

A judge short of a full bench: mental impairment and fitness to plead in the NT criminal legal system

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*Mental health should not be sentimentalized. It is frightening and uncharming. Yet the humanity of the afflicted should not be forgotten.*³

1. Introduction

This paper considers some of the legal, practical and ethical challenges arising when representing people in criminal proceedings in the NT where issues of mental impairment and fitness to plead arise.⁴

We have not attempted a comprehensive review of practices in other jurisdictions, although some interstate comparisons are made. The problems we identify in our survey of NT law and practice are not unique to the Territory. The paper is, in parts, anecdotal and reflects our experiences and those of our colleagues. We recognise that others working in the system, with clients who have different interests to ours, may have different perspectives.

We argue that people who cannot be held criminally responsible should be dealt with outside the criminal legal system and there is a need to rethink our approach – conceptually and practically – to dealing with these issues. We propose a range of practical changes and highlight the urgent need for more resources to be made available for people subject to supervision orders (having been found unfit or not guilty by reason of mental impairment). We also highlight concerns about the basis upon which risk is assessed.

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⁴ We do not attempt to cover all aspects of the courts' powers in relation to people with mental illness or other forms of cognitive impairment such as intellectual disability or acquired brain injury. These include the power to adjourn summary proceedings for the purposes of assessment and, if required, involuntary treatment of mental illness (Part 10, Division 1 *Mental Health and Related Services Act* ('MHRS Act')), the power to defer sentencing in summary matters for voluntary treatment of mental illness (Part 10, Division 3 MHRS Act) and the power of a court to make mental health orders for persons found guilty of an offence (Part 4, *Sentencing Act* (NT)).

2. Overview of the system

Issues of fitness to be tried are resolved exclusively by the Supreme Court, while questions of mental impairment going to criminal responsibility can be raised in either the Supreme Court or the Court of Summary Jurisdiction under different regimes.

a. *Downstairs: the Mental Health and Related Service Act*

The *Mental Health and Related Services Act* ('MHRS Act') provides a range of options for courts dealing summarily with criminal matters (excluding committal proceedings)⁵ in which issues of mental illness or mental disturbance arise.

It does not apply to other forms of cognitive impairment such as intellectual disability, acquired brain injury or dementia.

Section 77 deals, in essence, with criminal responsibility.⁶ It provides that the court *must* dismiss a charge if satisfied that at the time of carrying out the conduct constituting the alleged offence:

- (a) the person was suffering from a mental illness or mental disturbance; and
- (b) as a consequence of the mental illness or disturbance, the person:
 - (i) did not know the nature and quality of the conduct; or
 - (ii) did not know the conduct was wrong; or
 - (iii) was not able to control his or her actions.

Before making such an order, the court must receive a certificate from the Chief Health Officer stating:

- (a) whether at the time of carrying out the conduct constituting the alleged offence, the person was suffering from a mental illness or mental disturbance; and
- (b) if the person was suffering from a mental illness or mental disturbance - whether the mental illness or disturbance is likely to have materially contributed to the conduct.⁷

Despite the mandatory wording of s 77(4) ('the court *must* dismiss the charge'), the power to request a certificate from the Chief Health Officer is discretionary ('the court *may*

⁵ Sections 73A(2)(b)(ii); 77(1)(a); 78(1)(a).

⁶ Note also the power under s 73A(2): where the court is of the opinion that a person may require treatment or care under the MHRS Act, it *may* dismiss a charge at any time if the court is of the opinion that if the person were found guilty, the court would, under the *Sentencing Act*, dismiss the charge unconditionally or otherwise decline to record a conviction.

⁷ Section 77(2).

request'). There is no guidance in the legislation as to when that discretion should be exercised, although the relevant Division of the MHRS Act applies only to a person who 'in the opinion of the court, may require treatment or care' under the Act.⁸

The Chief Health Officer 'must not give the court the certificate unless the Chief Health Officer has received and considered advice on the person from an authorised psychiatric practitioner or designated mental health practitioner'.⁹

The issues the Chief Health Officer is required to address are not the same as the issues about which the court must be satisfied and the certificate is not conclusive in any event – the terms of the Act make it clear that it is for the court to be satisfied of the matters in s 77(4).

b. Upstairs: Part IIA Criminal Code Act

Part IIA of the *Criminal Code* provides for 'Mental impairment and unfitness to be tried'. Its provisions are based on the Victorian scheme.¹⁰

The provisions apply only to proceedings before the Supreme Court.¹¹

i. Mental impairment

Division 2 deals with mental impairment.¹² Section 43C codifies the defence of mental impairment. The Division then provides for the procedures by which the defence is to be raised and determined.¹³ A finding of not guilty because of mental impairment can be agreed by the parties to the prosecution,¹⁴ although not in situations where a person is unfit to stand trial (such circumstances requiring that a special hearing be conducted – see below).¹⁵

Where a person is found not guilty because of mental impairment, the court must declare that they are liable to supervision under Division 5 or order that they be released

⁸Section 73A(1)(b).

⁹Section 77(3). The Act treats the issues the subject of the certificate as being matters fact about which the Chief Health Officer can report, having considered the advice of an authorised/designated practitioner. In practice, however, the certificates invariably reflect the advice provided by the authorised psychiatrist or designated mental health practitioner.

¹⁰*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

¹¹'Court' is defined as the Supreme Court: s 43A.

¹²'Mental impairment' is defined in the *Criminal Code Act* (NT) as including 'senility, intellectual disability, mental illness, brain damage and involuntary intoxication': s 43A.

¹³Division 2, ss43C-I.

¹⁴Section 43H.

¹⁵This issue was recently argued before Barr J in the matter of *R v Chadum* SCC 20928312. Hunyor appeared for the supervised person and Swift has appeared in the matter previously. The court held that in the particular circumstances of that matter, the provisions of s 43H (which apply 'at any time during the trial of the offence') did not apply as the accused had not been arraigned. The Court also expressed the view that s 43H *could not* apply to persons who are not fit to stand trial as they cannot be arraigned such that a 'trial' could be said to be on foot.

unconditionally.¹⁶ The authors are unaware of anyone being released unconditionally under these provisions in the NT.

ii. Unfitness to stand trial

Division 3 provides for unfitness to stand trial. Unfitness is defined by reference to the ability of a person to understand the charges and proceedings and instruct their counsel¹⁷ and the Division then provides for the procedures by which the question of whether a person is fit to stand trial is to be resolved. The question of fitness is generally to be determined by an investigation conducted by a jury,¹⁸ but can be dispensed with by the court if the parties to the prosecution agree that the accused person is unfit to stand trial.¹⁹

If a person is found to be unfit to stand trial, the Judge must determine whether there is a reasonable prospect that the person might, within 12 months, regain the necessary capacity to stand trial.²⁰ If there is such reasonable prospect, the matter is to be adjourned for up to 12 months.²¹ Otherwise, the court is to hold a 'special hearing' within 3 months.²²

iii. Special hearings

Division 4 provides for special hearings for accused persons found not fit to stand trial. At a special hearing, a jury determines whether an accused person who is found not fit to stand trial:

- (a) is not guilty of the offence he or she is charged with;
- (b) is not guilty of the offence he or she is charged with because of his or her mental impairment; or
- (c) committed the offence he or she is charged with or an offence available as an alternative to the offence charged.²³

As with persons found not guilty because of mental impairment under Division 2, where a person is found not guilty because of mental impairment at a special hearing, the court must declare that they are liable to supervision under Division 5 or order that they be released unconditionally.²⁴

¹⁶ Section 43I(2).

¹⁷ Section 43J.

¹⁸ See ss43L; 43P.

¹⁹ Section 43T(1).

²⁰ Section 43R(1).

²¹ Section 43R(4). Further adjournments are possible up to a total of 12 months (s 43R(12)) if there remains a real and substantial question as to the accused person's fitness to stand trial: s 43R(9)(b).

²² 43R(3), (9)(b)

²³ Section 43V.

²⁴ Section 43X(2).

Similarly, if the jury finds that the accused person committed the offence charged (or an available alternative), the court must declare that they are liable to supervision under Division 5 or order that they be released unconditionally.²⁵

Again, the authors are unaware of anyone being released unconditionally under these provisions in the NT.

iv. Supervision orders

Division 5 deals with supervision orders. Supervision orders may be custodial or non-custodial and subject to such conditions as the court considers appropriate.²⁶

On overriding principle in determining whether to make a supervision order is that 'restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community.'²⁷

The court is required to have regard to the following matters:

- (a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;
- (b) the need to protect people from danger;
- (c) the nature of the mental impairment, condition or disability;
- (d) the relationship between the mental impairment, condition or disability and the offending conduct;
- (e) whether there are adequate resources available for the treatment and support of the supervised person in the community;
- (f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;
- (g) any other matters the court considers relevant.

Persons subject to a custodial order must be committed to custody in a prison or another 'appropriate place'.²⁸

A court must not commit a person to prison under a supervision order unless it is satisfied that there is no practicable alternative given the circumstances of the person.²⁹ However, a

²⁵ Section 43X(3).

²⁶ Section 43ZA(1).

²⁷ Section 43ZM.

²⁸ Section 43ZA(1)(a).

²⁹ Section 43ZA(2).

court cannot commit a person to an ‘appropriate place’ other than a prison (or provide a for a person to receive treatment or services in an ‘appropriate place’) unless the court has received a certificate from the CEO (Health) stating that facilities or services are available in that place for the custody, care or treatment of the person.³⁰ Supervision orders are for an indefinite term,³¹ but are subject to review,³² reporting at least annually³³ and can be varied or revoked.³⁴ When a supervision order is made, a ‘term’ is set at the end of which a major review is conducted. This nominal term is equivalent to the sentence of imprisonment that would have been appropriate if the person was found guilty.³⁵

On completing a major review, the court must release a supervised person unconditionally ‘unless the court considers that the safety of the supervised person or the public will or is likely to be seriously at risk if the supervised person is released.’³⁶

However, the court must not make an order releasing a supervised person from custody or significantly reducing the supervision to which they are subject unless the court has considered a range of reports, including 2 reports from a psychiatrist or other expert and reports on the views of the victim or next of kin.³⁷ The Court must also be satisfied that the victim (or next of kin), the supervised person’s next of kin and, if the person is a member of an Aboriginal community, that community has been given reasonable notice of the proceedings.³⁸

v. Independent discretion of legal counsel

In proceedings under Part IIA, legal counsel is given an independent discretion to act ‘as he or she reasonably believes to be in the person’s best interests’ where an accused or supervised person is unable to instruct their counsel on questions relevant to an investigation or proceedings.

³⁰ Section 43ZA(3).

³¹ Section 43ZC.

³² Section 43ZG provides for a major review and s 43ZH provides for periodic review.

³³ Section 43ZK.

³⁴ Section 43ZD deals with variation or revocation.

³⁵ Section 43ZG.

³⁶ Section 43ZG(6).

³⁷ Section 43ZN(2)(a).

³⁸ Section 43ZN(2)(b).

3. Trouble down below: s 77 orders

a. 'Crude and rudimentary'

The procedures in s 77, which have been operating since 2007, have been described by counsel appearing for the DPP in one matter, *Taylor v Bamber*, as 'crude and rudimentary'.³⁹ Although declining to make a finding on that characterisation, Barr J made a number of obiter comments and observations in that matter that tend to support such a view:

I do note that a 'designated mental health practitioner' (whose advice informs the Chief Health Officer) may be a psychologist, registered nurse, occupational therapist, Aboriginal health worker, social worker or an ambulance officer. [footnote: See s 23(3)(a) *Mental Health and Related Services Act*.] True it is that the person needs to have not less than two years approved clinical experience and have completed an approved 'training and orientation course' before the person can be appointed as a 'designated mental health practitioner'. However, to certify that a person was suffering from a mental illness or mental disturbance at the time of offending requires a retrospective medical diagnosis, and to certify that such mental illness or disturbance is likely to have materially contributed to the offending conduct requires an expert opinion as to causation. It is therefore unusual that the advice of persons in some of the occupations referred to is treated as equivalent to the advice of a specialist psychiatrist and is sufficient under the statute to relevantly inform the Chief Health Officer to enable him or her to give the s 77(2) certificate.⁴⁰

His Honour continued:

Although the Court is required to dismiss the charge only if satisfied as to the matters set out in [s 77(4)(a) and (b)], it is unclear what enquiry, if any, the Court is entitled to undertake in order to test the basis for the statements in the certificate of the Chief Health Officer. Section 77(4) seems to contemplate that the Court will accept the certificate of the Chief Health Officer, and does not make provision for a situation in which there is anything other than acceptance. Whether there can be an evidence-based enquiry in relation to the matters stated in the certificate and, if so, the nature of the enquiry, remains unclear. The issue was not argued before me. However, the regime set up under s 77 is such that the process leading to the dismissal of charges against a defendant may be less than rigorous.⁴¹

His Honour stressed that these comments were in obiter were 'not conclusions made after full legal argument'.

The issue of how a court should proceed if the contents of the certificate are not accepted has subsequently been the subject of full legal submissions in the matter of *Mununggurr v*

³⁹*Taylor v Bamber*[2011] NTSC 36, [9].

⁴⁰ *Ibid* [9].

⁴¹ *Ibid* [12], footnote omitted.

Gordon.⁴² In that matter, the Supreme Court confirmed that certificates issued by the Chief Health Officer are not determinative. It is for the court to apply the test under s 77(4) on the material before it and competing experts can be called by the defence and prosecution addressing these issues.

b. Differing tests and blurred roles

Another unclear aspect of s 77 is that the matters addressed by the Chief Health Officer's certificate differ from those matters about which the Court must be satisfied and there is no established procedure for the Court to receive evidence as to the other matters it must consider.

Certificates from the Chief Health Officer are required to address two questions only: whether at the relevant time the person was suffering from a mental illness or mental disturbance and whether 'the mental illness or disturbance is likely to have materially contributed to the conduct'.

It is then for the court, after receiving the certificate, to satisfy itself of a different set of criteria: whether the person was suffering from a mental illness/disturbance; and as a consequence whether the person did not know the nature and quality of the conduct; or did not know the conduct was wrong; or was not able to control his or her actions. If the court is so satisfied, it must dismiss the charges.

In practice, mental health practitioners frequently give their opinions in their reports to the Chief Health Officer about the matters that the Court is required to address despite this being beyond the scope of the matters about which the Chief Health Officer is required to report. Indeed some of the reports suggest that the government-employed health practitioners do not understand their role (or that of the court) under s 77, as illustrated by the following quotes from reports by a psychiatrist:

- '[The client] is not an appropriate person to recommend for dismissal of charges under section 77...'
- 'Unfortunately, a s 77 [MHRSA Act] certificate cannot be recommended in this case.'

It is not the role of a psychiatrist (or other 'designated mental health practitioner') in these matters to recommend anything. Their role is to provide medical advice upon which a certificate is to be prepared. A psychiatrist preparing a report may also be qualified to express an opinion on the ultimate issues upon which the court must decide, but their role is not to recommend dismissal of charges or the issuing of a certificate. If the prosecution wishes to call evidence from them on these issues, it should do so in the proper way.

⁴² SCNT, JA 62-64/2010. The Court is yet to hand down its reasons for decision, but the matter proceeded by way of joint submissions by the parties and the orders sought by the applicants/appellants were made by the Court.

c. 'Getting away with it'

The 'all or nothing' nature of s 77 orders appears to cause some disquiet for some Magistrates, prosecutors and mental health practitioners involved in these cases. This arises, in our observation, from two sources. The first is a concern that a person with a mental illness which may have led them to engage in criminal conduct will be released without any supervision or control over their behaviour. The second is that making a s 77 order is tantamount to 'letting someone off'.

One Magistrate has expressed their view of s77 in the following way:

All we've got, if you want me to rely on s 77, is to just release him, discharge him completely and put him back in the community, where he will no doubt reoffend...

[W]e just dismiss the charge and say, 'We've washed our hands of him,' he's out there and some other poor victim comes along.⁴³

There may, of course, be legitimate concerns about the conduct of a person who has a mental illness and the safety of the community. But we query whether those questions should be allowed to intrude into an inquiry into criminal responsibility.

In our view, it is more appropriate in cases involving people who have mental illnesses for community safety to be protected through the mental health system, rather than the criminal justice system. The provisions of the MHRSA allow for the involuntary treatment of people with mental illnesses or their supervision on community based order where this is required to prevent a person with a mental illness from harming themselves and/or others.

The following quotes from psychiatric reports to the Chief Health Officer prepared in recent cases carry, in our view, a flavour of the second source of disquiet – namely that that a s 77 order may amount to letting a person evade responsibility for their actions.

- '[The client] presumably has a sense of entitlement regarding this behaviour...'
- 'Once again [the client] has behaved in an entitled, aggressive manner when he was intoxicated...'
- '[The client] indicated that he understood that the report I was to prepare would address the issue of either dismissing his charges or leaving him to be judged and possibly sentenced.'
- '[The client] appeared to realise that it would seem to me from what he said that he was responsible for what he had done'.

The material questions for reports under s 77 are whether at the relevant time the person was suffering from a mental illness or mental disturbance and whether 'the mental illness or disturbance is likely to have materially contributed to the conduct'. The statements set out

⁴³*Police v Mununggurr*, 22 December 2010, Carey SM.

above suggest, in part, that the person preparing the report misunderstands their role: the question of responsibility and whether the charges are to be dismissed is a matter exclusively for the court, as discussed above. But some of the language also suggests value-judgments being made beyond those necessary for the purposes of the report. This may also be a feature of the fact that the inquiry is taking place within the framework of the criminal law.

Since this legislation was amended in 2007, everyone involved has been gradually working their way through the process. While we have not conducted a rigorous study, our impression from our experience and discussion with colleagues is that, initially, reports tended to come back with the conclusion that the section 77 criteria were satisfied. Then, reports started coming in which appeared to satisfy the test, but went on to recommend against dismissal of the charges. Recently, there have been a number of reports which acknowledge the presence of a mental condition, but rejected the causal link between the mental condition and the offending behaviour. It is difficult for us not to suspect that this trend reflects concern with clients 'getting away with it'.

Of course, if a person is criminally responsible for their actions, 'letting them off' may be a legitimate basis for concern. But it is not, in our view, a legitimate concern in determining the very question of criminal responsibility.

d. Exercising summary jurisdiction

One response to concerns about the reasonably blunt nature of the tool that is s 77, is for courts to decline to hear matters summarily or for prosecutors to refuse to consent to matters being dealt with summarily.⁴⁴

The following exchange comes from the *Mununggurr* matter at first instance:

HIS HONOUR: And the difficulty I have, Ms Lewer, is that if I act under s 77, he'll be let free with no constraint whatsoever.

MS LEWER: Well, your Honour - - -

HIS HONOUR: That's what s 43 of the Criminal Code is set up to do: to have a hearing in the Supreme Court and then the appropriate processes are put in place. If he shouldn't be released into the community, he is not. I don't have the power to stop that but they do.

MS LEWER: With respect, your Honour, the criminal justice system here - - -

HIS HONOUR: And that's one of the reasons I think that this should go to the Supreme Court.

MS LEWER: The criminal justice system is not designed to manage mentally ill offenders. He had been - - -

⁴⁴ For an example of the latter, see *Taylor v Bamber* [2011] NTSC 36.

HIS HONOUR: Ms Lewer, s 43 of the Criminal Code was put in place for a particular purpose and this is it.

MS LEWER: And my submission - - -

HIS HONOUR: Where a person perhaps should not be released into the community even if he is suffering, where we just dismiss the charge and say, 'We've washed our hands of him,' he's out there and some other poor victim comes along.

What his Honour's reasoning appears to overlook (and as counsel was attempting respectfully to point out), the entire MHRS Act was put in place for the particular purpose of managing people with mental illnesses who may be a risk of causing harm to themselves or others. Our view remains that only where the provisions of the MHRS Act are clearly inadequate to deal with the danger of harm posed by a person to themselves or community should resort be had to the more onerous and restrictive provisions of the criminal law under Part IIA of the Criminal Code.

The lower court's concern about the future actions of people dealt with under s 77 is not inappropriate. However, addressing that concern should not fall into the lap of the criminal legal system.

e. Change in the wind?

We understand that there have may been discussions about changing the legislation to address some of the issues raised above. The two possible changes that have been floated are limiting section 77 to minor offences and/or allowing a court to impose bond-like conditions on a person following dismissal. While some changes could be made to the legislation to clarify roles and procedure, we would oppose any such changes.

The first change would result in matters which should otherwise be dealt summarily being dealt with in the Supreme Court. As noted above, it is currently open to the Prosecution to refuse to consent to the matter being dealt with, or for a court to decline to proceed, summarily. In our view, retaining flexibility in how these matters can be resolved is preferable.

The imposition of conditions as part of the dismissal of charges is also undesirable as it exposes people to possible custody and/or criminal sanction. This would result in people circulating within the criminal system. Concerns about community safety and the health of the client are more properly dealt with by the Mental Health Review Tribunal. We recognise this still leaves unresolved the situation of clients with other forms of cognitive impairment, such as Acquired Brain Injury. In some of these clients, conditions will be meaningless anyway. But more importantly, if solutions are to be found, in our view we should be looking elsewhere than the criminal legal system: for example, through better levels or means of support from disability services.

4. *The Trial: Part IIA matters*

Bernadette McSherry notes:

The concept of fitness to be tried originated in the procedural formalities of the medieval court of law one of which required that the accused enter a plea. Those who remained mute were confined to a narrow cell and starved until they entered a plea or died, a technique known as *prison forte et dure* or, from 1406, were both starved and gradually crushed under increasing weights until they entered a plea or died. The latter technique was known as *peine forte et dure* [footnote: See D Grubin, 'What Constitutes Fitness to Plead?' [1993] CrimLR 748-758, 750]. Before resorting to these techniques, the court had to decide whether the accused was mute of malice or mute by the visitation of God, the latter exempting the accused from torture. Examples of the latter included those who were deaf-mute and those who were insane.⁴⁵

Things have moved on a little since 1406, although as we set out below, the effect of being found 'visited by God' in the Northern Territory is that you may be indefinitely detained, rather than spared detention, and the effect of the current system is not significantly different to the more recent practice of being held at 'the Governor's pleasure'.

a. **At his Honour's pleasure?**

Supervision orders are for an indefinite term.⁴⁶ Nevertheless, when a supervision order is made, a 'term' is set at the end of which a major review is conducted by the Supreme Court. This nominal term is equivalent to the sentence of imprisonment that would have been appropriate if the person was found guilty.⁴⁷

This approach is not unique. A similar approach is taken in Victoria,⁴⁸ while in NSW a 'limiting term' is set that is equivalent to the 'best estimate' of the sentence that a person would otherwise have received.⁴⁹

There is something, in our view, that is revealing (and confused) about this process. The essential rationale behind placing a person on a supervision order is that such an order is required in the interests of public safety. How or why is *the sentence they would have received had they been found guilty* a useful reference point? This suggests that there is a need for punishment that needs to be satisfied – even in a person who is not able to form the requisite mental state to commit an offence, or is not fit to be tried – such that a person isn't seen to 'get off more lightly'.

⁴⁵ Bernadette McSherry, 'A review of the New South Wales Law Reform Commission's Report *People with an Intellectual Disability and the Criminal Justice System*' (1999) 25(1) *Monash University Law Review* 166, 173.

⁴⁶ Section 43ZC.

⁴⁷ Section 43ZG.

⁴⁸ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 27(1).

⁴⁹ *Mental Health (Forensic Provisions) Act 1990*, s 23(1)(b).

Attempting to identify a hypothetical sentence also carries with it a certain artificiality and unfairness for people unfit to be tried or not guilty because of mental impairment. For example, it is difficult to see how such people can be given a discount for a plea of guilty and may be unable to express remorse. In *R v Mitchell*,⁵⁰ the NSW Court of Criminal Appeal held:

If a person's mental state means that such subjective factors were not, and because of that mental state could not be, present at relevant times, we are of the opinion that no presumption operates in the accused person's favour and no account can be taken of the absence of those subjective factors... the factors which will be relevant or of primary significance must thereby be objective ones, such as the seriousness of the charge and parity of sentence, if that is a relevant factor.⁵¹

On the other hand, specific deterrence can play no role in setting the sentence and the moral culpability of the individual must be assessed as being low.

The framework of sentencing is therefore, in our view, an unhelpful and inappropriate one. Once a point is reached at which a person is accepted to lack criminal responsibility, the role of the criminal justice system should be considered to be at an end. This is a point we explore further below.

b. 'Custody' means 'jail'

The practical operation of the regime of supervision orders in the NT is that 'custody' means 'jail.' The Criminal Code provides that the court must not make a custodial supervision order committing a person to custody in a prison unless it is satisfied that there is no practicable alternative available given the circumstances of the person.⁵²

Nevertheless, this remains the default option. While it is open to the court to commit a person to custody in another 'appropriate place', no such place is presently made available by the NT Government.⁵³ There is no forensic mental health facility in the NT for people on custodial supervision orders. There does not appear to be a reason why the Joan Ridley Unit (the secure mental health ward of the Royal Darwin Hospital) could not be declared an 'appropriate place' - at least for short term, transitional or interim placements - however the CEO has never issued a certificate for this purpose, despite request.

Jail is clearly an inappropriate place for detaining people who are unfit to be tried and/or not guilty by reason of their mental illness. On a purely practical level, it makes treatment and ultimate re-integration much more difficult. It is also difficult to justify incarceration of persons whom we deem not subject to criminal penalty in a facility intended to punish.

⁵⁰ (1999) 108 A Crim R 85, 96 [51].

⁵¹ See, however, *R v Doolan* [2009] NTSC 60, 11 [21] where Martin (BR) CJ made allowance for the plea of guilty in setting a term for an accused who was unfit to stand trial and for whom a special hearing was held.

⁵² Section 43ZA(2).

⁵³ The court cannot make an order committing a person to custody in another 'appropriate place' unless the court has received a certificate from the CEO (Health) stating that facilities are available: s 43ZA(3).

Many criminal practitioners from Darwin who have visited the prison over the years would be aware of the continuous plaintive cries of one of our clients who is routinely placed back in prison when he breaches his supervision order. Perhaps his experience of his treatment within the legal system feels similar to those unable to plead in medieval times. It certainly sounds so.

c. The Mental Health Behavioural Management Facility

The absence of a forensic mental health facility for people on custodial supervision orders will not be remedied until approximately 2015. The NT government has announced that the new correctional 'precinct' to be built in Holtze on the outskirts of Darwin is to include a Mental Health Behavioural Facility specifically intended to accommodate people on custodial supervision orders. The facility will be physically separate from the new prison (the Doug Owston Correctional Centre) and will be run by the Department of Health, not the Department of Justice.

Such a facility is needed, but it must be recognised as the highest end of the spectrum and reserved for those cases where nothing else will serve to protect the community and the individual. There are accordingly a number of concerns about how it will be used:

- Will it be used as the 'one size fits all' response to people on custodial supervision orders with no other custodial options being made available in the NT? This seems likely, given there are currently no 'appropriate places' made available to people on custodial supervision orders: the government has no qualms keeping people in prison, so will presumably not be inclined to provide a range of options in addition to the Mental Health Behavioural Management Facility.
- Will it discourage the government to make other highly-supervised non-custodial options available for people with high needs, leaving the court with no option but to impose custodial supervision orders and require that the person be detained in the Mental Health Behavioural Management Facility? This also seems to be a real possibility given the expense and real difficulty that government faces in providing appropriate options for people on non-custodial supervision orders who require high levels of supervision and care.
- Will the facility be used for the treatment of people on non-custodial supervision orders?
- Will the actual experience of being in the Management Facility be the same as prison? If it looks like a prison and acts like a prison, maybe it is a prison, and still an inappropriate place for people that have mental health issues.
- How will the facility deal with the cultural issues raised by the presence of Indigenous clients? Home and country are just as important to indigenous clients who have mental health and impairment issues. Clients from way down near South Australia in the APY lands would end up in the Top End in the Holtze Facility.

d. Indefinite detention

The combined result of the indefinite nature of supervision orders and the absence of custodial facilities other than jail is indefinite detention. People who have not been found criminally responsible end up spending more time in jail than if they had been convicted and sentenced. In one current matter, the supervised person remains in jail over a year after he would have been released had he been convicted and sentenced.

That this is grossly unjust barely needs stating. It is a blight on our system of justice in the NT.

e. Doing hard time

Prison is – obviously enough - not a therapeutic environment. While it can be recognised that for some people with particularly challenging behaviours and high needs, the structure and control possible in prison may have some positive therapeutic benefits, this can hardly be a justification for holding people in jail. Such features can be replicated in a non-prison environment, particularly given the powers now available under non-custodial supervision orders, discussed below.

Obviously enough, there is a limited extent to which a person being held in a jail can have their particular needs met. There is much less flexibility in a prison setting and the restrictions that are inevitable in prison may not be commensurate with the level of risk that is posed by the individual under supervision.

Another significant problem with extended incarceration is, of course, institutionalisation. This is particularly problematic for people on indefinite orders because their institutionalisation may be a factor that weighs against their ultimate release – they cannot be released because their potential inability to cope ‘outside’ adds to the risk factors.

We are also concerned about the lack of services available to people on custodial orders which may delay or impair the improvement of their mental health or ability to control/manage their behaviour such that they are able to be recommended for a discharge from supervision or a non-custodial supervision. This is not to deny that in some cases significant efforts are made.

In a recent matter reviewed by the Supreme Court, *R v Williams*,⁵⁴ the evidence was that the supervised person, who was on a long-term custodial supervision order, was not seen by a psychiatrist for periods of up to 9 months (with gaps in visits being regularly over 5 months). The expert evidence in the matter was that face-to-face assessment by a psychiatrist at least every 3 months was a minimum standard. The failure to meet this standard was attributable to a lack of resources available to Top End Mental Health Services.

⁵⁴SC No 20315440. His Honour Justice Southwood’s decision is reserved. Hunyor appeared for the supervised person.

The evidence in that case regarding the extent and quality of psycho-education, long recognised as vital to the supervised person's prospects of release from custody, is also, cause for concern. Despite the long-term nature of the custodial supervision order, no specific program of psychoeducation had been implemented – what was provided was 'ad hoc' and 'low-key'. The approach was conceded to be a failure.

The evidence also raised concerns about the extent to which issues of culture and language are adequately addressed in providing treatment to Aboriginal people with mental illness who are under custodial supervision orders. The importance of recognising the cultural dimensions to Aboriginal mental illness is well-recognised.⁵⁵ In *Williams*, the supervised person speaks English as a second (or possibly third) language and has been assessed by a linguist as requiring an interpreter. Despite this, no interpreter has been used in providing the supervised person with psychoeducation or, indeed, in conducting psychiatric assessments of him.

The first time that material developed specifically for Aboriginal people was used in providing psychoeducation to the supervised person was in September 2010 - 5 years after he was subject to a custodial supervision order. It was the first time that his case manager had used such materials in providing psychoeducation to an Aboriginal person. The evidence in that matter was that Top End Mental Health Service neither had its own psychoeducation material designed for Aboriginal people, nor had it sought to obtain and use similar resources developed elsewhere in the country.

f. Coercive powers under non-custodial orders

It is possible for non-custodial supervision orders to include strict conditions and permit the use of force by 'authorised persons' to enforce the order, take the person into custody or restrain the person to prevent them harming themselves or another person.⁵⁶

The relevant provisions were inserted into the Criminal Code following the decision in *R v Ebatarintja*⁵⁷ in which it was held that under the previous provisions of Part IIA, the Court did not have power to authorise persons other than police officers or correctional services officers to enforce the custody of a 'supervised person' in a place other than a prison. While it was open to a Court to impose a non-custodial supervision order which directed that a person reside in premises other than a prison and not leave without permission, those persons supervising the supervised person had no authority or power to enforce the restraint of liberty.

A supervision order generally contains prohibitions: the supervised person must not leave the premises unsupervised, must not drink alcohol, must not commit offences and various

⁵⁵ See, for example, Parker and Milroy, 'Schizophrenia and Related Psychosis in Aboriginal and Torres Strait Islander People' (2003) 27(5) *Aboriginal and Islander Health Worker Journal* 17.

⁵⁶ Section 43ZA(2A).

⁵⁷ [2010] NTSC 6.

other restrictions. Given that a significant number of the clients have been unfit to stand trial, is it often questionable the extent to which these orders are understood. Despite this, a serious breach, ie a leaving of the premises without permission, has lead to clients being gaoled for those breaches. In one particular case, no overnight visits were allowed in the supervised person's house. The client left the house, went and visited his girlfriend, and returned to his house in the morning. He was put in gaol for this breach. He remained in gaol for many months.

The amendments to the Criminal Code to overcome the effect of the decision in *Ebatarintja* were made by the *Criminal Code Amendment (Mental Impairment and Unfitness for Trial) Act 2010*.

Of interest, and particular relevance to these new powers, is the development of non-custodial houses that have been developed particularly for individual clients. National media interest, supported by judicial commentary on the unacceptability of prison as a place for people with mental health issues, led to a new type of custody. The Department of Health were responsible for the development and implementation of supervised non-gaol accommodation. This was done on a case-by-case basis, perhaps with a view to an eventual movement to the new Mental Health Behavioural Management Facility.

Whilst perhaps this was a valiant effort on behalf of the Department of Health, and a huge relief to the Department of Corrective Services, these houses effectively created mini-prisons. Initially, clients were 'detained' if they tried to leave but after some recognition of the legal problems within this, and the above ruling, the legislative changes were made to be able to restrain and contain clients within these settings.

Specific houses were rented and altered, often at a huge cost, for the residence of a client. Officially, they were on a non-custodial order, however the limits to their freedom were significant. One client, who but for his unfitness to plead is a healthy 28 year old male, was put into a house in an isolated location, with white carers who changed every week or so, flown up from Melbourne. A programme had been devised for him, telling him when to eat, when to do craft and when he could smoke. Whilst the carers themselves were trained and doing the best they could, in essence the client was lonely and bored. And a long way from home.

The lack of cultural activities, such as fishing and hunting with relatives, and attending ceremonies, may also alienate clients from their communities, and deprive them of culturally appropriate ways of coping and being. Being forced to learn to wash and change sheets, go shopping in a big supermarket and cook in a whitefella kitchen may be appropriate re-training for some clients, but may be bewildering and meaningless to others. Lack of response to this sort of behavioural therapy is not only understandable, but also, perhaps, easy to anticipate.

In considering how best to represent these clients, their legal representatives are also in a bind. Whilst on an order, despite its restrictions, clients are guaranteed some support. They have a house, food and people who, at some level, are looking after them. If they were to be taken off an order, it is unclear what level of support they would receive. It is one way of ensuring that your client does not fall through those cracks, and end up on the street. Some of these clients do have Public Guardians and, in discussions with them, this is certainly a feature in their considerations of their client's future.

g. Assessing risk: how much risk is too much?

One of the most significant and interesting issues which arises out of this whole process is the assessment of 'risk'. For anyone who has practised in any criminal system, the reality of the 'frequent flyer' or the recidivist offender is all too familiar. Whilst some people are lucky enough to be able to fully or partially rehabilitate, there will always be those who resort to violence and/or stupidity and keep coming back to court. Many of these people have committed offences under the heavy influence of drugs or alcohol. However, despite the significant possibility that these people may re-offend, the courts are, quite properly, not allowed to keep them in custody indefinitely. A risk of re-offending, or lack of rehabilitation is just one factor which would determine the severity of punishment. These people, by pleading guilty, have accepted criminal responsibility for what they have done. They will generally get out of gaol at some point and go on living the same kind of life, with the same elements of risky behaviour.

Unfortunately, if you are found to have *not* had criminal responsibility for your actions, you are not so lucky.

The 'assessment of risk' process is one that is usually carried out by a psychologist or psychiatrist. The nature and process of this procedure vary significantly. How do you assess the risk of someone who has such an impairment that you cannot communicate properly with them? It also raises the question of comparison: to whom should the comparison of risk be made? To a 'fit to plead' criminal who has committed a similar offence? Or to someone in a similar position as the judge or lawyers?

Southwood J has hinted at this problem, noting in the major review of a person subject to a Part IIA order:

It's not as if he has a history of numerous counts of violence. I mean comparing his circumstances to people who have 30 pages of priors of violence who don't come under this regime who are still at large, he's vastly different to someone like that, isn't he?⁵⁸

There is also an (understandable) risk aversion in all parts of the process: government psychiatrists, NT Government departments and the judiciary. Nobody wants to have approved the release of a person who then seriously re-offends.

⁵⁸*R v Williams* SC No 20315440, 15/03/2011, T155. Hunyor appeared for the supervised person in this matter.

h. Ethical issues⁵⁹

The indefinite nature of supervisions orders and the fact that custodial orders currently require incarceration in a mainstream prison mean that a client's best interests may well not be served by having issues of their fitness or mental impairment raised. In short, they may be better to be tried or plead guilty so that they can be sentenced, do their time if necessary, and be released. This is not a feature that is unique to the NT regime.

Traditionally counsel in a criminal trial, whether for the prosecution or the defence, have been reluctant to raise the issue of fitness to plead because of the perception that it may result in 'throwing away the key', that is to say, detention in a mental asylum indefinitely and without rights for the person detained.⁶⁰

Indeed, the potentially onerous nature of non-custodial supervision may produce a similar effect – in one current matter it has led a supervised person to choose to return to prison rather than continue in remotely located alternative accommodation under conditions that severely restrict his freedoms and ability to have regular social contact with others.

This situation may obviously raise ethical issues for practitioners.

i. Fitness to be tried

In relation to fitness to be tried, the position is reasonably clear. Where counsel forms the opinion that the client is not fit to be tried, they are obliged to bring this matter to the attention of the court.

In *Eastman v R*,⁶¹ the High Court considered an issue of fitness that had not been raised at trial. In fact, senior counsel appearing for Eastman had concerns about his client's fitness but was instructed not to raise the issue. Senior Counsel sought a ruling from the NSW Bar Association's Ethics Committee and he was advised not to raise the issue. While the trial was underway Eastman's then counsel sought advice from senior members of the ACT on the same issue and was given the opposite advice. Prior to being able to do so his instructions were withdrawn and the issue was not subsequently raised at trial.

In the High Court, Gaudron J noted that there can be no trial if a person is not fit to plead. Her Honour's reasons highlight the importance of the issue being addressed if it arises:

If a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead, or, if that issue is not determined in the manner which the law requires, 'no proper trial has taken place [and the] trial is a nullity. [footnote: *Mraz v The Queen* (1955) 93

⁵⁹ For a lengthier discussion of these issues in a NSW context, see the paper presented by Chris Bruce SC at the Public Defenders Criminal Law Conference, 27 February 2011, *Ethics and the Mentally Impaired*.

⁶⁰ The Honourable Acting Justice Miles, *Inquiry under s 475 of the Crimes Act 1900 into the matter of the fitness to plead of David Harold Eastman*, 6 October 2005, [282], cited in the paper by Chris Bruce SC, *ibid*.

⁶¹ (2000) 203 CLR 1. This summary of the *Eastman* matter is drawn from the paper by Chris Bruce SC, above n 59.

CLR 493 at 514 per Fullagar J] To put the matter another way, there is a fundamental failure in the trial process.⁶²

Hayne J similarly noted:

There can be no trial at all unless the accused is fit both to plead and to stand trial. Because the question of fitness is one which affects whether the accused has the capacity to make a defence or answer the charge, it is a question for the trial judge to consider regardless of whether the prosecution or the accused raise it. In that respect it is a question which falls outside the adversarial system. Indeed, it must fall outside the adversarial system because the very question for consideration is whether there is a competent adversary.⁶³

His Honour continued:

Ordinarily it would be expected that material suggesting doubts about the accused's fitness to plead or to stand trial would be drawn to the court's attention by counsel for the prosecution (if aware of it) or by counsel apparently retained for the accused (if counsel had doubts about the matter). In particular, if counsel for the prosecution or counsel for the accused had expert medical opinion that raised a question about the accused's fitness, it would be expected that the existence of this material would be drawn to the attention of the trial judge.⁶⁴

While Justice Hayne's reasons suggest that counsel should draw the issue of fitness to the court's attention if they have 'doubts about the matter', it is, in our view, a course that counsel could be expected to approach with some caution. We would anticipate that counsel would first need to be satisfied that the statutory criteria for unfitness to be tried may be met and then seek expert opinion on the issue before raising the matter in court.

The issue of Eastman's fitness was not resolved by the High Court and an inquiry followed into the issue, conducted by the Honourable Acting Justice Miles AO. His Honour stated:

The recognition of the anomalous nature of fitness to plead as something for the court and for counsel to consider outside the adversary system, and of the obligation on counsel who raises an issue of incapacity to indicate the nature of the facts which go to support the view that the accused is unfit carries the clear implication that there is no impropriety in counsel (whether for the defence or for the prosecution) raising the issue with the court. It suggests indeed that there is a duty to do so.

... I express the strong view that there is no impropriety in a lawyer appearing or acting in a criminal trial who has a well-founded belief that the accused person is unfit to plead informing the opposing lawyer and the court. The law as to how the issue is to be dealt with

⁶² (2000) 203 CLR 1, 15 [62].

⁶³ (2000) 203 CLR 1, 102-3 [294], footnotes omitted.

⁶⁴ (2000) 203 CLR 1, 104 [297].

clearly implies that the continuing duty to the court over-rides any perceived duty to the client to keep the matter secret.⁶⁵

The standard of a 'well-founded belief' being reached before the obligation to inform arises is, in our view, a more appropriate one than that of whether counsel has 'doubts' about the matter.

Hi Honour went on to express the view that the duty to the Court may require a lawyer to advise the court of concerns about fitness, *even after termination of their retainer*:

The duty to the Court should be regarded as surviving the termination of the lawyer/client relationship. The position of a lawyer as an officer of the court should usually be sufficient to secure a hearing in the courtroom. A lawyer who has been dismissed and who no longer has a right of audience in a trial will need to be tactful and possibly persistent in seeking to be heard on a matter concerning a former client. A request to prosecuting counsel to make or join in the application may be appropriate and effective.⁶⁶

This is a position in which no lawyer would wish to be placed – especially in the event that new counsel was retained. It would, we suggest, be appropriate for the NT Law Society to issue guidelines and rules of conduct on these issues generally, to assist practitioners navigate what can be difficult terrain.⁶⁷ The Ethics Committee of the Victorian Bar Association has provided some guidance on the issue as follows, although it deals with only the limited issue of ability to give instructions and, amongst other things, *does not* require disclosure if the brief is not retained:

Where counsel forms an opinion that there is a mental disorder or impairment with a consequent inability to give instructions, counsel, if he or she retains the brief, is obliged to disclose that inability to the trial judge in accord with the duty owed by counsel to the court. This arises because an inability to give instruction directly affects the proper administration of criminal justice. That a client may fear the consequences of a determination of unfitness does not negate or lessen this duty.

There is of course, the further difficulty of having a client who moves in and out and of lucidity. On one day, they are apparently able to give instructions. On the next, they are clearly unfit. What do you do?

ii. Fitness to plead

Given the disadvantages that follow from being found unfit to stand trial, the distinction between fitness to stand trial and fitness to plead is a significant one. In his paper *Ethics and the Mentally Impaired*, Chris Bruce SC states:

⁶⁵ Above n 59, [284]-[285].

⁶⁶ Ibid [288].

⁶⁷ We note that a similar suggestion is made by Chris Bruce SC in his paper, above n 59, in the context of NSW.

It is important at the outset, to make the distinction between a client being fit to plead guilty and competently take part in the sentencing proceedings and a client being fit for trial. The minimum standards in considering the question of whether a client is fit to plead guilty and take part in the sentencing proceedings that follow, as opposed to being fit to stand trial, are vastly less onerous. Also the degree of impairment may vary considerably from person to person. At the one end of the spectrum there are those who because of the severity of their mental impairment are unable to effectively communicate in any meaningful way and thus not fit for trial or to plead guilty. On the other hand there are those with less severe forms of impairment who are quite capable of providing instructions to plead guilty and follow less arduous sentencing proceedings but not fit for trial. The [*Mental Health (Forensic Provisions) Act 1990 (NSW)*] and the *Presser* [footnote: *Regina v Presser* (1958) 1 VR 45] test [which defines fitness to be tried at common law] are only directed to considerations of fitness to be tried, as opposed to fitness to plead guilty and competently take part in ensuing sentencing proceedings.⁶⁸

The distinction between fitness to plead and fitness to be tried is also one made in the comments of Hayne J in the quotes from Eastman, above. In our experience, however, this is a distinction that is rarely drawn in practice and may warrant further consideration by practitioners struggling to best protect their client's interests.

iii. Defence of mental impairment

For a client who is fit to give instructions but may have a defence of mental impairment, the issue seems ethically clear – they can choose not to raise the issue and can be advised accordingly – but weighing up and giving advice on what may be in their best interests is likely to be more complex.

On the one hand, if the relevant mental impairment was a mental illness that is now being appropriately treated and could be said to be under control, their prospects of a non-custodial supervision order may be good and this may be a better outcome than a jail sentence.

On the other hand, the indefinite nature of supervision orders will be a significant factor weighing against raising the defence. Even if a person is initially subject to a non-custodial order, our experience is that the complexities and difficulties inherent in the management and supervision of mental impairment and people with disabilities that fall within that category mean that there is a significant possibility of such orders becoming custodial at a later stage.

5. Conclusions

A range of changes should be considered to address the problems we have highlighted. These should be guided by the principle that if you are not fit to be held criminally responsible, you should not be a part of the criminal legal system. Both conceptually and

⁶⁸ Above n 59, 3.

practically there are significant shortcomings with the current approaches and they should be re-thought.⁶⁹

Some amendment to s 77 of the MHRS Act may clarify roles and procedures to ensure the process is sufficiently rigorous and transparent. More significantly, however, we argue that there is a need for mental health issues that may arise in the course of criminal matters to be more comprehensively addressed through the mental health system, rather than the criminal legal system. Better linkages with, and referrals to, the mental health system and disability support services are the best way to address concerns about protecting community safety and preventing re-offending.

Turning to part IIA of the Criminal Code, we suggest a range of possible changes. McSherry has argued, in the NSW context:

It seems preferable that a custodial order be based solely on the mental state of the individual rather than on the idea of punishment for an offence for which the individual was not held responsible. The appropriate criteria for committing the individual to an approved place should be those for civil confinement. The rationales for involuntary civil confinement are the treatment of the persons for his or her health or safety or for the protection of the members of the public. The detention of an involuntary patient is periodically reviewed and must be justified under mental health legislation. It is perhaps worthwhile considering whether such a regime could relate to those found not criminally responsible because of mental impairment.⁷⁰

We agree. It is far from ideal, as a matter of principle and in practice, to have these issues dealt with in an adversarial context, in the shadow of the criminal law. It would be preferable for them to be treated as matters of health and community safety, and there may be a role for regulation and oversight by a multi-disciplinary tribunal which can bring an inquisitorial approach, particularly to issues of ongoing management. We note, however, that one of the benefits of the current system is that supervised people are legally represented, and having the matters before the Supreme Court can bring a rigour and openness to the process that should not be lost.

There is an urgent need for custodial options other than prison. We cannot wait for the 'Holtze solution' in 2014 or 2015. And this must not be allowed to be the 'one stop shop' – each case should still require consideration of what is the least restrictive alternative and what is the best therapeutic context.

There is also an urgent need for more resources for non-custodial management and services – particularly mental health services – for people on custodial orders.

⁶⁹We note the significant advocacy work being done in this area at a national and local level by the Aboriginal Disability Justice Campaign. For more information contact Patrick McGee at <thiswhisperinginourhearts@hotmail.com>.

⁷⁰Bernadette McSherry, above n 45.

We have also highlighted the problems associated with risk assessment. The current approach discriminates against people on the basis of disability by requiring that 'the system' is satisfied they are not dangerous before they are freed from supervision. This is not a test that those criminally responsible are required to meet. This is an issue that warrants further consideration and will need to be tested with a view to better defining *acceptable* risk.

One thing we have not touched on, but should be remembered, is that many of these difficult cases arise because people have already been failed by the system. It is no coincidence that the overwhelming majority of people on supervision orders are Aboriginal people. We must also be careful not to forget, in all the legal process, that people are involved. It is not a sexy area of law and the clients can be very challenging. The most severe have serious communication and behavioural issues, and one can only imagine how they experience the world and its complexities, let alone the prison and legal system.