As a legal aid lawyer, I frequently appear for clients with a cognitive impairment – whether that be as a result of a mental illness, an acquired brain injury, a congenital disability, substance misuse or a combination of these. There is no consensus about the terminology, but I'll use the term "cognitive impairment" as a catchall.

Last month this Inquiry conducted a hearing in WA, at which you heard evidence of the acute ethical difficulty faced by defence lawyers: we often skirt around the elephant in the room that is the apparent cognitive impairment of our client, in order to avoid the prospect of a potential lifetime of custodial supervision, and instead cop a brief sentence of imprisonment. The Marlon Noble case is a particularly egregious example of this dilemma, and this Inquiry is referred to the Views of the UN Committee on the Rights of Persons with Disabilities published on 2 September 2016, which concluded that Australia had failed to fulfil its obligations to Mr Noble pursuant to articles 5(1) and (2), 12 (2) and (3), 13(1), 14(1)(b) and 15 of the Convention on the Rights of Persons with Disabilities. We commend the Committee's stern recommendations to this Inquiry, and urge you to endorse them.

In brief:

- Article 5 prohibits discrimination on the basis of disability: everyone is entitled to equal protection and benefit of the law;
- Article 12 gives the right to equal recognition before the law: we are required to give people with disabilities access to services to enable them to enjoy and exercise legal capacity;
- Article 14 requires that persons with disabilities, on an equal basis with others, are not deprived of their liberty unlawfully or arbitrarily; and that the existence of a disability must never justify a deprivation of liberty; and
- Article 15 provides no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

In the NT, the lawyer's ethical difficulty is not quite so acute as in WA, because we have more progressive legislation that enables a court to fix a term for a supervised person, after which there is a presumption that he or she be unconditionally released, unless to do so would result in the safety of the community or the person being placed at serious risk: s43ZG(6) *Criminal Code*.

This is an improvement on indefinite detention, but not a panacea. We adopt the important point made by the NSW Law Reform Commission, which applies equally to the NT:

> There is no provision… for a non-parole period, and limiting terms can be longer than terms imposed for an equivalent offence on a fit offender, as the unfit defendant cannot take advantage of a discount for an early guilty plea.

A further problem is that there is no statutory guarantee of a regular review by the court. Another is that in practice it is much easier to get into the NT Supervision Orders scheme established by Part IIA of the *Criminal* Code (NT) than to get out of it.

The detailed and comprehensive National Association of Aboriginal and Torres Strait Islander Legal Services submission, all of the recommendations of which we endorse, makes this point:

> In the Northern Territory, custodial supervision orders have no expiry date. The only way for an order to cease is if the Court accepts expert evidence that the person subject to the order is no longer a serious risk of harm to the community or themselves (p. 16, para [5.15]).

In practice, notwithstanding the presumption of release after the nominal term has expired, what NATSILS says is correct: the Supreme Court won't release a person without getting the nod from an expert.

As an example, I currently act for a client who engaged in conduct contrary to the NT *Criminal Code* in March 2011. He was acutely psychotic at the time. Indeed, he engaged in the conduct while an involuntary patient in the psychiatric ward of the Alice Springs hospital. He was eventually found not guilty by way of mental impairment and placed on a Part IIA Custodial Supervision Order. The judge fixed a term of 3 months, being the sentence he would have imposed had my client been convicted of the offence. By that time, he had already served 7 months. But he wasn't released from prison for a further 7 months, essentially because no suitable community-based placement had been arranged or funded. Since then, he has been on a Non-Custodial Supervision Order for the last two years and 3 months, which significantly curtails his freedom: he is not permitted to leave the home he lives in without an escort. Physically and mentally, he is going nowhere. If we can stitch together a robust care plan for him, the judge managing his case has indicated that he will consider discharging my client soon. In the meantime, he has endured 3 and a half years of restricted liberty for engaging in misconduct which the court found justified a sentence of 3 months imprisonment.

This is obviously unfortunate and unsatisfactory, and arguably unfair. But my client is difficult to manage in the community. He was released on bail some years ago, and promptly absconded. While at large, he resumed the sort of conduct that had brought him to the attention of police in the first place. However, in my view, even under the current law, my client could and should have had his liberty restored much more quickly. What prevented this was the lack of access to better, more co-ordinated, more pro-active service providers, service providers who work together to positively plan for the restoration of his liberty, and not wait for a judge to give them a nudge to do so.

That is just one example, but in my submission it is illustrative and instructive.

A second example was given by Professor Neil Morgan, the WA Inspector of Custodial Services. In his oral evidence to this Inquiry he stated that Roseanne Fulton was being reasonably well managed in the women's unit of the Eastern Goldfields Regional Prison, with women she knew. He suggested she'd be better off being reintegrated into the community by way of being supervised in "a declared place".

That evidence should be read in conjunction with the written submission dated 27 April 2016 to this Committee by Ms Fulton's Adult Guardian, Ian McKinlay. Mr McKinlay's submission is scarifying. It is also, with respect, accurate and should be accepted.

Tragically, after she was repatriated to the NT following a vigorous and well publicised campaign by those advocating for Ms Fulton, including Mr McKinlay, an attempt was made to reintegrate her into the community, but it appears to have failed: she has been in and out – mainly in – of prison ever since, and when she is out she appears to be living in an environment of very high risk of both committing minor offences, and, more disturbingly, of becoming a victim of very serious offences. In summary, unlike when she was in the Goldfields prison, she has <u>not</u> been reasonably well managed.

This is not to say Ms Fulton is better off in prison. It is to say that just as important as getting people like her released is a commitment to properly resourced, culturally and clinically appropriate, wrap-around services provided within a case management model, that is to say a model in which all of the relevant service providers work collaboratively to develop and deliver an Individual Care Plan for the client. ICPs are in use in the NT with persons on NCSOs (and CSOs), but often they appear to be more in the nature of tick a box form-filling exercise than an effective tool to manage the rehabilitation, care and supervision of the client.

Ms Fulton, as Mr McKinlay notes, should have been placed in a secure care facility. That did not occur. The facility had been built but ended up being used for other purposes, including the holding of people for assessment to be detained under the NT's alcohol mandatory treatment scheme. The original plan for the secure care facility should be reinstated. It should be managed by the Department of Health

Similarly, the management of the Complex Behaviour Unit at the Darwin Correctional Centre should be transferred from the Department of Corrections to the Department of Health. It is primarily a facility for people with cognitive disabilities who are subject to Custodial Supervision Orders. They are not prisoners or convicts, and should not be treated as such.

As CLANT says in our submission, we endorse the submission to this Inquiry by the Melbourne Social Equity Initiative, which proposes statutory frameworks throughout Australia which would give proper effect to the obligations our nation has assumed under the Convention on the Rights of Persons with Disabilities, including fixed non-extendable terms for supervision orders, as indeed has been the case for the last 27 years in relation to Federal offences pursuant to s20BC of the Commonwealth *Crimes Act*. That is our strategic objective, but it is a long-term objective: to meet it will require very significant law reform across all jurisdictions, including the introduction of both fixed terms of supervision and statutory defendant intermediary schemes. In the short-term, however, particularly in the context of the roll-out of the NDIS, we are also focussed on the more readily achievable objective of better services to disabled detainees.

I make one further brief point. As a member of the NT Law Reform Committee, I contributed to its *Report on the Interaction between people with Mental Health Issues and*

the Criminal Justice System, which we presented to then Attorney-General Elferink in May 2016. Regrettably, there has not yet been a public response to the Report, but it is available on the Committee's website. Of particular relevance to this Inquiry is our recommendation that some features of the Part IIA scheme be extended to the Local Court, thereby empowering Local Court judges exercising summary jurisdiction to impose supervision orders for up to 12 months on cognitively impaired defendants, including those who are unfit to stand trial, instead of, as is currently the case, either simply discharging them without any support or supervision, or sending them upstairs to the Supreme Court.

Thank you.

Russell Goldflam

26 October 2016