



Criminal Law Section

In your reply please quote

Our Ref: 29 July 2011

Your Ref:

Committee Secretary
Senate Community Affairs Committee
PO Box 6100, Parliament House
Canberra ACT 2600

Dear Dr Holland

INQUIRY INTO COMMONWEALTH FUNDING AND ADMINISTRATION OF MENTAL HEALTH SERVICES

We thank you for the invitation to make a submission to this Inquiry.

Our Services

The Northern Territory Legal Aid Commission (NTLAC) aims to ensure that the protection or assertion of the legal rights and interests of people in the Northern Territory are not prejudiced by reason of their inability to:

- ◆ obtain access to independent legal advice;
- ◆ afford the financial cost of appropriate legal representation;
- ◆ obtain access to the Federal or Territory legal systems; or
- ◆ obtain adequate information about access to the law and legal system.

NTLAC provides advice and assistance to persons in a range of matters, including:

- Family law
- Domestic violence
- Child in need of care
- Immigration law
- Proceedings before the Mental Health Review Tribunal (ceased as at August 2010)
- Criminal law; and
- Civil law.

NTLAC is a Territory wide legal service provider with offices across the NT and fits within a matrix of legal and related service providers across the NT.

Background

The challenges experienced by legal aid clients, including the prevalence and range of mental health issues they experience, have been well documented¹. Legal aid clients are often disadvantaged and vulnerable due to a range of personal circumstances. They may face multiple issues, compounding each other, including historical and current traumas and social, financial, geographic, language and literacy concerns.

Anecdotally, NTLAC staff observe these multiple stresses and concerns in conjunction with apparent mental health issues in clients every day:

‘I can say that a significant number of criminal clients present with symptoms of mental illness of some type including depression. Clients with serious mental health issues often find themselves before the courts, often for fairly minor offending, where their mental illness is a contributing factor or the major factor. It seems self evident that proper care for these clients may have an effect of reducing their offending and harm to the community.’ *Senior solicitor, NTLAC 2011*

Specific Issues

Facility for ‘Safe Custody’

There are currently no appropriate secure facilities in the NT to accommodate long term prison inmates who are on supervision ‘safe custody’ orders following either a decision that they are unfit to stand trial, or a decision that they suffer from a mental impairment (or both). In our view there is a critical need for such a facility. There have been calls for such a facility from the community at large as well as the judiciary for a number of years. See, for example the discussion by Martin CJ in *The Queen v Ebatarintja* [2010] NTSC 06 and Hunyor and Swift².

The most recent decided matter in which this issue was obliquely referred to was *R v Morton* [2010] NTSC 26, in which Mildren J observed at [4], that:

It was not in contest that I should make a custodial supervision order pursuant to s 43ZA of the Code and that the accused should be committed to custody in the Alice Springs Correctional Centre (ASCC), *there being no practicable alternative* given the circumstances of the offender [emphasis added].

These observations were made in the course of making a custodial supervision order for this young Indigenous person who suffers from a cognitive impairment. It is also of

¹ Karras, M, McCarron, E, Gray, A & Ardasinski, S 2006, *On the edge of justice: the legal needs of people with a mental illness in NSW*, Law and Justice Foundation of NSW, Sydney; Coumarelos, C, Wei, Z & Zhou, AH 2006, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, Sydney

² A Judge Short of a Full Bench: Mental Impairment and Fitness to Plead in the NT Criminal Legal System, 2011, Criminal Lawyers Association NT Conference

concern that on receiving a report pursuant to s43ZK of the *Criminal Code* (NT) on the treatment and management of Mr Morton twelve months after the supervision order was imposed, the Supreme Court declined to conduct a periodic review of the order pursuant to s43ZH of the *Criminal Code*, thus effectively depriving Mr Morton, his advocates and guardians of an opportunity to advocate for an improvement to his management and treatment.

It is our view that if it is impracticable and inappropriate for persons who suffer from multiple complex disabilities to be housed in the community with support and supervision, they should be accommodated in a secure care facility.

NLAC has made submissions in relation to the proposal to establish secure care facilities in the NT. We were surprised and concerned to learn that the facilities are not intended for persons who are incarcerated due to mental impairment or unfitness to stand trial. We understand the facility is intended for children and youth to complement existing out of home care services and short-term high-risk members of the public with an intellectual disability or cognitive impairment acute mental health problems. We do not suggest that this category of people is not also urgently in need. However, the need for persons currently incarcerated is also urgent.

We continue to support establishment of a secure care facility which is designed and resourced to provide for people who are the subject of safe custody orders made under Part IIA of the *Criminal Code*.

We attach the Commission's submission to the NT Government in relation to the proposed establishment of such a facility.

NLAC is particularly concerned about the situation of Indigenous people with a cognitive impairment who are incarcerated in the Northern Territory, in some cases for indefinite periods, pursuant to custodial supervision orders made under Part IIA of the *Criminal Code* (NT). Although some of these people (such as Mr Morton, referred to above) have engaged in conduct with extremely serious consequences, there are others who have been detained in prison for several years notwithstanding the fact that the conduct in which they engaged, had they been capable of being criminally responsible for it, would have attracted a prison sentence of only a few months. Typically, these detainees suffer from an intellectual disability and/or an acquired brain injury, rather than a mental illness. They have all been found not to be criminally responsible for their conduct, but their treatment on a day-to-day basis is effectively identical to that meted out to imprisoned criminals in the Northern Territory. Along with a broad range of other agencies and individuals, NLAC supports and participates in the Aboriginal Disability Justice Campaign which has been convened by Mr Patrick Magee, the guardian of the above-mentioned Mr Morton.³

Mentally ill persons charged with non-serious offences

³ The Aboriginal Justice Disability Campaign contact address is: thiswhisperingourhearts@hotmail.com

Section 77 of the *Mental Health and Related Services Act* (NT) establishes a mechanism for the summary dismissal by a Magistrate of charges alleging summary or minor indictable offences against a person in circumstances where a defence of mental impairment would arise if the matter were being dealt with pursuant to Part IIA of the *Criminal Code* (NT) for a matter proceeding by way of indictment. The Supreme Court of the Northern Territory has recently observed that these procedures are apparently 'less than rigorous'.⁴ Indeed, the Crown Prosecutor in that case frankly characterised them as 'crude and rudimentary'.⁵

There are serious shortcomings with the s77 procedure. Firstly, there is no power for the court to order treatment or management of the person charged, and consequently, the power to dismiss charges is only used very sparingly.⁶ Secondly, there is no power or procedure to dispose of a matter summarily where the person charged is unfit, or apparently unfit, to stand trial. Thirdly, there is no power for the court to order Forensic Mental Health Services to provide assessments and reports required to determine whether a circumstance in the nature of a defence of mental impairment arises. Fourthly, there is a mismatch between the matters the subject of the expert reports which the court is empowered to request, and the matters for determination by the court.⁷ Fifthly, if the prosecution declines summary jurisdiction in a case of a minor indictable offence, the person charged will be subject to the lengthy, complex and costly procedures of Part IIA of the *Criminal Code* (NT), with the prospect of what is effectively an indefinite sentence of incarceration.⁸

Mental Health Services in prison

The mental health issues experienced by prisoners have been well documented⁹. While there are mental health services in prison, in the NT the observation of our criminal lawyers is that the service appears to be stretched to capacity and under-resourced. Sadly for many Legal Aid clients, prison is one of the few opportunities they have to access appropriate diagnosis and treatment in relation to their mental health needs. Clients who are able to obtain this assistance in prison have a greater likelihood of 'turning their lives around' upon release.

Legal assistance for persons involuntarily detained

North Australian Aboriginal Justice Agency (NAAJA) and the Northern Territory Legal Aid Commission ('the Commission') have, in the past provided dedicated duty lawyer services at the Mental Health Review Tribunal ('the MHRT').

⁴ *Taylor v Bamber*[2011] NTSC 36, [12] per Barr J.

⁵ *Ibid* at [9].

⁶ "All we've got, if you want me to rely on s 77, is to just release him, discharge him completely and put him back in the community, where he will no doubt reoffend...[W]e just dismiss the charge and say, 'We've washed our hands of him,' he's out there and some other poor victim comes along. (*Police v Mununggurr*, 22 December 2010, Carey SM)

⁷ *Taylor v Bamber*, above at [11] - [12].

⁸ See *Taylor v Bamber*, above.

⁹ Grunseit, A, Forell, S & McCarron, E 2008, Taking justice into custody: the legal needs of prisoners, Law and Justice Foundation of NSW, Sydney

The Northern Territory funds the Commission for the purpose of providing legal services to the community in relation to matters arising under Territory Law. The funding which the Commission receives for this purpose is applied in accordance with the *Legal Aid Act* ('the Act') and the Legal Aid Guidelines ('the Guidelines'). The Act and the Guidelines list a number of service delivery areas. In determining the application of our limited resources to these areas, the Commission takes into account a range of competing interests and priorities.

Demand on the Commission's service in relation to matters arising under Territory laws has increased dramatically in the current funding cycle and in 2010 the Commission made the difficult decision to cut a number of services, including the services of a duty lawyer to patients appearing before the Tribunal. NAAJA had ceased their duty lawyer service for similar reasons in 2009.

This cessation of duty lawyer services by legal aid agencies was referred to by the Tribunal President in the 2009 and 2010 Mental Health Review Tribunal Annual Reports. The current arrangements are that legal representatives are appointed by the Tribunal from a panel of private practitioners; however in our submission this area of work is specialized and requires a level of continuity which is best provided by a legal service. The Tribunal President and Community Visitor appear to share this view. Both the Tribunal President and the Principal Community Visitor hold the view that NAAJA and NTLAC provide high-quality legal representation to patients appearing before the Tribunal, and that the duality of our services also allows ongoing benefit to the functioning of the Tribunal. The Tribunal President noted in the 2009 Annual Report that:

"[I]t is preferable that legal representation comes from both organizations... NAAJA are better geared to representing indigenous patients in any event. Not only are lawyers employed by NAAJA more experienced in general terms with cultural and other relevant issues, the availability of an Aboriginal Client Service Officer is often a great advantage in the preparation process. The previous duality of representation fostered efficiency at Tribunal hearings, especially at times when reports have been provided late by MHS, as it then enabled the sequence of hearings to be alternated so that lawyers had sufficient time to prepare for their next hearing without the need to delay hearings. That option is now no longer available."

In the 2010 Annual Report, the Tribunal President canvassed the impact of the withdrawal of NTLAC services from the MHRT and the significant additional costs that will be incurred when the Tribunal is to be dependent on a panel of private lawyers:

"As feared, NTLAC has withdrawn its services due to funding constraints. This occurred with effect from 6 September 2010, hence it has not impacted financially on the Tribunal in the current year. It does however forecast an increase in

operational costs for 2010-2011. DoJ needs to make appropriate allowances for the likely increase in costs orders effective from the 6 September 2010.”

The Principal Community Visitor, prior to becoming aware that NTLAC had also ceased providing legal services to the Tribunal, stated in the Community Visitor Program Annual Report 2009-2010:

“It is also of concern to the CVP that in 2009-2010, the North Australian Aboriginal Justice Agency (‘NAAJA’) ceased representing people who are involuntarily detained and appearing before the Mental Health Review Tribunal (‘the Tribunal’). Legal representatives perform an important function in the Tribunal process as they assist consumers to articulate their views and concerns and ensure a balance between their views and the information which is presented by medical practitioners. NAAJA brings a special expertise with Indigenous consumers, being known and trusted. They make sure that interpreters are used at Tribunal hearings.

While there are provisions in the Act for the appointment and reimbursement of legal representatives assisting consumers, it is desirable for reasons of continuity and expertise that they be represented by one of the two legal aid services. The CVP will continue to monitor and advocate for Mental Health consumers to receive the best ongoing legal representation.”

NTLAC and NAAJA have requested that the NT Department of Justice consider providing specific funding allocations to NTLAC and NAAJA to provide ongoing and regular legal services to the Tribunal in 2010/2011. Both services have provided budgets for the provision of these services to the Tribunal.

Recommendations

The Commission recommends:

- The proposed secure care facility be designed and resourced to make provision for people who are the subject of safe custody orders made under Part IIA of the *Criminal Code*.
- Increased resourcing for prisoners incarcerated and upon release to provide comprehensive mental health services to this target audience.
- That NAAJA and NTLAC be specifically funded to deliver a duty lawyer service to patients appearing before the Mental Health Review Tribunal and for related purposes.

Yours sincerely

SUZAN COX QC
Director