



The New South Wales Bar Association

Criminal Justice Reform Submission

Mental illness

The New South Wales Law Reform Commission has examined in detail the regime for dealing with persons found unfit for trial, found not guilty by reason of mental illness ('forensic patients') or found to be mentally ill whilst detained, bail refused or on sentence ('correctional patients'):

Consultation Paper 5: People with cognitive and mental health impairments in the criminal justice system: an overview

Consultation Paper 6: People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences

Consultation Paper 7: People with cognitive and mental health impairments in the criminal justice system: diversion

Consultation Paper 8: People with cognitive and mental health impairments in the criminal justice system: forensic samples

As a result of that examination, it is appropriate that the following reforms occur in respect of such mentally ill persons:

- (i) Revision of unfitness criteria, special hearings and limiting term concepts and processes to ensure potential release to a supported environment with assistance for employment etc rather than detention in prison.
- (ii) Joint responsibility of parole authorities and health facilities for mentally ill persons.
- (iii) The Metropolitan Remand and Reception Centre at Silverwater be designated as a screening unit and clinic under the *Mental Health Act 2007* (NSW) to enable involuntary treatment in that facility.
- (iv) Extend the diversion provision in ss 32 and 33 *Mental Health (Forensic Provisions) Act 1990* (NSW) ('MHFPA') beyond the Local Court to higher courts and increase their ambit to persons capable of being treated and rehabilitated (that is, remove or lessen the culpability restrictions).
- (v) Abolish the verdict of 'not guilty by reason of mental illness' and replace it with a verdict of 'not responsible in law by reason of mental illness'.
- (vi) Develop proper policies consistent with the role of the Mental Health Review Tribunal ('MHRT') to determine care, detention, treatment, leave and release for forensic patients to enable such patients to be released from prison when their condition may be safely and effectively treated under a less restrictive regime in the community.

In addition, a legislative framework should be introduced for fitness to be tried to be determined in summary matters. Such a scheme should be available because of the very wide jurisdiction of the

Children's Court, and the expanding jurisdiction of the Local Court. Currently, if a person is unfit to be tried in respect of a summary matter they must be discharged: *Mantell v Molyneux* (2006) 68 NSWLR 46. If this happens it is possible for the Crown to lay an ex officio indictment: *Police v AR* (Marien P, Children's Court, 19.11.2009) at [61]. This demonstrates why a legislative framework is required.

The goals of any scheme for determination of fitness to be tried in summary courts should be:

- (i) consistency as far as possible with the operation of MHFPA in higher courts;
- (ii) determination of criminal responsibility;
- (iii) avoidance of unnecessary delays; and
- (iv) simplicity.

The scheme proposed for fitness to be tried in summary matters has the following major elements:

- (i) Fitness to be tried can be raised by the Court, prosecution or defence, and at any stage of proceedings, although preferably before commencement of hearing.
- (ii) Once raised, the hearing is suspended until fitness is determined.
- (iii) A Court can direct preparation and service of expert reports.
- (iv) If an expert assesses a person as unfit to be tried, the expert must address the likelihood of the accused becoming fit in the next 12 months, as well as recommending a treatment plan.
- (v) After service of expert reports by one party on the other, the other party can decide if they want an expert report prepared.
- (vi) When the matter comes before a Court, the first determination will always be whether s 32 or s 33 MHFPA is appropriate. If it is not, then a fitness inquiry is to take place.
- (vii) Sections 12, 13 and 15 MHFPA apply to the fitness enquiry. Fitness enquiries can be contested, uncontested, or with consent of parties.
- (viii) A Court can inform itself as it considers appropriate.
- (ix) If a Court finds a person unfit, it is to decide if the person is likely to become fit during the next 12 months. If the person is not, a special hearing is to be held.
- (x) The procedure for a special hearing is to follow s 21 MHFPA as closely as possible and the verdicts available are those contained in s 22 MHFPA.
- (xi) After a special hearing a Court can make any order currently available: s 23(2) MHFPA. In addition, there should be a new power for a Court to make a Community Treatment Order (which a Court can currently only make under s 33(1A) MHFPA).
- (xii) If a limiting term is imposed the person is to be referred to the MHRT and consequent orders will be made to advise the MHRT of the person.
- (xiii) A Court can monitor progress and deal with variation or breach of community-based orders that are imposed: s 32A MHFPA.
- (xiv) Appeals lie to the District Court in relation to all stages of this process.

The general proposals made above derive from a paper delivered by G James QC at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010. The specific proposal to introduce a legislative framework to determine fitness to be tried in summary matters derives from a paper delivered by L Fernandez at the same conference.

Subpoenas to produce

There is confusion and conflict as to the test that should apply when a subpoena is challenged and a Court is asked to rule whether documents must be produced, or rule whether access should be granted to documents that have already been produced. There is conflict as to the appropriate test for determining whether documents should be produced and access granted. Further, the predominant test for getting hold of documents employs an enigmatic metaphor ('on the cards') that is ambiguous and open to subjective interpretation. The same is true in respect of the commonly stated proposition that a subpoenaing party is not entitled to go on a 'fishing expedition'. Legislation should be enacted, clarifying the position. The same test should apply to civil and criminal proceedings, although it would be appropriate that more latitude should be given in criminal cases within the scope of that test.

These proposals derive from a paper delivered by Ian Bourke at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010.

Sentence Indication Hearings

It is proposed that, notwithstanding the decision made in 1996 not to proceed with the Sentence Indication Hearings Pilot Scheme introduced in 1993, amendments should be made to the *Criminal Procedure Act 1986* (NSW) to permit sentence indication hearings.

A system of sentence indication has obvious potential benefits:

- (i) It would permit the accused to make a better informed decision whether to plead guilty, or not;
- (ii) It may result in more guilty pleas, with a consequent reduction in the number of trials; and
- (iii) If the sentence indication is provided well in advance of trial, it may result in more early guilty pleas.

Section 139 should be amended to permit sentence indications at a pre-trial hearing, to provide that an indication would be binding for a reasonable time and to provide that any reference to a request for a sentence indication would be inadmissible in any subsequent trial. A guideline judgment from the Court of Criminal Appeal should indicate appropriate procedure and the nature of the indication. The guideline might be based on the current English procedure established by the English Court of Appeal in *R v Goodyear* [2005] EWCA Crim 888, which may be summarised as follows:

- (i) The judge should only give an indication where one has been sought by the accused (at [55]). However, the judge may remind the defence advocate that the accused is entitled to seek an indication. Guidance is given to defence lawyers regarding their ethical responsibilities (at [65]).
- (ii) It would normally be sought at the plea and case management hearing (although it may be sought at a later stage) (at [73]-[74]).
- (iii) The judge has an unfettered discretion to refuse to give an indication (guidance is provided

on circumstances where it would not be appropriate) or to postpone giving one (until, for example, more information is available) (at [57]-[58]).

(iv) An indication should not be sought on a basis of hypothetical facts but on agreed facts in writing (at [62]).

(v) Guidance is provided regarding the approach of the prosecution to indications (at [69]-[70]).

(vi) Any indication 'should normally be confined to the maximum sentence [that would be imposed] if a plea of guilty were tendered at the stage at which the indication is sought' (at [54]).

(vii) Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case (at [61]). However, if, after a reasonable opportunity to consider his or her position in the light of the indication, the accused does not plead guilty, the indication will cease to have effect.

(viii) Any reference to a request for an indication, or the circumstances in which it was sought, would be inadmissible in any subsequent trial (at [76]).

(ix) The procedure would not affect the right of the accused or the Crown to appeal against sentence (at [71]-[72]).

Alternatively, the current Victorian procedure (limited to an indication as to whether the sentence would be custodial or not) might be adopted. Whatever model is adopted, the system must be designed in such a way as to avoid the creation or appearance of judicial pressure on the accused to plead guilty. Further, the problems apparent with the New South Wales Pilot should be avoided. In particular, the major problem with that Pilot arose from the selection of particular judges allocated the task of sentence indication. This resulted in disproportionately low sentences compared with sentences where the plea of guilty occurred in the Local Court. A revised New South Wales scheme operating along the lines of the English model would avoid this danger by being more generally available, avoiding the need to allocate particular judges to the task of sentence indication.

These proposals derive from a paper delivered by C Loukas and S Odgers SC at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010.

Sentencing of Aboriginal Offenders

The disproportionate representation of Aboriginal people in prison is a national shame. There was a 48 per cent increase in indigenous prisoner numbers in New South Wales between 2001 and 2008, despite the fact that there has been no increase in the number of indigenous adults convicted. As at 30 June 2009 the rates of indigenous to non-indigenous rates of imprisonment on an age standardised scale varied from three times in Tasmania, to 20 times in Western Australia, 13 times in New South Wales, 15 times in South Australia and 12 times in the Northern Territory, with a national figure of 14 times higher. There were 5,811 sentenced indigenous prisoners in Australia as at 30 June 2009, a 13 per cent increase on 2008. New South Wales, as at 2008, had the highest rate of age standardised imprisonment for indigenous adults in Australia (32 per cent), compared to 23 per cent for Western Australia, 22 per cent for Queensland, 12 per cent for the Northern Territory. The time has come for radical action to address this current sentencing reality. It is proposed that:

(i) Statutory provisions be introduced in respect of Aboriginal people (subject to appropriate definition of relevant persons, the character of the offending and relevant subjective matters)

which displace the existing requirements to approach sentencing from the perspective of 'punitive' purposes as statutorily defined, unless there are special or 'appropriate' circumstances for so doing.

(ii) The current legislative framework in which sentencing proceeds both at a Commonwealth and a State level should be changed. This would require, for example, amendments to s 16A *Crimes Act 1914* (Cth), and other legislation operating in State and Territory law concerned with both the 'purposes of sentencing' (example s 3A *Crimes (Sentencing Procedure) Act 1999* (NSW)) and 'factors' to be taken into account in sentence (example s 21A of that Act):

(a) In relation to the 'purposes of sentencing' (such as contemplated in s 3A *Crimes (Sentencing Procedure) Act 1999* (NSW)) concepts such as 'ensuring (social) justice', 'reducing Aboriginal disadvantage', 'recognising Aboriginal social and economic disadvantage', 'healing' should be added as general matters to concepts of 'punishment', 'denunciation', 'accountability' etc.

(b) Other 'purposes of sentencing' should be recognized, such as 'restoration of offenders to their community', 'restoration of stability and harmony to the offender's community', 'restoration of the offender to his or her family'.

(c) There should be express recognition of 'cultural or social circumstances to offending' as 'mitigating' or 'relevant' factors to be taken into account in the appropriate case. For example, where it could be established that a person's cultural or social environment or circumstances had contributed to the offending behaviour that may be expressly taken into account as a 'mitigating factor' (eg. s 21A(3) *Crimes (Sentencing Procedure) Act 1999* (NSW)). Other, or additional, terms may be more appropriate.

(iii) In relation to provisions such as s 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (and similar provisions elsewhere in the Commonwealth), which purports to identify 'imprisonment' as an option of 'last resort', there should be express reference to the sentencing of Aboriginal people in this context and express promotion of alternatives to imprisonment which will address both restoration of the offender and restoration of the offenders community where that can be addressed in the sentencing context.

(iv) There is a need for a national 'cost/benefit' analysis of incarceration to the cost of residential/non residential rehabilitation programs. Resources that are currently being spent on the incarceration of Aboriginal people could be diverted to resources for programs that will permit supervision and direction for Aboriginal offenders outside of custody for many offences currently leading to jail sentences.

(v) 'Justice reinvestment', an American concept involving diversion of funds spent on imprisonment to local communities with high rates of offending, to develop programs and services to divert offenders and prevent offending, should be implemented in appropriate communities (See *Investing in Indigenous Youth and Communities to Prevent Crime*, Tom Calma (former Aboriginal and Torres Strait Islander Social Justice Commissioner) – Australian Institute of Criminology Conference, 31 August 2009).

(vi) Where incarceration or deprivation of liberty is the only option, for the appropriate offender (subject to security risk and the like), there should be diversion of Aboriginal people from the mainstream gaol system to programs of the type such as Balund-A or Yetta Dhinnakkal, run by New South Wales Corrections, which accommodate Aboriginal people in a culturally

appropriate or relevant setting with options available for training and/or employment during the period of time that the offender is in custody. There must be change to the manner of imprisonment of Aboriginal people. Not just 'Aboriginal prisons' holding indigenous people together, but facilities that are imbued with encouragement of culture, opportunities for the offender to understand what brings that person into custody, concrete strategies to ensure that on release the offender does not go back to where he or she was beforehand.

(vii) Mentoring of offenders by Elders and suitably qualified people, in cultural issues, for education and training, drugs and alcohol abuse, domestic violence etc, should be available before, during and after custody.

(viii) Expand the availability of Circle sentencing/Koori Court models for dealing with appropriate Aboriginal offenders at Local Court/District Court jurisdictions.

(ix) There should be encouragement of the involvement of Elders in the 'traditional' sentencing exercises.

(x) Therapeutic justice models should take priority over punitive models in appropriate cases.

(xi) There should be greater legislative freedom to recognise the rights and interests of third parties dependent upon, or related to, the offender. To sentence particular individuals may have an effect upon the human rights of 'innocent third' parties, a concept recognised recently by the South African Constitutional Court in 2007 in *M v The State* [2007] SACC 18.

(xii) Legislative changes should be made to provide greater 'mix and match options' on sentencing:

(a) 'community service work' or in house rehabilitation programs as conditions of bonds, home detention, etc;

(b) power for courts to choose the type of community service work that might be performed, or programs that are available as part of community service work or of imprisonment; and

(c) greater power for courts to choose the place of detention, in the appropriate case, rather than make recommendations for such matters.

(xiii) Greater attention in legislation to the rights of children to protect them from incarceration in adult prisons and to prevent juvenile offenders finishing their sentences in adult prisons.

(xiv) Legislative recognition of wider options and greater flexibility in the execution of penalties, particular imprisonment, such as pre-release to halfway houses (or rehabilitation centres) before non parole periods expire, or short sentences expire where there is no non parole period. There are many creative models available from overseas (eg. in Canada, particularly Alberta, dealing with 'First Nation' offenders) to provide inspiration.

(xv) Sentences of 6-12 months imprisonment or less should be served by community service work, or in rehabilitation programs, with the risk of full time detention on failure to perform the work or complete the program. Alternatively, they should be automatically suspended to perform community work or complete training, rehabilitation, education, programs.

(xvi) Where imprisonment or detention is the last and only option, more 'special prisons', or places within them, for the drug addicted, the mentally ill and disabled, aboriginal men and women, domestic violence and repeat serious driving offenders, to protect the individual, to concentrate rehabilitation services and to avoid contact with experienced criminals.

(xvii) Judicial education bodies must provide specialist sentencing checklists and programs to alert the sentencing court to available options and programs or matters to look out for, as well as focussed programs and publications advising judicial officers of services and programs available to meet specific needs.

(xviii) There should be wider and more creative use of restorative justice models, or alternative court models for the drug and alcohol addicted in summary and indictable matters. The Drug Court in New South Wales is such a 'model'.

(xix) Specialist sentencing lists, particularly in the Local Court with adequate counselling and advisory resources readily available, for the mentally ill or disabled, aboriginal people, abused women and young people, sex workers and other identifiable disadvantaged groups.

(xx) A nationally co-ordinated survey of Aboriginal communities to assess the reliability, availability and relevance of government services, welfare, economic enforcement, correctional and the like.

(xxi) Remove restrictions upon the availability of particular non-custodial options and diversion programs at all levels both geographically and/or having regard to the characteristics of the offender. All programs, sentencing options and services should be available to all despite geographical tyranny.

(xxii) Once a person becomes involved in the system, putting aside the issue of determining guilt, the initial concerns from charging onwards should usually be diversion, treatment, rehabilitation and/or training. More than statutory lip service should be given to incarceration, sometimes called 'incapacitation', as a last resort.

(xxiii) 'Healing' should be as much part of the process as 'punishment' and 'retribution'.

(xxiv) Mentoring by elders should be encouraged at every opportunity outside the court processes.

(xxv) Where 'incapacitation' or 'incarceration' is the only option, the programs within prisons must be revolutionised to ensure that the person incarcerated is a better person on release and better able to cope in the wider community.

It goes without saying that these proposals require government and non-government (including local community) agencies having adequate resources and services to address treatment and counselling for mental and general health issues within communities and families, drug and alcohol dependence, anger management and non punitive strategies to reduce domestic violence.

These proposals derive from a paper delivered by Judge Stephen Norrish QC, District Court of New South Wales, at the New South Wales Bar Association Criminal Justice Reform Conference, 10 September 2010.

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