Equal under the Law? Indigenous People and the Lunacy Acts in Western Australia to 1920

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This article reviews the legal treatment of Indigenous people charged and diagnosed with lunacy in Western Australia in the late 19th and early 20th centuries. Under the Lunacy Acts of 1871 and 1903, Indigenous people were entitled – but not always expected – to undergo the same legal processes as whites considered to be insane. This article examines four areas: the general application of the Lunacy Acts, the use of insanity pleas in court, Indigenous admissions to lunatic asylums under these Acts, and examples of the use of the Lunacy Acts by Indigenous communities and families to protect themselves.

THIS article reviews some case studies which reveal aspects of the legal treatment of Indigenous people charged and diagnosed with lunacy in Western Australia in the late 19th and early 20th centuries.[1] This research is based on publicly-available records in the State Records Office of Western Australia, newspaper reports, and the private collection of mental health records held at the Mental Health Museum of Western Australia Inc at Graylands Hospital, Western Australia.[2] The records are an extraordinarily rich source of information about the application of white law to Indigenous people in the late 19th and early 20th centuries.

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1. 'Lunacy' is used throughout as reflecting specific late 19th century European and English beliefs and concerns about socially appropriate behaviour. Throughout this article, original terminology, such as 'Aboriginal', 'native', 'half-caste', 'gin', has been preserved when used in original sources.

2. I am grateful for the assistance given me by the Committee of the Mental Health Museum of WA Inc, and by staff at the JS Battye Library and the State Records Office of Western Australia. All medical records have been de-identified

Lunacy itself was a frustrating and confusing phenomenon, governed by sometimes-conflicting authorities: relatives, police, medical practitioners, employers, justices of the peace, and local magistrates. In at least three cases (one in 1852 and two in 1903) insanity pleas by Indigenous men charged with murder were effective in having the death sentence commuted. Western Australian government officials involved in the process of administering lunacy laws were sometimes unsure if Indigenous people should be treated under the Lunacy Act 1871 (WA) and Lunacy Act 1903 (WA) ('Lunacy Acts'), but once this ambiguity was resolved, they maintained consistently that Indigenous people had an equal right to treatment and care.

What do we mean by 'equal under the law'? Simply the idea that Indigenous people considered to be possibly insane were entitled - or expected – to undergo the same legal processes as whites considered to be insane. It is clear from 19th century Western Australian social history that not all West Australians were equal under all its laws: those who were poor, for example, tended to suffer more at the hands of the legal system than the affluent.[3] Equality under the law is also a two-way street: while historians continue to examine at length the conflict between white criminal justice and Indigenous peoples in Western Australia, there has been very little focus on the use of white colonial law by Indigenous people for protection from violence, including from a possible lunatic within their community. These lunacy records also describe instances in the same period when Indigenous families or communities, even in remote areas, felt confident enough to use the Lunacy Acts to remove a problematic and no-longer manageable person from a family or community. Their reasons for doing so ranged from a definite fear that the person would harm or kill others within the family to a broader concern that the person was burdensome and engaged in nuisance behaviours.

PREVIOUS HISTORICAL STUDIES ON INDIGENOUS LUNACY AND THE LAW

Edmund McMahon notes that 'Aboriginal mental health' simply did not exist as a concept in Australia before the 1960s,[4] and there has been little historical analysis of records and texts relating to Indigenous mental health. Major works on the history of mental illness in Australia barely mention Indigenous people, let alone provide any analysis of their situation.[5] Exceptions to this are McMahon, who describes the pioneering Indigenous data collection undertaken by Dr John

3. See, eg, P Hetherington, 'The Undeserving Poor, 1870-1890', in P Hetherington, *Paupers, Poor Relief and Poor Houses in Western Australia, 1829-1910* (Perth: UWA Publishing, 2009) 109.
4. E McMahon, 'Psychiatry at the Frontier: Surveying Aboriginal Mental Health in the Era of Assimilation' (2007) 9(2) *Health and History* 22, 47.
5. J Bostock, *The Dawn of Australian Psychiatry* (Sydney: Aust Med Assoc, 1968); S Garton, *Medicine and Madness: A Social History of Insanity in New South Wales 1880–1940* (Sydney: NSW UP, 1988); C Coleborne & D MacKinnon (eds), *'Madness' in Australia: Histories, Heritage and the Asylum* (Brisbane: QUP, 2003); LA Monk, *Attending Madness: At Work in the Australian Colonial Asylum* (Amsterdam: Rodopi, 2008).

Cawte,[6] and Murray, who has examined two formal presentations of medical opinion of Indigenous lunacy dating respectively from 1889 and 1923, those of Dr F Norton Manning and Dr John Bostock.[7] Stephen Garton claims that low numbers of Indigenous admissions to Australian asylums in the 19th century evidences white medical opinion that Indigenous people were not sophisticated enough to experience mental illness, but he does not specify the colonies or asylums of which he speaks, nor indicate how low the numbers actually were.[8]

Comparisons with international colonialism and lunacy administration, even in the Antipodes, are not easily made. Keller,[9] Ernst,[10] Mills,[11] and Ranjan Basu[12] have all described British colonists' willingness to recognise a certain degree of cultural and intellectual sophistication among the subcontinental and African populations they governed and whose sanity they evaluated. Pols describes a similar balance of power with Dutch colonists in Indonesia: a small white colonial population governing a much larger Indigenous population with which they had a comparatively long-standing relationship, and which possessed cultural practices identifiable, if not always comprehensible, to white authorities.[13]

Nor does New Zealand's colonial experience of Maori-paheka relations translate to the Australian situation: there was a consistent legal relationship from as early as 1840 between Maori and white colonists which had no equivalent across the Tasman; Maori also had the advantage of a common language and ethnic identity. Labrum's examination of the committal process used in Auckland, New Zealand, at the turn of the 20th century offers some insights,[14] and while McCarthy also touches on some experiences of Maori institutionalised as insane in 19th century New Zealand, her account is mostly descriptive.[15] The population balance of

6. McMahon, above n 4.
7. C Murray, 'The 'Colouring of the Psychosis': Interpreting Insanity in the Primitive Mind' (2007) 9(2) *Health and History* 7.
8. S Garton, 'The Dimensions of Dementia' in V Burgmann & J Lee (eds), *Constructing a Culture* (Melbourne: Penguin, 1988) 67.
9. R Keller, 'Madness and Colonization: Psychiatry in the British and French Empires, 1800–1962' (2001) 35 *Journal of Social History* 295.
10. W Ernst, 'Idioms of Madness and Colonial Boundaries: The Case of the European and "Native" Mentally Ill in Early 19th Century British India' (1997) 39 *Comparative Studies in Society and History* 153; 'Colonial Policies, Racial Politics and the Development of Psychiatric Institutions in Early 19th Century British India', in W Ernst & B Harris (eds), *Race, Science and Medicine, 1700–1960* (New York: Routledge, 1999) 80.
11. J Mills, *Madness, Cannabis and Colonialism: The 'Native Only' Lunatic Asylums of British India, 1857–1900* (London: MacMillan, 2000).
12. AR Basu, 'Emergence of a Marginal Science in a Colonial City: Reading Psychiatry in Bengali Periodicals' (2004) 41 *Indian Economic Social History Review* 103.
13. H Pols, 'Psychological Knowledge in a Colonial Context: Theories on the Nature of the "Native Mind" in the Former Dutch East Indies' (2007) 10 *History of Psychology* 111.
14. B Labrum, 'Looking Beyond the Asylum: Gender and the Process of Committal in Auckland, 1870–1910' (1992) 26 *New Zealand Journal of History* 125.
15. A McCarthy, 'Ethnicity, Migration and the Lunatic Asylum in Early Twentieth Century Auckland, New Zealand' (2008) 21 *Social History of Medicine* 47.

Maori to paheka also had more in common with British subcontinental and African colonialism: a far larger Indigenous population governed by a smaller white one. In Australia, the situation was completely different, as the Indigenous population still lived in small traditional hunter-gatherer societies. To British and European eyes this way of life was completely 'uncivilised'; Indigenous people were also very few in number (a 1901 census estimated the Western Australian Indigenous population at around 6000), and spread over a vast geographical area.

In Western Australia, there has been some research into minority groups at Fremantle Lunatic Asylum (1865-1909) which casts light on their experiences in and out of the system. Megahey has indicated that the Lunacy Act 1871 (WA) was used to remove troublesome people, including Asians, from some districts by certifying them as insane.[16] Harman has examined the use of the Lunacy Acts as a form of social control of women in Western Australia,[17] while Martyr has highlighted the more problematic diagnoses of Indigenous people as lunatics in Western Australia in this period.[18]

There is a substantial body of historical research into the legal status of Indigenous people in Western Australia, notably the separate laws passed for their control in the 19th and 20th centuries.[19] Most of this literature argues that white colonial law was imposed upon Indigenous people in Western Australia and was administered largely to their detriment. From 1840, Indigenous people were judged incapable of giving evidence under oath and were required instead to make a solemn affirmation,[20] and in 1841 Rottnest Island was constituted an Indigenous prison.[21] Choo and Owen have produced a table of laws and amendments which generated a separate form of legal administration for Indigenous peoples in Western Australia between 1840 and 1905, including the Aboriginal Native Offenders Act 1849

16. N Megahey, 'More than a Minor Nuisance: Insanity in Colonial Western Australia' (1993) 14 *Studies in WA History* 42; 'Insanity or Social Control? Asians in Fremantle Asylum 1890-1900', in R Frances & B Scates (eds), *The Murdoch Ethos. Essays in Australian History in Honour of Foundation Professor Geoffrey Bolton* (Perth: Murdoch UP, 1989) 8.
17. B Harman, 'Women and Insanity: The Fremantle Asylum in Western Australia, 1858–1908', in D Kirby (ed), *Sexuality and Gender in History: Selected Essays* (Melbourne: MUP, 1995) 167.
18. P Martyr, '"Behaving Wildly": Diagnoses of Lunacy Among Indigenous People in Western Australia, 1870–1914' (2010) *Social History of Medicine* 24.
19. See, eg, R Midford, 'Imprisonment: The Aboriginal Experience in Western Australia' (1988) 21 *Australian and New Zealand Journal of Criminology* 168; P Johnston, 'The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust' (1989) 19 *University of Western Australia Law Review* 318; C Clement, 'Monotony, Manhunts and Malice: East Kimberley Law Enforcement, 1896–1908' (1989) 10(1) *Early Days* 85; N Green & S Moon, *Far From Home: Aboriginal Prisoners of Rottnest Island, 1838–1931* (Perth: UWA Press, 1997); K Auty, 'Western Australian Courts on Native Affairs 1936–1954: One of "Our" little Secrets in the Administration of "Justice" for Aboriginal People' (2000) 23 *University of New South Wales Law Journal* 148; A Hunter, 'The Origin and Debate Surrounding the Development of Aboriginal Evidence Acts in Western Australia in the Early 1840s' (2007) 9 *University of Notre Dame Australia Law Review* 115.
20. Evidence and Summary Trial of Aboriginals Act 1840 (WA); Hunter, above n 19, 145.
21. Prison at Rottnest Act 1841 (WA).

(WA), the Aboriginal Offenders Act 1883 (WA), the Aborigines Protection Act 1886 (WA), and the Aborigines Acts of 1897 and 1905 (WA).[22]

For the most part, removals under these laws could not be challenged by habeas corpus: Clark and McCoy note that 'even in rare instances where the writ was successful, such cases were anomalous as full powers to restrict the lives of the Indigenous continued unabated'.[23] From the late 1880s, Indigenous people in Western Australia also came under the authority of 'Protectors of Aborigines', who reported to a central Aborigines Protection Board, and then from 1897 by the Chief Protector of Aborigines, who headed a government department to administer Indigenous peoples' rights and access to welfare, medical care and employment. An individual Protector's good intentions could, however, be undermined by lack of resources and by the strictures of the Aborigines Acts.

But was the traffic entirely one-way? The conflict between white criminal justice and Indigenous peoples in Western Australia is well documented, but there has been little focus on the historic use of white colonial law by Indigenous people for personal, family and community protection. Choo and others indicate the dangers of reliance on white records of the period,[24] but there is nonetheless ample primary evidence describing Indigenous attempts to enlist the protection of white law against other Indigenous people, so the fact that some sought white assistance to remove or control a lunatic can be contextualised against this background.[25]

The struggle to obtain primary source material in Australian mental health history has been noted by its practitioners, notably Coleborne and MacKinnon.[26] Most records in Western Australia pertaining to mental health are under 100 year restriction; many criminal indictment files and other court records are restricted.

22. C Choo & C Owen, 'Deafening Silences: Understanding Frontier Relations and the Discourse of Police Files through the Kimberley Police Records', in C Choo & S Holbach (eds), *History and Native Title* (Perth: UWA Centre for WA History, 2003) 155 Choo has also noted one case of a family servant, Judy, who died in Claremont Hospital for the Insane: C Choo, *Mission Girls Aboriginal Women on Catholic Missions in the Kimberley, Western Australia 1900–1950* (Perth: UWA Press, 2001) 44.
23. D Clark & G McCoy, *Habeas Corpus: Australia, New Zealand, the South Pacific* (Sydney: Federation Press, 2000) 7.
24. Choo & Owen, above n 22, 154.
25. These cases can be found throughout the index to the Colonial Secretary's Office papers: K Ward (ed), *Index to the Colonial Secretary's Office Letters Received: Guardian of Aborigines* (Dictionary of Western Australian Aboriginal Volumes Project, 1987). Richard Broome also touches on the question of intra-Indigenous violence in colonial Australia: R Broome, *Aboriginal Australians* (Sydney: Allen & Unwin, 3rd edn, 2002) 63, 69; while an excellent exploration of the Queensland data is M Finnane & J Richards, 'Aboriginal Violence and State Response: Histories, Policies and Legacies in Queensland 1860–1940' (2010) 43 *Australian and New Zealand Journal of Criminology* 238.
26. C Coleborne & D MacKinnon, '"Madness" in Australia: Histories, Heritage and the Asylum', in Coleborne & MacKinnon (eds), above n 5, 4.

Kercher has described the 'great paucity of law reporting in colonial Australia',[27] while Finnane and Richards have also described the use of newspaper archives to reconstruct early colonial case law in Queensland.[28] Cross-checking of lunacy archives in Western Australia also reveals inconsistencies in record-keeping. Even after the Lunacy Act 1903 (WA) and the introduction of printed registers, record-keeping seems to have been a largely idiosyncratic process: in some cases the record trail ends abruptly, and it is not possible to determine whether a person was ultimately admitted to an asylum or not. Trying to locate Indigenous people in Western Australian lunacy records is doubly challenging: the common use of aliases or European first names over traditional names; cases of mistaken identity; and evidence of white ignorance of the complex family relationships among Indigenous groups, all create problems of identification.[29]

Given these limitations, the material for this study has been drawn from a range of sources. Most important among these are the individual patient committal papers – medical certificates and committals signed by Justices of the Peace – from Fremantle Lunatic Asylum, now in the Mental Health Museum of Western Australia at Graylands Hospital, Perth. To support these documents, I have used the admissions registers and casebooks for Fremantle in the State Records Office of Western Australia. I have also used the Chief Protector of Aborigines files in the State Records Office, some Police Department files, and local newspaper reports.

This article will examine the question of Indigenous people's treatment as lunatics in Western Australia before 1920 by examining four areas: the general application of the Lunacy Acts, the use of insanity pleas in court, Indigenous admissions to lunatic asylums under these Acts, and examples of the use of the Lunacy Acts by Indigenous communities and families to protect themselves.

1. General application of the Lunacy Acts in Western Australia

The colony's first purpose-built lunatic asylum was opened in 1865 in Fremantle for insane prisoners from the Convict Establishment. The colonial government passed its first Lunacy Act in 1871, and then a revised version in 1903 which created a Lunacy Department headed by an Inspector General of the Insane, the first of whom was Belfast-born doctor Sydney Montgomery (1870-1916). Montgomery supervised the building of a larger institution, Claremont Hospital for the Insane, and as a result Fremantle Lunatic Asylum closed in 1909. The Lunacy Act 1903 (WA) and its subsequent amendments were also supported by

27. B Kercher, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project' (2000) 18 *Law & History Review* 659, 660.
28. Finnane & Richards, above n 25.
29. M Wood, 'Nineteenth Century Bureaucratic Constructions of Indigenous Identities in New South Wales', in N Peterson & W Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Cambridge: CUP, 1998) 35; L Marsh & S Kinnane, 'Ghost Files: The Missing Files of the Department of Indigenous Affairs Archives', in Choo & Holbach, above n 22, 111; Choo & Owen, above n 22, 128.

other legislation, including the Inebriates Act 1912 (WA) and Mental Treatment Act 1917 (WA).

Under the Lunacy Act 1871 (WA), a person considered to be of unsound mind at large could be arrested and confined to a lockup until examined by a medical practitioner. Deaths in custody could and did take place among white lunatics.[30] A suspected lunatic had to meet only one of five conditions: that they were without visible means of support, were wandering at large, were not under proper care and control, were being cruelly treated or neglected by their carers, or were considered at risk of committing suicide or some other crime.[31] If the examining medical practitioner (or practitioners) was convinced of the person's lunacy, they would complete a medical certificate to this effect. This certificate includes the summary: 'facts indicating insanity observed by myself' and 'other facts indicating insanity communicated to me by others'. Medical practitioners drew their own conclusions based on their training and experience; they also received information from other people – prison warders, arresting officers, relatives, friends, neighbours.

If the person was certified, then one or two justices of the peace or magistrates would complete a committal form requesting the person's reception at an asylum. In remote areas, it was part of police duty to escort certified lunatics to the city, destined for admission to Fremantle Lunatic Asylum or Claremont Hospital for the Insane – a journey of several days on horseback through bushland and desert, or a shorter journey by rail and boat.[32] Those already in the prison system – 'Imperial' (transported convicts) or 'colonial' (locally arrested) – could be committed from a prison to either Fremantle or Claremont by direct order of the Colonial Secretary. The Lunacy Act also outlined the process by which a jury could determine a defendant's sanity or insanity,[33] which could avert or commute a death sentence and lead instead to prison or the asylum.

With the power to make a preliminary diagnosis of insanity in the hands of the local police, and with station owners – the most significant employers of Indigenous people in remote areas[34] – doing double duty as justices of the peace, this could be dangerous for already-vulnerable Indigenous people. When the subjectivity of assessment was compounded by failure to observe due process,[35] the branding of

30. State Records Office of Western Australia (SROWA), acc 664 cons 36, Government Resident – Greenough, 'Arrest, Trial and Subsequent Death of John Bryant, a Greenough Resident' (1870); acc 1897/4489 cons 430, Western District, Geraldton Station, 'Death of Theodore Carlisen (a Lunatic) at Lockup' (11 Dec 1897).
31. Lunacy Act 1871 (WA) ss 12, 38.
32. SROWA acc 1888/1199 cons 430, Metropolitan Police, Central Station, 'Report from PC Edwin Waldock, re His Trip from Geraldton in Charge of a Lunatic' (1 Jan 1883).
33. Lunacy Act 1871 (WA) s 46.
34. See, eg, MA Jebb, *Blood, Sweat and Welfare. A History of White Bosses and Aboriginal Pastoral Workers* (Perth: UWA Press, 2002); A Haebich, *For Their Own Good: Aborigines and Government in the South West of Western Australia, 1900-1940* (Perth: UWA Press, 1992).
35. L Marchant, *Aboriginal Administration in Western Australia 1886–1905* (Canberra: AIAS, 1981) 38.

a person as a lunatic in 19th and early 20th century Western Australia became rife with opportunities for carelessness and abuse. So how were these laws applied, and to whom?

Admissions to Fremantle Lunatic Asylum indicate that while the law may have been designed to manage anyone posing a risk to the community because of unsound mind, some groups in the population were more vulnerable to this diagnosis than others. There were nearly 600 admissions to Fremantle between 1865 and 1896[36] and these show definite patterns: men accounted for around 59% of the total population in Western Australia, but 70% of the asylum admissions. Many of the male admissions were classed as paupers (70% of all those who had their status recorded), and 16% of the same group also had some connection with the prison system (as colonial or imperial prisoners, or expirees). They were old: in a colony where male life expectancy from 1880-1901 was around 43 years old,[37] the median age of male admissions to the Asylum after 1871 was 40. Many were physically sick or moribund: 61 of the 127 male deaths at the Asylum in this period (48%) took place within a year of admission, and the obituary tables published for the Asylum each year in the annual *Blue Books* indicate that chronic illnesses and old age were the cause of most deaths.[38]

By contrast, Western Australia's officially-counted Indigenous population in this period was small – the first national census in 1901 counted just over 6,000 people of both 'full blood' and 'half caste' Indigenous origin in the State, compared to over 184,000 whites.[39] Indigenous people formed a very small percentage of the asylum population in Western Australia (Table 1). These data also do not take into account any people who were diagnosed but not admitted, or those who were admitted and then discharged or died in the institution in the course of that year.

36. SROWA acc 1120/1, 'Fremantle Asylum Admissions Register – Male'. This register appears to have been rewritten, probably after the introduction of the Lunacy Act in 1871, which means that it is not an entirely reliable source of information on admissions before this date, as the register omits people who were admitted before 1871 but also discharged before that date. I have therefore used the more reliable part of the register which is after 1871. The other admissions register (acc 1120/25) is even less reliable as it was rewritten after 1903 and omits patients admitted and discharged before that date, only retaining the names of those who were admitted after 1857 but still in the asylum in 1903.

37. Australian Bureau of Statistics (ABS), *Australian Historical Population Statistics* (2006) 'Table 48: Life Expectancy at Birth by Sex, State and Territory'.

38. The most common single cause of death in Fremantle Lunatic Asylum from 1870–1881 was 'softening of the brain' (18% of all deaths), but chronic infectious and cardiovascular disease was also common, resulting in deaths from strokes and other incidents: Western Australia, *Blue Books* (1880-1891) s viii.

39. ABS, above n 37, 'Table 9: Indigenous Census Counts and Estimates of the Population, States and Territories: 1836 onwards'; 'Table 30: Population, Age and Sex, WA: 1901 onwards'. But see also G Briscoe, *Counting, Health and Identity: A History of Aboriginal Health and Demography in Western Australia and Queensland, 1900-1940* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2003).

Table 1: Indigenous people institutionalised as lunatics in Western Australia as of 31 December, 1898–1914[40]

Year	Indigenous patients			Total asylum population (WA)	%
	Male	Female	Total		
1898	4	-	4	239	1.7
1899	3	-	3	244	1.2
1900	3	-	3	277	1.1
1901	4	-	4	n/a	n/a
1902	4	-	4	365	1.1
1903	4	1	5	438	1.1
1904	5	1	6	474	1.3
1905	2	1	3	494	1.0
1906	6	2	8	546	1.5
1907	5	1	6	630	1.0
1908	7	3	10	705	1.4
1909	10	3	13	784	1.7
1910	9	1	10	798	1.3
1911	8	1	9	841	1.1
1912	8	1	9	871	1.0
1913	7	2	9	928	1.0
1914	8	2	10	961	1.0

The Statistical Register distinguishes between 'half-castes' and 'full-bloods', totals only provided

The Lunacy Act 1871 (WA) was amended in 1903 but the process of diagnosis and admission remained the same,[41] and by the 1920s, the subjective nature of the evidence required had become a sticking point in law. When Alfred Kidson had to deliver the findings of the 1921 Royal Commission into the unlawful detention of a (white) married couple at Claremont Hospital for the Insane, Western Australia, he found considerable fault with their committal papers, and cited Taylor's 1920 work *Principles and Practice of Medical Jurisprudence*:

> Medical practitioners have had some difficulty in assigning the fact or facts upon which their judgement of the insanity of a person is based.... A medical man should in all cases avoid giving as a fact indicating insanity, any delusion which might in reality have some foundation in truth.[42]

40. Western Australia, *Statistical Register of Western Australia* (1896–1914). The asylum statistics presented in the *Blue Books* do not distinguish between Indigenous and non-Indigenous patients until 1896, and after 1914, inmates' ethnicities were no longer published in the register.
41. Lunacy Act 1903 (WA) ss 5–20.
42. Western Australia, Royal Commission to Inquire into and Report upon the Arrest on a Charge of Insanity, Committal to and Detention in the Hospital of the Insane at Claremont of Georgina and Thomas Mable, *Commissioner's Report* (Perth: Government Printer, 1921) 15.

But this 1921 Royal Commission came at the end of many years of careless committals, even allowing for the extremely wide-ranging interpretation of what constituted lunatic behaviour.[43]

It is not unreasonable to suggest that under the Lunacy Acts, a substantial proportion of the Indigenous population of Western Australia – poor, migratory, socially burdensome and with spiritual beliefs incomprehensible to whites – could have been committed as lunatics.[44] So why did this not happen? Three factors impacted directly upon Indigenous admissions in this period: cost, space and existing legislation.

It was far more expensive to keep an Indigenous person as a lunatic in Western Australia than to maintain them on the Natives Relief List. In 1906, for example, the weekly cost of maintaining a lunacy patient in an asylum in Western Australia was 13s 2d.[45] Rations for 837 Indigenous people in Western Australia in the same year, classed as 'native relief', cost £8533, or just under 4s per head per week.[46] Remote area admissions were additionally expensive: in January 1905, an Indigenous man from Broome known as W (alias R) was admitted to Fremantle Lunatic Asylum. He had been brought down from Broome by a special police constable, a trip costing the Lunacy Department a total of £17/12s, or the equivalent of around six weeks' wages for a working man in Perth.[47] The Aborigines Department paid the full amount.[48]

The issue of space was a real one: by 1900, Fremantle Lunatic Asylum was notoriously overcrowded, and local magistrates were periodically informed that they were not to commit any more lunatics from their district.[49] Individuals were turned away, sometimes with tragic results.[50] Under these conditions, it seems unlikely that an Indigenous person would be admitted to an asylum – especially from a remote area – unless it was determined by white authorities to be the very last available option.

43. For example, in 1903 the three most common perceived causes of insanity in males admitted to Fremantle Asylum were alcohol abuse, sexually transmitted disease and masturbation: Western Australia, *Report of the Inspector General of the Insane* (1903) 9.
44. Marchant, above n 35, 31.
45. Western Australia, *Report of the Inspector General of the Insane* (1907) 5.
46. Haebich, above n 34, 100.
47. Western Australia, *Western Australian Year Book* (1904) Pt VI, 41.
48. SROWA acc 1905/0317 cons 255, 'Secretary, Lunacy Department, Transport Expenses Incurred During Committal of Aborigine to Hospital for the Insane' (31 May 1905). See also SROWA, acc 1914/3890 cons 430, 'Journal of Constable Norman 1073, Nullagine, Insane Native at Roy Hill' (Broome, 24 Apr–12 May 1914). Cost shifting also took place with white patients, SROWA acc 1912/0919 cons 430, 'Insane Patient, Chas James John Butcher of Midland Junction, Expenses, from Guildford'.
49. 'Government Gazette – Lunatic Asylum', *The West Australian* (Perth), 6 Dec 1889, 4.
50. 'Western Australia', *The Argus* (Melbourne), 11 Jul 1891, 10.

A third reason was that, as Choo and others have noted, there was already ample legislation keeping Indigenous people under control. The low numbers of Indigenous people admitted to Fremantle and later Claremont may not so much indicate a low prevalence of lunacy as the fact that already-existing legislation – that which provided 'native relief', or led to prison sentences – was cheaper to administer and more effective. Factors such as the cost of removal and maintenance, and the overcrowding of existing facilities, may have played a substantial part in keeping Indigenous people in Western Australia in this period out of the lunacy system altogether.

2. Indigenous use of the insanity plea

Between 1852 and 1903 there were at least 18 criminal cases in Western Australia where the defence set up a plea of insanity. Almost all of these were for murder, and nine involved the death penalty which was later carried out in five cases.[51] Under the Aboriginal Offenders Act 1849, Indigenous people could be formally tried for capital crimes at the discretion of the local justice,[52] and it would appear from newspaper evidence that they – and anyone else accused of capital crimes but unable to afford legal representation – were not generally assigned counsel up to as late as 1872, leading to misrepresentation and misunderstanding in court. *The Perth Gazette and West Australian Times* lamented that 'we have ourselves witnessed [Indigenous] cases which would have in all probability assumed a different complexion had the case of the prisoners been defended by counsel'.[53] One of the reforms introduced by the Aboriginal Offenders Act 1883 was to ensure that Indigenous people charged with capital crimes would not be tried locally by magistrates, but would have their cases heard by the Supreme Court.[54]

One of the earliest cases of an insanity plea in a murder case in Western Australia was in 1852, when two Indigenous men named Bickengoot and Qualtengoot were charged with the murder of an Indigenous woman called Cunjerung, in the Vasse district. Both were found guilty at the Quarter Sessions held in Perth in early April 1852, but sufficient doubts were raised about Bickengoot's sanity to have the case reviewed. The *Perth Gazette and Independent Journal of Politics and News* was dismayed, arguing that:

> [N]o Governor can hereafter again have any valid plea for consigning an aborigine to the gallows, for assuredly no more cool, deliberate murder could be perpetrated than that of the victim of Bickengoot, or one in which the murderer could be more fully aware of the nature of the crime or the penalty awarded to it ... That the

51. Those who pleaded insanity but were subsequently executed were: Kenneth Brown (1876), Henry Haynes (1884), William Conroy (1887), Jumna Khan (1897) and Ah Hook (1904).
52. Aboriginal Offenders, Summary Trial of 1849 (WA) ss III, IV.
53. 'Omnium', *The Perth Gazette and West Australian Times* (Perth), 29 Nov 1872, 3.
54. Aboriginal Offenders Act 1883 (WA) s 5.

> prisoner has been subject to fits of mental aberration, even if true, can be no excuse for the commission of crime when in his senses.[55]

Bickengoot was later examined by three white landowners who lived in the Vasse region to determine his sanity, whereupon the *Perth Gazette and Independent Journal of Politics and News* changed its tune:

> Several parties were examined who had been acquainted with the criminal for many years previous to his conviction, and we understand that all their evidence has tended to show that His Excellency the Governor will be justified in remitting the capital punishment. The rumours which were afloat relative to Bickengoot's insanity or weak state of intellect, seem to have been well founded, and the Government must now assuredly congratulate themselves upon taking the proper steps for ascertaining their truth.[56]

In 1884, white settler Henry Haynes was found guilty of murdering his wife after an unsuccessful defence of insanity,[57] which also appears to be the first case in Western Australia in which the M'Naghten Rules were explicitly invoked by the prosecution.[58] *The West Australian*, however, compared Haynes' verdict unfavourably with the case of an Indigenous man who was tried for murder of an Indigenous girl in the same session, but had the death sentence commuted on the grounds of tribal custom:

> But while Haynes is to suffer the extreme penalty of the law, Benben, the murderer of the unfortunate girl Lizzie is to have his sentence commuted to penal servitude for life. In face of the strong recommendation to mercy, emanating from the jury, on the ground that the dreadful outrage at the Williams was the outcome of 'tribal custom', it could not, we presume, be expected that the Executive would arrive at any other decision than that the life of Benben should be spared. But there really is a great deal of inhumanity about these recommendations to mercy, and there can be no doubt that numbers of unfortunate aboriginals meet with violent deaths owing to the leniency with which horrible barbarities on the part of the natives are treated whenever there is the slightest ground for attributing them to 'tribal custom'.[59]

In mid-1903, there were two further instances of Indigenous people pleading insanity when charged with murder. The first man, known as Tom or Morange

55. *The Perth Gazette and Independent Journal of Politics and News* (Perth), 23 Apr 1852, 3.
56. 'Domestic Sayings and Doings', *The Perth Gazette and Independent Journal of Politics and News* (Perth), 14 May 1852, 3.
57. 'Supreme Court – Criminal Sittings', *The West Australian* (Perth), 10 Jan 1884, 3. Haynes was executed on 23 Jan 1884.
58. Ibid. The M'Naghten Rules were a means of determining criminal liability in cases where the defendant was possibly of unsound mind. They were developed after the acquittal of Daniel M'Naughten for murder in 1843.
59. 'Occasional Notes', *The West Australian* (Perth), 22 Jan 1884, 3. The tribal custom plea seems to have been broadly effective in commuting Indigenous death sentences from around 1868 onwards. See, eg, 'Supreme Court – Criminal Side', *The Perth Gazette and West Australian Times* (Perth), 9 Oct 1868, 3. For an interstate comparison, see Finnane & Richards, above n 25, 238, 245.

(Morangi), had speared another Indigenous man and killed him. He was tried by a magistrate in Broome without counsel and was found guilty, but *The West Australian*'s Roebourne correspondent complained that this 'callous injustice to an unfranchised and helpless people ... dishonours the State'.[60] However, a report from 16 June states that Tom had been tried by a jury who found him insane, and that the case had been referred to the Attorney General.[61] Morangi's death sentence was commuted to 10 years' imprisonment with hard labour, but he does not appear to have been admitted as a patient to Fremantle or to Claremont.[62]

On 28 June 1903, a man known as Noru or Norn (alias Johnson) was tried at the Criminal Court in Esperance for killing Jessie, his tribal wife.[63] Norn's defence counsel was instructed by the Aborigines Protection Department to argue for his insanity, and the examining medical officer Dr Harvey gave evidence that he, the local doctor Dr Harrison and Dr Sydney Montgomery had all examined the man and found him incapable.[64] Harvey also claimed to have taken evidence from other local Indigenous people who said that Norn's 'brains had run away'.[65] An Indigenous man who testified at the trial (described by *The Kalgoorlie Argus* as 'an intelligent black named Jack'), told the court that 'up our way they say he mad and gone off his head. I think same'.[66] Norn was found to be insane and was handed over to the custody of the Protector of Aborigines. He was admitted to Fremantle Lunatic Asylum on 16 July 1903 and died there on 6 August 1905.[67]

Use of the insanity plea does not seem to have been generally widespread in colonial Western Australia, and it is worth noting that in the case of non-Indigenous people it seems to have failed as often as it succeeded. In the case of the Indigenous men in whose cases insanity was used as a defence, all three pleas were successful in avoiding the death penalty. It is also worth noting that in all three cases, the murder was of another Indigenous person, although if *The West Australian*'s impression was correct, other defences such as 'tribal custom' could be pleaded more successfully, even in cases where whites had been killed, if retaliation could be proven.[68]

60. 'News and Notes', *The West Australian* (Perth), 9 Jun 1903, 4.
61. 'West Australia', *The Kalgoorlie Western Argus* (Kalgoorlie), 16 Jun 1903, 54.
62 'News and Notes', *The West Australian* (Perth), 25 Jun 1903, 4. Tommy Moore, an Indigenous man charged with the murder of a child in Sydney, was sentenced to death in February 1903 when his plea of insanity failed to convince the jury: 'A Shocking Crime – Ramsay's Bush Murder – An Aboriginal Sentenced to Death', *The Advertiser* (Adelaide), 26 Feb 1903, 4; 'Crumbs', *Queanbeyan Age*, 15 Apr 1903, 2.
63. 'Native Murder – Prisoner Supposed to be Insane', *The West Australian* (Perth), 30 Jun 1903, 4.
64. 'An Insane Aboriginal – Charged with Wilful Murder – Handed Over to Aborigines Board', *The West Australian* (Perth), 16 Jul 1903, 6.
65. Ibid.
66. 'Telegraphic – Western Australia', *The Kalgoorlie Western Argus* (Kalgoorlie), 21 Jul 1903, 42.
67. SROWA acc 1120/25, 'Fremantle Asylum Admissions Register', 54.
68. See, eg, the 1872 murder of Walter Ledger, where whites urged clemency for the Indigenous men to be executed, on the grounds that it would start a payback war of killings in the district: *The Perth Gazette and West Australian Times* (Perth), 13 Dec 1872, 2. Judges were not always

3. Indigenous asylum admissions under the Lunacy Acts

There was no special provision made for Indigenous people under any lunacy legislation in Western Australia, which was noted by administrators puzzled by the cases with which they were presented. So far I have found only two pre-1871 records of Indigenous people being admitted to asylums in Western Australia. The first was a 'native schoolboy' called Gorman who was held in Fremantle's Round House for two months in 1847 as a 'supposed lunatic, also for stealing pigs', and who was later readmitted in 1849 for half a day.[69] In 1870, TM, described as 'Aboriginal', was admitted to Fremantle Lunatic Asylum on 10 August 1870 with a diagnosis of 'dementia' and was discharged on 30 August in the same year, being sent to Rottnest Island prison.[70]

Some admissions after the 1871 Act were clearly elderly and/or physically moribund. N was admitted with 'mania' in 1873 and then again in early 1874, his age being estimated at admission at 96 and 112 respectively, and he died in the Asylum on 9 May 1874.[71] B was also admitted with 'mania' in April 1877, but died of a haemorrhage of the lungs in October 1878. Y was admitted in November 1876 as a pauper imbecile and died in October the following year.[72] D was admitted at the age of 60 in February 1888 with a diagnosis of 'delusions', but Dr Henry Barnett, the surgeon superintendent who performed his post-mortem, reported on 15 March 1888 that he suspected that the man had died of a brain abscess.[73]

Admissions from prison or from other institutions were unambiguous and swift. BM, an admission from Rottnest Island Prison, was sent to the Asylum on 28 December 1886, but died in August the next year from longstanding 'cerebral congestion'.[74] M alias T was another 'criminal lunatic', convicted of murder in Derby in 1897, but whose commuted sentence took him to Rottnest Island in October that year. By April 1898, he was described by the prison superintendent as 'raving' and was admitted to Fremantle in May.[75] TN was serving a six months' sentence for vagrancy in 1893, but within a week of sentencing he was admitted to Fremantle Asylum with 'delusions', and died the next month.[76]

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sympathetic to the use of the tribal custom defence, and could instruct a jury to disregard it: see Stone's comments, 'Supreme Court – Criminal Sittings', *The West Australian* (Perth), 11 May 1883, 3.

69. N Hudson-Rodd & G Farrell, 'The Round House Gaol: Western Australia's First Lunatic Asylum' (1998) 7 *Australian and New Zealand Journal of Mental Health Nursing* 152, 158.
70. SROWA acc 1120/25, 'Fremantle Asylum Admissions Register', 4.
71. Mental Health Museum of WA Inc (MHMWA), N, committal papers, first admission 27 Nov 1873, second admission 23 Mar 1874.
72. MHMWA, Y, committal papers, first admission 19 Nov 1876, died 23 Oct 1877.
73. MHMWA, D, committal papers, first admission apparently 18 Jan 1888.
74. MHMWA, BM, committal papers, committed on 28 Dec, but may not have been admitted until 30 Dec 1886.
75. MHMWA, M alias T, committal papers, admitted 10 May 1898, died 2 May 1904.
76. MHMWA, TN, committal papers, admitted 26 Jun 1893, died 25 Jul 1893.

These admissions are comparable to white admissions to Fremantle Lunatic Asylum in the same period: predominantly male, older, connected with the prison system, and often with physical illnesses that rapidly produced delirium and death.[77] The first question raised about whether Indigenous people suspected of lunacy should be treated under the Lunacy Act 1871 (WA) came with the case of a woman, MH, who seems to have been committed twice in the 1870s and 1880s. Her second committal in 1883 prompted the acting Colonial Secretary to contact the Governor, Frederick Broome, about whether this case should be treated differently for financial purposes, noting that:

> The Lunacy Act 1871 makes no special provision for Aboriginal lunatics. If admitted as a 'Pauper Lunatic' the Magistrate's course is clearly defined by Part II of this Act. If as a 'Dangerous Lunatic' by Part III, the Magistrate makes no mention of how long the woman has been under observation, or of the probable cost of sending her to Fremantle.[78]

The reply came: 'If the procedure prescribed by section [sic] II of the Lunacy Act 1871 has been followed, the woman may be sent to the Asylum, the proper medical certificate and Justices' order accompanying her'.[79]

In 1903, before the new Act was passed, Dr John Roughan, the Resident Magistrate at Williams, reported that he had an 'insane native', probably the Indigenous man Q, in the police cells and wanted to know if he could have him admitted to Fremantle Lunatic Asylum.[80] The Chief Protector of Aborigines, Henry Prinsep, inquired from the Principal Medical Officer Thomas Lovegrove what should be done, and Lovegrove was quite explicit: 'An Aboriginal native of unsound mind can be dealt with in the same way as any other person – Dr Roughan should certify as this condition of mind under 34 Vict no 9 & advise the Medical Superintendant at Fremantle asylum as to his probable time of arrival there'.[81] Q was admitted to Fremantle with a diagnosis of epilepsy on 27 May 1903, where he died on 6 November of the same year.

The situation in 1905 of a woman at Roebourne known as D was more complicated, and reveals both medical ambivalence in diagnosing insanity and some unexpected aspects of the role of Chief Protector of Aborigines. Dr John Maunsell, medical officer at Roebourne, sought on 31 March to have D admitted to Fremantle as

77. The median age of 351 white male admissions to Fremantle Asylum from 1857–1895 was 40; life expectancy for men in Western Australia in the decade 1881–90 was estimated at 46 years of age. SROWA acc 1120/1, 'Fremantle Asylum Admissions Register – Male'.
78. SROWA acc 1883/0615 cons 527, 'Resident Magistrate Bunbury, Lunatic Aboriginal Native Woman' (20–23 Nov 1883).
79. Ibid, file note (20 Nov 1883).
80. SROWA acc 1903/0270 cons 255, 'Resident Magistrate Williams, Wishes to Commit Insane Native to an Asylum' (1 Apr 1898 – 31 Dec 1908).
81. Ibid (21 May 1903).

being of unsound mind and not fit to be at large.[82] Apparently no action was taken until 15 May, when the Chief Protector of Aborigines, Henry Prinsep, received the following communication from the Principal Medical Officer, Thomas Lovegrove:

> Police Fremantle called up by telephone at 3pm today, and state that two doctors have examined the native woman D, pronounced to be of unsound mind by Dr Maunsell of Roebourne and find that there are no signs of insanity about her. The woman is at present in the Fremantle lock-up – Police wish to know what is to be done with her.[83]

A handwritten note below says: 'Police never informed us of her arrival in Fremantle, that I know of.' Prinsep drew Lovegrove's attention to the woman's file, and wrote, 'Had not you better arrange for woman's return – or see her yourself?'[84] Lovegrove replied tartly:

> Is it not rather for you to make a personal inquiry concerning her treatment and wellbeing of this interesting case – Is it not possible that all the doctors who have examined this woman from want of experience with aboriginals are 'off the track'. Possibly when Dr Maunsell certified as to her state of mind she may have been under the influence of alcohol which has since become eliminated from the system.[85]

Prinsep retorted:

> After what you say it occurs to me that I cannot in future depend upon the opinion of a medical man whether an Aboriginal is sane or insane – unless I have first ascertained whether any medical man appealed to has experience with natives – this is an impossible case of course. Meanwhile I have wired to Dr Maunsell asking him if he has any remarks to make prior to my sending the poor creature back.[86]

Dr Maunsell, the doctor who had first examined D, replied from Roebourne on 24 May by telegram: 'Think native D ought not be sent back but kept under observation. goal & police authorities white people & natives on station she comes from consider her insane & have seen her behaving like a raving lunatic'.[87] Lovegrove was displeased at this opposition to his authority as Principal Medical Officer: 'If you will obtain Dr Maunsell's certificate in regard to this case I should like to see it. – I do not see how this woman can be legally detained as suggested by the Doctor'.[88]

82. SROWA acc 1905/0152 cons 255, 'Resident Magistrate Roebourne, Dispatch of Woman Believed Insane to Fremantle' (1 Apr 1898 – 31 Dec 1908) telegram, 31 Mar 1905.
83. Ibid, Principal Medical Officer to Chief Protector, 15 May 1905.
84. Ibid, Chief Protector to Principal Medical Officer, 15 May 1905.
85. Ibid, Principal Medical Officer to Chief Protector, 16 May 1905.
86. Ibid, Chief Protector to Principal Medical Officer, 18 May 1905.
87. Ibid, Maunsell to Chief Protector, 24 May 1905.
88. Ibid, Principal Medical Officer to Chief Protector, 25 May 1905.

Prinsep then contacted the Attorney General's office for a clarification of the Lunacy Act 1903 (WA).[89] The Attorney General's office replied:

> I can see nothing on this file to indicate whether or not the native woman 'D' has been dealt with in the manner prescribed in part II of the Lunacy Act (1903, no 15) or in any known legal way. If she is insane she ought to be sent to the asylum; if she is not insane she ought to be set free – And the question must be determined one way or other in some method prescribed by law. Suggest that you as Chief Protector should lay all information ... under s6 of the Lunacy Act before the Res[iden]t Magistrate, Fremantle, complaining that aboriginal native woman 'D' is deemed to be insane and that she is now in Fremantle lock up (or as the case may be) and is not under proper care & control. Procedure will then follow as prescribed in ss 6 and 7 and the ... Res[iden]t Magistrate or justices who adjudicate must decide the question on the evidence.[90]

Meanwhile, D remained in the Fremantle lockup without legal redress. A doctor in Roebourne had certified her insane and was maintaining this position from a considerable distance via telegram. Two local doctors had examined her in Fremantle and found her quite sane. She could not be kept imprisoned, and yet she could not be released. Prinsep was bewildered, and contacted Lovegrove again:

> I forward for your information Dr Maunsell's last wire of yesterday – from which he seems to imply that he did act according to your telegraphed instructions & sent a certificate of lunacy as to D. If so why cannot she be taken into the Asylum – after a while if it appears she has quite thrown off her malady she can be sent back – I would like you to read particularly Dr Maunsell's wire of 23rd May again.[91]

Lovegrove's response was blunt: 'I have nothing to do with Lunatic Asylums now – The Assistant Crown Solicitor's minute on folio 9 appears to me to set out my clear course'.[92]

What could be done? The Chief Protector of Aborigines decided to collect his own evidence as to D's sanity, and was already aware that the woman in charge of the Fremantle lockup, Mrs Sweeny (wife of a constable) thought that there was 'no sign of lunacy about D'.[93] He obtained from her a written statement to this effect:

> RE native woman C alias D now at Fremantle lockup on charge of Lunacy from Roebourne. I beg to state that she has been under my observation daily for the last three weeks and seems to be properly sane in her conversation, & passes her time away sewing, and mending her clothes. She seems very anxious to go back to her country and is very quiet. She eats and sleeps well.[94]

89. Ibid, Chief Protector to Attorney General, 25 May 1905.
90. Ibid, Assistant to Attorney General to Chief Protector, 25 May 1905.
91. Ibid, Chief Protector to Principal Medical Officer, 1 Jun 1905, 7.
92. Ibid, Principal Medical Officer to Chief Protector, 1 Jun 1905.
93. Ibid, Chief Protector to clerk, 2 June 1905.
94. Ibid, Statement from L Sweeny to Chief Protector, 3 Jun 1905.

Prinsep arranged for D to remain in the lockup and for her care to be charged to his department.[95] She was eventually admitted to Fremantle Lunatic Asylum on 3 July 1906, a full month after Mrs Sweeny declared her sane, and was discharged on 10 June 1908. She was subsequently readmitted and died there on 16 November 1909.

Indigenous lunacy was perplexing to white authorities. On the one hand, there is a clear acknowledgement that Indigenous people were to be treated as equal under the Lunacy Acts, and in practice there seems to have been reasonably careful investigations of the situation of alleged Indigenous lunatics, even if it was only to ensure that the Aborigines Department paid for the person's maintenance. On the other, there seems to be concern that the existing law and levels of medical expertise were not sufficient to deal with these cases of Indigenous lunacy, but no suggestion as to how this could be improved.

4. 'He cannot manage her': use of the Lunacy Acts by Indigenous people

The role of family and community cannot be excluded when examining the use of the Lunacy Acts by and against Indigenous people. In some cases, it seems that an individual was cared for by a community until a point came when the community was no longer able to support the person's behaviour. In others, there may be multiple agencies at work: domestic violence, retribution, or simply exasperation with (or fear of) a difficult family member. These cases raise issues of the use of white authority by Indigenous communities to deal with matters which they felt unable to manage. Like other aspects of white-Indigenous relations which have been interpreted as negative – such as multiplying names and mistaken identity — it is possible to read this more positively, as Indigenous communities and families striving for self-determination and preservation. The use of white law to secure safety for a family suffering violence, or to compel white authorities to remove a person displaying uncontrollable behaviour, may have been seen as positive outcomes. In the case studies below, Indigenous families also appear willing and able to ask for a family member to be returned to them.

When M, a woman aged about 40, was arrested in February 1878 for being 'in a state of mania', she was assessed by Dr Henry Barnett, the Surgeon Superintendent of Fremantle Lunatic Asylum, in the police cells. On 6 March, when her husband and sister came to visit her, they wished to take her home to Bunbury as, Barnett noted, they 'say she will be all right in bush'. On 7 March, M was 'excited' again: 'other patients excite her much and it will be well to let her go with her relations to the bush as soon as there seems to be decided improvement as she excites all the other patients'.[96]

95. Ibid, Inspector of Police to Chief Protector, 3 Jun 1905.
96. Ibid, 9 Mar 1878.

Barnett was ambivalent as to whether the asylum environment was bad for M, or M was bad for the asylum environment. This was resolved by 14 March, when Barnett wrote to the Official Visitors:

> This woman is a patient in Lunatic Asylum and is not yet sane. Her confinement in Asylum makes her mental affliction worse and her presence irritates all the other female patients. Her husband and sister are anxious to take charge of her to the Murray. It will give her a better chance of recovery to be in the bush and the husband promises to bring her back if she gets worse – Therefore I recommend that she be allowed out on a fortnight's trial in care of her husband.[97]

On 15 March, M was allowed out on trial with her husband, who returned her to the Asylum three days later because he 'cannot manage her, he says he will go to the Murray and return to see her after the rains. She is being troublesome and inclined to strike patients'.[98] He came back on 30 April and said he would call for her in 'six months and a fortnight's time' if she were fit to be released. By June M was 'quieter'; by August she was expressing more and more desire to leave the Asylum. Barnett recommended her discharge into the care of her sister on 29 August, but her sister left town without taking her. Finally her sister and brother came 'to take her into bush' on 17 September 1878.

M re-entered the system in early 1884, when the resident magistrate for Pinjarra wrote to the Fremantle police on 27 May:

> The Aboriginal woman M was in the Asylum some few years ago she seems to be again out of her mind and her son the bearer of this memo wishes to have her placed in the Asylum as there is no Medical Officer in this district, he [?felt obliged? illegible] to take her before Mr Black and Dr Barnett for examination under Lunacy Act.[99]

Barnett noted that, 'After carefully examining this case I do not think that it is one to send to Asylum. She talks and acts sensibly and her native relations are here waiting to take her away and I recommend that she should be allowed to go with them.' But two days later, on 9 June, Barnett changed his mind: 'Since last certificate this woman has been decidedly insane and I recommend that she be removed to Asylum – I shall give medical certificate.' M was later discharged to the care of her husband on 7 July 1884.[100]

MH is another case in point. Her behaviour first became problematic when her mother died suddenly in an accident, but then she had been cared for by her (Indigenous) husband WH. MH was committed to the Asylum in October 1879 at the estimated age of 45, and her husband's testimony stated that she 'has

97. Ibid, 14 Mar 1878.
98. Ibid, 18 Mar 1878
99. MHMWA, MH, committal papers.
100. SROWA acc 1120/1 Fremantle Asylum Admissions Register – Female, 4.

been ailing for a period of about three years but that of late her malady has been increasing, that she has burnt two houses in which the family resided, and that she has attempted to take his life three times by striking at him with a knife and tomahawk'.[101] MH's final outcome is unclear; there were two Indigenous women with identical names, both of whose committal papers indicate that they may be the same person, but Fremantle Lunatic Asylum's admissions records confuse the matter further by describing them separately and with substantially different ages.

The 1903 case of G (or K) at Wooramal River near Carnarvon provides an example of both Indigenous community care of a disturbed person, and administrative uncertainty as to what to do when her behaviour became intolerable to whites. On 16 January 1903, Constable Stevens reported that the young woman, around 20 years old, 'is insane. She is a young woman of about 18 or 20 years of age, looks strong and healthy. This woman seems perfectly harmless but her habits are filthy & disgusting. Her language which is in very fair English is also filthy'.[102] White settlers had asked for her removal from the district,[103] but the local sergeant of police, Houlahan, found the woman's change in behaviour puzzling:

> This woman belongs to the Wooramel tribe, and can only have taken to these filthy habits recently, as I have never heard of her carrying on in such a manner before. She has always been looked after by other natives who are employed with sandalwood cutters and for a time was at the Wooramel Telegraph Station on the relief list with other indigent natives, but went away from there to the Sandalwood Camps again.[104]

The local police inspector, EO Drewry, consulted the Chief Protector of Aborigines, Henry Prinsep, on 29 January: 'What do you suggest in this matter, it is no use the Police arresting this gin until some arrangement has been made for her treatment at some specified place. The hospital will not receive her, will the Fremantle Lunatic Asylum [?].'

Prinsep referred the matter to the Asylum, and followed up with Thomas Lovegrove: 'Will you kindly read this report & advise me what accommodation there is for such a case – Is it common? Is it permanent?' Lovegrove outlined the steps required under the Lunacy Act: 'The proper course is to get the doctor at Carnarvon to see the woman & give a certificate of Lunacy (if she is a lunatic & the report bears that construction) & then send her direct to the Asylum at Fremantle'.[105] G(K) was eventually admitted to Fremantle in March 1903. She was more fortunate than LP, an elderly Indigenous woman who was admitted to

101. MHMWA, MH, committal papers.
102. SROWA acc 1903/0047 cons 255, Police, Carnarvon, 'Re: Native Woman at Wooramal River – Stated to be Insane' (1 Apr 1898 – 31 Dec 1908).
103 Ibid.
104. Ibid, J Houlahan, 17 Jan 1903.
105. Ibid, 29 Jan, 2 Feb, 13 Feb 1903.

Fremantle in 1906 on the grounds that, 'The members of her own tribe refuse to look after her on account of her madness; as they are afraid of her'.[106]

The case of JN, years later, proved equally problematic. In 1918, Sergeant Barry, Protector of Aborigines at Narrogin, wrote to the Chief Protector in Perth about JN, who was –

> more of a mental case than anything else ... the other natives inform me that he sleeps all day, and he will not move about when the others have to move camp, they have to carry J, as he will not walk, he eats well and I have talked to him and he seems rational enough, but never the less I think that he should be sent to some place where he could be treated.[107]

The Chief Protector replied:

> In regard to J, it is difficult to know what to do, but I think that he should be examined and certified as fit or otherwise, or if he is fit to get about and look after himself, he should be made to do so ... .We might remove N to one of our settlements if there is no fear of his becoming a mental case, and is otherwise unable to care for himself.[108]

The difficulties began when it was ascertained that there were two JNs, with almost identical names. Both, it seems, were also admitted at more or less the same time to Claremont Hospital for the Insane. One ended up discharged, 'very much improved, and ... working'[109] but the other –

> is the man of whom I wrote you about Sept last, he is a great source of worry to the other natives as he wanders away from camp for days at the time [sic] and they have to go look for him, and while wandering about he is very likely to throw a lighted match away after lighting his pipe, and will set fire to the country; if he is not eventually sent to the Asylum, it will be useless to send him to Katanning, as he will run away from there.[110]

Again, it is hard to find any definite information about JN's outcome due to the confusion of identities.

The evidence given by Indigenous people in these accounts, whether at first– or second–hand, indicates that they felt able to ask for help under the Lunacy Acts. When a person's behaviour became too frightening or uncontrollable, these Indigenous people understood that they had a right to ask for the person to be removed from their family or community. Similarly, once that person's behaviour

106. MHMWA, LP, committal papers, admitted 23 Mar 1906, died 26 Apr 1906.
107. SROWA acc 1918/1161 cons 652, 'Police, Narrogin, Halfcaste JN Admission to Claremont Hospital for Insane' (1 Jan 1909 – 31 Dec 1920) 3 Sep 1918.
108. Ibid, 6 Sep 1918.
109. Ibid, 23 Oct 1918, 7.
110. Ibid, 18 Feb 1919, 8.

had improved, they also exercised the right to ask for them to be returned to the community or family.

CONCLUSION

Several elements emerge from these cases of Indigenous interactions with the Lunacy Acts in the late 19th and early 20th centuries in Western Australia. The first is the limited use of the insanity plea as a defence in court, but this may have been because there were other pleas, such as tribal custom, which were more effective. The second is a hesitancy and unwillingness on the part of medical and legal white authorities to institutionalise an Indigenous person under the Lunacy Acts unless they were very old, terminally ill, or considered offensive or dangerous either by whites or by their own community. This is consistent from the 1870s onwards, when both Fremantle Lunatic Asylum and Claremont Hospital for the Insane admitted white and Indigenous patients suffering from the same extremes of age, illness and antisocial behaviour, including senile dementia and delirium which was interpreted as lunacy.[111]

Why this hesitancy? Some reasons are clear in the above narratives: the asylum environment could be disrupted by Indigenous admissions (as with M), and some mainstream hospitals would not admit Indigenous people at all (as with G(K)). The perpetual question of cost is also important: moving someone from a remote area was expensive, and if the cost of maintaining an Indigenous lunatic could be shifted, then it was. If it were cheaper and more convenient to whites, the Indigenous person might remain where they were, regardless of the difficulty they posed to their own community. If whites were disrupted, as in the case of G(K), then a person would almost assuredly be moved, as the cost would be considered worthwhile. But if the person lived in a remote area, or if their own community was not complaining of their behaviour, then they could be left where they were, because of the high cost of moving them to the city and because the existing facilities were already overcrowded and unwilling to accept patients who were not perceived as being in real need of custodial care.

In this sense, Indigenous people were not treated as equals under the law: those most likely to suffer this inequality lived far from the metropolitan area, were considered a disruptive influence in an asylum environment, and were already receiving a cheaper form of welfare support which was easier to maintain. Given the living conditions in Western Australia's colonial asylums, this may have been a blessing in disguise. Yet overall, Indigenous admissions to Fremantle and Claremont match the existing profile of common white admissions: males from the labouring class, vagrants, those with prison backgrounds, the elderly and physically sick, and females suffering from lack of family support. It is interesting to note that although some Indigenous admissions were diagnosed as being in the last stages of sexually transmitted disease, alcohol – with the exception of

111. Western Australia, *Report of the Inspector General of the Insane* (1903–45).

D – forms no part of any diagnosis of, or discussion around the sanity of, any Indigenous lunatic in this period.

Western Australia's Lunacy Acts formed part of the wider socio-political structures of colonial society. The surviving colonial and early 20th century administrative documents reveal genuine attempts on the part of administrators to ensure that Indigenous people were granted their rights under the Lunacy Acts, such as the right to be found insane by a jury when on trial, the right to be properly assessed by a medical practitioner while detained as a lunatic, and to be released if found to be sane. On the whole, Indigenous people were treated as equal to whites under these Acts, except in the matter of admission to asylums, which seems to have been treated as a last resort for those in remote areas. Additionally, the Lunacy Acts did provide Indigenous people with a means of dealing with problematic individuals who defied other forms of legal control.

This field is only now opening up to the historian as an area for research. Indigenous diagnoses and treatment, both inside and outside the lunatic asylum, have yet to be explored in any detail. Closer examination of admissions records, if surviving; asylum casebooks and mission records may tell us more about whether Indigenous peoples in Australia really were considered as equals under the law when it came to the diagnosis and treatment of lunacy. Hopefully, as more historians take up this sensitive challenge, data will be forthcoming which will show clearer patterns of application of the Lunacy Acts to this historically marginalised and silenced population.