APS Australian Psychological Society

Submission by the Australian Psychological Society to the Victorian Law Reform Commission

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

August 2013

Contacts:

Dr Louise Roufeil, Executive Manager, Professional Practice (Policy)

Mr Bo Li, Senior Policy Advisor, Professional Practice

David Stokes, Executive Manager (Practice)

Level 11, 257 Collins Street
Melbourne VIC 3000
PO Box 38
Flinders Lane VIC 8009
T: (03) 8662 3300
F: (03) 9663 6177
www.psychology.org.au

© 2011 by The Australian Psychological Society Limited

Introduction

The Australian Psychological Society (APS) thanks the Victorian Law Reform Commission (VLRC) for the opportunity to provide feedback to the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (CMIA).

The APS is the national professional association for psychology representing over 21,000 members, with over 6,000 members in Victoria.

The submission from the APS addresses questions in the discussion paper that are relevant to the psychology profession. In collating this submission, the APS sought input from selected members practising as clinicians in forensic mental health.

The APS supports a range of expert clinicians involved in various aspects of legal proceedings, including forensic psychologists, clinical neuropsychologists and clinical psychologists.

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?

The APS believes that there should be a threshold definition of the mental health condition of the accused. Moreover, the definition of the mental health condition should be clearly defined as encompassing disorders of both psychiatric and organic origin.

In addition, the APS believes that some health conditions that result in cognitive impairments should also be considered alongside mental health conditions. That is, persons with impaired thinking processes due to effects of stroke, dementia and other neurological causes should also be considered for screening for their fitness to stand trial in addition to those suffering from psychiatric conditions such as psychosis. There are two reasons behind this: most people who have suffered a stroke or even an acquired brain injury do not consider themselves as suffering from a 'mental health' condition; furthermore, from a clinical point of view, a stroke is a neurological and vascular condition and not a mental health condition, even though it may result in mental health impairment or dysfunction.

The APS believes that, in most cases, only people suffering from moderate to severe mental health conditions or health conditions resulting in cognitive impairment should be considered for formal assessment of their fitness to stand trial. Examples of health and mental health conditions that can impair cognitive function include:

a. Psychiatric disorders (e.g. acute paranoia) including those of chemical/physiological origin (e.g. drug-induced psychosis)
b. Acquired brain injuries of acute (e.g. motor vehicle accidents) and chronic origins (e.g. prolonged alcohol abuse)
c. Developmental disorders such as autism spectrum disorders
d. Intellectual disabilities.

These health and mental health conditions can be readily diagnosed under DSM-5 or ICD-10 and people with these conditions can then be referred to clinicians such as psychiatrists or clinical neuropsychologists for detailed assessment of the functional implications of their diagnosed disorders (see below).

As stated above, the severity of the person's condition (and prognosis, if relevant) should be determined in assessing a person's eligibility for a fitness to plead assessment and in most cases be a pre-requisite. Mild intellectual disability or even a learning disorder should not be a basis alone.

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?

While the Prichard or Presser criteria can be very useful in determining fitness to stand trial, they are not adequate on their own. One of their inadequacies is that they rely on a person's capacity *to understand* the trial's proceedings and processes, while placing less emphasis on *functional aspects* of fitness to stand trial (e.g. capacity to exercise sound judgment, short term memory capacity to enable recall, capacity to effectively instruct legal representatives). Therefore, while the Pritchard or Presser criteria should be continued, they should be supplemented with other measures that enable the capture of the broader dimensions of an individual's fitness to stand trial.

The current test criteria rely heavily on an assessment of knowledge and as such provide only a superficial evaluation of a person's capacity to understand. Possessing knowledge pertaining to the proceedings and processes involved in a trial is important, but additional information is required to ascertain whether an individual can effectively utilise this knowledge. That is, understanding requires knowledge and effective judgment, behaviour and participation. These components of understanding are not routinely assessed.

Similarly, a diagnosis alone is often insufficient to determine the functional implications of the person's capacity for decision-making and effective participation throughout the trial process. For example, a stroke may leave a person with severely impaired speech, but their thought processes intact. This individual could be supported to enable effect participation in the trial process. On the other hand, a frontal lobe brain injury (such as that resulting from a motor vehicle accident) may severely impact on a person's capacity to demonstrate understanding and their capacity to make sound judgments. The critical factor in these examples is not the diagnosis but rather the functional capacity of the individual.

Therefore, the Pritchard or Presser criteria are one aspect of the process for assessing a person's fitness to stand trial but other aspects must also be considered.

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

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?

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?

Response to questions 3, 4 and 5: Decision-making capacity, as indicated above, is a critical component in the assessment of a person's fitness to stand trial. The APS contends that decision-making is a complex skill with multiple components that requires assessment by an appropriate expert (e.g. clinical neuropsychologist) who can provide opinions on matters such as:

1. Awareness: the ability to be alert to stimuli or cognisant of issues
2. Insight: awareness and understanding of one's attitudes, feelings, behavior, and motives
3. Reasoning: the ability to think logically and coherently
4. Organisation and planning: the ability to bring together related elements and thoughts in order to do something
5. Solution generation: the ability to initiate and think through a solution or solutions to a given scenario.

It should be noted that the components of decision-making are highly susceptible to a range of health and mental health conditions as mentioned above. If problems arise in any component of decision-making, consideration needs to be given to the individual's capacity to make *informed* judgments or decisions, and therefore their fitness to stand trial.

As noted above, a person should not be considered to lack capacity for decision-making on the basis of a mental disability alone. Rather, once it is established that a person has a diagnosed health or mental health condition with moderate or severe cognitive impairment, it is then up to expert clinicians to make the link between the impairment and a person's capacity for informed decision-making. This may require amendment to the Act to define clinical assessment of cognitive impairment.

Finally, social and cultural norms can also play a significant part in an individual 's capacity to take part in informed decision-making (e.g. perceived status in relation to a person of authority and hence the capacity of the individual to engage in a discussion on an equitable basis). Social and cultural norms may particularly influence an individual's response to the *current* tests for unfitness to stand trial.

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

The notion of effective participation requires similar consideration to decision-making and the APS would like to highlight its importance in relation to assessing a person's fitness to stand trial.

At a societal level, in order for a person to take part effectively, they are subject to a range of social and cultural norms and mores, which are themselves subject to change over time. It is also generally accepted that one is more familiar with such norms the longer one is exposed to, or is part of, that society.

However, these norms and standards go much deeper if one is to participate effectively in the legal system. Not only are the rules and procedures foreign in a social sense (to many), but also in a historical and cultural sense, reflective of the evolution of the Australian (and Victorian) legal context. Therefore the elements for informed decision-making mentioned above need to be considered as taking place within a specific legal context. It is almost impossible for a person to instruct their legal representative or represent themselves if any of these elements are affected by their cognitive impairment, thus limiting their effective participation in the entire process.

Further, it should be noted that effective participation is an ongoing process. A person's ability to participate effectively during one stage of the trial process does not necessarily make them competent in effective participation throughout the trial process. This is especially important to those at-risk or with borderline capacity to make informed decisions. Ongoing monitoring and evaluation should be a key aspect throughout the trial process to ensure the person's capacity for ongoing effective participation.

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?**

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

Response to questions 7 and 8: As mentioned above, the person's capacity for effective participation requires ongoing monitoring and evaluation. This necessitates the inclusion of new considerations in addition to the current criteria. Specifically, a person's ability to understand the charge and trial process does not mean they have the same capacity to continue to engage throughout the legal process, which requires insight, reasoning, planning and organisation and solution generation.

In order for a person to make informed decisions and participate effectively on an ongoing basis, the APS contends that appropriate clinical assessment of a person's cognitive impairment in relation to informed decision-making should be assessed initially and monitored on an ongoing.

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?

10. Do any procedural, ethical or other issues arise in creating this exclusion from the unfitness to stand trial test?

Response to questions 9 and 10: The APS would not agree with the exclusion proposal as there are serious ethical and psychological concerns. Such an exclusion, if enacted, would raise a number of issues around informed decision-making and ongoing effective participation.

Once again, the person's awareness or even insight into the charge and the plea process does not guarantee they have other components required to undertake informed decision-making. When combined with their inability to comprehend the full trial process, questions will be raised regarding the person's ability to provide *informed* consent to the various stages of the trial process.

Therefore, the APS would argue that failure to understand the court or trial process, regardless of grasping the other factors, would limit informed consent – an essential ethical issue.

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?

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

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

Response to questions 11, 12, 13 and 14: The APS recommends that a set of guidelines be created to satisfy the need of the Act and the court processes that identifies criteria, standards and issues that need to be met by experts. These could be similar to those created for the Office of the Public Advocate with regard to the preparation of neuropsychological reports for Guardianship Lists for the Victorian Civil and Administrative Tribunal (https://www.psychology.org.au/Assets/Files/Guidelines-neuropsychological-reports-VCAT.pdf).

Such guidelines, if created, may also be useful for other experts.

Clinicians such as forensic psychologists and clinical neuropsychologists are trained to assess an individual's cognitive, behavioural and emotional functions resulting from organic and psychiatric conditions. They are often called upon to provide expert opinions on the cognitive functional capacity of individuals in a range of settings, including in the courts. They provide complementary services to psychiatrists, who are experts in psychiatric disorders.

19. Are there any issues that arise in relation to the role of experts and expert reports in the process of determining unfitness to stand trial?

Should a set of guidelines be established as mentioned above, it would be subject to extensive prior consultation with external stakeholders such as the APS. The APS has a proven track record in producing and publishing guidelines and resources for practitioners. In addition to the guidelines mentioned above, the APS has an extensive range of position statements, and review papers (http://www.psychology.org.au/publications/statements/).

The APS firmly believe that psychological assessments and interventions must be evidence-based. In 2006, the APS undertook an extensive review of the literature examining the efficacy of a broad range of psychological interventions for the ICD-10 mental disorders in order to support the delivery of psychological services under government mental health initiatives. This review has since been updated and currently in its third edition. A copy of the review can be access via http://www.psychology.org.au/Assets/Files/Evidence-Based-Psychological-Interventions.pdf .

40. Are there any issues that arise in relation to the role of experts and expert reports in the process for establishing the defence of mental impairment?

Psychologists are subject to national statutory regulation under the Health Practitioner Regulation National Law Act 2009, and other state-based legislation such as the Health Records Act 2001. In addition, forensic, clinical and clinical neuropsychologists are subject to formal endorsement and protection of title by the Psychology Board of Australia (established under the Health Practitioner Regulation National Law Act 2009). Psychologists must have advanced training (an accredited qualification in an area of practice followed by a period of supervised practice) over and above the requirements for general registration in order to apply for endorsement by the Psychology Board of Australia.

The APS has nine Colleges corresponding to the nine areas of endorsed practice. The APS College of Forensic Psychologists and College of Clinical Neuropsychologists were established in the 1980s, in order to promote the science of psychology.

The APS urges the courts to specify endorsement and College membership as appropriate credentials for psychologists wishing to provide input as experts in assessing cognitive impairments and other clinical matters.

79. Is there sufficient clarity in the arrangements for monitoring people subject to non-custodial supervision orders?

80. If no, what changes should be made to ensure that people on non-custodial supervision orders are adequately monitored?

Response to questions 79 and 80: The APS is unable to provide a detailed response to these two questions. However, the APS is aware that much of the non-custodial supervision orders rely on community-based forensic and mental health services. It has been reported that many such services often lack access to expert clinicians such as psychologists, particularly in outer metropolitan, rural and remote parts of Victoria.

93. Are changes required to improve the way in which expert reports are provided to the courts? If so, what changes are required?

Please refer to the response to questions 14, 90 and 40 above.