QUEENSLAND'S MENTAL HEALTH COURT

The Hon Justice Catherine Holmes

October 2014

My role in this session is to talk about Queensland's Mental Health Court. I do so in two capacities, as a past presiding judge and as an enthusiast. It's unique to Queensland, has its flaws, usually arising from resource constraints, but I think is the best system going for dealing with people charged with offences who suffer mental impairment through illness or disability. It replaced the Mental Health Tribunal which had much the same functions and had been in existence since the 1980's. The Court began its operations in February 2002 under the *Mental Health Act* 2000. It consists of two Supreme Court Judges who sit separately, assisted by two experienced forensic psychiatrists from a panel of seven. Its major, but not sole, function is to determine references where there are questions of insanity or unfitness for trial. [1]

A reference can be made to the Court for a person charged with any indictable offence. This is my completely unscientific impression of the sorts of allegations and conditions that crop up:

- personal violence, from assault to murder, and damage to property cases usually involving psychotic individuals
- sex and property offences and minor violence by intellectually impaired people
- stalking by individuals whose mental states may fall anywhere along the spectrum from unfortunate personality traits to psychosis
- sometimes fraud committed by bipolar sufferers in a manic phase
- sex offences committed many years ago by men now suffering from dementia; usually this will just involve questions of unfitness.

Once a reference is made, the proceedings are suspended[2] except for decisions on bail.[3] References can come from a number of sources: the person himself, the

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1 *Mental Health Act* 2000, Chapter 7, Part 4.
2 Section 259.
3 Section 260.

Director of Mental Health where the person is already in the mental health system, the Director of Public Prosecutions, from the Supreme or District Court on a plea of guilty[4] or the Attorney-General. [5] In fact, they almost always come from the defendant's legal representative or the Director of Mental Health. The number of prospective referrers increases the chances of a mentally ill or impaired person being directed to the Court, but it isn't always the case that that happens, or happens promptly. Someone who's already in the mental health system very likely will be referred; someone whose symptoms are so florid or whose disability is so profound as to present management problems at the jail probably will be; but it often happens that it isn't till preparation for trial that someone looks at the defendant's history and identifies an unsoundness question.

Obviously early identification is in the interests of all concerned: the less time someone spends on remand and the fewer resources expended before questions of unsoundness or unfitness are resolved, the better; and the faster someone who needs it gets into treatment the better.

A reference must be accompanied by an expert report[6] and each party must disclose all expert reports they have obtained in relation to the reference, whether or not they are detrimental to their case[7]. In most cases the Court will make a court examination order, which requires the person the subject of the reference to be examined by one or more Court-appointed experts[8]. That is done on the recommendation of the assisting psychiatrists, who review the references and accompanying information to determine what is needed. Unfortunately, budgetary constraints limit the number of orders for reports that can be made per month, which can produce delays.

The Court sits for between 10 and 12 weeks a year and hears on average about 5 cases a day, not all of which are references; it hears appeals from the Mental Health Review Tribunal on various decisions about treatment orders. Last year it finalised 211 references. While there is some formality in its procedures, it tends to get down to

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4 Section 62.
5 Section 257.
6 Section 258.
7 Section 265.
8 Sections 422, 423.

business without much ado. The parties represented are of course the person referred, almost always through a lawyer, most commonly the Legal Aid office; the Director of Public Prosecutions and the Director of Mental Health. There is provision in the *Mental Health Act* for the Court to proceed in the absence of the referred person where it is in the interests of justice to do so.

The first issue for determination is whether the person was of unsound mind with, in the case of murder, an additional decision as to whether he or she was of diminished responsibility when the offence was committed. [9] The expression "unsound mind" is defined[10] by reference to s 27 of the *Criminal Code* (Qld), which deals with insanity. The effect is that, in determining whether the person was of unsound mind when he committed the offence, the Court will have to consider whether he had a mental illness or what is called a natural mental infirmity (usually mental retardation of a significant degree) which deprived him of one of three capacities: the capacity to know he ought not do the act, the capacity to understand what he was doing or the capacity of control.

In effect, the Mental Health Act provisions continue the common law approach to criminal responsibility, as it has stood for many years with the addition of the capacity of control as a relevant capacity. But there is this qualification: the definition of "unsound mind" in the schedule to the *Mental Health Act* excludes a state of mind resulting to any extent from intentional intoxication or stupefaction (mirroring the effect of s 28(2) of the *Criminal Code*). That limitation does not apply in respect of diminished responsibility. "Intentional intoxication or stupefaction" has been construed as meaning an intoxication operative at the actual time of offending so it doesn't rule out people who may have been acting under the effect of amphetamine psychosis.

The Court may not make a decision about unsoundness or diminished responsibility in two situations. The first is if it is satisfied there is reasonable doubt that the person committed the offence, [11] the rationale being that a person ought not be left with the appearance of escaping criminal responsibility by reason of insanity for an act which he may in fact not have committed. That can lead to some difficult questions. People the subject of the reference often prefer to disavow reliance on anything which

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9 Section 267.
10 Schedule 2.
11 Section 268.

might suggest innocence for the purposes of the hearing, preferring instead to have the unsoundness determination made.

The other situation in which the Court may not proceed is where there is a fact substantially material to an expert witness' opinion so in dispute that it would be unsafe to make the decision. [12] That might be something about the circumstances of the alleged offence itself or something about the person's psychiatric history. There is a review of the *Mental Health Act*[13] presently under way. Its discussion paper recommends that the court be enabled to resolve such a question. Depending on how complicated the factual dispute is, that may be a solution.

If the Court decides that the person was not of unsound mind when the offence was committed, and is fit for trial, the matter is ordered to proceed according to law.[14] If the person is found to be of diminished responsibility, and is fit for trial, the proceedings will continue on a charge of manslaughter.[15] If a finding of unsoundness is made, proceedings against the individual concerned are, in effect, forever stayed.[16]

If the Court decides that a person was not of unsound mind or is precluded from making any finding, because of reasonable doubt or a disputed fact, it must go on to determine whether the person is fit for trial.[17] That concept is the subject of statutory definition in the Act's schedule: "fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely". It largely reflects the common law with an additional consideration, the prospect of damage to the individual's mental health in the process. The application of the definition is illuminated by cases involving the common law tests.[18] If any of the criteria is not met, so that the person is unfit, the next question is whether the unfitness is permanent or temporary. In the case of intellectual disability or dementia, it is obviously

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12 Section 269.
13 http://www.health.qld.gov.au/mentalhealth/news/MHA2000-review.asp.
14 Section 272.
15 Section 282.
16 Sections 281.
17 Section 270.
18 See *R v Presser* [1958] VR 45; *Kesavarajah v R* (1994) 181 CLR 230.

more likely to be permanent. Again, if a finding of permanent unfitness is made, the proceedings are permanently stayed.[19]

Where the Mental Health Court makes a finding of unfitness of a temporary nature, proceedings are temporarily stayed[20], and the person's mental condition is reviewed by the Mental Health Review Tribunal, initially at three-monthly, and then at six-monthly intervals.[21] Those reviews continue over a period of three years in the usual course, or seven years for an offence carrying life imprisonment. If the person remains unfit at the end of that time, the proceedings are discontinued.[22] If after a year of reviews the Tribunal concludes there is no prospect of fitness within a reasonable time, it reports to the Attorney-General, who can decide to discontinue the proceedings or defer the decision and ask for continued reviews.[23]

It's a fairly neat system. In New South Wales, I gather, it's somewhat Kafkaesque: the court before which the person is to be tried makes the inquiry and if it finds him unfit must refer him to the Mental Health Tribunal.[24] If the Tribunal decides he has become fit, it advises the court which has to hold another inquiry.[25] In *R v Waszczuk*,[26] the Court decided the accused was not fit, the Tribunal decided he was fit, twice, the Court held its next inquiry and decided he was not fit, and sent him back to the Tribunal to decide on fitness once more. There seems no necessary end to the process.

If the Mental Health Court decides that a person is temporarily unfit for trial, it must make a forensic order. [27] If it concludes that the person was of unsound mind at the time the offence was allegedly committed or is permanently unfit for trial, it has a discretion as to whether to make a forensic order.[28] In deciding whether to do that it has to have regard to the seriousness of the offence, the person's treatment needs and the protection of the community. A forensic order can be of two types: one of which is for a

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19 Section 283.
20 Section 280.
21 Section 209.
22 Section 215.
23 Section 212.
24 *Mental Health (Forensic Provisions) Act* 1990 (NSW) s 14.
25 *Mental Health (Forensic Provisions) Act* s 29(1)(b).
26 [2012] NSWSC 380.
27 *Mental Health Act* s 288(3).
28 Section 288(2).

person with mental illness,[29] while the other is for a person with intellectual disability.[30] Before 2011, there was only the first form of forensic order which in effect commits a person for treatment and care to an authorised mental health service; those services are centred on the major hospitals with psychiatric units. It may mean that the person is hospitalised immediately, possibly in a secure facility, or in less serious cases, it may simply mean that they remain in the community but come under the care of an authorised psychiatrist so that they are required to report and receive medication as directed.

In 2011, the problem of placement of intellectually disabled people was recognised by legislation. It may be quite clear that an intellectually disabled person has a very strong prospect of re-offending and needs some kind of supervision to prevent that, but, not surprisingly, psychiatrists are not terribly enthused about being required to manage someone who has no psychiatric disorder especially when resources by way of accommodation and programmes are scarce. The *Forensic Disability Act* 2011 was passed to establish a forensic disability service[31] (a residential facility) which could manage the intellectually impaired group, and the *Mental Health Act* was amended to allow the making of forensic disability orders which focus on care rather than treatment, and give the court the option of placing the individual in the residential facility or under the supervision of an authorised mental health service.[32] Unfortunately, the residential facility can only house 10 people, and the places were, I gather, almost immediately taken up by people being moved off existing forensic orders, so the option is illusory. They end up instead with the authorised mental health service, still being supervised by psychiatrists. But the idea is a good one.

The decision whether to make a forensic order can be fraught and underlying it, is often that problem of shortage of resources. For example, you may have someone from a community on an island off Cape York who has no prospect of receiving any kind of psychiatric treatment if he remains in the community. On the other hand, you may do more harm than good by requiring him to shift from there to Cairns, hundreds of miles to the south. A forensic order once made is reviewed every 6 months by the Mental Health

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29 Section 288(6).
30 Section 288(7).
31 *Forensic Disability Act.*
32 *Mental Health Act* s 288(7)(b).

Review Tribunal.[33] It must decide whether to confirm or revoke the order.[34] The Tribunal's decision may be appealed to the Mental Health Court.[35]

Unlike most other States and the Australian Capital Territory,[36] Queensland has no special hearing process for determining whether or not someone found permanently unfit for trial actually committed the offence. The review into the *Mental Health Act* recommends in its discussion paper that where there is a finding of permanent unfitness or findings of temporary unfitness which last longer than 12 months, the defendant's lawyer be able elect to have a special hearing into whether he committed the offence. If the court finds he did not, he is acquitted and any forensic order is revoked; if it finds he did, the order is confirmed. It would have the advantage of being by election rather than automatically exposing someone who may not be in any condition for it to the rigours of a hearing.

A fundamental aspect of the way forensic orders and indeed the Act functions which is different from other States is this: continued detention is conditional on continued illness or disability. There is no punitive, deterrent or purely protective aspect to it. The individual may still present a risk because of criminal tendencies but if he or she no longer suffers from the mental illness or infirmity which led to the initial finding there is no role for the Act's continued application. There is no concept of a limiting term,[37] that is the notional term for which the individual would have been sentenced, as a factor in how long he is detained for treatment.

The logic of effectively sentencing someone who has been too ill to defend himself or was not responsible for what he did is not obvious. Worse is the current situation in Western Australia, in which for a range of offences including criminal damage[38] a custody order is mandatory for someone acquitted by reason of

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33 Section 200.

34 Section 203(1).

35 Section 320.

36 See *Mental Health (Forensic Provisions) Act* 1990 (NSW) s 19; *Criminal Justice (Mental Impairment) Act* 1999 (Tas) s 15; *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) s 15*; Criminal Law Consolidation Act* 1935 (SA) s 269M, 269N (with a similar procedure where unsoundness of mind is found: s 269F, s 269G); *Crimes Act* 1900 (ACT) s 316.

37 Cf *Mental Health (Forensic Provisions) Act* 1990 (NSW) s 23; *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 (Vic) s 28*; Criminal Law Consolidation Act* 1935 (SA) s 269O; *Crimes Act* 1900 (ACT) ss 301, 302.

38 *Criminal Law (Mentally Impaired Accused) Act* 1996 (WA) Schedule 1.

unsoundness,[39] in which event detention is at the Governor's pleasure.[40] The person may be detained in a hospital, a declared place a detention centre or a prison.[41] But the hospital option is only available for those with a mental illness;[42] in practical terms all that has been available for the intellectually disabled is prison. There are 18 people currently held in prison in WA on that basis,[43] but a Bill[44] under which the Disability Services Commission sets up declared places to take those people depending on the risk they pose is on its way through the WA parliament.

One of the advantages of the Mental Health Court is flexibility. It is not bound by the rules of evidence,[45] so it can receive relevant material in any form. What is before the Court will generally consist of a police brief of evidence, the person's medical records and psychiatric or psychological opinions. The Court gets through an enormous amount of work which would simply not be possible if every one of these cases had to proceed to trial on an insanity defence, or through the procedure under s 613 of the *Criminal Code* for jury determination of fitness for trial.

What actually happens is that in the more obvious cases the parties, that is to say, the Director of Mental Health, the Director of Public Prosecutions the individual's lawyer present a united front and the matter can be resolved quite quickly. The Court can really only operate effectively because of that level of consensus between the parties. Even where there is a need for a hearing, there is a level of expertise amongst the practitioners which, combined with the absence of requirement for formal proof, allows matters to be resolved quite quickly. In the ordinary course, the only witnesses who are called are experts, which streamlines the proceedings very considerably. Many references are determined without any evidence being heard, because there is unanimous opinion as to the finding.

Nothing a person the subject of a reference says at the hearing is admissible on any other proceeding.[46] In reality, individuals the subject of a reference do not give

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39 *Criminal Law (Mentally Impaired Accused) Act* s 21.
40 *Criminal Law (Mentally Impaired Accused) Act* s 35.
41 *Criminal Law (Mentally Impaired Accused) Act* s 24(1).
42 *Criminal law (Mentally Impaired Accused) Act* s 24(2).
43 http://www.department.dotag.wa.gov.au/_files/CLMIA_Act_Discussion_Paper.pdf p15.
44 *Declared Places (Mentally Impaired Accused) Bill* 2013 (WA).
45 *Mental Health Act* s 404.
46 Section 316.

evidence. Importantly, a decision by the Mental Health Court does not prevent the person's raising his or her mental condition at a subsequent trial, and the Court's decision is not made known to the jury.[47] A person may elect to go to trial notwithstanding the Court's decision that he was of unsound mind when he committed the offence.[48] No decision of the Court can be published until any trial is finished, or, where the proceedings are discontinued, for 28 days following the hearing.[49] The person whose mental condition is the subject of the decision and the Attorney-General may appeal to the Court of Appeal against a decision on a reference[50] and if an appeal is instituted, publication is deferred once more.[51]

In 2007, the Act was amended to create entitlements for victims and concerned persons not party to the reference hearing to submit material to the Mental Health Court in order to help it to make a decision on a reference.[52] "Victim" as defined in the schedule extends to immediate family members of the actual victim of the offence; "concerned person" is not defined. The material can include the views of the submitter about the behaviour of the person concerned and its impact on the submitter; the risk he poses; and any other relevant matter. The direct victim of an offence must,[53] with some exceptions,[54] be given a forensic information order; other persons considered to have sufficient personal interest may obtain one.[55] It essentially keeps the recipient informed about the movements of a forensic patient: where they are placed, when they are to be reviewed, whether they are to receive limited community treatment.[56]

I would not like to create the perception that the Court will scoop up anyone suffering from mental illness or impairment out of the criminal justice system. Summary offences per se don't fall within its jurisdiction, although they can be disposed of along with indictable offences. It does not cover Commonwealth offences, for which the *Crimes Act* 1914 (Cth) has its own regime.[57] There may just not be enough evidence about the

47 Section 317.
48 Section 311.
49 Section 524.
50 Section 334.
51 Section 524.
52 Section 284.
53 Section 318O(6).
54 Section 318S.
55 Section 318Q.
56 Section 318O(1).
57 Part IB Divs 6-9.

person's mental state at the time of the alleged offence for a finding to be made for the very reason that they themselves have been too unwell to shed any light on what was going on. A reasonable doubt or a dispute of fact may prevent any finding being made, necessitating a trial. Intoxication may have played a part in the offending so as to preclude reliance on unsoundness. And although the person may be mentally ill or impaired, his condition may not be so severe as to make him unfit for trial.

It seems to me an entirely civilised and humane way of proceeding, one which I would recommend to other jurisdictions. It keeps unwell people from the rigours of the regular criminal process and gets them into treatment. Unfortunately, though, it is vulnerable. The Court can hear and resolve thousands of matters quietly and effectively over years, but it takes only one tabloid report of a forensic patient in the wrong place on leave to engender hysteria. Debate about the mental health system is often not well-informed. There seems to be a deep resistance to what the common law has accepted for a couple of centuries: that is, if a person is not criminally responsible by reason of his mental condition for his act, he ought not to be treated as a criminal. However, I feel sure sure that we can rely on our politicians to understand the value of the system and not to jettison it for cheap electoral advantage.