Law and Justice Internship 2020/21

Final Essay

"A significant percentage of those persons detained in Australia's adult prisons have disabilities. In 2019 the UN Committee on the Rights of Persons with Disabilities called on Australia to do better in its treatment of these detainees. As it stands, current state legislation relating to unfitness to plead and the defence of mental incompetence are doing little to keep people with disabilities out of jail. What law reform measures can Australia take to come closer to ensuring its detainment of people with disabilities meets Australia's obligations under CRPD and OPCAT?"

Introduction

The ABS Survey of Disability, Ageing and Carers defines people with disabilities ('PWD') as someone who has 1 or more limitations, restrictions, or impairments affecting their everyday activities that have lasted, or are likely to last, at least 6 months.[1] A disability includes physical impairments as well as cognitive impairments.[2] What little research has been conducted indicates that PWD, particularly those with cognitive impairment, are significantly overrepresented in the Australian criminal justice system.[3] Despite having systems put in place for PWD to avoid being detained in prisons, they are often kept in prison while waiting trial and even after they are found not guilty by way of mental impairment. This brings to light grave mistreatment of PWD and possible breaches of international law. This essay will seek to explore how law reform can assist Australia in better complying with their obligations toward PWD under international law. Australia's international law obligations relating to PWD will first be discussed, followed by an analysis of each Australian jurisdiction's legislation relating to unfitness to plead ('UTP'). A case study on Victorian woman 'Rebecca' will highlight common issues in the system which leave the door wide open for necessary law reform. Finally, a conclusion will be

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[1] Australian Institute of Health and Welfare ('AIHW'), *The health of Australia's prisoners 2018* (Report, 2019) https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true> 77.

[2] For the sake of this paper, cognitive impairment or disability will refer to all disabilities that impact on cognitive functioning including, but not limited to, forensic disability, mental impairment, psychosocial disability and intellectual disability.

[3] AIHW (n 1).

made on what law reform should occur in order for Australia to better comply with its international law obligations.

Australia's International Law Obligations

Australia have ratified a number of international law instruments that indicate clear rights and obligations relating to PWD who engage with the criminal justice system. The primary treaty is the Convention on the Rights of Persons with Disabilities ('CRPD'). The CRPD requires Australia to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all people with disability'.[4] The convention obliges parties to take positive action, including law reform, to reflect these principles and protect the rights contained in the convention. Articles that relate to PWD in the criminal justice system include the right to freedom from torture or cruel, inhumane or degrading treatment or punishment, the right to freedom from exploitation, violence and abuse and equal recognition before the law. The latter right requires states to provide PWD supports and safeguards to ensure those with impaired mental capacity retain legal capacity.[5] This is to ensure that people with cognitive impairments are not denied their rights on the assumption that they are incompetent. While UTP intends to uphold these values, it's current application in some states can act against this goal.

The standard minimum rules for treatment of prisoners, or the 'Nelson Mandela Rules', implement a base-level requirement for treatment of prisoners. Rule 45 states that the use of solitary confinement on people with mental or physical disabilities amounts to cruel, inhuman or degrading treatment, when their conditions would be exacerbated by such measures. A psychiatrist who spoke with the Human Rights Watch stated that they 'haven't seen anyone with an intellectual disability who hasn't

[4] Australian Human Rights Commission, Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, (20 March 2020) 7.
[5] C*RPD* article 12.

gotten worse in prison'.[6] This leads into the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('OPCAT'), the object of which is to prevent the mistreatment of people in detention.[7] In 2019, a Royal Commission was launched into Violence, Abuse, Neglect and Exploitation of People with Disability in response to community concern that Australia was failing to meet its obligations under this treaty. An example of a possible breach was a situation involving four Aboriginal men with disabilities, indefinitely detained in prisons.[8] Explored in more detail below, these breaches have extended to multiple cases across different Australian jurisdictions.

UTP and Mental Incompetence

There are two primary resources that PWD facing criminal convictions can utilise in order to be treated for their mental impairment rather than going to prison: UTP and the defence of mental impairment.

Each state deals with criminal court proceedings and penalties in their own legislation. Likewise, prison systems are too operated by the states under section 120 of the Constitution. This results in varying laws relating to UTP and the defence of mental impairment around Australia. However, the general principal for both options is standard across all states.

UTP is a pre-trial procedural process where a judge or jury can declare a defendant UTP due to a mental incompetence. If found UTP, a criminal trial will not go ahead, and the defendant cannot be found guilty of committing a crime. Each state has their own procedure for UTP which is further explored below. The general principal for UTP is that everyone is entitled to a fair trial, and if you are

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[6] '"I Needed Help, Instead I Was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia', *Human Rights Watch,* (Web Page, 6 February 2018) <https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>.

[7] **'**Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment', *United Nations Human Rights Office of the High Commissioner* (Web Page, 18 December 2002) <https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx>.

[8] *KA, KB, KC and KD v Commonwealth* [2014] AusHRC 80.

unable to mentally comprehend proceedings, court processes, counsel advice etc. then a fair trial will not be received.

The defence of mental incompetence differs as it is used as a defence during a criminal trial and may result in a non-guilty verdict by reason of mental impairment. A jury may still make out the requisite elements of a crime, but the defendant can raise the defence of mental incompetence to find a not guilty verdict. The outcome for both processes is similar and likely result in mental health sentencing options rather than a criminal conviction. While UTP is classified as a pre-trial process and insanity as a defence, either can be identified by any party to the proceedings before and during a criminal trial.

State Legislation

1. Victoria

Under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), a defendant can be found to be UTP by a jury. If this decision is made, a judge then decides whether that person is likely to become fit within 12 months. If so, the proceedings can be adjourned until that time. If the judge finds that person is not likely to become fit, a special hearing is held where evidence is presented against the defendant. A jury at this hearing will decide whether the defendant is guilty or not guilty of committing the crime or that the person committed the offence but was not guilty by way of mental impairment. When this decision is made, it is then up to the discretion of the judge to determine whether the defendant should be (1) subject to a custodial supervision order detaining the defendant (2) a non-custodial supervision order allowing the person to live in the community subject to conditions or (3) an order releasing the person without conditions.[9] Adults subject to the *CMIA* can be detained in one of four places: Victoria's forensic mental health hospital (Thomas Embling Hospital), two DHHS operated services for people with intellectual disability (the Disability Forensic Assessment

[9] Victorian Ombudsman, *Investigation into the imprisonment of a women found unfit to stand trial* (October 2018) 8.

and Treatment Service in Fairfield and the Long Term Rehabilitation Program in Bundoora) and the prison system (when there are 'no practicable alternatives in the circumstances').[10]

2. New South Wales

The NSW legislation works similarly to that of Victoria. Under section 7 of the *Mental Health (Forensic Provisions) Act 1990 ('MHFPA'*) (NSW), an issue of fitness may be raised by either party at any time throughout proceedings, but preferably before arraignment for the sake of timeliness. If such a concern is raised, a fitness inquiry is conducted by a judge to determine whether the defendant is fit to stand trial, rather than a jury. If they are found UTP, the person is referred to the Mental Health Review Tribunal ('MHRT'), who determine whether that person is likely to become fit within 12 months, in which case the matter is adjourned until that time. If not, the matter is reverted back to the court for a special hearing to determine whether on the limited evidence, the person committed the alleged crime. Alternatively, the DPP can drop the case at this stage.[11] If found guilty, the judge must determine if a sentence of imprisonment would be handed down if it had been a standard criminal trial, and what that total sentence would have been (this is called a limiting term). This sentence time is the maximum period that the accused may be detained but may be released earlier if the MHRT decide they do not pose a danger to themselves or others.[12] The Court then determines whether the defendant should be detained in a place the court thinks fit or released from custody unconditionally or subject to conditions. This is where the *MHFPA* differs most from the Victorian legislation as it gives the court absolute discretion rather than listing appropriate accommodation

[10] Ibid.

[11] Ellen Limerick et el, 'Declared unfit to plead' (Research Report, *TC Beirne School of Law UQ Pro Bono Centre*, April 2018) 17.

[12] Mark Ierace, 'Fitness to be Tried' *The Public Defenders* (Presentation Transcript, 5 November 2010) <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_fitness_ierace.aspx#:~:text=The%20fact%20that%20a%20person,is%20unfit%20to%20stand%20trial>.

options. Therefore, while defendants could be sent to NSW's 135 bed Forensic Hospital mental health facility they could also be sent to prison or a number of other accommodations.

3. South Australia

The South Australian system works in the same way as NSW and Victoria. If there are reasonable grounds to suspect the accused is UTP the court may order an investigation, which may require the production of a report by their treating psychiatrist or other experts. If the accused is found UTP and unlikely to regain fitness within 12 months, the physical elements of the offence are still tried. If the court is satisfied beyond reasonable doubt that the elements are made out, the defendant is liable to forensic orders. South Australia appears to be the only model that allows the physical elements of the offence to be properly tested, which has the potential to 'reduce prejudicial outcomes based on UTP and maintain procedural fairness throughout the process.'[13] If the elements are not made out, the court will find the accused not guilty and the accused is acquitted. Those who are found UTP are often sent to James Nash House or Glenside Hospital. The problem that arises here is that these facilities are dedicated mental health facilities and are therefore inappropriate for perpetrators who suffer from cognitive disabilities. It is paramount that the distinction is made between mental illness (i.e. depression, anxiety, bipolar, OCD, PTSD etc.) and cognitive impairment (i.e. TBI, developmental disabilities, dementia, stroke, intellectual disability etc.) to ensure people are receiving appropriate care. A defendant may apply to vary their supervision order every 6 months.

4. Western Australia

Western Australian law is where things start to differ and raise a multitude of issues. The pre-decision process is fairly similar to other states but where red flags are raised is when it comes to imposing a limiting term – there is no requirement for this. The *Criminal Law (Mentally Impaired Defendants) Act*

[13] Limerick (n 15) 20.

1996 (WA), does not limit the period of time one spends in custody if found UTP and does not provide adequate processes of review. Further, the elements of the accused's crime do not need to be made out nor does guilt need to be determined. Defendants can therefore be subject to harsher punishments to what they would have received if they had gone to trial.

This has resulted in a number of detainees residing in custody for indefinite periods of time, often over the term they would have been sentenced to if they had been found guilty at trial. For example, a man named Marlon Nobel was charged with sexual assault offences which were later found to have no substance. However, he was held in custody for 10 years because he was found UTP, and the case never went to trial and thus he was never able to test the evidence against him. He was jailed for longer than what his prison term would have been if found guilty of his original charges.

Another case involves Rosie Anne Fulton, a woman held in a rural prison for over 18 months on charges of crimes related to a motor vehicle. Despite being found UTP, she was sent to prison as there were no other suitable accommodations available to her.[14]

5. Queensland

In Queensland, if a defendant is suspected to be UTP, they are referred to the Mental Health Court, who will make a determination. Queensland is the only state that have a dedicated MHC to determine an accused's fitness. The *Mental Health Act 2016* (QLD) empowers this court to evaluate fitness to plead and prescribe treatment plans for people charged with indictable offences. The Magistrates court deals with fitness to plead determinations for summary offences. The MHC is headed by a Justice of the Supreme Court of QLD and two expert clinicians (generally a psychiatrist or similar) who assist

[14] The Law Society of Western Australia, 'Mentally Impaired Accused' (Briefing Paper, December 2016) 2 <https://www.lawsocietywa.asn.au/wp-content/uploads/2015/10/Law-Society-Briefing-Papers-Mentally-Impaired-Accused.pdf>.

the judge in deciding matters. If the UTP is found to be permanent, the proceedings are discontinued and the MHC may make a forensic order detaining the defendant to an authorised mental health service ('AMHS') (a public psychiatric hospital or ward) for inpatient or community care, or to the Forensic Disability Service. This differs from other states as it highlights the different needs for those with a disability and those with a mental illness. The MHC views mental illness and cognitive impairment differently, with those found UTP due to an intellectual disability facing more restrictive orders.[15] Unlike other jurisdictions, the objective elements of the alleged offence are not required to be proved in order for a forensic order to be put in place. This means the accused may be forensically detained even if the elements of the case may not have been made out. This is problematic as it can result in harsher treatments than if they were to have gone through a criminal trial.

6. Northern Territory, Australian Capital Territory & Tasmania

These jurisdictions act in similar ways to other jurisdictions and each conduct investigations where fitness to plead becomes an issue. If the defendant is found UTP, and will not become fit within 12 months, a special hearing is held.[16] Stress can be exacerbated for people who suffer from mental or cognitive impairments. Therefore, it can be argued that special hearings do not account for those people, who likely do not have the capacity to cope with the pressures of a criminal trial (hence being deemed UTP).[17] However, special hearings have the capacity to determine guilt, which in most jurisdictions is applauded. The *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic) proposes to give the judge the power to excuse the accused from attending a special hearing in person, instead by audio-visual link or other means, to reduce significant stress on the accused. Other jurisdictions make look to follow suit.

[15] Limerick (n 15) 14.
[16] Ibid 19.
[17] Ibid 20.

Conclusion

There are pros and cons to each jurisdictions model. Victoria and NSW implement limiting terms but list prisons as accommodation options (despite being last resorts). Queensland's use of the MHC to determine UTP is commendable as is their distinguishment between mental illness and impairment. However, they do not implement limiting terms and decisions can result in harsher terms than criminal sentencing. While they do provide for periodic assessment of suitability for release, there is much work to be done in this jurisdiction. The Western Australian and Queensland models are most problematic as they allow for indefinite periods of detention and lack review mechanisms, with the detainee being detained 'at the Governor's pleasure'.[18] This means the discretion to release someone from custody is with the Governor, who acts on the recommendation of the Mentally Impaired Accused Review Board.[19] Both legislations place people UTP at risk of indefinite detention, violating the CRPD. The South Australian model is better practice with limiting terms, options for review and testing the physical elements of the crime. If they were to put more emphasis on mental health and cognitive disability, their model would be close to best practice. The NT, ACT and Tasmanian models are relatively standard and like everything, can always be improved with amendments to the rules of special hearings.

Case Study: 'Rebecca'

In 2017, the Victorian Public Advocate raised concerns about the imprisonment of a 39-year-old woman who suffers from pervasive developmental disorder (now classified under the Autism Spectrum Disorder) and borderline intellectual function.[20] The cause of Rebecca's imprisonment was her breach of an intervention order and resisting police. She was found UTP and not guilty due to

[18] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report, No 124, 2014) 209.
[19] Limerick (n 15) 25.
[20] The woman is referred to as Rebecca in the Victorian Ombudsman's investigation into her case.

mental impairment. Despite this, Rebecca remained in prison rather than being taken to a forensic facility.

Rebecca was held at the Dame Phyllis Frost Centre ('DPFC'), Victoria's primary women's prison and the only prison who holds women on remand awaiting trial or sentencing, for 18 months.[21] Rebecca first spent 3 weeks in the 'management unit', accommodation usually reserved as a punitive measure for women who commit offences in prison. Prison officers say they kept her here 'to allow ongoing psychiatric and medical assessment and observation' due to her erratic behaviour. Rebecca was kept in her cell 23 hours of the day as she was considered a risk to, and from, other prisoners – a clear breach of OPCAT.

After three weeks Rebecca was moved to 'Marrmak', the prisons mental health unit. The Public Advocate expressed concerns of this placement as Rebecca did not suffer from mental illness. DPFC do not offer any better alternatives. Unlike male prisons in Victoria that have specialist units for prisoners with an intellectual disability,[22] there is no such equivalent in the women's system. The Forensic psychiatrist in Marrmak agreed that Marrmak is 'not designed' for people with intellectual disabilities and that there is 'no resource for people with these difficulties.'[23]

The Mandela Rules state that people who are found not to be criminally responsible or are diagnosed with 'severe mental disabilities', must not be detained in prison if that would lead to exacerbation of their condition. Such people that find themselves in prison should be transferred to mental health facilities as soon as possible. The State clearly did not meet these standards while Rebecca was in their care and likely breached her human rights.

[21] Victorian Ombudsman (n 7) 17.
[22] Ibid.
[23] Ibid.

Law Reform

Rebecca's case, and common themes across state legislation, highlight multiple areas in need of law reform to ensure Australia's compliance with international law.

1. Limiting Terms

The UN committee have publicly condemned the use of indefinite detention after findings of UTP. Laws which expose people with cognitive impairment to the risk of indefinite detention are inconsistent with the CRPD.[24] Therefore, those states that have not implemented limiting terms are directly violating the CRPD.

If Rebecca had stood trial, been found guilty and sentenced for her alleged crimes, she would have spent less time in prison than she had already served at the time of the inquiry commencing. Rebecca's case is not isolated - Victorian Legal Aid told the Ombudsman they had witnessed repeated cases of prolonged detention of people found UTP. The Justice Project discovered that people found UTP can face 'protracted, sometimes indefinite, periods of detention at higher levels of security than is necessary',[25] which they claim likely violates the OPCAT. This can also deter defendants from raising UTP altogether.

Therefore, every Australian jurisdiction should implement limiting terms for people who have been found UTP. This limiting period should not exceed what the defendant would have received if found guilty of the alleged crime in a criminal proceeding. Further, a custody order should only be made where the statutory penalty for the alleged offence includes imprisonment. The Court should also have the power to regularly conduct reviews of detention orders and legislation should set minimum review periods. The Victorian legislation allows judges the discretion and flexibility to decide how often to review custodian supervision orders. While this does provide avenues for review, all

[24] Limerick (n 15) 31.

[25] Law Council of Australia, *The Justice Project* (Final Report, August 2018) 21.

Australian legislation should require automatic review for a prescribed period. The Victorian Law Reform Commission recommends reviews no longer than every 2 years.[26]

2. Distinction and Appropriate Accommodation

Where a supervision order is implemented to people found UTP, subjects should be kept in accommodation that caters to their therapeutic needs – prison should be out of the question. While some legislation provides prison accommodation as an absolute last resort, it is argued that prison should not be an option at all. However, it is clear that access to appropriate facilities are lacking and numerous cases show that PWD face prolonged periods of time in prison because there is nowhere else for them to go.[27] This is a matter of policy and state resourcing which should be a paramount consideration for the legislature. A distinction between mental illness and cognitive impairment is also paramount as many designated mental health facilities do not currently have the means to rehabilitate those with cognitive disabilities. Rebecca's case strongly highlights the need for states to recognise the distinction in care needs for people with cognitive disabilities and those with mental illnesses.

Finally, solitary confinement should in no circumstances be used to house prisoners with cognitive disabilities as it is a direct violation of OPCAT and the Mandela Rules. Prison staff acknowledge the overrepresentation of PWD in solitary due to the fact that they are not appropriately trained to distinguish between disobedience and misinterpreting a disability. Nor do they receive adequate training on techniques to interact with PWD, particularly in crisis moments.[28] Thus, their responses often result in punishment rather than support and detention becomes the default response.

[26] Victorian Law Reform Commission, *Guardianship* (Final Report, No 24, 2012) 431.
[27] Victorian Ombudsman (n 7) 47.
[28] Human Rights Watch (n 6).

Conclusion

As it stands, many Australian jurisdictions legislation relating to UTP are preventing Australia from complying with its international law obligations. Law reform is necessary to prevent further breaches of the OPCAT and CRPD and should be a paramount consideration for legislative authorities.

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The Nelson Mandela Rules

E | *Other*

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