Inspector's Overview

Custody Orders and the case of Mr B

"I just want a date. Everyone else has a date. It's not fair." (Mr B)

Mr B is a middle-aged Aboriginal man with whom I spent time during a prison inspection a couple of years ago. He repeated these or similar words over and over whenever we met. A softly spoken man with serious cognitive impairments and very limited social skills, his words say so much about the dilemmas and deficiencies of the *Criminal Law (Mentally Impaired Accused) Act* 1996 ('the Act') and the desperation it can generate for some severely impaired people.

In November 2008, due to the severity of his impairments, Mr B was found unfit to stand trial on charges of damage, street drinking and obscene acts in public. He had appeared before the courts on numerous previous occasions, predominantly for lower end alcohol-related public order offences. Previously, however, he had always been regarded as fit to stand trial. He had therefore been convicted and sentenced to fines and short prison terms. His longest prison sentence, imposed almost ten years earlier, had been 12 months' imprisonment for assaulting a public officer. His most recent prison sentence (six months) had been in 2003.

On this occasion, though, the court found Mr B unfit to stand trial. Given this finding, the evidence against him was never formally tested in court and he was never convicted or sentenced. The finding also meant that the court had only two options open to it. These options were polar opposites and highly problematic. The first was to release Mr B straight back into the community without any conditions. This would have offered him no support or supervision despite his impairment-related behaviour bringing him into the courts with monotonous regularity. The only other option was to impose a custody order.

The Act specifically nominates four types of place where a person can be detained under a custody order: an authorised mental hospital, a 'declared place', a prison or a juvenile detention centre. The idea behind 'declared places' was that they would allow people with severe cognitive impairments to be held somewhere other than a prison or detention centre. Given that no declared places had been built, and Mr B was not eligible to be held in an authorised mental hospital, he was only able to be held in prison.

Mr B was given a conditional release order in 2009. This allowed him to live in the community with supervision and support, while being subject to conditions. However, he committed further lower end alcohol-related public order offences within a few months of living in the community and was returned to prison. The Board has been working hard to progress him towards another conditional release order but his cognitive impairments are severe. As prisons go, the prison where he has been kept in

recent years offers a reasonably pleasant physical environment and, at the time I met him, the staff and some prisoners who were family members were looking after him as well as they could. He was also going out of the prison fairly regularly to undertake some community re-socialisation activities. But at the end of the day, this was a prison and he was a prisoner. He was fundamentally out of place and vulnerable to exploitation due to his agreeable nature and poor cognitive skills.

In 2012, Mr B's message to me, and to anyone who would listen, was simple: he knew he had to stay in the prison but he wanted something his fellow prisoners had - a date when his time in prison would end. A poignant and despairing request, but one that nobody could help with.

Two years after I first met Mr B, the Board is still actively monitoring his case. A number of government and non-government agencies are working with him and there are signs of progress. All being well, he will again be able to be released at some point in the future. But some fundamental realities remain: *Mr B is still a prisoner, five and a half years since the custody order was imposed, and two years since he spoke with me. If he had been well enough to be tried and convicted he would not have served anything like this period. He might not have been sent to prison at all. If he had been sent to prison, he certainly would never have been imprisoned indefinitely: he would have had a 'date', and that date would have been some years ago.*

Report Scope

I knew very well that Mr B's circumstances were far from unique: similar cases have been discussed in numerous papers and reports[1] and some have attracted media debate.[2] However, there has never been a full study of the number, profile and circumstances of people held on custody orders. Mr B's comments reinforced my view that we should prioritise such a report as part of our new Research and Audit function.[3]

The Act embraces two distinct groups of defendants. First, there are those like Mr B who are so impaired that they cannot understand enough about what is happening to be able to stand trial. This group comprises people with cognitive impairments or other conditions (such as dementia) which will not improve sufficiently for them to stand trial. The second group is very different, and comprises people acquitted by reason of 'unsoundness of mind' (commonly called the insanity defence). People in this group are well enough to be placed on trial and this means that the evidence against them is tested. At a bare minimum (and unlike cases of unfitness to stand trial) the prosecution

[1] Mental Health Law Centre (WA) Inc. *Interaction with the Western Australian Criminal Justice System by People Affected by Mental Illness or Impairment A Policy and Law Reform Submission: Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* (April 2013); N Morgan and I Morgan, *The Mentally Impaired Defendants Review Board: what is it, what does it do and how can it be improved?* Paper to a seminar hosted by legal Aid (WA) and the Law Society of WA, June 2002: <http://www.health.wa.gov.au/mhareview/resources/documents/MIDRB_paper_Morgans_110902.pdf>.

[2] <http://www.abc.net.au/local/stories/2012/01/09/3404559.htm>; <http://www.theaustralian.com.au/national-affairs/policy/failed-by-offcialdom-rosies-life-locked-up/story-fn9hm1pm-1226852947945#>.

[3] The *Inspector of Custodial Services Amendment Act 2011* (proclaimed in January 2012) expanded and embedded the Inspector's powers to examine specific aspects of a custodial service or a specific custodial experience of an individual or groups of people in custody. They were prompted by the findings of the coroner's inquest into the death of respected Aboriginal elder Mr Ward as a result of a long distance transport.

must prove beyond reasonable doubt that the person did the acts in question. Attention then turns to the person's mental state and they will be acquitted if they were so mentally impaired that they lost the capacity to know what they were doing, to know what they were doing was wrong, or to control their actions.

My legislative jurisdiction extends to prisons, detention centres and a number of other services. It does not extend to mental hospitals or to the workings and role of the courts or the Mentally Impaired Accused Review Board. However, the review would have been incomplete and unhelpful without reflecting on all of these areas. All parties were welcoming, helpful and generous with their time – a clear indicator that they also hold serious misgivings about the current system. I am particularly grateful for the assistance of the Board (who allowed us to access files and hold discussions); the positive engagement and assistance of the Frankland Centre (the state's only secure forensic mental health facility), the Health Department and numerous mental health professionals; and the engagement of judicial officers, including the Chief Justice and the Chief Magistrate.

Relevance, Timeliness and Action

What's been known and what's been done?

Overall this review generally confirmed, quite unequivocally, what many people had suspected. Our current system for managing mentally impaired accused is unjust, under-resourced and ineffective. Appendix A summarises our key findings. Sometimes when reports come out, I am told by the relevant agency that 'there are no real surprises' or 'you're telling us what we know'. Comments of this sort are irrelevant. They simply beg the obvious retort: 'if you *knew* about it, what did you *do* about it?'

Unfortunately, to date, despite everyone agreeing that reform is needed, there has been no action to amend the legislation since 1996, other than to tweak its name so that it now refers, even more pejoratively, to people as 'mentally impaired *accused*' rather than 'mentally impaired *defendants*'.[4] Professor D'Arcy Holman was pessimistic, realistic and prescient when, more than ten years ago, he released a review of the Act with a tortoise on the front cover.[5]

But the positive side is that tortoises do eventually reach their destination. After years of inaction other than meetings, the current government has made a definite commitment to establishing declared places. This is a very positive move, provided full attention is paid to gender, age and cultural diversity and to regional need.

In addition, several government departments are working together to produce a business case to expand forensic mental health services and infrastructure within

[4] *Criminal Procedure and Appeals (Consequential and Other Provisions) Act 2004* s. 82.
[5] Holman CDJ. *The Way Forward. Recommendations of the Review of the Criminal Law (Mentally Impaired Defendants) Act* 1996. Perth: Government of Western Australia, 2003

corrections. If successful, this will greatly improve the prospects for rehabilitation for people on custody orders.

In my view, there is also an opportunity for some immediate pragmatic legislative changes. The responses to this report have shown that there is an appetite for this, with the possibility of more comprehensive changes down the track.

Staging reform

Advocates of reform have generally wanted a complete, ground-up, re-write of the legislation. This is understandable and may well be the most appropriate long term goal. But this goal has also arguably slowed progress in enacting legislative amendments that would have made the Act more workable and flexible pending wholesale reform. In my view, appropriate immediate amendments, include the following:

- Increasing judicial flexibility by allowing people found unfit to stand trial to be released under community supervision and removing some of the current restrictions;
- Providing for a process of regular judicial review of custody orders, even if primary responsibility lies with the executive; and
- Providing a time limit on the duration of custody orders so that unless the most exceptional of circumstances exists, the order cannot run for longer than the alleged offences, if proved, would have justified. Detention after this time could only be on the basis of a court order.

Hitherto, suggestions of this sort have fallen on stony ground but this report could hardly be more timely or relevant. We sent the draft report to relevant stakeholders for comment in January 2014 and requested comments by 26 February 2014. Over that very period, media outlets drew attention to the sad plight of Ms Rosie Anne Fulton. Ms Fulton is a young Aboriginal woman from the Alice Springs area who is currently being held indefinitely in Eastern Goldfields Regional Prison after being found unfit to stand trial on charges of stealing a motor vehicle and driving recklessly. Her life has been marked by disadvantage, deprivation, and abuse. Media scrutiny of her case follows on from the concern that greeted the case of Mr Marlon Noble when it became known four to five years ago.

Labor Party Bill and DotAG Review

In the aftermath of Ms Fulton's case, the State Opposition introduced a Bill that, if enacted, would address one of the concerns mentioned earlier by imposing a time limit on the duration of a custody order.[6]

The Department of the Attorney General (DotAG) has responsibility for the carriage of any changes to the Act and has been reviewing the Act for a number of years. In September 2012, Parliament was informed that a review had been completed and that

[6] Criminal Law (Mentally Impaired Accused) Amendment Bill 2014 (WA).

there had been broad consultation with 'key stakeholders'.[7] It was also said that a Green Paper would not be released for consultation because there had already been consultation, that Cabinet would consider reform proposals, and that a Bill to amend the Act would be before Parliament by the end of 2013.

In response to our draft report (March 2014), DotAG stated that it had concluded a stakeholder consultation process and will release a discussion paper as part of a public consultation process later this year.

Interestingly, whilst the Act deals with people appearing in the courts, and the judiciary are the 'gatekeepers' of the system, they were not on the list of key stakeholders in 2012. It would also appear that they have not been consulted since then.[8] However, in engaging with this review both the Chief Justice and the Chief Magistrate have indicated strong support for many of the key recommendations, including the need for greater flexibility.

Conclusion: 'I want a Date'

Reform obviously takes time but Professor Holman's tortoise should have reached the finishing line by now. Like Mr B I would like some dates, including a confirmed date at which legislative change will come into effect. This is in no way a comment directed at any political party: the Act has been in force for 17 years through governments of different colours. In fact it is a plea (probably naïve) for party politics to be set aside and for collaborative debate.

Reform can be staged if necessary and it is important not to lose the opportunity to make good practical changes even if comprehensive longer term reform will take longer. The first stage will be to give more discretion to the courts and, at the same time, to action broader reforms to forensic mental health and cognitive impairment.

The number of people held under the Act may be small but as Ghandi put it, and as others have echoed many times: 'A nation's greatness is measured by how it treats its weakest members'. Furthermore, community protection also demands that we all work towards fairer and more effective interventions.

Neil Morgan

17 April 2014

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[7] Hansard, Legislative Council, 11 September 2012, p5423b-5424a.

[8] The parties listed as consulted in September 2012 (see above) were: Mental Health Commission; Disability Services Commission; Department of Corrective Services; Office of the Chief Psychiatrist; State Forensic Mental Health Service; Department of Health; and Mentally Impaired Defendants Review Board.