

Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997

Consultation Paper

Submission to the Victorian Law Reform Commission

by Jamie Walvisch

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## Author's Background

Jamie currently works as a lecturer at Monash University, where he is also completing a PhD examining the intersection between mental illness and sentencing. He has previously worked as a Research and Policy Officer at the Victorian Law Reform Commission, a Research Analyst at the Australian Institute of Criminology and a Senior Policy Officer at the Judicial College of Victoria.

## Introduction

I would like to start by expressing my appreciation for the opportunity to make a submission to the Commission's *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (the 'CMIA'). It is clear that people with mental illnesses 'comprise a disproportionate number of people who are arrested, who come before the courts and who are imprisoned'.<sup>1</sup> This makes it essential to ensure that the law in this area is based on well-developed guiding principles, so that those who suffer from mental health disorders are treated fairly and consistently by the criminal justice system.<sup>2</sup> It is my hope that this review will contribute to such an outcome.

In addressing the issues raised by the *Consultation Paper*, it is my belief that it is first necessary to clearly outline the purposes we believe the criminal law and the criminal trial should serve, as well as the appropriate role of the state and its relationship with its citizens. This is because it is only by understanding the reasons *why* we are seeking to determine a person's guilt, and the ways in which we think it is appropriate to do so in modern day Australia, that we can properly resolve many of the questions that have been asked in the *Consultation Paper*. In the section below I outline my views concerning these issues. Following that, I apply my model to some of the questions raised in the *Consultation Paper*.

## Background: The Nature Criminal Responsibility and the Criminal Trial

### The Nature of Criminal Responsibility

When determining the best way to approach such a fundamental issue as the nature of criminal responsibility, it is useful to begin by describing the type of society in which we aspire to live. This is because a normative model of the state can help inform our views on how criminal law and procedure should be structured. In this regard, I agree with Duff that we should aim to live in a 'liberal-communitarian' society, which he describes as 'a polity of citizens whose common life is structured by such core liberal values as autonomy, freedom, privacy and pluralism, informed by a conception of each other as fellow citizens in the shared civic enterprise'.<sup>3</sup>

In such a society, conduct is criminalised because it is wrongful in terms of the shared values of the community.<sup>4</sup> Rather than prohibiting such conduct, the criminal law formally declares its wrongfulness.<sup>5</sup> The role of the criminal trial is to call a citizen to answer a charge of wrongdoing:

He is called to answer by and to the community whose law he has allegedly broken, for a 'public' wrong in which the community is properly interested. If the charge is proved against him, he is censured for it by a formal conviction. Such a procedure makes clear that the wrong allegedly committed is the concern of the whole political community, and makes it clear to both victims and defendants that they are seen and treated as members of that community – that the community shares in the wrong suffered by the

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<sup>1</sup> Senate Select Committee on Mental Health, 'A National Approach to Mental Health - From Crisis to Community: First Report' (Commonwealth of Australia, 2006) [13.1].

<sup>2</sup> Jamie Walvisch, 'Sentencing Offenders with Impaired Mental Functioning: Developing Australia's "Most Sophisticated and Subtle" Analysis (2010) 17 *Psychiatry, Psychology and Law* 187.

<sup>3</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 11. See also Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 35-55.

<sup>4</sup> My discussion here relates to central *mala in se* crimes, rather than the regulatory *mala prohibita* offences.

<sup>5</sup> Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 58.

victim, and that the defendant is both bound by the community's values and protected by the various rules of the criminal process.<sup>6</sup>

Duff does not explicitly address the question of precisely *what* a person should be sentenced for (other than committing a 'public wrong'), and this is a complex issue that need not be resolved here.<sup>7</sup> However, it appears to me that it is the commission of an action that displays insufficient concern for the legally protected interests of others that is at the heart of culpability determinations.<sup>8</sup> That is, it is acting in a way that risks others' legally protected interests for insufficient reasons that opens a person to blame, and subjects them to the possibility of punishment.

Under such a model, a person should only be called to account for their wrongdoing if they are responsible for that wrongdoing. At the very minimum, this means they must be a 'responsible agent' – a person who can be expected to recognise and discharge the responsibilities laid down by the criminal law. This requires them to be reasons-responsive: 'a responsible agent is one who is capable of recognising and responding to the reasons that bear on his situation'.<sup>9</sup>

This is not simply a matter of acting in conformity with appropriate reasons:

It involves recognising reasons as reasons, ie as considerations by which my actions and thoughts could be guided; having some grasp of their relevance (of the contexts in which they apply) and force; being able not simply to follow them, but to weigh them in deliberation and in relation to other reasons – and, when appropriate, to take a self-reflective, critical stance towards them and ask whether I should recognise them as reasons at all; and, finally, being able to act or think as deliberation shows them to require or permit.<sup>10</sup>

Failure to be a 'responsible agent' in this sense is not about being unable to recognise a sufficient reason for action on one particular occasion. It is about failing to exhibit a *pattern* of reason-recognition that is understandable to those who are judging the agent's responsibility, and that is grounded in reality.<sup>11</sup> According to this view, a person will not be responsible if he or she is unable to recognise how reasons fit together, to see why one reason is stronger than another, or to

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<sup>6</sup> Ibid 72.

<sup>7</sup> This is the central issue I am examining in my PhD thesis *Sentencing Offenders with Mental Illnesses: A Principled Approach*.

<sup>8</sup> For similar views, see: Nicola Lacey, *State Punishment* (Routledge, 1994); Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005); Larry Alexander and Kimberley Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009).

<sup>9</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 39. See also Andrew Ashworth and Andrew Von Hirsch, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 17. While Duff's theory is based on the accused's *capacity* to respond to reasons, Lacey focuses on the issue of whether, due to their disordered thinking, the accused was *unable to participate in the normal discourse* which underpins the enterprise of criminal justice: Nicola Lacey, *State Punishment* (Routledge, 1994) 74. In my opinion, these are simply two different ways of addressing the same issue. I have adopted the language of Duff's approach because I believe it will be easier for a jury to comprehend.

<sup>10</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 39.

<sup>11</sup> John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998) 72.

understand how the acceptance of one reason as sufficient implies that a stronger reason must also be sufficient.<sup>12</sup>

However, this does not mean that a disorder must be general and all-embracing to exempt a person from criminal responsibility. The key issue is whether, *at the time of the offence*, the accused's psychological condition was such that the accused was not functioning as a responsible agent *in relation to the offending behaviour*. In other words, we need to ask whether, at the time of the relevant conduct, the beliefs, attitudes and emotions that informed the accused's deliberations and actions were 'within the realm of reason; or were they so disordered, so detached from reason, that he was not operating within that realm at all?'.<sup>13</sup> I agree with Duff that, in light of the radical practical and symbolic implications of finding the person was not a responsible agent, we should be slow to make such a finding – and set the bar as low as we sensibly can.<sup>14</sup>

It is important to highlight the fact that the claim being made here is that the accused is not operating within the realm of reason, and so should not be expected to answer for his or her actions. This differs from a person who offers an 'excuse' such as duress or provocation. Excuses operate within the realm of practical reason, but seek to explain why the accused acted in a way that was seemingly unreasonable.

The approach outlined above flows from a general consideration of the nature of responsibility. People can only properly be held responsible for their past actions ('retrospective responsibility') if they had a duty to avoid those actions (a 'prospective responsibility'). It is our prospective responsibilities that generate reasons for acting (or not acting) in a certain way, and which provide the grounding for blame if those reasons are not properly attended to.<sup>15</sup> If a person is incapable of understanding the nature and scope of those prospective responsibilities (e.g., due to a mental illness), they are unable to be properly guided by them, and so should not be blamed for behaving 'inappropriately'.

This approach also follows from an understanding of the purpose of the criminal law, which is:

interested in and addresses citizens as agents who have and exercise the capacity to actualise the results of their practical reasoning in ways that make a difference to the world in which they live and the law operates. It offers, or reminds us of, reasons for acting in certain ways; those reasons should, it claims, figure in our practical reasoning and guide our actions. It calls us to answer, in its courts, for doing what we had reason not to do; but we can answer only for doings that fell within the reach of our capacity to actualise the results of our practical reasoning.<sup>16</sup>

In this regard, it is useful to also take into account the possible outcomes of the trial process. If a person is convicted of an offence, he or she will be punished in some way. In imposing punishment, society is expressing the view that the offender *deserved* to be punished – that his or her conduct was sufficiently wrongful to deserve blame and censure. However, if the accused was incapable of

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<sup>12</sup> Ibid 70.

<sup>13</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 290-1.

<sup>14</sup> Ibid 291.

<sup>15</sup> Ibid 40. See also Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002).

<sup>16</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 100-101. For a similar view, see also Larry Alexander and Kimberley Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009).

recognising the reasons for acting differently, then it seems inappropriate to censure him or her for his or her behaviour.

Duff makes the important point that the reasons to which people must be able to respond in order to be held responsible differ depending on the context. In the context of the criminal law, people need to be able to respond to the reasons against action provided by or expressed in the criminal law. In relation to the central *mala in se* offences (such as murder or rape), these are moral reasons.<sup>17</sup> Thus, to be criminally responsible a person must at least be able to recognise that people in the community have moral claims; that certain moral demands are stronger than others; that in some instances the rights of others outweigh one's own prudential interests; and that these moral claims give rise to reasons for action: 'Without such a minimal receptiveness to moral reasons, agents would fail to be moral agents at all, and consequently would not be appropriate candidates for the reactive attitudes' of the state'.<sup>18</sup>

### The Nature of the Criminal Trial

The discussion above focuses on the responsibility a person has for his or her actions, and whether or not it is appropriate to hold him or her accountable for those actions. Connected to this issue is whether it is appropriate for that person to stand trial for his or her alleged actions.

In this regard, I again agree with Duff that to properly be able to stand trial, a person needs to be capable of answering for his or her own actions.<sup>19</sup> This follows from the nature of the criminal trial, which aims to call those who are accused of perpetrating public wrongs to account. In doing so, the polity addresses the accused as a 'responsible agent' – as 'someone who can be called to answer the charge, and to answer for the wrongdoing if [he or] she is proved to have committed it; as someone who is capable of thus answering...'.<sup>20</sup> If the accused lacks the capacities necessary to understand the charge or to account for his or her actions (e.g., due to a mental illness), then he or she cannot properly engage in the criminal trial, and must not be held responsible.

In order to be able to properly engage in the criminal trial process, the accused not only needs to be able to understand the charges and the trial processes, but also the meaning of conviction and punishment. That is, he or she must understand that the purpose of the process is to determine whether he or she should be subjected to censure for his or her crime, and to impose a sanction that is proportionate to his or her level of blameworthiness. He or she must also be capable of understanding the values in light of which his or her conduct is alleged to count as wrong, and to be capable of accepting any blame that is imposed on him or her for that conduct. This flows from the communicative nature of the sentencing process, which purports to communicate the state's censure of his or her behaviour, in an attempt to seek his or her acceptance that it was wrong.<sup>21</sup>

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<sup>17</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 221-222. For regulatory *mala prohibita*, it is the legal regulation of the matter that provides the reason for desisting. This difference arises because the *mala in se* are wrongful independently of being defined as criminal. The criminal law simply *declares* them to be public wrongs (rather than creating them as crimes). By contrast, *mala prohibita* offences *make conduct wrong* which may not be wrong independently of the law: Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 57-66.

<sup>18</sup> John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998) 77.

<sup>19</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 41.

<sup>20</sup> *Ibid* 178. See also Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 80.

<sup>21</sup> See, e.g., Antony Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 180-190.

## The Importance of Civil Commitment

In considering the scope of the mental impairment defence, it is essential to always remember that the criminal law is not the only tool at the state's disposal for detaining people. There are also civil commitment laws, which enable the state to deprive a person of his or her liberty in order to protect him or herself or others. I do not wish to address the appropriate scope of these powers in this submission, but believe it is important to keep in mind that other options are available for dealing with people considered to be 'dangerous'.

In this regard, I believe it is vital to strongly differentiate between the 'punishment' function of the criminal law (which aims to achieve the purposes outlined above), and the state's ability to 'commit' people who are considered to be a continuing danger to others or to be unable to care for themselves. It is imperative that these two functions not be blended, or offenders are likely to suffer grave injustice.<sup>22</sup>

## Responses to Questions Raised in the *Consultation Paper*

### Chapter 4: Unfitness to Stand Trial

#### Threshold definition

**1. Should the test for determining unfitness to stand trial include a threshold definition of the mental condition the accused person would have to satisfy to be found unfit to stand trial?**

In my view, there should not be a threshold definition. The introduction of such a definition would create the possibility that a person who does not understand the charges he or she faces, or who is unable to account for his or her actions, would nonetheless be required to stand trial. This would not only be unjust, but would undermine the purpose of the criminal trial (as outlined above).

Regardless of the cause of an accused's unfitness, if he or she cannot properly engage in the criminal trial, he or she must not be held responsible.

#### Decision-making capacity or effective participation

**2. Does the current test for unfitness to stand trial, based on the Pritchard or Presser criteria, continue to be a suitable basis for determining unfitness to stand trial?**

I do not believe that the current test continues to be a suitable basis for determining unfitness to stand trial. While the ability to understand trial processes is important, the accused must also be able to *account* for his or her actions. This requires more than mere intellectual understanding. It also requires the accused to be able to make decisions relevant to the trial, and to be able to effectively communicate those decisions.

In addition, I believe there is one significant omission from the current criteria that focus on the accused's intellectual ability: the ability to understand the meaning of conviction and punishment. The need for this criterion flows from the communicative nature of the trial and sentencing process, which purports to communicate the state's censure of the accused's behaviour, in an attempt to seek his or her acceptance that it was wrong. If the accused is unable to understand that the purpose of the process is to determine whether he or she should be subjected to censure for his or her crime, and to impose a sanction that is proportionate to his or her level of blameworthiness, then he or she is an inappropriate subject to be tried.

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<sup>22</sup> See, e.g., Norval Morris, *Madness and the criminal law* (University of Chicago Press, 1982) 31-2.

**3. Should the test for unfitness to stand trial include a consideration of the accused person's decision-making capacity?**

Yes. As noted above, in order to be able to properly participate in the trial process, the accused needs to be able to account for his or her actions. This requires the accused to be able to make decisions about the way in which to answer the accusations that have been made against him or her. If the accused is unable to do so, then it would be unfair to hold him or her responsible for his or her behaviour.

**4. If the test for unfitness to stand trial is changed to include a consideration of the accused person's decision-making capacity, what criteria, if any, should supplement this test?**

In my view, the test should explicitly focus on three issues:

1. The accused's capacity to *understand* the trial process (as contained in the current criteria, supplemented by the suggestion above);
2. The accused's capacity to *make decisions* relevant to the trial process (as suggested by the Law Commission of England and Wales); and
3. The accused's capacity to *communicate* those decisions to the court or his or her lawyer.

Although these criteria overlap, they are each independent of each other, and address separate (but equally important) issues. Consequently, they should all be explicitly included in the test.

**5. If the test for unfitness to stand trial is changed to include a consideration of the accused person's decision-making capacity, should the test also require that the lack of any decision-making capacity be due to a mental (or physical) condition?**

For the same reasons that I oppose the idea of a threshold definition, I also oppose the inclusion of such a requirement. While the consequence of rejecting such a limitation may be to broaden the operation of the test, this is entirely appropriate. If a person is unable to understand the trial process, to make relevant decisions, or to communicate those decisions, then he or she should *not* be tried, regardless of the cause of that incapacity.

I would also query the extent to which the operation of the test will be broadened. The decision-making test does not require the accused to be able to make the 'right' decision – it simply requires a capacity to make a coherent decision based on the available information. As long as appropriate support is provided to those who are accused of a crime, it will be rare that factors such as poor education or social background will lead to unfitness. In addition, due to the serious consequences that can flow from a finding of unfitness, there are limited incentives for relying on such a plea in the absence of a legitimate concern.

**6. If not decision-making capacity, should the test for unfitness to stand trial include a consideration of the accused person's effective participation?**

I am not opposed to the idea of a test based on effective participation as an alternative to the suggestion made above. Such a test clearly addresses my concerns about the need to ensure that the accused is able to properly account for his or her actions. However, if such a test is to be implemented, it would be essential to carefully spell out what 'effective participation' means in a way that is readily understandable by a jury, to avoid inconsistent application of the law.



## Rationality

### **7. Should the accused person's capacity to be rational be taken into account in the test for unfitness to stand trial?**

**If yes, is this best achieved:**

**(a) by requiring that each of the Presser criteria, where relevant, be exercised rationally**

**(b) by requiring that the accused person's decision-making capacity or effective participation be exercised rationally, if a new test based on either of these criteria is recommended, or**

**(c) in some other way?**

I agree with the Law Reform Committee that the current test sets the threshold for determining fitness too low, and that an accused's person's capacity to be rational should be taken into account in the test for unfitness to stand trial. Without such a requirement, a person whose decision-making process is completely divorced from reality may nonetheless be considered fit, due to the fact that he or she seemingly has the requisite capacities. This could lead to unjust results, as such a person is not a proper subject for the trial process.

However, I also agree with the Law Commission of England and Wales that it is essential to respect a person's autonomy and their choice to make unwise decisions, and so believe it is necessary to take great care in developing the bounds of any rationality test. In particular, it is essential that people not be considered unfit simply because the content of their decisions differs from the decisions that would be made by expert witnesses, the judge or the jury.

Consequently, I believe that the notion of rationality should be incorporated by requiring the accused to be able to make decisions that are 'reasons-responsive' in the way outlined above. As noted above, this is not simply about being unable to recognise a sufficient reason for action on one particular occasion. It is about failing to exhibit a *pattern* of reason-recognition that is understandable to those who are judging the agent's responsibility, and that is grounded in reality.<sup>23</sup> According to this view, a person will not be fit to stand trial if he or she is unable to recognise how reasons fit together, to see why one reason is stronger than another, or to understand how the acceptance of one reason as sufficient implies that a stronger reason must also be sufficient.

## Issues specific to the Presser criteria

### **8. If the unfitness to stand trial test remains the same, are changes required to the Presser criteria?**

I believe that a number of changes are required to the Presser criteria. First, I believe it should be made clear that the criteria are seeking to address the question of whether the accused is fit for *the particular trial in issue*, not for trials generally. Consequently, whether the accused is able to follow the course of the proceedings, to answer to the charge, or to give instructions to their counsel may vary according to the likely complexity of the proceedings. If it is anticipated that the trial is likely to be especially complex, the accused will need a greater level of understanding in order to be fit. This is essential if the purpose of the trial is not to be undermined.

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<sup>23</sup> John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998) 72.

While I appreciate the Law Commission of England and Wales's concern that there may be difficulty in predicting the complexity of the trial at the unfitness stage, I do not believe this is an insurmountable problem. The parties and the judge will generally have a sufficiently good idea of the likely complexity of the trial – in light of the nature of the charges, and the type of issues that are commonly raised in such trials – to allow these issues to be adequately assessed.

Secondly, I believe it would be useful to separate the ability to enter a plea to the charge from the ability to exercise the right to challenge jurors or the jury. These are separate issues, which need not be addressed together. In this regard, I am not convinced that it is essential to retain the requirement concerning the ability to challenge jurors, other than in cases involving self-represented litigants. This will usually be an issue that is dealt with solely by counsel, without input by the accused, and is not an issue that is fundamental to trials in Australia. It is my view that a trial would still be fair even if a represented accused did not understand this aspect of the trial.

Thirdly, as noted above (see Question 2), I believe that the criteria should be amended to require the accused to be able to understand the meaning of conviction and punishment. This will be particularly important if changes are to be made to the criteria that need to be met in cases involving guilty pleas (see below).

**9. Should the criteria for unfitness to stand trial exclude the situation where an accused person is unable to understand the full trial process but is able to understand the nature of the charge, enter a plea and meaningfully give instructions to their legal adviser and the accused person wishes to plead guilty to the charge?**

I believe that it is appropriate to amend the criteria in such cases. It does not seem sensible to require a person to be able to understand the intricacies of the trial process if they are not going to undertake that process. However, care must be taken to ensure that the requisite capacities are not too strictly circumscribed, and that the accused properly understands the nature of the guilty plea.

Consequently, in my view a modified version of the Presser criteria should be used for cases involving guilty pleas. In such cases, the accused must be able to:

- Understand the nature of the charge;
- Understand that he or she has a right to contest that charge, and what that would generally involve (i.e., a trial involving witnesses giving evidence, determined by a jury/magistrate);
- Understand the nature and strength of the evidence that may be given in support of the prosecution;
- Understand the meaning of conviction and punishment, and the nature of the sanctions which may be imposed;
- Enter a plea to the charge;
- Give instructions to their legal practitioner.

In addition, I believe that the accused should be able to make decisions that are 'reasons-responsive' in the way outlined above.

**11. Are changes required to improve the level of support currently provided in court in trials for people who may be unfit to stand trial?**

**12. What would be the cost implications of any increase in support measures?**

It is in the community's interests that people who are accused of committing crimes be called to account for those crimes. Consequently, I would support the implementation of measures to assist accused people to meet the fitness standards outlined above, such as the use of intermediaries. However, if such a system is implemented, great care would need to be taken to ensure that the accused person's impairment be properly taken into account in the sentencing process, if it is likely to significantly affect the way he or she experiences any sanctions that are imposed. While I appreciate sentencing is beyond the scope of this reference, I would be concerned if a system were implemented which assisted an accused to face charges at trial, only to abandon him or her at the sentencing and punishment stage.

**13. Should the availability of support measures be taken into consideration when determining unfitness to stand trial?**

It is appropriate to take into account such measures, so long as the court is certain that they practically going to be available to the particular accused, and there is evidence to support the fact that they will assist that accused to reach the requisite standards. It should not be sufficient for the court to note that such measures *may* be available (or are available 'in theory'), or that such measures *may* be of assistance to the accused.

If such measures are taken into account, there should be provision to revise the fitness assessment if the support becomes unavailable, or it becomes apparent that it is not assisting the accused to meet the requisite standards.

**14. What changes can be made, if any, to enhance the ability of experts to assess an accused person's unfitness to stand trial?**

As fitness assessments will frequently be based on expert evidence, it is essential that experts understand precisely what they are being asked to assess. However, it is important to keep in mind that the fitness test has been developed for specific *legal* purposes, and is not a clinical test used for diagnostic or treatment purposes. Its purpose is to determine if a person is capable of being called to answer for his or her behaviour in a criminal trial. Consequently, it is neither possible nor desirable to try to develop a test that tracks more closely with clinical decision-making models.

Instead, the solution to this problem would appear to be to provide clearer guidance to experts working in the field about both the *purpose* of the test and its precise *scope*. This could be done through the development of a handbook for use by practitioners, as well through the implementation of training courses for people working in the field.

[Requirement to 'plead' in a committal proceeding](#)

**15. Is there a need for a uniform procedure in committal proceedings where a question of unfitness to stand trial is raised?**

Yes. The current procedure, which requires a person who may be incapable of entering a plea to do so (and may ultimately penalise him or her for failing to enter a guilty plea) is unjust.

**16. What procedure should apply where a question of an accused person's unfitness to stand trial is raised in a committal proceeding?**

There appear to be two main options that could be used in such a case. First, the committal proceedings could be suspended to allow for immediate resolution of the fitness proceedings. However, this is undesirable due to the fact that it creates the possibility that a person will be

subject to continuing state intervention despite the absence of sufficient evidence against him or her.

Alternatively, it would be possible to allow the committal proceeding to continue, but without requiring the entry of a plea. This will continue to filter out unwarranted prosecutions, but will not unjustly force a person to do something which they may be incapable of doing, or which they may not properly understand.

I support the second option, as long as it is accompanied by a provision which makes it clear that the failure to enter a guilty plea at the committal stage in such cases is *not* to be taken into account in sentencing. It is only once an accused has recovered their fitness to stand trial that the 'earliest opportunity' to plead guilty should be seen to arise.

#### The role of lawyers in the process for determining unfitness to stand trial

**17. What ethical issues do lawyers face in the process for determining unfitness to stand trial?**

**18. What is the best way of addressing these ethical issues from a legislative or policy perspective?**

Each of the ethical issues outlined in the *Consultation Paper* are important to consider. While there is no simple solution to these dilemmas, from a general policy perspective I believe it is essential to keep the following mind:

- We should aspire to live in a society whose common life is structured by such core liberal values as autonomy, freedom, privacy and pluralism. Consequently, where at all possible, the desires of the accused should be given primacy.
- Third parties should not be able to override a person's decisions simply because they disagree with them. People must be free to make irrational decisions.
- A person may retain the capacity to make decisions in some areas, despite lacking the capacity to make decisions in other areas. Where this is the case, regard should be had to those decisions that are made with capacity.
- Where the accused's mental health is seriously impaired, ideally they would be restored to health before any decisions are made that may detrimentally affect their future.
- If the accused appears unable to make his or her own decisions, it is better to provide for some kind of supported decision-making framework than to simply allow lawyers, judges or experts to exert their own will.

#### Jury involvement in all investigations of unfitness to stand trial

**20. Should the CMIA provide for a procedure where unfitness to stand trial is determined by a judge instead of a jury? If yes:**

**(a) should the process apply only where the prosecution and the defence agree that the accused person is unfit to stand trial or should a jury not be required in other circumstances?**

**(b) what safeguards, if any, should be included in the process?**

The CMIA should provide for a procedure where unfitness to stand trial is determined by a judge instead of a jury. This would be especially useful in cases where both parties agree, for the reasons outlined in the *Consultation Paper*. In addition, I note that the jury charge on this issue is particularly complex, given the seven different requirements of the current fitness test. This may become even

more complicated, depending on the resolution of the issues discussed above. Consequently, it would be preferable to avoid burdening the jury with the need to engage in such a task, if possible.

In relation to cases where the parties agree, I believe it would be useful to implement both of the safeguards mentioned in the *Consultation Paper* (i.e., the agreement of two registered medical practitioners as well as the independent assessment of the judge). This will hopefully ensure that the procedure – with its potentially serious consequences for the accused – is only implemented where truly warranted.

In cases where there is *not* agreement between the prosecution and defence, I believe that a judge-alone hearing should only be allowed with the consent of the defence. However, if the defence elects to have the matter heard by a jury, that should remain their right. Although (as noted above) the matter is complex to explain to a jury, to prevent the jury from determining the accused's fitness in a contested case, where the defence seeks jury involvement, would open the system to grave allegations of abuse.

[A 'consent mental impairment' hearing following a finding of unfitness to stand trial](#)

#### **21. Should a 'consent mental impairment' hearing be available following a finding of unfitness to stand trial?**

This is a difficult issue, with compelling arguments on both sides (as pointed out in the *Consultation Paper*). On balance, however, it is my view that a consent hearing should be available. In cases where both parties agree, and there is medical evidence to support their positions, it is unlikely that a properly instructed jury would reject the defence. Consequently, putting the parties through the stress of the hearing, as well as incurring the delay, inconvenience and expense of such a hearing, seems unnecessary.

However, it may be worth considering the implementation of a provision that provides the accused with a right to appeal this verdict, if he or she recovers his or her fitness. This will allow the accused to retain his or her autonomy to decide whether or not such a plea was appropriate when he or she is able to do so.

[The length of the process](#)

#### **25. What procedures could be implemented to expedite the unfitness to stand trial process?**

I do not support the implementation of the kind of procedure suggested in paras 4.121-124. It seems unjust to allow even this limited aspect of the trial to take place when the accused is unable to fully participate. In addition, it seems unlikely that many cases which have been committed to trial will result in an acquittal on this basis. The more probable outcome is that the trial will ultimately have to be adjourned, and the matters re-opened at a later date – leading to even greater inefficiency.

[Suitability of findings in special hearings](#)

#### **26. Should changes be made to the findings available in special hearings?**

I agree that the current terminology gives the misleading perception of guilt, and should be amended. I think the wording of the Tasmanian and Community Development Committee recommendations is confusing (due to the use of double negatives), and believe the NSWLRC suggestion ('the accused person was unfit to be tried and was not acquitted') is preferable. My main concern with that formulation is that it may still give the impression that the accused is 'really'

guilty. It may be preferable to make it clear that no verdict was given, by the use of a formula such as ‘the accused person was unfit to be tried and was neither acquitted nor found guilty’.

#### Directions to the jury on findings in special hearings

### **27. What is the most appropriate way of directing the jury on the findings in special hearings?**

In line with the approach taken in the *Jury Directions Act 2013*, I believe the CMIA should be amended to only require the judge to direct the jury on the findings that are relevant to the hearing. It is essential that jury directions be kept as simple as possible, and burdening the jury with information about a finding that is not relevant to the hearing is counter-productive.

A similar approach to that taken in the *Jury Directions Act* should be taken, whereby:

- The parties must request that the judge direct the jury about the mental impairment verdict;
- The judge must give a direction if a request is made;
- The judge need not give a direction if a request is not made, but may do so if it is necessary to avoid a substantial miscarriage of justice.

## Chapter 5—Defence of mental impairment

### Introductory matters

Before addressing the specific questions raised in this chapter, I would briefly like to comment on two matters that arise from the introduction to the chapter. First, in paragraph 5.10, it is suggested that punishment is not an appropriate response to people who are found not criminally responsible for their actions because they cannot be deterred or influenced by the prospect of being punished, or are unable to understand the legal ramifications of the actions. While this may be true, in my view it does not tell the whole story. Punishment is also inappropriate where a person is unable to recognise the moral reasons against action provided by the criminal law. This is not just about being incapable of understanding the potential *sanctions* faced for breaching the law, but about understanding the *reasons* why those laws exist in the first place and why they should be followed. As noted in my introductory section, if a person is not receptive to moral reasons, they fail to be moral agents, and so are not appropriate candidates for the reactive attitudes of the state.

Secondly, in paragraph 5.11, it is noted that the defence of mental impairment is grounded in two important principles: that it may act as an excuse from criminal responsibility, and that ‘the community must be protected from people who, as a result of a mental impairment, are a risk to themselves or others’. While I can understand the argument that the community may need to be protected from people who pose a risk to *others*, I query whether the community needs to be ‘protected’ from people who only pose a risk to *themselves*. In addition, I am not sure that the fact that a person poses a danger to themselves has any relevance to the defence of mental impairment (cf civil commitment proceedings), and think that this reference should be removed from the justification for the defence.

### The meaning of ‘mental impairment’

### **30. Should ‘mental impairment’ be defined under the CMIA?**

### **31. What are the advantages or disadvantages of including a definition of mental impairment in the CMIA?**

### **32. If mental impairment is to be defined in the CMIA, how should it be defined?**

**33. What conditions should constitute a ‘mental impairment’? Are there any conditions currently not within the scope of a mental impairment defence that should be included? If so, what are these conditions?**

In considering the need for a definition of the term ‘mental impairment’, and the appropriate scope of any definition, I believe it is essential to focus on the *purpose* the defence serves. At heart, the defence aims to exculpate people who suffer from some kind of ‘abnormality’ which undermines their responsibility for their behaviour.<sup>24</sup> The precise nature of that ‘abnormality’ is not as important as the fact that there was some kind of ‘abnormality’, and the effects that ‘abnormality’ had on them. Consequently, ideally the requirements for the defence would mark out the need for an ‘abnormality’, but provide flexibility about the specific ‘abnormalities’ that qualify.

In my view, the current test does this relatively well. It requires some kind of an ‘impairment’ (i.e., an ‘abnormality’), without being specific about the precise impairment required. However, there are some difficulties with the scope of the current test, including the seemingly absurd situation where hyperglycaemia constitutes a mental impairment, while hypoglycaemia does not. The lack of clarity about other conditions, such as cognitive impairment and intellectual disability, is also of concern.

I believe these problems can be overcome in two ways. First, it should be made clear that the *cause* of the impairment (e.g., whether it is internally or externally caused) is not important – that the test is solely focused on whether the accused suffered from an abnormal mental state. Secondly, an inclusive definition should be included in the CMIA, that makes it clear that conditions such as mental illness, cognitive impairment, intellectual disability, acquired brain injury, senility, drug induced psychosis and personality disorder constitute a ‘mental impairment’. This definition should be inclusive, and cast widely to capture a broad range of ‘abnormalities’.

It may be argued that this test would be too broad. However, it must be borne in mind that the existence of an ‘abnormality’ is only the first matter that must be proved. It must also be established that the abnormality affected the accused in one of the relevant ways. It is these other requirements that act to severely limit the scope of the defence. In my view this is an appropriate scheme.<sup>25</sup> A person who is incapable of understanding the nature or quality of their conduct, or of reasoning that it was wrong, should not be denied a defence simply because they suffered from the ‘wrong’ kind of impairment. Conversely, a person who suffers from an impairment should not be entitled to a defence unless it affects them in an appropriate fashion.

I would strongly oppose any attempt at an exhaustive definition based on specific medical diagnoses. Medical diagnoses, such as those contained in the DSM, have been developed for treatment and research purposes. They are not targeted at the normative concerns of the defence of mental impairment, which address issues of criminal responsibility. This is a *legal* issue not a *medical* one – so it is appropriate to have a legal test in place.

The test for establishing the defence of mental impairment

**36. If a definition of mental impairment were to be included in the CMIA, should it also include the operational elements of the M’Naghten test for the defence of mental impairment? If so, should changes be made to either of the operational elements?**

<sup>24</sup> On the issue of ‘abnormality’, see Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press, 2012).

<sup>25</sup> Such a broadly inclusive scheme also has the benefit of avoiding arguments about matters such as whether the accused suffered from a ‘cognitive impairment’ or an ‘intellectual disability’, or whether the accused’s personality disorder was ‘severe’ or not.

**37. Are there any issues with interpretation of the requirement that a person be able to reason with a 'moderate sense of composure'?**

As noted above, I am supportive of the inclusion of a definition of mental impairment in the CMIA. However, I believe this is an entirely separate issue from the operational elements of the test. The requirement for a 'mental impairment' simply serves the purpose of identifying a class of people with some 'abnormality' that may need to be treated differently from the rest of the population. The operational elements then specify the circumstances in which they should be treated differently. Consequently, I do not believe the definition should 'include' the operational elements – these two issues should be addressed separately in the Act.

In terms of the scope of the operational elements, in line with the general approach to criminal responsibility outlined in the beginning of my submission, I believe the test should focus on the accused's 'reasons-responsiveness'. That is, the accused should be provided with a defence if he or she was not capable of recognising and responding to the reasons that bear on his or her situation.

As noted above, this is not simply a matter of acting in conformity with appropriate reasons. It involves recognising reasons as reasons - as considerations by which the accused's actions and thoughts could be guided. The accused must be able to grasp the relevance and force of the reasons for acting or refraining from acting, and to be able to weigh those reasons in deliberation and in relation to other reasons.<sup>26</sup> If the accused fails to exhibit a pattern of reason-recognition that is understandable to those who are judging his or her responsibility, and that is grounded in reality, he or she should be exempted from responsibility.<sup>27</sup>

In assessing whether or not the accused is able to grasp the relevance and force of the reasons for acting or refraining from acting, the focus should not simply be on whether he or she understands that the behaviour is legally prohibited or may lead to sanctions. He or she must be able to recognise that there are *moral* reasons for acting in a certain way. Thus, the accused must at least be able to recognise that people in the community have moral claims; that certain moral demands are stronger than others; that in some instances the rights of others outweigh one's own prudential interests; and that these moral claims give rise to reasons for action.<sup>28</sup>

If Duff's model of criminal responsibility were strictly followed, it would also be appropriate to have a volitional element to the mental impairment defence, for one of the requirements of his 'responsible agent' is that they are 'able to act ... as deliberation shows them to require or permit'.<sup>29</sup> Consequently, even if they were able to recognise the appropriate reasons for acting, if their impairment prevented them from acting in accordance with those reasons they should not be held responsible for their actions.

Such a lack of volition needs to be distinguished from mere impulsiveness. While acting impulsively may affect the clarity with which people perceive the risks of their acts and their ability to weigh the reasons for and against those acts,<sup>30</sup> it does not undermine their ultimate responsibility for those

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<sup>26</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 39.

<sup>27</sup> John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 1998) 72.

<sup>28</sup> *Ibid* 77.

<sup>29</sup> Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 39.

<sup>30</sup> Larry Alexander and Kimberley Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009) 157.



actions. They are still *capable* of accessing and following proper reasons for action, even though they do not do so on that occasion.

At a theoretical level, I am supportive of exempting non-volitional actors from liability. However, I believe the difficulty of differentiating non-volitional actors from impulsive actors is so great that such a scheme would not be practically viable. It would potentially open the defence too widely, as well as creating the possibility for great abuse. Consequently, I am not supportive of the introduction of a volitional element.

#### The role of lawyers in the process for establishing the defence of mental impairment

**38. What ethical issues do lawyers face in the process for establishing the defence of mental impairment?**

**39. What is the best way of addressing these ethical issues from a legislative or policy perspective?**

The *Consultation Paper* highlights the difficulties lawyers and clients may face in determining whether or not to plead the defence of mental impairment. As pointed out in the *Paper*, in making this decision it is essential that all parties have a good working knowledge of the CMIA. In addition, it is crucial that they have a good understanding of how that Act is operating in practice. In particular, if a lawyer is going to advise clients about their options, or make a decision for them (in unfitness cases), they need to understand the likely nature and length of any disposition that will be imposed under the CMIA. To this end, it would be useful if data could be collected and distributed to practitioners that identifies matters such as the average length of supervision orders that have imposed on people found not guilty because of mental impairment, by reference to the type of impairment and the relevant offence. Such information would provide a crucial element in the decision-making process.

The other ethical issue that I believe should be considered in the course of this reference relates to the ability of the prosecution (and possibly the judge)<sup>31</sup> to raise the defence of mental impairment against the wishes of the accused. There are two policy grounds that support this position. First, it ensures that people who are not criminally responsible for their actions are not improperly punished. This is important both from the perspective of the individual (who only deserves to be punished if he or she has committed a blameworthy act) and society (which has an interest in ensuring that ‘insane’ people are not incorrectly labelled as criminals).<sup>32</sup>

Secondly, it aims to protect the public, by ensuring that people who have committed ‘criminal’ acts and who meet the requirements of the mental impairment defence are subjected to the supervisory dispositions available in relation to mentally impaired offenders. As noted above, it is arguable that such people are potentially ‘dangerous’ to others, and should be monitored rather than set free.

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<sup>31</sup> In *Hawkins v R* (1994) 179 CLR 500, in the context of the Tasmanian Criminal Code, the High Court held that whenever the evidence is capable of supporting an acquittal on the ground of insanity, the judge has a duty to address the issue. While not clear, it is likely that this is an application of the ‘*Pemble* principle’, which requires judges to direct the jury about any defences which are reasonably open on the evidence, in order to ensure a fair trial (see *Pemble v R* (1971) 124 CLR 107). It is not clear whether judges in Victoria retain this ability, or whether the matter can only be raised by the defence or the prosecution (with the leave of the judge): see CMIA s.22(1).

<sup>32</sup> See, eg, *R v Swain* [1991] 1 SCR 933, para 56.

There are, however, a number of arguments that can be made against such an approach. Foremost amongst these is the contention that, in a system which claims to respect the autonomy and dignity of its participants, an accused person should have the right to control his or her own defence:

The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defence ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law'.<sup>33</sup>

This is an issue that affects *all* people who are charged with offences, and who, by virtue of the *Pemble* principle, are denied the ability to conduct their own defence. However, it is a particular problem for offenders who suffer from mental illnesses, due to the discrimination and stereotyping often faced by such people:

In denying the mentally disabled personal autonomy in decision-making, it reinforces the stereotype that they are incapable of rational thought and the ability to look after their own interests.<sup>34</sup>

In addition, the whole trial process may be distorted if the mental impairment defence is raised against the wishes of the accused. In particular:

- The accused may be placed in a position where inconsistent defences must be advanced;
- The accused's credibility may be undermined, potentially prejudicing the other defences he or she wishes to raise; and
- The jury may be left with the impression that, because of the mental illness, the accused is the 'type of person' who would have committed the offence.<sup>35</sup>

These last two matters are a particular problem due to the stigma that is attached to mental illness in our society. This factor was highlighted by the Canadian Supreme Court in *Swain*, with Chief Justice Lamer suggesting that the 'irrational fear of the mentally ill in our society' could result in an accused's credibility being irreversibly damaged where the issue of 'insanity' is raised.<sup>36</sup>

In fact, it is arguable that this 'irrational fear' underlies the public protection aim of the current law. This aim is premised on the view that offenders who meet the requirements of the mental impairment defence are potentially dangerous, and need to be contained in the interests of public safety. Yet there is no empirical evidence that firmly establishes that offenders with mental illnesses are any more likely to reoffend, or to reoffend in a more serious way, than offenders without mental illnesses. To subject people with mental illnesses to a different legal outcome on account of an unproven and stereotyped view that they are 'dangerous' therefore appears discriminatory.

This is a particular problem given that, under the current scheme, an individual can be deprived of his or her liberty on a standard of proof which is less than the ordinary criminal standard. This is because it appears that the prosecution may only need to prove that the accused committed the physical act alleged beyond reasonable doubt, rather than all of the elements of the charged offence (see below for a discussion of the elements that need to be proven). If they can then prove, on the

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<sup>33</sup> *Faretta v California*, 422 US 806, 834 (1975), citations omitted.

<sup>34</sup> *R v Swain* [1991] 1 SCR 933, para 193 (Wilson J).

<sup>35</sup> *R v Swain* [1991] 1 SCR 933, paras 38, 174.

<sup>36</sup> *R v Swain* [1991] 1 SCR 933, para 39.

balance of probabilities, that the requirements of the mental impairment defence have been met, the result may be lengthy detention in a secure facility.

This concern is compounded by the possibility that the jury will return a compromise verdict of not guilty because of mental impairment where they are not convinced of the accused's guilt beyond reasonable doubt, but are satisfied that the accused 'is mentally ill and perhaps dangerous'.<sup>37</sup> Furthermore, it is important to note that the consequences of a qualified acquittal may be more harmful to the accused than a conviction. He or she may ultimately be detained or subjected to supervision for a longer period than had he or she been found guilty of the offence. In addition, he or she must 'live with the stigma of being held to be both a criminal and insane, and may face conditions worse than those obtaining in prison'.<sup>38</sup>

The depth and breadth of these arguments seems to far outweigh the policy goals which the current law aims to achieve. The aim sought by the *Pemble* principle – justice for the accused – seems to be undermined when that principle is put into practice. Rather than being protected, the accused is denied the right to autonomy and dignity, and placed at risk of greater state intervention. The aim of 'public protection' seems to be based on a discriminatory view of the dangers posed by individuals with mental illnesses. Moreover, where there is a genuine need to protect the community from a truly dangerous person, civil commitment laws can be relied upon.

That simply leaves the problem of potentially convicting some people who are truly not blameworthy. This could largely be overcome by the use of prosecutorial discretion – the prosecution could decide not to proceed with charges against an individual who is believed to have a valid defence. Alternatively, the judge could direct an acquittal in such circumstances, perhaps accompanied by a recommendation that an investigation be undertaken into the possible need for civil commitment. While a few individuals may slip between the cracks of these approaches, and may be convicted despite the fact that they were not criminally responsible for their actions, the numbers are likely to be extremely limited. In light of this fact, there does not seem to be sufficient justification for allowing the mental impairment defence to be raised against the accused's wishes.

Instead, a competent accused should be allowed to waive his or her right to raise the defence, just as he or she can waive other rights. This is the approach that has been taken in a number of cases in the United States, such as *Frendak*:

Because the defendant must bear the ultimate consequences of any decision, we conclude that if a defendant has acted intelligently and voluntarily, a trial court must defer to his or her decision to waive the insanity defense.<sup>39</sup>

If, contrary to my suggestion, it is thought desirable to continue to allow the prosecution (or the judge) to be able to raise the defence, the ability to do so should be heavily circumscribed. At present, section 22(1) of the *CMIA* simply states:

The question of mental impairment may be raised at any time during a trial by the defence or, with the leave of the trial judge, by the prosecution.

It is not clear from this provision on what grounds a judge may refuse to give leave to the prosecution to raise the question. Following the general principles outlined in *Hawkins*, it is possible

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<sup>37</sup> *R v Swain* [1991] 1 SCR 933, para 174 (Wilson J).

<sup>38</sup> *R v Swain* [1991] 1 SCR 933, para 178 (Wilson J).

<sup>39</sup> *Frendak v United States*, 408 A 2d 364, 378 (DC App Ct, 1979).

that the provision will be interpreted as requiring a judge to give leave whenever there is sufficient evidence to raise the defence. However, such an interpretation would strip the provision of any meaningful purpose, unnecessarily restricting the trial judge's discretion.

A preferable approach (if the prosecution is to be allowed to raise the issue at all) would be to give the trial judge a broad discretion to focus on whether the interests of justice require the prosecution to raise the matter, taking into account factors such as:

- The amount of evidence addressing the accused's impairment;
- The extent to which that evidence raises a question about the accused's criminal responsibility for his or her actions;
- The likelihood that the accused committed the criminal act in question;
- The nature and seriousness of the offence;
- The extent to which the accused poses a threat to society; and
- The prejudice that will be caused to the accused by raising the defence.<sup>40</sup>

Such an approach has the benefit of ensuring that the defence will only be raised against the accused's will where it is seen to be absolutely necessary, rather than potentially being addressed in every case where there is some evidence of mental illness.

#### [Jury involvement in the process and consent mental impairment hearings](#)

#### **40. Should there be any changes to the current processes for jury involvement in hearings and consent mental impairment hearings?**

No – the current process seems to strike an appropriate balance.

#### [Order of considering the elements of an offence](#)

#### **41. What approach should be adopted in directing juries on the order of the elements of an offence in cases where mental impairment is an issue?**

#### **42. Should the trial judge be required to direct the jury on the elements of an offence in a particular order where mental impairment is an issue?**

#### **43. What approach should be adopted in determining the relevance of mental impairment to the jury's consideration of the mental element of an offence?**

These are particularly complex issues, which I have spent considerable time investigating. My research has identified seven different ways in which this issue has been approached:

- i) Require the jury to be satisfied that all elements have been proven before considering the defence (the original High Court approach);
- ii) Require the jury to be satisfied that all elements have been proven before considering the defence, but direct them to return a qualified acquittal if the accused's illness provided the reason for them failing to be satisfied about those elements (the *Pantelic* approach);
- iii) Require the jury to be satisfied that all elements have been proven before considering the defence, but prevent the jury from considering evidence of mental illness when determining whether those elements have been met (the *Stiles* approach);

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<sup>40</sup> See, eg, *R v Simpson* (1977) 16 OR (2d) 129; *R v Saxell* (1980) 33 OR (2d) 78; *R v Swain* [1991] 1 SCR 933, paras 219-222 (L'Heureux-Dubé J).

- iv) Only require the jury to be satisfied that the ‘incriminated act’ has been proven before considering the defence. Prevent the jury from considering evidence of mental illness when determining whether the incriminated act has been proven, but allow such evidence to be taken into account when considering specific intention (if the defence is rejected) (the *Hawkins* approach).
- v) Require the jury to be satisfied that the *actus reus* has been proven before considering the defence. Prevent consideration of the *mens rea* until after the defence has been rejected (the UK approach);
- vi) Require the jury to be satisfied that the *actus reus* and specific intention have been proven before considering the defence. Prevent consideration of other aspects of the *mens rea* (the ACT approach);
- vii) Require the jury to be satisfied that the objective elements of the offence have been proven before giving a qualified acquittal (the SA approach).

I discuss each of these options in turn below, before providing my own suggested approach.

#### *The Original High Court Approach*

In early High Court cases, such as *R v Porter*,<sup>41</sup> *R v Sodeman*<sup>42</sup> and *R v Stapleton*<sup>43</sup> it appears to have been simply assumed that the prosecution had to prove all elements of the offence before turning to the defence. For example, in relation to a murder charge, Dixon J told the jury in *Porter*:

If... you are satisfied beyond reasonable doubt, to the exclusion of all doubt, of these three matters (1) that he did administer strychnine to the child; (2) that he did so with the intention of killing it; and (3) that the child's death did result from that administration then you will turn and proceed to consider whether, at that particular time when he did those things, his state of mind was such as to make him criminally responsible for his act.<sup>44</sup>

On this view, a person who lacks the requisite mental state due to his or her impairment is entitled to a complete acquittal, even if he or she meets the requirements of the defence.<sup>45</sup>

A similar approach was briefly adopted in the UK, in the context of fitness proceedings.<sup>46</sup> At the time, the legislation required the jury to determine whether the accused ‘did the act or made the omission charged against him as the offence’.<sup>47</sup> The Court of Appeal held that this required the jury to find that *all of the elements* of the relevant offence had been proven:

It will be apparent that the use of the phrase ‘the act’ in the statutory provision to which we have already referred and in other sections of both the 1964 and 1991 *Criminal Procedure Acts* is to avoid a person being afflicted with the stigma of a criminal conviction when at the time he or she was in fact under a disability. It would be wrong in those circumstances, manifestly for such person to be the subject of a criminal record for the commission of that offence. But that in no way exonerates the

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<sup>41</sup> (1933) 55 CLR 182.

<sup>42</sup> (1936) 55 CLR 192.

<sup>43</sup> (1952) 86 CLR 358.

<sup>44</sup> (1933) 55 CLR 182, 185.

<sup>45</sup> See, e.g., *Davies* (1858) 175 E.R. 630.

<sup>46</sup> Although this was a decision concerning fitness, the court has held that the issue is identical in relation to insanity (*Attorney-General's Reference (No. 3 of 1998)* [2000] Q.B. 401).

<sup>47</sup> *Criminal Procedure (Insanity) Act 1964* s4A(2).

Crown in an instance of this kind from proving that the defendant's conduct satisfied to the requisite extent all the ingredients of what otherwise, were it not for the disability, would be properly characterised as an offence. Accordingly we are satisfied, and indeed both counsel agree, that although the words 'the act' are used in the relevant legislation, the phrase means neither more nor less than proof of all the necessary ingredients of what otherwise would be an offence, in this case theft. Thus it was necessary undoubtedly for the Crown in this case in order to satisfy the jury that the appellant had committed the act in question to prove that his conduct surely fulfilled all the necessary ingredients of that offence. That meant that the prosecution had to satisfy the jury that he had dishonestly taken the lady's handbag, intending at the time of such taking, permanently to deprive her of it and its contents.<sup>48</sup>

This approach has the benefit of ensuring that a person is not subjected to intervention by the criminal justice system unless they have acted in a way ordinarily considered to be 'criminal'. For example, it ensures that a person who seriously injures another person, but did not intend to do so (either due to their mental impairment or for some other reason) is not subjected to the serious consequences of being found 'not guilty of intentionally causing serious injury because of mental impairment'. However, this approach has been criticised on the basis that it completely undermines the first limb of the mental impairment defence (that the accused did not know the nature and quality of his or her conduct), as a person who meets that limb will never have the requisite intention.<sup>49</sup> It also arguably undermines the public protection purpose of the defence, by allowing a person who has committed a criminal act due to a mental impairment to be acquitted.<sup>50</sup>

#### *The Pantelic Approach*

The first Australian case that carefully considered the possible interaction between proof of mental impairment and proof of the elements was *R v Pantelic*.<sup>51</sup> In that case, Fox J, of the ACT Supreme Court, held:

While it is commonly the position that a jury is told to consider insanity only if it is satisfied that the elements of the crime charged have been proved beyond reasonable doubt, this is not the only possible situation. An ingredient of the crime, such as intent, may be negated by insanity. In that event, if the crime would otherwise be made out, the jury may properly bring in a verdict of not guilty on the ground of insanity... [W]hat has to be proved before an insanity verdict can be brought in is not a crime but the doing of the act charged...<sup>52</sup>

As I see the position, there are cases in which insanity, applying the tests of the M'Naghten rules, does not negative matters such as intent and voluntariness, and cases in which it does. There are of course many situations in which a crime can be established notwithstanding the accused has a mental condition which deprives him of his cognitive faculties. In such a case, the 'defence' of insanity is a defence, in the sense that it operates as an independent exculpatory factor. I left the matter to the jury in this way:

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<sup>48</sup> *R v Egan* [1998] 1 Cr App R 121. This approach was overruled by the House of Lords in *R v Antoine* [2001] 1 AC 340.

<sup>49</sup> *R v S* [1979] 2 NSWLR 1; *R v Abbey* [1982] 2 SCR 24; *R v Pantelic* (1973) 21 FLR 253.

<sup>50</sup> However, it is possible that the person could face civil commitment proceedings if considered sufficiently dangerous.

<sup>51</sup> (1973) 21 FLR 253.

<sup>52</sup> On this point, Fox J cited *Felstead v R* [1914] A.C. 534 and *R v Oxford* (1840) 173 E.R. 941.

‘If, in accordance with the directions I have given you, you are of the view that he (the accused) is not guilty, it will probably be because you are not satisfied beyond reasonable doubt that he had the intention to kill or to inflict grievous bodily harm, or because you are not satisfied that his act was a voluntary one, or you may not be satisfied of either of these matters. If the Crown failed to satisfy you on one or both of those matters, you should proceed to consider whether, at the time he struck the fatal blows, the accused was insane in the relevant sense, and, if so, whether it was because of the insanity that he was, in your view, not guilty.’

I can mention at this stage that after my summing up I was asked by counsel for the accused to direct the jury that if they found the accused guilty of murder, in the sense that the elements thereof were made out, I should direct then that it was still necessary for them to consider insanity, so that, in this way too, they might bring in a verdict of not guilty on the grounds of insanity. The legal position was I think sufficiently apparent from what I had already said but I had not specifically adverted to the particular possibility. The practical question was whether, if the jury found intent and voluntariness proved, notwithstanding the psychiatric evidence called for the accused, there was still a possibility that they could find insanity proved. The request for a direction was withdrawn shortly after it was made, but I nevertheless recalled the jury and gave them a direction on the matter.<sup>53</sup>

According to this test, the jury may return a qualified acquittal if they are:

- Satisfied beyond reasonable doubt that the prosecution has proven all the elements of the offence, but find on the balance of probabilities that the accused meets the requirement of the defence; or
- Not satisfied beyond reasonable doubt that the prosecution has proven all the elements, but are satisfied that the reason for this is because, due to his or her ‘insanity’, the accused did not act voluntarily or intentionally.

This approach overcomes the two objections raised in relation to the original High Court approach, as a person who lacks the requisite mental state due to his or her impairment will still be subject to state intervention. However, it was rejected in *R v S*,<sup>54</sup> with the court holding that it:

- Impermissibly imposes a burden on the prosecution of proving the accused’s sanity; and
- Invites the jury to declare the accused ‘insane’ where the evidence merely introduces a doubt as to the accused’s sanity.

#### *The Stiles Approach*

As noted in the *Consultation Paper*, the *Stiles* approach requires the jury to be satisfied of all elements beyond reasonable doubt before considering the defence, but to exclude consideration of any evidence of mental impairment when determining whether the elements have been proven. This also overcomes both of the problems outlined in relation to the original High Court approach. However, it is in conflict with the general principle that, in determining a person’s mental state, ‘all

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<sup>53</sup> A similar approach was also taken in the Federal Court in *Taylor v R* (1978) 22 ALR 599 by Smithers J.

<sup>54</sup> [1979] 2 NSWLR 1

facts personal to the person concerned which have bearing or which in the judgment of reasonable men may have a bearing upon the operation of his mind' are relevant.<sup>55</sup>

In addition, the approach is highly artificial, insofar as it requires the jury to proceed by reference to the presumption that the accused was sane, when he or she may not have been. This has been criticised as 'dangerous' by the NSW Court of Criminal Appeal.<sup>56</sup> It is also unlikely that a jury can comply with this requirement.

Furthermore, the need to inform the jury of precisely what evidence they must exclude when determining whether the elements have been proven may make this approach unworkable. For example, the definition of a 'disease of the mind' is complex and, in some cases, requires the jury to make intermediate findings of fact. A process which requires the jury to carefully consider certain pieces of evidence in order to determine whether they constitute a 'disease of the mind', and then to ignore those pieces of evidence until it comes to consider the defence of mental impairment, is likely to be an impossible task.

#### *The Hawkins Approach*

In *Hawkins v R*,<sup>57</sup> in the context of the Tasmanian *Criminal Code*, the High Court unanimously held that:

- On proof that an 'incriminated' act is done by a person, there is a presumption that that person is of sound mind;
- The presumption of sound mind justifies the further presumption that the act was 'voluntary and intentional';<sup>58</sup>
- Evidence of mental disease is not relevant to the question of whether an act is 'voluntary and intentional', and cannot be used to rebut the two presumptions outlined above. To allow otherwise would be to destroy the limitations placed on the 'insanity' defence by its two limbs.
- Evidence of mental disease may be relevant to the issue of specific intention because the accused will generally be liable to conviction for an offence constituted by the doing of the act. He or she should only be liable to conviction for a more serious offence if the prosecution establishes the intent which is the additional element in the more serious offence.<sup>59</sup>

Having made these decisions, the Court held:

In principle, the question of insanity falls for determination before the issue of intent. The basic questions in a criminal trial must be: what did the accused do and is he criminally responsible for doing it? Those questions must be resolved (the latter by reference either to

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<sup>55</sup> *R v Schultz* [1982] WAR 171. See also *Thomas* (1960) 102 CLR 584; *Cameron* (1990) 2 WAR 1; *R v Hawkins* (1994) 179 CLR 500.

<sup>56</sup> *R v Youssef* (1990) 50 A Crim R 1.

<sup>57</sup> (1994) 179 CLR 500.

<sup>58</sup> Section 13(1) of the Tasmanian *Criminal Code Act 1924* provides that 'No person shall be criminally responsible for an act, unless it is voluntary and intentional...'.

<sup>59</sup> This is also the approach taken in a number of Canadian cases: see, e.g., *R v More* [1963] SCR 522; *R v Kirkby* (1985) 21 CCC (3d) 31; *R v Baltzer* (1974) 27 CCC (2d) 118; *R v Lechasseur* (1977) 38 CCC (2d) 319; *R v Allard* (1990) 57 CCC (3d) 397; *R v Stevenson* (1990) 58 CCC (3d) 464. But cf *R v Wright* (1979), 48 CCC (2d) 334.



s 13 or to s 16)<sup>60</sup> before there is any issue of the specific intent with which the act is done. It is only when those basic questions are answered adversely to an accused that the issue of intent is to be addressed. That issue can arise only on the hypothesis that the accused's mental condition at the time when the incriminated act was done fell short of insanity under s 16.<sup>61</sup>

It is clear from this part of the judgment that under this approach, before considering the issue of insanity, the jury must be satisfied:

- That the accused committed the 'incriminated act'; and
- That he or she did so voluntarily.

It is also clear that the jury *do not* need to be satisfied of any specific intention required for the relevant offence. The jury will only need to consider the issue of specific intention if they are not satisfied that the insanity defence has been proven on the balance of probabilities. In that case, the jury may consider the evidence of insanity when assessing whether the prosecution has proven the relevant specific intent.

This approach overcomes both of the problems outlined in relation to the original High Court approach, while also avoiding the artificiality of the *Stiles* approach. However, it suffers from a number of drawbacks. For example, in *Ward v R*,<sup>62</sup> Justice Wheeler noted that:

- As a matter of principle, the accused is entitled to have a jury determine precisely what offence, if any, the prosecution is able to prove against him or her before attention is directed to the question of whether he or she should be exempted from criminal responsibility by reason of insanity;
- A qualified acquittal carries significant social stigma, as a jury has found that the accused committed a criminal act and would have been convicted but for the insanity. An accused has a clear interest in not attracting that stigma unless it is truly warranted;
- The *Hawkins* approach risks leading the jury to think that they should return a qualified acquittal when consideration of further matters might have led them to an unqualified acquittal. This creates the potential for injustice which the Court sought to avoid in *Falconer*.<sup>63</sup>

The High Court also did not address the risk of unfairness that may arise due to the ability of the prosecution to raise the defence of mental impairment. This may allow the prosecution to secure a qualified acquittal in circumstances where the accused may have legitimately been able to secure a complete acquittal due to lacking specific intent for a reason unrelated to his or her mental illness.

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<sup>60</sup> As noted above, s13 relates to whether the accused's act was 'voluntary and intentional'. Section 16 states: 'A person is not criminally responsible for an act done or an omission made by him — (a) when afflicted with mental disease to such an extent as to render him incapable of — (i) understanding the physical character of such act or omission; or (ii) knowing that such act or omission was one which he ought not to do or make; or (b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.'

<sup>61</sup> *Hawkins* (1994) 179 CLR 500.

<sup>62</sup> (2000) 118 A Crim R 78.

<sup>63</sup> (1990) 171 CLR 30.

In *Ward v R*,<sup>64</sup> Justice Wheeler was also concerned about the practical difficulties involved in implementing the *Hawkins* approach, noting that:

- The sequence of jury directions has traditionally been governed by the need for clarity based on the issues in a case, rather than an order dictated by formal logic;
- Considering insanity before specific intention carries a risk of injustice due to confusion around the shifting onus and standard of proof. Greater clarity and simplicity is achieved where the jury only need to consider insanity at the end of its deliberations, after the prosecution discharges its onus of proof;
- The *Hawkins* approach risks splitting the issues of intent and confusing the jury. The directions about insanity would be interposed between general directions about inferring intent (relevant to all matters where intent arises), and the directions about the need to prove specific intent. It is likely to be clearer for a jury (and more convenient for the judge) if these directions could be given relatively close in time.<sup>65</sup>

In addition, the judgment in *Hawkins* leaves a number of matters unresolved, such as the meaning of the phrase ‘incriminated acts’ and the treatment of basic intent.

#### ‘Incriminated Acts’

Throughout the judgment in *Hawkins*, the court uses the term ‘incriminated act’ to refer to the matter the prosecution must prove. The scope of this term is not clear. It is clear that it covers the relevant *physical act*, such as killing the victim. It is likely that, where the *actus reus* of an offence includes a mental element,<sup>66</sup> the prosecution will also need to prove that mental element. In such cases, the mental element forms part of the ‘incriminated act’.

It is unclear whether the prosecution must also disprove any *defences* that are open on the evidence. This issue was not addressed in *Hawkins*, which focussed on the narrow question of whether evidence of insanity is relevant to the issue of specific intent. I address the issue of defences in more detail below.

#### Basic Intention

It is unclear whether, on the *Hawkins* approach, the jury must be satisfied that the accused had the requisite *basic intention* before considering the insanity defence. It seems likely that they do for two reasons:

- Throughout the judgement the High Court continually refers to ‘specific intention’, indicating that basic intention is regarded differently,<sup>67</sup>
- The Court notes the need for the prosecution to prove ‘criminal responsibility’ before examining insanity. In Tasmania, a person is criminally responsible for an act which is

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<sup>64</sup> (2000) 118 A Crim R 78.

<sup>65</sup> This is likely to lead to be a particular problem in cases involving self-defence. In such cases, the jury may need to consider questions of intent in relation to self-defence at an early stage in their deliberations, and then return to the issue of specific intention if they reject the insanity defence.

<sup>66</sup> E.g., The concept of ‘concealment’ in relation to the offence of ‘concealing a material fact’, requires proof of the accused’s mental state: see the discussion of *R (Young) v Central Criminal Court* [2002] 2 Cr App R 12 below.

<sup>67</sup> This distinction is made explicit in some of the Canadian cases cited by the Court: see, e.g., *R v Baltzer* (1974) 27 CCC (2d) 118.

‘voluntary and intentional’.<sup>68</sup> The Court notes that a ‘voluntary and intentional’ act is defined, in Tasmania, as ‘a willed act; one which the person was aware he was doing and meant to do’.<sup>69</sup> This seems to cover acts of basic intent.

However, there are some indications that the Court intended to limit the jury’s consideration to the commission of the relevant act and the voluntariness of that act, with all other issues of intention being considered after resolution of the insanity issue:

- In addition to defining ‘voluntary and intentional’ in the way outlined above, the Court also notes approvingly that in *Williams*<sup>70</sup> Neasey J held that ‘intention in this context is no more than an element in voluntariness’. It is possible, therefore, that acts of basic intent will be considered to be of a different nature.
- The Court also draws a distinction between proving ‘criminal responsibility for doing an act’ (which must be done before insanity is addressed) and proving ‘an element of an offence’ (which must be addressed afterwards). If basic intent is seen to be an ‘element of an offence’ in the same way as ‘specific intent’, it may not need to be proven by the prosecution prior to consideration of the defence.

#### *The UK Approach*

In England, the defence of insanity is governed by s2 of the *Trial of Lunatics Act 1883*, which states:

Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time *when the act was done or omission made*, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused is not guilty by reason of insanity. (Emphasis added).

A similar provision exists in the *Criminal Procedure (Insanity) Act 1964*, in relation to fitness to stand trial. Section 4A(2) states that the jury must determine ‘whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, *that he did the act or made the omission charged* against him as the offence’ (emphasis added).

Originally, in the context of fitness proceedings,<sup>71</sup> the court held that to be satisfied that the accused ‘did the act or made the omission charged against him as the offence’, the jury had to find that *all of the elements* necessary to prove the offence charged had been proven (i.e., both the *actus reus* and the *mens rea*).<sup>72</sup> This approach was criticised in *Attorney-General’s Reference (No. 3 of 1998)*,<sup>73</sup> which held, in relation to insanity, that:

- The prosecution is required to prove the ingredients which constitute the *actus reus* of the crime; and

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<sup>68</sup> *Criminal Code Act 1924* (Tas) s.13(1).

<sup>69</sup> *Williams v R* [1978] Tas SR 98.

<sup>70</sup> [1978] Tas SR 98.

<sup>71</sup> Although this was a decision concerning fitness, the court has held that the issue is identical in relation to insanity: *Attorney-General’s Reference (No. 3 of 1998)* [2000] Q.B. 401.

<sup>72</sup> See *R v Egan* [1998] 1 Cr App R 121, discussed above in relation to the original High Court approach.

<sup>73</sup> [2000] Q.B. 401.

- The prosecution is not required to prove the *mens rea* of the crime alleged. The accused's state of mind is only relevant to the defence of insanity.

The court defined the prosecution's duty as proving that the accused 'has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law'.<sup>74</sup> This approach was partly based on the fact that, in 1883, the legislature replaced the requirement that the accused 'committed the offence' with the requirement that the accused 'did the act or made the omission':

The difference is material. The original phrase 'committed the offence,' appears to encompass the relevant act, together with the necessary intent. By contrast, 'act' and 'omission' do not readily extend to intention.<sup>75</sup>

This approach was also based on the principle seen to underlie the legislative scheme:

Taking it very briefly, this legislation acknowledged the essential principle that a proper conviction depended on proof of *mens rea* at the time when the criminal act was committed. If the defendant was of unsound mind at that time the right verdict, *mens rea* being absent, was an acquittal. However, to protect the public from an individual whose actions constituted the *actus reus* of a crime, an acquittal on the grounds of insanity was to be followed by custody during His Majesty's pleasure.<sup>76</sup>

This approach was upheld (and *Egan* authoritatively overruled) by the House of Lords in *R v Antoine*.<sup>77</sup> They emphasised the danger of requiring proof of intention as part of proof of the relevant 'act':

if the appellant's submission as to the meaning of the word 'act' in section 4A(2) were correct, very serious risk to the public would arise which Parliament could not have intended. The risk would be that if a defendant who killed another person and was charged with murder was insane at the time of the killing and was unfit to plead at the time of his trial by reason of that insanity, then *mens rea* could not be proved because of the insanity existing at the time of the alleged offence, and the jury would have to acquit the defendant and he would be released to the danger of the public.<sup>78</sup>

The main drawback of the UK approach arises from the difficulty in distinguishing the *actus reus* (which the prosecution has to prove) from the *mens rea* (which the prosecution does not have to prove). The court in *Antoine* noted this difficulty, but ultimately concluded that the distinction is still sufficiently useful that it should be employed:

A number of learned authors have commented that it is difficult in some cases to distinguish precisely between the *actus reus* and the *mens rea* and that the *actus reus* can include a mental element. In Smith & Hogan, Criminal Law, 9th ed, p 28 Professor Sir John Smith QC states:

'It is not always possible to separate *actus reus* from *mens rea*. Sometimes a word which describes the *actus reus*, or part of it, implies a mental element.'

<sup>74</sup> *Attorney-General's Reference (No. 3 of 1998)* [2000] Q.B. 401.

<sup>75</sup> *Attorney-General's Reference (No. 3 of 1998)* [2000] Q.B. 401. See also *R v Antoine* [2001] 1 AC 340.

<sup>76</sup> *Attorney-General's Reference (No. 3 of 1998)* [2000] Q.B. 401, 405.

<sup>77</sup> [2001] 1 AC 340.

<sup>78</sup> *Ibid.*

In his speech in *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 , 688 Lord Simon of Glaisdale recognised the difficulties arising from what he termed ‘the chaotic terminology’ relating to the mental element in crime. Nevertheless, he recognised that *actus reus* and *mens rea* are useful terms and said, at p 690:

‘Both terms have, however, justified themselves by their usefulness; and I shall myself employ them in their traditional senses—namely, *actus reus* to mean such conduct as constitutes a crime if the mental element involved in the definition of the crime is also present (or, more shortly, conduct prohibited by law); and *mens rea* to mean such mental element, over and above volition, as is involved in the definition of the crime.’<sup>79</sup>

The difficulty in distinguishing between the *actus reus* and the *mens rea* became important in the case of *R (Young) v Central Criminal Court*.<sup>80</sup> In that case the accused was charged with dishonestly concealing material facts, and a question was raised whether the prosecution (on a fitness hearing) needed to prove what his intentions were at the time of the alleged offence, or whether consideration of his mental state was precluded by the *Antoine* test. It was ultimately held that the *actus reus* in this case went beyond purely physical acts, and the prosecution:

- Had to prove the accused’s ‘present intentions’ at the time of the offence (e.g., that he intended to reduce the value of the bonds); but
- Did not have to prove that the accused acted dishonestly, or was acting for the purpose of inducing or being reckless as to whether he might induce the trustees to make an investment.

A number of other difficulties with this approach were highlighted by the court in *Attorney-General’s Reference (No 3 of 1998)*:

Despite the potential difficulties illustrated by counsel in their arguments, the advantages of certainty, and the impossibility of providing a definitive answer to every conceivable case which may arise, in our judgment the criminal law should distinguish between providing for the safety of the public from those who are proved to have acted in a way which, but for their mental disability, would have made them liable to be convicted and sentenced as criminals, and those whose minds, however disturbed, have done nothing wrong. So far as the criminal courts are concerned, we do not accept that public safety considerations can properly be deployed to justify the making of orders against those who have done nothing which can fairly be stigmatised as a criminal act. Our concerns can be readily illustrated by practical examples. A person with mental disability, swimming in an overcrowded public pool, should not be at risk of the consequences of a finding of insanity when the alleged indecent touching of another swimmer may well have been accidental, or non-deliberate. On the other hand, where an apparently deliberate touching takes place in what on the face of it are circumstances of indecency, the individual in question (arguing that he was insane at the time) should not avoid the appropriate verdict on the basis of his own mistaken perception, or lack of understanding, or indeed any defences arising from his own state of mind.

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<sup>79</sup> Ibid.

<sup>80</sup> [2002] 2 Cr App R 12.

The difficulties are, if anything, greater where the alleged crime is more serious. Where on an indictment for rape it is proved that sexual intercourse has taken place without the consent of the woman, and the defendant has established insanity, he should not be entitled to an acquittal on the basis that he mistakenly, but insanely, understood or believed that she was consenting. But when an individual surrounded by a group of much larger, aggressive and armed youths strikes out and lands a blow on one of them who unfortunately falls to the ground sustaining a fatal head injury, it would be unjust if he were prevented from inviting the jury to consider that his violence might have been lawful, merely because, as a result of insanity, he believed that the group of youths was a mob of devils attacking him because (as the defendant in the present case believed) he was Jesus Christ. Excluding this individual's own damaged mental faculty at the time, the jury might conclude that although he caused death, his actions were not unlawful, and so did not constitute the *actus reus* of murder, or manslaughter.

Despite noting these difficulties, the court maintained that this approach was the appropriate one. It is clear, however, that these issues should be considered when developing a Victorian test.

#### *The ACT Approach*

Before 2004, the fitness to plead provisions in the ACT required the prosecution to prove that the accused 'committed the acts which constitute the offence charged'.<sup>81</sup> In interpreting this provision, the Court of Appeal was strongly influenced by the UK Approach (see above).<sup>82</sup> However, they varied that approach to some degree, due to a concern about people being convicted of serious offences when a lesser alternative would be more appropriate:

It would plainly be unsatisfactory so far as the accused is concerned, if, on the facts as proved to the requisite degree, it appears that the accused should have been acquitted of the offence charged because there was reason to doubt that a specific intent, an element of that offence, existed. It may even be the case that it is apparent, by reason of, for example, mental retardation, that the accused could not have had that specific intent. It would be plainly absurd to find that the accused had committed the acts constituting that offence when it appears that the accused did not have a specific intent or specific knowledge necessary to constitute one offence rather than another, perhaps, lesser offence -- for example, assault occasioning actual bodily harm, as opposed to assault with intent to cause grievous bodily harm.<sup>83</sup>

Although not clear, the court in *Ardler* seemed to resolve this difficulty by requiring the prosecution to prove specific intention or knowledge:<sup>84</sup>

[I]f the offence charged requires a specific intent of the particularity necessary to constitute the offence, such as the offence of arson referred to in s 117 *Crimes Act*, 'to endanger the life of another person', that specific intent must be proved in order that the 'acts' proved will constitute that offence rather than a lesser offence.

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<sup>81</sup> *Crimes Act 1900* (ACT) s.317.

<sup>82</sup> While the cases discussed in this section focus on fitness to plead rather than the defence of 'insanity', the general principles are equally applicable to that defence: see *R v Ardler* (2004) 144 A Crim R 552. However, it should be noted that under the *Criminal Code 2002* (ACT), there is a specific provision that prevents a person from relying on a mental impairment to deny voluntariness or the existence of a fault element (s29(1)).

<sup>83</sup> *R v Ardler* (2004) 144 A Crim R 552.

<sup>84</sup> It is not clear from the judgment to what extent the prosecution is relieved of the obligation of proving other aspects of *mens rea*.

If the specific intent or knowledge is present, it is no answer for it to appear that that specific intent or knowledge was the consequence of mental impairment. However, the mental impairment will be relevant to the question whether that intent or knowledge was in fact present.

However, the prosecution is assisted by the presumption of sanity, and can often discharge its onus by relying on the evidence that reveals that the accused appeared to have the requisite mental state, unless there is 'objective evidence' to contest this fact:

the prosecution is required to prove beyond reasonable doubt the physical acts of the offence charged which would constitute an offence if done intentionally and voluntarily and with any particular intent or knowledge specified as an element of the offence but is not required to negative lack of mental capacity to act intentionally or voluntarily or to have the specific knowledge or intention specified as an element of the offence unless there is objective evidence which raises such an issue including mistake, accident, lack of any specific intent or knowledge of the particularity necessary to constitute the offence that is an element of the offence or self-defence in which case the prosecution must negative that issue beyond reasonable doubt.<sup>85</sup>

After the judgment in *Ardler* was handed down, the wording of the relevant legislation was changed. Instead of requiring the prosecution to prove that the accused 'committed the acts which constitute the offence charged', they must now prove that the accused 'engaged in the conduct required for the offence charged'. The Revised Explanatory Statement to the *Crimes Amendment Bill 2004 (No 2)* explained that this amendment:

clarifies that proof of intentional elements is not required at a special hearing. That is to say, it is only the physical elements of the offence that must be established at a special hearing. The Prosecution is not required to establish intent, or any mental element, of any offence.

It is not clear precisely what effect this has had on the principles established in *Ardler*. While some cases have suggested that the principles have not been affected,<sup>86</sup> others have suggested that the term 'conduct required for the offence charged' refers to the 'physical acts' which constitute the offence. Those acts must be done voluntarily.<sup>87</sup>

The ACT approach shares many features with the UK approach, and so shares many of the same problems. In addition, the ACT cases have clearly demonstrated the difficulties involved in identifying the 'conduct elements'. For example:

- In relation to burglary, it has been held that having an intention to commit theft of property in the building is a 'conduct' element that the prosecution must prove.<sup>88</sup>
- In relation to theft, it has been held that having an intention to permanently deprive is a 'conduct element', but dishonesty is not.<sup>89</sup>
- In relation to 'dishonestly driving a motor vehicle without the owner's consent', it has been held that the prosecution must prove that the 'motor vehicle was dishonestly taken by

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<sup>85</sup> *R v Ardler* (2004) 144 A Crim R 552. It is unclear from *Ardler* whether evidence of a mental illness is sufficient to put matters such as specific intention in issue.

<sup>86</sup> Ssee, e.g., *R v King* (2005) 155 ACTR 55; *R v Clements* [2006] ACTSC 44.

<sup>87</sup> *R v Dunn* [2011] ACTSC 84.

<sup>88</sup> *R v Williams (No 2)* [2011] ACTSC 77; *R v Dunn* [2011] ACTSC 84.

<sup>89</sup> *R v Williams (No 2)* [2011] ACTSC 77; *R v Dunn* [2011] ACTSC 84.

someone without the consent of the person to whom it belongs', but they do not need to prove that the accused acted 'dishonestly'.<sup>90</sup>

- In relation to rape, it has been held that awareness that the complainant was not consenting or might not be consenting is a conduct element.<sup>91</sup>
- In relation to the non-Code offence of 'negligent driving', the prosecution must prove 'negligence'.<sup>92</sup>

### *The SA Approach*

In South Australia, sections 269C-G of the *Criminal Law Consolidation Act 1935* require the 'objective elements' of the offence to be proven before a qualified acquittal may be given. An 'objective element' is defined to mean an element of the offence that is not a subjective element.<sup>93</sup> A 'subjective element' is defined to mean voluntariness, intention, knowledge or some other mental state that is an element of the offence.<sup>94</sup> This test is broader than any of the other tests outlined above, insofar as it clearly excludes consideration of *all* mental state elements, including voluntariness, basic intention and knowledge of circumstances.

While the SA approach offers a high degree of clarity, it may be criticised as being unfair to an accused. It excludes defences that would be available to an accused even if he or she was not suffering from a mental impairment. This could present a powerful disincentive to raising evidence of any impairment, where there is some other arguable defence. However, this may not be possible, as such evidence – as well as the defence itself – may be raised by the prosecution (with the court's leave).

### *Other Matters for Consideration*

Apart from the issues specific to each approach that have been outlined above, there are also a number of general matters that must be considered when determining the appropriate approach to this issue:

- Lesser included offences;
- Aggravated offences;
- Inchoate and Negligent Offences;
- Defences.

These are addressed in turn below.

### *Lesser Included Offences*

There are a number of offences that require proof of the same conduct element (e.g., causing serious injury) but different mental elements (e.g., intentionally, recklessly, negligently). This can create difficulties if the jury is not required to consider the mental element prior to determination of the mental impairment defence, as is the case in many of the approaches outlined above.

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<sup>90</sup> *R v Dunn* [2011] ACTSC 84.

<sup>91</sup> *R v Ardler* (2004) 144 A Crim R 552. It should be noted that this was decided under the pre-2004 legislation.

<sup>92</sup> *R v Griffith* [2009] ACTSC 114. In *Griffith*, the judge noted that the situation may be different under the *Code*, which labels negligence as a 'fault element'.

<sup>93</sup> *Criminal Law Consolidation Act 1935* s.269A.

<sup>94</sup> *Criminal Law Consolidation Act 1935* s.269A.



For example, if the accused is charged with intentionally causing serious injury,<sup>95</sup> and it is proven that he or she caused serious injury and was suffering from a mental impairment at the time, what verdict should the jury return? Is it appropriate to return a verdict of 'not guilty of intentionally causing serious injury because of mental impairment', when no consideration has been given to the intentionality of the accused's acts? Should he or she instead receive a qualified acquittal to a lesser included offence, such as recklessly or negligently causing serious injury?<sup>96</sup> Similarly, if the jury only found that the accused caused injury, would the appropriate qualified acquittal be to a charge of intentionally causing injury or recklessly causing injury?<sup>97</sup>

This is not just an academic question – it can have real effects on the accused because, under s28 of the *CMIA*, the nominal term of a supervision order is currently determined by reference to the offence of which the accused receives a qualified acquittal.<sup>98</sup> Each of the offences identified in the previous paragraph attract different maximum penalties.

The importance of this issue was highlighted by Burt CJ in *Perkins v R*. He noted that that:

It is, I think, important that the Executive should know the true position and it is more important that there should exist no ground for supposing that a man has committed, although not criminally responsible for, a crime for which the jury has found him to have been not guilty.<sup>99</sup>

In addition, Wheeler J noted in *Ward v R* that:

A verdict of not guilty by reason of unsoundness of mind is a verdict which, although it means that an accused 'is not criminally responsible' for the act... nevertheless carries with it the stigma of a finding that the person has killed in circumstances which are not authorised, justified or excused by law. It should not necessarily be assumed that merely because he or she will escape punishment, an accused person has no further interest in the nature of the jury's finding. The insanity may not persist, or it may take a form which allows the accused to comprehend the stigma which attaches to such a verdict, and it may be important for the accused not to be visited with the continuing stigma which attaches, for example, to an unresolved suspicion that he or she may have killed another intending to cause death, rather than while lacking such an intention...

Additionally, it is in many cases also important for the family and friends of the deceased, or for those who may have been caught up in the events leading to the killing, to know what view is taken by the jury as to the accused's intent. Finally, the decisions as to treatment and disposition of a person acquitted by reason of unsoundness of mind may be influenced by the knowledge that a jury, after close examination of all of the relevant evidence, has formed a particular view as to his or her intention at the relevant time.<sup>100</sup>

This issue has received particular attention in Western Australia, due to s653(1) of *Criminal Code Act 1913*. This provision, which was inserted after *Hawkins*<sup>101</sup> was decided, required the jury, if they acquitted a person, to return a special verdict as to 'the offence the person was acquitted of'.<sup>102</sup>

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<sup>95</sup> *Crimes Act 1958 (Vic)* s.16.

<sup>96</sup> *Crimes Act 1958 (Vic)* ss.17 and 24.

<sup>97</sup> *Crimes Act 1958 (Vic)* s.18.

<sup>98</sup> See below for a critique of the current 'nominal term' system.

<sup>99</sup> [1983] WAR 184

<sup>100</sup> (2000) 118 A Crim R 78.

<sup>101</sup> (1994) 179 CLR 500.

<sup>102</sup> This provision has since been repealed.

Conflicting views have been given about how to comply with both *Hawkins* and s653. For example, in relation to a charge of wilful murder, it has variously been held that:

- The jury must follow the *Hawkins* procedure, and if they return a verdict of not guilty due to insanity, must be asked whether they have acquitted the accused of wilful murder, murder or manslaughter.<sup>103</sup>
- The verdict must relate to the offence charged (e.g. murder rather than manslaughter).<sup>104</sup>
- In light of the *Hawkins* procedure, s653 does not require the jury to make a finding about the relevant form of homicide, and should be repealed.<sup>105</sup>
- It is impossible to comply with s653, as the accused has not been acquitted of any offence (as there is no offence by definition).<sup>106</sup>
- The *Hawkins* approach should generally not be followed, and the jury should deliver a verdict related to a specific offence.<sup>107</sup>
- Whatever procedure is followed, there is a statutory imperative to identify the relevant offence.<sup>108</sup>

To avoid such confusion, it is essential that this issue be taken into account in determining the way in which the mental impairment defence should be addressed.

#### *Aggravated Circumstances*

A similar problem arises in relation to offences that have an aggravated version which depends on the accused's mental state. This can be seen by considering *R v Sandoval* [2010] NSWDC 255. In that case, the accused was charged with dangerous driving, as well as an aggravated version of that offence which requires proof that the accused was 'driving to escape pursuit by a police officer'. He claimed the defence of insanity. The court held:

- Driving to 'escape pursuit' requires a person to know about the pursuit and was driving in order to escape that pursuit;
- There was no evidence that the accused knew about the pursuit in this case, so he should be acquitted of the aggravated offence;
- Because the accused met the requirements of the insanity defence, he should receive a qualified acquittal on the non-aggravated count.

The approach taken by the judge here seems to conflict with the *Hawkins* approach. Under that approach, it seems that the judge should not have considered evidence about the accused's intention to escape pursuit prior to considering the defence of insanity.<sup>109</sup> Instead, if he was satisfied

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<sup>103</sup> *Garrett v R* [1999] WASCA 169 per Ipp J. Ipp J noted the problem with requiring the jury to undertake this exercise, and queried 'the practical need to know what the jury's verdict would otherwise have been', but felt bound to adopt such a procedure. This approach was subsequently criticised by Wallwork J in *Ward v R* (2000) 118 A Crim R 78, who held that 'to instruct a jury, when it has found a person not guilty by reason of unsoundness of mind, to consider what offence it would otherwise have found the innocent person guilty of, would be a hypothetical exercise. It could involve most complicated considerations which might result in the jury not being able to reach a verdict at all'.

<sup>104</sup> *Ward v R* (2000) 118 A Crim R 78 per Kennedy J; *Iley v WA* [2006] WASC 107 per Johnson J.

<sup>105</sup> *Garrett v R* [1999] WASCA 169 per Murray J; *Ward v R* (2000) 118 A Crim R 78 per Scott J.

<sup>106</sup> *Ward v R* (2000) 118 A Crim R 78 per Wallwork J.

<sup>107</sup> *Ward v R* (2000) 118 A Crim R 78 per Wheeler J.

<sup>108</sup> *R v Lavell* [2002] WASC 200 per Heenan J.

<sup>109</sup> This would not be required if the judge, following the broad approach to the meaning of 'conduct elements' adopted in the ACT, found that 'driving to escape pursuit' was a conduct element.

that the accused was 'driving dangerously', he should have found the accused 'not guilty because of mental illness'. In such circumstances, should he have received a qualified acquittal in relation to the aggravated count or the simple offence?

### *Inchoate and Negligent Offences*

Consideration should also be given to precisely what the prosecution must prove where the accused is charged with an inchoate offence (conspiracy, incitement or attempt). For example, if the accused is charged with attempted murder and raises the defence of mental impairment, is it sufficient to prove that he or she committed acts that were sufficiently proximate before turning to the defence, or is it also necessary to prove that he or she had an intention to kill?<sup>110</sup>

Similarly, it is also necessary to consider what the prosecution must prove when the accused is charged with a negligent offence. The resolution to this issue may depend on the nature of the offence in issue (e.g., does it require that the accused 'ought to have known' something, or simply that he or she departed from a standard of care).

In *Hawkins v R (No 3)*<sup>111</sup> the Tasmanian Court of Appeal held that the phrase 'ought to have known' is subjective, as it involves an assessment of what the particular accused, with his or her actual knowledge and capacity, ought to have known in the circumstances in which he or she was placed. Consequently, a mental illness falling short of insanity was held to be relevant to this question. Following the procedure laid down in *Hawkins v R*,<sup>112</sup> this would indicate that this element should be considered *after* the issue of mental impairment has been resolved.

However, the situation may be different for offences such as manslaughter by criminal negligence, where the test for criminal negligence is considered to be entirely objective.<sup>113</sup> In such cases, the negligent nature of the act may be considered to be part of the *actus reus*, and may need to be addressed before the issue of mental impairment.

### *Other Defences*

When the defence of mental impairment is in issue, it is unclear precisely when the jury should consider evidence relating to other defences such as self-defence, consent or provocation. This issue is of great importance, as it may determine whether the accused receives a full or qualified acquittal.

Where this issue has been addressed, it has generally been held that defences such as self-defence, mistake or accident should be considered by the jury *before* considering the defence of mental impairment.<sup>114</sup> For example, in *Antoine* the House of Lords held:

The issue is this. If, on a determination under section 4A(2), the jury are only concerned to decide whether the defendant did the 'act' and are not required to consider whether the defendant had the requisite *mens rea* for the offence, should the jury nevertheless decide that the defendant did not do the 'act' if the defendant would have had an arguable defence of accident or mistake or self-defence which he could have raised if he had not been under a disability and the trial had proceeded in the normal way. The difficulty inherent in this issue

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<sup>110</sup> In *WA v Tarau* [2005] WASC 290 the judge took the view that the prosecution must prove that he or she had an intention to kill. Having such an intention was seen as an inherent part of the concept of 'attempting' to do something.

<sup>111</sup> (1994) 4 Tas R 376.

<sup>112</sup> (1994) 179 CLR 500.

<sup>113</sup> See, e.g., *R v Richards & Gregory* [1998] 2 VR 1.

<sup>114</sup> See, e.g., *McDonald (No 2) v WA* [2010] WASC 355; *R v Antoine* [2001] 1 AC 340; *R v Bailiff* (2004) 145 A Crim R 564.

is that such defences almost invariably involve some consideration of the mental state of the defendant. Thus in *Palmer v The Queen* [1971] AC 814 , 832 when considering self-defence, Lord Morris of Borth-y-Gest referred to the defendant doing 'what he honestly and instinctively thought was necessary' to defend himself. But on the determination under section 4A(2) the defendant's state of mind is not to be considered. How then is this difficulty to be resolved?

I would hold that it should be resolved in this way. If there is objective evidence which raises the issue of mistake or accident or self-defence, then the jury should not find that the defendant did the 'act' unless it is satisfied beyond reasonable doubt on all the evidence that the prosecution has negated that defence. For example, if the defendant had struck another person with his fist and the blow had caused death, it would be open to the jury under section 4A(4) to acquit the defendant charged with manslaughter if a witness gave evidence that the victim had attacked the defendant with a knife before the defendant struck him. Again, if a woman was charged with theft of a handbag and a witness gave evidence that on sitting down at a table in a restaurant the defendant had placed her own handbag on the floor and, on getting up to leave, picked up the handbag placed beside her by a woman at the next table, it would be open to the jury to acquit.<sup>115</sup>

However, a different approach has been taken to the defence of provocation.<sup>116</sup> It has been held that that defence should *not* be considered prior to the determination of the issue of insanity for two reasons:

- Provocation depends on the accused having had the intention to kill, and intention is not something for the jury to consider prior to addressing insanity;
- Any consideration of provocation inevitably requires examination of the defendant's state of mind, in determining whether there has been a sudden and temporary loss of self-control and whether that loss of self-control was caused by the conduct of the deceased. It would be unrealistic and contradictory to require a jury to consider what effect the conduct of the deceased had on the mind of a person, but not to consider their intention.<sup>117</sup>

Another issue that needs to be considered is how the law should address cases in which the accused's impairment contributes to the belief that his or her actions were necessary in self-defence. This issue was addressed in *R v Walsh*, a pre-*Hawkins* case in Tasmania.<sup>118</sup> In that case it was held that the jury should:

- First address the issue of self-defence, by reference solely to the 'sane' beliefs of the accused. If satisfied that the accused's actions were justified, he or she should be acquitted.
- If the accused's actions were not justified on the basis of his or her 'sane' beliefs, the jury should then consider whether or not the evidence establishes the elements of the offence.
- If the jury finds that the elements have been satisfied, then it should consider the insanity defence. If satisfied the requirements of that defence have been proven, he or she should receive a qualified acquittal.

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<sup>115</sup> *R v Antoine* [2001] 1 AC 340.

<sup>116</sup> While provocation has been abolished in Victoria, it is still necessary to consider how it should be approached as old cases raising the defence continue to be heard by the courts.

<sup>117</sup> *R v Grant* [2002] Q.B. 1030.

<sup>118</sup> *R v Walsh* (1991) 60 A Crim R 419.

- If the jury is not satisfied that the requirements of the insanity have been proven, it can then consider whether the accused's actions were justified on the grounds of any 'deluded' beliefs he or she held.<sup>119</sup>

Concerns about the possibility of 'deluded self-defence' appear to have driven the approach taken to defences in South Australia. As noted above, in South Australia only the 'objective elements' of the offence need to be proven before a qualified acquittal may be given.<sup>120</sup> This raises the question of whether defences should be considered 'subjective' or 'objective' elements. This issue was addressed in *Question of Law Reserved for the Full Court (No 1 of 1997)*,<sup>121</sup> in which the court held:

The definition of subjective elements encompasses every mental state which qualifies as an element of the offence. It would seem that the rationale for excluding them from consideration after mental incompetence has been established rests on the assumption that the cause of any involuntariness, lack of intention or other similar exculpatory factor is likely to be the result of the mental incompetence. This causal connection may or may not exist as a matter of fact; involuntariness may have been due to other causes unconnected with mental incompetence as is recognised in cases such as *The Queen v Cottle...* However, given the intent of the legislation that such mental states are not to be relied upon to support a complete acquittal if mental incompetence is established, it is not difficult to appreciate that the same policy reasons can be applied to self-defence. In the present case, for example, it would appear that the accused might want to rely for a defence on a delusional belief which was due to mental impairment as defined by the Act. In that event the policy of the legislation would require that evidence which supports a finding of mental incompetence (and in this case succeeds in establishing it) is not to be used to support a defence which would lead to a complete acquittal or a reduction of the offence from murder to manslaughter. If self-defence was an objective element for the purposes of the legislation the pursuit of such a result could not be prevented.

The court's finding that self-defence was not to be considered prior to the insanity defence was eventually given legislative backing, with a provision inserted into the relevant Act stating that, on the trial of the objective elements of an offence, the court is to exclude from consideration any question of whether the defendant's conduct is defensible.<sup>122</sup> This approach prevents people being able to rely on defences that flow from their mental impairment (e.g., a delusional belief in the need for self-defence). However, it also prevents a person who is genuinely acting in self-defence from obtaining an unqualified acquittal.

#### *Suggested Approach*

It can be seen from the lengthy analysis above that the issues involved in determining the appropriate approach to this matter are complex. In resolving these issues, regard should be had to the following principles:

- The purpose of the defence of mental impairment is to exculpate people who have committed an act which would ordinarily be considered 'criminal' due to their mental impairment, and to provide some measure of protection to the community due to the fact that they have committed such an act. As such, it is crucial that the defence only be available

<sup>119</sup> *R v Walsh* (1991) 60 A Crim R 419.

<sup>120</sup> *Criminal Law Consolidation Act 1935* ss.269C-G.

<sup>121</sup> (1997) 70 SASR 251

<sup>122</sup> *Criminal Law Consolidation Act 1935* s.269E.

where the accused's act is sufficiently 'criminal' to call for intervention by the criminal justice system.

- A person who suffers from a mental impairment should not be disadvantaged due to that impairment. Consequently, if an accused person would have been found not guilty even in the absence of his or her impairment (e.g., due to a legitimate claim of self-defence), he or she should be acquitted.
- Justice is likely to be undermined if jurors are provided with a task that is too complex or divorced from reality. Ideally, any approach that is developed must be capable of being implemented in a readily comprehensible fashion.

In my view, these principles cannot be achieved through the implementation of any system which seeks to draw a distinction between categories such as *actus reus/mens rea*, subjective/objective elements or basic/specific intent. Not only are the boundaries of these categories notoriously difficult to draw (leading to the likelihood of inconsistent application and providing fertile ground for appeals), but they do not reflect the way in which the 'criminal' nature of an act should be understood. For example, it is not the mere killing of another person that makes murder 'criminal', it is *intentionally or recklessly* killing a person that constitutes the crime. Consequently, a person should not be subjected to the potential of an extended period of custodial supervision simply because they have caused another person's death. Such a disposition is only appropriate if they intentionally or recklessly killed another person whilst suffering from a mental impairment or met the requirements of an alternative offence.

In addition, it is difficult to see how a system that draws such distinctions can avoid the difficulties highlighted above concerning matters such as lesser included offences, aggravated circumstances and inchoate and negligent offences. Moreover, any attempt to draw such distinctions is likely to lead to incomprehensible jury charges, as noted by Wheeler J in *Ward v R*.<sup>123</sup> A similar criticism can be made of the *Stiles* approach, which requires the jury to perform complicated acts of mental gymnastics.

Consequently, I advocate returning to the simplicity of the original High Court approach, and requiring the jury to be satisfied that all of the elements of the offence have been proven, and all relevant defences disproven, before considering the mental impairment defence. Such an approach has a number of benefits:

- It ensures that the accused has committed a sufficiently criminal act to require a disposition under the CMIA;
- It avoids problems with the labelling of the verdict. For example, a person will only be found 'not guilty of *murder* because of mental impairment' if they had an intention to kill or cause really serious injury, or were aware that death/really serious injury was a probable consequence of their behaviour;
- It will not lead to complex legal arguments about which elements of the offence fall within a particular category (e.g., *actus reus/mens rea* or subjective/objective elements);
- It circumvents the issues outlined above concerning inchoate or negligent offences and other defences; and
- It avoids breaking up the charge in a way that is likely to inhibit juror comprehension, or requiring the jury to engage in hypothetical or speculative reasoning.

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<sup>123</sup> (2000) 118 A Crim R 78.

I appreciate that this approach is likely to substantially (if not completely) undermine the first limb of the mental impairment defence (that the accused did not know the nature and quality of his or her conduct), as a person who meets that limb is unlikely to have had the requisite mental state. However, I do not believe this is of great practical concern, as it appears that this aspect of the test is rarely relied upon. For example, in the South Australian Sentencing Advisory Council's recent review of cases in which there had been a finding of not guilty on the basis of mental incompetence in the South Australian District and Supreme Courts between 2006 and 2012, this limb was relied on in only 2% of the cases.<sup>124</sup> The vast majority of cases involved the second limb of the test (knowledge that the act was wrong). This type of mental impairment is unlikely to affect the question of whether or not the accused had the requisite mental state.

In addition, even if a person is ultimately acquitted, that does not mean he or she will not be subjected to state intervention. If he or she is considered to pose a continuing risk to the public, then he or she will be subject to the civil commitment laws, which aim to ensure community safety. The use of these law in such circumstances seems more appropriate than finding the accused 'not guilty because of mental impairment' of an offence that he or she did not commit.

#### Legal consequences of the findings

#### **44. Are changes required to the provision governing the explanation to the jury of the legal consequences of a finding of not guilty because of mental impairment?**

I am supportive of the policy underlying the requirement to explain the legal consequences of findings to the jury, but believe that the current law requires directions that are unnecessarily complicated. Instead of requiring the judge to explain the difference between an unconditional discharge and a supervision order to the jury (only to then tell them not to take these possible consequences into account), it would be better if the jury could simply be instructed that people who are found not guilty because of mental impairment will *generally* be subject to a supervision order. If the jury choose to question the judge about other possible dispositions, he or she should be free to explain the possibility of an unconditional discharge – but that should not be mandated in all cases.

#### Earlier Culpable Acts

One issue that was not addressed in the *Consultation Paper* is whether a person who was not responsible for their behaviour at the time of the offence should ever be held criminally responsible for their lack of responsibility, due to their earlier behaviour. For example, if a person's impairment was caused by their failure to take prescribed medication, or by their decision to take illicit drugs, should they be held responsible for their impaired behaviour?

On this issue, I agree with Cane that a person should be held responsible if their impairment was the result of culpable conduct on their part.<sup>125</sup> In such circumstances, while the accused should be found not guilty of the principal offence (due to their impairment), they should be convicted of a specific offence targeted at the culpable conduct (such as 'culpable failure to take medication').<sup>126</sup>

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<sup>124</sup> South Australian Sentencing Advisory Council, *A Discussion Paper Considering the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)*, para 2.41.

<sup>125</sup> Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 65.

<sup>126</sup> The example provided below relates to a culpable failure to take medication. A similar offence could be constructed to address the situation where taking drugs induces the impairment.

If such an offence were to be created, great care would need to be taken to limit its scope, to ensure that it does not unjustly undermine the autonomy of people with mental illnesses. In particular, I believe there are four areas which would need to be addressed by any criminal offence:

1. Evidence of a prior criminal act;
2. Awareness of the risks of reoffending;
3. Decision to discontinue medication;
4. Commission of a subsequent offence.

These are each briefly addressed below.

#### Evidence of a Prior Criminal Act

In order for a person to be convicted of a *culpable* failure to take medication, it is essential that they be fully aware of the dangers of discontinuing their treatment. In my view, a full appreciation of this fact can only come from having previously committed the kind of act that the criminal law seeks to prevent. In the absence of having previously done so, it will never be clear whether there is a real risk of such behaviour, or whether they are simply being presumed to be dangerous due to their illness. This would have the undesirable effect of undermining their autonomy.

To limit the breadth of any such offence, I believe it is also desirable to limit its scope to cases where the accused knows that there are potentially grave risks attached to the failure to take medication. Consequently, I suggest that the offence should require proof that the accused has previously committed an act that would constitute an *indictable offence* if the mental impairment defence were not available. This would require the accused to have previously been charged with an indictable offence, and to have been convicted, been found not guilty because of mental impairment, or been found to have committed the acts but to be unfit to stand trial.

#### Awareness of the Risks of Reoffending

In addition to having previously offended, an offence criminalising the failure to take medication should require proof that the accused had explicitly been made aware of a substantial risk that he or she would commit similar acts if he or she failed to take his or her prescribed medication. This will generally require the accused to have been advised of those risks by his or her treating practitioner.

It will be noted that I have suggested that the relevant standard be one of 'substantial risk'. While it would be possible to instead simply refer to a 'risk' of committing similar acts, I believe this would cast the net too broadly (as there will almost always be at least some risk of reoffending). Conversely, a 'likelihood' standard is probably too difficult to prove, setting the bar too high. In my view a 'substantial risk' standard strikes an appropriate balance, ensuring that the accused properly takes into account the legally protected interests of others when deciding whether or not to take his or her medication.

#### Decision to Discontinue Medication

For a failure to take medication to be culpable, the accused must have voluntarily and intentionally chosen to take that course of action. It will not be sufficient for the accused to have simply forgotten to take the medication, or to have been unable to do so for some reason. In addition, that decision must have been unjustifiable in the circumstances. It would not seem appropriate to convict a person who was following their doctor's advice to discontinue the medication, or who chose to do so in order to avoid side-effects that outweigh the risks involved in stopping treatment.



I appreciate that introducing the notion of 'justifiability' into the test creates a certain element of subjectivity, which will potentially require the jury to weigh the unpleasant side-effects of the medication against the risks of discontinuing it. I believe, however, that this is necessary in order to properly protect the autonomy and liberty of individuals. The state should not, under threat of criminal sanction, be able to require a person to take medication that is having damaging side-effects, unless it is absolutely necessary to do so.

#### Commission of a Subsequent Offence

Finally, any offence must require proof that, due to his or her decision to discontinue the medication, the accused suffered a relapse of his or her mental illness, as a result of to which he or she committed an act of a similar nature to that previously committed (i.e., an act that would constitute an indictable offence if the mental impairment defence were not available). This restriction to offences of a 'similar nature' is important to ensure that the accused is not convicted of this crime for having acted in a way that he or she could not have predicted.

#### Penalty

It is important to ensure that the penalty for this offence *not* be strictly related to the relevant indictable offence, but instead be related to the culpability of the accused for failing to take his or her medication. That is not to say that the harm caused should be irrelevant to the ultimate sentence. However, the focus of the sentence should be on the fact that the accused took an unjustifiable risk that resulted in that harm, knowing there was a substantial risk that would happen.

#### Advantages and Disadvantages of this Approach

The advantages of such an approach are threefold. First, it properly coincides with the theory of responsibility outlined above. While citizens should *not* be held responsible for actions over which they have no control at the time, they do have a prospective responsibility to avoid committing acts that harm the legally protected interests of others. Consequently, it is inappropriate to convict a person of an offence such as intentionally causing serious injury if the relevant acts were committed due to a mental illness that undermined his or her responsibility in the way outlined above. However, it may be entirely appropriate to censure that person for failing to take their medication, if they were aware that doing so was likely to lead to them assaulting someone.

Secondly, it may help to alleviate the jury of some concerns they may have with (properly) finding the accused not guilty of the principal offence. It will ensure that the accused is called to account for his or her behaviour in some way, even if it is somewhat different from the traditional path.

Thirdly, it provides an additional disincentive to those suffering from mental illnesses that have been shown to result in criminal behaviour from discontinuing their medication. While it is to be hoped that having an awareness of the risks posed to others would be sufficient to ensure this was the case, the existence of a criminal offence may provide some level of prudential safeguard.

The main disadvantage of this approach is its complexity. It can be seen from the requirements outlined above that, in order to strike an appropriate balance between safeguarding the legally protected interests of the community and protecting the autonomy and liberty of those with mental illnesses, it is necessary to strictly define the bounds of the offence. This may result in very complicated jury charges, which may ultimately undermine the effectiveness of any such reform. However, it is my belief that this could be overcome through the use of integrated directions that target the factual questions at issue.

## Chapters 7-9 – Nominal Terms and Supervision Orders

- 62. Is the use of a nominal term an effective safeguard in balancing the protection of the community with the rights of the person subject to a supervision order?**
- 63. Should the method for setting the nominal term be changed? If so, how should it be changed?**
- 64. What steps should be undertaken for people involved in CMIA proceedings to better understand the expression ‘nominal term’?**
- 70. Are changes required to the provisions for reviewing, varying and revoking supervision orders to make them more just, effective and consistent with the principles underlying the CMIA? If so, what changes are required?**
- 73. Does the CMIA strike the right balance between allowing for flexibility in the frequency of reviews and ensuring that people subject to supervision orders are reviewed whenever appropriate?**
- 87. Are the current presumptions in varying and revoking supervision orders appropriate?**
- 89. Should the court continue to consider the likelihood of the person endangering themselves?**
- 90. What role should the seriousness of the offence play in the making, varying and revocation of orders and applications of leave?**

In considering the issue of nominal terms, it is essential to keep in mind the purpose which supervision orders serve. Given that people subject to such orders have not been convicted of an offence, it is clear that they do not serve a penal purpose – their aim is *not* to punish. Instead, they serve a protective function, aiming to prevent people who have committed acts that are ordinarily classified as ‘criminal’ from harming other people. Consequently, as far as possible their reach should be limited to the supervision of people who continue to pose a risk to others.

Bearing this in mind, I am supportive of the use of nominal terms to provide a safeguard against the arbitrary and indefinite detention of people who no longer pose a risk to the community. In an era of increasing punitivism and risk aversion, it is essential that we have specific measures that ensure that people are not detained for longer than their condition warrants.

However, I am opposed to the current link between nominal terms and the maximum penalty for the offence the person has been found not guilty of or found at a special hearing to have committed. The maximum penalty for that offence bears no connection to the time at which it is appropriate to assess whether or not that person continues to pose a risk to the community. That is an issue that relates to matters such as the nature of the person’s illness and the treatment available for that illness, rather than the acts he or she committed in the past.

For a similar reason, I would be opposed to any attempts to link a nominal (or limiting) term to the period of imprisonment or supervision that would, in the judge’s opinion, have been appropriate if the person had been convicted of the offence concerned. The extent of a person’s hypothetical blameworthiness for an offence for which they have not been convicted bears no connection to the length of time they should serve under a supervision order before a review or release.

Furthermore, maintaining a link between the nominal term and either the maximum penalty or hypothetical sentence implicitly suggests that the person bears some responsibility for the offence, thereby partially undermining the purpose of the qualified acquittal. For example, the fact that a person who is found not guilty of murder because of mental impairment must serve a longer nominal term than a person found not guilty of rape because of mental impairment, suggests that the former person is more culpable than the latter. Whilst this may be the popular perception of the issue (with the public perhaps thinking that a person receiving a qualified acquittal for murder

*should* serve a longer time under supervision), it is not the purpose of the order. The length of supervision should solely be related to the question of whether or not the person continues to pose a risk to the community.

Consequently, in my view it would be desirable to replace the 'nominal term' system with a system of regular reviews that is not referable to the alleged crime. While the nature of that crime may be taken into account in determining whether or not the person continues to pose a danger to the community (as it may be a predictor of future behaviour), it should not affect the intervals at which their situation is reviewed.

The purpose of the review should be to determine whether or not the accused continues to pose a danger to the community, and thus whether or not the supervision order should be maintained or varied. In my opinion that should be done annually.<sup>127</sup> An annual review period strikes a fair balance between providing sufficient time for a person's condition to substantially change, and not leaving people too long under unnecessary supervision. A regularised review process like this will make it clear that the purpose of the system is to review the risks posed by the person rather than to punish them for their past behaviour. It will also alleviate some of the confusion that currently exists in relation to the meaning of a 'nominal term'.

I appreciate that this maintains a system of indefinite detention, which has a number of drawbacks as noted in the *Consultation Paper*. However, these drawbacks would hopefully be reduced to some extent by breaking the link between the 'nominal term' and the offence, as well as the introduction of regular reviews. Under such a system it is anticipated that the term of supervision for many offenders would be significantly reduced. The main alternative – the introduction of a 'limiting term' – seems likely to reintroduce some kind of link between the alleged offence and the period of supervision, and may ultimately increase the period of supervision (as well as resulting in the conceptual confusion about the purpose of supervision orders outlined above).

Regardless of the system which is implemented, I believe that the review process should incorporate a presumption in favour of reducing the level of supervision, unless there is evidence that members of the public will be seriously endangered as a result of reducing the supervision status of the person. Such a presumption strikes an appropriate balance between achieving the purpose of supervision (protection of the community) and ensuring that a person's liberty is not deprived any longer than absolutely necessary. I agree with the New South Wales Law Reform Commission that the likelihood of the person endangering themselves should not be a relevant factor in this determination.

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<sup>127</sup> If this is considered to be too onerous, then I would suggest an interval of no longer than two years.