Response to the review of Mental Health Act 2000

Jodie O'Leary, Bond University
Suzie O'Toole, Bond University
Bruce Watt, Bond University
Mental Health Act Review
Department of Health
PO Box 2368
Fortitude Valley BC QLD 4006
MHA.Review@health.qld.gov.au

To Whom It May Concern:

We thank you for the opportunity to contribute in response to the Review of the Mental Health Act 2000: Discussion Paper May 2014.

We are involved in an ongoing project examining juvenile fitness for trial in Queensland and Australia. As such, we are confining our submissions to aspects of the Mental Health Act Review that relate to fitness for trial.

We note the statement in the Background Paper [at 18.2] that:

'The impact of mental illness on a child is often greater because children lack capacity, or a degree of capacity, to make good decisions for themselves and have limited ability to protect their own interests.'

The literature review for our project supports that statement (see discussion in O'Leary, O'Toole and Watt 2013:855-856).\(^1\) It details that cognitive development experienced during childhood and adolescence (often impeded further within juvenile offender groups as opposed to non-offender controls) results in differences between juveniles and adults in areas relevant to fitness for trial. These differences

are likely compounded by intellectual impairments or mental disorders. Such developmental differences indicate that juveniles should be more likely to be found unfit to stand trial compared to adults. However, between 2006 and 2011 juveniles were found unfit in the Mental Health Court at half the rate of adults. This finding correlated to the percentage of referrals made to the Mental Health Court for juvenile offenders. That is, juveniles were referred to the Mental Health Court at half the rate of adults (O'Leary et al 2013:857). Such findings support the need for reform in this area and this review is an important starting point.

To examine the reason for these results we interviewed 20 legal and 20 youth justice and 8 mental health professionals.2

Our research with the lawyers and youth justice workers revealed that (Watt, O'Leary, O'Toole forthcoming):3

1. The legal and youth justice professionals identified a much larger number of juveniles for whom they had concerns about fitness (133) over the preceding 12 months than the average number of juveniles that were referred to the Mental Health Court between 2006 and 2011 (7);
2. Of the juveniles for whom they had concerns about unfitness the most prevalent underlying basis was intellectual impairment (37%), followed by immaturity (28%) and mental illness (26%);
3. Approximately half of the juveniles identified as being potentially unfit were referred to a mental health professional for assessment; and
4. Of the relevant capacities for fitness, potentially unfit juveniles were more likely to have difficulties following the nature and course of legal proceedings; understanding and making decisions regarding pleas, elections and defences; and understanding and making decisions in their best interests than other capacities such as understanding the nature of the charge and the ability to communicate with counsel. Immature juveniles were considered to have significantly more difficulty in understanding and making decisions about pleas, elections and defences and making decisions in their best interest than mentally ill and intellectually impaired juveniles. While juveniles with mental illness and intellectual impairment were considered to have

2 We aimed to interview 20 of each professional group. We invited a total of 75 mental health professionals to participate in interviews. The majority of those professionals (46) did not conduct fitness assessments with juveniles and one did not complete an assessment in the preceding 12 months. Five indicated they did not have time to participate, four were not interested, two had retired and nine did not respond. From this information the pool of professionals in this group appears very limited.

3 Watt BD, O'Leary J and O'Toole S, 'Juvenile Fitness for Trial: Lawyer, Youth Justice and Mental Health Professional Survey' (Forthcoming).
more difficulty than immature juveniles in understanding charges and communicating with counsel.

Our research with the mental health professionals revealed that:

1. They had received 39 referrals for fitness assessment over the preceding 12 months.
2. Of those juveniles referred for assessment 28.2% were assessed as unfit for trial.
3. Intellectual impairment was the most frequently diagnosed condition (61.5%), followed by mental illness (35.9%).
4. The most prevalent deficits identified were: understanding proceedings; making decisions in their best interests; and understanding and making decisions about pleas, elections and defences. Difficulties in communication with counsel and understanding the nature of the charge were less prevalent though quite common.

We asked all professionals for their observations as to the reasons that professionals who have concerns about a juvenile's fitness might not refer that juvenile. Juveniles were observed to be significantly more likely not to be referred for pragmatic/tactical reasons than for reasons of substantive uncertainty (uncertainty about the applicable law) and procedural uncertainty (uncertainty about the applicable procedure). Such pragmatic/tactical reasons could relate to perceived benefits of finalization in the Childrens Court (Magistrate's level) - such as simplified procedures, speedy disposition and the perceived likelihood of leniency of sentence.

As such, the current gap in the legislative scheme at the Magistrate's court level, and uncertainty over the existence of any inherent/residual power of magistrates to finalise matters where unfitness is raised may be having a significant impact upon potentially unfit juveniles. This is particularly concerning in the youth justice system given that the vast majority of juvenile matters are finalized summarily. In the 2012-2013 financial year 93.8% of all juvenile defendants had their matters disposed of summarily, while the remainder were disposed of upon indictment. In the Childrens Court (Magistrate's level) where a juvenile is assessed by a mental health professional and found unfit (in relation to an offence that is not within the jurisdiction of the Mental Health Court) the usual process is to make a submission to the police prosecution to offer no evidence in relation to the charge. Such a process is inadequate as it relies on the exercise of prosecutorial discretion. As such, in

---

principle, we support the implementation of a consistent procedure at the Magistrates/Childrens Court level to deal with potential unfitness.

Early indications from our comparative research suggest that the problem is not confined to QLD. We have found that NSW has a similar problem to QLD in relation to the number of juveniles being found unfit. That is, juveniles in NSW are found unfit at a much lesser rate than adults in NSW. Like QLD, Magistrates in NSW do not have the power to make a finding of unfitness summarily, however they can deal with offenders under s32 of the Mental Health (Forensic Provisions) Act 1990 (NSW). In contrast, in New Zealand juveniles are found unfit at almost twice the rate as adults. In that jurisdiction the powers in relation to the Criminal Procedure (Mentally Impaired Persons) Act 2003 apply to any defendant charged with an ‘imprisonable offence’ regardless of the court exercising criminal jurisdiction.

Specifically in relation to the recommendations surrounding the Magistrates Court powers on findings of unsoundness of mind or unfitness for trial we note that it is proposed that Magistrates, who are satisfied a person is likely to be, or appears, permanently unfit for trial...

- due to mental illness may discharge the person unconditionally, or discharge the person and order an ITO with a non-revoke period of up to six months for summary offences and up to 12 months for indictable offences (Recommendation 4.24); or
- due to intellectual disability must discharge the person unconditionally, and may refer the person to the Department of Communities, Child Safety and Disability Services to consider whether appropriate care can be provided to the person (Recommendation 4.28).

And in accordance with Recommendation 4.25, it is implied that where the concern is mental illness and the Magistrate believes that the person might become fit within six months the Magistrate may adjourn the charge and make a non-revokable ITO; and if the unfitness remains after six months the Magistrate must act as per Recommendation 4.24.

As we have stated, legal and youth justice professionals in our study indicated that the potential bases for unfitness included not only mental illness and intellectual disability, but also immaturity. It is important to note that in New Zealand, the definition of mental impairment in the Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ) is broad enough to encompass immaturity as a basis for

---

5 So far we have retrieved useful data from NSW and New Zealand.
unfitness. The data we obtained from New Zealand which indicates findings of juvenile unfitness at double the rate of adults seems appropriate given that developmental differences mean that juveniles should be more likely to be found unfit to stand trial compared to adults. As such, we suggest that Magistrates also be granted the power to determine unfitness on the basis of immaturity. This could be done by expanding the reach of Recommendation 4.28 to include ‘intellectual disability or developmental stage’. It may be suggested that findings of unfitness due to developmental stage may more likely be only temporary. Usually the principles of youth justice that stress timely disposition and diversion from the criminal justice system would still require unconditional discharge in such situations. Perhaps for more serious offences another form of diversion could be used that incorporates educational sessions to address fitness capacities. However, it would need to be clear that such a disposition did not require acceptance of guilt. The potential dispositions available to Magistrates upon a finding that a juvenile is unfit due to developmental stage would also need to be made available to judges dealing with juveniles in superior courts.

We question the application of identical ITO non-revoke periods for adults and juveniles where they are found unfit due to mental illness (implied in the recommendations), given that generally juveniles would be facing lesser punishments than adults should they proceed to sentence. Such a blanket approach potentially provides further justification for ‘tactical’ considerations militating against raising unfitness that we found so prevalent on the part of practitioners.

We suggest that there needs to be clear provision for appeal or review of Magistrates’ decisions in relation to fitness and that generally the most appropriate venue for appeal will be the Mental Health Court. We support Recommendation 4.30 for an independent evaluation of the revised arrangements for the Magistrates Court powers. We stress that a separate evaluation should be made in relation to the Childrens Courts (Magistrate’s level) and that data should specifically consider regional variation.

We support the introduction of a special hearing following a finding of unfitness for trial in the Mental Health Court (Recommendation 4.21). However, we question why a similar procedure is not available at the Magistrate’s court level where a person is placed on an involuntary treatment order.

6 The New Zealand Youth Court has considered immaturity as a basis for incompetence: New Zealand Police v UP (Unreported, New Zealand Youth Court, Fitzgerald AJ, 5 May 2011).

7 Although it does not appear to have been utilized this way, we suggest that superior courts can potentially make determinations of unfitness on the basis of immaturity given that the focus of s 613 of the Criminal Code is whether the accused person is ‘capable of understanding the proceedings at the trial’.
We understand that the intention is for accused persons and/or their representatives to obtain reports from mental health professionals should they wish to raise unfitness, regardless of the level of court. As stated, our research discovered that juveniles were often not being referred to psychiatrists or psychologists despite concerns regarding unfitness. Again the reasons may be partly pragmatic. The low numbers of the pool of psychiatrists or psychologists certainly suggests that it would be difficult to get a timely report from a mental health professional. Further, following this process would require a juvenile to attend an appointment with a mental health professional at a later date and then return to court on another date. Such adjournments could prove particularly problematic for juveniles who may have fitness issues and fail to appreciate the consequences of not meeting those commitments. We suggest that, in line with the assessment outlined in the background paper [3.2.7] that will occur as to the best way that court liaison officers can support the revised arrangements regarding the identification of persons appearing before a Magistrates Court with mental health issues, an examination also be made as to the potential for mental health professionals to be embedded within Childrens Courts to make immediate fitness assessments where possible.

We note that Recommendation 20.2 provides for the inclusion of an amended definition of unfit for trial that provides that ‘a person is mentally unfit to stand trial on a charge of an offence if the person is mentally impaired to the extent that the person is:

- unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based;
- unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors);
- unable to understand the nature of the proceedings or to follow the evidence of the course of the proceedings; or
- unable to endure the person’s trial without serious adverse consequences to the person’s mental condition.’

We support this recommendation to the extent that it extends the Presser rules. That is, as we have stated, in our research of the juveniles for whom there were concerns about fitness all of the capacities articulated in the Presser test, including the ability to instruct counsel (not articulated in the above definition), were identified as being in deficit. In addition, importantly, many of the juveniles for whom there were concerns about fitness were thought to lack the competence to make decisions in their best interests. While the ability for an accused to make decisions in their best
interests is not strictly a Presser requirement, we are of the view that the addition of the words 'to respond rationally to' and 'give rational instructions about' implies such a competence and is to be welcomed. We note however the background paper's assertion that this approach is purely a 'reflection of the common law' and does not change the meaning [20.2.5].

Lastly, we note that, as stated in the background paper, one of the purposes of the recommendations in relation to expanding the potential orders available to the Mental Health Court upon findings of unfitness is to provide for 'an option somewhere between no action and a forensic order' [4.2.2]. This has led to Recommendation 4.3 which provides the option for the Mental Health Court to make an ITO upon a finding of unfitness. We question the application of this recommendation to a person who is unfit by reason of intellectual disability. While there is a specific Forensic Order (Mental Health Court – Disability) representing the most interventionist order for persons with intellectual disability it is our understanding that a person with an intellectual disability could not be placed on an ITO (unless it is proposed to amend the legislation on ITOs to extend to intellectual disability as well as mental illness). This is probably the reason that the suggested amendments in the Magistrates Courts do not provide for ITOs to be ordered for persons who are unfit by reason of intellectual disability. This means that in the Mental Health Court there is no option between the forensic order and no action for persons unfit by reason of intellectual disability. Given our research which shows that intellectual impairment is the most prevalent underlying condition for unfit juveniles, and the lack of access to the forensic disability service for juveniles, it would seem important that a similarly graduated option is available to the Mental Health Court as is proposed to be available at the Magistrates Court level, that is to refer the person to the relevant department.

Should you require any clarification or further information regarding our submissions please contact Assistant Professor Jodie O'Leary at jooleary@bond.edu.au

Yours faithfully,

Assistant Professor
Jodie O'Leary

Assistant Professor
Suzie O'Toole

Assistant Professor
Bruce Watt

---

8 Cf see discussion in Victorian Law Reform Commission, Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, Consultation Paper (June 2013) [4.43]-[4.50].