THE AUSTRALIAN
CLINICAL PSYCHOLOGY
ASSOCIATION

Submission to the Victorian Law Reform Commission

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

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Unfitness to stand trial

General Recommendations

1: It is imperative that legislative/policy changes take into consideration the need to ensure experts offering opinions within these frameworks are carefully chosen with respect to expertise, specialist qualifications and further training relevant to the assessment of fitness. We discuss this further at question 19 (The role of experts in the process for determining unfitness to stand trial).

2: That legislative / policy changes reflect Rights based agendas. We discuss this further question 6 (Effective participation).

3: That legislative/policy changes consider the adoption of special support measures in order to facilitate access to justice. We discuss this further under question 6 (Effective participation).

Chapter 4—Unfitness to stand trial

Threshold definition

Question #1

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

Answer

1: In terms of 'mental' in the context of condition we believe the term focuses too much on psychiatric/mental problems. We would recommend the term 'mental condition' be re-considered to reflect the broad range of conditions that can impede an individual's capacity to pass a legal threshold for fitness.

2: We believe a definition and understanding of an individual's medical/neurological/psychological or developmental condition provides the necessary context within which to consider the issue of fitness. Threshold definitions we advise may create expectations based on severity of the underlying condition thereby limiting the focus to diagnostic models as opposed to their interaction with the individual. We regard the interaction between the individual, their condition, and extraneous variables (such as education, occupation, previous experiences) are key elements through which fitness can be expressed or compromised, and also assessed.

3: We accept your comment *"Some accused people may have a physical condition that would affect their mental processes to such an extent that they would be unfit to stand trial. In those cases, including a threshold definition based on mental diagnoses may unduly limit the application of the unfitness to stand trial test"* and draw attention to recommendations outlined in 1 above. The focus we believe should be on an individual's cognitive, or communication ability. An individual with a physical condition may therefore not be excluded within this description. We advise the UK model that emphasizes 'communication ability' to be considered. In this respect our comments under paragraph 2 could be included to discuss the degree to which any condition negatively affects an individual's ability to stand trial.

Decision-making capacity or effective participation

Question #2.

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

Answer

1: We agree with the sentiments expressed in 4.32, 4.33, 4.34. We agree with the importance of having legal standards appropriate to either the cognitive/intellectual or indeed, as per your comment above, the 'physical context' that may impede fitness.

2: The authors have assessed individuals against thresholds. In most cases individuals pass the threshold for some criteria, but not others. Remediation, support and assistance may enable them to reach the necessary threshold and participate in their trial.

3: To this extent, we would recommend that the standards for both psychiatric / cognitive intellectual disability should reflect development and refinements in case law.

Question # 3.

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

Answer

1: *Decision making* ability is a nebulous and unhelpful concept for the test of unfitness to stand trial. The concept requires further consideration and refinement. Decision-making under the NSW Guardianship Tribunal Act notes that decision-making is domain specific. Therefore, use of this terminology would still require the analysis of individuals' cognitive/communication abilities in relation to details of the trial.

2: We note under 4.36 you advise that, *"The Law Commission of England and Wales anticipates that if a person has decision-making capacity, then they would also satisfy the requirements of the current test based on the Pritchard criteria because these criteria set a higher threshold for unfitness to stand trial than a test that is based on decision-making capacity".*

> 2.1 We note, however, that the test outlined in 4.37 makes no reference to an individual's speed of information processing capacity, expressive or receptive language ability, nor physical factors such as fatigue, which are important factors that can impede fitness.
>
> 2.2 We also agree with the concerns you outline under 4.39, *"that an accused person could have decision-making capacity without the basic competencies important for a trial".*

2.3 We would remind the committee that the proposed UK test would operate within a system that allows for the use of registered intermediaries to assist vulnerable witnesses participate in their trials. The committee should consider carefully whether the adoption of the UK legal would be appropriate given that in Australia, such provisions are not currently available.

2.4 We also note your comments under 4.34 regarding the emphasis on more active participation in the trial, but would not see 'making decisions' as the sole ingredient of this active participation.

3: We note your comment in 4.40 and would agree with the two-stage approach put forward.

4: We further observe your concerns that *"Adopting a test where decision-making capacity or effective participation is considered would change the threshold for unfitness to stand trial and would likely result in more people being found unfit to stand trial".* We again bring to attention the fact that an interventionist-focused model of fitness may allow necessary accommodations to be put in place to enable an individuals participation in trials. We respectively suggest a focus on an individual's right to a fair trial, be of paramount emphasis when considering what we agree are necessary changes.

Question #4

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

Answer

1: Once again, we prefer the focus on 'active participation' and not decision-making.

2: We recommend a review of more recent fitness findings cases together with a review of academic research in this area. The recommendation for a new test, or supplemental tests should reflect empirical findings and scholarly legal debate.

Question #5:

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

Answer

1: We believe this should reflect rights based agenda and the ultimate right to a fair trial.

2: We also advise that in determining fitness, it should be incumbent to take account of the complexity of the particular proceedings.

Effective participation

Question #6

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

Answer

1: We regard this as crucial. In the case of psychiatric, acquired or developmental barriers that impede capacity to stand trial, consideration of the accused person's participation to access justice MUST reflect relevant Rights Based philosophies and directions. For example, the Convention of Rights of Person's with Disability (CRPD). Namely, legal standards/thresholds must be *flexible* to allow consideration and include recommendations that may guide participation. We draw attention in particular to the articles from CRPD (below);

> **Article 12 - Equal recognition before the law, Section**
>
> States Parties shall take appropriate measures[1] to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> **Article 13 - Access to justice**
>
> States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations[2], in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2: We also draw attention to the Human rights framework by the 'Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers', section 4.1.2 covering the range of national and Victorian strategic policies, the *Disability Act 2006*, the *Charter of Human Rights and Responsibilities Act 2006* (Vic), and international treaties and conventions[3]. They note in particular, that "there are a number of other provisions in the Convention that have a bearing on how the justice system interacts with people with a disability. These include access to facilities and services, the recognition of alternative communication systems, the provision of accessible information, and the participation of persons with a disability in policy settings and program development.

3: We further note that the 'Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers'

[1] Our emphasis.
[2] Ibid.
[3] Law Reform Committee, March 2013.

recommended that ***"****appropriate measures should be adopted to ensure equitable and effective access to justice both by people with an intellectual disability and by those with a cognitive impairment",* and *"that the Department of Justice should explore the possibility of establishing a witness intermediary scheme to assist communications with a person with an intellectual disability or cognitive impairment involved in court proceedings".* We support these recommendations.

4: We draw attention to a case example from South Australia, details of which can be viewed at;
http://www.abc.net.au/pm/content/2012/s3405854.htm

As noted, *"This is the story of a legal case in South Australia which has exposed a national legal loophole that effectively stops people with an intellectual disability from being able to give evidence in court. As the law currently stands, intellectually disabled people are often viewed as unreliable witnesses. In this particular case, it means that several cases of alleged sexual abuse will never be tested in court".*

We are aware that the case concerned witnesses and not defendants, but draw attention to the case to highlight the fact that lack of available provisions/accommodations, can result in individuals being denied access to justice.

Rationality

Question #7

Should the accused person's capacity to be rational be taken into account in the test for unfitness to stand trial? If yes, how is this best achieved:

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

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

(c) in some other way?

Answer

We would support the approach outlined in 4.49. We add that the concept 'rational' is somewhat nebulous, judgemental, difficult to define and assess clinically.

Issues specific to the Presser criteria

Question # 8

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

Answer

1: As noted above in our responses to Question 3, it is important to *enable* fitness (where possible) using appropriate and available means wherever possible. However, we also would suggest that when considering the accused person's ability to follow the course of the proceedings, specific factors such as the complexity and length of the trial should also be taken into account[4].

[4] I am grateful to Dr Ilana Hepner (Clinical Neuropsychologist) for her contribution to this question.

Unfitness to plead and unfitness to stand trial

Question # 9

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

Answer

1: This may result in cost savings by reducing the need for fitness hearings in these instances, however, ethical concerns are raised that could impact on the right to a fair trial (see below).

Question #10

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

Answer

1: Accused persons with cognitive/language or other (e.g., physical) limitations would be expected to be vulnerable at all levels of the criminal justice system. They may have difficulty understanding legal processes and with giving testimony. In view of these issues, such accused persons may perceive no other recourse but to plead guilty so as to avoid going through the trial process. This would impact on their right to a fair trial.

The role of support measures

Question #11

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

Answer

1: We wholeheartedly support the role of support measures as outlined in 4.60 – 4.71.

2: In a paper currently under preparation, Hepner et al[5] observe that in the UK, Registered Intermediaries (RIs) are trained, registered professionals whose role it is to ensure that communication with vulnerable witnesses (including those with ID) is as "*complete, accurate and coherent as possible*" during Police interviews and the trial process. We are aware that there is research supporting relevant modifications that can facilitate vulnerable witnesses and we would recommend the committee consult this research[6].

3: Dr Hepner comments further that it had also been argued in NSW and QLD that the judiciary and legal profession should become better educated as to the communication issues experienced by vulnerable witnesses. This may indeed prove beneficial; however, it is unclear as to whether this has eventuated. An interesting subject of future research would be the examination of Court transcripts involving vulnerable witnesses (e.g., those with Intellectual Disability (ID)) to determine whether the judiciary and legal practitioners are protecting them from inappropriate questioning (e.g., leading questions etc.) in the Courtroom. Nonetheless, given that prison medical officers and psychiatrists have been demonstrated to overestimate the cognitive ability of witnesses with ID[27], it is uncertain as to whether the judiciary and legal practitioners could be *sufficiently* educated to accurately and reliably facilitate communication between a vulnerable witness and others[30]. In view of the existence of well-trained and accredited RIs, one might wonder why the need would even arise.

4: We further remind the need for provision of supports as per Article 12 & Article 13 of the Convention of Rights of Person's with Disability.

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[5] Hepner I, (In Prep) Registered Intermediaries for Individuals with Intellectual Disability in the Criminal Justice System.

[6] Kebbell, M.R., Hatton, C. & Johnson, S. D., *Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?* Legal and Criminological Psychology, 2004. **9**: p. 23-35

Cossins, A., *Cross-Examination In Child Sexual Assault Trials: Evidentiary Safeguard Or An Opportunity To Confuse?* Melbourne University Law Review, 2009. **33**(68-104).

Temes, M., & Yuille, J. C., *Eyewitness Memory and Eyewitness Identification Performance in Adults with Intellectual Disabilities*. Journal of Applied Research in Intellectual Disabilities, 2008. **21**(21): p. 519–531

Kebbell, M.R., Hatton, C., Johnson, S. D., & O'Kelly, C. M. E. , *People with learning disabilities as witnesses in court: What questions should lawyers ask?* . British Journal of Learning Disabilities, 2001. **29**: p. 1-5.

Perlman, N.B., Ericson, K. I., Esses, V. M. & Isaacs B. J., *The Developmentally Handicapped Witness: Competency as a Function of Question Format*. Law and Human Behavior, 1994. **18**(2): p. 171-187.

Gudjonsson, G.H., & Gunn, J. , *The competence and reliability of a witness in a criminal court.* British Journal of Psychiatry, 1982. **141**: p. 624-627.

Question #12

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

Answer

1: In a recently submitted paper Woodward et al [7], herself a UK registered intermediary currently living in NSW, commented that *"Formal evaluation of the pilot Witness Intermediary Scheme in England and Wales was overwhelmingly positive, with a number of reported emerging benefits, including the potential to: assist in bringing offenders to justice; increase access to justice; contribute to cost savings; assist in identifying witness needs; and inform appropriate interviewing and questioning techniques[8]".*

2: We are of the view that cost savings would be gained from avoiding the lengthy procedures of continued detention, supervision and special trials.

Question #13

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

Answer

1: We agree wholeheartedly with the sentiments expressed in 4.72. With regard to 4.73 and the case example given we would remind the committee that interpreters, special hearing loops or assistance from counsel may be limited only to situations where there are language barriers, hearing difficulties, or visual difficulties. (Ngatayi v The Queen,) In this respect, we further support the comment at 4.73 that it may still be useful to expressly provide for the consideration of support measures in an assessment of unfitness to stand trial to ensure that such measures are considered in every investigation into unfitness and to encourage the use of support measures in individual cases.

[7] Woodward M.N, Hepner J.I, Stewart J,E (Submitted) Out of the Mouth of Babes: Enabling Children to Give Evidence in the Justice System.
[8] Plotnikoff, J; Woolfson, R (2007) 'The Go-Between: An Evaluation of Intermediary Path-finder projects'

Difficulty in assessing unfitness to stand trial

Question #14

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

Answer

1: We would advise reference to our recommendations under paragraph 19 (below). In addition, we recommend training and accreditation for experts, similar to the system adopted by the NSW Motor Accident Authority and Work Cover (NSW).

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

Question #17

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

Answer

1: We agree with the sentiments outlined in 4.89. We would advise the need to consult with relevant legal bodies and authorities.

Question #18

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

Answer

1: We are aware that the NSW Law Society has prepared a guide for lawyers taking instructions from clients when capacity is in doubt[9]. It is possible for similar documents to be prepared state wise with the emphasis of dealing specifically with fitness issues. We note this document has also been referenced in the *'Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers'and*. We would also advise consultation with relevant legal bodies and authorities. We would further advise that the recommendations under 6.2 noted by the Inquiry.

[9] When a client's capacity is in doubt. A Practical Guide for Solicitors. NSW Law Society.

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

Question #19

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

Answer

1: We observe that at 4.96 you advise *"the Commission has little information on the issues that may arise in relation to the provision of expert reports to the court and the role of experts in the process for determining unfitness to stand trial. Potential issues may arise in relation to the qualifications of experts, the quality and utility of expert reports and the number of experts relied on in assessments of unfitness to stand trial".*

2: We are of the view that experts chosen to assess fitness to stand trial be selected very carefully indeed given the serious nature of the fitness issue. Experts should in our view, only be chosen from experienced competent clinicians with expertise relevant to those factors underlying the question of the individual's fitness. It is imperative that the most appropriate expert is matched appropriately to the need of the accused.

3: In some cases experts identify clinical needs recommending further assessment by an expert with particular experience in that area (e.g., a forensic psychiatrist may recommend a neuropsychological assessment).

4: Endorsement of a psychologist's registration is a legal mechanism under National Law that requires the Psychology Board of Australia to identify practitioners who have specialist clinical qualifications and advanced clinically supervised practice. The psychologist must be registered with the Psychology Board of Australia (PsyBA) and be competent to conduct fitness assessments. The PsyBA *Register of practitioners* which includes endorsed areas of practice is available (below)[10] For example, registered psychologists endorsed by the PsyBA in the approved area of practice of Clinical Neuropsychology are qualified and competent to conduct neuropsychological assessments and can be sought to determine their expertise in fitness assessments in the case of individuals with intellectual or cognitive impairments. Similarly, registered psychologists endorsed by the PsyBA in an approved area of practice of Clinical Psychology are qualified and competent to conduct psychological assessments in relation to mental health. *Both psychiatrists and clinical psychologists should be employed to examine fitness with respect to mental health.* Registered psychologists endorsed by the PsyBA the approved area of practice of Forensic Psychology are qualified and competent to conduct psychological assessments in relation to understanding and functioning of legal and criminal justice systems, and conduct assessments in criminal, civil and family legal contexts including perpetrators and victims.

[10] ahpra.gov.au/Registration/Registers-of-Practitioners.aspx

5: Furthermore, we draw attention to empirical research highlighting the need for training and education of psychologists conducting Fitness to Stand Trial assessments.[11]

6: We strongly recommend that non-endorsed psychologists are not involved in the assessment of fitness. Endorsement enables the identification of practitioners who have had advanced training, specialist qualifications and experience necessary for this type of work.

[11] White A J., et al (2012) The Role of Cognitive Assessment in Determining Fitness to Stand Trial. International Journal of Mental Health, 11 (2), pp 102-109.

Suitability of findings in special hearings

Question #26

Should changes be made to the findings available in special hearings?

Answer

1: In relation to the issue of special hearings, we offer the advantages of using special accommodations/assistance in order to reduce the need for special hearings. We further support the relevant recommendations as made by 'Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers'.

The defence of mental impairment under the CMIA

General Recommendations

1: That it is imperative for legislative/policy changes take into consideration the need to ensure experts offering opinions within these frameworks are carefully chosen with respect to expertise, specialist qualifications and further training relevant to the assessment of fitness. We discuss this further at question 40 (*The role of experts in the process for establishing the defence of mental impairment*).

2: We would recommend wherever there is potential for judge-alone trials that this option is exercised. A lay jury made up of community members without specialist legal or medical knowledge cannot fully understand complex issues pertaining to mental impairment.

3: We would recommend that mental impairment is defined under the legislation to ensure a much more consistent understanding and application of this term in legal proceedings of this nature.

The defence of mental impairment under the CMIA

The meaning of 'mental impairment'

Question # 29

How does the defence of mental impairment work in practice with 'mental impairment' undefined?

Answer

In practice this can lead to an inconsistent understanding and unfair application of this term in legal proceedings.

Question # 30

Should 'mental impairment' be defined under the CMIA?

Answer

Yes, in order for there to be a consistent understanding and fair application of this term.

Question # 31

What are the advantages or disadvantages of including a definition of mental impairment in the CMIA?

Answer

Advantages include a more consistent understanding and application of this term in legal proceedings.

Disadvantages include inconsistency in understanding, unfairness of application and lack of parity.

Question # 32

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

Answer

That the Victorian Government consider introducing legislation to provide a definition of 'mental impairment' in the Crimes (Mental Impairment and Unfitness to be Tried) Act

1997 (Vic) to encompass mental illness, intellectual disability, acquired brain injuries and severe personality disorders.

Question # 34

If a statutory definition of mental impairment is not required, what other measures could be taken to ensure the term is applied appropriately, consistently and fairly?

Answer

We would recommend that a statutory definition of mental impairment is included in the legislation to ensure the term is applied appropriately, consistently and fairly. Where terms have been left undefined there is more room for inconsistency, for individual interpretation and application of that term leading to greater inconsistencies and unfairness.

The test for establishing the defence of mental impairment

Question # 35

How does the test establishing the defence of mental impairment in the CMIA operate in practice? Are the current provisions interpreted consistently by the courts?

Answer

From experience there is inconsistency in interpretation of the test for establishing the defence of mental impairment by the courts.

Question # 36

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

Answer

We would support inclusion of the operational elements of the M'Naghten test for the defence of mental impairment.

Question # 37

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

Answer

The main issue is having a common understanding of what constitutes "moderate sense of composure." What evidence is required to demonstrate this? Which professionals can make that assessment and give that opinion?

The role of experts in the process for establishing the defence of mental impairment

Question # 40

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

Answer

1: We are of the view that experts chosen to establish the defence of mental impairment be selected very carefully indeed given the serious legal consequences. Experts should in our view, only be chosen from experienced competent clinicians with expertise relevant to those factors underlying the defence of mental impairment. It is imperative that the most appropriate expert is matched appropriately to the need of the accused.

3: In some cases experts identify clinical needs recommending further assessment by an expert with particular experience in that area (e.g., a forensic psychiatrist may recommend a neuropsychological assessment).

4: Endorsement of a psychologist's registration is a legal mechanism under National Law that requires the Psychology Board of Australia to identify practitioners who have specialist clinical qualifications and advanced clinically supervised practice. The psychologist must be registered with the Psychology Board of Australia (PsyBA) and be competent to conduct fitness assessments. The PsyBA *Register of practitioners* which includes endorsed areas of practice is available (below).[12] For example, registered psychologists endorsed by the PsyBA in the approved area of practice of Clinical Neuropsychology are qualified and competent to conduct neuropsychological assessments and can be sought to determine their expertise in fitness assessments in the case of individuals with intellectual or cognitive impairments. Similarly, registered psychologists endorsed by the PsyBA in the an approved area of practice of Clinical Psychology are qualified and competent to conduct psychological assessments in relation to mental health. *Both psychiatrists and clinical psychologists should be employed to examine fitness with respect to mental health.* Registered psychologists endorsed by the PsyBA the approved area of practice of Forensic Psychology are qualified and competent to conduct psychological assessments in relation to understanding and functioning of legal and criminal justice systems, and conduct assessments in criminal, civil and family legal contexts including perpetrators and victims.

[12] ahpra.gov.au/Registration/Registers-of-Practitioners.aspx

5: We strongly recommend that non-endorsed psychologists are not involved in the assessment of fitness. Endorsement enables the identification of practitioners who have had advanced training, specialist qualifications and experience necessary for this type of work.

6: We would advise training and accreditation, a system similar for providing assessments for Motor Accident Authority, Work Cover (NSW).

Jury involvement in the process and consent mental impairment hearings

Question # 41

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

Answer

We would recommend where possible that an election is made for judge-alone hearings for the reasons given in questions 43 & 44.

Directions to the jury on the defence of mental impairment

Question #42

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

Answer

Giving directions to jurors is quite a complicated undertaking. Not only does the judge have to explain the law, interpret the law and give direction as to the application of the law to the facts in issue, the judge must also give direction to jurors as to what constitutes evidence, what is hearsay and what aspects of the trial to ignore. Additionally the judge needs to then be able to give directions of what constitutes mental impairment and then how to apply all this information to each element of the offence/s. Jurors often struggle to fully understand all this information and apply it appropriately. If a judge errs in giving directions then this can be a cause for appeal.

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?

Answer:

Yes, a lay jury made up of community members without specialist legal or medical knowledge cannot fully understand complex issues pertaining to mental impairment. Being able to understand the elements of an offence and that each of these elements needs to be proved beyond reasonable doubt adds another layer of complexity in these cases.

The relevance of mental impairment to the jury's consideration of the mental element of an offence

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?

Answer

We recommend that the consideration of mental impairment should be considered by a judge alone. The issues pertaining to mental impairment are complex and difficult to understand for the lay public who have no medical or legal training and have to assimilate and understand very complex material in a short space of time.

Legal consequences of the findings

Question # 45

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

Answer

Firstly, yes, and with reference to our answer in 44 above, we reiterate our recommendations that determining the relevance of mental impairment should be considered by a judge alone and not the jury.

Secondly, in the event that the jury is retained, we would recommend that the judge should give explanation to the jury of the legal consequences of a finding of not guilty because of mental impairment. We are of the view that the lay public will not fully comprehend that the finding of not guilty because of mental impairment does not equate with innocence or an acquittal.

Appeals against findings of not guilty because of mental impairment

Question # 46

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

Answer

We are of the opinion that there are barriers to accused persons pursuing appeals in relation to findings of not guilty because of mental impairment. Individuals found to suffer mental impairment are vulnerable by virtue of their physical, psychological or cognitive needs and as such may not have their legal rights effectively advocated.