



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

24 April 2019

Tasmania Law Reform Institute

Dear Sir/Madam

Please accept the following comments and recommendations regarding (un)fitness to plead or stand trial.

Yours sincerely,

Michelle O'Flynn, Director

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About QAI

Queensland Advocacy Incorporated (QAI) is a member-driven and non-profit advocacy NGO for people with disability. Our mission is to promote, protect and defend through advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland.

Our Human Rights and Mental Health services offer legal advice and representation: the first, on guardianship and administration and the latter on mental health matters. Our Justice Support and NDIS Appeals programs provide non-legal advice and support to people with disability in the criminal justice system and to participants in NDIS Appeals. This individual advocacy informs our campaigns at state and federal levels for changes in attitudes, laws and policies, and it assists us to understand the challenges, needs and concerns of people who are the focus of this submission.

QAI's constitution holds that every person is unique and valuable, and that diversity is intrinsic to community. People with disability comprise the majority of our Board; their wisdom and lived experience of disability is our foundation and guide.

Recommendations

- QAI supports and recommends to this inquiry the 2014 position of the Australian Law Reform Commission ('ALRC'): that the test for fitness should be reformed consistently with the National Decision-Making Principles.¹
- People with intellectual impairments are capable of making decisions about their own lives. Intellectual impairment on its own, however defined, should not be a basis on which to deny anyone participation in criminal proceedings.
- The tests for fitness to plead and to stand trial should not be *de facto* tests of a person's cognitive capacity: that is, they should not be about a person's intellectual ability to comprehend specific aspects of legal proceedings and trial process.
- The tests should focus on a person's decision-making ability, with support, and in the context of the particular criminal proceedings which they face. That is, the tests for fitness should take into account the supports mandated by Article 12 of the *Convention on the Rights of Persons with Disabilities*.

¹ The Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws Report 124*, Recommendation 3-1: Reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines (see Recommendations 3-2 to 3-4) to ensure that: · supported decision-making is encouraged; · representative decision-makers are appointed only as a last resort; and · the will, preferences and rights of persons direct decisions that affect their lives.

Principle 1: The equal right to make decisions All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

Introduction

QAI's view is that the current common law and statutory tests for fitness for trial and to plead are discriminatory towards some people who have intellectual impairments. Regarding fitness, QAI supports the position of the Australian Law Reform Commission: namely, that the test for fitness should be restructured so that it is consistent with the National Decision-Making Principles.² The test should be "reformulated to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all".³ It is not controversial to suggest that even some lawyers, let alone those with no legal training, struggle to understand trial processes, yet the courts do not even apply the tests for fitness to run-of-the-mill defendants. The fitness tests are discriminatory because they treat some people with disability less favourably, placing an undue emphasis on a defendant's cognitive capacity to understand specific aspects of the legal proceedings and trial process. The tests place too little emphasis on a person's decision-making ability.

As the law in Tasmania currently stands, failure to meet any of the (un)fitness criteria may have devastating consequences for an accused. The *Presser*⁴ test used in Queensland certainly had and does have devastating consequences for accused such as our client 'Andrew'⁵ who from his late 'teens until his death spent more than 35 years in confinement as a result of alleged offences which, if proved in a criminal court, would not have been likely to have earned a

² The Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws Report 124*, Recommendation 3-1: Reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines (see Recommendations 3-2 to 3-4) to ensure that: · supported decision-making is encouraged; · representative decision-makers are appointed only as a last resort; and · the will, preferences and rights of persons direct decisions that affect their lives.

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³ The Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws Report 124*, p 194.

⁴ See Smith J in *R v Presser* [1958] VR 45 at 48

⁵ Pseudonym of an actual QAI client.

custodial sentence, or another client 'Brett', who spent years in a form of solitary confinement, separated at all times from other people by a Perspex screen.

At QAI we also know from experience that some people who are at risk of failing the test for fitness for trial, as it stands, will choose to plead guilty. They want to avoid the possibility of diversion into the forensic system and having to endure a considerably longer period of incarceration or community monitoring than they would have served if convicted for the alleged offence/s.⁶ QAI has represented clients who made precisely this choice, later vindicated by relatively short custodial sentences rather than having to endure forensic orders that likely would have mandated indefinite and usually very long periods in forensic facilities.

QAI's position is that the *Presser* and *Presser*-based tests are discriminatory because:

- these tests focus on an accused's cognitive capacity rather than their decision-making ability, and
- do not allow for decision-making support, as Article 12 of the CRPD mandates.
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Article 12 *Convention on the Rights of Persons with Disabilities* ('CRPD' or 'the Convention')

The UN *Convention on the Rights of Persons with Disabilities* sets out a rights-based rather than welfare-based approach to government provision in relation to people with impairments, and Article 12 mandates that people with disabilities must be able to exercise their legal capacity on an equal basis with others and that they are provided with the supports they need to do so. In 2013, Amhita Dhanda⁷ explained the drafting of Article 12 of the CRPD at a QAI conference on supported decision-making. Article 12, she said, is there because of a double standard at the heart of legal process.

We acknowledge that the impairments of the human body make for disabilities when social barriers exclude people. The legal regime of capacity does just that for persons with intellectual and psychosocial impairments.⁸

⁶ The Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws Report 124*, p 194-206.

⁷ Professor of Law at National Academy of Legal Studies and Research (NALSAR), Hyderabad. 2013. 'If Legal Capacity is Universal, Should Support be Particular'. Professor Dhanda was a co-author of Article 12 of the CRPD.

⁸ *Ibid.*

The law denies legal capacity to persons with disabilities, she explains, according to three different formulae. The first is based on status, and the second, on interests. If you are a person with intellectual, psychosocial or cognitive deficits, you do not have the capacity for a range of legal actions. In the second, 'interests-based' denial, 'we' decide what we consider to be good or bad for you, and what is unwise, bad or not otherwise desirable. These two forms of prohibition zero-in on the disability, and they are pointed.

Case study:

Mark (not his real name) was placed on a forensic order by the Mental Health Court for the alleged offences of breaching a domestic violence order and public nuisance, approximately three years ago. He has been diagnosed with schizophrenia. The public nuisance and breach of a domestic violence order charges did not involve violence against anyone.

Mark regrets that his charges were dealt with by the Mental Health Court as the forensic order has impacted on his freedom significantly. Mark feels that being on a forensic order is a disproportionate punishment for offences that would ordinarily receive low penalties. He is aware that if the same charges were dealt with in the Magistrates Court, he may have only received a fine or good behaviour bond. Under the forensic order he has been detained in hospital mental health wards and at the Park Centre for Mental Health in a secure setting for the past two to three years. While he has been able to spend some nights a week away from the Park recently, his freedom is still limited by the restrictions of the forensic order, such as reporting back to the Park by a certain time and undergoing drug tests. Being on a forensic order has made it more difficult for him to obtain employment, see his children or build new friendships.

Mark looks forward to the day when the forensic order will end and he can regain his freedom.

The third prohibition is linked to function, so, if you're entering into a contract you must understand the contract and its impact on you. If you're getting married you must understand the nature of the marriage ceremony, and what are your associated obligations, and so on. Lawmakers considered function-focused formulae to be non-discriminatory because they are not about denying legal capacity generally, but about, 'Can you understand this, can you perform this particular function, or not?'

The problems, argues Dhanda, are twofold. First, do we ask this question to everybody? That is, if we are saying that a prohibition is function-linked, then the question is one that should be asked uniformly of everyone. If we don't ask everyone, and if two similarly situated persons are not similarly treated then that treatment is discriminatory. Second, the justification behind the discrimination and exclusion commonly is to shield the person from harm, mischief, exploitation or abuse.

During the Committee deliberations, this apprehension, prejudice and fear came up again and again: an impulse that Dhanda described as ‘the Old Paradigm’ — the need to protect people with disability. The defenders of the Old Paradigm said, ‘Yes, it’s wrong and it’s discriminatory to deny capacity to all persons with intellectual and psychosocial disabilities, but you can’t say that there is nobody who doesn’t need to be protected’. The defenders put forward more and more horrendous scenarios:

“Alright” they said, “but what about this kind of person, or that sort of decision? Can you really say that this individual should also have legal capacity? They are few, but there are persons with disabilities who cannot make their own decisions, so denial or deprivation of legal capacity is okay”. Here is always someone, they said, who can’t perform the relevant function. They need to be looked after, they cannot have their own opinions, they need to be taken care of, and other people need to decide. It’s a prejudiced view, and one that justifies protection at the expense of autonomy.⁹

In Queensland

The Mental Health Court may determine that a person with intellectual impairment (for example) is unfit for trial. It may order that they be detained for treatment or care in the Forensic Disability Service, a prison-like facility adjacent to a number of prisons located in the suburb of Wacol, near Ipswich. The order is reviewed periodically at the Mental Health Tribunal, but may remain in place indefinitely, and potentially for a period much longer than the term of a sentence had the person been tried and found guilty of the offence. It is likely that the longer people are detained the more their capacities will diminish, particularly given the sterile environment and limited opportunities to use those capacities. While the courts have a duty to the public to manage risk, the cost to the defendant is high. The indefinite detention of those with intellectual impairments on the basis of a risk of harm to others is discriminatory. Those without mental or intellectual impairments are not, as a general rule, indefinitely detained on this basis.

QAI’s view is that people with intellectual impairments are no less capable than anyone of making decisions about their own lives, even if their cognitive impairment means that (all other things being equal) they may be less capable of understanding the relevant criminal law and trial process. Impairment on its own, however defined, is not, nor should be a basis on which to deny anyone participation in criminal proceedings.

With appropriate legal support, and if needed, decision-making support, all people with intellectual impairments are capable of participating in a trial process. Given that the outcome of the trial is so critical to their future liberty, the onus should be on the prosecution to

⁹ Ibid.

demonstrate that a defendant is not capable of participating and the courts should assess fitness with the provision of support taken into account.

Unfitness – a flawed rationale

The common law presumption is that everyone is capable of entering a plea or standing trial unless proven otherwise, and the great majority of defendants with intellectual impairments stand trial in the same way as every other accused. There is no express ‘disability exemption’ from the determination of guilt,¹⁰ although in its sentencing calculus the court may find that an offender’s impairment reduces their moral culpability and the relative weight it assigns to the retributive and deterrent components.¹¹

Despite the common law presumption of fitness, in some circumstances it may be necessary for a party or for the court itself to raise the question of the defendant’s fitness to plead or to stand trial. The court must exclude people as a protective measure¹² to ensure that a person cannot be tried for a crime unless they are capable of defending themselves’.¹³ Smith J in *Presser* set down the definitive test.¹⁴ An accused must be able to-

1. understand the nature of the charge
2. plead to the charge
3. understand the nature and follow the course of the proceedings
4. challenge jurors
5. understand the evidence and its implications

¹⁰ Petrella’s research in the US is old and in a different common law jurisdiction so it should be treated with caution, but it showed that, of criminal defendants with intellectual disability, 90% with mild retardation and 67% with moderate retardation were criminally responsible. Few people with more severe intellectual disability were charged, let alone be found criminally responsible. Anecdotally, in Queensland a person with intellectual disability charged with an indictable offence is more likely to be found unfit for trial than of unsound mind (which is linked to the person’s understanding of the alleged offence): R Petrella. Defendants with mental retardation in the forensic services system. R Conley et al. 1992. *The Criminal Justice System and Mental Retardation*. Baltimore: Paul Brookes.

¹¹ Capacity may be relevant, however, because the courts try to tailor sentences according to a person’s degree of moral culpability, according to the likely effectiveness of specific and general deterrence, retributive purpose, likely effect of incarceration on the person (if relevant) and prospects of rehabilitation: see *R v Verdins* [2007] VSCA 102 and *Muldrock v The Queen* [2011] HCA 39, in which the High Court held that sentencing principles of punishment and denunciation did not require significant emphasis in light of Mr Muldrock’s limited moral culpability for his offence.

¹² Thomson Reuters. *The Laws of Australia*. 9.3.1950.

¹³ Australian Law Reform Commission. 2014. *Equality, Capacity and Disability in Commonwealth Laws*, 159.

¹⁴ *R v Presser* [1958] VR 45.

6. make a defence or answer to the charge.¹⁵

The accused is not fit for trial if they do not satisfy one or more of these conditions. If they satisfy all but the last condition they may still be fit to enter a guilty plea. The courts have developed the fitness exclusion to:

- avoid inaccurate verdicts and unfairness to the accused.¹⁶
- maintain the moral dignity of the process. It would be an abuse of legal process to subject someone to a trial when he or she is unable to play any real part in that trial'.¹⁷

An accused is not entirely passive in the trial process: they must instruct the counsel they engage, enter a plea, follow proceedings, instruct or conduct a defence, and consider evidence if there is a trial. Even if they plead guilty, the accused must decide the plea and participate in sentencing.

The test focuses on the accused's cognitive abilities: comprehension, analysis, synthesis, understanding, communication skills and knowledge. The emphasis, as the Law Commission of the UK points out,¹⁸ is on the person's ability to understand rather than their ability to function or to do something: in other words, the emphasis is on the defendant's mental capacity. The test is unfairly discriminatory towards people with intellectual impairments.

CRPD Article 12 mandates that people with disabilities must be able to exercise their legal capacity on an equal basis with others and that they are provided with the supports they need to do so. The Australian Law Reform Commission's discussion paper on access to justice¹⁹ discusses the status of defendants with intellectual impairments in the courtroom, noting the common law's undue emphasis on a person's intellectual ability to understand specific aspects of legal proceedings and trial process and its lack of emphasis on a person's decision-making ability.²⁰

Ignorance of legal process does not necessarily undermine a person's ability to make judgements about their own interests. Who is better placed to make those judgements? Few non-lawyers can claim to have a clear grasp of court processes but the courts do not forbid their participation on that basis. The state already financially supports the duty lawyer service in

¹⁵ Smith J in *R v Presser* [1958] VR 45, 48.

¹⁶ Thomson Reuters, *The Laws of Australia* [9.3.1950].

¹⁷ Law Commission of England and Wales. 2010. *Unfitness to Plead*. Consultation Paper No 197, 4.

¹⁸ Law Commission of England and Wales. 2010. *Unfitness to Plead*. Consultation Paper No 197, 29.

¹⁹ The Australian Law Reform Commission, *op cit*, 158.

²⁰ *Ibid*, 7:14.

order to ensure that criminal defendants get basic advice and support in relation to often unfamiliar legal processes, and defendants accept that support without forfeiting their right to participate in the trial process or to decide their plea.

Lack of fitness - the often appalling consequences

At law, there is a clear distinction between the immediate court or tribunal -based processes that flow from a finding of fitness to plead, or a finding of fitness for trial, and the longer-term orders made by the relevant court or tribunal. The immediate result of a finding of fitness for trial is an adversarial and evidence-focussed determination of criminal responsibility that culminates in acquittal or a sentence framed by some combination of punishment, deterrence, rehabilitation, denunciation and community protection. The alternative path, depending on the jurisdiction, may be the framing of a supervision order, or it may be referral to a special court²¹ where proceedings are inquisitorial rather than adversarial, where no party bears an onus of proof, and the orders focus on treatment, habilitation and the management of risk to the person and the community.

In Queensland, the majority of defendants who the court has determined to be unfit have some form of intellectual impairment, and the majority of those found 'unsound' have some form of mental illness. It is important to distinguish the two. The first group may need habilitation and education, particularly in relation to offending behaviour, but intellectual impairment is not an illness. The second group are more likely to have a mental illness requiring treatment.

For both, the 'Forensic Order' pursuant to the *Mental Health Act 2016* (Qld) may require the person to stay in community but oblige them consistently to report their whereabouts and activities to a relevant authority, or, a Forensic Order may mandate detention. Depending on the jurisdiction, the terms of forensic orders may be indicative, or nominal, or, as in Queensland, indefinite, without limit. The purpose of the order may be in part therapeutic, but here in Queensland the detainee has no idea when, or if, they will be released. The substantive long-term effects are de-habilitation and institutionalisation, because in Queensland all but a few of the accused are placed into purpose-built facilities that in appearance and structure are little different to prisons. With lack of use, communication and other skills erode, and the transitioning detainee, many years down the track, must attempt to relearn them. The day-to-

²¹ In Queensland, matters may be referred to the Mental Health Court or the Mental Health Court itself may have determined fitness.

day support staff at the major Queensland facility have no skills in forensic behaviour support or habilitation and therefore the detention does not fulfill the purpose for which it was intended.

The *Presser* test or its statutory equivalents are imposed to ensure fairness at trial, but the long-term consequences are not fair when compared to the alternate process. A trial works with a higher standard of proof, so conviction and sentencing are less likely, and if criminal responsibility is established, the length of the sentence almost invariably is far less than the time spent subject to a forensic order.

A finding of unfitness is no 'get out of jail free card'. Failure to fulfil the protective *Presser* criteria may have devastating consequences for the accused, who may languish in forensic detention for longer than they would have had they been found fit and steered through the usual criminal court process. Once found unfit, it is likely that the person will find their liberty more constrained than it would have been had they entered a guilty plea and been sentenced accordingly.

In their submission to the ALRC Inquiry into *Equality, Capacity and Disability in Commonwealth Laws*,²² the Tasmanian Anti-Discrimination Commissioner observed that if determined unfit to stand trial, a person may 'end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts'. They 'will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed'.

Queensland's Mental Health Court determines (and the Mental Health Review Tribunal reviews) a term of forensic detention or other forensic order according to a therapeutic and risk calculus rather than punishment. A criminal sentence is finite, but a forensic order is open-ended, its termination depending on whether the person can later show fitness, and on whether the person can show themselves to be sufficiently low risk. If risk endures, so does the order. The Mental Health Court and the Mental Health Review Tribunal adjust their risk calculus to the person's known behaviour, to their compliance with the original order and with the rules of the detention centre.

According to anecdotal evidence, the staff at Queensland forensic facilities lack the skills to promote habilitation and reintegration, and while there is clinical expertise to develop behaviour support plans, there is a disconnect between the plans and their implementation. The plans are

²² See, for the final report, <https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf>

often extremely detailed and complex, but their implementation is left to unskilled support workers who do not read them anyway.

In addition, the artificial, hierarchical, structured living arrangements atrophies detainee's capacities and living skills. The longer a person stays in detention the *less* likely it is that they will ever emerge from it. It is almost impossible to prove a reduction in risk when the person's risk environment is so sterile and artificial. Extraneous factors play on risk too. No matter how accurately the Court/Tribunal predicts risk the calculation still depends upon the availability of accommodation and support outside forensic detention.

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