A submission to the Victorian Law Reform Commission – 2013.

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The Victorian Law Reform Commission is reviewing the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CMIA), and aims to consider whether:

1. The CMIA should define 'mental impairment' and, if so, how it should be defined;
2. The process of determining fitness to stand trial can be improved;
3. The application of the CMIA should be further extended to the Magistrates' Court;
4. Changes should be made to the provisions governing supervision and review; and
5. Legislative clarification is required as to how the law should provide for the jury to approach the elements of an offence and, any defences or exceptions, when the defence is in issue.

This submission will focus on the first and fifth terms of reference.

1. The issue of definition

The purpose of a trial in which mental illness is an issue is to determine whether an offender was mentally impaired at the time of their alleged crime due to a disease of mind (a legal term with no medical relevance). Within this framework, the law can exculpate mentally ill offenders–under the mental impairment defence –on the basis that they did not know the nature and quality of their conduct or whether the conduct was wrong. That is, the offender did not know the physical element of the conduct and could not estimate the consequences of the conduct (e.g. knowing the significance of killing), or the offender could not reason about whether the conduct was wrong, as 'normal' reasonable people would.

On this basis, the defence in Victoria appears to only be successful if offenders with psychotic symptoms or illnesses employ it. When non-psychotic offenders suffering from common and 'familiar' illnesses like depression raise the defence, it is not successful (Wondemaghen, Forthcoming 2014). Indeed, the last review by the Commission found that since the introduction of the CMIA, all of the cases in which mental impairment has

succeeded as a defence have concerned offenders who had been psychotic at the time of the homicide (VLRC, 2003, p. 181) making the defence narrow and restricted to this specific group of offenders. This is significant because the defence is almost exclusively raised for homicide cases, and the incidence of depression amongst offenders tends to be higher than that of other disorders at the time of committing a homicide (Mullen, 1997).

Victoria is the only Australian state that employs the defence without a definition of the components of mental states that amount to mental impairment; unlike, for example, the Northern Territory, Western Australia, the Australian Capital Territory and South Australia in which the defence may be raised on the basis of mental illness, brain damage, intellectual disability or senility. In Queensland and Tasmania, the defence may be raised on the basis of a 'mental disease' and in New South Wales on the basis of a 'disease of mind' (Bronitt & McSherry, 2010, pp. 240-1). But if 'mental disease' or 'disease of mind' are considered definitions, these are vague and they are legal constructs rather than medical terms or diagnoses. Furthermore, the term 'mental illness' refers to a broad range of medical diagnoses including schizophrenia (psychotic) and depression (non-psychotic); yet the defence is not successful for offenders suffering from the latter group of illnesses. Although these definitions do not specify which illnesses satisfy the legal test of 'mental impairment', in practice, currently, the psychotic illnesses appear to amount to this test.

So the question is: who would benefit from a 'defined' mental impairment defence? As it has operated since its introduction in 1997, a specific definition as to what constitutes 'mental impairment' in the CMIA may be beneficial to mentally ill offenders with non-psychotic illnesses, if the threshold for the legal test of insanity was lowered that is, because the current defence in Victoria is not different from the vague and broad M'Naghten definitions that appear to only be satisfied by psychotic symptoms like delusions and hallucinations. The defence and its operation (and successful employment) can thus be understood in terms of two groups of mentally ill offenders: psychotic and non-psychotic.

Significantly, whether the legislation in Victoria is defined or not, how it operates and for which offenders it is successful is dependent on how members of a jury understand the concept of criminal responsibility in the context of these two groups of offenders.

2. Legislative clarification for juries

The relevance of mental impairment

Though legislative clarification for juries are crucial when it comes to 'mental impairment', 'criminal responsibility' and 'sentencing considerations', what is equally significant to consider is how juries ultimately understand and decide what type of mental illnesses mitigate serious violent behaviour and exculpate offenders from culpability. Which illnesses fit the current test of 'mental impairment'? The reasons behind why psychotic mental illnesses seem to satisfy the current test of legal insanity and non-psychotic illnesses do not, can be understood in terms of the familiarity and perceived causes of depression.

There is a high incidence of non-psychotic illnesses like depression in the Australian population; 45% of those aged 16-85 years have had these types of mental illnesses at some point in their life (Australian Bureau of Statistics, 2008). The general public's familiarity with the more common illnesses like depression may influence the courts' and juries' willingness to exculpate criminal responsibility in the context of offenders who suffers from this type of illness. Depression is now understood and perceived to be a type of illness that can be experienced by 'anyone' and is psychosocially rather than biologically induced (Phelan et al., 2000; Angermeyer & Matschinger, 2003). As such, affected individuals are perceived to be well able to discern right from wrong, and to control their conduct. Jorm et al. (2005, 2007) argue that the Australian public does not believe that medical treatment is necessary for conditions such as depression, illustrating how the seriousness of depressive illnesses is often underestimated. Depression is seen as a part of life, an aspect of 'the human condition' resulting from adverse life situations (Hogg, 2011, p. 654). These popular perceptions and 'trivialisations' of this illness affect the way members of a jury reach their verdict in these cases, regardless of whether there are specific definitions about the defence or further legislative clarifications. Contrarily, with 'alien' illnesses such as those of the psychotic type (Phelan et al., 2000) the concept of criminal responsibility is applied differently. Psychotic disorders, characterised by delusions and hallucinations, are understood to be biologically caused illnesses (Phelan et al., 2000; Angermeyer & Matschinger, 2003) that impair perceptions of reality (Link et al., 1999; Douglas et al., 2009) and, therefore, render sufferers unable to control their conduct or appreciate right and

wrong. It can be argued that these beliefs significantly contribute to the ready acceptance amongst courts and jurors when psychotic offenders claim mental impairment.

A fitting case study about the significance of diagnostic labels such as 'depression' and jury perception about criminal responsibility is the Donna Fitchett case. Following a series of marital disputes, Fitchett drugged her two sons with large amounts of benzodiazepines. After the drugs failed to take the effect she had anticipated, she used a sock to strangle one of the children. The other woke up groggy and delirious, and wet himself. Fitchett changed him into clean clothes, put him back to bed and then placed a pillow over his face to stop him from breathing. Approximately three hours after killing her children, she swallowed a number of benzodiazepine tablets and wrote a suicide note to her husband. Later in the day, she inflicted some wounds on her arms, neck and groin. She was later admitted to the Thomas Embling Hospital as an involuntary patient (R v Fitchett [2009] VSCA 150). Fitchett detailed her actions to emergency and hospital staff, explaining that she had killed her children to protect and spare them from what would be a harsh life with their father (R v Fitchett transcript, 2008, pp. 69 –72). In her mind, she 'had moved them to a safer place' where 'all [was] peaceful [and] no one could ever hurt them' (2008, pp. 68– 69). Fitchett claimed mental impairment, twice, on the basis of severe depression. Psychiatrists Paul Mullen and Danny Sullivan gave evidence for the defence that Fitchett was mentally impaired at the time of the crime, whilst Yvonne Skinner (1st trial) argued that Fitchett's depression was not severe and she was legally sane. Over the course of two trials (having successfully appealed her first conviction on grounds that a miscarriage of justice had occurred because the trial judge had failed to explain the outcome of a 'not guilty because of mental impairment' verdict) Fitchett's defence was rejected.

What this case illustrates is the significance of diagnostic labels. McSherry (2005, p. 48) asserts 'it may be that it is better to focus more on the effect of particular mental conditions on the person's ability to reason, rather than on which mental conditions themselves should form the basis for the defence'. But currently, diagnostic labels do matter because it can be argued that since psychotic symptoms are more persuasive to juries, Fitchett's rationalisations that her children would be better off dead rather than in the care of their father or family members, can be viewed or interpreted as psychotic-like or delusional. It appears that Fitchett's diagnostic label of 'depression' significantly influenced the way

members of the jury understood her criminal responsibility, over the course of two different trials, despite the psychotic-like manifestations of her reasoning.

Furthermore, juries are influenced by conflicting psychiatric opinions about whether depression (unless it has psychotic features) can amount to mental impairment. In cases of 'consent mental impairment', there is consensus amongst mental health experts called by the defence and prosecution, and this tends to occur when offenders manifest with psychotic illnesses. If definitive answers about the state of mind at the time of the crime cannot be reached by these experts in the context of mentally ill offenders with depression, the claim of mental impairment is rejected.

Thus, jury perceptions and understandings about particular illnesses and their effects on criminal responsibility are as crucial as legislative clarifications, and it may be that in some cases, these perceptions persist despite legal guidance on these matters.

Legal consequence of findings

Using the Fitchett case as an example, the issue of jury direction is briefly discussed.

Fitchett was granted a re-trial for a breach of s22 (2) of the CMIA, which states: If there is admissible evidence that raises the question of mental impairment and a jury has been empanelled

a) The judge must direct the jury to consider the question and explain to the jury the findings which may be made and the legal consequences of those findings.

The legal consequences outlined in s23 of the CMIA state that in a case of a 'not guilty because of mental impairment' verdict, the court can either declare the defendant liable to supervision orders or release them unconditionally. Because the trial judge had failed to explain these consequences, pursuant of s23, it was regarded as a fundamental defect in the Fitchett trial. This legislature was formulated due to a concern that in the absence of any information as to what would follow a finding of 'not guilty because of mental impairment', some jury members might be reluctant to deliver this verdict believing that the accused, who should be in custody for protective purposes, could be released and walk free (R v Fitchett [2009] VSCA 150: 15).

The legislation dealing with how much a judge is required to inform the jury of the consequences of their verdict, is, as held by the Appellate Court, challenging. On the one hand, the jury needs to be informed that if an offender is found 'not guilty because of mental impairment', the offender will be remanded to a secure psychiatric facility although there is a possibility of non-custodial orders or, rarely, unconditional release. Therefore, members of a jury need to know that an offender claiming mental impairment and involved in serious violence is not going to be 'set free' into the community. On the other hand, the judge must ensure that the jury deliver their verdict without any reference or knowledge of what the outcome of that verdict might be. The role of the jury is to establish if the Crown had proven its case beyond reasonable doubt that the crime in question was committed, and not have any role in the subsequent sentence. Otherwise, there is a risk that jury perception of the likely outcome might affect a verdict (2009: 17). As already mentioned, however, the legislation to inform the jury of the likely outcomes came from the concern that a jury might reach a guilty verdict, for fear of allowing 'dangerous' offenders free with a verdict of 'not guilty because of mental impairment'.

Because this issue is pertinent to cases in which mental illness is an issue and it can affect a verdict, a trial judge should direct and explain to the jury about the legal consequences of the 'not guilty because of mental impairment' verdict, clearly specifying that the offender would be detained in a secure psychiatric facility for treatment purposes, or released unconditionally if there is no mental health issue at the time of the disposition (which rarely occurs).

Conclusion

Considering the test of the second limb of the defence (the more commonly raised of the two limbs) – not knowing the conduct was wrong– is based on everyday standards of 'reasonable' people, jury members will make decisions on culpability based on how they understand specific illnesses in the context of criminal responsibility regardless of definitions about 'mental impairment'. That is, in the case of depressed offenders, juries will decide on the basis that a large portion of the Australian population (including themselves or someone they know) suffers from depression, yet do not commit serious crimes such as homicide. A specific (or any) definition of the defence may not alter how these concepts are

understood. Because criminal responsibility in the context of mentally ill offenders is determined based on what juries understand about a specific illness and its effects on culpability (schizophrenia vs. depression), whether 'mental impairment' is defined or not may not make a significant impact on the operations of the defence. If the defence is defined, this will be for purposes of making it less restrictive to non-psychotic offenders, having seen how it has operated since 1997; a decision that should consider the already strained mental health services and lack of sufficient psychiatric beds that operate on the basis of accommodating those with severe and acute symptoms first. Even though, currently, the law recognises offenders' mental health state at the time of sentencing, and those found 'guilty' but with a mental illness can be sent to psychiatric facilities for treatment purposes, the focus should be on having well-established and well-staffed mental health services for all offenders with mental health issues regardless of culpability. It is focusing on strengthening these services that seems to be of greater significance before (or in addition to) considering definitions of the defence, because juries (and the community) have an understanding of what constitutes legal insanity regardless of specific definitions. Common sense understandings about madness and violence may see a discrepancy if an offender knew the nature and quality of the conduct but did not know it was wrong; a common argument made when defending mentally ill offenders with depressive illnesses. This may mean that juries, in some cases, resort to common sense understandings of insanity rather than the legal definition.

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