**A Kangaroo Loose in the Top Paddock: Criminal Justice, Mental Impairment and Fitness for Trial in the Northern Territory

Uluru Criminal Law Conference
31 August 2012**

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1. **Introduction**

There has been significant national attention in recent months directed to the indefinite incarceration of Aboriginal people with mental illness and cognitive impairment in the NT.[[2]](#footnote-2) There have been a number of Aboriginal men detained in jail for extensive periods, well beyond any sentence they may otherwise have served, under the Northern Territory’s provisions relating to mental impairment and fitness to be tried.

This paper examines some of the significant issues that arise in the application and operation of those provisions, with a particular focus on issues of fitness. After looking at the mechanics of laws governing unfitness, I will consider some of the reasons why the system is failing in the NT. Finally, I will make some suggestions for reform.

The law operating in the NT in relation to mental impairment and fitness to be tried is similar in many ways to most other Australian jurisdictions and mirrors most closely the regime operating in Victoria.[[3]](#footnote-3) I have not attempted an exhaustive review of interstate practice, but I do touch on common issues throughout and hope that my somewhat parochial focus will not disappoint those practitioners from Down South.[[4]](#footnote-4)

1. **Overview of the Northern Territory legislative scheme: Part IIA Criminal Code Act**

Part IIA of the *Criminal Code Act* (NT) (Part IIA) provides for ‘Mental impairment and unfitness to be tried’. The provisions apply to proceedings before the Supreme Court[[5]](#footnote-5) as well as committal proceedings.[[6]](#footnote-6)

* 1. ***Mental impairment***

Division 2 deals with mental impairment.[[7]](#footnote-7) Section 43C codifies the defence of mental impairment, along established lines: the defence is made out if, as a consequence of a mental impairment, the accused did not know the nature and quality of their conduct, did not know the conduct was wrong or was not able to control their actions. A finding of not guilty because of mental impairment can be agreed by the parties to the prosecution,[[8]](#footnote-8) although not in situations where a person is unfit to stand trial (such circumstances requiring that a special hearing be conducted).

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 unconditionally.[[9]](#footnote-9)

* 1. ***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 to instruct their counsel.[[10]](#footnote-10) Division 3 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,[[11]](#footnote-11) but can be dispensed with by the court if the parties to the prosecution agree that the accused person is unfit to stand trial.[[12]](#footnote-12)

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.[[13]](#footnote-13) If there is such reasonable prospect, the matter is to be adjourned for up to 12 months.[[14]](#footnote-14) Otherwise, the court is to hold a ‘special hearing’ within 3 months.[[15]](#footnote-15)

* 1. ***Special hearings***

Division 4 provides for special hearings for accused persons found not fit to stand trial. At a special hearing, a jury determines (through a process that is conducted as nearly as possible as if it were a criminal trial)[[16]](#footnote-16) whether an accused person:

(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.[[17]](#footnote-17)

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.[[18]](#footnote-18)

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.[[19]](#footnote-19)

* 1. ***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.[[20]](#footnote-20)

An 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.’[[21]](#footnote-21)

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’.[[22]](#footnote-22)

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.[[23]](#footnote-23) However, a court cannot commit a person to an ‘appropriate place’ other than a prison (or provide for a person to receive treatment or services in an ‘appropriate place’) unless the court has received a certificate from the CEO (Department of Health) stating that facilities or services are available in that place for the custody, care or treatment of the person.[[24]](#footnote-24)

Supervision orders are for an indefinite term,[[25]](#footnote-25) but are subject to review,[[26]](#footnote-26) reporting at least annually[[27]](#footnote-27) and can be varied or revoked.[[28]](#footnote-28) 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.[[29]](#footnote-29)

There is a presumption in favour of release at the end of the nominal term. On completing a major review, the court must release a supervised person unconditionally ‘unlessthe 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.’[[30]](#footnote-30)

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.[[31]](#footnote-31) 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.[[32]](#footnote-32)

* 1. ***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.[[33]](#footnote-33)

1. **The meaning and scope of unfitness for trial**

In this paper I want to focus primarily on issues arising in relation to fitness for trial and some of the practical consequences that follow under the regime of ‘supervision orders’ in the NT. I note that these practical consequences are the same for people who are found not guilty by reason of mental impairment and often both issues arise as a result of a person’s mental illness or cognitive impairment.

Don Grubin provides this summary of the origins of the concept of fitness for trial in the medieval courts:

Those who could not offer a plea to the court, and those who would not do so, posed a similar problem for an adversarial process which required the accused to respond to allegations made against him. In order to overcome these difficulties, the recalcitrant individual was given three warnings, and then confined in a narrow cell and starved until he either reconsidered his position or died, a technique called the *prison forte et dure*; from 1406 simple withholding of food was replaced by the *peine forte et dure* in which the mute prisoner was both starved and gradually crushed under increasing weights, again until he was either dead or agreed to enter a plea.

Before resorting to such extreme practices, the court needed to decide whether the defendant who would not plead was mute of malice, in which case he was subjected to the *peine*, or mute by the visitation of God and hence spared the *peine*, with a plea of not guilty entered on his behalf on the assumption that that was how he would have pleaded had he been able. In the early courts of England, therefore, three types of individuals became closely linked: the insane, the deaf-mute, and the individual who, for more calculated reasons, decided it was not in his best interests to enter a plea.[[34]](#footnote-34)

Things have moved on a little since 1406, although as I explain 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 potentially held in conditions that are oppressive, inhumane and degrading.

More recently, the significance of a person’s fitness for trial has been understood as integral to the right to a fair trial:

Traditionally, an accused person has not been put on trial unless fit to plead because of ‘the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing. [footnote: *Proceedings in the Case of John Frith for High Treason* (1790) 22 Howell’s State Trials 307 at 318] That statement may indicate a positive and independent right on the part of an accused not to be tried unless fit to plead. It is unnecessary to decide whether that is so. It is sufficient to approach the… matter on the basis that the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead.[[35]](#footnote-35)

At common law, the basis upon which a person can be found to be unfit for trial is not limited to reasons of mental illness or impairment.[[36]](#footnote-36) The accepted test for unfitness for trial is the *Presser* test.[[37]](#footnote-37) The High Court has distilled the test for ‘fitness’ as requiring the ability:

* + - * 1. to understand the nature of the charge;
				2. to plead to the charge and to exercise the right of challenge;
				3. to understand the nature of the proceedings, namely that it is an inquiry as to whether the accused committed the offence charged;
				4. to follow the course of the proceedings;
				5. to understand the substantial effect of any evidence that may be given in support of the prosecution; and
				6. to make a defence or answer the charge.[[38]](#footnote-38)

1. ***Distinguishing fitness to plead and fitness for trial***

Chris Bruce SC has suggested:

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* test 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.[[39]](#footnote-39)

A distinction between fitness to plead and fitness to be tried is also made by Hayne J in *Eastman v The Queen*.[[40]](#footnote-40) I have, however, been unable to find further case law that considers the distinction.

It seems to me that the best approach in considering whether a person is ‘fit to plead’ is to apply those parts of the *Presser* test that are relevant to sentencing proceedings, rather than consider there to be a separate test of fitness to plead.[[41]](#footnote-41) There are a range of variables that need to be considered in each case such that, for example, a client may be fit to plead guilty to a simple assault while unfit for trial in a case involving complex forensic evidence.

The difficult, and often finely balanced, matter that arises will be the extent to which a practitioner is able to take effective instructions. While the requirements of ‘fitness to plead’ may be less onerous than ‘fitness for trial’, ensuring that a client is able to provide instructions – including understanding the options available to them so that they can make an informed decision about pleading guilty – will often remain challenging. The experience and skill of the practitioner, in particular their ability to communicate effectively often complex legal concepts and work with interpreters, can be highly significant.

1. ***A ‘commonsense’ approach***

It is well recognised that, if literally applied, the test of fitness for trial might demand a high degree of education and intelligence: consider, for example, the requirement that an accused person ‘follow the course of proceedings’. Grubin recounts a story, ‘perhaps apocryphal, of a High Court judge who observed that if comprehension of court proceedings was a prerequisite for participation in a trial then most of those in court, including members of the legal profession would be considered unfit to plead’.[[42]](#footnote-42)

A ‘reasonable and commonsense’ approach is therefore required.[[43]](#footnote-43) The High Court has held:

The test looks to the capacity of the accused to understand the proceedings, but complete understanding may require intelligence of quite a high order, particularly in cases where intricate legal questions arise. It is notorious that many crimes are committed by persons of low intelligence, but it has never been thought that a person can escape trial simply by showing that he is of low intelligence.[[44]](#footnote-44)

An accused need not have sufficient capacity to make an able defence or ‘to act wisely or in his own best interest’ and a person will not be unfit for trial simply because they are unable, unaided, to understand the proceedings so as to be able to make a proper defence.[[45]](#footnote-45)

It is necessary to take into account the fact that a person will be represented by counsel. In *R v M*,[[46]](#footnote-46)de Jersey CJ held that in order to be tried fairly, a person need not ‘appreciate the nuances of court procedure or the intricacies of the substantive law’.[[47]](#footnote-47) His Honour stated:

Fitness for trial, in relation to the capacity to instruct counsel, posits a reasonable grasp of the evidence given, capacity to indicate a response, ability to apprise counsel of the accused’s own position in relation to the facts, and a capacity to understand counsel’s advice and make decisions in relation to the course of the proceedings. It does not extend to close comprehension of the forensic dynamics of the courtroom, whether as to the factual or legal context. For a person represented by counsel, fitness for trial of course assumes that counsel will represent the client on the basis of the client’s instructions. That the giving of such instructions may take longer because of the intellectual deficit is a feature with which the courts should and do bear.

1. ***Deafness as a basis for unfitness***

A number of cases have dealt with the position of Deaf people who, by reason of their disability and the lack of an appropriate interpreter, are unable to effectively communicate in a legal setting. Indeed, some of the earliest common law authority deals with ‘deaf mute’ people, for whom the issue was often conflated with questions about their mental capacity.[[48]](#footnote-48)

This is an issue that unfortunately arises regularly in the Northern Territory. The North Australian Aboriginal Justice Agency (NAAJA) has a number of clients who are Deaf and, while able to communicate with family and community members at a ‘functional’ level through Aboriginal sign language,[[49]](#footnote-49) ‘homesign’,[[50]](#footnote-50) gesture and mime, do not speak a sign language such as Auslan[[51]](#footnote-51) that would enable them to effectively communicate in formal settings, including legal ones.

In some cases, intensive work over a number of sessions with a skilled interpreter, an experienced lawyer and often family members, can enable sufficient communication for a person to be fit for plea and/or trial. However, this is not always the case.

This was most famously so for Roland Ebatarintja. In 1995 Mr Ebatarintja was charged with murder and his trial was permanently stayed on the basis that he was a ‘deaf mute’ and unable to communicate and follow legal proceedings.[[52]](#footnote-52) Some years later, in 2002, Mr Ebatarintja was charged with a number of assaults, including one that caused grievous harm. He was again found unfit to be tried but was now subject to Part IIA of the *Criminal Code* (NT) which had since been introduced. Its terms are ‘neutral’ in that they are not limited to any particular cause of unfitness. Mr Ebatarintja was accordingly subject to a supervision order[[53]](#footnote-53) – a variant of which continues to operate to this day.

This issue has also arisen in South Australia, where the test for determining fitness requires a link to a disorder or impairment of a person’s ‘mental processes’.[[54]](#footnote-54) Despite this requirement, in *R v Abdullah*,[[55]](#footnote-55) the South Australian Supreme Court held that the provisions apply to Deaf people. Duggan and Besanko JJ,[[56]](#footnote-56) found that Mr Abdullah’s deafness was capable of constituting an impaired ‘mental process’within the meaning of the legislation. This result seems somewhat surprising (and for Deaf people, doubtless disturbing), but was consistent with the common law in relation to unfitness which had treated ‘deaf mute’ people ‘insane’ for the purposes of determining fitness.[[57]](#footnote-57)

1. ***Other forms of disability***

While deafness is the most common physical disability that has resulted in people being found unfit for trial, it is worth noting that other forms of disability may lead to the same result. The issue is a peson’s ability to communicate and participate in the trial process.[[58]](#footnote-58) Mark Ierace SC has noted:

As our population becomes older, we are likely to encounter what I call medical unfitness: that is, accused who cannot fairly partake in a trial process because of a physical disability, such as a poor heart condition.[[59]](#footnote-59)

1. ***Language & Culture***

A number of cases have also considered the fitness of people who, by reason of language and cultural issues, have been unable to receive a fair trial.

Again, this is an issue that is a very live one in the NT. Many Aboriginal people, particularly those living in remote communities, speak English only as a second or third language, behind Aboriginal languages. In some of the Top End communities that are serviced by NAAJA, almost all people appearing in the local circuit (or ‘bush’) court, require an interpreter.

Despite the best efforts of our Aboriginal Interpreter Service, there are many times when an appropriate interpreter simply cannot be found, or cannot service the demand. A recent trial in the Supreme Court was adjourned (an application for a permanent stay being refused), because of the lack of an interpreter in the Anindilyakwa language.[[60]](#footnote-60) Anindilyakwa is spoken by over 1,000 people on Groote Eylandt, off the north-east of Arnhem Land. The potential application of Part IIA to the case was not raised but it would appear that it may have been applicable, particularly if the inability to find an interpreter had continued.

The matter of *Ngatayi v The Queen*[[61]](#footnote-61) involved an applicant described as a ‘full blood’ and ‘tribal aboriginal’ from Western Australia who was tried for murder. His counsel submitted that the accused was not capable of understanding the proceedings because he could not ‘be made to understand that it is a defence to a charge of wilful murder that the accused was drunk and had not formed an intention to kill’.[[62]](#footnote-62) The essence of the submission was that the accused did not

understand white men’s law. In his law a man who kills is always guilty and there is no amelioration. He just cannot understand that in our law if a man is drunk and kills we have gradations of wilful murder, murder, manslaughter.[[63]](#footnote-63)

It is worth noting that the issue here was not the lack of an interpreter, but an issue of cultural incomprehensibility.

While deciding the matter under the Western Australian statute that existed at that time, the High Court applied the common law principles applicable to fitness for trial, including *Presser*.[[64]](#footnote-64) The Court found that the accused was sufficiently able to make his defence: ‘[t]he fact that the applicant could not understand the law under which he was tried did not mean that he was not able to make a proper defence with the assistance of counsel’.[[65]](#footnote-65)

In *R v* *Grant*,[[66]](#footnote-66) both the lack of a suitable interpreter and cultural issues were issues preventing the accused from being able to be tried in the ordinary course, the Court concluding that ‘it was impossible to convey to the accused an adequate synonym in his dialect of the terms “unlawful”, “guilty”, and “not guilty”, or to explain their meaning to him.’[[67]](#footnote-67)

The issue also arose in England in the matter of *Begum*,[[68]](#footnote-68) in which the appellant’s trial for murder (which had proceeded by way of a plea of guilty) was found to be a nullity, having been conducted without a competent interpreter. The appellant had been born in a rural district of Pakistan and had, since moving to England 16 years earlier, acquired very little command of the English language.

1. **The legal and practical consequences of unfitness**

People found unfit to be tried in the NT are liable to be subject to a regime of supervision orders. As already noted, the regime is the same for people found not guilty because of mental impairment.

It is this regime of supervision – and the practical limitations to its implementation in the NT – that has been the source of the national attention to which I referred in the introduction. This section looks at why the system is failing in its application and suggests what we might do about it.

1. ***Indefinite supervision & nominal ‘terms’***

In the NT, supervision orders are for an indefinite term,[[69]](#footnote-69) subject to regular reporting[[70]](#footnote-70) and non-mandatory periodic review.[[71]](#footnote-71)

When a supervision order is made, a ‘term’ is set at the end of which a major review is conducted by the Supreme Court. The nominal term is equivalent to the sentence of imprisonment that would have been appropriate if the person was found guilty.[[72]](#footnote-72) Despite the indefinite nature of supervision orders, the period of the nominal term is still potentially significant.

First, the nature of a major review that occurs at the end of that term carries a presumption in favour of release. On completing a major review, the court must release a supervised person unconditionally ‘unlessthe 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.’[[73]](#footnote-73) The position is different in relation to the outcome of a *periodic* review. A person on a custodial supervision order cannot be released unconditionally after a periodic review: ‘the best outcome that the person can hope for is for an order varying the supervision order to a non-custodial supervision order’.[[74]](#footnote-74)

Second, the fact that a person has ‘done their time’ under supervision may be a factor that is relevant when the court considers what order to make at the end of the term. The matters that a court is to take into account include ‘any other matters the court considers relevant’.[[75]](#footnote-75) If a person has been subjected to a greater deprivation of their liberty than otherwise would have been the case if they were fit to be tried, this may a factor that the court is prepared to take into account.

Third, the setting of a nominal term has some symbolic value that can be useful in broader advocacy. There is a particular sense of injustice if a person remains subject to custodial supervision longer than the period of any jail sentence that they would have received in the ordinary course. This may bring a greater sense of urgency to finding alternatives to custodial supervision for a particular person and also be a basis for lobbying for more resources to be made available. It is a practical reality – certainly in the NT if not in all jurisdictions - that a court is significantly constrained in its choices in matters involving supervision orders by the resources that the Department of Health is prepared to make available. Effective advocacy outside the courtroom can therefore be an important part of getting a good result for a client who finds themselves subject to a supervision order.

In any event, the process of setting a ‘term’ – which I note is not unique to the Northern Territory[[76]](#footnote-76) - is, in my view, somewhat confused.

The ostensible 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 approach suggests that there is a desire to hold people responsible and see them punished that needs to be satisfied such that a person isn’t perceived to ‘get off more lightly’. This makes little sense in the context of people who are not able to form the requisite mental state to commit an offence, or are not able to understand the process under which they are being dealt.

Attempting to identify a hypothetical sentence also carries with it artificiality and unfairness for people unfit to be tried or not guilty because of mental impairment. For example, a person is unable to get a discount for a plea of guilty and may be unable to express remorse. In *R v Mitchell*,[[77]](#footnote-77) 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.[[78]](#footnote-78)

On the other hand, in cases of people with mental illness or cognitive impairment, specific and general deterrence should play no role in setting the sentence and their moral culpability may be considered to be low.[[79]](#footnote-79)

Particularly in cases where a person lacks criminal responsibility, the framework of sentencing is, in my view, simply unhelpful and inappropriate. Once it is established that a person lacks criminal responsibility, the role of the criminal justice system should be considered to be at an end. This is an issue that clearly requires re-thinking and I return to it later in the paper.

1. ***‘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.[[80]](#footnote-80) 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.[[81]](#footnote-81)

There is presently no forensic mental health facility in the NT for people on custodial supervision orders.

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 and has the potential to further erode a person’s mental health. It is also difficult to justify incarceration of persons whom we deem not subject to criminal penalty in a facility intended to punish.

Of particular concern is that the Darwin Correctional Centre has no appropriate place for people with mental illnesses or significant cognitive impairment to be held humanely. It is already acknowledged that regular prisoners on remand in the NT are held in conditions that do not meet basic human rights standards.[[82]](#footnote-82) Prisoners with ‘high needs’ are subject to conditions that are far worse and frankly disgraceful. They are locked down alone in their cell for at least 17 hours each day and when not locked in their cell, generally have access only to a small concrete courtyard that is walled in on all sides. They rarely have contact with other prisoners. It is oppressive, inhumane and degrading: were it not making light of the situation, it might be described it as ‘medieval’.

It is also important to note that 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 have ended up spending more time in jail than if they had been convicted and sentenced.

Take, for example, the case of Christopher Leo, highlighted on ABC’s Lateline. At the time of the story, Mr Leo had spent over 5 years in prison for an assault for which the judge hearing his case, the former Chief Justice Brian Martin, said he would ordinarily have sentenced him to a year in prison. Of Mr Leo’s ongoing incarceration, his guardian, Ian McKinlay said: ‘That would be torture for him. For an Indigenous person to be kept in that type of an environment, not being able to get out to country and family, that would be as cruel as you can get’.[[83]](#footnote-83)

That such a situation is grossly unjust barely needs stating. It is a blight on our system of justice in the NT and makes a mockery of the ‘humanity of the law’ that is meant to underpin our approach to those unfit to be tried.

1. ***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. Work has commenced on a new correctional ‘precinct’ to be built in Holtze on the outskirts of Darwin, which is to include a Mental Health Behavioural Management Facility specifically intended to accommodate people on custodial supervision orders. The facility will be physically separate from, but in close proximity to, 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 sorely needed, but there are a number of concerns about how it will be used. In particular, 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 is a real danger that the facility will be used as the ‘one size fits all’ response to people on custodial supervision orders. There are currently no other ‘appropriate places’ made available to people on custodial supervision orders. If the Government is content to keep people in prison, it will presumably not be inclined to provide a range of options in addition to the Mental Health Behavioural Management Facility.

It would also seem likely to operate as a disincentive to the Government making other highly-supervised non-custodial options available for people with high needs. Given the expense and difficulty that government faces in in the NT in providing appropriate options for people on non-custodial supervision orders who require high levels of supervision and care, the temptation to make greater use of the Mental Health Behavioural Management Facility will be significant. This would then leave 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.

Another serious concern is how the facility will deal with the cultural issues raised by the presence of Aboriginal people. Home and country are just as important to Aboriginal clients who have mental health and impairment issues. It is a concern that clients from Central Australia may end up in the Top End in the Holtze Facility and not have the opportunity to remain connected to family and country.

1. ***Secure Care Facilities***

Another potentially relevant local development is the establishment of two Secure Care Facilities in the NT: one in Darwin and one in Alice Springs. These facilities have 16 beds in each, with 8 for juveniles and 8 for adults. The facilities have been built but are not yet operational.

The Department of Health describes the secure care setting as being ‘created for the delivery of intensive therapeutic assessment and interventions’.[[84]](#footnote-84) They are designed to both detain people and provide a therapeutic environment.

In short, for children, the facilities are to operate as a temporary option of last resort for children in the care of the Minister who are at serious risk of harm to self or others and cannot be safely accommodated elsewhere.[[85]](#footnote-85) For adults, they are intended to accommodate people with complex needs arising out of cognitive impairments and intellectual disabilities, who likely to present serious harm to themselves or others or represent a substantial risk to the community and need intensive therapy.[[86]](#footnote-86)

The adult facilities are not designed primarily to accommodate people under Part IIA supervision orders. However, there does not seem to be any reason why these facilities cannot be made available for people subject to supervision orders under Part IIA. While they are clearly a ‘high end’ option, they are a significant improvement on holding people in the general prison, particularly in the remand section.

1. ***One size fits all unfit***

In most Australian jurisdictions, including the NT, the regimes that apply to supervise and potentially detain people apply regardless of the basis for unfitness: mental illness, cognitive impairment, physical disability and language or communication issues.[[87]](#footnote-87)

In the case of Deaf people or people who are Deaf and mute, as I have touched on earlier, this follows in the tradition of the common law that effectively treated them as ‘insane’. I suggest that it is time we took a different approach.

That a person can be found unfit for reasons other than mental illness or cognitive impairment seems uncontroversial enough. The issue is, however, what then should be done? In my view, it is simply not appropriate to subject all persons found unfit to the same regime and doing so can produce perverse and unfair results.

I discussed earlier the South Australian decision in *R v Abdullah*,[[88]](#footnote-88) in which a majority of the South Australian Supreme Court held that deafness constituted a disorder or impairment of a person’s ‘mental processes’. The result of this was that a Deaf person was subjected to the South Australian regime of supervision. Debelle J dissented, drawing a distinction between the finding that a person is unfit to stand trial and the consequences of that finding. His Honour held that ‘even if it is correct to say that the common law held that a deaf mute who was unfit to plead was insane, it does not follow that it is intended that [the South Australian regime] applies to that person’.

Debelle J noted that the regime of supervision and reporting for persons found to be unfit focuses on the mental condition of a defendant and ‘[r]eports on mental condition are not consistent with the defendant being unfit to plead by reason of a physical condition which does not cause a disorder or impairment of mental processes’.[[89]](#footnote-89)

In the NT, the position is clear. Part IIA of the *Criminal Code* (NT) is generally expressed without reference to the cause of unfitness and does not require any link to a disorder or impairment of mental processes. The Second Reading Speech described the provisions relating to fitness as follows:

The fitness provisions deal with the situation where fairness cannot be achieved because of the condition of the accused. Factors such as the inability to understand the nature of the trial or being unable to understand the substantial effect of the evidence presented mean that a person cannot be fairly tried for an offence with which they have been charged. This inability may arise from a number of different causes. It can obviously arise in some instances where a person has a mental illness although not in all cases. It may arise in the case of an intellectually disabled person; there may be cases where the accused is suffering from severe physical illnesses at the time of the trial. There are a wide range of conditions that must be taken into account in provisions of this nature and the law must provide some means of dealing with those situations.

I accept that the law ‘must provide some means’ of dealing with situations in which people are found unfit for trial. But I question whether the same means are appropriate for all cases.

The regime of supervision orders is generally an appropriate one for people who cannot be held criminally responsible and are not appropriately subject to criminal punishment but, because of mental impairment, continue to pose a danger to the community. It is clearly designed for such cases, with reports focusing on ‘diagnosis and prognosis of the accused person’s mental impairment, condition or disability’,[[90]](#footnote-90) ‘details of the accused person’s response to any treatment, therapy or counselling’[[91]](#footnote-91) and ‘a suggested treatment plan for managing the accused person’s mental impairment, condition or disability’.[[92]](#footnote-92) A court must not make an order releasing a person from supervision or reducing the supervision to which they are subject without considering two reports prepared by a ‘psychiatrist or other expert’.[[93]](#footnote-93)

The focus of the regime is on community safety. The principle that underlies decisions in relation to supervision orders 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’.[[94]](#footnote-94) This seems unexceptional enough, but here’s the rub. In general (and leaving aside regimes applicable to serious sex offenders that exist in some jurisdictions) a person who is found guilty of an offence receives a sentence that takes into account protection of the community and risk and when they have done their time they are released.

For those practising in the criminal law, the reality of the ‘frequent flyer’ or recidivist offender is all too familiar. 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 that determines their sentence. At the end of their sentence, they get out of jail (and if not on parole, they are released without any restrictions) and, more often than not, go on living the same kind of life, with the same elements of risky behaviour.

However, a person who is unfit to be tried but found to have committed the offence is liable to indefinite supervision. This restricts their liberty in a range of ways, most seriously by detaining them in prison. They cannot simply serve their time. To be returned to freedom they must show, in essence, that they are not an unjustifiable risk to the community. This is the case even if their unfitness is completely unrelated to any risk that they may pose to the community (most starkly so in cases where a person is unfit because of language or communication issues). It is a standard to which those fit to be tried are not subject.

While the legislation requires a balancing between the freedom of the individual and the protection of the community, there is, in my view, a tendency to risk aversion in practice. This is understandable: nobody wants to have approved the release of a person who then seriously re-offends. But it can operate to the significant disadvantage of people subject to the regime and has, in my experience, resulted in a number of clients spending many more years in prison than their ‘fit’ (but possibly equally ‘risky’) counterparts.

1. **Options for reform**

A range of changes should be considered for the NT and an extensive review of the operation of Part IIA of our Criminal Code, involving stakeholder and expert consultation, is long overdue.

1. ***Mental impairment***

In the case of people who are found not guilty by reason of mental impairment, they should no longer be a part of the criminal justice system. Both conceptually and practically there are significant shortcomings with the current approach. Bernadette McSherry has argued:

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.[[95]](#footnote-95)

I agree. It is far from ideal, as a matter of principle and in practice, for cases in which mental impairment has been made out to continue to be 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, with regulation and oversight by a multi-disciplinary tribunal which can bring an inquisitorial approach, particularly to issues of ongoing management. This is the approach that is taken, for example, in NSW.

I 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. Any alternative therefore needs to be a robust one.

1. ***Limiting terms***

I also think there is a strong case for introducing ‘limiting terms’ rather than having a system of indefinite supervision orders. The length of terms should be dictated by the need to protect the community, balanced against the principle that a person’s liberty should be subject to the minimum restriction necessary. The system should more clearly place an onus onto the state to justify continuing any restriction on a person’s liberty.

It would be hoped that the practical effect of such a change would be to place greater pressure on government departments to make suitable arrangements to support a person in the community at the end of an order. By having a clear end date, greater planning towards a person’s release from supervision can be made. In practice I have seen a number of cases in which there has been a disturbing lack of long-term planning that would have enabled a person to be released from prison much sooner. It seems to me that the indefinite nature of orders is a part of this (as well as gross under-resourcing within the relevant government departments).

1. ***Resources for more custodial and non-custodial options***

There is an urgent need for custodial options other than prison. We cannot wait for the ‘Holtze solution’ in 2014 or 2015. It is not yet clear the extent to which the Secure Care facilities will be made available for people who require custodial supervision, but given the disgraceful conditions that are otherwise faced by prisoners with high and complex needs arising out of mental illness and cognitive impairment, it is imperative that they are. Holding mentally unwell people in the remand section of Darwin prison is a gross violation of their human rights. It must not be allowed to continue.

There is also an urgent need for more resources for non-custodial management and services – particularly mental health services – for people on supervision orders. There are some very dedicated and professional people working in this area. I do not always agree with them but I am well aware of the challenges they face. These can be very difficult cases and the lack of resources (and therefore options) does not make them any easier.

1. ***Resources and commitment to communication with Deaf people***

For Deaf Aboriginal people who speak limited or no Auslan, a significant issue is finding a skilled interpreter and giving them the time to establish communication with the person. This can involve building trust and establishing points of reference, as well as the Deaf person learning new signs and the interpreter learning an individual’s unique signs.

Ideally, this work should happen independently of the criminal justice system – for example, through the use of interpreters by a range of government service providers (particularly health services and Centrelink). Unfortunately there is a low level of use of interpreters and significant reliance on family and other community members to ‘make do’. This ties in with a much larger issue about the right of Deaf people to fully participate in society, including by being able to communicate with government agencies, and any real change will require a significant shift in attitude and practice, along with a commitment of resources.

1. ***Risk assessment and the ‘one size fits all’ approach***

I have highlighted the problems associated with risk assessment for people who are not criminally responsible, having been found not guilty because of mental impairment or unable to defend themselves at trial. Particularly for those who are unfit to be tried, the current approach arguably discriminates against people on the basis of disability (and in some cases on the basis of race) by requiring, in effect, that they show they are not dangerous before they are freed from supervision. This is not a test that those fit to be tried and criminally responsible are required to meet.

I suggest that it is time that we re-examine our approach to unfitness that treats all those unfit, and those who are not unfit but not guilty because of mental impairment, in the same way. The Australian Law Reform Commission considered problems of communication for Aboriginal people in the criminal trial process in its report into Aboriginal customary law and suggested:

The problems created by incomprehension of the nature of a guilty plea and of the trial that some traditional Aborigines suffer from are no reason for applying a procedure designed for mentally ill persons, which may result in their detention without trial.[[[96]](#footnote-96)] Nor are they a reason for in effect exempting such a person, through a pre-trial procedure, from the application of the criminal law. But such incomprehension is a good reason for requiring the prosecution case to be made out. By definition, in such cases a plea of guilty is likely to be unreliable, even meaningless. Accordingly it should be provided that, in a criminal proceeding against an Aboriginal defendant who appears to the court not to be fluent in the English language, the court should not accept a plea of guilt unless it is satisfied that the defendant sufficiently understands the effect of the plea, and the nature of the proceedings. If necessary, the court should adjourn the proceedings to allow legal advice or an interpreter to be provided, to assist in explaining the plea and its effect. This does not mean that the defendant needs to have a lawyer’s understanding of the plea or the proceeding, only that the level of understanding should be sufficient to justify the trial proceeding on the basis of a guilty plea. If this does not exist, a plea of not guilty should be entered. This provision should apply even where the defendant is represented, although the existence of legal representation will assist in ensuring that the basic level of understanding required for a guilty plea exists.[[97]](#footnote-97)

The suggestion that persons unfit by reason of language or communication should be subject to the criminal law with effectively only procedural modifications is a controversial one and departs significantly from the common law in relation to unfitness that I have discussed above. But I think we *should* look more closely at when it may be appropriate to subject people to the criminal law and whether we are really showing any fairness to those unfit to be tried by subjecting them to a potentially more onerous scheme that can restrict their liberty indefinitely.

I am confident that a number of my clients would rather have had a straight sentence, do their time and be free, than be subject to ongoing supervision simply because they are Deaf or because they had a mental illness that made them unfit at the time of their case. I don’t think they have any trouble understanding that they did the wrong thing when they committed their offence. I don’t think they would fail to understand that, if they were simply sent to jail, that this was punishment for having done the wrong thing. What they struggle to understand is why everyone else gets to do their time and go home, but they remain in custody or under strict supervision. I still haven’t figured out how to explain this to them.

1. Principal Legal Officer, North Australian Aboriginal Justice Agency. These are my views and not those of NAAJA. Parts of this paper are drawn from a paper I gave with Michelle Swift (Forbes Chambers) at the 2011 conference of the Criminal Law Association of the Northern Territory (‘A judge short of a full bench: mental impairment and fitness to plead in the NT criminal legal system’) and I gratefully acknowledge her intellectual DNA. Thanks also to Ruth Barson for her helpful comments on a draft of the paper. [↑](#footnote-ref-1)
2. See, for example, coverage on the ABC: <http://www.abc.net.au/lateline/content/2012/s3532797.htm>; <http://www.abc.net.au/am/content/2012/s3532890.htm>; <http://www.abc.net.au/radionational/programs/lawreport/nt-indefinite-detention-hca-challenge/4151268>; <http://www.abc.net.au/radionational/programs/lawreport/indefinite-detention-in-nt/3983208> . See also the work of the Aboriginal Disability Justice Campaign: <http://www.pwd.org.au/systemic/adjc.html>. [↑](#footnote-ref-2)
3. *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). [↑](#footnote-ref-3)
4. For those seeking a detailed overview, see the NSW Law Reform Commission ‘People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences’, Consultation Paper 6, January 2010, available at: <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp06toc>. For discussion of some of the practical and ethical issues arising in these matters, I can also recommend the papers available online through the NSW Public Defenders Office website: <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_papersbypublicdefenders>; and <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_confpapers>. [↑](#footnote-ref-4)
5. ‘Court’ is defined as the Supreme Court: s 43A. Note that the Northern Territory does not have an intermediate District or County Court. [↑](#footnote-ref-5)
6. Committals are dealt with by s 43M. In summary matters, issues of mental illness or mental disturbance are dealt with under the *Mental Health and Related Services Act* (NT). Where a person is unfit for trial in relation to summary matters, the common law applies and a stay can be sought: see *Pioch v Lauder* (1976) 27 FLR 79. [↑](#footnote-ref-6)
7. ‘Mental impairment’ is defined in the *Criminal Code Act* (NT) as including ‘senility, intellectual disability, mental illness, brain damage and involuntary intoxication’: s 43A. [↑](#footnote-ref-7)
8. Section 43H. [↑](#footnote-ref-8)
9. Section 43I(2). [↑](#footnote-ref-9)
10. Section 43J. [↑](#footnote-ref-10)
11. See ss 43L; 43P. [↑](#footnote-ref-11)
12. Section 43T(1). [↑](#footnote-ref-12)
13. Section 43R(1). [↑](#footnote-ref-13)
14. 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). [↑](#footnote-ref-14)
15. Sections 43R(3), (9)(b) [↑](#footnote-ref-15)
16. Section 43W(1). [↑](#footnote-ref-16)
17. Section 43V. [↑](#footnote-ref-17)
18. Section 43X(2). [↑](#footnote-ref-18)
19. Section 43X(3). [↑](#footnote-ref-19)
20. Section 43ZA(1). [↑](#footnote-ref-20)
21. Section 43ZM. [↑](#footnote-ref-21)
22. Section 43ZA(1)(a). [↑](#footnote-ref-22)
23. Section 43ZA(2). [↑](#footnote-ref-23)
24. Section 43ZA(3). [↑](#footnote-ref-24)
25. Section 43ZC. [↑](#footnote-ref-25)
26. Section 43ZG provides for a major review and s 43ZH provides for periodic review. [↑](#footnote-ref-26)
27. Section 43ZK. [↑](#footnote-ref-27)
28. Section 43ZD deals with variation or revocation. [↑](#footnote-ref-28)
29. Section 43ZG. [↑](#footnote-ref-29)
30. Section 43ZG(6). [↑](#footnote-ref-30)
31. Section 43ZN(2)(a). [↑](#footnote-ref-31)
32. Section 43ZN(2)(b). [↑](#footnote-ref-32)
33. Section 43ZO. [↑](#footnote-ref-33)
34. Don Grubin, ‘What Constitutes Fitness to Plead?’ [1993] *Criminal Law Review* 748, 750. [↑](#footnote-ref-34)
35. *Eastman v The Queen* (2000) 203 CLR 1, 22-3 [64] (Gaudron J). [↑](#footnote-ref-35)
36. *Eastman v The Queen* (2000) 203 CLR 1, 59 (Gaudron J); *Ngatayi v The Queen* (1980) 147 CLR 1, 7 (Gibbs, Mason and Wilson JJ). [↑](#footnote-ref-36)
37. *R v Presser* [1958] VR 45. [↑](#footnote-ref-37)
38. *Kesavarajah v The Queen* (1994) 181 CLR 230, 245 (Mason CJ, Toohey and Gaudron JJ). [↑](#footnote-ref-38)
39. Chris Bruce SC, ‘Ethics and the Mentally Impaired’, paper presented to the Public Defenders Criminal Law Conference, 27 February 2011, 3, available at: [http://www.lawlink.nsw.gov.au/lawlink/pdo/ll\_pdo.nsf/vwFiles/Ethics&MentalIllness.pdf/$file/Ethics&MentalIllness.pdf](http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/vwFiles/Ethics%26MentalIllness.pdf/%24file/Ethics%26MentalIllness.pdf). [↑](#footnote-ref-39)
40. (2000) 203 CLR 1, 98 [294]. [↑](#footnote-ref-40)
41. I note, for example, that Gaudron J in *Eastman v The Queen* uses the terminology ‘fitness to plead’ and applies the *Presser* test: (2000) 203 CLR 1, 20 [58]. [↑](#footnote-ref-41)
42. Don Grubin, ‘What Constitutes Fitness to Plead?’ [1993] *Criminal Law Review* 748. [↑](#footnote-ref-42)
43. *R v Presser* [1958] VR 45, 48 (Smith J). [↑](#footnote-ref-43)
44. *Ngatayi v The Queen* (1980) 147 CLR 1, 8. [↑](#footnote-ref-44)
45. *Ngatayi v The Queen* (1980) 147 CLR 1, 8-9. [↑](#footnote-ref-45)
46. [2002] QCA 464. [↑](#footnote-ref-46)
47. [2002] QCA 464, [5], McPherson JA and Mullins J agreeing. [↑](#footnote-ref-47)
48. See, for example, *R v Dyson* (1831) 7 C. & P. 305; *R v Pritchard* (1836) 7 C. & P. 303, discussed in Don Grubin, ‘What Constitutes Fitness to Plead?’ [1993] *Criminal Law Review* 748, 752-3; Russ Scott, ‘Fitness for Trial in Queensland’, (2007) 14(2) *Psychiatry, Psychology and the Law*  327, 329-330. [↑](#footnote-ref-48)
49. Sign language is a common feature of communication amongst many Aboriginal communities. [↑](#footnote-ref-49)
50. ‘Homesign’ refers to unique signs that individuals develop with family and friends to communicate but may not generally be used or recognized by other Deaf people. [↑](#footnote-ref-50)
51. Australian sign language. [↑](#footnote-ref-51)
52. The High Court considered whether committal proceedings could be validly conducted in Mr Ebatarintja’s circumstances (and concluded they could not) in *Ebatarintja v Deland* (1998) 194 CLR 444. [↑](#footnote-ref-52)
53. *R v Roland Ebatarintja* SCC 20202017, Supreme Court of the Northern Territory, 3 June 2004 (Riley J). [↑](#footnote-ref-53)
54. *Criminal Law Consolidation Act 1935* (SA) s 269H. [↑](#footnote-ref-54)
55. (2005) 93 SASR 208. [↑](#footnote-ref-55)
56. Debelle J dissenting. [↑](#footnote-ref-56)
57. See 212-214 (Duggan J); 225 (Besanko J); but note Debelle J’s discussion of the issue in which his Honour suggests it ‘might be an oversimplification to state that that common law regarded a deaf must as insane’ ([44] 219). [↑](#footnote-ref-57)
58. *R v Sexton* [2000] SASC 276, 11 (Gray J, Prior and Williams JJ agreeing). [↑](#footnote-ref-58)
59. Mark Ierace SC, ‘Fitness to be Tried’, paper presented at the University of NSW Law Faculty CLE/CPD day 5 November 2010, available at: <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/vwPrint1/PDO_fitnessierace>. [↑](#footnote-ref-59)
60. *The Queen v Wurramara* [2011] NTSC 89. [↑](#footnote-ref-60)
61. (1980) 147 CLR 1. [↑](#footnote-ref-61)
62. (1980) 147 CLR 1, 4. [↑](#footnote-ref-62)
63. (1980) 147 CLR 1, 5. [↑](#footnote-ref-63)
64. (1980) 147 CLR 1, 7-8 (Gibbs, Mason, Wilson JJ). [↑](#footnote-ref-64)
65. (1980) 147 CLR 10 (Gibbs, Mason, Wilson JJ). [↑](#footnote-ref-65)
66. [1975] WAR 163. [↑](#footnote-ref-66)
67. [1975] WAR 163, 164. [↑](#footnote-ref-67)
68. (1991) 93 Cr App R 96. [↑](#footnote-ref-68)
69. Section 43ZC. [↑](#footnote-ref-69)
70. Section 43ZK [↑](#footnote-ref-70)
71. Section 43ZH; *Re Scotty* (2007) 210 FLR 235, 241 [24]. [↑](#footnote-ref-71)
72. Section 43ZG. [↑](#footnote-ref-72)
73. Section 43ZG(6). [↑](#footnote-ref-73)
74. *Re Scotty* (2007) 210 FLR 235, 240 [22] [↑](#footnote-ref-74)
75. Section 43ZN(1)(g). [↑](#footnote-ref-75)
76. For example, a similar approach is taken in Victoria: *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 27(1). In NSW, orders are also set by reference to the ‘best estimate’ of the sentence that a person would otherwise have received (but notably are not indefinite in their operation): *Mental Health (Forensic Provisions) Act 1990* (NSW), s 23(1)(b). [↑](#footnote-ref-76)
77. (1999) 108 A Crim R 85, 96 [51]. [↑](#footnote-ref-77)
78. 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. [↑](#footnote-ref-78)
79. *R v Morton* [2010] NTSC 26, [45]-[46], applying *R v Verdins* (2007) 16 VR 269; see also *R v Ebatarintja* SCC 20202017, 3 June 2004 (Riley J); *Smith v The Queen* (2007) 169 A Crim R 265, 278 [85]-[90]. [↑](#footnote-ref-79)
80. Section 43ZA(2). [↑](#footnote-ref-80)
81. 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). [↑](#footnote-ref-81)
82. *R v Bradbury and Emmerson* SCC 21106092, 21106091 (Mildren J, 22 September 2011). [↑](#footnote-ref-82)
83. See Lateline ‘Mentally ill in jail “tantamount to torture”’, 25 June 2012, available at: <http://www.abc.net.au/lateline/content/2012/s3532797.htm>. [↑](#footnote-ref-83)
84. See Department of Health ‘Questions and Answers - Secure Care Facilities and Services’, available at: <http://www.health.nt.gov.au/Secure_Care_Facilities_and_Services/index.aspx>. [↑](#footnote-ref-84)
85. It is intended that orders requiring a child to be detained in a secure care facility will be made under amendments to the *Care and Protection of Children Act 2007* (NT). [↑](#footnote-ref-85)
86. The full list of criteria for involuntary treatment and care are set out in s 5 of the the *Disability Services Act* (NT). [↑](#footnote-ref-86)
87. See *Criminal Code Act* (NT) s 43J; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8; *Criminal Code 1899* (Qld) s 613; *Mental Health (Forensic Provisions) Act 1990* which applies generally to persons found unfit. In jurisdictions, the regimes relating to fitness explicitly require link to a disorder or impairment of mental processes: see *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6; *Criminal Law Consolidation Act 1935* (SA) s 269H; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), s 9. [↑](#footnote-ref-87)
88. (2005) 93 SASR 208. [↑](#footnote-ref-88)
89. (2005) 93 SASR 208, 222 [49]. [↑](#footnote-ref-89)
90. Section 43ZJ(2)(a). [↑](#footnote-ref-90)
91. Section 43ZJ(2)(b). [↑](#footnote-ref-91)
92. Section 43ZJ(2)(c). [↑](#footnote-ref-92)
93. Section 43ZN(2)(a)(i). [↑](#footnote-ref-93)
94. Section 43ZM. [↑](#footnote-ref-94)
95. 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. I note that McSherry was making her argument in the context of the NSW regime as it then was, but her argument is equally applicable to the NT. [↑](#footnote-ref-95)
96. I note here that under the NT system a person may not receive a trial but will be subject to a ‘special hearing’. [↑](#footnote-ref-96)
97. Australian Law Reform Commission, ‘Recognition of Aboriginal Customary Law’ (ALRC Report 31, 1986), [585], available at: <http://www.alrc.gov.au/publications/report-31>. [↑](#footnote-ref-97)