Victorian Law Reform Commission

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

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About the LIV

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 17,000 members.

This submission has been prepared with input from the Criminal Law Section of the LIV, which consists of experienced criminal defence practitioners, many of whom are accredited Criminal Law specialists. Additionally, our members have experience in acting as legal representatives for those who suffer from mental illness and have been charged with criminal offences. We have drawn on some of this experience in preparing this submission. We note however, that LIV members are constrained from providing specific details relevant to some of the questions provided in the consultation paper due to client confidentiality obligations.

Views were also obtained from the broader membership of the Administrative and Human Rights Law Section and the LIV Young Lawyers Law Reform Committee.

We would like acknowledge significant input from Carmen Randazzo SC, James Dowsley, Megan Aumair, Adrian Serratore, Leigh Howard, Brianna Chesser and Morgan Nyland.

We also note that some members of the various LIV Sections above participated in preliminary consultations with the VLRC in February 2013. As such, we have addressed only specific issues noted in the Terms of Reference which are of most concern to our members.

Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to provide further comments on the Review of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CMIA) Consultation Paper prepared by the Victorian Law Reform Commission (VLRC).

The LIV notes that the CMIA affects some of the most vulnerable members of our community. Those who have been charged with criminal offences may be vulnerable due to a mental condition.

We note that a number of provisions in the CMIA deal with the rights of a person whose disability may limit their ability to understand court proceedings including disabilities such as cognitive and intellectual disabilities, acquired brain injuries, and psycho-social disabilities.

The LIV also notes that the CMIA sits within a broader human rights framework as defined in the *Charter of Human Rights and Responsibilities* (Vic) (Charter). The CMIA is also accountable to principles held in the *Mental Health Act 1986* (Vic) and *Disability Act 2006* (Vic).

Right to a fair hearing

The right to a fair hearing is the central principle underlying the CMIA, in recognising that a person should not be tried for an offence unless they are mentally fit to stand trial.

Section 24(1) of the Charter protects the fundamental human right to a fair hearing. This is particularly relevant for those charged with criminal offences *'to have the charge decided by a competent, independent and impartial court after a fair and public hearing'*. The Charter provides that a human right may be limited only so far as can be demonstrably justified in a free and democratic society taking into account all relevant factors including any less restrictive means reasonably available.[1]

The right to a fair trial also includes the right of 'effective access'[2] to the courts in the determination of criminal charges.

[1] S.7(2) of the Charter

[2] *Slaveski v Smith & Anor* [2012] VSCA 25 at [49]-[50] - the Court of Appeal considered that one aspect of the right to a fair trial in section 24(1) of the Charter is the right to effective access to the courts.

Minimum rights in criminal proceedings

Sections 25(1) and (2)(a)-(k) of the Charter provides that a person charged with a criminal offence is entitled, without discrimination, to 'minimum fair trial guarantees' as specified in s25(2):

(a) to be informed promptly and in detail of the nature and reason for the charge in a language that he or she speaks or understands,

(b) to have adequate time and facilities to prepare a defence and communicate with a lawyer or advisor chosen by him or her,

(c) to be tried without unreasonable delay,

(d) to be tried in person, and to defend himself or herself personally or through legal assistance chosen by him or her, through legal aid (if eligible),

(e) to be told, if he or she does not have legal assistance, about the right to legal aid (if eligible),

(f) to have legal aid provided if the interests of justice require it (if eligible),

(g) to examine, or have examined, witnesses against him or her,

(h) to obtain the attendance and examination of witnesses under the same conditions as witnesses for the prosecution,

(i) to have the free assistance of an interpreter,

(j) to have the free assistance of assistants and specialised communication tools and technology if he or she has communication or speech difficulties that require such assistance, and

(k) not to be compelled to testify against himself or herself or to confess guilt.

The LIV submits that a person suffering from mental impairment and charged with a criminal offence must be recognised under these provisions and that the CMIA must reflect these as underlying principles to any amendments made during this review.

The defence of mental impairment

The LIV notes that section 20 of the CMIA examines the defence of mental impairment.[3] However, the CMIA does not actually define 'mental impairment,' and when matters come before the Courts, the common law definition of mental impairment is traditionally referred to as 'disease of the mind'.[4]

The LIV submits that reliance on the common law definition will allow the defence to be relied upon by those with mental health disabilities, but may exclude those with cognitive disabilities.

The LIV submits that the common law definition is not sufficient in capturing the wide range of cognitive injuries that might affect those who did not understand the nature of their conduct, or that their conduct was wrong.

The Consultation Paper notes that the traditional common law defence of insanity was replaced by the term 'mental impairment', as the former term was 'antiquated and carried a historical stigma'.[5]

The LIV submits that the VLRC should also consider whether the term 'mental impairment' remains an appropriate term for the defence of criminal responsibility in light of the current definition of 'disability'. For example, the word 'impairment' in the *Equal Opportunity Act 2010* was replaced by 'disability' in the Equal Opportunity Amendment Bill 2011. This amendment was made to ensure

[3] Questions 29, 30 and 31 of the Consultation Paper establishes how the defence of mental impairment works with 'mental impairment' undefined, and whether 'mental impairment' should be defined under the CMIA.
[4] Definition of 'insanity' in *Daniel M'Naghten's Case* (1843) 8 ER 718, 722 [210].
[5] Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, p 187 (Jan Wade, Attorney-General).

'consistency with more common terminology used in human rights and discrimination laws nationally and internationally.'[6]

If this is not an option available to this review, the LIV submits that the CMIA provide an extensive definition of mental impairment which includes a wide range of disabilities, including cognitive disabilities such as intellectual disabilities, learning disabilities, acquired brain injuries, and degenerative disabilities as well as psycho-social disabilities. However, we submit that this should not limit the Court's discretion as to what else might be included in the definition.

The defence of mental impairment in the Magistrates' Court

The LIV notes that the CMIA has very limited application in the Magistrates' Court.[7]

Traditionally, it has been unclear to practitioners how one could apply the provisions either generally or specifically, to the defence of mental impairment in the Magistrates' Court.

We note that ss4 and 5 of the CMIA were intended to provide the framework for the defence to be available in summary jurisdictions:

> *"The defence of mental impairment as provided for in Section 20(1) and the presumption in Section 21(1) apply to summary offences and to indictable offences tried summarily."*

However, the *Forensic Health Legislation (Amendment) Act 2002* made an addition to the above provision:

> *"If the Magistrates' Court finds a person not guilty because of mental impairment of a summary offence or an indictable offence tried summarily, the Magistrates' Court must discharge the person."*

These provisions outline the problematic application of the defence of mental impairment in the Magistrates' Court.

LIV members report that it is extremely difficult to successfully raise the mental impairment defence in the Magistrates' Court. The issue of what charges are to be laid against the mentally impaired offender is often the determinant factor as to whether a summary hearing can be applied for.

Members advise that this is due to some resistance by the Office of Public Prosecution to have matters determined summarily.[8] It is believed that the rationale behind this is the inability by the Magistrate to do anything other than to discharge the defendant unconditionally[9].

Members advise that this causes frustration among defence practitioners as well as Magistrates who are unable to impose any form of therapeutic jurisprudence[10] on a mentally impaired offender who has come before them, especially those with an obvious need for mental health services and intervention.

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[6] Explanatory Memorandum to the Equal Opportunity Amendment Bill 2011, pp 2-3.

[7] CMIA s4: *"The Act applies only to indictable matters, except as provided for in Sections 5 and 25(1) and Parts 7A and 7B".*

[8] Members report that there have been cases in the Magistrates' Court where the prosecution have stated that this is the reason why a summary hearing is opposed or why the defence is challenged.

[9] ibid

[10] The concept of ttherapeutic jurisprudence is that the processes used by courts, judicial officers, lawyers and other justice system personnel can impede, promote or be neutral in relation to outcomes connected with participant wellbeing such as respect for the justice system and the law, offender rehabilitation and addressing issues underlying legal disputes: Australasian Institute of Judicial Administration [http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse/the-concept-of-therapeutic-jurisprudence]

The Diversion Program[11] in the Magistrates' Court is sometimes offered to those with a mental illness who have committed summary offences. However, this requires an admission or acceptance of responsibility by the mentally ill offender. While it is always preferable for defence practitioners to divert vulnerable clients from the criminal justice system, it refutes the rights of vulnerable offenders to avail themselves of a valid defence which may see them acquitted.

Extending the powers of the Magistrates' Court

While the CMIA clearly applies to all indictable offences in the County and Supreme Courts, there are significant concerns for those who wish to use the defence of mental impairment in the Magistrates' Court.

LIV members report that this leads to several problematic issues including:

1.) The inability of a Magistrate to impose conditions to ensure that mentally impaired defendants (who have been discharged after successfully relying on the defence of mental impairment), receive adequate and proper support in the community.

2.) The concern that even though the offence with which the mentally impaired defendant was charged may be regarded as being minor, the mental illness that the person suffers from may be inherently serious and severe, even though its seriousness and severity is not reflected in the offending behaviour.

3.) The unfortunate practice of laying indictable offences instead of, or in addition to, more appropriate summary offences so that the case is then unable to be determined in the Magistrates' Court and therefore is uplifted to the County Court.

4.) The inability to use the Diversion program in matters where mental impairment is raised as a defence.

The LIV notes that a person charged with an 'indictable offence triable summarily' has the right to seek a summary hearing of the offences. In circumstances where a defence of mental impairment is not relied upon, there is usually no difficulty with a Magistrate accepting a plea of guilty to an indictable offence under the s25 of the *Magistrates' Court Act 1989*.

LIV members report that a concerning practice has developed where those who have been charged with summary offences and indictable offences triable summarily are faced with the prospect that a summary hearing will be opposed if mental impairment is raised as a defence. Furthermore, the LIV is concerned with reports that the practice of laying additional charges which are indictable only, has developed.

The LIV submits that the same powers should be granted to Magistrates (as exists for the higher jurisdictions) when dealing with mentally impaired offenders who are found not guilty by reason of mental impairment, with the applicable jurisdictional limit (insofar as sentences are concerned).

Additionally, if the Magistrates' Court's jurisdiction is relevantly extended, we support the suggestion made in the Consultation Paper that time limits and nominal terms are appropriate for any supervision orders imposed by the Magistrates' Court, and that the range of orders in Part 5 of the *Sentencing Act 1991* should be readily available.

The LIV submits that providing Magistrates with flexibility to decide terms or how often to review a supervision order is important in light of the very different needs and requirements of those who are suffering from mental impairment..

[11] The Diversion program in the Magistrates' Court is only available to those who accept responsibility to an offence. Defendants must "acknowledge to the Magistrates' Court responsibility for the offence", s59 (2)(a) of the *Criminal Procedure Act (Vic)*. Further, under s59(3), "an accused's acknowledgment to the Magistrates' Court of responsibility for an offence is inadmissible as evidence in a proceeding for that offence and does not constitute a plea".

Assessment and Referral Court List (ARC)

In 2010 the ARC List was implemented in the Melbourne Magistrates' Court. The legislation[12] empowers the Department of Justice and the Melbourne Magistrates' Court to develop and implement a specialised court list which deals specifically with those charged with a criminal offence that is not 'a violent, serious violent or serious sexual offence' as defined in s6B of the *Sentencing Act 1991 (Vic).*

The ARC list is a specialist Court to 'meet the needs of accused persons who have a mental illness and/or cognitive impairment'[13]. It works with the Court Integrated Services Program (CISP) which provides case management to participants. The eligibility criteria[14] is set out as follows:

1. The accused is charged with a criminal offence that is not a violent, serious violent or serious sexual offence as defined by Section 6B(1) of the *Sentencing Act 1991 (Vic).*
2. The accused has one or more of the following:
   (a) a mental illness;
   (b) an intellectual disability;
   (c) an acquired brain injury;
   (d) an autism spectrum disorder; or
   (e) a neurological impairment, including but not limited to, dementia.
3. The accused has one or more of the above which causes a substantially reduced capacity in at least one of the areas of self-care, self-management, social interaction or communication.
4. The accused would benefit from a problem-solving Court process and an individual support plan.
5. The accused must consent to participate in the list.

If the above criteria are met, a defendant may participate in the program and defer any plea of guilty until the end of their participation. If the participant pleads guilty at the end of their participation, they will be sentenced within the list, and pursuant to normal sentencing principles. However, if the participant pleads not guilty, then the matter will be returned to the mainstream Court for a contested hearing.

LIV notes that despite the introduction of the ARC list, which is only available in Melbourne, there are still issues which are yet to be resolved at the Magistrates' Court level in addressing the defence of mentally ill offenders as outlined above.

The LIV recommends that the CMIA is amended and expanded to create a framework in which Magistrates are empowered to deal with mentally impaired offenders in a way which does not result in a finding of guilt, and which does not erode the fundamental rights of all those who are entitled to valid defences.

Unfitness to stand trial in committal proceedings

The LIV notes that section 8(1) of the CMIA provides that where a question of the fitness of an accused to stand trial arises in criminal proceedings for indictable offences, the committal proceedings must be completed in accordance with Chapter 4 of the *Criminal Procedure Act 2009* (Vic) (CPA).

Chapter 4 of the CPA sets out the procedure before and on committing an accused for trial. Currently, these provisions do not contain guidance as to how a Magistrate should adapt these

[12] *Magistrates' Court Amendment (Assessment and Referral Court List) Act 2010*
[13] ibid
[14] ibid

procedures to ensure that people with an intellectual disability or cognitive impairment are able to understand these directions.

It has been reported that different Magistrates have adopted different procedures when determining how to commit an accused person whose fitness to be tried has been questioned.[15]

The LIV submits that there is a lack of procedural uniformity in how committal proceedings are conducted for people with a mental impairment. We recommend that procedures should be consistent with the rights a fair hearing under s24-25 of the Charter.

Supervision and review

The LIV notes that CMIA provisions relating to custodial and non-custodial supervision orders seek to strike a balance between the need to protect the community from danger and the rights and needs of the accused.

The LIV recommends that the CMIA include requirements for the court to set a nominal term for a supervision order, and to conduct a major review of the order before the end of the term as an important safeguard against arbitrary detention.

Under s27 of the CMIA, a supervision order is for an indefinite term. The risk of arbitrary detention is heightened if there is *no* time limit on the term of a supervision order. For example, if a court reviewing a person's custodial supervision order considers that detention is no longer necessary, yet there are no non-custodial alternatives that are appropriate for the accused, there is a risk that the person will be subjected to an unnecessarily extended period of imprisonment

The LIV reiterates that providing the judiciary with flexibility and discretion to decide terms and how often to review an accused's supervision order is vital in light of the different needs and requirements of those who are suffering from mental impairment and subjected to supervision orders under the CMIA.

[15] 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), pp 235-6.