one such order attached to a forensic order (disability) in the 2016-17 report tabled to Parliament.<sup>22</sup> Nonetheless, the ALRC went on to recommend that the test should be reformulated to ‘focus on whether, and to what extent a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all.’<sup>23</sup>

The NSWLRC proposed an additional procedural qualification on the test that would consider the accused’s circumstances and potential to participate in a trial. It recommended that courts should consider:

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<sup>15</sup> *Ngatayi v The Queen* (1980) 147 CLR 1, 8.

<sup>16</sup> Russ Scott, ‘Fitness to Plead in Queensland’ (2007) 14 *Psychiatry, Psychology and Law* 327, 334.

<sup>17</sup> *Ibid.*

<sup>18</sup> Piers Gooding et al., ‘Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change’ (2017) 40(3) *Melbourne University Law Review* 816.

<sup>19</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014), 157.

<sup>20</sup> *Ibid.*

<sup>21</sup> Gooding et al., above n 18.

<sup>22</sup> Queensland, Mental Health Court, *Annual Report 2016-17*, 6.

<sup>23</sup> New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) rec 2.2.

- (a) whether modifications to the trial process can be made to facilitate the person's effective participation;
- (b) the likely length and complexity of the trial;
- (c) whether the person is legally represented; and
- (d) any other relevant matter.<sup>24</sup>

Further, a uniform statutory test, consistent between all jurisdictions, may increase equality and fairness between Australian jurisdictions, as well as provide an opportunity for 'matters that have been acknowledged by the courts post-*Presser*,' including the High Court's qualifications in *Ngatayi v The Queen* to be incorporated into the evaluative process.<sup>25</sup>

## 2.2 Legislative Frameworks

### 2.2.1 Queensland

While Queensland case law reflects the use of the *Presser* criteria to evaluate an accused's fitness to plead,<sup>26</sup> the *Mental Health Act 2016* (Qld) codifies the process for determining fitness.<sup>27</sup> While section 118 gives the Mental Health Court broad discretion to decide whether the person is fit for trial,<sup>28</sup> the Act does not provide criteria which may guide the court in making this evaluation. The *Mental Health Act 2000* had previously defined fitness 'as being fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely.'<sup>29</sup> However, this definition was removed in the new Act. The Explanatory Note made clear that it was the intention of the Parliament that 'fitness for trial' not be defined in the Act, and that the common law interpretation of the term must be applied by the courts.<sup>30</sup>

See Appendix A: for the relevant provisions of the *Mental Health Act 2016* (Qld).

### 2.2.2 Victoria

Section 6 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) defines an accused's unfitness to stand trial as:

'an inability to understand the nature of the charge against them, an inability to enter a plea to the charge and to exercise the right to challenge jurors or the jury, an inability to understand the nature of the trial, an inability to follow the trial, an inability to understand the substantial effect of any evidence that may be given in support of the prosecution, or an inability to give instructions to his or her legal practitioner.'<sup>31</sup>

Each of the enumerated criteria are alternative – suggesting only one of the six tests must be met in order to satisfy a finding of unfitness to plead. The drafting of the statutory criteria mirrors that of the judgment of Smith J in *Presser*, with the exception of criterion (c) – as being unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence) and

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<sup>24</sup> Australian Law Reform Commission, above n 19.

<sup>25</sup> Gooding et al., above n 18.

<sup>26</sup> *Re Stuart* [2015] QMHC 12; *Re BLK* [2016] QMHC 7.

<sup>27</sup> *Mental Health Act 2016* (Qld).

<sup>28</sup> *Mental Health Act 2016* (Qld), s 118.

<sup>29</sup> *Mental Health Act 2016* (Qld), s 10.

<sup>30</sup> State of Queensland (Queensland Health), *A Guide to the Mental Health Act 2016* (2017).

<sup>31</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6.

criterion (d) - as being unable to follow the course of the trial.<sup>32</sup> At common law, these general tests of capacity are qualified by the limitations expressed in *Ngatayi v The Queen*— including that the accused need only understand the court procedure in ‘a general sense’ rather than have an appreciation of ‘all the various court formalities. Further, an accused need only have ‘the capacity to decide what defence [they] will rely upon and to make [their] version of the facts known to court and [their] counsel.’<sup>33</sup> By excluding these common law qualifications, the Victorian statutory criteria may be too broad in its application, disregarding the capacity for the accused to be assisted in such a way that may optimise their capacity to stand trial.

The legislation also codifies a statutory presumption of fitness, to be rebutted only through an investigation of the person’s capacity to stand trial by applying the criteria outlined in section 6 of the Act.<sup>34</sup> This is explained in greater detail in section three of the report.

See Appendix A: for the relevant provisions of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

### 2.2.3 New South Wales

The *Mental Health (Forensic Provisions) Act 1990* (NSW) does not define ‘fitness.’ Rather, discretion is granted to the ‘judge alone’ to evaluate an accused’s capacity to stand trial.<sup>35</sup> Like Queensland, the statute places no fetter on judicial discretion to determine fitness nor requires the consistent use of the test enumerated in *Presser*.

See Appendix A: for the relevant provisions of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

### 2.2.4 South Australia

The *Criminal Law Consolidation Act 1935* (SA) codifies the criteria to be applied by the court in evaluating the accused’s fitness to stand trial. Fitness is evaluated by considering:

- the capacity of the accused to exercise their procedural rights; and
- to understand the nature of the proceedings; or
- to understand and respond to the charges brought against them.

Each criterion is evaluated in the alternative, with only one test needing to be satisfied in order to make a finding of unfitness to plead. The South Australian statutory test broadly applies the *Presser* criteria by classifying each common law test into three critical measures of capacity: the accused’s ability to understand the allegations brought against them, the accused’s ability to exercise their procedural rights and the accused’s ability to understand the nature of the trial.<sup>36</sup> This appears to be a logical approach.

See Appendix A: for the relevant provisions of the *Criminal Law Consolidation Act 1935* (SA).

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<sup>32</sup> *R v Presser* [1958] VR 45, 48.

<sup>33</sup> *Ngatayi v The Queen* (1980) 147 CLR 1, 8.

<sup>34</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 7.

<sup>35</sup> *Mental Health (Forensic Provisions Act) 1990* (NSW) s 11.

<sup>36</sup> *Criminal Law Consolidation Act 1935* (SA) s 269H.

### 2.2.5 Western Australia

Section 9 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) outlines the test for determining whether a party is unfit to stand trial.<sup>37</sup> The criteria used closely mirrors the *Presser* test and emphasises an inability to understand the nature of the charge and incapacity to properly engage with the trial process, or the purpose and nature of defending the charge.

See Appendix A: for the relevant provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

### 2.2.6 Northern Territory

The *Mental Health and Related Services Act 2002* (NT) defines a person as unfit to stand trial if they are unable to understand the nature of the charges brought against them or engage with the trial process.<sup>38</sup> The Act specifically categorises these incapacities as an inability to understand the nature of the charge, an inability to plead to the charge and to exercise the right of challenge, an inability to understand the nature of the trial, an inability to follow the course of the proceedings, an inability to understand the substantial effect of evidence given in support of the prosecution or an inability to instruct legal counsel. An accused person need only satisfy one of the stated incapacities in order to be determined unfit to stand trial as defined in the Act.

See Appendix A: for the relevant provisions of the *Mental Health and Related Services Act 2002* (NT).

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<sup>37</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 9.

<sup>38</sup> *Mental Health and Related Services Act 2002* (NT)

## Part 3 Process for trying fitness to plead

### 3.1 Legislative frameworks

Each Australian jurisdiction has varying procedural guidelines embedded in legislation and subordinate legislation to assist the court in determining whether an accused is fit to plead.

#### 3.1.1 Queensland

Queensland is the only jurisdiction with a Mental Health Court (MHC) to determine an accused's capacity to stand trial.<sup>39</sup> Other Australian jurisdictions have various procedural measures to divert mental health matters from criminal adjudication to a mental health appropriate form of adjudication. The *Mental Health Act 2016* (Qld) empowers the court to evaluate fitness to plead and prescribe treatment and/or care for persons charged with indictable offences who, on the basis of mental illness or cognitive impairment, are determined to be incapable of effectively participating in the regular trial process. Since the 2016 reforms, fitness to plead determinations for summary (non-indictable) offences are now dealt with the Magistrates Court. A presiding Magistrate has the power to dismiss a complaint if the court is reasonably satisfied that the person was of unsound mind at the time the offence was committed or is unfit for trial.<sup>40</sup> This report focuses only on the process for indictable offences and does not consider this new process in the lower courts.<sup>41</sup>

The MHC may make either a forensic order (disability) or a forensic order (mental health).<sup>42</sup> The orders differ according to the form of detention and degree of treatment and care they prescribe. A forensic order operates in a way that is more restrictive of a person's rights and liberties than a treatment support order<sup>43</sup>, which is unable to be issued to patients declared unfit for trial on the basis of intellectual disability.<sup>44</sup> Mental illness and cognitive impairment are thus treated differently by the court, with patients found unfit to plead on the basis of an intellectual disability being subjected to a more restrictive order under the Act. The MHC must make a forensic order 'if the court considers a forensic order is necessary because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property.'<sup>45</sup> The court must then decide the category of the order – either 'inpatient,' or a less restrictive 'community order' which a patient may be eligible for 'only if the court considers that there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property.'<sup>46</sup> This is discussed in more detail in Part 4.

The MHC is constituted by a Justice of the Supreme Court of Queensland, and two expert clinicians who 'assist' the judge in deciding matters before the court.<sup>47</sup> The assisting clinicians are appointed by Governor-in-Council, and may be either a psychiatrist or a person 'with expertise in the care of persons who have an intellectual disability.'<sup>48</sup> The clinicians are required to assist the court by advising it on the meaning and significance of clinical evidence, clinical issues relating to the treatment, care

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<sup>39</sup> The State of Queensland (Queensland Courts), *About the Mental Health Court* (14 February 2018) Queensland Courts <<http://www.courts.qld.gov.au/courts/mental-health-court/about-the-mental-health-court>>.

<sup>40</sup> *Mental Health Act 2016* (Qld), s 172.

<sup>41</sup> The policy intention for this reform is outlined in the Explanatory Notes *Mental Health Amendment Bill 2016* <<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T2189.pdf>> See also Betheli Lin O'Carroll (2016) 'Lawyers' Experiences with Fitness to Plead to Summary Offences' *Australian & New Zealand Journal of Criminology*, 49(2), 221.

<sup>42</sup> *Mental Health Act 2016* (Qld), s 130.

<sup>43</sup> *Mental Health Act 2016* (Qld), s 130(2).

<sup>44</sup> *Mental Health Act 2016* (Qld), s 143(3).

<sup>45</sup> *Mental Health Act 2016* (Qld), s 134.

<sup>46</sup> *Mental Health Act 2016* (Qld), s 138.

<sup>47</sup> *Mental Health Act 2016* (Qld), s 683.

<sup>48</sup> *Mental Health Act 2016* (Qld), s 652.

and detention of patients governed by the Act and on matters relating to the hearing of proceedings or the administration of the court.<sup>49</sup>

Persons charged with an indictable offence may be referred to the MHC by their legal representative or by the Director of Public Prosecutions, if they believe the person to be unfit for trial.<sup>50</sup> If a person is on an existing treatment authority, a referral is more commonly made by the Director of Mental Health (now the Chief Psychiatrist) through the presentation of a psychiatrist report. If the Chief Psychiatrist is satisfied that the person charged may be unfit for trial, they will be referred to the MHC.<sup>51</sup> Alternatively, superior courts are empowered to stay a proceeding and refer an accused to the MHC to evaluate fitness to plead, if the person charged pleads guilty to an indictable offence, and the court is reasonably satisfied on the balance of probabilities that the person is unfit for trial.<sup>52</sup>

If a trial has already commenced for an indictable offence in a superior court, section 645 of the *Criminal Code Act 1899* (Qld) requires the question of fitness to be decided by the jury presently empanelled.<sup>53</sup> If the jury finds that the accused person is incapable of standing trial, the court may order the person to be admitted to an Authorised Mental Health Service (AMHS) and be diverted to the mental health system under the *Mental Health Act 2016* (Qld). However, section 117 of the *Mental Health Act 2016* (Qld) prevents the MHC from making a finding of fitness if the court is satisfied there is a substantial dispute about whether the person committed the offence against which they are charged.<sup>54</sup> This represents the statutory safeguard to ensure that an accused has had the opportunity to test the allegations against them. Importantly, 'substantial dispute' is not defined in the legislation and the court has discretion to determine whether a dispute exists.

Under section 684 of the *Mental Health Act 2016* the Mental Health Court is not bound by the rules of evidence in making a judgment.<sup>55</sup> Unlike in South Australia, the objective elements of the offence brought against the accused are not required to be proved before an accused is found permanently unfit to plead.<sup>56</sup> The court must, however, have regard to the 'relevant circumstances of the person accused, the nature of the offence to which the reference relates and the period of time that has passed since the offence was allegedly committed' in determining 'whether a forensic order or treatment support order is necessary, the category of the order, whether the person is to receive any community treatment or deciding the conditions, if any, to impose on the order.'<sup>57</sup>

If the MHC decides a person is unfit for trial and the unfitness for trial is not permanent, the person's fitness for trial is periodically reviewed by the Mental Health Review Tribunal (MHRT).<sup>58</sup> The jurisdiction of the MHRT extends to reviews of treatment authorities, forensic orders, treatment support orders, the fitness for trial of particular persons, and the detention of minors in high security units.<sup>59</sup> The MHRT has the power to review the ongoing status of forensic orders issued by the MHC, as well as to issue forensic orders when superior courts remit a matter to the MHRT to decide whether to detain an accused in an AMHS or with the Forensic Disability Service. Section 433 of the Act requires periodic reviews of forensic orders within six months of an order being issued and at 'intervals of not more than six months after the review is completed.'<sup>60</sup> However, the MHRT may decide that 'there are no matters

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<sup>49</sup> *Mental Health Act 2016* (Qld), s 651.

<sup>50</sup> *Mental Health Act 2016* (Qld), s 110.

<sup>51</sup> *Mental Health Act 2016* (Qld), s 101.

<sup>52</sup> *Mental Health Act 2016* (Qld), s 181.

<sup>53</sup> *Criminal Code 1899* (Qld) s 645.

<sup>54</sup> *Mental Health Act 2016* (Qld) s 117.

<sup>55</sup> *Ibid* s 684.

<sup>56</sup> *Criminal Law Consolidation Act 1935* (SA) s 269 N.

<sup>57</sup> *Mental Health Act 2016* (Qld) s 133.

<sup>58</sup> The State of Queensland (Mental Health Review Tribunal), *About the Mental Health Review Tribunal* (2010) Queensland Government < [https://www.mhrt.qld.gov.au/?page\\_id=2](https://www.mhrt.qld.gov.au/?page_id=2)>.

<sup>59</sup> *Mental Health Act 2016* (Qld), s 28(1).

<sup>60</sup> *Mental Health Act 2016* (Qld), s 433.

relevant to the next scheduled review that were not considered in the previous review and defer a periodic review.<sup>61</sup>

Parties to MHRT proceedings that are entitled to be present at a review of a treatment support order include: the patient subject to the order, the administrator of the AMHS responsible for the person, and a delegate of the Office of the Chief Psychiatrist (OCPQ).<sup>62</sup>

At the periodic review of forensic orders, the person subject to the order, delegates of the Attorney-General, the OCPQ, Director of Forensic Disability, and the administrator of the AMHS or Forensic Disability Service must all be notified of the hearing.<sup>63</sup> The person subject to review may be represented at a hearing by a nominated support person or a legal representative.<sup>64</sup> The MHRT may appoint a lawyer under section 740 of the Act to represent the person at the hearing if the MHRT considers it would be in the person's best interests to be represented at a hearing. Though where a person is a minor, they must appoint a lawyer, the hearing is a review of a person's fitness for trial, or the proceedings are for the approval of electroconvulsive therapy (ECT) on the person.<sup>65</sup>

### 3.1.2 Victoria

In Victoria, there is a legal presumption that the accused is fit to plead, and this presumption is only rebutted if it is established, upon investigation, that the person is unfit to stand trial.<sup>66</sup>

The issue of whether there is a real and substantial question as to the fitness of the accused to stand trial must be determined by the trial judge, and this question can be considered at any point during the proceedings.<sup>67</sup> If the judge is satisfied that there is a real and substantial question in relation to fitness to plead, an investigation into the accused's fitness to plead must commence within three months of the committal hearing.<sup>68</sup> If the question is raised during trial, the judge must adjourn or stay the proceedings so an investigation can proceed.<sup>69</sup> Whilst the investigation is pending, the court is able to make an order granting the accused bail, or to remand the accused in custody for a specific period.<sup>70</sup>

An investigation into the accused's fitness for trial involves a jury making a decision, on the balance of probabilities,<sup>71</sup> with reference to evidence and submissions made by the prosecution and the defence.<sup>72</sup> The judge is able to call evidence on their own initiative, or require the accused to undergo an examination by a registered medical practitioner, or psychologist.<sup>73</sup>

If the jury find that the accused is unfit for trial, the judge must decide, on the balance of probabilities, whether the accused is likely to become fit for trial within the next 12 months.<sup>74</sup> If the judge decides that the accused is likely to become fit for trial within that period of time, the judge must adjourn the matter.<sup>75</sup> During this period, the judge may grant the accused bail, remand the accused in an appropriate place for a specified period, or remand the accused in a prison if there are no practicable alternatives.<sup>76</sup> If the accused is not likely to become fit within the 12 month period, the court must proceed to hold a

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<sup>61</sup> *Mental Health Act 2016* (Qld), s 434.

<sup>62</sup> *Mental Health Act 2016* (Qld), s 471.

<sup>63</sup> *Mental Health Act 2016* (Qld), s 439.

<sup>64</sup> *Mental Health Act 2016* (Qld), s 739(1).

<sup>65</sup> *Mental Health Act 2016* (QLD), s 740.

<sup>66</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), ss 7(1)–(2).

<sup>67</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 9(1).

<sup>68</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 8(2)(c).

<sup>69</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 9(2).

<sup>70</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 10(1)(a)–(b).

<sup>71</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 11(4)(a).

<sup>72</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 11(1)(a).

<sup>73</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 11(1)(b).

<sup>74</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 11(4)(a).

<sup>75</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 12(1).

<sup>76</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 12(2)(a)–(c).



special hearing within three months of the jury decision.<sup>77</sup> Special hearings are discussed in more detail in Section 3.2.

### 3.1.3 New South Wales

#### *Supreme or District Court*

New South Wales differs from Victoria in that the question of an accused's fitness to plead is determined by the judge alone.<sup>78</sup> The court is also given the power to decline an inquiry into the accused's fitness to plead and dismiss charges if the court believes it to be inappropriate to inflict punishment, having regard to the trivial nature of the charge or offence, the nature of the disability, or any other matter which the court thinks it proper to consider.<sup>79</sup>

If the court rules that the accused is unfit to plead, the accused must be referred to the New South Wales MHRT.<sup>80</sup> The role of the MHRT is to determine, as soon as practicable after the person has been referred, whether the person will become fit to plead within the period of 12 months.<sup>81</sup> The judge may grant the accused bail, or remand the person in custody until the determination of the MHRT has been given effect.<sup>82</sup>

If the MHRT determines that the accused will not be fit to plead within the 12 month period, the judge responsible for the initial referral must seek the advice of the Director of Public Prosecutions of New South Wales to determine whether the Director intends to proceed on the indictment.<sup>83</sup> If the Director decides to pursue the indictment, a special hearing must be undertaken as soon as practicable.<sup>84</sup> Special hearings are discussed in more detail in Section 3.2.

#### *Magistrates Court*

The process in New South Wales is different regarding summary offences. If it appears to the Magistrate that the accused is cognitively impaired or suffering from a mental illness, the Magistrate may make an order dismissing the charge and discharge the accused into the care of a responsible person unconditionally, or subject to the requirement that the accused seek assessment or treatment.<sup>85</sup> This is considered the main diversionary mechanism in New South Wales for individuals with a cognitive impairment or mental illness in the criminal justice system.<sup>86</sup> However, as of 2013, only 142 out of 2,731 had been granted a 'section 32'.<sup>87</sup>

### 3.1.4 South Australia

South Australia is similar to Victoria in that the court may order an investigation of the accused's fitness to stand trial if there are reasonable grounds to suppose that a person is mentally unfit.<sup>88</sup> The court can exercise this power on application of the prosecution or the defence, or if the judge considers it necessary to prevent a miscarriage of justice.<sup>89</sup> Before an inquiry is commenced, the court may require

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<sup>77</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 12(5).

<sup>78</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 11(1).

<sup>79</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 10(4).

<sup>80</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 14(a).

<sup>81</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 16(1).

<sup>82</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 14(b).

<sup>83</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 19(1)(a).

<sup>84</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), s 19(1)(b).

<sup>85</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW), ss 32(1)–(2).

<sup>86</sup> Eileen Baldry and Peta Macgillivray, 'Indigenous Australians, Mental and Cognitive Impairment and the Criminal Justice System: A Complex Wave' (2013) 8(9) *Indigenous Law Bulletin* 22, 24.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Criminal Law Consolidation Act 1935* (SA), s 269J(1).

<sup>89</sup> *Criminal Law Consolidation Act 1935* (SA), s 269J(2)(a)–(b).

the production of a report by the treating psychiatrist, or other expert reports that may exist on the accused's medical condition, or order that the court have its own report prepared.<sup>90</sup> If it appears that the accused is mentally unfit, but there is a reasonable prospect that the accused will gain sufficient capacity over the course of 12 months, the court may adjourn the proceedings for a period not exceeding 12 months.<sup>91</sup>

If the accused is not likely to re-gain sufficient capacity within the 12 months, the judge has discretion to conduct an inquiry into the accused's fitness to plead, either before or after the physical elements of the offence are tried.<sup>92</sup> If the trial judge decides to conduct the investigation into fitness to plead prior to the trial of the physical elements of the offence, the judge must hear relevant evidence and representations put to the court, and may also require the accused to undergo an examination by an court appointed psychiatrist, or other appropriate expert, and require the results of the examination to be reported to the court.<sup>93</sup> If the court finds that the accused is unfit to stand trial, the court must hear evidence and representations put to the court by the prosecution and the defence regarding the physical elements of the offence.<sup>94</sup> The court is to exclude from consideration any question of whether the accused's conduct is defensible.<sup>95</sup> If the court is satisfied beyond reasonable doubt that the physical elements of the offence are established, the accused is liable to supervision under Division 4 Subdivision 2 of the Act (what South Australia calls forensic orders).<sup>96</sup> If the court is not satisfied, the court must find the accused not guilty and the accused must be acquitted.<sup>97</sup>

### 3.1.5 Tasmania

Similar to other Australian jurisdictions, the court may adjourn or stay the trial, and proceed with an inquiry if a question of the accused's fitness to plead arises.<sup>98</sup> If the issue arises prior to the commencement of the trial, the question is reserved for determination by the Supreme Court of Tasmania, and the preliminary proceedings continue in accordance with appropriate criminal procedures.<sup>99</sup> The investigative process is conducted in a manner similar to other jurisdictions in Australia, but if proceedings are conducted in the Supreme Court (as a superior court) the question of fitness is determined by a tribunal of fact, usually a jury.<sup>100</sup> If the court determines that the accused is unfit to plead, and will not become fit within a 12 month period, the court must conduct a special hearing.<sup>101</sup>

### 3.1.6 Western Australia

The question of whether an accused is fit to plead is decided by the presiding judicial officer in a criminal trial. The matter is determined on the balance of probabilities after informing themselves in any way that the judicial officer sees fit.<sup>102</sup> If the accused is being tried in a court of summary jurisdiction and the court rules that the accused is unfit, and will not become fit within six months, the court can release the accused or make a custody order in respect of the accused.<sup>103</sup> A custody order must not be made in respect of the accused unless the statutory penalty for the alleged offence is, or includes, imprisonment, and the court is satisfied that a custody order is appropriate having regard to:

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<sup>90</sup> *Criminal Law Consolidation Act 1935* (SA), s 269K(1).

<sup>91</sup> *Criminal Law Consolidation Act 1935* (SA), s 269K(2).

<sup>92</sup> *Criminal Law Consolidation Act 1935* (SA), s 269L.

<sup>93</sup> *Criminal Law Consolidation Act 1935* (SA), s 269M(1A)(a)–(b).

<sup>94</sup> *Criminal Law Consolidation Act 1935* (SA), s 269M(1B).

<sup>95</sup> *Criminal Law Consolidation Act 1935* (SA), s 269M(3B).

<sup>96</sup> *Criminal Law Consolidation Act 1935* (SA), s 269M(2B).

<sup>97</sup> *Criminal Law Consolidation Act 1935* (SA).

<sup>98</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 10(3).

<sup>99</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 10(2).

<sup>100</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 12(1).

<sup>101</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 15(1).

<sup>102</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 12(1).

<sup>103</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 16(5).

- the strength of the evidence against the accused;
- the nature of the alleged offence and the alleged circumstances of its commission;
- the character of the accused; and
- the public interest.<sup>104</sup>

If the offence is indictable, the accused is presumed to plead not guilty to the charge.<sup>105</sup>

If the proceedings take place in a superior court, and the judge is satisfied that the accused is unfit to plead, and will not become fit within six months, the judge must make an order quashing the indictment or, if there is no indictment, dismissing the charge and quashing the committal, without deciding whether the accused is guilty.<sup>106</sup> This order can involve either releasing the accused or imposing a custody order, which involves identical statutory terms to the custody orders imposed in a court of summary jurisdiction.<sup>107</sup> Thus, even though the court has not made a decision regarding the guilt of the accused, the custody order that could be imposed by the court still aligns with the potential punishments triggered as a result of a criminal conviction.

### 3.1.7 Northern Territory

As is the case with other Australian jurisdictions, the court may order an investigation into the fitness of an accused person to stand trial if the question was reserved during committal proceedings or the judge is satisfied that there are reasonable grounds on which to question the accused person's fitness to stand trial.<sup>108</sup> Like Victoria, the question of fitness is decided by the tribunal of fact (usually the jury).<sup>109</sup> If the jury finds that the accused is not fit to plead, and the judge is satisfied that the accused will not become fit within 12 months, the court must hold a special hearing within three months of the determination.<sup>110</sup>

### 3.1.8 Australian Capital Territory

If the question of fitness to plead is put forward during committal proceedings or the trial, the court must adjourn the hearing or trial and proceed with an investigation.<sup>111</sup> The investigation is conducted according to the same procedures as other Australian jurisdictions.<sup>112</sup> If the accused is found unfit to plead, and will not become fit within 12 months, the court must hold a special hearing.<sup>113</sup>

## 3.2 Special hearings

With the exception of South Australia, Queensland and Western Australia, all states and territories conduct special hearings in situations where it has been determined that an accused will not be fit to plead within 12 months. Special hearings are conducted as similarly as possible to a criminal trial, with the accused considered to have entered a not guilty plea.<sup>114</sup> The tribunal of fact is required to reach a

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<sup>104</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 16(6).

<sup>105</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 17(2).

<sup>106</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 19(4).

<sup>107</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 19(4)–(5).

<sup>108</sup> *Criminal Code Act 1983* (NT), ss 43N(2)(a)–(b).

<sup>109</sup> *Criminal Code Act 1983* (NT), s 43P.

<sup>110</sup> *Criminal Code Act 1983* (NT), s 43R(3).

<sup>111</sup> *Crimes Act 1900* (ACT) s 315(1).

<sup>112</sup> *Crimes Act 1900* (ACT), s 315A.

<sup>113</sup> *Crimes Act 1900* (ACT), s 315C(a)(ii).

<sup>114</sup> Australian Human Rights Commission, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, Australian Human Rights Commission Submission to the Senate Community Affairs References Committee March 2016, 18.

finding as to whether the unfit accused is not guilty, not guilty by reason of mental impairment/illness, or 'committed the offence charged' (or an alternative offence) on limited evidence.<sup>115</sup> If the tribunal of fact determines that the accused has committed the offence charged, the decision will not lead to a conviction, but will empower the court to detain an individual under a supervision or custodial order.<sup>116</sup>

The concept of a special hearing has been criticised by various human rights and law reform bodies. The New South Wales Law Reform Commission (NSWLRC), for example has argued that a special hearing does not account for those accused persons that do not have the capacity to cope with the pressures of a criminal trial.<sup>117</sup> Moreover, the inability of an accused to adequately participate in the proceedings, and give evidence on their own behalf, reduces the ability of the court to accurately test the evidence against the accused.<sup>118</sup> However, this criticism is based on assumption that it would be advisable in the circumstances of an individual case for an accused to not rely on their right to not be compelled to give evidence in their own defence. This can present problems in some cases. For example, in matters that relate to serious sexual assaults or homicides, often the accused is one of the only witnesses.

It is interesting to note that the *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic) proposes to give new powers under section 16(3) for a judge to excuse the accused from attending a special hearing, allowing the accused to attend by audiovisual link or make any reasonable modifications to procedure at the special hearing that the judge believes would assist the accused to attend in person.<sup>119</sup> This change was made in direct response to the concern that the special hearing process can cause the accused significant stress, and this stress could be exacerbated by the fact that the accused suffers from a mental or cognitive impairment.<sup>120</sup>

### 3.3 Part 3 Conclusion

The review of legislative and procedural guidelines within each Australian jurisdiction reveals varying approaches to the process for determining unfitness to plead. It appears that the South Australian model may be the only jurisdiction that allows accused persons to have the physical elements of the offence brought against them to be properly tested. This model arguably has the potential to reduce prejudicial outcomes based on unfitness to plead and maintain procedural fairness throughout the process. The Queensland model does not appear to have sufficient legislative or procedural safeguards to monitor the length of time that a person is placed on a forensic order. The risk for accused persons in Queensland becoming trapped in a cycle of periodic forensic order reviews by the MHRT is underscored by poor statutory reporting, considered next in Part 4.

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<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 15, 27.

<sup>118</sup> Australian Human Rights Commission, above n 111,18.

<sup>119</sup> Explanatory Memorandum, *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic) 22.

<sup>120</sup> Ibid 23.

## Part 4 Forensic orders

In March 2016, the AHRC Report *KA, KB and KD v Commonwealth of Australia* contained four case studies of Aboriginal people with cognitive or psychiatric impairment, who were indefinitely detained in the Northern Territory.<sup>121</sup> In addition to the case of Marlon Noble, these case studies demonstrate both the potential for miscarriage of justice on an individual level and also a systemic pattern of indefinite detention throughout Australia. This Part of the report reviews the statutory reporting mechanisms in Queensland and Australia to illustrate their inadequacy in providing systematic checks and balances to avoid a situation of indefinite detention.

### 4.1 Analysing indefinite detention

Most legislative schemes in the Australian jurisdiction require either the OCPQ, the equivalent of the MHRT, or Directors-General administering the relevant legislative schemes to publically report on the administration of the legislation.<sup>122</sup> Legislative schemes are generally divided into forensic mental health (covering mental illnesses) and forensic disability (covering intellectual impairments). The Director of each forensic disability agency has similar reporting mechanisms. Without nationally consistent data collection, it is difficult to accurately benchmark and compare different jurisdictions.

#### 4.1.1 Statutory reporting mechanisms in Australian jurisdictions

Statutory reporting may appear on its face to be an administrative formality, however it is an important accountability mechanism.

The problem of poor data collection was exposed in the recent Senate Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia (the Senate Inquiry), which reported to the Senate in November 2016.<sup>123</sup> The Senate Inquiry could not quantify the statistical prevalence of indefinite detention and what the demographic makeup of that group of people was and the Inquiry commented 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 publically available at all.’<sup>124</sup>

The Senate Inquiry did note that the Crime and Community Safety Council of the Council of Australian Governments (COAG) undertook to:

‘...establish a working group to collate existing data across jurisdictions and develop resources for national use on the treatment of people with cognitive disability or mental impairment unfit to plead or found not guilty by reason of mental impairment.’<sup>125</sup>

The Senate Inquiry ultimately recommended that COAG ‘complete its data collection project at its earliest opportunity.’<sup>126</sup> The Senate Inquiry went on to conclude that there could be up to 100 persons

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<sup>121</sup> Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia (Department of Prime Minister and Cabinet, Department of Social Services, Attorney General’s Department)*, Report No 80 (2014).

<sup>122</sup> *Mental Health Act 2016* (Qld), ss 307, 701; *Mental Health Act 2007* (NSW), ss 108, 147; *Mental Health Act 2009* (SA), s 92; *Mental Health Act 2014* (Vic), ss 145; 177.

<sup>123</sup> Commonwealth, Senate, Senate Community Affairs References Committee, *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia* (‘The Senate Inquiry’).

<sup>124</sup> The Senate Inquiry, 20 [2.31].

<sup>125</sup> *Ibid.*

<sup>126</sup> The Senate Inquiry, above n 123,176 [9.25].

indefinitely detained on some form of forensic order in Australia, with about half of those people identifying as Aboriginal and Torres Strait Islander.<sup>127</sup>

Insufficient statutory reporting prompted the Law Council of Australia (LCA) to call for a national audit of people held in detention to ensure people with a cognitive or psychiatric impairment are not imprisoned for ‘undetermined periods.’<sup>128</sup> The LCA went on to comment:

‘People [who identify as ATSI] are significantly overrepresented in the criminal justice system... Despite this, there is a lack of critically informed evidence, analysis and co-ordinated policy and service response on this most pressing human rights issue.’<sup>129</sup>

Statutory reporting mechanisms in each Australian jurisdiction vary in the level of detail and the extent of agency practice in releasing public reporting. For example, Victoria has very detailed reporting in the reports of the Mental Health Tribunal (MHT) however, the level of statutory prescription is minimal.<sup>130</sup> Conversely, Queensland has introduced increased statutory prescription in the new *Mental Health Act 2016* (Qld),<sup>131</sup> though in both the Annual Reports of the OCPQ, and the MHRT, there is less detailed reporting included than in Victoria, and even less than under the now superseded *Mental Health Act 2000* (Qld).<sup>132</sup> Importantly in Queensland, there is no statutory reporting mechanism for the Forensic Disability Service; rather there is merely a practice of internally reporting some limited amounts of information.<sup>133</sup>

Ultimately, until COAG completes its work in relation to collating cross-jurisdictional data, it will continue to be difficult to adequately benchmark and measure the effectiveness of different legislative models, levels of agency funding, and institutional practices in each jurisdiction, and to what extent and degree those factors contribute to indefinite detention.

#### 4.1.2 Statutory reporting in Queensland

There are a few consistent trends in publically available data relating to persons on forensic order in Queensland. Prior to the enactment of the *Mental Health Act 2016* (Qld), Queensland had 781 persons on a forensic order, according to the 2015-16 Annual Report of the Director of Mental Health.<sup>134</sup> In contrast to New South Wales in the same reporting period, Queensland had 57% more persons on a forensic order.<sup>135</sup> However, after the introduction of the *Mental Health Act 2016* (Qld), the *Annual Report of the Chief Psychiatrist 2016-17* did report an 11% decrease from the previous reporting period, with 699 persons remaining on a forensic order.<sup>136</sup> The Forensic Disability Service reported that there are currently 63 persons on a forensic order (disability) in Queensland, however only nine are ‘detained to the Forensic Disability Service’ and the remainder by an AMHS.<sup>137</sup> The Director noted that only one

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<sup>127</sup> See *Mental Health Act 2014* (Vic), s 177; Victoria, Department of Health and Human Services, *Victoria’s Mental Health Services Annual Report* (2016-17).

<sup>128</sup> Law Council of Australia, Submission No 72 to the Senate Community Affairs References Committee, *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016) 8 [24].

<sup>129</sup> *Ibid* 8 [25].

<sup>130</sup> Queensland Health, *Annual Report of the Chief Psychiatrist* (2016-17); Queensland, Mental Health Review Tribunal, *Annual Report* (2016-17).

<sup>131</sup> *Mental Health Act 2016* (Qld), ss 307, 701.

<sup>132</sup> Queensland Health, *Annual Report of the Chief Psychiatrist* (2016-17); Queensland, Mental Health Review Tribunal, *Annual Report of the Mental Health Review Tribunal* (2016-17)

<sup>133</sup> **Note:** the *Forensic Disability Act 2011* (Qld) only provides for a statutory reporting mechanism between the Director of Forensic Disability and the Minister, either on their own initiative, or at the request of the Minister. This is pursuant to section 87(1)(f).

<sup>134</sup> Queensland Health, *Annual Report of the Director of Mental Health* (2015-16)

<sup>135</sup> New South Wales Mental Health Tribunal, *Annual Report of the Mental Health Tribunal* (2015-16)

<sup>136</sup> Queensland Health, *Annual Report of the Chief Psychiatrist 2016-17*.

<sup>137</sup> Director of Forensic Disability (Qld), Submission No 69 to the Senate Community Affairs References Committee, *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016), 1.

of the nine is on a community-based order, with limited community treatment.<sup>138</sup> This raises a concern as to whether it is appropriate for persons with intellectual impairment to be managed by an AMHS. However, it is unclear how many of the forensic order (disability) patients have a dual diagnosis as it is not reported. Given the smaller number of persons on forensic orders (disability), more prescriptive public reporting may raise legitimate privacy concerns on behalf of Forensic Disability Service clients.

The extent to which these statistics are attributed to legislative design, institutional practice, the clinical complexity of cases before the MHRT, or agency resourcing is unclear, and impossible for this report to capture. However, data published from the MHRT Annual Report for 2016-17 highlighted that with over 12,000 hearings, in only 1,096 of those hearings a legal representative was present.<sup>139</sup> The MHRT Annual Report for 2015-16 observed in the previous reporting period that:

- about 14.3% of all matters at matters where the person subject to the forensic order identifies as Aboriginal or Torres Strait Islander (ATSI);<sup>140</sup> and
- the large proportion persons on forensic orders are on a form of forensic order that is inpatient-based, but with limited community treatment. Therefore, they remain on a predominantly custodial form of forensic order.<sup>141</sup>

Figure 1: Forensic orders (mental health) confirmed and revoked by the MHRT

State	12-13	13-14	14-15	15-16	16-17
Confirmed	39	36	40	41	1420
Confirmed (LCT revoked)	22	7	16	11	
Confirmed (with LCT)	1260	1344	1309	1399	
Revoked	69	69	75	67	33
Treatment Support Order	-	-	-	-	29

Source: Annual Reports of the Mental Health Review Tribunal.<sup>142</sup>

Figure 2: Forensic orders (disability) confirmed and revoked by the MHRT

State	12-13	13-14	14-15	15-16	16-17
Confirmed	1	1	-	2	114
Confirmed (LCT revoked)	-	1	-	1	Unkwn
Confirmed (with LCT)	18	47	54	102	Unkwn
Confirmed (with LCT and T/F)	-	2	5	-	Unkwn
Revoked	1	3	2	3	5
Treatment Support Order	-	-	-	-	Unkwn

Source: Annual Reports of the Mental Health Review Tribunal.<sup>143</sup>

The *Mental Health Act 2016 (Qld)* introduced a new statutory reporting mechanism for administration of the Act. The reporting mechanism requires the newly established OCPQ and the re-constituted MHRT to report on certain statistics prescribed by the Act. For example, the Annual Report of the Chief Psychiatrist must include statistics on the making and revoking of forensic orders and treatment support orders and adverse events, such as the clinical use of mechanical restraint and seclusion.<sup>144</sup> The Chief Psychiatrist and the MHRT may also include any other statistics that they consider

<sup>138</sup> Ibid, 1.

<sup>139</sup> Queensland Mental Health Review Tribunal, *Annual Report 2016-17*.

<sup>140</sup> Queensland Mental Health Review Tribunal, above n 140.

<sup>141</sup> Ibid.

<sup>142</sup> Queensland Mental Health Review Tribunal, *Annual Report 2012-2013; Annual Report 2013-14; Annual Report 2014-15; Annual Report 2015-16; Annual Report 2016-17*.

<sup>143</sup> Queensland Mental Health Review Tribunal, *Annual Report 2012-2013; Annual Report 2013-14; Annual Report 2014-15; Annual Report 2015-16; Annual Report 2016-17*.

<sup>144</sup> *Mental Health Act 2016 (Qld)*, s 701.

appropriate.<sup>145</sup> Despite the increased prescription of statutory reporting requirements there are a number of notable departures from reporting under the Annual Reports tabled to Parliament under the *Mental Health Act 2016* (Qld). For example:

- the Chief Psychiatrist departed from the practice of the Director of Mental Health in no longer reporting the proportion per 10,000 of the population remaining on forensic orders;<sup>146</sup> and
- the MHRT aggregated the statistics, so the statutory category of order cannot be distinguished. In other words, the MHRT's Annual Report for 2016-17 did not distinguish between the numbers of forensic orders that were inpatient, limited community, or community-based.<sup>147</sup>

What is actually reported still only provides a superficial measurement of whether the Act is achieving its newly revised objectives,<sup>148</sup> and whether those bodies applying the law are adhering to the principles for administration of the Act.<sup>149</sup> In particular, whether the Act is:

- safeguarding the rights of persons;<sup>150</sup>
- promoting individual development and enhancing the opportunities for equality of life;<sup>151</sup>
- least restrictive of the rights and liberties of a person who has a mental illness;<sup>152</sup> and
- promotes recovery of a person who has a mental illness or disability, and the person's ability to live in the community, without the need for involuntary treatment and care.<sup>153</sup>

In Queensland there is no public reporting or independent watchdogs to determine the length of time:

- persons remain on inpatient forensic orders;
- persons remain on inpatient (with limited community treatment) forensic orders; and
- between when a forensic order was made and revoked.

It is important to note that limited community treatment may also involve restrictive conditions that may run contrary to the principles and objects of the Act. The ability to assess trends in types of conditions may also be appropriate if they can be easily classified. The reporting also does not distinguish between forensic orders currently in force by their defined statutory categories: inpatient, inpatient with limited community treatment, or community-based. Further, forensic orders by their statutory category should also be measured with reference to the following important indicators (which are currently not reflected in the reporting mechanisms):

- the seriousness of the offence;<sup>154</sup>
- whether persons identify as ATSI;

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<sup>145</sup> *Mental Health Act 2016* (Qld), s 307(3).

<sup>146</sup> Queensland Health, Director of Mental Health, *Annual Report 2015-16*, 30; *Annual Report 2014-15*, 30.

<sup>147</sup> Queensland, Mental Health Review Tribunal, *Annual Report 2016-17*.

<sup>148</sup> *Mental Health Act 2016* (Qld), s 3.

<sup>149</sup> *Ibid* s 5.

<sup>150</sup> *Ibid* s 3(2)(a).

<sup>151</sup> *Forensic Disability Act 2011* (Qld), s 3(c).

<sup>152</sup> *Mental Health Act 2016* (Qld), s 3(2)(b).

<sup>153</sup> *Mental Health Act 2016* (Qld), s 3(2)(c); *Forensic Disability Act 2011* (Qld), s 3(d).

<sup>154</sup> **Note:** Whether the forensic order is a prescribed offence subject to a non-revocation order under section 137 of the *Mental Health Act 2016* (Qld), or whether the offence was a serious offence ordinarily demanding a forensic order under section 134 of the *Mental Health Act 2016* (Qld).



- whether persons are from a culturally or linguistically diverse background
- whether persons are minors; and
- whether persons were legally represented at their last review by the MHRT or MHC; or
- whether they have access to supported accommodation (for forensic disability).

Without measurement against the indicators, there is no way to publically scrutinise the administration of the legislation against its main objectives. It is also difficult to effectively analyse the demographics of people subject to a forensic order and whether they fall within a vulnerable demographic. It raises the question of whether Government should take steps to require more robust reporting (privacy considerations noted) so that, a ‘less restrictive form of care’ can be appropriately measured.

## 4.2 Forensic orders in Australian jurisdictions

In Australia, there are differing models of detention for people who are unfit to plead in the normal criminal justice system. They can be broadly grouped into four forms of forensic orders:

- ‘Governor’s pleasure’ detention;
- nominal terms;
- limiting terms; and
- fixed terms.

In its consideration of equality, capacity and disability in Commonwealth laws, the ALRC noted that the *Crimes Act 1914* (Cth) contains safeguards to ensure a person is not detained indefinitely, including regular reviews of the need for the individual’s detention and ensuring the detention period did not exceed the maximum period of imprisonment that could have been imposed if the individual had been convicted of the offence charged. The ALRC notes, however, that these safeguards are not implemented in State and Territory jurisdictions.<sup>155</sup> In fact, in Western Australia, the Northern Territory and Victoria there are no specified time limits for detention under custodial orders.<sup>156</sup> This section of the report outlines each of these models and analyses their susceptibility to indefinitely detain a person. Finally, it comments on the validity of these models in light of international human rights law.

### 4.2.1 Governor’s Pleasure Detention

Western Australia retains the traditional ‘Governor’s pleasure’ detention model, while Queensland and Tasmania both incorporate some features of this model. The ALRC criticises Western Australian legislation for lacking review mechanisms, which in effect, means the person is detained ‘at the Governor’s pleasure.’<sup>157</sup> In Western Australia, the discretion to release a person from a custodial order is with the Governor, who acts on the recommendation of the Mentally Impaired Accused Review Board.<sup>158</sup> Queensland also retains the traditional ‘Governor’s pleasure’ detention model to a degree, by having an administrative body such as the MHRT determine when an individual is released from a custodial order.<sup>159</sup> Therefore, in Western Australia and Queensland, the power to release individuals lies with the executive branch of government.<sup>160</sup>

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<sup>155</sup> Australian Law Reform Commission, above n 2, 210.

<sup>156</sup> Ibid 208–209.

<sup>157</sup> Australian Law Reform Commission, above n 2, 209.

<sup>158</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 33(3).

<sup>159</sup> *Mental Health Act 2000* (Qld) ss 203(1), 207, 293.

<sup>160</sup> Gooding et al., above n 18, 851.

While Tasmania also contains an administrative body, namely, the MHRT, the Supreme Court of Tasmania has the final decision to end a custodial order.<sup>161</sup> Similarly, in Western Australia and Queensland, the detention *may* be indefinite as it is not subject to a nominal or limiting term. The safeguards in the Queensland and Western Australian systems are that the individuals are periodically assessed for suitability for release.<sup>162</sup> The Governor's pleasure model is critiqued for being 'harsh and arbitrary' and it was the driving force behind Victoria's reforms and the creation of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).<sup>163</sup>

#### 4.2.2 Nominal terms

The approach of Victoria and the Northern Territory is to set 'nominal terms' after finding that the person is unfit to plead. In these States, the legislation provides that the person is to be brought back before the court for a 'major review.'<sup>164</sup>

##### *Victoria*

Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), a major review must be conducted to ascertain whether the person must be released at the end of the nominal term provided that they do not pose a serious risk to the public, or themselves.<sup>165</sup> However, the subtle but significant difference between the two jurisdictions is that, in Victoria there is a form of statutory presumption that a custodial order must be varied to a non-custodial order unless the court is satisfied 'on available evidence' that the safety of the person, or the public will be seriously endangered as a result of a release of the person on a non-custodial supervision order.<sup>166</sup> This must be read with section 27, which unambiguously criticised the indefinite detention of persons found unfit to plead under the Act.<sup>167</sup>

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) was enacted as an alternative regime in 1997, which abolished the traditional model of detention at the Governor's pleasure.<sup>168</sup> Under the current 'nominal term' system, a major review occurs three months before the expiry of the nominal term appointed by statute (for serious crimes),<sup>169</sup> and appointed by the court (for less serious crimes).<sup>170</sup> Section 35(3) of that Act reads:

'On a major review, the court—

(a) if the supervision order is a custodial supervision order—

(i) must vary the order to a non-custodial supervision order, unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a non-custodial supervision order; or

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<sup>161</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 37, 24, 26.

<sup>162</sup> **Note:** In Queensland, the individual is reassessed every six months: *Mental Health Act 2000* (Qld) ss 200(1)(a). In Western Australia, they are reassessed every 12 months: *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 237.

<sup>163</sup> Gooding et al., above n 18, 852.

<sup>164</sup> *Criminal Code* (NT) s 43ZG(5)–(7); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 27(1).

<sup>165</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 28.

<sup>166</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 35.

<sup>167</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 27(1).

<sup>168</sup> Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (2013), 14 [2.19].

<sup>169</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 28(1)(a).

<sup>170</sup> *Ibid* s 28(1)(b)–(c).

(ii) if so satisfied, must confirm the order or vary the place of custody...'<sup>171</sup>

In 2013, the VLRC criticised the *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).<sup>172</sup> The VLRC recommended that the nominal-term model in Victoria be revised.<sup>173</sup> The Victorian Government accepted this recommendation and introduced a Bill to require a 'progress review' every five years.<sup>174</sup> The Bill will maintain the 'major review' at the end of the nominal term, but it will now give a person the right to require a progress review of their supervision order every five years.<sup>175</sup> However, the equivalent of the section 35 statutory presumption is proposed to be substantially re-enacted only for the 'major review.' This means that under the proposed amendment, the statutory presumption will only apply to progress reviews at the expiry of the nominal term.

Figure 3: Proposed modification of the statutory presumption for progress reviews

Review Type	Presumption	Length of time
Progress Review (Initial) <sup>176</sup>	Presumption in favour of a custodial order	Within 5 years that the order was made, or an earlier time that is appropriate by order of the court and if the term is under 10 years.
Progress Review (Further) <sup>177</sup>	Presumption in favour of a custodial order	Within 5-years after the last progress review (either initial or further).
Progress Review (Major) <sup>178</sup>	Presumption is reversed, to be in favour of a non-custodial order.	3 months before nominal term expiry.

The Victorian Attorney-General informed the Legislative Assembly on 7 December 2016 that:

'The bill provides for presumptions for and against the reduction of supervision that depend on how far the person has progressed through the review pathway. These presumptions are designed to encourage the gradual reduction of supervision over time, where this is consistent with community safety. Regular reviews ensure that people subject to [supervision orders] are not detained longer than necessary, and that their treatment and support needs are continually evaluated.'<sup>179</sup>

If these changes are implemented, Victoria will remain a nominal term jurisdiction. However, with the new progress reviews every 5 years, it may lead to a strengthened framework for less restrictive care for persons that are subject to a form of supervision order, and to prevent unnecessary (or possibly indefinite) detention.

#### Northern Territory

In the Northern Territory, there is a similar presumption in favour of a release of the person.<sup>180</sup> On the face of the legislation, the Northern Territory has a statutory safeguard for people found to be unfit to plead. This is because section 43ZG(2) of the *Criminal Code* - in comparison to Victorian provisions

<sup>171</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 35(3).

<sup>172</sup> Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (2013).

<sup>173</sup> *Ibid* xxxiv and vi [84]–[86].

<sup>174</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic).

<sup>175</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic), ss 27A, 27B.

<sup>176</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic), ss 27A, 32(3).

<sup>177</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic), ss 27B, 32(3)–(4).

<sup>178</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic), ss 27C, 32(5).

<sup>179</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 7 December 2016, 4810.

<sup>180</sup> Gooding et al., above n 18, 853.

- more closely aligns with the approach a court would take when sentencing the accused after a finding of guilt. The Northern Territory legislation has been criticised for its ability to incarcerate people subject to a finding of unfitness for longer than they would have been had they been found guilty of the offence charged. Piers Gooding and his colleagues note that the Northern Territory's system of a rebuttable presumption in favour of release at the end of the court's chosen period is a preferable system to the Governor's pleasure detention regime, however ultimately, the term remains indefinite and can lead to a sentence far longer than would otherwise have been imposed if the individual had been found guilty of the crime.<sup>181</sup> The Senate Inquiry also criticised the legislative approach of the Northern Territory, stating that it adopts a 'custody by default' model.<sup>182</sup>

It is important to note that nominal terms in the Northern Territory may be determined by reference to sentencing principles, which factor in punishment and deterrence.<sup>183</sup> The AHRC regards reference to these general sentencing principles as inappropriate because people who have been found unfit to plead have not been found guilty of a crime and therefore the decision to detain them should only be for treatment, for their own health or safety, or for public protection.<sup>184</sup>

#### 4.2.3 Limiting terms

South Australia and New South Wales both have a 'limiting term' model. This means the court sets a limiting term for forensic orders, beyond which the individual's detention or supervision may not extend.<sup>185</sup> The Senate Inquiry recommended limiting terms as an effective mechanism to prevent indefinite detention of people with cognitive disability, together with appropriate therapeutic programs being available to the individual whilst the individual is imprisoned.<sup>186</sup> South Australia and New South Wales impose criminal-like sentences following conviction. The limiting term is to be the 'best estimate of the sentence the court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried for that offence and the person had been found guilty of that offence.'<sup>187</sup>

Scholars acknowledge the advantage of using limiting terms because the fixed end date to detention avoids the problem of accused people choosing to plead guilty and because 'the certainty of a fixed sentence is preferable to detention with no end in sight.'<sup>188</sup>

#### 4.2.4 Fixed terms

The Commonwealth and the Australian Capital Territory legislation both contain 'fixed terms.' Scholars argue that this appears to be the best approach for individuals subject to a finding of unfitness in it is the most consistent with international convention objectives (discussed in Part 5). The legislation in both jurisdictions provides for a maximum period of imprisonment and ensures that the person is not detained any longer than the period they would have been sentenced to, had they been found guilty.<sup>189</sup> Notably, in both jurisdictions the person may be released before the fixed term expires and in the Australian Capital Territory, a tribunal must review the decision every month,<sup>190</sup> and in the Commonwealth jurisdiction the decision is reviewed by the Attorney-General every six months.<sup>191</sup>

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<sup>181</sup> Gooding et al., above n 18, 854.

<sup>182</sup> Senate Inquiry Report, above n 123, 70 [3.76].

<sup>183</sup> Jonathon Hunyor and Michelle Swift, 'A judge short of a full bench: Mental impairment and fitness to plead in the NT criminal legal system' (Paper presented at the Criminal Lawyers Association Northern Territory Conference, Sanur, Bali, 30 June 2011) 12-13.

<sup>184</sup> Australian Human Rights Commission, above n 111, 20.

<sup>185</sup> Senate Inquiry Report, above n 123, 13 [2.4]

<sup>186</sup> Senate Inquiry Report, above n 123, 70.

<sup>187</sup> Gooding et al., above n 18, 855; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b). **Note:** this is also the procedure in South Australia: *Criminal Law Consolidation Act 1935* (SA), s 269O(3).

<sup>188</sup> Gooding et al., above n 18, 856.

<sup>189</sup> *Crimes Act 1914* (Cth), s 20BC; *Crimes Act 1900* (ACT) ss 301, 305; *Mental Health Act 2015* (ACT) s 183.

<sup>190</sup> *Mental Health Act 2015* (ACT) s 180(2)(b).

<sup>191</sup> *Crimes Act 1914* (Cth) s 20BD(1).

Therefore, on the face of the legislation, these jurisdictions take into account the individual's needs by regularly considering whether early release is possible.

### 4.3 Part 4 Conclusion and Recommendations

Part 4 has highlighted the different approaches in jurisdictions for reporting the prevalence of forensic orders, and models for detention under the forensic order system. Nationally, the system remains fragmented and lacks legislative uniformity.

One recommendation raised in the literature is the creation of an independent statutory office such as an 'Inspector for Custodial and Forensic Services' that can report to directly to Parliament on its findings. Such an office once existed in Queensland, however it was only administrative within the Department of Justice and Attorney General, and only reported on the condition of prisons once.<sup>192</sup> Other jurisdictions such as New South Wales and Western Australia have an independent statutory watchdog. In Western Australia, the Inspector's jurisdiction covers custodial and forensic services generally and has general powers of investigation.<sup>193</sup> For example, the Inspector made incredibly detailed systemic findings and frank recommendations in his submission to the Senate Inquiry.<sup>194</sup> Interestingly, in the Inspector's report it was found that of the 60 persons held under the Western Australian mental health legislation at the time, the average time spent in custody before discharge of the order was about four years before discharge from custody.<sup>195</sup> It was possible to benchmark this figure against New South Wales (with a much larger forensic population), where the Inspector found that persons on forensic orders spent on average about eight years in custody before some form of conditional release order was made.<sup>196</sup> It is impossible to draw these kinds of conclusions in the Queensland.

One of the key problems in Queensland is the absence of publicly available statutory for forensic disability. This is a policy area that can transcend the portfolios of up to five different Ministers, three government departments, and multiple different agencies with varying degrees of statutory independence. For this reason, it may be sensible to consolidate the reporting obligations of various custodial and forensic agencies to an Inspector who can then include coherent measurement of key statistics in their annual report to Parliament.

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<sup>192</sup> **Note:** the 'Health Prison Report' from 2012. See: <<http://www.justice.qld.gov.au/corporate/business-areas/queensland-corrective-services/reviews-and-reports/healthy-prison-report>>.

<sup>193</sup> *Inspector of Custodial Services Act 2003* (WA).

<sup>194</sup> Inspector for Custodial Services (WA), Submission No 51 to the Senate Community Affairs References Committee, *Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia* (2016).

<sup>195</sup> *Ibid* 21-22.

<sup>196</sup> Greg James, Review of the NSW Forensic Mental Health Legislation (2007).

## Part 5 International law

The following sections of this report will outline the general obligations of Australia towards people with disabilities under UNCRPD. The focus will be on the UNCRPD's relationship to unfitness to plead laws in Australian jurisdictions.

### 5.1 Obligations to people with disabilities under international law

Australia was one of the first countries to sign the UNCRPD by signing the UNCRPD on 30 March 2007.<sup>197</sup> Australia declared, upon ratification of the UNCRPD on 17 July 2008, the following:

Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards...<sup>198</sup>

It is clear from the declaration above that Australia has made a commitment to move away from the traditional 'substituted decision-making paradigm' towards a model of 'supported decision-making' for people with impaired capacity.<sup>199</sup> There is significant academic debate about the extent to which jurisdictions should now be acting based on a person's 'rights, wills and preferences' as opposed to what is in the person's 'best interests.' However, some academics are calling for law reform to 'transform decision-making in mental health from a risk-management model to one centred on promoting and protecting the rights, wills and preferences of persons with mental illness....'<sup>200</sup>

The issue is whether Australian jurisdictions are, in practice, giving people with impaired capacity the appropriate support to exercise legal capacity on an equal basis with others. While an assessment of all the support measures available to people with impaired capacity is beyond the scope of this report, it is important to outline the meaning of Articles 12 and 13 of the UNCRPD to assess whether the terms of detention imposed on people with disabilities in Australian jurisdictions violates its obligations under international law.

#### 5.1.1 Equal recognition before the law (Article 12)

Under Article 12 of the UNCRPD, persons with impaired capacity retain legal capacity and the onus is on States to provide such persons with support and ensure that there are appropriate and effective safeguards in place.<sup>201</sup> The Committee on the Rights of Persons with Disabilities (the UN Committee) in their General Comment No.1 in 2014, acknowledges that there is a general misunderstanding amongst states as to the exact scope of Article 12; however, the UN Committee re-affirms that the concept of mental capacity should not be conflated with legal capacity.<sup>202</sup> The UN Committee states that legal capacity is the 'ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency),' while mental capacity 'refers to the decision-making skills of a person, which

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<sup>197</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2151 UNTS 3 (entered into force 3 May 2008).

<sup>198</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2151 UNTS 3 (entered into force 3 May 2008) ('Declarations and Reservations').

<sup>199</sup> Arlene S. Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Taylor and Francis, 2014).

<sup>200</sup> Sascha Callaghan and Christopher James Ryan, 'An Evolving Revolution: Evaluating Australia's Compliance with the *Convention on the Rights of Persons with Disabilities* in Mental Health Law,' (2016) 39(2) *University of New South Wales Law Journal* 596, 623.

<sup>201</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2151 UNTS 3 (entered into force 3 May 2008) art 12.

<sup>202</sup> Committee on the Rights of Persons with Disabilities, *General Comment No 1. Article 12: Equal Recognition before the Law*, 11<sup>th</sup> sess, UN Doc CRPD/C/GC/1 (19 May 2014).

naturally vary from one person to another...’ Further, the UN Committee notes that it is the component of ‘legal agency’ that is frequently denied to persons with disabilities.<sup>203</sup> Article 12 re-affirms the two related concepts of equal recognition before the law and legal capacity, with a goal to ensure that people with cognitive impairment are not denied their rights on the basis of assumptions that they are incompetent.<sup>204</sup>

Scholars recognise that Article 12 marks an important ‘paradigm shift’ towards supporting people to make their own decisions even when the person has impaired capacity, and on ‘respecting the rights, will and preferences of the person in all circumstances.’<sup>205</sup> This is because traditionally Australian State and Territory jurisdictions have only been concerned with avoiding risk of harm to the person or others, and have neglected to take into account the person’s wishes or their decision-making ability. As international disability law scholar Arlene S. Kanter, states, ‘Article 12 marks an important paradigm shift from the practice of depriving people of their rights simply on the basis of their perceived lack of capacity to the promotion of national policies and laws that comport to the goals and principles of the UNCRPD, including autonomy, dignity and independence.’<sup>206</sup>

### 5.1.2 Access to justice (Article 13)

Article 13 is another important provision of the UNCRPD as it goes beyond ensuring that people with disabilities receive the same treatment as people without disabilities– it ensures the availability of modifications or accommodations to give people with disabilities equal access to the justice system.<sup>207</sup> Article 13 provides persons with disabilities the right to: effective access to justice on an equal basis with others; effective access to justice at all levels of the administration of justice; ‘procedural and age-appropriate accommodations’ to facilitate access to justice; effective access to justice as both ‘direct and indirect participants, including as witnesses.’<sup>208</sup> Article 13, read in conjunction with Article 4(3), means that States must consult with persons with disabilities or with their representatives to ensure that barriers to their access to justice are eliminated.<sup>209</sup> The Committee’s General Comment No. 1 suggests that Article 13 is closely connected to Article 12, as being granted legal capacity to testify on an equal basis with others is inherent to the right to access justice.

It should be recognised that the language of the UNCRPD has been described by scholars as unclear,<sup>210</sup> and the instrument has been criticised as containing ‘tedious, detailed and sometimes excruciating discussions.’<sup>211</sup> Additionally, while the Committee’s interpretation of Article 12 and 13 has also been subject to significant academic debate and is not binding on Australia, the Committee’s interpretation is still considered authoritative.<sup>212</sup>

## 5.2 UNCRPD and unfitness to plead in Australian jurisdictions

The UN Committee has publically condemned the use of indefinite detention after findings of unfitness to plead. Australian laws which expose people with cognitive impairment to the risk of indefinite detention are inconsistent with the UNCRPD. Accordingly, the regimes of Western Australia, Victoria,

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<sup>203</sup> Committee on the Rights of Persons with Disabilities, *General Comment No 1, Article 12: Equal Recognition before the Law*, 11<sup>th</sup> sess, UN Doc CRPD/C/GC/1 (19 May 2014).

<sup>204</sup> Kanter, above n 199, 236.

<sup>205</sup> Callaghan and Ryan, above n 200, 602.

<sup>206</sup> Kanter, above n 199, 237.

<sup>207</sup> *Ibid* 221; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2151 UNTS 3 (entered into force 3 May 2008) art 13.

<sup>208</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2151 UNTS 3 (entered into force 3 May 2008) (‘Declarations and Reservations’).

<sup>209</sup> Kanter, above n 199, 223.

<sup>210</sup> Callaghan and Ryan, above n 200, 601.

<sup>211</sup> Marianne Shulze, *Understanding the UN Convention on the Rights of Persons with Disabilities* (Handicap International, 3<sup>rd</sup> ed, 2010) 86.

<sup>212</sup> Australian Law Reform Commission, above n 2, 48 [2.56].

Tasmania, the Northern Territory and Queensland, which all use indefinite and/or nominal terms, are inconsistent with the UNCRPD.

It is questionable whether the regimes in South Australia and New South Wales include a use of indefinite detention. Both jurisdictions use limiting terms; however, when they expire they may also be extended and therein lies the potential for the imposition of an indefinite term of detention.<sup>213</sup> Some scholars argue that limiting terms violate the right to liberty and security of person under Article 14. This is because jurisdictions which allow health officials to help make the decision to extend custodial orders inevitably make decisions based partially on disability.<sup>214</sup>

### 5.2.1 Queensland

Although recognised by scholars that Queensland is one of two jurisdictions to have put forward legislative models directed towards establishing a more thorough ‘supported decision making’ model for persons with cognitive disabilities, there is still more work to be done to ensure Queensland respects the goals of the UNCRPD.<sup>215</sup>

As discussed in Part 4.2.1, Queensland still retains elements of the Governor’s pleasure detention regime due to the MHRT assessment of individuals’ suitability for release every six months. Additionally, the detention is indefinite as the legislature does not impose a nominal or limiting term. Therefore, by the existence of such a legislative regime, Queensland’s system operates in such a way as to place people at risk of indefinite detention and on this basis violates the UNCRPD’s commitment to people with cognitive disabilities being equally recognised before the law (Article 12) and having equal access to the justice system (Article 13).

The UNCRPD clearly requires jurisdictions to make modifications or accommodations to give people with disabilities equal access to the justice system. Policy-makers in Queensland need to carefully consider the risk of indefinite detention of people with cognitive disabilities and learn from the shortcomings of other jurisdictions. Imposing limiting terms for sentences would help improve Queensland’s legislative regime. Further, Queensland has one of the greatest numbers of Aboriginal and Torres Strait Islander people in Australia (approximately 30%),<sup>216</sup> and considering that there are a disproportionate number of Aboriginal and Torres Strait Islander people incarcerated,<sup>217</sup> law reform measures in Queensland should consider identifying whether support measures are culturally appropriate.

## 5.3 Part 5 Conclusions

This report recognises that there is still much to do to in Queensland and throughout Australia to achieve compliance with the UNCRPD. It is important that Queensland sets a standard for the other states and commits to the UNCRPD’s goal of instituting supported decision making. Further, it is important that the standards are implemented appropriately and that the Queensland Government continues to support research initiatives in this area to ensure that people with impaired capacity have equal access to justice and recognition before the law.

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<sup>213</sup> Gooding et al., above n 18, 863

<sup>214</sup> Ibid; See Mental Health (Forensic Provisions) Act 1990 (NSW) Sch 1 cls 5(b), 6(5)(a).

<sup>215</sup> The other jurisdiction is the Australian Capital Territory. Callaghan and Ryan, above n 200, 623.

<sup>216</sup> Australian Bureau of Statistics, *2016 Census: Queensland* (27 June 2017)

<[http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/ED6AC1443949FE77CA258148000C1A01?Open Document](http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/ED6AC1443949FE77CA258148000C1A01?OpenDocument)>.

<sup>217</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (July 2017) <[https://www.alrc.gov.au/sites/default/files/pdfs/publications/discussion\\_paper\\_84\\_compressed\\_cover2.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/discussion_paper_84_compressed_cover2.pdf)>.



## Appendix A: Table of Legislative Tests for Fitness to Plead

<i>Mental Health Act 2016 (Qld)</i>	
Section	Description
118	<p>Decision about fitness for trial</p> <p>(1) This section applies if –</p> <p style="padding-left: 40px;">(a) the mental health court decides the person was not of unsound mind when the offence was allegedly committed; or</p> <p style="padding-left: 40px;">(b) because of section 117 the court may not decide whether the person was of unsound mind when the offence was allegedly committed</p> <p>(2) The court must decide whether the person is fit for trial.</p> <p>(3) If the court decides the person is unfit for trial, the court must also decide whether the unfitness for trial is permanent</p> <p>(4) This section does not apply if under section 117(4) the proceeding against the person for the offence is discontinued.</p>
121	<p>Temporary unfitness for trial – stay of proceeding</p> <p>This section applies if the mental health court decides the person is unfit for trial and the unfitness for trial is not permanent. The proceeding for the offence is stayed until, on a review under chapter 12, part 6, the tribunal decides the person is fit for trial</p>
122	<p>Permanent unfitness for trial – discontinuance of proceeding</p> <p>If the mental health court decides the person is unfit for trial and the unfitness for trial is permanent –</p> <p style="padding-left: 40px;">(a) the proceeding against the person for the offence is discontinued and</p> <p style="padding-left: 40px;">(b) further proceedings may not be taken against the person for the act or omission constituting the offence.</p>
<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)</i>	
Section	Description
6	<p>When is a Person Unfit to Stand Trial?</p> <p>(1) A person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be—</p> <p style="padding-left: 40px;">(a) Unable to understand the nature of the charge; or</p> <p style="padding-left: 40px;">(b) Unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or</p> <p style="padding-left: 40px;">(c) Unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or</p> <p style="padding-left: 40px;">(d) Unable to follow the course of the trial; or</p> <p style="padding-left: 40px;">(e) Unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or</p>

	<p>(f) Unable to give instructions to his or her legal practitioner</p> <p>(2) A person is not unfit to stand trial only because he or she is suffering from memory loss.</p>
7	<p>Presumptions, standard of proof, etc.</p> <p>(1) A person is presumed to be fit to stand trial.</p> <p>(2) The presumption is rebutted only if it is established, on an investigation under this Part, that the person is unfit to stand trial.</p> <p>(3) The question of a person's fitness to stand trial—</p> <p>(a) is a question of fact; and</p> <p>(b) is to be determined on the balance of probabilities by a jury empanelled for that purpose.</p> <p>(4) If the question of a person's fitness to stand trial is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption of fitness.</p> <p>(5) If the question is raised by the trial judge, the prosecution has carriage of the matter, but no party bears any onus of proof in relation to it.</p>
<i>Mental Health (Forensic Provisions) Act 1990 (NSW)</i>	
Section	Description
6	<p>Basis of determination of question of unfitness</p> <p>The question of a person's unfitness to be tried for an offence is to be determined on the balance of probabilities.</p>
11	<p>Determination of question of unfitness</p> <p>The question of a person's unfitness to be tried for an offence is to be determined by the Judge alone.</p> <p>Any determination by the Judge under this section must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.</p>
15	<p>Presumptions as to findings concerning unfitness</p> <p>It is to be presumed:</p> <p>(a) that a person who has, in accordance with this Part, been found to be unfit to be tried for an offence continues to be unfit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case, and</p> <p>(b) that a person who has, in accordance with this Part, been found fit to be tried for an offence continues to be fit to be tried for the offence until the contrary is, on the balance of probabilities, determined to be the case.</p>
<i>The Criminal Law Consolidation Act 1935 (SA)</i>	
Section	Description
269H	<p>Mental Unfitness to Stand Trial</p> <p>A person is mentally unfit to stand trial on a charge of an offence if the person's mental processes are so disordered or impaired that the person is—</p> <p>(a) Unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or</p> <p>(b) Unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or</p> <p>(c) Unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.</p>

269I	<p>Presumption of mental fitness to stand trial</p> <p>A person's mental fitness to stand trial is to be presumed unless it is established, on an investigation under this Division, that the person is mentally unfit to stand trial.</p>
<i>Crimes Act 1900 (ACT)</i>	
Section	Description
311	<p>When a person is unfit to plead</p> <p>(1) A person is unfit to plead to a charge if the person's mental processes are disordered or impaired to the extent that the person cannot—</p> <ul style="list-style-type: none"> <li>(a) understand the nature of the charge; or</li> <li>(b) enter a plea to the charge and exercise the right to challenge jurors or the jury; or</li> <li>(c) understand that the proceeding is an inquiry about whether the person committed the offence; or</li> <li>(d) follow the course of the proceeding; or</li> <li>(e) understand the substantial effect of any evidence that may be given in support of the prosecution; or</li> <li>(f) give instructions to the person's lawyer.</li> </ul> <p>A person is not unfit to plead only because the person is suffering from memory loss.</p>
<i>Criminal Law (Mentally Impaired Accused) Act 1996 (WA)</i>	
Section	Description
9	<p>Mental unfitness to stand trial, definition</p> <p>An accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is —</p> <ul style="list-style-type: none"> <li>(a) Unable to understand the nature of the charge;</li> <li>(b) Unable to understand the requirement to plead to the charge or the effect of a plea;</li> <li>(c) Unable to understand the purpose of a trial;</li> <li>(d) Unable to understand or exercise the right to challenge jurors;</li> <li>(e) Unable to follow the course of the trial;</li> <li>(f) Unable to understand the substantial effect of evidence presented by the prosecution in the trial; or</li> <li>(g) Unable to properly defend the charge.</li> </ul>
10	<p>Presumptions as to mental fitness to stand trial</p> <p>An accused is presumed to be mentally fit to stand trial until the contrary is found under this Part.</p>

	(2) An accused found under this Part to be not mentally fit to stand trial is presumed to remain not mentally fit until the contrary is found under this Part.
<i>Mental Health and Related Services Act 2002 (NT)</i>	
<b>Section</b>	<b>Description</b>
43J	<p>When is a person unfit to stand trial?</p> <p>(1) A person charged with an offence is unfit to stand trial if the person is -</p> <ul style="list-style-type: none"> <li>(a) Unable to understand the nature of the charge against him or her;</li> <li>(b) Unable to plead to the charge and to exercise the right of challenge;</li> <li>(c) Unable to understand the nature of the trial (that is that a trial is an inquiry as to whether the person committed the offence);</li> <li>(d) Unable to follow the course of the proceedings;</li> <li>(e) Unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or</li> <li>(f) Unable to give instructions to his or her legal counsel.</li> </ul> <p>(2) A person is not unfit to stand trial only because he or she suffers from memory loss.</p>
43K	<p>Presumption of fitness to stand trial and burden of proof</p> <p>(1) A person is presumed to be fit to stand trial.</p> <p>(2) The presumption of fitness to stand trial is rebutted only if it is established by an investigation under this Division that the person is unfit to stand trial.</p> <p>(3) If the question of a person's fitness to stand trial is raised by the prosecution or the defence, the party raising the question bears the onus of rebutting the presumption of fitness.</p> <p>(4) If the question of a person's fitness to stand trial is raised by the court, the prosecution has carriage of the matter and no party bears the onus of rebutting the presumption of fitness.</p>
43L	<p>Standard of proof</p> <p>The question of whether a person is fit to stand trial is a question of fact to be determined by a jury on the balance of probabilities.</p>