Criminal Bar Association

Submission to the Victorian Law Reform Commission

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

Introduction

1. The Criminal Bar Association (CBA) is the peak body for barristers in Victoria practising in the criminal law. Its members comprise almost one quarter of all barristers practising in Victoria and it counts almost one third of Victoria's Judiciary among its Honorary Members.

2. The CBA represents criminal barristers who principally prosecute, those who principally defend and those who have a mixed practice. We issue press releases, regularly meet with the judiciary and government, and are involved in the continuing legal education scheme of the Victorian Bar. The website of the CBA can be found at www.crimbarvic.com.au and is regularly updated.

3. Members of the CBA appear in criminal cases of all types, both in Victoria, and across all states and territories of the Commonwealth. Further, such appearances are in matters involving all facets of the criminal law, both state and federal.

4. The CBA notes the terms of reference of the Commission's review and the contents of Consultation Paper 17 (June 2013). We are pleased to make the following submissions.

Chapter 4 – Unfitness to stand trial

***Question 9**: Should a person who is unable to understand the full trial process, but otherwise fit, be considered fit to plead?*

5. No.

6. The value of acting on instructions cannot be underestimated. Any legal representative relies very substantially on the client being able to understand advice, grapple with the evidence and bring to mind his or her memory and understanding of the surrounding circumstances when instructing his or her lawyer. Whilst a trial may be conducted efficiently and seemingly well from the point of view of an outsider, without the accused person's understanding of the full trial process, such a trial may not in fact be a fair trial of that particular accused. Neither will counsel be in a position to know what the accused knows unless the accused has an adequate understanding of the

whole trial and can consequently bring matters to the attention of his or her representative that otherwise (or from the outside) might not be apparent.

7. Recent jury directions reform emphasises the importance of forensic decisions made during the trial. Appellate courts increasingly refer to and rely on those decisions when adjudicating on the fairness or reasonableness of the trial process and outcome. In this context, the need for an accused person to understand the process is all the more important.

***Question 10**: What ethical issues arise if this aspect of unfitness were to be excluded?*

8. It is apparent from the answer to question 9, that a fundamental ethical obligation would be at risk of being breached if counsel could not rely fully on the instructions of his or her client, that is instructions given based on an adequate understanding of the full trial process. Counsel have an obligation to act upon instructions obtained as a result of discharging the obligation to communicate effectively with their client. Effective communication is based upon the client having an adequate understanding of the full trial process. The danger of proceeding otherwise, again, is that a trial may proceed efficiently and apparently fairly, but that this trial may not in actual fact be a fair trial of that particular accused in his specific circumstances.

***Questions 11 and 12**: Would increased resources improve the fairness of trials?*

9. Yes.

10. The experience of our members is that there are some cases where increased resources would assist an accused person in the trial process such that they would be fit to be tried. This, however, is not true of every case. And accused may be "marginally unfit" such that specific resources, if made available, may enable the trial to proceed fairly. But this will not be an answer to every case where fitness is an issue. The kinds of resources required will need to be assessed on a case-by-case basis.

***Question 15**: Is there a need for a uniform procedure at committal?*

11. No.

12. The current procedure in the act is clear enough to allow for flexibility in individual cases. At times, it will be necessary to conduct a contested committal in order to ascertain with sufficient clarity the nature of the evidence. As a matter of justice, doing so is as important to an unfit person as to a fit one. It is passably clear that a question of fitness that arises at the committal stage can be referred to a trial judge without undue delay.

***Question 20**: Should the Act provides for a "consent" procedure for unfitness?*

13. Yes.

14. The number of cases that would be dealt with under such a procedure are few. It is our members experience that with appropriate care the "consent mental impairment" procedure works effectively and fairly. Ample resources exist and are effectively deployed when such a case arises. Judges consult each other and the charge book. The prosecutor has a specialist unit that commonly advises or indeed acts in the case. Individual counsel consult senior and or more experienced colleagues about the issues. The bar ethics committee have published further guidance in this field. In these circumstances, there are sufficient safeguards in an appropriate case for the question of fitness to be answered by a judge alone. In fact, the Judge is far from acting alone. In practice, the Judges charge is inevitably very close in nature to one of a "directed verdict". It is difficult to see how any cues to persons rights or interests would be un-fairly determined or the community's expectations frustrated in an appropriate case given the level of expertise applied to such a decision. This is to say nothing of the fact that, in practice, they will inevitably be two highly experienced medical professionals involved in the relevant assessment. The savings in court time and cost to the community would be substantial and justified.

***Question 21**: Should a consent mental impairment hearing be available following a finding of unfitness to stand trial?*

15. Yes.

16. The reasoning in the case of *DPP v CJC*[1] should be followed or implemented in new legislative provisions. To do so it is to adopt an appropriate efficiency measure. Giving the safeguards outlined in the response to question 20, the Court is in a good position to make a decision in a manner that is robust and capable of withstanding scrutiny. Again, the savings in court time and cost to the community would be substantial and justified.

***Question 23**: Would removing the jury expedite the process?*

17. No.

18. It is our experience that it is not the availability of a jury panel that creates delay. The Court, in fact, has demonstrated an ability to conduct hearings in a manner that permits relatively short periods of court time being set aside to conduct an investigation and then a special hearing, sometimes separately, so as to avoid lengthy adjournments. The Act provides for appropriate time limitations that act as a safeguard.

---

1 *DPP v CJC* (2008) 21 VR 581

Question 22-25: *The length of the process*

19. Although the consultation paper does not specifically address the time frames for holding a special hearing under s 12(5) of the Act, this issue should be anticipated because of current issues known to practitioners working in the area.

Time Frame for holding a special hearing pursuant to s 12(5)

20. This sub-section governs the situation where an Accused person has been found by a jury to be unfit to stand trial and by a judge to be unlikely to become fit within 12 months. It reads:

> *If the jury finds that the accused is not fit to stand trial and the judge determines that the accused is not likely to become fit within the next 12 months, the court must proceed to hold a special hearing under Part 3 within 3 months.*

21. Until recently, the prosecutors and Courts have relied upon the power in s 14(5) to extend time should the special hearing not commence within that time. Often, investigations into fitness and special hearings to determine liability are listed so that the special hearing follows on directly after the investigation; the first jury being discharged and the second empanelled shortly thereafter. However, it would appear that this section is directed only at the circumstance where an accused has been found unfit to be tried but a judge has determined that the accused is *likely to become fit* within 12 months and grants the case an adjournment. The word 'adjournment' in s 14 of the Act has a specific meaning, that is, the time allowed for the accused to possibly become fit to be tried.

22. Supporting this proposition is the fact that s 14(4)(b) and 14(5) refer to 'the trial' and 'commencement of a trial' where the Act is careful to distinguish between a 'trial' and a 'special hearing'.

23. Reference can also be made to s 8 of the Act. This section governs the period in which the accused has reserved the question of fitness to plead, a trial judge has determined that there is a real and substantial question to be tried, and an investigation is to be held for a jury to determine the question. Again, the Court is granted power to extend the three month period for the holding of an investigation by operation of ss 8(3) and (4).

24. The fact that both s 14 and s 8 explicitly give the Court power to extend time in those two circumstances but s 12 contains no such provision suggests that Parliament has taken a different view of the accused who has been found to be unfit and has also been found to be unlikely to become fit within 12 months.

25. The Explanatory Memorandum in relation to s 8(2) makes it clear that the time frames set out in the Act are for the benefit of the Accused:

> *'These time frames are provided to ensure that persons who are unfit to stand trial have the issues in relation to them determined as soon as possible to ensure that if appropriate treatment or services are required to assist the person they can be provided as soon as possible.'*[2]

26. A recent case in which this arose has now been discontinued. However, there are pending cases that are now outside the statutory period without any apparent power for the Court to extend time. It is understood the issue is currently being reviewed by the DPP. The question will be the subject of further litigation and potentially request for legislative review.

27. Comparisons with other time frames under the *Criminal Procedure Act* 2009 can be helpful,[3] however it should be borne in mind that unfit persons awaiting special hearings are by definition exceptionally vulnerable and often unable themselves to press the courts or their lawyers for time frames to be adhered to.

28. All accused endure considerable stress awaiting trial. Because the legal system is equipped only to categorise an accused as fit or unfit it can sometimes be forgotten that an unfit accused is still vulnerable to becoming more unwell under stressful circumstances. The temptation to think that because a person has been placed in the category of 'unfit' that is the end of the Court's interest in their mental health. The community also has an interest in unfit accused not having their already doubtful mental health further compromised.

29. The cost of bearing that stress on an unfit accused can be very great and the observations of lawyers appearing for them is that their symptoms can be exacerbated by the distress of coming to court. In one recent case, the matter waited twice in the reserve list, then had some days of pre trial argument, then to find the matter had to be adjourned for a further six months when the Court could accommodate the matter. The accused in that case had to seek emergency psychiatric treatment on day eight of pre trial argument. Unsurprisingly, uncertainty and repeated attendances at court without any real indication of when his case might conclude had exacerbated his mental illness.

30. Finite mental health treatment resources will be saved by maintaining real time frames with respect to these hearings.

31. If legislative change to enable courts to extend time under s 12(5) is contemplated, the 'base' time frame of three months should not be interfered with.

---

2 Explanatory memorandum, Crimes (Mental Impairment and Unfitness to be Tried) Bill p3 Clause 8(2).

3 See s 211 of the Criminal Procedure Act 2009. For non-sexual offences, 12 months from the date of committal or filing of indictment, sexual offences three months (s 212). Section 247 contains the general power to extend time.

32. While we know that time frames in the trial process under Part 5 of the *Criminal Procedure Act* 2009 are regularly extended using the power in s 247, it is still important to have time frames, even if they are regularly extended. The time frame serves as a reference point by which to measure a person's common law right to a stay of a proceeding in the case of undue delay or to assess their right to a trial without undue delay pursuant to s 25(2)(c) of the *Charter of Human Rights and Responsibilities Act* 2006.

33. A statutory time frame, even if regularly extended, is a good yardstick by which to measure delay in making the assessment of unacceptable delay. A delay between a finding of unfitness and the special hearing of more than twelve months multiplies the statutory time frame by a factor of four, whereas an ordinary non-sexual offence would need to be delayed for four years to reach the same level of unacceptability. There are currently cases in the court where delay of over 12 months has occurred.

34. The other aspect of this is that delay is sometimes more significant when it takes the form of repeatedly having to attend court only to wait in the reserve list and not be reached. The uncertainty of that process can significantly add to the burden that an unfit accused carries during the delay in their case. Housing and treatment options, often already very narrow, can be further limited by the fact that the accused must, at some point, often unknown with any certainty, be available to come to court daily to face trial.

35. An accused person found to be unfit and unlikely to become fit within 12 months should have the mater determined expeditiously. The expectation that a fit person should be tried in the normal course has been displaced by the Court's finding that this is not likely in the foreseeable future (12 months). The policy of the Act seems clear – that a more lengthy delay should only be permitted if the accused is likely to become fit, and only then up to a total of 12 months (s 14(2)). This provision further supports the proposition that Parliament intended to limit the delay to 3 months, and that this was not a case of the legislators simply failing to turn their mind to the issue.

36. Given the particular importance of a trial (special hearing) without undue delay to an unfit accused, great caution should be taken when considering granting a power to extend time. Courts will use it, often repeatedly, multiplying the time frame by many factors.

***Question 25**: Procedural issues*

37. In many instances a defendant who is unfit to be tried will be charged in relation to multiple matters. Currently, a jury would be empanelled in order to make a finding that the accused person is fit or unfit to stand trial in relation to each separate matter.

38. The CBA suggests that where application is made by the defence, and the court agrees, the question of unfitness a person charged in relation to multiple matters should be able to be determined in the one proceeding. Such a change should be given

the imprimatur of specific provision in the Act and this should also address related issues to do with the framing of indictments.

39. Thereafter, if a person is found fit or if a special hearing is held, separate trials in relation to each matter could be held in accordance with the current law about joinder and severance.

***Question 29**: How does the defence of mental impairment work in practice with "mental impairment" undefined?*

40. It is not uncommon for the DPP to dispute whether mental impairment is available to an accused who does not suffer from a mental illness. That is, a person suffering from a brain injury or an intellectual disability is arguably outside the scope of the provisions. In practice, however, such a dispute does not always require the court to determine the issue as the prosecutor will often agreed to proceed on the basis that mental impairment attracts a wide definition.

***Question 30**: Should mental impairment be defined?*

41. Yes.

42. The definition, however, should be open and flexible. In *R v Verdins*,[4] the Court of Appeal adopted an approach such that, whatever the cause of the incapacity, the focus of the enquiry was on its effect on the accused's mental state at the appropriate time. Whilst there may be good policy grounds for specifically excluding specific circumstances in which an incapacity arises, e.g., self induced intoxication, there seems to be no reason in justice to preclude an otherwise legitimate defence from a person who suffers an incapacity regardless of its source. Such a person, however their circumstances have arisen, our worthy of a merciful approach focused on risk management not punishment. This principle surely underlies the operation of the Act.

43. Medicine, psychiatry, and psychology, along with numerous other fields of science, are constantly developing. The Act should permit the law to embrace developments in this respect, with appropriate safeguards. To do otherwise risks the law falling behind, unfairness in an individual case and the justice system coming into disrepute.

***Question 41**: Procedural issues*

44. Under question 25, above, that CBA suggests that there are similar issues that arise when a person who raises the defence of mental impairment is charged in relation to multiple matters.

---

4 *R v Verdins* (2007) 16 VR 269

45. In such cases, on the application of the accused, and where the court agrees, one proceeding should be held in relation to all of those matters or some of them. This procedure might be used particularly where there is a 'consent mental impairment'.

46. Consequently, where a defence of mental impairment is successful in such a proceeding, the court should be able to impose a single supervision order. If a supervision order already exists, the court should be able to set new periods, if appropriate, on an already existing order instead of a person having to be subject to multiple supervision orders.

47. The stress of multiple trials and special hearings is often onerous. The ability to deal with the central issue of mental impairment across multiple matters in an efficient manner is in the interests of the accused, victims and the community as a whole.

***Question 46**: Are there any barriers to accused persons pursuing appeals in relation to findings of not guilty because of mental impairment?*

48. Yes.

49. The Victorian Supreme Court Registry has not had an appeal from a finding of not guilty by reason of mental impairment. There has been one appeal against a finding of a verdict of mental impairment in the last year, which was abandoned. Why? There are three barriers to a person found not guilty by reason mental impairment pursuing an appeal. The first is procedural, and the second and third are barriers of substantial consequential risk.

50. Firstly, an appeal against a verdict of not guilty by reason of mental impairment must be lodged prior to a supervision order being made. Secondly, the Court of Appeal can impose a conviction in lieu of a finding of mental impairment. Thirdly, even if an appeal on an error ground were successful, the likely remedy is a retrial where an accused found "not guilty by reason of mental impairment" runs the risk of being found "guilty" and imprisoned.

A procedural anomaly

51. In contradistinction to the procedure for lodging an appeal against conviction 28 days after sentence pursuant to s 274 of the *Criminal Procedure Act* 2009 (CPA), an application for an appeal against a verdict of not guilty by reason of mental impairment under section 24AA of the CMIA must be filed within 28 days after the day on which the verdict is recorded.

52. Ordinarily, an application for leave to appeal conviction under section 274 of the CPA is commenced under s 275 by filing a notice of application for leave to appeal in accordance with the rules within 28 days after the day on which the person is sentenced. By way of contrast, an application for leave to appeal a finding of mental impairment under subsection 24AA of CMIA is commenced by filing an appeal in

accordance with the rules of court within 28 days after the day on which the verdict is recorded.[5]

53. Both regimes allow for an extension of time to be granted.[6]

54. There is no basis in logic for this anomaly. The effect of the anomaly is that an applicant must lodge an appeal prior to knowing the order that is made against him or her that flows from a finding not guilty by reason of mental impairment.

55. By way of analogy, a convicted person may want to wait until sentence has been imposed to find out if he will be ordered to serve a term of imprisonment in order to make an informed decision about whether he wants to lodge an appeal against conviction or not. If he were to receive a bond without conviction, for example, he might not want to appeal.

56. Similarly, a person has been found not guilty of mental impairment would want to know prior to filing an appeal whether he will be unconditionally discharged, detained in a custodial setting at Thomas Embling, or released on non-custodial supervision order. This is a procedural impediment to lodging appeals.

57. The CBA recommends that section 24AA of CMIA should be amended to mirror, *mutatis mutandis*, section 275 of the CPA, so it would read:

> *An application for leave to an appeal under section 24AAA is commenced by filing a notice of application for leave to appeal in accordance with the rules of court within 28 days after verdict or a declaration that the person is liable to supervision under part 5 of this act is made, or any extension of that period under granting under section 76C.*

58. It is unlikely that an accused person would appeal on order that a person be released unconditionally, however if the legislation allowed for appeal against verdict or an order, a discharged person would retain their right to appeal. If this recommendation were adopted, the procedure for appeals against findings of mental impairment would be brought into line procedure for appeals against conviction.

Conviction

59. The court of appeal can impose a conviction in lieu of an acquittal on the basis of mental impairment.

60. Section 24 (7) of CMIA provides that if the Court of Appeal allows an appeal on a ground that the verdict of not guilty because of mental impairment ought not to stand and considers that the proper verdict would have been guilty of an offence (or an

---

[5] S 424 *Criminal Procedure Act* 2009 .

[6] CPA s 313, CMIA 76. C

alternative) the Court of Appeal must substitute for the verdict a verdict of guilty of that offence.

61. *Prima facie*, this provision reads like a warning to lawyers not to appeal a finding of mental impairment. There may be situations, such as where the mental impairment of the accused has been raised by the prosecution with the leave of the judge during the course of the trial rather than the defence, where it would be desirable for an accused person to serve a short sentence rather than an indefinite supervision order, where the appelant may want the Court of Appeal to impose a conviction and sentence in lieu of indefinite detention at Thomas Embling.

62. However, in cases where an accused has been found not guilty by reason of mental impairment and has received a non custodial supervision order '(NCSO') under 26(2)(b), and he appeals on the ground that he should have been acquitted outright, he is taking an enormous risk, as the consequence could be imprisonment.

63. The prospect of having the Court of Appeal review the psychiatric evidence and potentially coming to a different view from a jury that had found that the accused did not know that his conduct was wrong, and the Court of Appeal proceeding to conviction and sentence when an appellant is at liberty is a strong disincentive to appeal.

Retrial

64. Ordinarily, a jury verdict of acquittal is considered sacrosanct. However, a verdict of "not guilty by reason of mental impairment" is not. Therefore an accused person who has been acquitted on the basis of a mental impairment and has been given a NCSO and maintains their liberty runs the risk of being convicted and imprisoned if his appeal is successful and a retrial ordered.

65. The Court of Appeal may enter on acquittal on appeal, but it is highly doubtful that the doctrine of issue estoppel would limit a jury to make a finding of "not guilty" or "not guilty by reason of mental impairment" on a retrial. On a retrial, a jury would be at large to convict an accused. An appellant could face a term imprisonment. Such a risk is unattractive to an appellant on a NCSO in the community, because of the potential outcome.

***Question 42**: What approach should be adopted in directing juries on the order of elements of an offence in a case where mental impairment is in issue?*

66. It is important that there should be a flexible approach in directing juries on the order of elements of an offence in cases where mental impairment is in issue. The CBA recommends that the order in which the questions of intention and mental impairment be considered by a jury be tailored to the circumstances of a particular

case. The current state of the law is unsatisfactory. The dissonance between the *Stiles*[7] and *Hawkins*[8] approaches creates much uncertainty. Nevertheless, the differing approaches allow for a certain degree of flexibility.

67. Moreover, maintaining flexibility would be consistent with the purpose of simplifying jury directions in section 1 of the *Juries Directions Act* 2013. Under s 19 of that Act, a trial judge may give to the jury integrated directions in the form of factual questions that address matters that the jury must consider in order to reach a verdict. Thus there is considerable scope for a flexible approach under the existing law to tailor directions to the circumstances of a particular case.

68. However, the order in which the issue of mental impairment should be decided is a lingering source of controversy. Arguably, if the jury is asked to consider the elements first, or the question of mental impairment first, it could yield different result. Section 20 of CMIA outlines the defence of mental impairment but provides no guidance, except by necessary ambiguous implication, on the question of priority. This controversy will no doubt linger if section 20 is retained in its current form.

Three approaches

69. Broadly, the there are three main approaches to the issue of mental impairment. They are the "linear approach"[9] to mental impairment, the "anterior question"[10] approach to mental impairment, and the either/approach.[11] All three approaches have their advantages and disadvantages from a public policy and practical point of view.

1) Linear approach

70. The *Stiles* approach is as follows.

> *The jury in the first place must consider whether the offence is proved. If it is not the accused should be acquitted, not found not guilty on the ground of insanity. An accused must not lose the chance of an acquittal on the offence charged by reason of being insane. In considering whether the offence has been proven the jury must, in the first place, act upon the presumption that the accused was of sound mind. The question of insanity only arises if the jury, assuming the accused was of sound mind, would find the offence proved beyond reasonable doubt.*[12]

---

[7] R *v Stiles* (1990) 50 A Crim R.

[8] *Hawkins v R* (1994) 179 CLR 500.

[9] *R v Stiles* (1990) 50 A Crim R.

[10] *Hawkins v R* (1994) 179 CLR 500.

[11] Adopted by the House of Lords in the United Kingdom *R v Antoine* [2001] AC 340.

[12] *R v Stiles* (1990) 50 A Crim R at 22.

71. Section 20 of the CMIA provides.

> *(1) The defence of mental impairment is established for a person charged with an offence if, at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment…*

72. The linear approach is consistent with interpreting the verb "constituting" in s 20 as encompassing both *actus reus* and *mens rea*. On this construction the combination of the conduct and the intention make up the constituent parts of the offence.[13]

73. Further this construction (so far as it is possible to interpret section 20 consistently with the purpose of CMIA) is compatible with the presumption of innocence in s 25 of the *Charter of Human Rights and Responsibilities Act* 2006. The alternative construction is that "conduct constituting the offence" means *actus reus*. This construction is inconsistent with the presumption of innocence.

2) Either/or approach

74. In *Antoinne* the House of Lords were confronted with a distinct but related problem of statutory construction. Their Lordships considered whether the phrase "did the act . . . constituting the offence" (in legislation comparable to section 20 of the CMIA) included *mens rea.*

75. In that case, Lord Hutton noted the contrast between the words "committed the offence" in the Act of 1800 and the words "did the act" in the Act of 1883. His Lordship concluded that this pointed to the conclusion that the word "act" (in the context of the English statutory scheme) did not include intent.

76. On the *Antoine* approach the jury are asked: "Did the accused do the act constituting the offence?" If the jury conclude that the accused does not know the nature and quality of his act he does not have the requisite intent. The jury do not then go on to consider the element of *mens rea*.[14]

77. Judge LJ's obiter exemplar in in *A-G Ref (No 3 of 1998)*[15] squarely raises the policy consideration underpinning the either/or approach.

> *Where on indictment of 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, believed that she was consenting.*

---

[13] *R v Egan* [1988] 1 Cr App R 121; Cf: *A-G Ref (No 3 of 1988)* [2000] QB 401; *R v Antoine* [2001] AC 340.

[14] (2001) AC 373 E, 374 D

[15] (1999) QB 401 AT 411, cited in Lord Hutton's speech in *R v Antoine* [2001] AC 340 at 376B.

3) Anterior question approach

78. By way of contrast following *Hawkins* the questions should go to the jury in the order of i) *actus reus*, ii) mental impairment and iii) specific intent.

> *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 s. 13 or to s.16) 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.*[16]

79. Following the *Hawkins* approach:

a. the prosecution is entitled to invoke the presumption of sound mind but not to exclude any evidence which is relevant to rebut it;

b. evidence of mental disease is relevant to and admissible on the issue of the formation of specific intent; and

c. [Intention] must be determined by the jury as an inference from all the evidence which is relevant to the issue and *no presumption of law exists to relieve the jury of that duty*.

80. Mental illness is relevant to crimes of specific intent, and has been followed in a number of New South Wales cases where an alternative charge could be left to the jury.[17]

Importance of flexibility

81. In some cases, where there is no issue about intention to kill but only a question as to whether an accused appreciated the wrongfulness of his conduct, a *Stiles* approach — where soundness of mind is presumed in considering the element of intention — may be more appropriate.

82. In other cases, where all the elements and/or the *mens rea* of an offence are disputed, and the defence of mental impairment is raised, a *Hawkins* approach may be more appropriate, particularly if there is an alternative charge to a crime of specific intent.

83. For example, in a trial like *Fitchett*[18] there was no real issue as to whether the accused person had the requisite intention to murder. The sole issue for the jury to decide was

---

[16] At 517, para [18]

[17] *R v Gosling* [2002] NSWCCA 351; *R v Minani* [2005] NSWCCA 226; *R v Toki* NSWCCA 125.

whether the accused knew that her conduct was wrong. In that case, a linear approach — which presupposes intention in proving the elements of the offence — was appropriate and behoved the circumstances of that case.

84. By way of contrast, in the trial of Soliman referred the accused denied having the *mens rea* for rape, and argued mental impairment in the alternative. In that case, a controversy arose about whether the jury should have been permitted to look at the accused's psychotic relapse, which fell short of the threshold of not knowing his conduct was wrong on the Crown psychiatric evidence – to determine whether the accused knew that the complainant was not or might not have been consenting.

85. This case raised the question as to how a jury should be directed where there was evidence that the accused was of sound mind at the time of committing an alleged offence, but nonetheless has a mental illness that fell short of the threshold of mental impairment that could impact on the accused's *mens rea*.

Limitations with Stiles approach

86. In *Soliman*, the trial judge applied the *Stiles* approach. Defence counsel requested a direction that that the jury be able to have regard to the psychiatric evidence in considering whether the accused had the requisite intention for rape. On the Crown psychiatric evidence, the accused's psychotic relapse fell short of not knowing that the conduct as wrong, but could have impacted on the accused's awareness that the complainant was not or might mot have been consenting. The trial judge reasoned:

> *If the accused's mental illness was such that he gave no thought as to the complainant's lack of consent, then whilst his mental illness may be the reason for his non-advertance, it does not seem to me that his mental illness is relevant in itself for the purpose of determining this element. It is not the reason for non-advertence which is pertinent. It is the question whether, for whatever reason, the accused did not turn his mind to the fact that the complainant was not or might not be consenting.*[19]

87. Her Honour ruled:

> *In assessing whether the Crown has proven beyond reasonable doubt that the accused man was aware that the complainant was not consenting, might not be consenting, or failed to give any thought as to whether or not the complainant was consenting, the jury will not be directed to consider the accused's mental illness.*[20]

88. Part of the trial judge's rationale was:

---

[18] *R v Fitchett* [2008] VSC 258; *R v Fitchett* [2009] VSCA 150.

19 Ruling [2012] VCC 658.

20 At [61].

> *It cannot be right that a jury can factor in evidence of his mental illness which, on Dr Cidoni's view, does not meet the test of the further defence of mental impairment. In determining whether they are satisfied beyond reasonable doubt that the accused has the necessary state of mind for the offence of rape it simply cannot be right that an accused who engages in criminal conduct can have evidence falling short of mental impairment considered in such a way that they might be completely acquitted because of that mental condition without the benefit of any supervision or treatment regime such as would be provided if they were found not guilty because of mental impairment….The corollary of this is that a person who is not so mentally ill, but they are mentally impaired in accordance with the relevant act's definition ought be held responsible for their actions.*[21]

89. An inflexible linear approach to mental impairment is problematic. Arguably, the upshot of the ruling in *Soliman* is indistinguishable from an either/or approach. When a jury are asked to disregard mental illness when considering the element of intention, it is an all or nothing approach. Mental impairment is either made out, or there is no consideration of *mens rea*, or no consideration of *mens rea* in any meaningful way as the accused, suffering from a mental illness falling short of impairment, is presumed to be of sound mind.

90. As noted in the Law Reform Commission's report, in such a case the jury are paradoxically asked to disregard the psychiatric evidence they have heard about a person's state of mind in determining whether an accused had the requisite intent, and at the same time to assume that that same person is of sound mind.

91. In some cases, arguably mental illness falling short impairment is relevant to specific intent, just as intoxication or an acquired brain injury is relevant to whether an action is intentional or reckless. In *Soliman*, for example, the Crown case was that the accused had a psychotic relapse falling short of mental impairment that impaired his judgment, leaving open the inference that his mental illness affected the accused's capacity to advert to whether the complainant was nor or might not have consenting.

92. The policy question that loomed large in the ruling to disregard evidence of the accused's mental illness falling short of impairment was that because there was no alternative lesser charge to be left to the jury, if the jury were to consider that the mental element could not be made out, it might yield to a repugnant result — an outright acquittal.

93. The trial judge reasoned that an accused who suffers from a mental illness falling short of mental impairment ought be held responsible, and that mental illness negating specific intent should only be left to juries when they can convict on a lesser charge. There are policy arguments to support this position.

---

21 At [49]

94. Nonetheless, arguably the presumption of sound mind should not preclude a jury from considering evidence of mental illness that could impact on *mens rea*. Following *Hawkins*, the jury should be allowed to consider such evidence as going to intention if, and only if, the evidence is such that it falls short of satisfying the jury on the balance of probabilities that the defence of mental impairment is not made out. This would suggest that mental impairment should be considered first as a matter of principle, but arguably a jury could consider mental impairment and intention together.

95. Maintaining flexibility in the approach in directing juries on the order of elements of an offence in a case where mental impairment is in issue would allow trial counsel and judges tailor directions to the circumstances of a particular case. The CBA recommends that a flexible approach be adopted.

***Question 44**: What approach should be adopted in determining the relevance of mental impairment to the jury's consideration of the mental element of an offence?*

96. As a matter of basal principle, a person suffering a mental illness falling short of mental impairment should not be deprived of an outright acquittal because the Crown cannot prove intention. Mental impairment and *mens rea* are not co-extant, awareness of wrongness and intention are two distinct concepts. "Awareness of 'wrongness' is not an element in mens rea."[22] Soundness of mind merely means that a person knows the nature and quality of their acts and the difference between right and wrong. A person with acute autism spectrum disorder might know the difference between right and wrong, for example, but their condition may affect their ability to read emotional cues that could affect their ability to know that a complainant was not consenting.

97. However, there are countervailing policy considerations that accused suffering from mental illness should not get off "Scot free" without supervision if a person suffers from a mental illness that negates intent but falls short of mental impairment. A balance needs to be struck between these two competing imperatives.

98. The Hawkins approach, like *Verdins*, recognizes that mental illness is on a spectrum. There may be situations where an accused does not meet the high threshold of mental impairment on the balance of probabilities, but that very same psychiatric evidence can be adduced to negate specific intent that must be proved beyond reasonable doubt. A person may be presumed to be of sound mind, in the sense that he can reason with a moderate degree of composure as to the difference between right and wrong, but still suffer from a mental illness that could impact on his capacity to intend the probable consequence of his actions.

---

22 Professor Sir John Smith Q.C. in Smith & Hogan, *Criminal Law*, 9th ed., (1999), p. 206, with reference to the proposition that the defence of insanity is based on the absence of mens rea. Cf: *Sherras v De Rutzen* [1895] 1 QB 918.

99. Sir Owen Dixon argued that the enactment of the *M'Naghten* rules imprisoned the common law into a formula that has deprived it of its flexibility of application.[23] On the one hand the linear *Stiles* approach is preferable because it is most consistent with the principle of legality and the presumption of innocence. On the other hand, the presumption of sound mind in the *Stiles* approach ought not be applied rigidly to preclude an accused from relying on relevant psychiatric evidence — falling short of mental impairment — to negate a specific intent, as was the case in *Hawkins*.

100. It is often thought that the linear approach and the anterior question approach to mental impairment are mutually exclusive. However, an amalgam of both approaches could be tailored to the circumstances of a particular case if required. The CBA submits that in appropriate cases, mental illness falling short of impairment is relevant to the question of intention, and juries should be directed as such.

***Question 43**: 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?*

101. There should be considerable flexibility in directing a jury on what order the questions of mental impairment should be approached. The *Jury Directions Act* 2013 allows for this.

102. This a difficult and problematic area, because there is case law to support the proposition that mental impairment should be considered first,[24] that the elements of the offence should be considered first,[25] and that it does not matter which issue is considered first.[26]

103. Clearly this is an area on which different minds can differ. All three positions have much to commend them.

Elements first

104. The *Stiles* approach requires a jury to consider the elements of the offence first, presuming soundness of mind. In cases where all the elements of the offence are in issue, the order in which the question of mental impairment goes to the jury assumes much greater importance. Priority assumes less importance in those case where an intention to commit the offence is not in issue.

105. The reason for this is that arguably, if the jury considers the elements and first, and question of intent has priority, which must be proved beyond reasonable, the accused

---

23 Sir Owen Dixon: A Legacy of Hadfield (1957) ALJ 31 255 at 260.

24 Hawkins v R (1994) 179 CLR 500, 517.

25 Stiles v R ; R v Cottle [1958] NZLR 999, 1030.

26 Ward v R (2000) 232 WAR 254 [130]; Stanton v R [2001] WASCA 189 [84]

has a better chance of an outright acquittal than if the questions are considered in reverse order.

106. The linear approach is suited to a case where intention is not disputed, or where, for example, an accused forms the requisite intention to commit an offence but believes on reasonable grounds that he was acting in self-defence. In such a case, the absence of a lawful excuse ought to be proved first beyond reasonable doubt before a jury considers mental impairment.

Mental impairment first

107. If the question of mental impairment goes to the jury first, the jury might never get to the element of intention. However, if the elements of the offence are proved and soundness of mind is presumed, a jury might not get to consider a mental illness that could affect intention either. The difficulties are compounded by the different onuses of proof for a finding of impairment and proof of intention respectively.

108. From a practical perspective, there is a real risk that if a jury considers mental impairment first rather than the elements of the offence, an accused may be deprived of an outright acquittal. Considering the elements first in a linear fashion is also consistent with the presumption of innocence enshrined in the *Charter*.

109. On the other hand, it would seem logical that given that the onus of proof is on the accused to prove mental impairment on the balance of probabilities, that this question has logical priority before the question of specific intent — which must be proved beyond reasonable doubt. Even Viscount Sankey's famous "golden thread" speech in *Woolmington*[27] is prefaced with a qualification that mental impairment is an exception to the rule about the presumption of innocence, and thus it is arguable that any interference with the charter right is proportionate.

Any order

110. It is arguable that where questions of intention and mental impairment are raised, a jury should be permitted to consider the issues at the same time — while bearing in mind the different onuses of proof. The danger with this approach is that a jury may conflate mental impairment with intention — when they are two discrete concepts. The different onuses of proof also make a simultaneous consideration of mental impairment and specific intent problematic.

Conclusion

111. For these reasons the CBA submits that a trial judge should not be required to direct the jury on the elements of an offence and the question of mental impairment in any particular order where mental impairment and the element of intention are in issue.

---

27 *Woolmington v DPP* [1935] UKHL.

While the linear and anterior approaches both have much to commend them, one size does not necessarily fit all. What approach is the best fit for a particular case is best left to be worked out by trial counsel with the judge on a case by case basis.

112. The CBA recommends that judges be permitted to take a courses for horses approach to mental impairment, tailoring directions to the unique factual circumstances of a particular case, and the haecceity of an individual's psychiatric condition, and how it may (or may not) impact on the question of specific intent.

Chapter 6 – Mental impairment in the Magistrates Court

113. A CBA member has provided two examples of decision making under the current legislative provisions so as to provide practical context for the following submissions.

Case study 1

A man enters a plea of guilty in Magistrates court to indecency charges. He has an IQ of 42 and is a client of intellectual disability services (DHS). His case manager is at court. It is questionable whether he can enter a meaningful plea and probably has a mental impairment defence. He has meager savings with which he has paid a barrister. He pleads guilty and is placed on a CCO with a justice plan and is thereby a registered sex offender with 8 years of reporting. He apparently has no idea how to manage the CCO or his registration obligations. The offending occurred more than 12 months before the plea. His case manager thinks that due to his disability he probably does not remember what happened. He does not understand the concepts of guilty and not guilty. His guilty plea will have a significant effect on his ability to obtain any placements in community residential units. It will restrict his already limited social life. He now has a criminal history for conduct that he can't recall that has consequences far beyond any order of the court.

Case study 2

A boy had a growing number of indictable matters (triable summarily) and summary matters before the Children's Court. He had an IQ below 50 and did not understand the court process or the concept of pleading guilty. He was in state care. He was probably unfit and likely had a mental impairment defence. Due to the Court's limited jurisdiction (see *CL (a minor)*

> *v Lee*) the majority of matters were uplifted to the County Court. The trial judge raised very significant concerns about the consequences for the child of being found unfit, notwithstanding counsel's stated obligation to appraise the court when the question of fitness arose. The matter was adjourned to allow counsel to obtain a ruling from the Bar Ethics Committee, which confirmed counsel's conduct of the matter. In light of how the matter proceeded, counsel withdrew. An in-house advocate then appeared and the child entered guilty pleas. The child was sentenced and has been going in and out of YTC ever since.

***Question 47**: What issues arise in relation to the Magistrates' Court's lack of jurisdiction to determine unfitness to stand trial?*

114. The CBA endorses the issues raised in the Consultation Paper at 6.26-6.31.

115. It is the experience of members that there is a significant number of persons in the summary jurisdiction for whom unfitness and mental impairment are real issues. Further, due to the onerous nature of CMIA proceedings and supervision orders, the issues are avoided in favor of speedy lenient sentences and, unfortunately, the criminalisation of the CMIA cohort.

116. The CBA supports an increased focus on early intervention in cases where the accused may be unfit or have a mental impairment defence. The focus of early intervention should be on the seriousness of the allegation, the state of the evidence, the accused fitness and his or her needs for therapeutic intervention related to any problematic behaviour. Such intervention could be managed in such a way as to allay many of the concerns raised about increasing the Court's jurisdiction. Much of the workload is probably already being managed by existing services such as the ARC List and CISP.

***Question 48**: Should the magistrates court have the power to determine unfitness?*

117. Yes.

118. With appropriate case management and early intervention, the Magistrates' Court should be permitted to find a person unfit in limited cases. The limitation is provided by the existing discretion to refuse summary jurisdiction and could be bolstered by an appropriate provision outlining necessary considerations in determining the discretion in a given case. The value of experienced practitioners and a specialist list is noted.

119. (a) in principle, the question of fitness should apply to any offence before the Court.. However, it may be appropriate that summary offences are simply discharged, whilst further intervention, eg, supervision orders, may be appropriate for indictable offences.

120. (b) the question of fitness should be raised early in the proceedings. There might be a statutory time frame requiring the Court to determine whether unfitness is a real issue in the case, so as to avoid an innocent person, albeit unfit, becoming inappropriately enmeshed in the criminal justice system. Of course, as a matter of justice, it ought remain possible to raise the question at any time in the proceedings.

121. (c) the trigger for the courts investigation, as with the current provisions, should essentially remain with the parties. However, early intervention along with a cooperative approach (as has been seen in the ARC list) should avoid this issue becoming cumbersome.

122. (d) the court should not be able to refuse to deal with the question of fitness once it has been properly raised. To permit such a power would be to undermine the rights of an accused person, particularly a vulnerable accused. Whilst the court should have broad discretionary powers, the right to be tried fairly (including the right of an unfit person) is not a matter of discretion.

123. (e) the same test should apply in the Magistrates Court as in the higher courts. There is no compelling reason to adopt a different approach, especially as the essential issue remains the same in any case – whether the accused can fairly be tried. If a different test were to apply, the passage of a given case through the courts on appeal or review might be problematic.

***Question 49**: Costs implications*

124. The CBA has little data on which to make a submission about costs. However, given the resources required for a fitness determination in the higher courts, it is expected that the costs of dealing with appropriate matters summarily will lead to ultimate savings. An appropriate case study or pilot program would no doubt be of assistance.

***Questions 50 – 52**: Broad discretionary powers*

125. Consistent with the need to prevent innocent people becoming enmeshed in the criminal justice system, the CBA supports the use of flexible case management and bail powers, which are reviewable, in order to achieve appropriate early intervention. So much is currently the case in programs such as ARC and CISP. The CBA does not have any information that would allow it to comment on costs, save to say that many cases would currently attract the attention of existing programs.

***Questions 53 – 54**: Summary and indictable offences*

126. A person charged with a summary offence found to be unfit should simply be discharged. Parliament has indicated that such behavior should be dealt with swiftly and efficiently consistent with justice. The full engagement of the criminal process in

cases of minor seriousness is not justified. If the seriousness of the problem demands more, then one would ordinarily expect more serious charges to be filed.

127. Indictable offences, albeit tried summarily, should attract the same care and scrutiny in the fact-finding process as is currently the practice. This care and scrutiny ought not be reduced by virtue of an accused person's unfitness, which would amount to an unjustifiably discriminatory approach.

***Question 55**: What issues arise because of the Magistrates Courts lack of power to make orders in relation to people found not guilty because of mental impairment?*

128. Members of the CBA regularly encounter cases in which an accused person pleads guilty and is sentenced where in fact they have a complete defence. This problem is not rare.

129. The prevalence of inaccurate or inappropriate guilty pleas is a major issue. The fear of CMIA proceedings, their delay, costs and the perception of onerous outcomes militates against them being pursued. This coupled with the attraction of a lenient sentence (under *Verdins*) is often overwhelming. This often results in Court outcomes that do not reflect real criminality – and in some cases are effectively discriminatory and unjust.

130. Related to the prevalence of inappropriate guilty pleas, there is a problematic perception that once a person has a criminal history, he or she is not effectively able to rely on unfitness or mental impairment in a subsequent case. This is clearly not the case, but it reflects the unfortunate consequences of the current state of the law.

131. The impact of the criminal justice system on treatment and care resources is also an issue. In many cases, where family support and social services are already engaged (and possibly already taxed), the intervention of the criminal justice system does not result in proportionate benefits to the accused or the community. The effect on the accused, whose capacities are already compromised, should not be underestimated.

132. The reluctance of the Court and prosecutors to deal with mental impairment cases summarily (because of the lack of power to make orders of any kind) exacerbates these issues. In particular, there is a perception that prosecutors adopt a one-size-fits-all approach – all mental impairment cases should 'go up'. Under any new scheme, training and building expertise in this area will be important.

133. These pressures in combination can be intense. With limited resources, legal aid and otherwise, the risk of injustice in a given case is significant. Fewer legal aid resources are applied to briefing counsel in summary matters, which may be of significance.

134. The disproportionate consequences that currently flow from raising fitness or mental impairment are a major factor giving rise to the above problems. The problems could be avoided by giving magistrates limited powers that are proportionate to the kinds of

cases in that jurisdiction. If magistrates were simply given the same powers currently provided by the Act, i.e. the making of indefinite orders, then any benefits of permitting magistrates to deal with fitness and impairment will be undermined.

135. An important feature of the magistrate's jurisdiction is the capacity to divert cases from ultimate criminal sanction by way of programs such as diversion. Under any new scheme, an unfit person should be eligible for diversion.

136. Statewide access to appropriate early intervention and the resources of a specialist list should be made available across the state. The use of video conferencing resources could facilitate this.

Chapter 7 – Consequences of findings under the CMIA

***Question 60**: Are there appropriate and sufficient facilities?*

137. No.

138. The quality of facilities available to persons treated under the CMIA is generally high. The treatment provided by Thomas Embling Hospital consistently attracts praise. Similarly, that of other specialist services in this field. The problem is crudely put – there are not enough beds. It is the consistent experience of counsel appearing in these matters that the paucity of resources available unfairly limits the options open to a court under the Act.

***Question 61**: Are changes needed to the provision of reports and certificates?*

139. It is the experience of CBA members that reports and certificates are forthcoming, give appropriate details and are available within the time specified by the court.

***Question 62**: Is the use of a nominal term affective?*

140. The setting of a nominal term is often confused with the end date of an order. The latter, of course, is not set until the court chooses to revoke. In this sense the use of a nominal term is often confusing. However, the requirement to conduct a major review is important. The current provisions setting out the test to be applied to those on a custody order at the time of the major review seem appropriate. But these provisions rarely come into play – few people remain in custody by that time.

141. The timing of a nominal term should be changed. It may be appropriate to consider the nominal term in a similar fashion as the courts consider a non-parole period – the minimum period of supervision that justice requires.

142. The test to be applied at a major review should focus on whether ongoing supervision is necessary in order to achieve the purposes of the Act. Further submissions are made on this point under chapter 9.

***Question 63**: Should the method for setting the nominal terms changed?*

143. The disproportion between the likely or perceived length of CMIA orders and the applicable maximum penalty in a given case is a significant problem. The problem is even greater when comparing the CMIA order and current sentencing practices. As discussed above, this disproportion result in a major disincentive in CMIA cases.

144. To counter this, the normal term should be set at a much lower proportion of the maximum penalty. An exception might be created for very serious offences for which an indefinite order might be justified. A proportion of 30 to 60% at which time a major review is conducted might more easily be justified.

145. The CBA agrees with the concerns set out at 7.63 – 7.68 of the discussion paper.

***Question 65**: What factors affect the advice given about unfitness and mental impairment?*

146. It is clear from the previous submissions, that the disproportion between CMIA orders and likely sentence (on a guilty plea) is a major factor affecting the advice given to impaired persons. It is hoped that these submissions make it clear that the CBA supports significant change in this regard.

147. As to ensuring accurate information is given to accused persons, victims and others, this is a matter best left to of those involved in each case, not for legislation.

***Questions 68 – 69**: Ancillary orders*

148. Some ancillary orders bear little resemblance to punishment and may, in a given case, be entirely appropriate. However, others, e.g. compensation, may be punitive in effect and our therefore inappropriate in cases where a person is not criminally liable.

149. Compensation and recovery of assistance under the Victims of Crime Assistance Act, for example, are likely to be punitive in effect even if not intended. To make such orders runs contrary to the spirit and intent of the Act.

150. Restitution, confiscation and orders that seek to manage risk, on the other hand, in appropriate circumstances may be quite appropriate.

151. Sex offender registration in its current form is problematic. Except in a minority of cases (where a discretion is available under section 11 of the *Sex Offender Registration Act* 2004), that Act does not proceed on the basis of individual risk assessment, as previously reported by the Commission. If the commission's recommendations were to be adopted and registration to be discretionary, then it may have a role to play in

CMIA matters. The CBA, however, does not support the automatic registration with its consequent obligations of and fit and impaired persons. It must be remembered that the reduction of the risk of further offending lies at the core of CMIA supervision orders in any case. Further, there may be an unfortunate circularity in the position that a person who is unfit or not guilty of offending should be placed on an order the breach of which is enforced by criminal sanction.

152. In principle, ancillary orders should only be made if appropriate for an accused person's treatment and stability or for the safety of the community and only when necessary.

Chapter 9 – Decision making and interests

***Questions 85 – 86**: Is there a need for more flexibility in making and reviewing orders?*

153. CBA members regularly appear in cases where revocation and variation of orders are sought. In particular, the current provisions as to the content of non-custodial supervision orders are broad. This seems to work. The court has the capacity to include conditions tailored to the needs and risks of an individual person and is able to engage in a broad enquiry taking into account matters as the court sees fit. Any perceived inflexibility would more appropriately be met by training and information sharing rather than by introducing new types of borders. The latter would have the effect of unduly complicating the process and making it more difficult to understand for all concerned.

***Question 87**: Current principles and presumptions*

154. The principles set out in section 39 of the Act are important and should be retained. The only difficulty arising out of that section in some cases is the focus on "safety" of the community. In some cases, our members have had to submit, sometimes strenuously, that *some* risk to the safety of the community is acceptable. That is to say, that section 39 does not permit restrictions on a person's freedom and autonomy because of *any* risk to safety. This distinction should be made clear in the Act.

155. The issue outlined in 9.17 of the paper should be overcome by the application of a simple test whenever the court considers whether a custody order is warranted. At worst, the presumption in section 32(2) suggests that a person should remain in custody for a time fixed by the court, rather than for a time according to his progress on treatment or according to his risk. To do so suggests a punitive approach rather than a protective one. The protective approach is to be preferred.

***Question 88- 91:** Factors relevant to the Court's decisions*

156. The source of the jurisdiction exercised under the CMIA is the existence of a criminal allegation. The jurisdiction does not arise under the *Disability Act* 2006 or the *Mental*

Health Act 1986. It is exercised by criminal judges in a criminal court. The limitations on the court's powers under section 39, amongst others, gives appropriate weight to this fact. The extension of the jurisdiction into the civil arena should be resisted.

157. It is appropriate that the exercise of CMIA powers commence with a thorough consideration of the alleged offence and its connection to the source of the mental impairment or unfitness. This necessarily contemplates the seriousness of the offence, its connection to the impairment and the likelihood of it occurring again.

158. There is a danger to the public interest in permitting criminal powers to creep into matters that rightly belong in the civil arena. To do so is likely to result in a flow of cases, most likely about disadvantaged persons, from the mental health and disability fields into the criminal. This should be resisted.

159. Consistently, whether a person endangers themselves ought attract less weight in CMIA decisions then it would under, say, the *Mental Health Act* 1986. This is not to say that this issue should be disregarded entirely.

Question 93: *Changes to expert reports*

160. CBA members have not suggested the need for changes in the manner in which experts have provided reports. They are on the whole comprehensive and well-targeted to the needs of the case.

161. One procedural anomaly is apparent. Section 23 requires the court to decide whether supervision or unconditional release is appropriate. If the later is being considered, section 40(2) requires the court to consider a report provided under section 41 (the usual report). However, section 41 provides that this report is only to be provided if the Court has declared the person liable to supervision. This effectively results in the Court proceeding contrary to the Act, or discounting the merits of unconditional release.

162. Section 41 reports should be available for all options being considered by the Court.

Question 94: *Is the current approach too cautious?*

163. The CBA does not dispute that an overly cautious approach has been adopted in many decisions. However, the wording of the Act, properly interpreted, does not suggest that it is the source of the problem.

164. There are two elements of the decision making process that could be further developed. First, references to the level of risk that forms the threshold for making an order should be couched in terms of serious or significant risk. Unacceptable risk is also a term that is increasingly well-known to Victorian courts.

165. Second, given that the accused person is subject to CMIA decisions is based on his or her impairment, greater emphasis should be given to the need for a nexus to be proven to exist between any offending and the impairment. This would avoid the problem, for example, of a once impaired person who is now successfully treated remaining on an order due to risks arising out of drug use or some other cause.

166. It should be noted that the availability of an appeal, whilst perhaps cumbersome, provides some protection against overly cautious decisions at first instance. Such appeals provide guidance for a larger number of cases than simply the one appealed. A recent example is *NOM*.[28]

Question 95: *Should there be a change in the model of judicial decision-making?*

167. An important benefit of the current model is that trial judges in the general criminal lists maintain a practice that includes questions of unfitness and mental impairment. It is important for the day-to-day operation of the criminal law that these courts have these questions before them in each case. Sometimes, for example, an issue of unfitness will arise during an otherwise normal trial. If the matter then had to be transferred to a specialist court, this would cause undue delay and disruption. In another case, the trial judge's experience in mental impairment cases might be of considerable benefit in dealing with a somewhat impaired accused (albeit not impaired to the level that would give rise to the operation of the CMIA).

168. The operation of a specialist court, notwithstanding its benefits, risks further disenfranchisement of a vulnerable group within the community. Conversely, the separation of jurisdictions might reduce the likelihood that judges and practitioners in the criminal court will remain live to CMIA issues.

169. It is the experience of CBA members that judges and practitioners (legal and medical) adopt a relatively cooperative approach in these matters.

Question 99*: Should community interests be represented?*

170. It is the experience of CBA members that the interests of the community form a substantial element in each case under the current system. The need for legislative change on this point does not seem apparent.

Questions 100 – 101*: The number of parties representing the community's interests*

171. Prior to the Court of Appeal's comments in *NOM*, the usual experience of CBA members was that of two competing interests, namely the Attorney—General and the person subject to the order. The DPP generally does not participate in the argument

---

28 *NOM v DPP* [2012] VSCA 198

on the merits. The role of the Secretary to the Department of Human Services or Department of Health was generally that of counsel assisting and remained largely out of the fray. If the court is to give specific weight to the submissions of both the Attorney-General and the Secretary, this could give rise to unfairness or an "inequality of arms". Whilst there is ample justification for the community's interests to be represented by way of a contradictor, it would seem adequate that one party only performs this role. It is hoped that the passage of time will demonstrate that the Departments of Health or Human Services only adopt a position as to outcome in the clearest of cases.

***Question 105**: What matters should the court consider when making suppression orders?*

172. The long-term stability of a person made the subject of an order under the Act is key. It is widely acknowledged that this factor in fact provides the community with the strongest safeguard against further offending. The principle of open justice has always been subject to appropriate limitations necessary to do justice in an individual case. Very significant weight must be given to the fact that the person has not been found guilty of an offence.

***Question 106**: What issues arise concerning suppression orders under the CMIA?*

173. The focus in recent legislation on limiting suppression orders to a given date or event is difficult to apply in CMIA cases. Often, the period of treatment and rehabilitation, in which the community has a vital concern, will be lengthy and unable to be so fixed. The Act should make specific reference to the importance of long-term stability when considering the suppression of an accused's name and personal details.

***Question 107**: What is the appropriate balance between therapeutic considerations (pointing to suppression) and open proceedings (pointing to publication).*

174. The principle of open justice, as found in s 24 of the Charter[29], and victim's rights are important. The experience of CBA members in this area is that the principles of open justice and victim's rights predominate and suppression orders are not usually made.

175. However, the accessibility, speed and reach of modern media result in widespread publication of the name of identified reviewees and details of cases[30]. Open justice must be balanced against the well-being of the reviewee and the likelihood of rehabilitation. The Act creates a statutory mechanism for dealing with vulnerable people who suffer from mental illness. Reviewees are not subject to usual sentencing principles by reason of their illness but are diverted into a supportive and therapeutic

---

29 *Charter of Human Rights and Responsibility Act* 2006 (Vic).

30 Discussion Paper at [9.122].

health care system pursuant to the Act. These considerations ought to lead to the favouring of non-publication, subject to an overriding public interest test.

176. In *Re PL*, Cummins J stated at paragraph 15:

> *'…It must be remembered that applicants found not guilty by reason of mental impairment (or previous insanity) have not been convicted of a crime. Characteristically, they have suffered from a mental illness. The court's jurisdiction in that respect is protective. It should be remembered that ultimately the best protection of the community is that persons found not guilty by reason on mental impairment are able to return to the community as useful citizens'.*[31]

177. Further, as partially quoted by the Commission in its paper at paragraph [27], His Honour stated:

> *The activating criterion is in s75(1) ("that it is in the public interest to do so") includes the public interest in the applicant's progressive rehabilitation not being deflected or defeated. That is an important interest, which must be given due and proper weight. However, a suppression order of its nature is antipathetic to the judicial process. It follows that suppression orders should not be granted, or come to be granted, routinely. The powerful and fundamental value of the community's knowledge of the judicial process in the midst should not be whittled down by a developing habit of suppression. Nearly always, publication of the identity of an applicant will be likely to cause some difficulty to the applicant or to have some deleterious effect upon rehabilitation. Plainly, in some cases the degree of such negative impact will justify, indeed necessitate, a suppression order. But in others it will not. The degree of likely negative impact needs to be examined in each case. The existence of negative impact will not of itself justify a suppression order. Sufficient negative impact needs to be established to justify departure from the fundamental that courts are open.*

178. The entirety of paragraphs 15 and 27 in *Re PL* show that Justice Cummins's reasoning was that much weight is to be given to the negative impact of publication upon the rehabilitation of vulnerable reviewees.

179. A stronger statutory mechanism is required in relation to suppression orders that better reflects the objects of the Act, consistent with the reasoning of Justice Cummins. The therapeutic interests of the reviewee ought to routinely predominate because the reviewee has not been convicted of a crime but is mentally ill, subject to an overriding public interest test.

180. With apologies to Bentham, publicity may well be the very soul of justice, the keenest spur to exertion, the surest of all guards against improbity and may keep the judge him or herself, while trying, under trial. However, just as the common law in Australia recognises that mentally ill persons are not an appropriate vehicle for general

---

31 *Re an application of PL* (unreported, VSC, Cummins J, 1998) citation required, at [15].

deterrence, neither is the public interest served by exposing their personal details, intimate as they invariably are, to the unrestricted gaze of the press.

Conclusion

181. Our CBA expresses gratitude to Justin Wheelahan, Fiona Todd, Megan Tittensor, Amanda Hurst, Alex Burt, Aggy Kapitaniak, Peter Chadwick SC and Simon Moglia who spent considerable time and effort in drafting our Association's comments in respect of this matter.

182. Should the Commission require further assistance in respect of any matters relevant to this issue there should be no hesitation to contact Remy van de Wiel QC, Chairman or Simon Moglia of the CBA.

Criminal Bar Association of Victoria
13 September 2013