

11 November 2014

The Hon. Justice D Jackson
Queensland Law Reform Commission
PO Box 13312
George Steet Post Shop
Brisbane QLD 4003

By email: David.Groth@justice.qld.gov.au

Dear Justice Jackson,

Proposed QLRC program of work

Thank you for inviting Queensland Association of Independent Legal Services Inc (**QAILS**) to inform the Queensland Law Reform Commission's program of work. QAILS suggests that the Commission examine the lack of equality when it comes to judging a person's fitness to plead, with different processes and systems for people charged with summary and indictable crimes.

QAILS is the peak organisation for Queensland's community legal centres, working towards a fair and just Queensland. To achieve this, QAILS supports and develops community legal centres to provide effective, high quality services to their communities, and leads to unite its members and be a leading voice for social justice.

Currently, as the law stands in Queensland, there is no provision that accounts for people who may be unfit to plead in summary matters in the Magistrates Court. For indictable offences and simple offences that are related to indictable offences, the defendant is referred to the Mental Health Court if there is reason to believe they may be unfit to stand trial under s 256 and s 257(3) of the *Mental Health Act 2000* (Qld). This means that those who are mentally ill or have an intellectual disability, are afforded appropriate recognition as to their mental state, allowing the court to decide whether they have the full capacity to plead.

Community legal centres, and other organisations providing legal and other supports to people with disability in the criminal justice system, observe that this inequity results in harsh and unjust outcomes for these vulnerable people.

Queensland law does not include any provision regarding fitness to plead in summary matters. The Court of Appeal considered fitness for trial in *R v AAM; ex parte A-G (Qld)* [2010] QCA 305. The Court commented (at [9]):

It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness,

intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.

Queensland is currently the only state that does not have any statutory mechanisms in place to deal with this issue, leading to inappropriate convictions being recorded. Intervention by the Attorney General is required to allow the convictions to be overturned, as demonstrated in *R v AAM; ex parte A-G (Qld)*. While the common law applies in the absence of statutory procedure, which allows Magistrates to discharge the defendant if they are found to be not fit to plead, Legal Aid Queensland reports that duty lawyers' experience that some Magistrates are not aware of its application or are reluctant to apply it. However, if they do discharge the defendant, they lack the power to keep the defendant in custody or refer to any applicable treatment or program. As such, statutory provisions are needed to effectively deal with the problem.

By way of proposing possible solutions at this stage, there are a number of options for reform. While a reference to the Commission would enable more fulsome consideration of the issue and possible responses, QAILS briefly suggests the following options could be considered:

- Special Circumstances Court reinstated (Queensland wide)
- Specialist list, dealing with people who are unfit to plead
- Specialist clinicians, working closely with the court

We believe this is an area the Queensland Law Reform Commission could address, allowing the necessary reforms to occur to ensure that people with disabilities are not unfairly treated under the law.

Please contact me (on 3392 0092 or director@gails.org.au) to further discuss the issue and its possible inclusion in the Commission's proposed program of work.

Yours sincerely,



James Farrell
QAILS Director