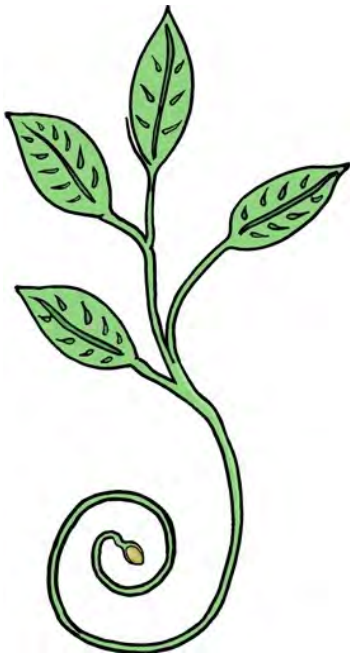

Progressive Law Network

Law for Positive Social Change

Submission to the Victorian Law Reform Commission review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

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About the Progressive Law Network

The Progressive Law Network recognises that people with experience of mental illness or an intellectual disability are some of the most vulnerable people in our society. Involvement in the justice system can compound this vulnerability for such people. The Progressive Law Network supports reforms that ensure improved legal outcomes whilst ensuring a balance with broader community interests. From this basis, the Progressive Law Network has decided to prepare a submission to this review.

The Progressive Law Network is comprised of lawyers and law students advocating for positive social change through law reform. The Progressive Law Network formed at Monash University in 2010. It is an independent, volunteer-run and not-for-profit association.

The Progressive Law Network is dedicated to:

- Encouraging law students and practitioners to utilise their law degrees to effect positive social change,
- Engaging members with their communities and the legal challenges facing them, while encouraging intelligent and informed activism and advocacy,
- Holding events and forums to exchange views about new developments in the law and social justice; and
- Facilitating connections between law students, professionals and community advocacy organisations.

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The defence of mental impairment

The adversarial nature of our legal system can be confronting for many individuals and is especially confronting for those suffering from mental impairment. For most crimes, a successful prosecution must establish that the accused was not only responsible for the act which forms the basis of the crime, it is also necessary that the outcome was the intention of the person accused. In cases where the accused has a mental impairment it may be determined that they were not capable of forming the requisite intention.[1] The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) provides the legislative framework for dealing with people accused of committing a crime "who are unfit to stand trial or who are found not guilty because of mental impairment."[2]

In order to establish a defence of mental impairment it must be demonstrated that the accused did not know the nature and quality of his or her conduct or that he or she did not know that the conduct was wrong.[3] Although the CMIA abolished the defence of insanity[4] the formulation for the defence of mental impairment would seem to reproduce the common law insanity defence contained in *M'Naghten's Case.*[5] In that case it was established that a defence of insanity is available to an accused person if he or she is labouring under "a defect of reason, from disease of the mind, as not to know the nature and quality of the act he [or she] was doing; or, if he [or she] did know it, that he [or she] did not know he [or she] was doing what was wrong."[6]

As no definition of mental impairment is provided within the CMIA, there has been some debate as to whether intellectuality disability should be classified as being a mental

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1 Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (March 2013) 224.
2 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 1(c).
3 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20(1).
4 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 25.
5 *M'Naghten's Case* 1843 10 C & F 200 and see generally Waller, L. & Williams, C. R. *Criminal Law: text and cases* (11th ed, 2009) 912.
6 *M'Naghten's Case* as quoted in Waller, L. & Williams, C. R., above n 5, 876.

impairment for the purposes of the CMIA. Although intellectual disability fundamentally differs from mental illness it has been argued that it falls within the common law definition of insanity as this defence was formulated at a time when intellectual disability was regarded as a form of insanity.[7] Whether this common law formulation of the defence can lawfully be applied in practice was discussed in a submission by the Office of Public Prosecutions to the *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*. In that submission it was suggested that the defence of mental impairment would not necessarily be available to defendants with an intellectual disability:

> … only persons suffering from a mental illness at the time of the offence can avail themselves of the defence of mental impairment … an accused person who did not know that their conduct was wrong because of their intellectual disability is not able to avail themselves of the defence of mental impairment. Whether or not they should be able to do is a question of policy for the Government and the Legislature.[8]

The OPP submission further outlined that:

> … the criteria required to satisfy a defence of mental impairment are often misunderstood by the psychologists and psychiatrists who give evidence in proceedings under the Act. The criteria are also sometimes misunderstood by the counsel and judges administering those proceedings. Consequently, some persons are found not guilty because of mental impairment in circumstances where that defence is not lawfully available to them.[9]

In 1995 the Community Development Committee, Parliament of Victoria, (CDC) reviewed the legal regime which existed prior to the introduction of the CMIA. While the CDC was mindful of defining mental impairment restrictively, it recommended that mental illness, intellectual disability, acquired brain injury and severe personality disorders should all be considered in any statutory formulation.[10] The Commonwealth *Criminal Code* contains a

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7 Law Reform Committee, Parliament of Victoria, above n 1, 242.

8 Office of Public Prosecutions, Submission No 20 to Law Reform Committee, Parliament of Victoria, I*nquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, (September 2011) 2.

9 Ibid 3.

10 Community Development Committee, *Review of legislation under which persons are detained at the Governor's pleasure*, Parliament of Victoria, Melbourne, 1995, pp. 171-172 as referenced to in Law Reform Committee, Parliament of Victoria, above n 1, 242.

definition of mental impairment which includes "senility, intellectual disability, mental illness, brain damage and severe personality disorder."[11] Similar definitions of mental impairment are contained in the statutory frameworks of several Australian jurisdictions.[12]

The Victorian Law Reform Commission *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Consultation Paper* (*Consultation Paper*) considers the defence of mental impairment in Chapter 5 and invites responses to the following questions:

30. Should 'mental impairment' be defined under the CMIA?

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

Recommendation:
The CMIA should be amended in order to clarify the term Mental impairment and bring the Victorian formulation in-line with other Australian jurisdictions. The definition should include mental illness, intellectual disability, acquired brain injury and severe personality disorder.

11 *Criminal Code Act 1995* (Cth) s 7.3(8).
12 *Criminal Law Consolidation Act 1935* (SA) s 269A; *Criminal Code 2002* (ACT) s 27(1).

Unfitness to be tried

Under the CMIA a person is unfit to stand trial for an offence if, due to his or her mental impairment, they are:

- unable to understand the nature of the charge,
- unable to enter a plea and to exercise the right to challenge jurors or the jury,
- unable to understand the nature of the trial,
- unable to follow the course of the trial,
- unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- unable to give instructions to his or her legal practitioner.[13]

In order to determine fitness for trial a court can call evidence or require the defendant to undergo an examination by a medical practitioner or psychologist.[14] This low threshold test has been criticised as it focuses on the accused person's ability to understand court processes and giving instructions to a lawyer rather than the accused person's capacity to make rational decisions based on his or her understanding of the evidence.[15] As there is no requirement that an accused person's decisions be rational in relation his or her own defence "it sets the requirements for a fair trial too low."[16] The Progressive Law Network is concerned that the current test is detrimental to the right to a fair trial and equality before the law for accused persons with a mental impairment.

In the United States an accused person must, at the time of trial, possess the ability to consult with his or her lawyer with a "reasonable degree of rational understanding."[17] In South

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13 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 6(1).
14 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 11(1)(b).
15 Law Reform Committee, Parliament of Victoria, above n 1, 230.
16 New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper No 6 (January 2010) 9.
17 *Dusky v United States* 362 US 402 (1960) as quoted in Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Consultation Paper* (July 2013) 59.

Australia the element of rationality has been included in the statutory definition of mental unfitness to be tried and imposes a minimum threshold such that an accused person must:

- understand or respond rationally to the charge or the allegations on which the charge is based; or
- be able to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors).[18]

The *Consultation Paper* considers unfitness to stand trial in Chapter 4 and invites responses to the following question:

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

Recommendation:

In accordance with the recommendations of the Law Reform Committee, Parliament of Victoria, the CMIA should be amended to require the court to determine, when considering fitness to stand trial:

- the ability of the accused to understand, or respond rationally to, the charge or allegations on which the charge is based; or
- the ability of the accused to exercise, or to give rational instructions about the exercise of, procedural rights.[19]

An accused person's unfitness to be tried can be raised before a court by any party to the proceedings and if the trial judge finds that there is a real and substantial question as to the defendant's fitness to stand trial, the judge must adjourn or discontinue the trial and proceed with an investigation[20] and a jury must be appointed solely for this purpose.[21] The Progressive Law Network is concerned that this requirement can cause additional stress for accused

18 *Criminal Law Consolidation Act 1935* (SA) s 269H.
19 Law Reform Committee, Parliament of Victoria, above n 1, 231.
20 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 9.
21 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 11(6).

persons with a mental impairment. The Law Reform Committee, Parliament of Victoria has outlined that:

> … in some circumstances all parties may benefit from allowing the court to commence with unfitness to be tried procedures where both defence and prosecution counsel agree the defendant is unfit to stand trial, thereby avoiding the need to appoint a jury. … in other Australian jurisdictions, except the Northern Territory and Tasmania, fitness determinations are made by the trial judge or a specialist division of the court.[22]

The Progressive Law Network is mindful that removing a jury from this part of criminal procedure may prejudice the rights of an accused person with a mental impairment. As a safeguard the court should be required to seek the agreement of two registered medical practitioners in order to establish a finding of unfitness. A similar safeguard is included in the *Criminal Procedure (Insanity) Act 1964* (UK).[23]

The *Consultation Paper* has invited responses to the following question:

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

Recommendation:

The CMIA should be amended to:

- allow a judge (or magistrate) to investigate an accused person's fitness to stand trial when where both defence and prosecution counsel agree the defendant is unfit to stand trial.
- require the court to seek the agreement of two registered medical practitioners in order to establish a finding of unfitness.

22 Law Reform Committee, Parliament of Victoria, above n 1, 227.

23 *Criminal Procedure (Insanity) Act 1964* (UK), s 4. It should be noted that the required contained in this statute relates to jury findings.

Application of the CMIA in the Magistrates' Court

The CMIA does not permit the Magistrates' Court to make a determination on an accused person's fitness to stand trial.[24] If fitness to stand trial is raised during a committal hearing, the Magistrates' Court will determine whether to commit the accused to trial in the County Court or Supreme Court and the question of fitness will be reserved for consideration by the trial judge.[25] This is not the case for summary offences where a magistrate must discontinue proceedings where there is sufficient evidence to suggest that the accused is not fit to stand trial.[26] Furthermore, if a defence of mental impairment is established in the Magistrates' Court, the trial will be discontinued. As the Magistrates' Court does not have the power to issue a supervision order no further action can be taken by the Court.[27]

The Progressive Law Network is concerned that this will be the source of additional disadvantage for accused persons who suffer from mental impairment. Victoria Legal Aid has outlined that prosecutors may be inclined to have offenders with a mental impairment tried for an indictable common law offence in situations where a lesser summary offence would typically be charged.[28] The Victoria Legal Aid submission to the *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* includes a compelling case study in which police charged an intellectually disabled man with an archaic common law offence after previous charges for a summary offence of a similar nature were dismissed in the Magistrates' court. The goal of police was the imposition of a supervision order, something which could only be imposed by a higher court.[29]

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24 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5.
25 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 8(1).
26 Law Reform Committee, Parliament of Victoria, above n 1, 231.
27 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 5(2).
28 Victoria Legal Aid, Submission no. 52 to Law Reform Committee, Parliament of Victoria, I*nquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*, (November 2011) 17.
29 Ibid 17 – 18.

While the Progressive Law Network is not advocating the widespread use of supervision orders, particularly for minor offences, we are concerned that simply discontinuing proceedings without any further action does little to prevent further offending[30] and does little to provide support for the accused. The Victorian Law Reform Commission first confronted this issue in 2003 as part of its review of *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care*. In the final report it was acknowledged that where a "person is in need of care and is acting violently or dangerously, and may do so again in the future if he or she does not receive appropriate care the Magistrate has no power to deal with the situation."[31] The Office of Public Prosecutions has also outlined that:

> … where an indictable offence would ordinarily be determined by the Magistrates' Court ... and unfitness to stand trial and/or mental impairment is demonstrated by evidence, and there needs to be some court order in place to assist the accused and protect the community, this Office has no option but to seek that the accused be committed to stand trial before the County Court so that a supervision order may be made under the Act. It could be argued that such a situation discriminates against the accused on the basis of their intellectual disability and/or mental illness.[32]

The Progressive Law Network agrees with the assertion in the Office of Public Prosecutions' submission and has concerns that the present legal regime could result in discrimination on the basis of intellectual disability or mental illness.

The *Consultation Paper* considers the application of the CMIA in the Magistrates' Court in Chapter 6 and invites responses to the following question:

48. Should the Magistrates' Court have the power to determine unfitness to stand trial?

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30 Office of Public Prosecutions, above n 8, 4.

31 Victorian Law Reform Commission, *People with intellectual disabilities at risk: A legal framework for compulsory care: Final report* (2003) 123.

32 Office of Public Prosecutions, above n 8, 3.

Recommendation:

The CMIA should be amended to confer on the Magistrates' Court the power to:

- adjudicate the issue of unfitness to stand trial and make supervisory orders upon findings of unfitness to stand trial; and
- make supervisory orders upon a successful defence of mental impairment.[33]

33 These recommendations are the same are those proposed by the Office of Public Prosecutions, above n 8, 4.