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Out of Mind – No Longer Out of Sight

(Insanity and Fitness to be Tried – Reform of the Northern Territory Criminal Code)

INTRODUCTION:

In May 2002 the Northern Territory Legislative Assembly passed on urgency the *Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act* 2002. The Act repealed provisions of the Criminal Code that had previously dealt with the issues of insanity[1] and want of understanding in an accused person[2] and replaced them with a new Part IIA drawn from the Model Mental Impairment and Unfitness to be Tried (Criminal Procedure) Bill (the "Model Bill") developed in 1995 by the Model Criminal Code Officers Committee (established by the Standing Committee of Attorneys-General ("SCAG")) as a result of a reference from SCAG in relation to "Governor's Pleasure" detainees. Part IIA commenced on 15 June 2002.

Why were the existing Code provisions replaced?

The relevant provisions had caused difficulties over a considerable timeframe and were considered to be inadequate to properly deal with the issues raised by persons who suffer from mental or other disabilities that effect their liability for, or ability to be tried for, an offence.

The problems were not new ones. As will be seen from the cases referred to in this paper, the issue of the adequacy of the current provisions, particularly with respect to fitness to stand trial, had existed since the early 1980's, predating the Criminal Code.

Section 357 - "Want of Understanding by an Accused Person".

Section 357 provided that where there was some uncertainty as to an accused's capacity to understand the proceedings at trial so as to make a proper response, the Court was to inquire into their capacity to be tried.

> *357. Want of understanding of accused person*
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> *(1) If, when the accused person is called upon to plead to the indictment or during the trial, it appears to be uncertain, for any reason, whether he is capable of understanding the proceedings at the trial so as to be able to make a proper response, the Court shall inquire into the question of whether he is capable or not.*

[1] Section 35 Defence of insanity and s382 Acquittal on the grounds of insanity
[2] s357 Want of Understanding by an Accused Person

(2) *If the Court finds that he is capable of understanding the proceedings the trial is to proceed as in other cases.*

(3) *If the Court finds that he is not so capable it is to say whether he is so found by it for the reason that he is in a state of abnormality of mind or for some other reason that it shall specify and the finding is to be recorded; and the Court may order the accused person to be discharged or may order him to be kept in custody in such place and in such manner as the Court thinks fit, or admit him to bail, until he can be dealt with according to law.*

(4) *A person so found to be incapable of understanding the proceedings at the trial may be again indicted and tried for the offence.*

As will be seen, the provision had a primary focus on mental illness as a cause of the inability to be tried. However, it was not confined to mental illness and had been applied by the Supreme Court of the Northern Territory to a deaf mute[3] and to a brain damaged accused[4]. It is clear that the inclusion of the words "for any reason" gave the provision broad application. In *Ngatayi v The Queen*[5] the High Court canvassed the application of such a provision and was of the view that the use of these words in a similar provision meant that it could be applied to language difficulties, citing cases of Aboriginals for whom no interpreter could be found.

The Court was required to record the reason for its finding making a distinction between a disability arising from "abnormality of mind" or "some other reason".[6] Abnormality of mind was defined in s1 as:

> *"abnormality of mind arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease, illness or injury.*

"Abnormality of Mind" therefore appeared to include not only mental illness but also organic brain injury and other intellectual disabilities. The phrase "abnormality of mind" was also used in the insanity defence.

The provision was unsatisfactory for a number of reasons:

First, it lacked any reference to the procedure to be followed where if the question of fitness arose. This had resulted in the provision being interpreted as not requiring a jury to determine the question of fitness; the question being determined by judge alone, a situation different from every other jurisdiction [7] It therefore required the judge, in a criminal proceeding, to try a question of fact.

Other procedural difficulties had arisen because the provisions dealing with committal proceedings in the *Justices Act* did not contemplate fitness issues. In

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[3] *Ebatarinja v Deland* (1998) 194 CLR 444, (1998) 157 ALR 385
[4] *R v Bradley* (1986) 40 NTR 6
[5] (1980) 147 CLR 1 at 9 per Gibbs, Mason and Wilson JJ
[6] s357(3)
[7] In *R v Bradley*. (1986) 40 NTR 6, Asche J, as he then was, determined that the expression "the Court" in s 357 meant "judge alone", noting that in all other jurisdictions the question was determined by a jury, either a special jury formed for the purpose of the determination or the jury that was trying the matter when the question of fitness arose.

Ebatarinja v Deland[8] the High Court held that the requirements of sections 106 and 110 of the *Justices Act* that the evidence in committal proceedings must be taken "in the presence or hearing of the defendant" and that the defendant "having heard the evidence for the prosecution" must be given the right to give evidence or say something "in answer to the charge" meant that a magistrate had no authority to continue committal proceedings where the defendant was a deaf mute. This was not strictly a "fitness to plead" issue in itself and it did not prevent the Crown from proceeding by way of *ex officio* indictment, allowing the question of fitness to be determined in the Supreme Court. Nevertheless it was an unsatisfactory situation because there would ultimately be no evidential record of the facts of the alleged offence because the Supreme Court would only consider the issue of fitness to plead and there would be no trial and therefore record of the evidence of the alleged offence.

The Code provided no criteria to determine fitness. Asche J in *R v Bradley* determined that the inquiry to be made by the judge should follow the common law tests established in *R v Pritchard* (1836) 7 C & P 303 and subsequently applied in *R v Presser* [1958] VR 45.

However the most unsatisfactory element was that there was a complete failure to provide for the disposition of a person found unfit to stand trial. This arose because sub-section (3) was framed only to provide options for dealing with a person "until he can be dealt with according to law". That is, it pre-supposed that the incapacity bringing about unfitness was temporary. However, many people unfit to be tried will never become capable of being tried because they suffer from a permanent disability such as brain damage or dementia. Consequently, in those cases, the "fitness" provisions effectively become open ended and potentially allowed for permanent incarceration.

This aspect of a predecessor provision to s357 of the Criminal Code (s382A of the *Criminal Law Consolidation Act* which contained similar provisions for dealing with persons found "unfit to plead") had been considered by the Federal Court in *R v Jabanardi*[9]. The Federal Court held that s382A did not empower the Court to order the indefinite holding of a person in custody.

> *"It seems clear, on the evidence, that there is no possibility of the respondent ever being fit to plead to the murder charge brought against him. It seems undesirable that such a charge should be left hanging over the head of a person in the position of the respondent, and that he should be held in custody indefinitely by virtue of that fact. It would seem preferable that appropriate steps be taken to lay the charge to rest and to deal with the respondent in accordance with general legislation concerning mentally ill persons who represent a risk to themselves or others. This, however, is a matter for the relevant authorities in the Northern Territory.*
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> *All this Court can be concerned with is whether there is power to hold a person in custody, pursuant to s.382A of the Criminal Law Consolidation Act (NT), after it has become clear that he will never be fit to plead. We think it is quite possible that there is no such power, since the intention of the legislature in enacting the section seems to have been to regulate the control of the accused person until such time as he could either be put on trial or be finally discharged. The accused person's*

[8] (1998) 194 CLR 444, (1998) 157 ALR 385
[9] (1983) 77 FLR 333

entitlement to absolute discharge would, of course, be reinforced if the proceedings against him were discontinued. The emphasis in the section on periodic orders and opportunities to review those orders is consistent with the doubt we feel about the power under this section to hold a person who will never be fit to plead. Any suggestion that a person could be held in custody for many years, without trial or any possibility of trial, simply because a charge has been laid against him which he will never be well enough to answer, is so repugnant to our legal system's protection of the right to freedom that it would require clear evidence of legislative intention before it could be accepted."

It would appear that this problem and the necessity for reform referred to by the Federal Court was either not considered or was disregarded in the enactment of the Criminal Code as the same difficulties were presented by s357. Indeed, the provision exacerbated the problem, as there was, unlike the *Criminal Law Consolidation Act* provisions, no provision for periodic review.

Other issues were that there was no final disposal of the alleged offence because s357(4) provided that a person who has been found to be incapable of understanding the proceedings at the trial might again be indicted and tried for the offence and there was no provision dealing with the ethical considerations of counsel appearing for a person unable to provide instructions. This matter had been noted in *Jabanardi*:

"At the later hearing of the Summons, and before this Court, Mr. McDonald explained that, as Mr. Jabanardi was unable by reason of mental incapacity to instruct him he, appeared as 'a friend of the Court'. No point was taken by the appellant about the form of the action or the status of Mr. McDonald, either in the Supreme Court or in this Court. It is no reflection on the excellent motives of Mr. McDonald, or on his very competent presentation of the case for Mr Jabanardi, to say that this is an unsatisfactory state of affairs. There can be no doubt that proceedings such as these should be brought by a next friend, perhaps the Public Trustee, appointed under the Rules of the Supreme Court. However, on this occasion, we shall follow the Supreme Court in dealing with the merits of the matter without regard to questions of form or the standing of Counsel."

INSANITY

Similar problems existed with respect to sections 35 and 382 of the Criminal Code dealing respectively with the defence and acquittal of a person on the ground of insanity. The insanity provisions dealt with the state of mind of the accused at the time of the alleged offence, unlike fitness to plead which concerns the accused's understanding at the time of trial.[10]

"35. INSANITY

(1) A person is excused from criminal responsibility for an act, omission or event if, at the time of doing the act, making the omission or causing the event he was in such a state of abnormality of mind as to deprive him of capacity to understand what he was doing or of capacity to control his actions or of capacity to know that he ought not do the act, make the omission or cause the event.

[10] Although as Part IIA recognises, sometimes both issues arise.

(2) A person whose mind, at the time of his doing, making or causing an act, omission or event, was affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of the foregoing provisions of this section, is criminally responsible for the act, omission or event to the same extent as if the real state of things had been such as he was induced by the delusions to believe to exist.

36. INTOXICATION

Section 35 applies also to a person who was in a state of abnormality of mind caused by involuntary intoxication."

The grounds of the defence were therefore that the accused:

- did not understand the nature and quality of the conduct;
- did not know that the conduct was wrong;
- was unable to control his actions.

Although the defence could be applied to all offences that involve *mens rea* it has seldom been used for anything other than the most serious offences. This is because the only order that a Court may make on a finding of not guilty on the ground of insanity was an order for indefinite custody. The Court was required under s382 to commit the person to "strict custody" until "the Administrator's pleasure is known".

"382. ACQUITTAL ON GROUND OF INSANITY

(1) If, on the trial of a person charged on indictment, it is alleged or appears that he was insane at the time when it is alleged the offence occurred, the jury are to be required to find specially, if they find that he is not guilty, whether he was insane at that time and to say whether he is acquitted by them on account of such insanity.

(2) If they find that he was insane at that time and say that he is acquitted by them on account of such insanity the Court is required to order him to be kept in strict custody in such place and in such manner as the Court thinks fit until the Administrator's pleasure is known.

(3) In any such case, but subject to subsection (4), the Administrator may give such orders for –

(a) the safe custody of such person during his pleasure in such place of confinement and in such manner; or

(b) the release of such person during his pleasure on such terms and conditions, if any, as he thinks fit.

(4) The Administrator shall not give an order referred to in subsection (3) except with the advice of the Executive Council."

These provisions likewise create a number of problems: Whilst recognising that a person should not be held criminally responsible for offences where they lack the

necessary mental element because of some "abnormality of mind", the Court was left with no option but to commit the person to an indeterminate period of incarceration. This situation was exacerbated in the Northern Territory because of the lack of a forensic psychiatric facility. This factor resulted in a failure to give proper recognition and response to mental illness or intellectual disabilities in the criminal justice system. Only persons charged with the most serious offences raised the defence. This had the effect of understating the extent of mental illness or intellectual disability in the criminal justice system, and a failure to give proper recognition, disposition and treatment of such persons.

The fact that a person committed under s382 might only be released on the order of the Administrator following the advice of Executive Council had the inevitable effect that political considerations could be applied to release decisions. In a small community such as the Northern Territory, the impact of media and consequent public response is heightened. In any event there were no criteria nor required evidence upon which Executive Council might determine their advice to the Administrator and no protocols had been developed.

Where an accused who may have been "insane" at the time of the offence but following treatment prior to trial no longer suffered under that mental disability successfully raised the insanity defence, there was no option but to sentence them to indeterminate custody. An accused would no doubt be reluctant to raise the defence in those circumstances. However, the defence of insanity could also be raised by either the prosecution or the Court itself, leaving open the possibility that the accused could be made subject to the provision (and the consequence of indeterminate custody) even where they had not themselves chosen to rely on that defence.

In summary, it might be said the critical and ironical problem with the provisions were that the fitness provision did not enable detention whilst the insanity provision did not enable release.

REFORM- CRIMINAL CODE AMENDMENT (MENTAL IMPAIRMENT AND UNFITNESS TO BE TRIED) ACT 2002 ("PART IIA")

The key feature of Part IIA is that decisions both for detention and release from detention are made by a Court on the basis that the detention of a person brought before the Court in relation to criminal proceedings is a matter for the criminal justice system, not for the health system or the executive arm of Government.

Courts have a traditional role to protect the rights of the individual, especially their liberty.

There is an isolation of the issues of mental impairment and/or unfitness from the other issues by requiring those issues to be separately tried. In the case of unfitness a special trial process allows the evidence of the prosecution to be tested to determine whether, notwithstanding the absence of any input by the accused, the accused is not guilty of the offence charged, or whether on the limited evidence available the accused committed the offence charged.

The disincentive for the use of the defence for less serious crimes in circumstances where criminal responsibility should not be attached because of mental impairment is reduced by setting a limiting term for a major review of supervision orders.

Although it might have been thought that conversely here would be a drop in fitness cases, there now being provision for detention, this has not been the experience, rather the number of cases has increased.

Defence of Mental Impairment

This defence replaced the insanity provisions in the Code (sections 35 and 382). A person is presumed not to have been suffering from a mental impairment unless the contrary has been proved. The party raising the defence has the onus of rebutting the presumption.

The defence is established where a person was suffering from a mental impairment at the time of the offence and in consequence of the impairment did not know the nature and quality of the conduct; or did not know that the conduct was wrong, or were unable to control their actions.

Mental impairment is defined as senility, intellectual disability, mental illness, brain damage and involuntary intoxication. In turn, mental illness is defined as "an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli (although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur). The question of whether a person was suffering from a mental impairment having the required effect is a question of fact to be determined by the jury on the balance of probabilities.

"Severe personality disorder" was included in the definition in the Model Bill by MCCOC on the basis that the issues in relation to criminal responsibility are moral rather than medical. The Committee had considered that a jury should be allowed to consider whether, for example, a defendant's severe personality disorder prevented him or her from knowing the wrongness of the conduct. The Committee's view was that this inclusion accorded with the broad definition of "disease of the mind" under the *M'Naughten* Rules and that the High Court had held that severe personality disorder may amount to a "disease of the mind" (*Willgoss* (1960) 105 CLR 295, *Stapleton* (1952) 86 CLR 359, *Jeffrey* (1982) 7 A Crim R 55.

Severe personality disorder was however not included in the Northern Territory definition and has also been excluded in a number of other jurisdictions.

The defence may be raised by the accused or by the Court on application from the prosecution or on its own initiative at any time during the trial. If the question arises during a committal hearing, the question of the accused's mental competence must be reserved for consideration by the Supreme Court.

The Court may require the accused, on application by either the defence or the prosecution or on the Court's own initiative, to undergo an examination by a psychiatrist or other appropriate expert and require the results to be reported to the Court. The Court will hear relevant evidence and representations as to the accused's competence.

The issue of the defence is a separate issue to that of whether the evidence establishes the elements of the offence with which the person is charged and is to be

separately tried.[11] Therefore at the conclusion of the evidence, the judge is required to direct the jury to consider two issues (a) whether the defence of mental impairment is established on the balance of probabilities and (b) whether the evidence establishes the elements of the offence (or an alternative offence) beyond a reasonable doubt. The jury may therefore determine either that the person is not guilty of the offence, not guilty because of mental impairment or that the person committed the offence charged.

At any time during the trial the Court may, if the defence and prosecution agree, accept a plea and record a finding of not guilty of the offence by reason of mental impairment.

If the Court finds that a person is not guilty by reason of mental impairment, the Court must either declare the person to be liable to supervision or order the person be released unconditionally. The Court can make orders pending the making of a supervision order that include remand in custody (in an "appropriate place" or in prison), bail and psychiatric examination.

Unfitness To Stand Trial

The legislation has codified the common law rules.[12] A person is unfit to stand trial if the person is:

(a) unable to understand the nature of the charge against him or her;

(b) unable to plead to the charge and to exercise the right of challenge;

(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);

(d) unable to follow the course of the proceedings;

(e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or

(f) unable to give instructions to his or her legal counsel.

A person is not unfit to stand trial just because they suffer from memory loss. This is a codification of the common law rule in *R v Padola* [1959] 3 All ER 418.

There is a presumption that a person is fit to stand trial and is rebutted only by an investigation of the issue. The party who raises the question bears the onus of rebutting the presumption of fitness. If the question is raised by the Court then the prosecution has carriage of the matter but no party bears an onus of rebuttal.

If the question of an accused's fitness to stand trial arises at a committal proceeding then, notwithstanding the provisions of the *Justices Act,* the committal proceeding must be completed. The accused must not be discharged only because the question has been raised. If the accused is committed for trial the question of fitness must be reserved for the trial judge.

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[11] s43F(2)

[12] *Kesavarajah v The Queen* (1994) 181 CLR 230 adopting the *Presser* criteria as to when a person is unfit to be tried.

If there are reasonable grounds to suppose that a person is unfit to stand trial or if the question of fitness has been reserved following committal, the Court may order an investigation of fitness. The power to investigate may be exercised on application by the defence or the prosecution or on the Court's own initiative. If the trial has commenced the Court may adjourn or discontinue the trial to allow for the investigation. The question of fitness may be raised more than once in the same proceedings. Fitness is determined by a jury.

Prior to undertaking the investigation the Court may make orders including bail, remand in custody (in an "appropriate place" or prison), medical, psychiatric or psychological examination.

The judge is required to explain to the jury the reason for the investigation, the findings that may be made and the consequences in law and otherwise of those findings.

The Court may require the accused, on application by either the defence or the prosecution or on the Court's own initiative, to undergo an examination by a psychiatrist or other appropriate expert and require the results to be reported to the Court. The Court will hear relevant evidence and representations as to the accused's fitness.

The Court may, if the defence and prosecution agree, dispense with an investigation into the accused's fitness and record a finding that the accused is unfit to stand trial. If the Court finds that the accused is not unfit to stand trial, the trial then proceeds in the normal manner.

If a finding of unfitness to stand trial has been recorded, the Court must determine whether or not the defendant is likely to become fit to stand trial within the next 12 months. If the Court determines that the accused may become fit, then the proceedings are to be adjourned for a period not exceeding 12 months. The judge may make orders including bail, remand in custody (in an "appropriate place" or in a prison). An order for remand in prison must only be made where the judge is satisfied that there is no practicable alternative.

If the judge determines that the accused is not likely to become fit to stand trial within 12 months then the Court must proceed to hold a special hearing within 3 months.

Any period of adjournment (of the trial or a special hearing) can be abridged on application by the accused or the Director of Public Prosecutions. Applications for abridgement are to be accompanied by a medical report. This provision empowers the Court to either recommence the trial (where the accused has become fit) or if satisfied that the accused will now not become fit within 12 months, order a special hearing.

At the end of an adjournment the accused is presumed to be fit to stand trial unless a real and substantial issue of fitness is again raised. The matter can again be adjourned but not so that the total period of adjournments exceeds 12 months. These provisions are aimed at ensuring both that: if there is a realistic expectation that the accused will be able to stand trial that they are given the opportunity to be tried; and that the resolution of the charge is not put off indefinitely.

Special Hearings

The purpose of the special hearing is to determine whether, on the evidence available, the accused is not guilty of the offence, is not guilty of the offence because of mental impairment or that the accused committed the offence charged or an offence available as an alternative.

A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings, and

(a) the accused is taken to have pleaded not guilty;

(b) the accused's legal representative may exercise the right of challenge to jurors;

(c) any defence that could have been raised in a criminal trial, including mental impairment, may be raised;

(d) the rules of evidence apply;

(e) the accused person may give evidence;

(f) any alternative verdict available at a criminal trial is available to the jury.

At a special hearing the judge must explain certain matters to the jury including the meaning of fitness to be tried, the purpose of the special hearing and the findings and consequences that arise.

If the accused is found not guilty of the offence then the Court must discharge the accused. The verdict is to be taken as a finding of not guilty at a normal trial.

If the accused is found not guilty because of mental impairment, then the Court must declare that the accused is liable to supervision or discharge the person unconditionally.

If the finding is that on the limited evidence available the accused committed the offence (or an available alternative offence) then the Court must declare that the accused is liable to supervision or discharge the person unconditionally.

The Court can make orders pending the making of a supervision order that include remand in custody (in an "appropriate place" or in prison), bail and medical or psychiatric examination.

Supervision Orders

Supervision orders must be made for both persons found to be unfit to plead and who have been found on the limited evidence available to have committed the offence or an alternative offence, and for persons found not guilty on the grounds of mental impairment once they have been declared to be liable to supervision.

Supervision orders may be custodial or non-custodial with both subject to such conditions as the Court may impose. A custodial supervision order commits the person to custody in an "appropriate place" or in a prison. The Court may not order the person to be remanded in custody in an "appropriate place" (eg a mental health facility) unless the Court has received a certificate from the Secretary of the Department of Health and Community Services that facilities or services available for the custody, care or treatment of the person exist and the Court must not make a

supervision order committing a person to custody in a prison unless satisfied that in the circumstances no practicable alternative exists.

Supervision orders are subject to the same rights of appeal as a sentence by either the supervised person or the DPP. A right of appeal is also available to the Secretary of the Department of Health and Community Services if the Secretary considers that a different order should have been made and that an appeal should be made in the public interest. On appeal, the Appeal Court can quash the original order and make its own supervision order.

Where a person has been declared to be liable to supervision the "appropriate person" must, within 30 days, prepare and submit a report to the Court on the mental or medical condition or disability of the person or any other condition or disability that has caused the person to be unfit to stand trial that contains:

- a diagnosis and prognosis of the condition;
- the person's response to treatment, therapy or counselling or other services and
- a suggested treatment plan for the defendant's condition.

In making orders, the Court must apply the principle that restrictions on the supervised person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community. The Court is required to consider:

- the nature of the person's mental impairment or other condition or disability; and
- the relationship between these matters and the offending conduct; and
- whether the person is, or would if released be, likely to endanger another person, or other persons generally; and
- whether there are adequate resources available for the treatment and support of the person in the community; and
- whether the person is likely to comply with the conditions of a supervision order; and
- other matters that the court thinks relevant.

The Court cannot release a person, or significantly reduce the degree of supervision to which the person is subject, unless the Court has considered:

- at least two reports each prepared by a different psychiatrist or other appropriate expert who has personally examined the defendant on the mental, medical or other condition of the defendant; and the possible effects of the proposed action on the behaviour of the defendant;
- the report most recently submitted to the Court by the appropriate person; and
- any report submitted on the attitudes of victims and next of kin;

and is satisfied that the person's next of kin, the victim (if any) of the supervised person's conduct; the next of kin of a deceased victim, and, where relevant, an aboriginal community, have been given reasonable notice of the proceedings. Notice is not required if the whereabouts of the relevant person cannot be ascertained after reasonable inquiry.

There are powers to move a person from non-custodial to custodial supervision. If it appears to a person having the supervision of a person under a non-custodial supervision order that the person subject to the order has contravened or is likely to contravene a condition of the order, that person may apply to the Court to make an order varying the order including cancelling the person's release. Powers of apprehension are also provided to deal with emergency situations.

Out of sight?

The most important aspect of the reform is that decisions for the release of a person from supervision or for a significant reduction in the degree of supervision eg. from a custodial to a non custodial supervision order are made by the courts. It was a notorious fact, not just in Australia but in all jurisdictions that employed a Governor's detention system of release, that release decisions could and were effected by political considerations.

Governor's or Administrator's orders are made only on the recommendation of the Executive Council. The reality is that it would be a brave Minister and Government indeed, that in the face of intense media coverage would chose to recommend the release of a person acquitted on the grounds of insanity of a murder.

Part IIA significantly places those decisions before a court to make on the evidence of experts in the relevant field. The proceedings are not adversarial but designed to assist the court to determine the crucial factor, whether the supervised person poses a serious risk to safety, either to themselves or others. A review system ensures that people are not detained and forgotten.

There are three mechanisms by which a court may review and may revise a supervision order.

Major Review

When setting a supervision order, the court must fix what is referred to in Part IIA as a "limiting term". A supervision order is for an indefinite term[13] but the Court must fix a "limiting" term that is to be equivalent to the period of imprisonment or supervision[14] (or aggregate period) that would have been appropriate had the person been convicted of the offence charged. If the offence carries a mandatory penalty of life imprisonment or where the Court is of the view that life imprisonment would have been an appropriate penalty for the offence, the limiting term to trigger a major review is 15 years. If there are multiple offences, then the term is set according to the offence that carries the maximum term. The "limiting term" is therefore a period provided only for the purposes of ensuring a major review. It does not act as a form of minimum sentence because revocation and variation of supervision orders may occur before that date and detention may continue after that date.

This is different from the Model Bill. Under the Model Bill, a person is to be automatically released from the supervision order at the conclusion of the limiting

[13] S43ZC – subject to the Courts power to vary or revoke the order.
[14] For example, the period of a supervised bond or release on parole after serving a non parole period.

term. The MCCOC theory behind this provision is that to continue to apply restraint to a mentally impaired or unfit accused places upon that person a greater penalty than a person of sound mind convicted of the same offence. The theory is that if the person's particular disability continues and they are a threat to the community, they then become the responsibility of the civil authorities. For example, a mentally ill person might be detained under involuntary admission provisions of mental health legislation. The NT legislation did not adopt this feature of the Model Bill. Whilst the theory on its face appears jurisprudentially sound in that it is protective of the rights of a person under a disability, it ignores a number of realities.

First, it ignores the fact that the basis for detaining a person acquitted on the grounds of mental impairment or found unfit to stand trial is that they present a serious danger to the community. Although this concept is out of step with the idea that such persons should not bear criminal responsibility for acts committed as a consequence of their mental illness or other disability, it faces the reality, long accepted under civil mental health legislation and the common law rules on insanity, that persons who are a danger to themselves or others can be restrained for the wider benefit of themselves and the community. There is no public interest served by permitting the disabled to be at liberty to harm themselves or others.

More problematical is the theory for detaining a person found unfit to stand trial. The essential function of a criminal trial is to minimise the risk of convicting an innocent person[15]. Ordinarily, if a trial has proceeded with an accused person who was in fact unfit to stand trial, for example because of an inability to understand and participate in the trial process this would be such a departure from the essential requirements of the law that it would amount to an irregularity going to the root of the proceedings[16] and would amount to a fundamental failure of the trial process.[17]

This is because the key adversary in an adversarial process is unable to properly participate so that there "can be no adequate testing of the Crown case in cross examination, no adequate process of preventing erroneous ruling by a trial judge, no proper attention given to the defence answer to the Crown case or to any proper case which the defence might have been well advised to advance, whether that answer or case be testimonial, documentary or otherwise; and no proper development of defence submissions."[18] Fitness to plead legislation based on the Model Bill attempts to build a bridge between the common law that prevents a trial from proceeding where an accused person is unfit and the public interest of guarding individual and public safety. It does so by employing the special trial process to enable a jury to conduct and making findings on the limited evidence available and where an accused is unable to instruct his or her legal representative, the legal representative may exercise an independent discretion in what he or she reasonably believes to be the defendant's best interests.

Consequently, notwithstanding the problems associated with theories safeguarding individual liberty, the truth is that legislatures have moved to impose sanctions on persons in these circumstances even though there is a recognition that moral and criminal responsibility does not attach and that the full protection of the trial process cannot be guaranteed.

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[15] *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28 at para 114 per Heydon J with whom Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ agreed

[16] *Wilde v The Queen* (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ.

[17] *Eastman v The Queen* (2000) 203 CLR 1 at 22 per Gaudron J

[18] *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28 at para 115

The other flaw in the Model Bill provision that sets the "limiting term" as the period beyond which a person cannot be detained under criminal provisions, is that it appears to have a primary focus on mental illness as the source of mental impairment or unfitness to stand trial. Certainly, mental health legislation can be used to provide safeguards to protect both for the individual and the community, but as has been discussed, not all mental impairment cases or fitness to stand trial cases are a consequence of mental illness. Indeed it is likely that in the Northern Territory at least, the majority of mental impairment or fitness cases will be in respect of persons with severe brain damage, particularly as a result of substance abuse. These persons cannot be detained under civil mental health legislation as they do not have a mental illness. Guardianship legislation is of limited assistance as its focus is principally on substituted decision making for a person lacking competence to make their own decisions, not on restraint or protective custody issues.

Consequently, under Part IIA the "limiting" term acts instead only to trigger a major review of the person's supervision order. The expression "limiting term" was utilised because that is the phrase used in the Model Bill. However, on reflection, the term is inapt to describe the actual situation under Part IIA because the effect of a limiting term is not to bring the period of supervision to an end but to ensure that a major judicial review occurs. The major review is to be conducted at least three months (but not more than six months) prior to the expiration of the limiting term. The purpose of the review is to determine whether the person subject to the order is to be released from it.

On the completion of a major review, the Court is to release the supervised person unconditionally unless it considers that the safety of the supervised person or the public will be seriously at risk if the person is released.

Periodic reviews

If a supervision order is made (custodial or non custodial) then the "appropriate person" must arrange to have prepared and submitted to the Court at intervals of not more than 12 months, a report containing a statement of the treatment that the person has undergone since the last report and any changes in the prognosis of the person's condition and/or the treatment plan for managing the condition.

The "appropriate person" is the Secretary of the Department of Health and Community Services if the person is in custody in a mental health facility or receiving treatment from mental health service or disability services or other health services or is under a guardianship order or the Secretary of the Department of Justice if the person is in custody in a prison or under the supervision of a parole officer.

If after considering a periodic report, the court considers it appropriate, the court may conduct a review to determine whether the supervised person may be released from the supervision order. This is a key feature of the reform and a significant departure from Administrator's Pleasure detention. The repealed Code provisions did not contain any review provisions of a person who had been directed to be held in custody at the Administrator's pleasure save that the order itself could contain a reporting requirement, for example to the Attorney General. However there was no legislative or other requirement for an Attorney General to act upon the reports.

Variation or revocation of a supervision order

Finally, supervision orders may be varied or revoked at any time during the limiting term on the application of the DPP, the supervised person or any other person having the custody, care, control or supervision of the person or any other person recognised by the Court as having a proper interest in the matter.

If the application has been made by the supervised person and refused, the person cannot again apply within twelve months or such greater or lesser time as fixed by the Court.

Media attention

In the recent case of *Eastman v Director of Public Prosecutions (ACT)* [2003] HCA 28 Justice McHugh observed that "Like Bishop Berkeley who 'maintained that material objects only exist through being perceived, the lawyer maintains that 'guilt' exists in a criminal law context only when it is perceived as the concomitant of a conviction. To assert otherwise is to deny the presumption of innocence, a presumption that operates until the entry of a conviction rebuts it."[19]

On any observation, there is clearly a distinction between what criminal lawyers regard as guilt and the consequences or not of that finding and that of the average media report.

The media apparently find it difficult to differentiate between a measure that is aimed at individual and community protection and a sentence for an offence. There is an apparent failure to appreciate that the principles of retribution and punishment that apply in the sentencing of offenders do not apply to those who are not criminally responsible for their acts or who have been unable to be tried according to proper trial principles.

As Dixon J said in *Porter*[20] "...it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot in the least be influenced by the possibility or probability of subsequent punishment; if they cannot understand the ground upon which the law proceeds."

This media confusion has been particularly apparent in the Northern Territory following the introduction of Part IIA. As part of the reform, consideration had to be given to those persons being held under Administrator's Pleasure orders having previously been acquitted on the ground of insanity. Transitional provisions provided that from commencement such a person was to be taken to be a supervised person held in custody under the same terms and conditions under a custodial supervision order.

The transitional also brought into effect a review in the nature of a periodic review under s43ZH. This was considered necessary because these persons had been in a custodial situation for a lengthy period and a periodic review could consider both the appropriateness of their continued custody and the terms and conditions of that

[19] [2003] HCA 28 at para 11
[20] *R v Porter* (1933) 55 CLR 182 at 186

custody. It would initiate a process by which regular reporting to the court could commence.

On such a review the Court is not able to release the person unconditionally, as it might on a major review, but can order that the supervision order be varied to a non custodial unless satisfied on the evidence available that the safety of the supervised person or the public will be seriously at risk if the person is so released.

The review process for these cases has commenced. Rather than recognising the protection that this process would give to individuals who had not been found guilty of an offence, the NT press produced articles that questioned the idea that a person who was a "murderer" might be released by the Court. The articles were misleading and inflammatory of public comment focusing on the distress and concern of the relatives of a deceased victim.

They were, in fact, a perfect illustration for the justification of placing detention and release decisions before a court rather than having them made by the executive arm of government.

Drawing on decisions from the Victorian legislation that it also adopts the Model Bill framework, there are certain features of reviews that illustrate the difference between supervision orders and sentences. First, it may be noted that reviews are not adversarial in nature[21] and no party to the proceedings has any onus in respect of proof of dangerousness. A review is concerned about public safety, not punishment in the same way that the original detention following acquittal on the grounds of insanity was not about punishment.[22]

The standard of proof that applies as to the issue of dangerousness is not the criminal standard but is proof on the balance of probabilities but with the *Briginshaw* "gloss".[23]

It has previously been noted that the courts are not subject to the same pressures that may be brought to bear on executive decision making. An additional safeguard against inflammatory media reporting is the sanction of contempt of court. In *The Queen (on the application of the Attorney-General for the State of Victoria) v The Herald & Weekly Times Limited*[24] a conviction for contempt of court was made in relation to newspaper articles on a review of a person under the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic). The articles were headed respectively "Don't let him out", and "Never let him out" and contained interviews of various persons including the father of a deceased child and a detective who had investigated and interviewed the person under review.

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[21] *R v Herald and Weekly Times Ltd* [1999] VSC 432 at paragraph 10

[22] *In the matter of s35 Crimes (Mental Impairment and Unfitness to be Tried Act) 1997. In the matters of major reviews of Derek Ernest Percy, Barbara Kay Farrell and RJO (Name suppressed)* [1998] VSC 70.

[23] *Briginshaw v Briginshaw* (1938) 60 CLR 226 at 360-1; *In the matter of s35 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997. In the matters of Derek Ernest Percy, Barbara Kay Farrell and RJO* [1998] VSC 70 at paragraph 43

[24] [1999] VSC 432

Justice Balmford found a charge of contempt proved.

> *"I am satisfied beyond reasonable doubt that each of the articles, incorporating, as they do, the respective headlines, has a tendency or is objectively likely to undermine public confidence in the administration of justice by giving rise to a serious risk that this Court, constituted by Mr Justice Eames, in the major review relating to Mr Percy, would appear not to have been free from any extraneous influence."*[25]

The Courts may therefore not only draw on their independence to ensure that reviews are properly conducted and decisions made on appropriate evidence but may invoke the sanction of contempt to protect the public interest of the protection of individual liberty and the independence of the judiciary.

Victims/Relatives

It is nevertheless understandable that relatives of victims will seek retribution and punishment. That is human nature. Part IIA provides that for the purpose of assisting the Court to determine any supervision proceedings, the Court may receive a report setting out the views of the victim (if any) of the supervised person's conduct, the next of kin of a deceased victim, the next of kin of the supervised person and, where relevant, the Aboriginal community to whom the person belongs.

The Court must not make an order releasing a supervised person from custody unless it is satisfied that the victim of the offence concerned, or the next of kin of a deceased victim; the next of kin of the supervised person, and if the supervised person concerned is a member of an Aboriginal community – the Aboriginal community, have been given reasonable notice of the proceedings concerned. Such notice would allow each person to make application to be a party to the proceedings if they have a proper interest in the matter.

Although yet to be determined in the Northern Territory it would seem likely that a "proper interest" would not include representation to put a view to the court that a person should never be released from custody for purposes of retribution or punishment. The issues before the Court on a review focus on the question of present and future danger, not on punishment for the events of the past. The Court should therefore not focus attention on the circumstances of the killing save to the extent that it is relevant to the task of assessing present or future dangerousness, and save to the extent necessary to understand the factors the Court takes into account in reaching its decision.[26]

However in order to assist relatives of victims to understand the nature of the proceedings and the possible outcomes, if an application is made that might result in a supervised person being released from custody, the Minister must ensure that counselling services are made available to victims, the next of kin of a deceased victim or the next of kin of the supervised person. A person who discloses any information about the supervised person in providing counselling under this provision does not breach any code or rule of professional ethics.

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[25] [1999] VSC 432 at para 72

[26] *In the matter of s35 Crimes (Mental Impairment and Unfitness to be Tried) Act 1997. In the matter of Derek Ernest Percy* [1998] VSC 90 at paragraph 9.

CONCLUSION

It may be considered that legislation of this nature creates an unusual criminal law hybrid in that it is capable of employing detention measures whilst also employing public health measures by requiring that supervised persons have "treatment plans" formulated, thereby providing for the necessary treatment or supervision of such persons by those responsible for health or their welfare.

The Northern Territory legislation is in its infancy. There will no doubt be problems that arise over the construction of its terms. There are public information issues to be dealt with and issues in relation to dealing properly with the sensitivities of those affected by the actions of the mentally impaired or the unfit that must be developed and addressed. There will no doubt be a need to refine its provisions from time to time by necessary amendments.

However there is no doubt that it provides a vast improvement over a situation where a person could be ordered to be held in prison with no judicial review and no imperative for treatment. It provides a vast improvement over a situation where a person would be released unconditionally, receiving no treatment or care for a recognised disability, and where they presented a continued threat to the safety of others. It may have been a less confronting circumstance that these people remained out of sight and out of mind but it was not one that our community should have tolerated for so long.