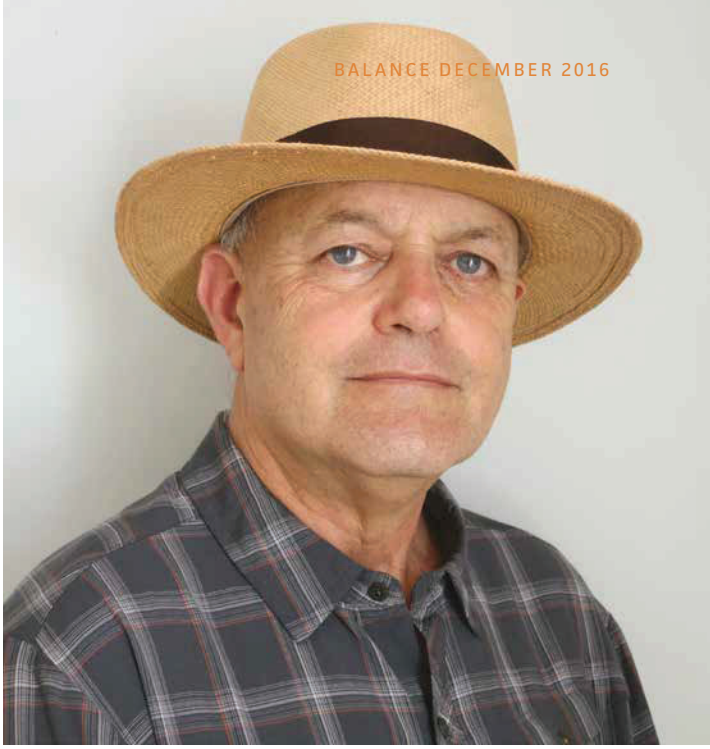
Out of mind, out of sight

CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY (CLANT)



Russell Goldflam
President
CLANT

On 26 October 2016, Felicity Gerry QC and myself appeared on behalf of CLANT before the Senate Committee Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia. CLANT's written submission to the Inquiry, together with our opening statement, are on the CLANT website at www.clant.org.au. Here is some of what we had to say.

We often skirt around the elephant in the room that is the apparent cognitive impairment of our client, in order to avoid the prospect of a potential lifetime of custodial supervision, and instead cop a brief sentence of imprisonment. The Marlon Noble case is a particularly egregious example of this dilemma, and we commend the stern recommendations of the UN Committee on the Rights of Persons with Disabilities which concluded in its views published on 2 September 2016 that Australia had failed to fulfil its obligations to Mr Noble pursuant to the Convention on the Rights of Persons with Disabilities.

In the NT, the lawyer's ethical difficulty is not quite so acute as in WA, because we have more progressive legislation that enables a court to fix a term for a supervised person, after which there is a presumption that he or she be unconditionally released, unless to do so would result in the safety of the community or the person being placed at serious risk: s 43ZG(6) Criminal Code.

This is an improvement on indefinite detention, but not a panacea. We adopt the important point made by the NSW Law Reform Commission, which applies equally to the NT:

> There is no provision… for a non-parole period, and limiting terms can be longer than terms imposed for an equivalent offence on a fit offender, as the unfit defendant cannot take advantage of a discount for an early guilty plea.

A further problem is that there is no statutory guarantee of a regular review by the court. Another is that in practice it is much easier to get into the Part IIA Supervision Orders scheme than to get out of it. Notwithstanding the presumption of release after the nominal term has expired, the Supreme Court won't release a person without getting the nod from an expert.

As an example, I currently act for a client who engaged in conduct contrary to the NT Criminal Code in March 2011. He was acutely psychotic at the time. Indeed, he engaged in the conduct while an involuntary patient in the psychiatric ward of the Alice Springs hospital. He was eventually found not guilty by way of mental impairment and placed on a Part IIA Custodial Supervision Order. The judge fixed a term of three months, being the sentence he would have imposed had my client been convicted of the offence. By that time, he had already served seven months. But he wasn't released from prison for a further seven months, essentially because no suitable community-based placement had been arranged or funded. Since then, he has been on a Non-Custodial Supervision Order for the last two years and three months, which significantly curtails his freedom: he is not permitted to leave the home he lives in without an escort. Physically and mentally, he is going nowhere. If we can stitch together a robust care plan for him, the judge managing his case has indicated that he will consider discharging my client soon. In the meantime, he has endured three and a half years of restricted liberty for

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engaging in misconduct which the court found justified a sentence of three months' imprisonment.

This is obviously unfortunate and unsatisfactory, and arguably unfair. But my client is difficult to manage in the community. He was released on bail some years ago, and promptly absconded. While at large, he resumed the sort of conduct that had brought him to the attention of police in the first place. However, in my view, my client could and should have had his liberty restored much more quickly. What prevented this was the lack of access to better, more coordinated, more pro-active service providers, service providers who work together to positively plan for the restoration of his liberty, and not wait for a judge to give them a nudge to do so.

A second example is Roseanne Fulton. Tragically, after she was repatriated from a WA prison (where she had been 'reasonably well managed') to the NT following a vigorous campaign, an attempt was made to reintegrate her into the community, but she has been in and out – mainly in – of prison ever since, and when she is out she appears to be living in an environment of very high risk of both committing minor offences, and, more disturbingly, of becoming a victim of very serious offences.

This is not to say Ms Fulton is better off in prison. It is to say that just as important as getting people like her released is a commitment to properly resourced, culturally and clinically appropriate, wrap-around services provided within a case management model, that is to say a model in which all of the relevant service providers work collaboratively to develop and deliver an Individual Care Plan for the client.

Ms Fulton should have been placed in a secure care facility. That did not occur. The facility had been built but ended up being used for other purposes, including the holding of people for assessment to be detained under the NT's alcohol mandatory treatment scheme. The original plan for the secure care facility should be reinstated. It should be managed by the Department of Health.

Similarly, the management of the Complex Behaviour Unit at the Darwin Correctional Centre should be transferred from the Department of Corrections to the Department of Health. It is primarily a facility for people with cognitive disabilities who are subject to Custodial Supervision Orders. They are not prisoners or convicts, and should not be treated as such.

We endorse the submission by the Melbourne Social Equity Initiative, which proposes statutory frameworks throughout Australia which would give proper effect to the obligations our nation has assumed under the Convention on the Rights of Persons with Disabilities, including fixed non-extendable terms for supervision orders. That is our strategic objective, but it is a long-term objective: to meet it will require very significant law reform across all jurisdictions, including the introduction of both fixed terms of supervision and statutory defendant intermediary schemes. In the short-term, however, particularly in the context of the roll-out of the NDIS, we are also focussed on the more readily achievable objective of better services to disabled detainees.