

TASMANIA
LAW REFORM
INSTITUTE

**Review of the Defence of
Insanity in s 16 of the
Criminal Code and Fitness
to Plead**

FINAL REPORT NO. 28

DECEMBER 2019

CONTENTS

Information about the Tasmania Law Reform Institute	vi
Acknowledgments	vi
Terms of Reference	vii
Executive Summary.....	viii
Recommendations	xiv
Part 1: Introduction	1
1.1 Background to the reference.....	1
1.2 Conduct of the reference	2
1.3 Structure of this Report	3
1.4 Scope of the Reference.....	3
Part 2: Background and Principles.....	5
2.1 Introduction	5
2.2 Brief overview of legislative framework.....	5
2.3 Understanding fitness to stand trial and the defence of insanity	7
The difference between insanity and fitness to stand trial.....	7
The criminal justice pathway	8
2.4 The principles underlying the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas).....	10
Background to the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas).....	10
Principles that underlie the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas).....	12
Part 3: Mental Health Impairments and Cognitive Impairments and the Criminal Justice System.....	16
3.1 Introduction	16
3.2 Overview of mental illness and cognitive impairments and the criminal justice system	16
3.3 Mental health impairment and cognitive impairment as sentencing factors.....	17
3.4 Reliance on unfitness to stand trial and insanity in Tasmania.....	25
Supreme Court	25
Magistrates Court	27
Part 4: Unfitness to Stand Trial: Making an Assessment of Unfitness.....	28
4.1 Introduction	28
4.2 Reforming the test for determining unfitness to stand trial: the current test	30
Tasmania	30
The position in other jurisdictions.....	32
4.3 The need for reform.....	33
4.4 Approaches to reform.....	37
Abolition of the doctrine	37
Reforming fitness to stand trial	39
Pleas of guilty.....	58
Part 5: Unfitness to Stand Trial: Procedure to Determine Unfitness to Stand Trial	64
5.1 Introduction	64
5.2 The Tasmanian position	64

5.3	The position in other jurisdictions	66
	Higher courts	66
	The Magistrates Court	67
5.4	Issues for consideration	70
	Determination of the issue of fitness by a judge rather than jury in the Supreme Court	73
	Procedure in the Magistrates Court	75
Part 6: Unfitness to Stand Trial: Procedure Following a Determination of Unfitness to Stand Trial		82
6.1	Introduction	82
6.2	The Tasmanian position	82
6.3	Other jurisdictions	84
6.4	Issues for consideration	85
	CRPD obligations	85
	Judge only proceedings	90
Part 7: Insanity		94
7.1	Introduction	94
7.2	Overview of the law of insanity in Tasmania	95
	History	95
	Rationale	96
7.3	The current law of insanity in Tasmania	98
	Key components of the defence	99
	Procedural matters	106
7.4	Law in other jurisdictions	107
7.5	Issues for consideration	113
	Make no change to the current defence of insanity	113
	Abolish the defence of insanity	114
	Abolish the defence of insanity and introduce a replacement defence (a 'radical' change)	119
	Retain but amend the insanity defence in s 16 of the <i>Criminal Code</i>	125
	Section 16(3): The interrelationship between insanity and self-defence	151
	Procedural aspects of the defence	160
	The operation of s 16 in the Magistrates Court	171
Part 8: Disposition: Forensic and Treatment Orders		173
8.1	Introduction	173
8.2	Consequences of findings under the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) ...	174
	Orders available under the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas)	174
	Use of orders under the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas)	178
	Process for making orders	179
	Review of orders	180
	Review of orders by the Mental Health Tribunal and the Supreme Court	181
	Process to discharge or vary forensic orders	183
	Discharge of orders in Tasmania	183
	Factors relevant to the discharge or revocation of orders	185

Leave provisions	187
8.3 Issues for consideration	188
Indefinite nature of forensic orders	189
Setting the limiting terms for restriction and supervision orders in Tasmania	203
Consequences of reaching the limiting term	207
Test for making, varying, discharging or revoking orders under the <i>Criminal Justice (Mental Impairment) Act 1999 (Tas)</i>	216
Transition from forensic patient status	226
Conditional release orders	233
The appropriateness of orders under the <i>Criminal Justice (Mental Impairment) Act 1999 (Tas)</i> for people with intellectual disabilities.....	234
Appendix 1: Proposed reforms to unfitness to stand trial test	239
Appendix 2: Schedule 1 – Mental health service delivery principles.....	241
Appendix 3: Orders available and making and discharging orders	242
Appendix 4: Fitness to stand trial	249
Appendix 5: Special hearing provisions	253
Appendix 6: Extension of orders beyond limiting terms (New South Wales and South Australia)	255
Appendix 7: Law reform recommendations	265
Appendix 8: Length of restriction and supervision orders in comparison with median sentence	271
Appendix 9: Submissions received.....	274

Information about the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State government signed in 2000. The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the government, the community, the University and the Institute itself.

The Institute's Director is Associate Professor Terese Henning. The members of the Board of the Institute are Associate Professor Terese Henning (Chair), Professor Tim McCormack (Dean of the Faculty of Law at the University of Tasmania), the Honourable Justice Helen Wood (appointed by the Honourable Chief Justice of Tasmania), Ms Kristy Bourne (appointed by the Attorney-General), Associate Professor Jeremy Prichard (appointed by the Council of the University), Mr Craig Mackie (appointed by the Tasmanian Bar Association), Ms Ann Hughes (appointed at the invitation of the Institute Board), Mr Rohan Foon (appointed by the Law Society of Tasmania), Ms Kim Baumeler (appointed at the invitation of the Institute Board) and Ms Rosie Smith (appointed at the invitation of the Institute Board as a member of the Tasmanian Aboriginal community).

The Board oversees the Institute's research, considering each reference before it is accepted, and approving publications before their release.

Acknowledgments

This Final Report was prepared for the Board by Dr Rebecca Bradfield with valuable feedback provided by the TLRI Director. The Issues Paper that preceded this Report was prepared for the Board by Dr Rebecca Bradfield. Both these documents were edited and formatted by Mr Bruce Newey. Valuable contributions to the project and feedback on drafts of the Issues Paper were provided by the TLRI Director and the Reference Group for this project, the Honourable Justice Helen Wood, Daryl Coates SC, Marita O'Connell, Yvonne Chaperon, Aaron Groves, Georgina O'Donnell and Associate Professor Jeremy Prichard. The TLRI acknowledges the invaluable assistance provided by the Mental Health Tribunal in the collection of data for this project. Assistance was also provided by the Legal Aid Commission. The project was funded by a grant from the Solicitors' Guarantee Fund.

This study has been approved by the Tasmanian Social Science Human Research Ethics Committee (HREC). If you have any concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 62266254 or email human.ethics@utas.edu.au. The Executive Office is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752]. The study conducted with the assistance of the Mental Health Tribunal in relation to the collection of data had its own ethics approval. If you have any concerns or complaints about the conduct of this aspect of the study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 62266254 or email human.ethics@utas.edu.au. Please quote ethics reference number [H0017154].

Terms of Reference

To consider the operation of the law of insanity in Tasmania with particular reference to:

- the operation of s 16(3) of the *Criminal Code* (Tas);
- whether evidence of insane delusions arising from mental illness should form the basis of self-defence;
- if insane delusions arising from mental illness form the basis of self-defence, whether defendants relying on insane delusions should be liable to supervision under the *Criminal Justice (Mental Impairment) Act 1999* (Tas); and
- if insane delusions arising from mental illness form the basis of self-defence, whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) requires amendment in relation to treatment options for such defendants.

To consider the operation of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and whether changes are needed to ensure that the Act operates justly, effectively and consistently with the principles that underlie it. In particular, the Institute should consider whether:

- the process of determining fitness to stand trial or establishing the defence of insanity can be improved; and
- the operation of Part 4 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) including in relation to discharge and review of forensic and treatment orders and whether there is a need for 'step-down' options.

Executive Summary

This Report considers two specialised responses for individuals with mental illness and/or cognitive impairment where their mental impairment affects their ability to participate in the ordinary processes of the criminal justice system. These are:

- (1) fitness to stand trial; and
- (2) the defence of insanity.

Although there may be an overlap in the conditions that give rise to a finding that a person is unfit to stand trial and a finding that a person is not guilty by reason of insanity, the scope of their operation and their legal requirements are different.

Fitness to stand trial is a *procedural* provision that relates to the issue of whether the accused has the ability to understand or participate in his or her trial. It is concerned with a person's capacity at the *time of the trial*. It applies where a person's mental processes are disordered or impaired, or if for any other reason the person is unable to understand court processes and make a defence to the charge.

Insanity is a matter of *substantive law* involving the determination of whether a person should not be held criminally responsible on the ground that he or she lacked the mental capacity to commit the offence. Insanity is concerned with an individual's capacity at the *time of the offence*. In order to rely on the insanity defence, the person must have a mental disease (which includes what has in past legislation been called 'natural imbecility') such that he or she lacked the capacity to understand the physical character of the act or to know that the act was one which he or she ought not do, or, by reason of the mental disease, the person was deprived of the power to resist an impulse.

A significant proportion of people within the criminal justice system have mental and/or cognitive impairments, yet only a small number of such individuals rely on unfitness to stand trial or the defence of insanity. More commonly, people with mental or cognitive impairments do not rely on the unfitness procedure or the insanity defence and instead enter a plea of guilty or are found guilty following a trial. A focus of this reference has been to consider barriers that may discourage people from relying on these specialised provisions when they might otherwise be appropriate. The Issues Paper asked a range of questions about the operation of the rules relating to fitness to stand trial and the defence of insanity in Tasmania. After conducting its review of the current law, considering the feedback received to questions asked in the Issues Paper and examining the research and the developments in other jurisdictions, the Institute's view is that reform is required to the law of fitness to stand trial, the law of insanity and the structure of the orders that are available to the court following a finding of not guilty by reason of insanity (either at trial or a special hearing) or if a finding cannot be made that the defendant is not guilty of an offence (at a special hearing).

Part 1 of this Report details the background to this reference and presents an overview of the structure of the Report and the scope of the reference.

Part 2 of this Report provides an overview of the legislative framework that sets out the law in relation to the operation of the criminal justice system for people with mental health impairments and/or cognitive impairments. Several Acts set out the law in relation to the operation of the criminal justice system for people with mental health impairments and/or cognitive impairments, including the *Criminal Justice (Mental Impairment) Act 1999* (Tas), the *Criminal Code* (Tas), the *Mental Health Act 2013* (Tas) and the *Sentencing Act 1997* (Tas).

This Part also sets out the distinction between fitness to stand trial and insanity and considers the principles that underlie the *Criminal Justice (Mental Impairment) Act 1999* (Tas). These principles are fairness to the accused and the right to a fair trial, the protection of the community and the recognition of the rights of mentally impaired individuals consistent with the principles of least restriction. These principles are considered in light of the obligations that arise under international legal instruments to which Australia is a signatory including the *International Covenant on Civil and Political Rights* ('ICCPR'), and the *Convention on the Rights of Persons with Disabilities* ('CRPD').

Part 3 provides an overview of mental health impairments and cognitive impairments and the criminal justice system. As noted, insanity and fitness to stand trial apply to only a small number of people compared to the number of individuals with mental health impairments and cognitive impairments overall who are involved in the criminal justice system. Individuals with mental health or cognitive impairments may not rely on the process of fitness to stand trial or on the insanity defence but may proceed through the usual criminal justice process. This is a clear alternative and the possible sentence received (if found guilty) compared to the consequences of a finding of unfitness or insanity are likely to weigh into the decision-making process.

A question considered in the Issues Paper is the relationship between the 'dangerous criminal' provisions contained in the *Sentencing Act 1997* (Tas) Part 3, Division 3 and the sentencing orders available to the court under the *Sentencing Act 1997* (Tas) Part 10 where an offender found guilty of an offence may be sentenced to a restriction order, a supervision order or a treatment order in cases where the offender appears to be suffering from a mental illness. The Institute's view is that a more appropriate pathway for such an offender – one that will protect the community and allow the person to obtain appropriate treatment – is found in the forensic orders contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) rather than in indefinite detention as a dangerous criminal under the *Sentencing Act 1997* (Tas). Based on feedback about whether a statutory trigger is necessary to facilitate consideration of the forensic orders, the Institute's recommendation is that an amendment to this effect is unnecessary given the factors relevant to the court's sentencing decision and the matters that courts take into account in any event in deciding whether to make dangerous criminal declarations.

Part 4 sets out the current test for determining unfitness to stand trial in Tasmania and considers the law in other jurisdictions. Unfitness to stand trial relates to the issue whether an accused is able to participate in the trial process, and, as the Institute has previously written, this ability 'fundamentally determine[s] whether that person can gain access to justice and whether justice can in fact be done'.¹ The current focus of the fitness test is on a person's cognitive capacity or intellectual ability to understand features of the criminal trial. Based on submissions received and its research, the Institute is of the view that this test is deficient in that it does not give adequate recognition to whether the accused can participate meaningfully in his or her trial. The answer to this question depends on two inter-linked matters: first, whether the accused has the capacity to make decisions in relation to key elements of the trial and, second, whether the necessary conditions exist or can be created to enable him or her to exercise that decision-making capacity.

The Institute recommends a shift from the current focus on cognitive capacity to a supported decision-making approach based on facilitating an individual's ability to exercise his/her decision-making capacity and effectively participate in the trial. The determination of an

¹ TLRI, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* Final Report 23 (2018) vi–vii.

accused's decision-making capacity needs to be clearly grounded in relevant determinative criteria. Consequently, what these criteria are should also be determined and specified in reforming the fitness test. The purpose of such criteria is to guide courts when applying what might otherwise appear to be a relatively vague and subjective test. The Institute makes recommendations in this regard. In summary, the approach recommended by the Institute has three interrelated components:

- the reformulation of the fitness test to replace the current 'Presser' test with a decision-making test;
- the specification of guidance/criteria in the application of that test to give it content and avoid subjectivity in its application;
- a requirement for assessment of the need for and, where necessary, creation of the conditions that optimise and/or enable people to exercise their decision-making capacity and therefore participate in trials. These might include making necessary accommodations in court processes or providing decision-making and communication supports through the use of communication assistants or intermediaries.

These recommendations are made in light of the submissions received, the Institute's broader research and the requirement set out in the terms of reference that the Institute should consider whether changes are needed to ensure that the *Criminal Justice (Mental Impairment) Act 1999* (Tas) operates justly, effectively and consistently with the principles that underlie it.

Part 5 sets out the current Tasmanian procedure to determine unfitness to stand trial, the position in other jurisdictions and makes recommendations to reform the current procedure. Concerns that arise in this area include: the role of experts and experts' reports in the process of determining unfitness to stand trial, the appropriate decision-maker (judge or jury) in making fitness determinations in the Supreme Court, and the appropriateness of the current procedure for determining fitness in the Magistrates Court. After considering these issues, this Part makes recommendations about developing best practice guidelines for the preparation of expert reports to be used by the court to make a determination of fitness to stand trial or to enter a guilty plea. The recommendations highlight the need for experts to provide information to the court in relation to supports and accommodations that may help the accused's decision-making capacity and assist him/her to participate in the criminal justice process. Other significant recommendations are that determinations of fitness to stand trial in the Supreme Court should be determined by a judge (rather than a jury) and for the introduction of a simplified alternative pathway for appropriate cases in the Magistrates Court.

Part 6 sets out the procedure following a determination of unfitness to stand trial in Tasmania and in other comparable jurisdictions. This concerns the conduct of the 'special hearing'. If the court determines that the defendant is not likely to become fit to stand trial within 12 months or the defendant does not become fit to stand trial within 12 months, then the court holds a special hearing. The special hearing provides a way to test the prosecution case and is conducted so that the onus of proof and standard of proof are the same as in a trial of criminal proceedings and in other respects as nearly as possible as if it were a trial of criminal proceedings. Key issues that arise in relation to the special hearing are whether the special hearing process complies with the human rights obligations under the *CRPD* and whether there should be provision for a judge-alone process for special hearings. Based on its consideration of the provisions in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16, the Institute's view is that the provisions do currently allow for the special hearing to be conducted as far as possible

like an ordinary trial and, crucially, allow for an individual to be acquitted if the prosecution cannot establish its case beyond reasonable doubt in a criminal trial.

However, an area of concern was identified in relation to the role of the legal practitioner in circumstances where the accused is unable to give instructions. This creates practical and ethical difficulties for legal practitioners. Accordingly, aligned with the Institute's recommended approach of facilitating supported decision-making (as set out in Part 4), the Institute makes recommendations to use intermediaries and communication assistants in special hearings to assist with the provision of instructions. In these cases, the defendant's rights, wishes and preferences should be given effect where he or she is capable of giving instructions. There will be cases where this is not possible, and in these cases legal practitioners must act to promote and uphold defendants' personal and social wellbeing and in a way that is least restrictive of their human rights. This reflects the requirements of the *CRPD* and the National Decision-Making Principles.

Recommendations are also made in Part 6 to allow for a special hearing to be heard by a judge alone where the prosecution and the defence agree in relation to the defence of insanity (or, as recommended in this Report, the defence of mental or cognitive impairment). This should operate with judicial oversight to provide appropriate safeguards, so that the court has access to the expert reports and the power to hear from expert witnesses. This is consistent with the Institute's recommendation in relation to a 'consent' defence of mental or cognitive impairment in Part 7.

Part 7 provides an overview of the law of insanity in Tasmania and identifies concerns in relation to the existing law before considering options for reform and outlining recommendations for reform. Extensive scholarly literature has identified deficiencies with the law of insanity. An overview of these concerns is set out in Part 7, including that it contains inappropriate and outdated terminology (including 'insanity' and 'natural imbecility') and that the nature of the qualifying mental state (mental disease) is outdated, limited and offensive. Another area of concern in relation to the law of insanity in Tasmania is the role of s 16(3) of the *Criminal Code* (Tas) and the interrelationship of the defences of insanity and self-defence. This matter has previously been addressed by the TLRI and was again specifically raised in the terms of reference for this project. Based on its consideration of the literature, the submissions received and the approaches taken in other jurisdictions, the key reforms recommended are to retain and reform the defence of insanity in the *Criminal Code* (Tas) s16 by:

- Changing the name of the defence of insanity to the defence of mental or cognitive impairment.
- Changing the scope of the qualifying condition by replacing the term 'mental disease' with detailed definitions of mental impairment and cognitive impairment.
- Changing the terminology in s 16(1)(a)(i) from 'understanding the physical character' to 'understanding the nature and quality' of such act or omission.
- Repealing s16(3).
- Making legislative provision for the prosecution to raise the defence of mental or cognitive impairment against the wishes of the defendant with the leave of the court.
- Providing the court with the power to dispense with a trial if the prosecution and defence agree that the evidence in a case raises the defence of mental or cognitive impairment. This should operate with judicial oversight to provide appropriate

safeguards, so that the court has access to the expert reports and the power to hear from expert witnesses.

- Ensuring that the same law applies in the Supreme Court and the Magistrates Court.

Part 8 examines the orders that can be made under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) following a finding that an individual is not guilty by reason of insanity (either at a trial or a special hearing) or if a finding cannot be made that the defendant is not guilty of an offence (at a special hearing). An individual is **not** found guilty of an offence where he or she is found not guilty by reason of insanity or unfit to stand trial if a finding cannot be made at a special hearing that the accused is not guilty. Accordingly, the person is not ‘sentenced’ for the offence according to the ordinary principles of sentencing. The Terms of Reference require the Institute to consider the just and effective operation of the *Criminal Justice (Mental Impairment) Act 1999* (Tas), in particular the operation of Part 4 of the Act, including in relation to the discharge and review of forensic and treatment orders and whether there is a need for ‘step-down’ options. In light of these considerations, this Part sets out recommendations for reform that would abolish the current indefinite detention scheme for forensic orders and replace it with a new model with the following features:

- (1) A limiting term set by the court following a finding of not guilty by reason of mental or cognitive impairment or where a finding cannot be made that the defendant is not guilty.
- (2) The limiting term to be set on the basis of the hypothetical sentence model. This means that the court must nominate a limiting term, which would be the court’s best estimate of the length of the sentence that would have been imposed had the person been found guilty at a normal trial.
- (3) A limiting term to not operate as an absolute limit of the duration of an order. The DPP should be able to make an application to the Supreme Court prior to the expiration of the limiting term for an extension of a restriction order or a supervision order. The DPP should also be able to apply for a restriction order to be replaced with a supervision order instead of an extension of the restriction order.
- (4) A forensic patient to be able to apply to the Supreme Court for a discharge of a restriction order or the variation or revocation of a supervision order prior to the expiry of the limiting term. This reflects the current process for the review of orders by the Supreme Court under the *Criminal Justice (Mental Impairment) Act 1999* (Tas).
- (5) The test for making, varying or removing orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) to be changed from ‘likely to endanger’ to require determination of whether the defendant does, or would if released, pose an unacceptable risk of causing physical or psychological harm to a person or persons generally.
- (6) The test for making, varying or removing orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1) to be amended to require the Mental Health Tribunal and the court to have regard to the person’s recovery or progress in terms of treatment progression and personal improvement in making a decision to discharge a restriction order or vary or revoke a supervision order.

Recommendations are also made that consideration be given to empowering courts to make suppression orders in relation to applications under the *Criminal Justice (Mental Impairment) Act 1999* (Tas). This would be for the purposes of assisting the long-term recovery of people subject to the Act and facilitating their reintegration into the community.

The Institute has also identified barriers to patient reintegration and release from forensic orders within the Forensic Mental Health system and recommends a review be conducted to ensure that appropriate pathways are available for the gradual reintegration of forensic patients into the community, consistent with the principles of least restriction and community safety. In addition, appropriate rehabilitation pathways should be developed for people with cognitive impairments.

Recommendations

1. It is unnecessary to amend to the dangerous criminal provisions contained in the *Sentencing Act 1997* (Tas) to provide a statutory trigger for judicial consideration of the appropriateness of making an order under the *Sentencing Act 1997* (Tas) Part 10 instead of a dangerous criminal declaration. (p 25)
2. There is a need to reform the current test for unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8. (p 37)
3. The doctrine of fitness to stand trial should not be abolished in Tasmania. (p 39)
4. The right to a fair trial should be given legislative recognition as the fundamental principle governing the determination of whether a defendant is fit to stand trial within the meaning of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8. (p 40)
5. The TLRI does not support the minimalist reform approach of simply up-dating the criteria for the current cognitive capacity fitness test (the *Presser* test) without making additional reforms to that test. More profound reform is needed. (p 41)
6. The test for assessing fitness to stand trial in s 8 of the *Criminal Justice (Mental Impairment) Act 1999* should be reformed so that its focus is on the accused's decision-making capacity as means of determining whether he or she can effectively participate in the trial rather than on his or her cognitive capacity. This recommendation is to be understood in conjunction with two other factors:
 - (1) an identification of the key matters about which a person must be able to make decisions in the trial in order for them to be able to meaningfully participate (see Recommendation 8); and
 - (2) the need for the court to take into account any accommodations and supports that would assist a person to be able to exercise their decision-making capacity in the trial process (see Recommendations 9 and 10). (p 44)
7. Rationality or rational decision-making should not be included in the test for determining whether a person should be required to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8. (p 48)
8. Criteria should be legislatively prescribed to guide assessments of defendants' decision-making capacity. These criteria should consist of critical understandings and abilities that defendants must have in order to make key decisions during trials including:
 - an understanding of the actual significance and effect of entering a plea
 - the ability to communicate *meaningful* instructions to his or her legal practitioner
 - the ability to decide whether to give evidence to support his/her case and his/her ability to give evidence (that is, the ability to give a coherent account in his/her defence and to answer questions put to him/her)

- an understanding of the meaning and consequences of a finding of guilt including that he/she may be punished and in jeopardy of imprisonment, if so advised that they are at risk of such a penalty
 - an understanding of the nature of the offence(s) with which he/she is charged
 - the ability to understand the nature of the proceedings as a process to determine whether it has been proved that he/she has committed the offence(s) charged
 - the ability to understand and follow the substance of the evidence that may be given at trial
 - the ability to understand the course of the proceedings and what is going on in a general sense at each stage of the trial process. (p 52)
9. There should be legislative recognition in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 of the need for courts to take into account support measures and accommodations that are available to an individual with a view to optimising an accused's fitness to stand trial in circumstances where they may otherwise be unfit. Further, the legislation should specify that a finding of lack of capacity is only to be made as a last resort, that is, in the event that support measures have been exhausted. (p 58)
10. The court's assessment of the supports and accommodations that may assist an accused to be fit for trial must be based on the supports/accommodations that are actually available and would be effective to assist the accused. This should be the subject of expert reports in relation to the court's determination of the fitness to stand trial test. (p 58)
11. There should be a separate test in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to determine whether a person is fit to enter a plea of guilty. (p 62)
12. The test for fitness to enter a plea of guilty should reflect the decision-making and communication approach contained in the proposed test for determining fitness to stand trial (see Recommendation 6) with necessary alterations to reflect the difference between entering a plea of guilty and participating in a defended trial. (p 62)
13. The following trial processes are relevant to a person's decision-making capacity to be fit to enter a guilty plea (see Recommendation 6):
- the nature of the offence with which he or she is charged.
 - the right to contest that charge.
 - the nature of the hearing if he or she entered a plea of not guilty as a process to determine whether it has been proved that the person committed the offence charged.
 - the consequences of entering a plea of guilty, including what is being admitted when a plea of guilty is entered, the effect of a plea of guilty, that the court may impose punishment and a general understanding of the punishment that the person is in jeopardy of receiving.
 - the accused's understanding of the course of the sentencing hearing and a general understanding of what is occurring at each stage and the right to challenge the facts stated by the prosecution. (p 62)
14. Best practice guidelines should be developed for the preparation of expert reports to be used by the court to make a determination of fitness to stand trial or enter a guilty plea.

These should be developed by an expert working group, which should consider how to address challenges arising in the assessment of fitness to stand trial by experts posed by cultural and ethnic factors, as well as other communication difficulties. This may include taking into account the efficacy of psychometric instruments, where relevant, that were developed through studies of Western, English-speaking populations. (p 73)

15. The scope of the best practice guidelines should accommodate the proposed changes to the fitness test and should provide information to the court in relation to the supports and accommodations that may support the person's decision-making capacity and assist an individual to participate in the criminal justice process. (p 73)
16. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to provide that the investigation into fitness to stand trial is to be determined by a judge (rather than the jury). (p 75)
17. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to allow a magistrate to discharge people without making determinations of their fitness to stand trial or their criminal responsibility. (p 80)
18. The power to discharge should operate as follows:
 - (a) It should apply to summary offences and indictable offences dealt with summarily. The discharge power should not apply to matters that are referred to the Magistrates Court for trial from the Supreme Court by virtue of the *Criminal Code* (Tas) s 308.
 - (b) The threshold test for the operation of the discretion to discharge should be that there is a real and substantial question about the defendant's fitness to stand trial.
 - (c) Advice in relation to the issue of fitness for the purpose of exercising the discretion should be provided to the magistrate by the Court Liaison Officers. Appropriate resources should be made available to the Court Liaison Service for this purpose.
 - (d) The power should operate as a genuine discretion vested in the magistrate and should not require the consent of the prosecution and defence.
 - (e) Legislative guidance as to the factors that are relevant to the exercise of the discretion to discharge the charges should be provided and include: (1) the nature of the offence, (2) the nature of the impairment, (3) the risk to the community, (4) the treatment, support or services available to the accused.
 - (f) The power to discharge should only provide for an unconditional discharge and not a conditional discharge or the power to order other therapeutic intervention by the magistrate. (p 80)
19. The approach taken to the use of intermediaries and communication assistants in special hearings should reflect the approach recommended in the Institute's Final Report on the establishment of an Intermediary/Communication Assistant scheme in Tasmania. This will require legislative amendment of the *Criminal Justice (Mental Impairment) Act 1999* (Tas). (p 90)
20. There should be legislative recognition that, in the conduct of an investigation into fitness to enter a guilty plea/to stand trial and in special hearings, a person's rights, wishes and preferences should be given effect where a person is capable of giving instructions. However, in circumstances where defendants are not capable of giving instructions even

with support, legal practitioners must act to promote and uphold the person's personal and social wellbeing in a way least restrictive of their human rights. (p 90)

21. There should be provision in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) for a special hearing by a judge alone where the prosecution and defence agree that the defence of mental or cognitive impairment would be established on the evidence. However, safeguards are required and the court should have the power to review the evidence (including hearing from expert witnesses) in order to be satisfied that the evidence establishes the defence of mental or cognitive impairment in a case where the prosecution and defence agree that the proposed evidence establishes the defence. (p 93)
22. The Institute recommends making changes to the current defence of insanity contained in the *Criminal Code* s 16. (p 114)
23. The Institute does not recommend abolition of the defence of insanity simpliciter. (p 119)
24. The Institute recommends retaining and reforming the current defence of insanity. (p 119)
25. The insanity defence in s 16 of the *Criminal Code* (Tas) should not be wholly replaced by a new defence. (p 125)
26. The name of the insanity defence in s 16 of the *Criminal Code* (Tas) should be changed. (p 128)
27. The name of the defence in s 16 of the *Criminal Code* (Tas) should be changed to the defence of mental or cognitive impairment. (p 128)
28. The qualifying condition contained in the *Criminal Code* (Tas) s 16 should be changed from a 'mental disease' to mental or cognitive impairment with detailed definition of these terms included in the section. (p 145)
29. The definition of mental and cognitive impairment should be based on the definitions set out by the NSWLRC as follows:

Mental impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.

Such mental impairment may arise from but is not limited to the following:

- (i) anxiety disorders
- (ii) affective disorders
- (iii) psychoses
- (iv) substance induced mental disorders.

'Substance induced mental disorders' include ongoing mental impairments, but do not include substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.

Cognitive impairment means an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.

Such cognitive impairment may arise from, but is not limited to, the following:

- (i) intellectual disability
- (ii) dementias
- (iii) acquired brain injury
- (iv) drug or alcohol related brain damage
- (vi) autism spectrum disorders. (p 145)

- 30. Section 16(4) of the *Criminal Code* (Tas) should be repealed. (p 145)
- 31. The legislative definition of mental impairment and cognitive impairment should not expressly include or exclude personality disorders from the defence. (p 145)
- 32. The *Criminal Code* (Tas) s 16(1)(a)(i) should be amended to refer to ‘understanding the nature and quality of such act or omission’. (p 148)
- 33. The *Criminal Code* (Tas) s 16(1)(b) should be retained without amendment. (p 150)
- 34. The *Criminal Code* (Tas) s 16(3) should be repealed.(p 159)
- 35. A delusional belief should not form the basis for self-defence and a provision should be inserted in the *Code* to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental or cognitive impairment, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas). (p 160)
- 36. The burden of proof in relation to the defence of mental or cognitive impairment should remain with the defence in cases where it is raised by the defence. (p 162)
- 37. The prosecution should have the power to raise the defence of mental or cognitive impairment against the wishes of the defendant with the leave of the court. In this case, the onus of proof should be on the prosecution and the standard of proof should be the balance of probabilities. (p 167)
- 38. The court should have the power to dispense with a trial if the prosecution and defence agree that evidence establishes the defence of mental or cognitive impairment. However, safeguards are required and the court should have the power to review the evidence (including hearing from expert witnesses) in order to be satisfied that the evidence establishes the defence of mental or cognitive impairment in a case where the prosecution and defence agree that the proposed evidence establishes the defence. (p 171)
- 39. The new defence of mental or cognitive impairment introduced to amend the current defence of insanity contained in the *Criminal Code* (Tas) s 16 should apply to indictable and summary offences. (p 172)

-
40. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended by abolishing the indefinite nature of forensic orders and introducing limiting terms. (p 203)
 41. In imposing a forensic order under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), the court must nominate a limiting term, which would be the court's best estimate of the length of the sentence that would have been imposed had the person been found guilty at a normal trial (a hypothetical sentence). (p 207)
 42. A forensic patient should be able to apply to the Supreme Court for a discharge of a restriction order or the variation or revocation of a supervision order prior to the expiry of the limiting term. (p 207)
 43. A limiting term should not operate as an absolute limit on the duration of an order. There should be power for the prosecution to make an application to extend the order. (p 212)
 44. The NSW model should be adopted in Tasmania to allow for the extension of orders beyond the limiting term set by the court, with appropriate changes to reflect the Tasmanian approach to decision-making and the role of the Mental Health Tribunal. The scheme for the extension of orders should have the following key features:
 - (a) The DPP should be able to make an application to the Supreme Court prior to the expiration of the limiting term for an extension of a restriction order or a supervision order. The DPP should also be able to apply for a restriction order to be replaced with a supervision order instead of an extension of the restriction order.
 - (b) The Supreme Court should make the extension order on the basis of a twofold assessment of the unacceptable risk of serious harm to others posed by the forensic patient if released from detention or supervision and the inadequacy of other less restrictive means of managing the risk. This regime reflects the principles contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 34, which provides that the 'court is to apply, where appropriate, the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.'
 - (c) Considerations that the court should have regard to include:
 - the safety of the community
 - expert reports
 - any certificates issued by the MHT
 - the person's level of compliance with any obligations imposed while being a forensic patient, especially while they were on leave
 - the view of the court at the time the limiting term was imposed
 - a report from the forensic patient's treatment team which would include information about the need for ongoing management of the person and the

reasons why arrangements that do not involve continued supervision or detention are not appropriate

- a report on the attitudes of victims, if any, and next of kin.
- (d) The term of the extension order should be five years subject to further extension.
 - (e) The MHT should be mandated to conduct annual reviews of the extended forensic order.
 - (f) The Supreme Court should have the power to make an interim extension order if it appears that the limiting term or existing extension order will expire before the proceedings are determined and that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.
 - (g) The Supreme Court should at any time be able to vary or revoke an extension order on the application of the DPP or the person subject to the forensic order if satisfied that circumstances have changed sufficiently to render the order unnecessary. (p 215)
45. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) should be changed to refer to whether the defendant does, or would if released, pose an unacceptable risk of causing physical or psychological harm to a person or persons generally. (p 221)
 46. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1) should be amended to require the Mental Health Tribunal and the court to have regard to the person's recovery or progress in terms of treatment progression and personal improvement in making a decision to discharge a restriction order, or to vary or revoke a supervision order prior to the expiration of the limiting term. (p 222)
 47. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should not be amended to introduce a presumption that prior to the expiry of the limiting term a court cannot discharge a restriction order or revoke a supervision order unless the court is satisfied in relation to the risk of harm test. (p 223)
 48. There should be a statutory requirement in the *Criminal Justice (Mental Impairment) 1999* (Tas) for the court to take account of the certificates and recommendations made by the Mental Health Tribunal with a presumption in favour of varying, revoking or discharging a forensic order if the Mental Health Tribunal has issued a certificate. (p 226)
 49. Consideration should be given to the enactment of a new provision in the *Criminal Justice (Mental Impairment) 1999* (Tas) that expressly empowers courts to make suppression orders and that sets out that the purpose of making suppression orders is to enable the long-term recovery of people subject to the Act and to facilitate their reintegration into the community for the protection of the community. (p 226)
 50. The Tasmanian Government should initiate a review to identify the barriers in the forensic mental health system to patients' reintegration into the community with a view to ensuring that appropriate pathways are available for the gradual reintegration of forensic patients into the community, consistent with the principles of least restriction and community safety. (p 232)

51. As part of the review of the transition pathways from a restriction order to a supervision order, consideration should be given to the amendment of the leave provisions so that an order can be made allowing forensic patients to leave the SMHU for an extended period. (p 233)
52. As part of the review, the use of technological solutions to overcome concerns in relation to risk and community safety should be considered. (p 233)
53. The *Criminal Justice (Mental Impairment) Act 1999* ss 18(e) and 21(e) should be amended to provide for a maximum time limit for a conditional release order of five years. (p 234)
54. Rehabilitation pathways should be developed for people with intellectual disabilities or cognitive impairments. The Institute recommends that this matter be addressed in the review of the 'step-down' pathways for forensic orders. (p 238)

Part 1

Introduction

1.1 Background to the reference

1.1.1 In its Report, *Review of the Law Relating to Self-defence* (Final Report No 20), the Tasmania Law Reform Institute (TLRI) recommended that a review of the defence of insanity contained in the *Criminal Code* (Tas) s 16 should be undertaken. Concerns were expressed about the extent to which the criminal law reflects contemporary medical knowledge about mental illness. Of particular concern was the relationship between delusions and self-defence and whether mistakes arising from insane delusions can ever ground the defence of self-defence. The Report noted that to permit complete acquittals in cases of insane delusions does not enable appropriate treatment to be provided to deluded defendants or take into account the need for community protection. Ultimately, the TLRI recommended that if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion should only be used as a defence under s 16 of the *Criminal Code* and should not be relied on to support a defence of self-defence under s 46 of the *Code*.

1.1.2 Following the TLRI's recommendations, the then Attorney-General of Tasmania, the Hon Vanessa Goodwin, requested the TLRI to provide advice in the following terms:

To consider the operation of the law of insanity in Tasmania with particular reference to:

- the operation of s 16(3) of the *Criminal Code* (Tas);
- whether evidence of insane delusions arising from mental illness should form the basis of self-defence;
- if insane delusions arising from mental illness form the basis of self-defence, whether defendants relying on insane delusions should be liable to supervision under the *Criminal Justice (Mental Impairment) Act 1999* (Tas); and
- if insane delusions arising from mental illness form the basis of self-defence, whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) requires amendment in relation to treatment options for such defendants.

To consider the operation of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and whether changes are needed to ensure that the Act operates justly, effectively and consistently with the principles that underlie it. In particular, the Institute should consider whether:

- the process of determining fitness to stand trial or establishing the defence of insanity can be improved; and

- the operation of Part 4 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) including in relation to discharge and review of forensic and treatment orders and whether there is a need for ‘step-down’ options.

1.1.3 This research forms part of the *Disability Justice Plan for Tasmania 2017–2020*, which sets out a commitment to safeguard the rights of forensic mental health patients.² The Plan is premised upon the principles articulated in the United Nations *Convention on the Rights of Persons with Disabilities* (‘CRPD’) and its objective is to develop a justice system in Tasmania that is responsive to the needs of people with disability and that provides equality before the law and equal access to justice.³

1.1.4 In related research, the TLRI has also undertaken a project that recommends the establishment of an intermediary/communication assistant scheme in Tasmania for people with communication needs involved in the criminal justice system.⁴ The term ‘communication needs’ encompasses a range of communication needs, including those arising from linguistic and intellectual development, physical, mental, intellectual and cognitive impairments and those attributable to physical and mental trauma.⁵ The purpose of the scheme is to maximise the opportunities for people with communication needs to participate in the criminal justice process by optimising their communication and comprehension capacities. The implementation of such a scheme will have clear relevance to the issues raised in relation to fitness to stand trial in this Report.⁶ The TLRI has also undertaken a review of the *Guardianship and Administration Act 1995* (Tas) and has released a Final Report that makes recommendations for reform.⁷

1.1.5 In preparing the Issues Paper for this reference, the Institute formed a Reference group consisting of, the Honourable Justice Helen Wood, Daryl Coates, SC (Director of Public Prosecutions), Marita O’Connell (then Court Liaison Officer, Forensic Mental Health Services), Yvonne Chaperon (President Mental Health Tribunal), Aaron Groves (Chief Forensic Psychiatrist), Georgina O’Donnell (Psychologist) and Associate Professor Jeremy Prichard. This group provided advice on the scope of the project and a preliminary draft of the Issues Paper.

1.2 Conduct of the reference

1.2.1 An Issues Paper and an Easy Read Summary of the Issues Paper were released for consultation in February 2019. This was followed by a period of community consultation which closed on 24 May 2019. Thirteen formal submissions were received, either in writing, by completing the submission template, or by making a verbal submission. A list of the submissions received is provided in Appendix 9. Submissions received have been taken into account in the development of the recommendations in this Report and the Institute thanks all those who contributed to the review.

² Department of Justice, *Disability Justice Plan for Tasmania 2017–2020* (2017) 19.

³ *Ibid* 5. *CRPD*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

⁴ TLRI (n 1).

⁵ *Ibid* vii.

⁶ See Parts 4 and 5.

⁷ TLRI, *Review of the Guardianship and Administration Act 1995 (Tas)*, Final Report No 26 (2018).

1.3 Structure of this Report

1.3.1 This Report is divided into several parts:

- Part 2 provides an overview of the legislative framework that sets out the law in relation to the operation of the criminal justice system for people with mental health and/or cognitive impairments. It sets out the distinction between fitness to stand trial and insanity and considers the principles that underlie the *Criminal Justice (Mental Impairment) Act 1999* (Tas).
- Part 3 provides an overview of mental illness and cognitive impairments and the criminal justice system.
- Part 4 sets out the current test for determining unfitness to stand trial in Tasmania and considers the law in other jurisdictions. This Part outlines possible options for reform and then makes recommendations for reforming the test.
- Part 5 sets out the current Tasmanian procedure to determine unfitness to stand trial, the position in other jurisdictions and outlines options available to reform the current procedure. This Part also sets out the Institute’s recommendations for reform.
- Part 6 sets out the procedure following a determination of unfitness to stand trial in Tasmania and in other comparable jurisdictions. It then examines options for reform of the procedure following a determination of unfitness to stand trial and makes recommendation for reform.
- Part 7 provides an overview of the law of insanity in Tasmania and identifies concerns in relation to the existing law and considers options for reform. This Part also sets out the Institute’s recommendations for reform.
- Part 8 examines the orders that can be made under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) following a finding that a person is not guilty by reason of insanity (either at a trial or a special hearing) or if a finding cannot be made that the defendant is not guilty of an offence (at a special hearing). It identifies concerns in relation to the existing law and considers options for reform. This Part also sets out the Institute’s recommendations for reform.

1.4 Scope of the Reference

1.4.1 This Report considers two specialised responses for people with mental illness and/or cognitive impairment where their mental impairment affects their ability to participate in the ordinary processes of the criminal justice system:

- (1) fitness to stand trial; and
- (2) the defence of insanity.

In examining the law of insanity, this Report considers the interaction of evidence of an individual’s mental health and/or cognitive impairment with other defences, in particular the law of self-defence and the law of intoxication. It also examines the orders that may be made

following a special hearing in circumstances where a person has been found to be not fit to stand trial and after a person has been found not guilty by reason of insanity. A key point to observe is that a person is **not** found guilty of an offence where he or she is found not guilty by reason of insanity or unfit to stand trial if a finding is not able to be made at a special hearing that the person is not guilty. Accordingly, the person is not ‘sentenced’ for the offence according to the ordinary principles of sentencing. Instead, the dispositions available to the judge or magistrate rely on an assessment of the future risk posed by the person to inform the exercise of judicial discretion.

1.4.2 This Report examines the operation of fitness to stand trial and insanity provisions for individuals with mental health and/or cognitive impairments. The use of terminology and the scope of definitions are problematic given that medical and legal definitions may differ depending on the purpose and context in which they are used.⁸

1.4.3 This Report does not involve a review of the *Mental Health Act 2013* (Tas) but does consider the interaction between the criminal justice system and that Act. In addition, it does not review the *Guardianship and Administration Act 1995* (Tas) but, as noted earlier, the TLRI has undertaken a separate review of that Act.⁹ Further, this Report does not review the Diversion List that operates in the Magistrates Court for individuals who have mental health and/or cognitive impairments.¹⁰ The Institute’s recommendations in relation to the recognition of supports and accommodation in the test for fitness to stand trial should be read in conjunction with the recommendations contained in the Institute’s previous report, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?*¹¹ This Report recommended the introduction of an expert intermediary/communication assistant scheme in Tasmania for people with communication needs involved in the criminal justice system.

⁸ New South Wales Law Reform Commission (‘NSWLRC’), *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report 135 (2012) Ch 5.

⁹ See TLRI (n 7).

¹⁰ See discussion of the Diversion List at [2.2.2]–[2.3.3].

¹¹ TLRI (n 1).

Part 2

Background and Principles

2.1 Introduction

2.1.1 This Part contains an overview of the legislative framework that sets out the current law in relation to the operation of the criminal justice system for people with mental health and/or cognitive impairments. It sets out the distinction between fitness to stand trial and the defence of insanity and also considers the principles that underlie the *Criminal (Justice Mental) Impairment Act 1999* (Tas).

2.2 Brief overview of legislative framework

2.2.1 In Tasmania, several Acts set out the law in relation to the operation of the criminal justice system for people with mental health and/or cognitive impairments. These include:

<i>The Criminal Justice (Mental Impairment) Act 1999</i> (Tas)	Establishes: <ul style="list-style-type: none">the process and criteria for determining if a person is unfit to stand trial;the procedure for a special hearing following a finding of unfitness to stand trial;the findings available at a special hearing;the consequences of a finding that an accused is not guilty by reason of insanity (either following an ordinary trial or a special hearing) or where a finding cannot be made that the defendant is not guilty;the process and criteria for the discharge of a restriction order, and the variation or revocation of a supervision order.
<i>The Criminal Code</i> (Tas)	<ul style="list-style-type: none">Sets down the law and procedure for determining if an accused is not guilty by reason of insanity.
<i>The Mental Health Act 2013</i> (Tas)	Provides: <ul style="list-style-type: none">for the management of involuntary patients (including people placed on a treatment order);for the management of forensic patients (including people placed on restriction and supervision orders);the procedure for the review of orders by the MHT.
<i>The Sentencing Act 1997</i> (Tas)	<ul style="list-style-type: none">contains the process and criteria for making an assessment order, treatment, supervision and restriction order in respect of offenders found guilty of an offence.

2.2.2 Some individuals who have mental health and/or cognitive impairments who may be unfit to stand trial and/or who may be able to rely on the insanity defence, might opt instead to

participate in the Diversion List (if eligible).¹² An outcome of the Diversion List is to modify and improve court processes to reflect the court's aspiration to improve access to justice for individuals with mental health problems or cognitive disabilities.¹³ While a person is engaged with the diversion program, a treatment plan is developed for them and their compliance with that plan is relevant to the final disposition made by the court. This may include the prosecution withdrawing the charges or the person receiving a lesser sentence than they would have received if their case had been heard according to the ordinary court process.¹⁴ Another aim of the Diversion List is to achieve long-term savings for the court and community by reducing reoffending. A concomitant result is the reduced number of special hearings under s 15 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).¹⁵ For example, in an evaluation of the Diversion List conducted in 2009, it was reported that a benefit had been a decrease in the need for special hearings in the Magistrates Court.¹⁶

2.2.3 A Diversion List has operated in the Magistrates Court in Tasmania since the implementation of a pilot program in Hobart in 2007. This has now been expanded to Launceston, Burnie and Devonport. The Diversion List is a pre-sentence 'problem-solving' approach that uses the provisions of the *Bail Act 1994* (Tas) and the *Sentencing Act 1997* (Tas) to divert eligible individuals to mental health, disability and other welfare services in order to address the underlying issues of their criminal offending where they have been charged with summary offences or minor indictable offences that can be tried summarily.¹⁷ The Diversion List targets repeat offenders where the nature of their offending is usually not serious enough to warrant a prison sentence or a community service order.¹⁸ In 2011, it was reported that an average of 500 Hobart defendants are referred by the court to Forensic Mental Health Court Liaison Officers each year for assessment and as of April 2011, 231 individuals had been referred to the list.¹⁹

2.2.4 In addition, as discussed further in Part 3, a significant proportion of defendants have mental and/or cognitive impairments, and, as noted, only a small number of such people rely on unfitness to stand trial and/or the defence of insanity. Many more people with mental and/or

¹² The eligibility criteria state that an offender is eligible if he or she has (or is likely to have) a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder and/or a neurological impairment, including dementia: Magistrates Court Tasmania, *Tasmanian Magistrates Court Diversion List: Procedural Manual Version 1.4* (2014) 5. Other eligibility criteria include: that the defendant has not been charged with an excluded criminal offence that involves serious violence or serious sexual assault, unless the court, at its discretion, considers the harm minor; the impairment/s cause/s a substantially reduced capacity in at least one of the areas of self-care, self-management, social interaction or communication; a connection exists between the mental impairment and/or mental illness and the offending behaviour, the defendant being likely to derive benefit from participation in a problem-solving court process; the defendant may not be eligible if, based on the opinion of Forensic Mental Health Services (Court Liaison) staff, he or she has exhausted all reasonable and available treatment and/or support services for the mental illness and/or impaired intellectual functioning. The defendant must consent to participate in the List, including attending court regularly and following the reasonable directions of Forensic Mental Health Services (Court Liaison) staff: at 5. See also F Davidson et al, 'Mental Health and Criminal Charges: Variation in Diversion Pathways in Australia' (2017) *Psychiatry, Psychology and Law* online edition.

¹³ Magistrates Court Tasmania (n 12) 4.

¹⁴ E Newitt and V Stojcevski, *Mental Health Diversion List* (Evaluation Report, 2009) 13.

¹⁵ Magistrates Court Tasmania (n 12) 5.

¹⁶ Newitt and Stojcevski (n 14) 6.

¹⁷ Magistrates Court of Tasmania, *Annual Report 2015–16* (2016) 12–13.

¹⁸ I Bartkowiak-Théron and J Fleming, *Integration and Collaboration: Building Capacity and Engagement for the Provision of Criminal Justice Services to Tasmania's Mentally Ill* (TILES, University of Tasmania, 2011) 6.

¹⁹ *Ibid* 7.

cognitive impairments do not rely on the unfitness procedure or the insanity defence and instead enter a plea of guilty and/or are found guilty following a trial. Accordingly, in understanding the operation of the criminal justice system in relation to people with mental and/or cognitive impairments, it is important to understand the role of impairment as a sentencing factor. This is discussed at [3.3].

2.3 Understanding fitness to stand trial and the defence of insanity

2.3.1 Although there may be an overlap in the conditions that give rise to a finding that an individual is unfit to stand trial and a finding that an individual is not guilty by reason of insanity, the scope of their operation and their legal requirements are different.

The difference between insanity and fitness to stand trial

2.3.2 As shown in Table 2.1 below, fitness to stand trial is a *procedural* provision that relates to the issue of whether the accused has the ability to understand or participate in his or her trial.²⁰ It is concerned with the accused's capacity at the *time of the trial*. It applies where a person's mental processes are disordered or impaired, or if for any other reason the person is unable to understand court processes and make a defence to the charge.²¹

Case example (unfit but no issue of insanity)

D was found unfit to stand trial for offences of arson and attempted arson by agreement of the prosecution and defence. D has Alzheimer's disease. Following a special hearing conducted before a jury, the jury returned a verdict that they were unable to find D not guilty. D was released unconditionally.

2.3.3 In contrast, insanity is a matter of *substantive law* involving the determination of a whether an accused should not be held criminally responsible on the ground that he or she lacked the mental capacity to commit the offence.²² Insanity is concerned with an accused's capacity at the *time of the offence*. In order to rely on the insanity defence, the accused must have a mental disease (which includes natural imbecility) such that the person lacked the capacity to understand the physical character of the act or know that the act was one which he or she ought not do, or, by reason of the mental disease, the person was deprived of the power to resist an impulse.²³

Case example (no issue of fitness but insanity)

D was charged with murder. He suffered from schizophrenia or a schizophrenic condition which resulted in an acute psychosis. Expert evidence was given that this disorder deprived him of the capacity to know the acts were ones which he ought not to do. Following a jury

²⁰ A Loughlan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) 67.

²¹ The specific requirements of the test contained in the *Criminal Justice (Mental Impairment) Act 1999* s 8 are discussed further at [4.2].

²² Victoria Law Reform Commission ('VLRC'), *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Final Report 28 (2014) 103.

²³ *Criminal Code* (Tas) s 16. This is discussed further at [7.3].

trial, D was found not guilty by reason of insanity. D was detained in a secure mental health unit under a restriction order.

2.3.4 Consequently, an accused may be unfit to stand trial but not insane for the purposes of the insanity defence, or fit to stand trial but insane, or unfit and insane.

Case example (unfit and insanity)

D was charged with assaulting a police officer. D suffered from severe schizophrenia. Following a finding that D was unfit to stand trial, at the special hearing, the jury found that D was not guilty on the grounds of insanity because D was incapable of knowing that his acts were ones he ought not to do. D was detained in a secure mental health unit under a restriction order.

Table 2.1: Process and timing of determining unfitness to stand trial and the insanity defence²⁴

	Unfitness to stand trial	Insanity
Issue to be determined	Whether the accused is fit to stand trial	Whether the accused is not guilty by reason of insanity
Relevant time	Time of trial	Time of offence
Process	Investigation into unfitness	Trial or special hearing (if the person is unfit)
Relevant legislation	<i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas)	<i>Criminal Code</i> (Tas) s 16

The criminal justice pathway

2.3.5 Figure 2.1 contains a flowchart that sets out the criminal justice pathway where an accused's mental health and/or cognitive impairment raises issues of fitness to stand trial and/or insanity.

²⁴ This table is taken from the VLRC, *Review of the Crimes (Mental Impairment and Unfitness to be Tried Act 1997*, Consultation Paper (2013) 33.

Figure 2.1: Criminal justice pathway where an accused’s mental health and/or cognitive impairment raises issues of fitness to stand trial and/or insanity

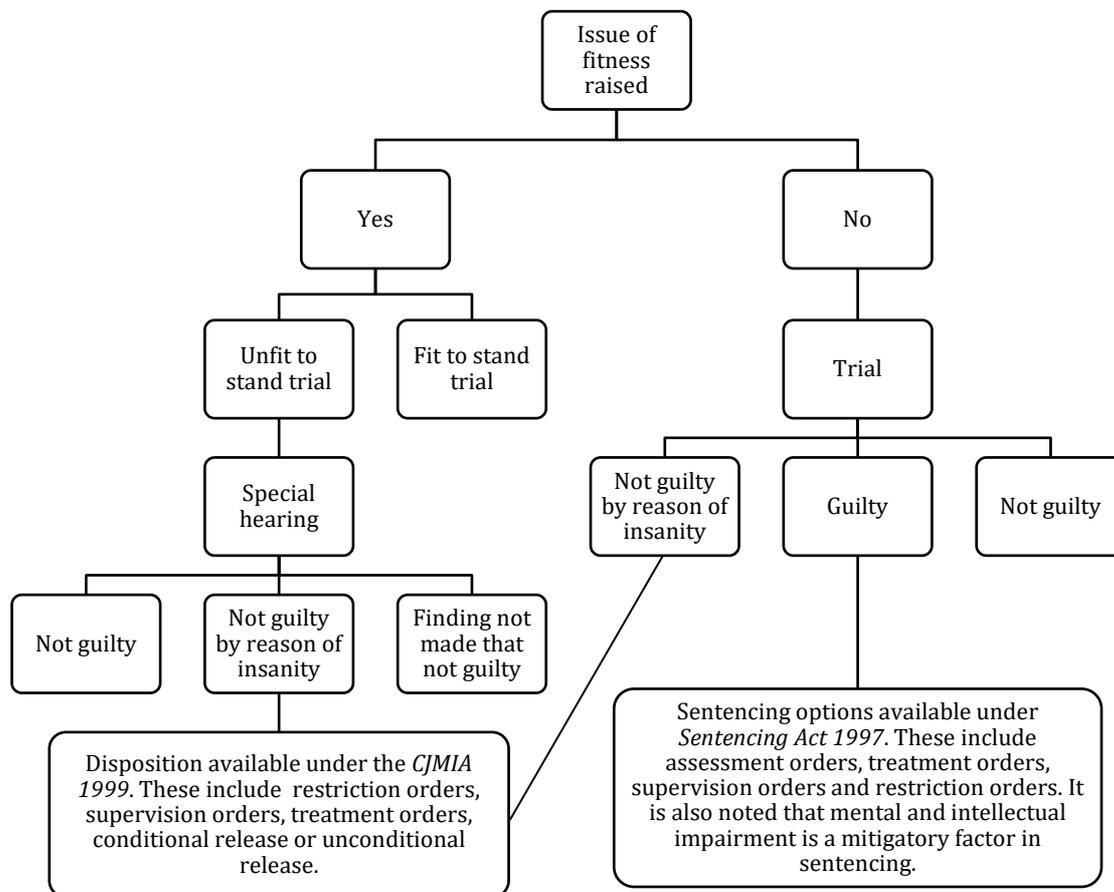


Figure 2.1 shows that the same dispositions are available to the court whether:

- (1) an accused is found not guilty by reason of insanity following a trial (where the person was fit to stand trial); or
- (2) where an accused is found not guilty by reason of insanity or a finding could not be made that an accused was not guilty following a special hearing (unfit to stand trial).

These orders are a restriction order, a supervision order, conditional release or unconditional release.²⁵ It is important to note that these dispositions are **not** sentences of the court and **do not follow** from a finding of guilt (unlike the ordinary trial where sentencing orders follow a finding of guilt).

2.3.6 In addition, under the *Sentencing Act 1997* (Tas), the court can make a treatment order, a supervision order or a restriction order (in addition to or instead of any sentence it may impose), in respect of an offender who has been found guilty of an offence. However, in this case, the offender has been found guilty and the orders are imposed as a sentence. This power exists where the offender is suffering a mental illness that requires treatment.²⁶ There were

²⁵ *Criminal Justice (Mental Impairment) Act 1997* (Tas) ss 18, 21. These dispositions are discussed further in Part 8.

²⁶ *Sentencing Act 1997* (Tas) Part 10. A mental illness is defined as a mental illness within the meaning in the

seven offenders identified in the Mental Health Tribunal ('MHT') data as being subject to restriction or supervision orders imposed as part of a sentence.

Case examples

D suffered from schizophrenia and was found guilty of wounding. At the sentencing hearing, D was released under the supervision of the Chief Forensic Psychiatrist on conditions including in relation to taking medication, submission to treatment and attendance at drug and alcohol rehabilitation sessions.

D suffered from schizophrenia and pleaded guilty to arson and setting fire to vegetation. D was sentenced to 13 months' imprisonment and, on release, a restriction order detaining him in a secure mental health unit until the order was discharged by the Supreme Court.

2.4 The principles underlying the *Criminal Justice (Mental Impairment) Act 1999* (Tas)

Background to the Criminal Justice (Mental Impairment) Act 1999 (Tas)

2.4.1 In 1999, the *Criminal Justice (Mental Impairment) Act 1999* (Tas) made significant changes to the law that applies to individuals with mental illness and/or cognitive impairment in Tasmania. It was part of a package of reforms that followed from a review of the *Mental Health Act 1963* (Tas) and sought to address deficiencies that existed in the previous law. Formerly, the procedural law on the insanity defence, fitness to plead and disposition of individuals were contained in the *Criminal Code* and the *Mental Health Act 1963* (Tas). Under these provisions, if a person had been found unfit to stand trial or found not guilty by reason of insanity then:

- (1) The *Criminal Code* required a judge to make an order that the person was to be dealt with as a mentally disordered person who had become subject to the criminal process. There was no discretion in relation to this.
- (2) When the judge made the order, the Attorney-General was required to specify an institution in which the person was to be detained, which was a Special Institution at Risdon Prison.

Mental Health Act 2013 (Tas) s 4. The *Mental Health Act 2013* (Tas) s 4 states that: '(1)(a) a person is taken to have a mental illness if he or she experiences, temporarily, repeatedly or continually – (i) a serious impairment of thought (which may include delusions); or (ii) a serious impairment of mood, volition, perception or cognition; and (b) nothing prevents the serious or permanent physiological, biochemical or psychological effects of alcohol use or drug-taking from being regarded as an indication that a person has a mental illness. (2) However, under this Act, a person is not to be taken to have a mental illness by reason only of the person's – (a) current or past expression of, or failure or refusal to express, a particular political opinion or belief; or (b) current or past expression of, or failure or refusal to express, a particular religious opinion or belief; or (c) current or past expression of, or failure or refusal to express, a particular philosophy; or (d) current or past expression of, or failure or refusal to express, a particular sexual preference or orientation; or (e) current or past engagement in, or failure or refusal to engage in, a particular political or religious activity; or (f) current or past engagement in a particular sexual activity or sexual promiscuity; or (g) current or past engagement in illegal conduct; or (h) current or past engagement in an antisocial activity; or (i) particular economic or social status; or (j) membership of a particular cultural or racial group; or (k) intoxication (however induced); or (l) intellectual or physical disability; or (m) acquired brain injury; or (n) dementia; or (o) temporary unconsciousness.'

- (3) When the Attorney-General made the order, the *Criminal Code* (Tas) stated that the person was to be treated for the purposes of the *Mental Health Act 1963* as having been admitted in pursuance of a hospital order made together with a restriction order.
- (4) Once the Attorney-General made the order the person could only be released by the Governor acting on the advice of the Executive Council and on the recommendation of the Mental Health Review Tribunal. The decision as to whether or not to accept the recommendations of the tribunal was generally made by Cabinet.²⁷

This was ‘akin to a sentence for the term of the defendant’s natural life’ (at least for some people) given that the decision to release a person ‘was for practical purposes in the hands of the State Cabinet and therefore subject to political pressure from a community with little compassion for, or understanding of, mental illness’.²⁸ However, while there is a lack of statistics, it has been reported that the ‘Governor’s pleasure regime’ did allow for the release of some people after relatively short periods of time.²⁹

2.4.2 Changes were made in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) in relation to two key issues to address these concerns:

- (1) **Procedures for a special hearing were created where an accused was found unfit to stand trial.** Previously, if a person was declared unfit, then they were detained under a restriction order, ‘notwithstanding the fact that these persons have not been convicted of any offence and irrespective of both the seriousness of the mental illness, and whether or not they are a danger to the public’.³⁰ Under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), a special hearing was created to ‘determine the external facts of the case — excluding the question of intention — to ascertain whether the basic prosecution case can be proved beyond reasonable doubt’.³¹ At the special hearing, the following findings are available: not guilty, not guilty of the offence charged on the grounds of insanity, or that a finding cannot be made that the defendant is not guilty.³² It is noted that following a special hearing, there is no provision to find that the defendant is guilty.
- (2) **The process for determining the appropriate disposition order for persons found unfit to stand trial or not guilty by reasons of insanity.** The court was given a discretion in relation to the disposition options ranging from an unconditional release order up to the making of a restriction order. The court, rather than the executive, was also given the power to revoke or discharge orders. There was a power for a person to make an application to the Supreme Court for release every two years and for review hearings to be conducted annually by the MHT. Under these provisions, if the MHT is of the view that a restriction order or a supervision order is no longer required, it issues a Certificate that allows the

²⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

²⁸ A Smith, ‘Out of the Frying Pan: Forensic Mental Health Orders – Have Changes to the Review Processes for People Found “Unfit to Plead” or “Not Guilty by Reason of Insanity” Enhanced the Liberty of the Subject?’ (2010) *Law Letter* 22, 22.

²⁹ *Ibid* 24. Smith referred to at least two known examples of discharge after two years from a restriction order imposed for the offence of murder.

³⁰ Tasmania, *Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

³¹ *Ibid*.

³² *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 17.

person to apply to the Supreme Court for the release of the restriction order or the revocation of the supervision order. The purpose of this was to provide for the eventual release of persons found unfit to stand trial or not guilty by reason of insanity.³³ Accordingly, while the *Criminal Justice (Mental Impairment) Act 1999* (Tas) did not make any changes to the defence of insanity in the *Criminal Code* (Tas), it did make significant changes to the consequences of a finding that an individual was not guilty by reason of insanity.

2.4.3 In making these changes, the *Criminal Justice (Mental Impairment) Act 1999* (Tas) was intended to modernise the law in relation to mental impairment and to recognise the rights of defendants while at the same time protecting public safety.³⁴ It reflects the background to the unfitness to stand trial doctrine that ‘was largely incorporated into modern law as a humanistic measure to protect accused persons with disabilities, offer a mechanism to test the prosecution, and divert individuals to relevant treatment’.³⁵

Principles that underlie the Criminal Justice (Mental Impairment) Act 1999 (Tas)

2.4.4 The Terms of Reference require the TLRI to consider whether changes are needed to the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to ensure that it operates justly, effectively and consistently with the principles that underlie it. The principles that can be identified from the legislative provisions and background to the implementation of the Act are: fairness to the accused person and the right to a fair trial, the protection of the community and the recognition of the rights of mentally impaired defendants consistent with the principles of least restriction.³⁶

2.4.5 In addition, the TLRI’s consideration of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) is informed by the obligations that arise under international legal instruments to which Australia is a signatory including the *International Covenant on Civil and Political Rights* (‘*ICCPR*’) and the *CRPD*. The *ICCPR* sets out the right to a fair trial, the right to be treated with dignity and humanity, the right to equality before the law and the right not to be discriminated against. The *CRPD* sets out the requirement for substantive equality for accused persons with disabilities, including the prohibition of discrimination on the basis of disability, the right to equal recognition before the law, the right to access to justice and the right to liberty and security of the person.³⁷ In understanding the human rights implications of current insanity and fitness to stand trial laws, the TLRI has been assisted by the considerable work that has been undertaken by the Melbourne Social Equity Institute (and associated researchers) in this field.³⁸ Submissions provided by Equal Opportunity Tasmania (‘EOT’), the Mental Health

³³ Tasmania, *Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

³⁴ *Ibid.*

³⁵ P Gooding et al, ‘Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change’ (2017) 40 *Melbourne University Law Review* 816, 819.

³⁶ The identification of these principles was drawn from the VLRC’s report: see VLRC (n 22).

³⁷ *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 14, 10, 26; *CRPD* arts 4, 5, 12, 13 14. For a more detailed discussion of these provisions in the context of fitness to stand trial, see [4.3.3]–[4.3.5].

³⁸ See for example, B McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (Melbourne Social Equity Institute, 2017).

Council of Tasmania and Queensland Advocacy Incorporated also contained detailed consideration of the human rights perspective in this context.

Fairness to an accused person and the right to a fair trial

2.4.6 Fundamental principles underpinning the *Criminal Justice (Mental Impairment) Act 1999* (Tas) are fairness to an accused person and the right to a fair trial. This reflects the historical basis for the requirement that an individual must be fit to stand trial. As observed by the VLRC, ‘this principle is based on the “central precept of our criminal law ... that no person shall be convicted of a crime otherwise than after a trial according to law”’.³⁹ The Australian Law Reform Commission (‘ALRC’) has summarised the justifications for the rule that a person who is unfit to stand trial cannot be tried as follows:

- [to] avoid inaccurate verdicts—forcing the defendant to be answerable for his or her actions when incapable of doing so could lead to an inaccurate verdict;
- [to] maintain the ‘moral dignity’ of the trial process—requiring that a defendant is fit to stand trial recognises the importance of maintaining the moral dignity of the trial process, ensuring that the defendant is able to form a link between the alleged crime and the trial or punishment and is accountable for his or her actions; and
- [to] avoid unfairness—it would be unfair or inhumane to subject someone to the trial process who is unfit.⁴⁰

In his submission to this reference, Jamie Walvisch addresses the basis on which it is appropriate for a person to stand trial for his or her alleged actions. He writes ‘that to properly be able to stand trial, a person needs to be capable of answering for his or her own actions’.⁴¹ Walvisch observes that:

This follows from the nature of the criminal trial, which aims to call those who are accused of perpetrating public wrongs to account. In doing so, the polity addresses the accused as a ‘responsible agent’ — as ‘someone who can be called to answer the charge, and to answer for the wrongdoing if [he or] she is proved to have committed it; as someone who is capable of thus answering...’ If the accused lacks the capacities necessary to understand the charge or to account for his or her actions (e.g., due to a mental illness), then he or she cannot properly engage in the criminal trial, and must not be held responsible.⁴²

2.4.7 In addition to providing that a person who is unfit to stand trial is not subject to the normal trial procedure, the *Criminal Justice (Mental Impairment) Act 1999* (Tas) sets out a process for providing a fair hearing to test the evidence against a person found unfit to stand trial.⁴³ In order to address concerns about the imposition of orders on a person who has not been established to have committed an offence and without the opportunity of an acquittal, the

³⁹ VLRC (n 24) 18 quoting A Mason, ‘Fair Trial’ (1995) 19 *Criminal Law Journal* 7, 7.

⁴⁰ ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report No 124 (2014) 194–195 quoting the VLRC (n 24) 52.

⁴¹ Submission 4, 8 agreeing with the views expressed by Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 41.

⁴² *Ibid* quoting Duff 178.

⁴³ VLRC (n 24) 18.

Criminal Justice (Mental Impairment) Act 1999 (Tas) provides for a special hearing. The Act provides that special hearings are ‘to be conducted so that the onus of proof and standard of proof are the same as in a trial and in all other respects as nearly as possible as if it were a trial of criminal proceedings’.⁴⁴ At a special hearing, the defendant can raise any defence that could be raised if the special hearing were an ordinary trial and the defendant is entitled to give evidence.⁴⁵ In addition, the defendant’s legal representatives are able to challenge jurors.⁴⁶ Following the special hearing, the jury can make a finding that the person is not guilty, which has the same effect as if the accused was acquitted following an ordinary trial process, or a finding that the accused is not guilty by reason of insanity or that a finding cannot be made that the defendant is not guilty of the offence.

Least restrictive alternative

2.4.8 The *Criminal Justice (Mental Impairment) Act 1999* (Tas) expressly states that the court is to apply the principle that ‘restrictions on the defendant’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community’.⁴⁷ As noted by the VLRC:

The principle of least restriction is fundamental to considering the protection of the community, as the rehabilitation of people subject to the CMIA [the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)] through successful community reintegration is the best way to ensure protection of the community, as well as restoring the person to a state in which they can be a functioning member of that community.⁴⁸

This principle applies to the decision of the court in relation to which dispositions to impose on an individual, the conditions of such an order and the decision as to whether to discharge or vary the order. In reviewing forensic orders under the *Mental Health Act 2013* (Tas), the MHT must also have regard to this principle.⁴⁹

Community protection

2.4.9 Connected with the principle of least restrictive alternative is the need for community protection. A key focus of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) is the need to protect community safety, including the need to recognise the interests of victims and family members. Concern to reflect the interests of a person with mental health and cognitive impairment within the criminal justice process and the needs of the community and victims was articulated in the Butler Report:

It is fundamental for all mental health consumers, including forensic patients, to be accorded basic rights and treated with humanity and respect. They should not be discriminated against on the grounds of mental illness. Where, however, a person has

⁴⁴ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 16.

⁴⁵ *Ibid* s 16(3)(c), (d).

⁴⁶ *Ibid* s 16(3)(b).

⁴⁷ *Ibid* s 34.

⁴⁸ VLRC (n 22) 30.

⁴⁹ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(2).

committed a serious criminal act, particularly a violent act, consideration must also be given to the fundamental rights of others to protection and support.⁵⁰

2.4.10 Community protection is reflected in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) with the court being directed to have regard to whether the defendant is, or would if released be, likely to endanger another person or other persons generally.⁵¹ The court is also directed to have regard to the nature of the defendant's mental impairment or other condition or disability,⁵² and a court must not discharge a restriction order, release a defendant or significantly reduce the degree of supervision, unless it has considered expert reports on the condition of the defendant and the possible effect of the proposed action on the behaviour of the defendant.⁵³ In reviewing forensic orders under the *Mental Health Act 2013* (Tas), the MHT must also have regard to these principles.⁵⁴ Community protection is also a factor relevant to the operation of the insanity defence (as discussed at [7.2]).

2.4.11 Related to community protection, a significant factor that is recognised under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) is the rights of victims and family members. Before varying or discharging an order, the *Criminal Justice (Mental Impairment) Act 1999* (Tas) provides that the court must be provided with a report stating the views of the next of kin of the defendant and the victims of the defendant's conduct, so far as is reasonably ascertainable.⁵⁵

⁵⁰ B Butler, *Promoting Balance in the Forensic Mental Health System: Review of the Queensland Mental Health Act 2000* (Final Report, 2006) 28–29 (the 'Butler Report').

⁵¹ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b).

⁵² *Ibid* s 35(1)(a).

⁵³ *Ibid* s 35(2)(a).

⁵⁴ *Ibid* s 37(2).

⁵⁵ *Ibid* s 33(1). However, in relation to supervision orders, the court does not require a report to determine if the defendant should be detained or subjected to a more rigorous form of supervision or to vary in minor respects the conditions on which the defendant was released: s 33(2).

Part 3

Mental Health Impairments and Cognitive Impairments and the Criminal Justice System

3.1 Introduction

3.1.1 Insanity and fitness to stand trial apply to only a small number of individuals compared to the number of defendants with mental health and cognitive impairments overall who are involved in the criminal justice system. This Part provides an overview of mental illness and cognitive impairments and the criminal justice system.

3.2 Overview of mental illness and cognitive impairments and the criminal justice system

3.2.1 Research has concluded that there ‘is strong evidence that people with cognitive and mental health impairments are over-represented throughout the criminal justice system’.⁵⁶ In 2015, the Australian Institute of Health and Welfare reported that 49 per cent of prison entrants had disclosed that they had been told by a doctor, psychiatrist, psychologist or nurse that they had a mental health disorder (including drug or alcohol abuse).⁵⁷ In Victoria, it has been estimated that ‘approximately 55% of offenders at court suffer some form of mental impairment’.⁵⁸ There are also high rates of cognitive impairment identified in individuals in contact with the criminal justice system.⁵⁹ Victorian research has found that people with intellectual disabilities are at increased risk of having a history of criminal charges, particularly for violent and sexual offences.⁶⁰ The Law Council of Australia has observed that ‘[b]etween 50 to 78 per cent of prisoners have experienced a psychiatric disorder compared with 11 per cent of the general population, and 20 per cent of prisoners have an intellectual disability compared with 2 to 3 per cent of the general population’.⁶¹ In this context, Gooding and his

⁵⁶ NSWLRC (n 8) xv; NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report 138 (2013) 6–7. See also Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2013) 11 (‘Law Reform Committee’); VLRC (n 22) 2; K Dean et al, *The Justice System and Mental Health: A Review of the Literature* (2013) 4.

⁵⁷ Australian Institute of Health and Welfare, *The Health of Australia’s Prisoners 2015* (2015) 36.

⁵⁸ Magistrates’ Court Victoria, Submission No IDAJ31 to Law Reform Committee, Parliament of Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers* (2011) 5 quoted in VLRC (n 24) 34.

⁵⁹ Dean et al (n 56) 13; Law Reform Committee (n 56).

⁶⁰ M Nixon et al, ‘Estimating the Risk of Crime and Victimization in People with Intellectual Disabilities: A Data-Linkage Study’ (2017) 52 *Social Psychiatry and Psychiatric Epidemiology* 617, 617.

⁶¹ Law Council of Australia, *The Justice Project: People with Disability*, Consultation Paper (2017) 14 referring to C Jennings, *Triple Disadvantage: Out of Sight, Out of Mind*, Violence Against Women with Disabilities Project (Domestic Violence and Incest Resource Centre, 2nd ed, 2003) 12.

colleagues have written that, '[a]lthough there are significant issues with data collection, [this finding] echo[s] a growing body of international research suggesting people with cognitive disabilities are significantly over-represented ... in the criminal justice systems of Western, high-income countries'.⁶² International research also indicates that the prevalence of mental health impairments in individuals in contact with the criminal justice system is much higher than rates in the general population.⁶³ Bagaric and Edney indicate that 'most studies which have been undertaken to measure the prevalence of mental disorders among criminal offenders suggest that it is very high: ranging from approximately one-third to half of criminal offenders'.⁶⁴

3.2.2 In its submission, Community Legal Centres Tasmania ('CLC Tas') highlighted the growing prison population in Tasmania and the overrepresentation of persons with cognitive or mental health impairments in the criminal justice system. CLC Tas noted that Australian Institute of Health and Welfare research found that '40% of Tasmanian prison entrants are referred to prison mental health services; the second highest rate in Australia'.⁶⁵ As noted below at [3.3.2], there have been concerns raised about whether Risdon Prison has appropriate and adequate provision to meet the mental health care needs of the Tasmanian prisoner population.

3.2.3 Higher involvement in the criminal justice system, however, does not reflect a simple relationship between impairment and crime. Instead, 'it is frequently the product of impairment together with other factors, such as disrupted family backgrounds, family violence, abuse, misuse of drugs and alcohol, and unstable housing'.⁶⁶ Other factors that have been identified include the 'deinstitutionalisation of mentally ill people ... and the limited capacity of community-based mental health services to address the needs of mentally ill offenders'.⁶⁷ Further, as Cunneen et al observe, 'for people with mental and cognitive impairment, the majority of research finds no inherent link between these illnesses or disabilities and crime, but a strong causal link between disability and incarceration'.⁶⁸ Further, the risk of being drawn into the criminal justice system is not spread evenly for those with mental and cognitive impairments, as 'it is only those who are seriously socially disadvantaged (homeless mentally ill persons in particular) and from racialised communities who are likely to be imprisoned'.⁶⁹

3.3 Mental health impairment and cognitive impairment as sentencing factors

3.3.1 Although a review of the relevance of mental health impairment and cognitive impairment as a sentencing factor is beyond the scope of this reference, it is important to be aware of the operation of the sentencing process for several reasons. First, an accused with a

⁶² Gooding et al (n 35) 827.

⁶³ Dean et al (n 56) 5.

⁶⁴ M Bagaric and R Edney, *Sentencing in Australia* (Thomson Reuters, 2016) 347.

⁶⁵ Submission 12, 2 referring to Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* Cat no PHE 207 (2015) Table S55.

⁶⁶ NSWLRC (2013) (n 56) 7; Dean et al (n 56) 8–9.

⁶⁷ J Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System' *Trends and Issues in Criminal Justice* 334 (2007) 2.

⁶⁸ C Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Taylor and Francis, 2013) 91 (references omitted).

⁶⁹ *Ibid* 191.

mental health or cognitive impairment may not rely on the process of fitness to stand trial and/or on the insanity defence but may proceed through the usual criminal justice process. This is a clear alternative and the possible sentence received (if found guilty) compared to the consequences of a finding of unfitness or insanity are likely to weigh into the decision-making process. As discussed below, there has been a marked shift in relation to the types of mental health and cognitive impairments that may mitigate sentencing and this broadening of approach, together with the sentencing discount that a guilty plea attracts, may make a guilty plea a more attractive option from an accused's point of view given that the sentence imposed by the court may be less restrictive than if the person relies on unfitness to stand trial and/or insanity and is placed on a restriction or supervision order.⁷⁰

3.3.2 However, it needs to be borne in mind that the nature of the deprivation of liberty and the treatment services that a person will receive in prison are not the same as a person detained at the Secure Mental Health Unit (SMHU) or a supervision order in the community. Concerns have been raised about the level of services available for prisoners with mental health needs at the Risdon Complex and a taskforce has been established to investigate the issue.⁷¹ As noted by CLC Tas, the 2015 Australian Institute of Health and Welfare report into the health of prisoners in Australia, found that of those Tasmanian prisoners with a mental impairment, 54% are discharged with either no improvement or with deteriorating mental health compared to when they were admitted'.⁷² The Custodial Inspector Tasmania has recently reported that 'current mental health services do not meet the needs of the Tasmanian prison population.'⁷³ Particular issues identified were understaffing, lack of mental health leadership in the prison, no formal service level agreement with the Forensic Mental Health Service, a lack of dedicated spaces that are conducive to the provision of mental health care in the prisons, and the need for ongoing training and support for correctional officers to allow them to 'understand and manage people with mental health issues'.⁷⁴

3.3.3 Another factor that makes it important to be aware of the sentencing approach to mental health and cognitive impairments is that if changes are made to the test for fitness to stand trial (such as the use of supports, accommodations and intermediaries), which would assist people to be fit for trial or if the concept of fit to enter a plea was adopted in Tasmania,⁷⁵ then the approach taken to the accused's impairment at the sentencing stage will be important. Walvisch has argued that 'great care would need to be taken to ensure that the accused person's impairment be properly taken into account in the sentencing process' and that it would be a concern 'if such a system were implemented which assisted an accused to face charges at trial, only to abandon him or her at the sentencing stage'.⁷⁶ In his submission, Walvisch reiterated

⁷⁰ See Appendix 8.

⁷¹ E Bevin, 'New taskforce to probe how mentally ill prisoners are dealt with after Voula Delios's murder', *ABC News*, 2 October 2018 <<https://www.abc.net.au/news/2018-10-02/prisoner-mental-health-focus-of-new-taskforce/10328332>>.

⁷² Submission 12 referring to Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* Cat no PHE 207 (2015) Table S32.

⁷³ Custodial Inspector Tasmania, *Annual Report 2017–18* (2018) 13.

⁷⁴ *Ibid.*

⁷⁵ See discussion in Part 4.

⁷⁶ J Walvisch, submission to VLRC (n 24).

his concern that ‘in implementing such measures, great care should be taken to ensure that the accused person’s impairment is *also* properly taken into account in the sentencing process’.⁷⁷

3.3.4 In Tasmania, as with other jurisdictions, an offender’s mental or cognitive impairment is relevant to the sentencing process.⁷⁸ While it is not known what number of offenders raise mental health impairment or cognitive impairment as mitigating factors at sentencing (or, as discussed at [3.2], the number of offenders with mental health impairment or cognitive impairments who are involved in the criminal justice system), it is likely that this may affect a significant proportion of offenders. Anecdotally, it appears that there has been an increase in the number of sentencing submissions in Tasmania that rely on expert reports outlining impairment. This raises complex issues. Bagaric and Edney have written that ‘the sentencing of mentally impaired offenders is one of the most complex and acute issues in the criminal justice system’.⁷⁹

3.3.5 The difficulty that arises in sentencing offenders with mental health or cognitive impairment stems from the number of offenders who suffer some form of mental or cognitive impairment and the need to reconcile the tension between two competing considerations: the nature of the condition that may reduce the moral culpability of the offender that may justify a more lenient sentence on the one hand, and, on the other, the nature of the condition that may indicate that the offender is ‘a more intractable subject for reform than one who is not so affected or even as one who is so likely to offend again that he [or she] should be removed from society for a lengthy or indeterminate period’.⁸⁰ As recognised in *Veen v The Queen*:⁸¹

a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.⁸²

Accordingly, in the circumstances of a case, the nature of the offender’s mental or cognitive impairment may be such that protection of the community carries greater weight in the exercise of the sentencing discretion. This involves balancing the offender’s culpability and the need to protect the community. This complexity has been recognised by the Tasmanian Court of Criminal Appeal.⁸³

3.3.6 More recently, the principles set out by the Victorian Court of Appeal in *R v Verdins*⁸⁴ have been adopted in Tasmania in relation to the mitigation of sentence.⁸⁵ These principles

⁷⁷ Submission 4, 12.

⁷⁸ See Bagaric and Edney (n 64) 347–367.

⁷⁹ Ibid 347.

⁸⁰ *Channon v The Queen* (1978) 33 FLR 433, 436–437 cited in *Acting Director of Public Prosecutions v CBF* [2016] TASCCA 1 [42] (Porter J).

⁸¹ (1988) 164 CLR 465.

⁸² Ibid 476–477 (Mason CJ, Brennan, Dawson and Toohey JJ).

⁸³ *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1.

⁸⁴ (2007) 16 VR 269, 276 (Maxwell P, Buchanan and Vincent JJA).

⁸⁵ *Startup v Tasmania* [2010] TASCCA 5; *Groenewege v Tasmania* [2013] TASCCA 7; *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1.

recognise that an offender’s impaired mental functioning, whether temporary or permanent, is relevant to sentencing in at least six ways:

1. to reduce the offender’s moral culpability, thereby affecting the punishment that is just in the circumstances and the importance of denunciation as a sentencing consideration;
2. to influence the kind of sentence that should be imposed, or the conditions under which it should be served;
3. to moderate or eliminate the need for general deterrence as a sentencing consideration;
4. to moderate or eliminate the need for specific deterrence as a sentencing consideration;
5. to make a sentence weigh more heavily on the offender than on a person in normal health, thereby affecting the determination of a proportionate sentence; or
6. to create a serious risk of imprisonment having a significant adverse effect on the offender’s mental health, suggesting the need to reduce the sanction.⁸⁶

The decision in *Verdins* was a change from the pre-existing position ‘that only “[s]erious psychiatric illnesses” needed to be taken into account by a sentencing judge,⁸⁷ and so expanded the relevance of mental impairment as a factor relevant to sentencing. However, following *Verdins*, the extent to which the principles applied to personality disorders was unclear and subsequent decisions were inconsistent in this regard.⁸⁸

3.3.7 The application of the *Verdins* principles to personality disorders was considered by the Victorian Court of Appeal in *Director of Public Prosecutions v O’Neill*.⁸⁹ In this case, the court indicated that the *Verdins* principles did not apply to the personality disorder that affected the accused (dependent personality disorder) but indicated that this did not mean that the ‘personality disorder should be completely disregarded by the sentencing judge’.⁹⁰ There are also unresolved issues in relation to the application of the *Verdins* principles as it is unclear whether the judgment was intended to exclude all personality disorders (the broad interpretation) or only those that were similar in some way to dependent personality disorder (narrow interpretation).⁹¹ This ambiguity has not been resolved by subsequent higher court cases in other jurisdictions.⁹² However, in Tasmania it has been observed that the Court of Criminal Appeal appeared to apply a narrow interpretation (that is, excluding only personality disorders that are similar to dependent personality disorder and not all personality disorders)

⁸⁶ See Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Lawbook, 3rd ed, 2014) 289–298; Bagaric and Edney (n 64) 348–367; See D Gee and J Ogloff, ‘Sentencing Offenders with Impaired Mental Functioning: R v Verdins, Buckley and Vo [2007] at the Clinical Coalface’ (2014) 21 *Psychiatry, Psychology and Law* 46 for further discussion of these principles.

⁸⁷ J Walvisch and A Carroll, ‘Sentencing Offenders with Personality Disorders: A Critical Analysis of DPP (Vic) v O’Neill (2017) 41 *Melbourne University Law Review* 417, 422.

⁸⁸ Ibid 423–424.

⁸⁹ [2015] VSCA 325.

⁹⁰ Walvisch and Carroll (n 87) 425.

⁹¹ Ibid 426.

⁹² Ibid 427.

and so this is the interpretation of the law that applies in Tasmania.⁹³ It is also clear that a further limitation of the *Verdins* principles exists in relation to self-induced impairment (such as a mental impairment resulting from drug or alcohol use).⁹⁴

3.3.8 Despite this uncertainty, it is clear that the court's view was that a rigorous assessment of the evidence was required. The court expressed the view that it was inappropriate to apply a mechanistic approach such that if an offender suffered from any impaired mental functioning the *Verdins* principles were automatically attracted. Instead, the court stated that careful consideration should be given to the evidence to determine whether the offender suffered from an impairment of mental functioning, and if so, whether there was a connection between the impairment and the person's moral culpability or the need for general and specific deterrence. This meant that there needed to be a 'realistic connection' between the impairment and the offence or that it 'caused or contributed' to the offence or was 'causally linked' to it.⁹⁵ Further, it must be shown that the mental impairment affected the offender's ability to appreciate the wrongfulness of the conduct, or obscured his or her intent to commit the offence, or impaired his or her ability to make calm and rational choices or to think clearly at the time of the offence.⁹⁶ The ability of the court to make this rigorous assessment is clearly dependent on the nature of the information contained in the expert reports received by the court. Further, the information contained in the expert report, in more serious cases of mental or cognitive impairment, may trigger an exploration of whether the appropriate pathway for the offender is an order under the *Sentencing Act 1997* (Tas) Part 10 (restriction, supervision and treatment orders) rather than a sentencing order under ss 7(a)–(h) of the *Sentencing Act 1997* (Tas).

3.3.9 Under the *Sentencing Act 1997* (Tas) Part 10, an offender who is found guilty of an offence may be sentenced to a restriction order, a supervision order or a treatment order in cases where the offender appears to be suffering from a mental illness.⁹⁷ In a case where a person is found guilty, the court makes a restriction order upon receiving a report from the Chief Forensic Psychiatrist, or another psychiatrist, that the person appears to be suffering from a mental illness that requires treatment, that such treatment can be obtained by admission to and detention in a secure mental health unit, that the person should be admitted as a patient for the person's own safety and the Chief Forensic Psychiatrist recommends the proposed admission.⁹⁸ There is also power for the court to make a treatment order or a supervision order, subject to the receipt of an expert report.⁹⁹ In its research, the TLRI identified nine cases in the Supreme Court between 2001 and 2016 where an offender was sentenced under the *Sentencing Act 1997* (Tas) to either a sentence of imprisonment combined with a supervision order (five cases) or imprisonment combined with a restriction order (two cases) or a supervision order (two cases). In eight cases, the offender entered a plea of guilty and in one case, the offender was found guilty by a jury of one offence (the issue was whether the offender was guilty of attempted murder or attempted wounding) and entered a plea of guilty to another charge.

⁹³ Ibid 428.

⁹⁴ Bagaric and Edney (n 64) 312.

⁹⁵ *Director of Public Prosecutions v O'Neill* [2015] VSCA 325, [74] as summarised in *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1, [39] (Porter J).

⁹⁶ *Director of Public Prosecutions v O'Neill* [2015] VSCA 325, [75] as summarised in *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1, [39] (Porter J).

⁹⁷ See discussion at [2.3.6].

⁹⁸ *Sentencing Act 1997* (Tas) s 75(1).

⁹⁹ Ibid ss 75(1), (2A).

3.3.10 The other context in which an offender’s mental condition at the time of the offence is relevant to the imposition of sentence, and, again, the nature of the information contained in any reports provided to the court is central to the exercise of judicial discretion, is in making a dangerous criminal declaration under the *Sentencing Act 1997* (Tas) s 19. The dangerous criminal provisions in the *Sentencing Act 1997* (Tas) Part 3, Division 3 allow the court to make a dangerous criminal declaration which provides for indefinite detention and so an offender is ineligible for release until the declaration is discharged.¹⁰⁰ One of the pre-conditions to making an order is the requirement that the judge is of the opinion that the declaration is warranted for the protection of the public.¹⁰¹ Section 19(2) sets out a non-exhaustive list of factors that are relevant to the making of the declaration including medical opinion. It has been stated that the ‘existence of a mental disorder making a convicted person prone to commit random and impulsive acts of violence would be a most material factor in assessing whether to make a declaration’.¹⁰² The interaction of an offender’s mental health and the dangerous criminal provisions can be seen in the case of *McCrossen v Tasmania*,¹⁰³ where the applicant’s complex mental health state was exacerbated by his indefinite detention and long history of incarceration. Expert reports to the court highlighted the rehabilitative benefit to the offender that would result from his being discharged from the Dangerous Criminal Declaration and instead treated in the secure mental health unit under the *Mental Health Act 2013* (Tas) as an involuntary civil patient. This was the approach to the offender’s rehabilitation that was taken by Wood J in making an order discharging the declaration:

What this case has demonstrated is that the indeterminate nature of the sentence was in itself crushing and counterproductive in terms of the applicant’s rehabilitation. Since there has been talk of the order being lifted, the applicant has made significant progress in a short time. To offset these crushing effects, a prison system would have to be vigilant and have a committed and co-ordinated approach to an individual’s rehabilitation. Questions may be asked about whether more could have been done from the beginning by the prison system to promote the applicant’s rehabilitation in a committed way which recognised the applicant’s profound difficulties and mental health condition. His potential for reform cannot be doubted, noting the marked significant improvement away from the prison during his admissions to the Wilfred Lopes Centre, particularly in 2009.

3.3.11 It may be that in cases where the basis for the need for community protection arises from the nature of the offender’s mental impairment, a more appropriate pathway for the offender that will protect the community and allow the offender to obtain appropriate treatment may be found in the forensic orders contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) rather than in indefinite detention as a dangerous criminal under the *Sentencing Act 1997* (Tas). This point was made clearly by the High Court in *Chester v The Queen*,¹⁰⁴ where the court expressed the view that indefinite detention as a dangerous criminal should not ‘be contemplated when in due course it may be more appropriate that there be a justice’s order ...

¹⁰⁰ See TLRI, *A Comparative Review of National Legislation for the Indefinite Detention of ‘Dangerous Criminals’*, Research Paper No 4 (2017).

¹⁰¹ *Sentencing Act 1997* (Tas) s 19(1)(d).

¹⁰² K Warner, *Sentencing in Tasmania* (Federation Press, 2nd ed, 2002) 221.

¹⁰³ [2018] TASSC 49.

¹⁰⁴ (1988) 165 CLR 611.

for reception into and detention in an approved hospital of a person suffering from mental disorder'.¹⁰⁵

3.3.12 On this basis, in the Issues Paper the Institute identified that a possible reform may be to amend the dangerous criminal provisions contained in the *Sentencing Act 1997* (Tas). The proposed reform provides a statutory trigger for judicial consideration of the appropriateness of making an order for referral for assessment with a view to making a restriction, supervision or treatment order under the *Sentencing Act 1997* (Tas) Part 10, rather than making a dangerous criminal declaration. The Issues Paper asked:

Should there be an amendment to the dangerous criminal provisions contained in the *Sentencing Act 1997* (Tas) to provide a statutory trigger for judicial consideration of the appropriateness of making an order under the *Sentencing Act 1997* (Tas) Part 10 instead of a dangerous criminal declaration?

3.3.13 Five submissions addressed this issue with two opposed to an amendment to the dangerous criminal provisions in the *Sentencing Act 1997* (Tas) to provide a statutory trigger for judicial consideration of the appropriateness of making an order under the *Sentencing Act 1997* (Tas) Part 10 instead of a dangerous criminal declaration.

3.3.14 The DPP and O'Connell both opposed such an amendment but provided different reasons for their opposition. In her submission, O'Connell opposed any change to the *Sentencing Act 1997* (Tas) provisions on the basis that 'the premise that there is a correlation between dangerous criminals and mental illness is a discriminatory one'. Further, O'Connell's view was that 'any supervision by the Chief Forensic Psychiatrist should be limited to cases where the defendant has a major mental illness'.

3.3.15 The DPP opposed an amendment to provide a statutory trigger because he considered it to be unnecessary. He submitted that if an order under the *Sentencing Act 1997* (Tas) Part 10 was appropriate (instead of a dangerous criminal declaration), this is likely to be readily apparent at the time of sentencing and the court would have the benefit of the expert reports provided at this time to facilitate the making of the appropriate sentencing order.

3.3.16 In contrast, Walvisch supported an amendment to the dangerous criminal provisions to:

make it clear that mental health problems per se do not provide a basis for making a 'dangerous criminal' declaration, even if those mental health problems are likely to result in violence; but that a consistent failure to manage one's mental health, despite known risks of violence, may be taken into account (along with the reasons for that failure).

He considered that it was unjust and highly stigmatising to label an individual a 'dangerous criminal' where the 'dangerousness' arises from mental health problems over which the person had no control. Further, in circumstances 'where the alleged "dangerousness" arises from mental health problems over which the offender has no control, appropriate treatment is more likely to reduce any danger to the public than indefinite imprisonment'. In addition, making a dangerous offender order on the basis of a person's mental illness appears to be contrary to Australia's international human rights obligations on the basis that 'it discriminates against

¹⁰⁵ Ibid 617–618. See also at 619.

offenders based on their mental health’. However, Walvisch considered that it may be appropriate to label individuals as ‘dangerous criminals’ if they consistently fail to manage their own mental health for insufficient reasons. Sufficient reason would include ‘a lack of access to appropriate, affordable mental health treatment; and a lack of insight into one’s mental health problems or the risks it poses’.

3.3.17 EOT directly supported amendment to the *Sentencing Act 1997* (Tas) to include a statutory trigger for judicial consideration of the appropriateness of making an order for referral for assessment and the subsequent making of a restriction, supervision or treatment order. In EOT’s view, this is consistent with reforms proposed by the TLRI in its consideration of the dangerous criminal legislation¹⁰⁶ and Article 25 of the *CRPD* which has the effect that people with mental illness should have access to care, treatment and rehabilitation where this is required.

3.3.18 The Institute agrees that it is stigmatising and discriminatory to perpetuate a stereotype of people who experience mental illness as violent or to conflate mental illness with dangerousness.¹⁰⁷ Further, as noted at [3.2.3], there is a complex relationship between mental illness or impairment and crime with research showing that there is no necessary link between mental and cognitive impairment and crime but rather between disability and incarceration. The Institute also agrees that individuals with mental impairment who are sentenced by the court should have access to appropriate treatment and that the court should give consideration to whether treatment in a health setting is more appropriate than imprisonment. In asking for feedback about the interaction of the dangerous offender provisions and Part 10 of the *Sentencing Act 1997* (Tas) (which provides for the imposition of forensic orders or treatment orders), the Institute did not intend to suggest that individuals with mental illness were more likely to be dangerous offenders or, conversely, could not be the subject of a dangerous criminal declaration. Rather, the Institute was concerned to ensure that courts give appropriate consideration to legal responses other than declaring people with mental illnesses to be dangerous criminals under the *Sentencing Act 1997* (Tas) s 19. However, based on the feedback received from the DPP, the Institute agrees that an amendment to this effect is unnecessary given the factors relevant to the court’s sentencing decision and the matters courts take into account in deciding whether to make dangerous criminal declarations.

3.3.19 This Report is not a review of the dangerous offender provisions in general, however, the submissions received from ForensiClinic and EOT made observations in relation to the need to change the dangerous criminal provisions on the basis that the provisions as a whole were in need of reform. For example, ForensiClinic wrote that:

The current legislation is limited in scope, and does not easily allow for a clear method of determining when applications should be made, and for whom. The legislation also does not allow for risk management processes at the point of removal of the declaration.

The DPP also suggested that amendment may be necessary to facilitate the making of a supervision order for an offender who has been declared to be a dangerous criminal in

¹⁰⁶ See TLRI (n 100).

¹⁰⁷ See M Varheny et al, ‘Violence and Mental Illness: What is the True Story?’ (2016) 70(3) *Journal of Epidemiology and Community Health* 223.

circumstances where he or she has subsequently developed mental health issues while in prison, which would prevent the order being discharged.

3.3.20 As noted, the Institute has previously reviewed the dangerous criminal provisions in the *Sentencing Act 1997* (Tas) Part 3, Division 3 and made 10 recommendations for substantial reforms to address problematic aspects of the indefinite detention regime. These include recommendations in relation to a legislative statement of the factors to be considered in determining whether to discharge a declaration and the ability to impose pre- and post-release conditions on discharge. Accordingly, the Institute reiterates its previous observations in relation to the need to reform.

Recommendation

1. It is unnecessary to amend to the dangerous criminal provisions contained in the *Sentencing Act 1997* (Tas) to provide a statutory trigger for judicial consideration of the appropriateness of making an order under the *Sentencing Act 1997* (Tas) Part 10 instead of a dangerous criminal declaration.

3.4 Reliance on unfitness to stand trial and insanity in Tasmania

3.4.1 The TLRI has sought to identify information in relation to cases where unfitness to stand trial and insanity were raised by using a number of sources:

- data obtained from the Director of Public Prosecutions Annual Report;
- data obtained from the MHT;
- data obtained from the Supreme Court;
- a survey of sentencing cases using a search of the TLRI database and the online sentencing database at the Inglis Clark Library;
- data obtained from the Department of Justice.

Supreme Court

3.4.2 Table 3.1 sets out information from the Office of the Director of Public Prosecutions ('DPP'). It shows that in the period 2006–2007 to 2017–2018, there were 31 people who were found insane or unfit to stand trial in the Supreme Court. These data also show that such cases only account for a small number of cases dealt with in the Supreme Court when compared with cases that are finalised by way of a sentence following conviction (4347 cases). In this period, individuals found unfit to stand trial or insane made up 0.7 per cent of cases.¹⁰⁸

¹⁰⁸ It is noted that in Western Australia in the period 1 July 2010 to 30 June 2015, 0.03 per cent of matters finalised in the adult courts involved accused who were found either mentally unfit to stand trial or not guilty by reason of unsoundness of mind: Department of the Attorney-General, Western Australia, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996*, Final Report (2016) 27. In Victoria, it was noted that insanity and fitness

Table 3.1: Person tried, Supreme Court

Year	Convictions	Found insane or unfit to plead
2006–7	413	2
2007–8	408	3
2008–9	512	9
2009–10	430	2
2010–11	406	2
2011–12	392	3
2012–13	342	5
2013–14	267	2
2014–15	306	0
2015–16	274	0
2016–17	284	2
2017–18	313	1

Source: DPP Annual Reports

3.4.3 The TLRI conducted a survey of Supreme Court sentencing cases using the TLRI sentencing database and a sentencing search on the Inglis Clark Library website for the period 2005–June 2018. This was supplemented by details provided by the Supreme Court and the MHT. This study located 45 cases where an individual was found unfit to stand trial and/or not guilty by reason of insanity.¹⁰⁹ There were 17 cases where the person was unfit to stand trial and 27 cases where the person was fit for trial but found not guilty by reason of insanity at trial. In one case, it was not clear whether the person was unfit to stand trial and/or not guilty by reason of insanity.

3.4.4 Table 3.2 shows the most serious offence for those persons identified in this survey of sentencing cases with the offences ranging from murder to being found prepared for the commission of a crime.¹¹⁰

Table 3.2: Insanity or unfit to stand trial, 2005–June 2018, by most serious offence

Offence category	No of cases
Homicide and related offences	3
Acts intended to cause injury	17
Sexual assault and related offences	4
Property damage	9
Robbery/burglary	3
Related weapons and explosive offences	2
Public order offences	1
Harassment (stalking)	2
Threatening behaviour	2
Driving offences	2

to stand trial cases made up only approximately one percent of the total cases that resulted in a sentence or a CMIA order in the higher courts: VLRC (n 22) 15.

¹⁰⁹ There were also three cases identified where it was not possible to determine if the order made under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) was a result of a sentence imposed by the court or finding of unfitness or insanity.

¹¹⁰ The offence categories are taken from the Australian Bureau of Crime Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (2011, 3rd ed).

Magistrates Court

3.4.5 Table 3.3 sets out information provided by the Department of Justice in relation to the number of findings of not guilty by reason of insanity and unfit to stand trial in the Magistrates Court from 2013–2018.¹¹¹ It shows that only a small number of individuals successfully rely on insanity or are found ‘not guilty’ (that is, a finding cannot be made that the accused is not guilty) following a finding of unfitness to stand trial.

Table 3.3: Magistrates Court 2013–14 to 2017–March 2018

	2013–14	2014–15	2015–16	2016–17	2017–Mar 2018
No Finding – Mental Impairment	4	0	2	2	4*
Not Guilty – Insanity	1	2	1	3	2
Total	5	2	3	5	6

*includes one Youth Justice case

Using online search databases, the TLRI found three cases in the Magistrates Court, where the defendant relied on the defence of insanity.¹¹² In two of these three cases, the defendant was found not guilty by reason of insanity.¹¹³ These cases involved assault and destroying property¹¹⁴ and dangerous driving, failing to stop after being involved in a crash and evade police, as well as common assault.¹¹⁵

3.4.6 These numbers are very low. However, although difficult to capture in official data, anecdotally, it is reported that there are a significant number of defendants in the Magistrates Court who have mental health or cognitive impairment problems. Some of these individuals may participate in the Diversion List, and many others proceed through the ordinary criminal process. In addition, the data do not indicate those who have not successfully relied on insanity or been found fit to stand trial (when the issue of fitness was raised) and those who are unfit to stand trial and are subsequently acquitted at the special hearing.

¹¹¹ Information provided by Betty Evans, Department of Justice, email 2 April 2018.

¹¹² These cases were identified using a search for Magistrates Court decisions on the Australasian Legal Information Institute (AUSTLII database).

¹¹³ In *Brazendale v O* [2008] TASM 3, the defendant unsuccessfully relied on the defence of insanity in relation to charges of stalking and assault with indecent intent.

¹¹⁴ *McKenna v Smith* [2014] TASM 11.

¹¹⁵ *Bonde v Weate* [2017] TASM 11.

Part 4

Unfitness to Stand Trial: Making an Assessment of Unfitness

4.1 Introduction

4.1.1 Unfitness to stand trial relates to the issue whether an accused is able to participate in the trial process, and, as the Institute has previously written, this ability ‘fundamentally determine[s] whether that person can gain access to justice and whether justice can in fact be done’.¹¹⁶ Accordingly, the basis used to make a finding of fitness or unfitness will have significant consequences on an individual level. The aim should be to maximise an individual’s participation in the trial and provide a separate process for those who are not able to make decisions in their own trials even with the provision of appropriate accommodations and supports.

4.1.2 Unfitness to stand trial is concerned with an assessment of the accused’s ability at the *time of the trial* rather than at the time of the offence. There is a presumption that those accused of committing crime are fit to stand trial unless it is established that they are unfit to stand trial. This is determined on the balance of probabilities.¹¹⁷ The issue of fitness may be raised by the prosecution, the defendant or the court (on its own initiative) and may be raised at any time after the accused has been charged, including after the trial has commenced.¹¹⁸ In order for a court to conduct an investigation into a defendant’s fitness to stand trial, there must be a real and substantial question in relation to their fitness.¹¹⁹ In circumstances where evidence of a person’s fitness to stand trial is raised, a judge can only accept a plea of guilty if satisfied that no reasonable jury, properly instructed, could find the person unfit to stand trial.¹²⁰

4.1.3 The Terms of Reference request that the TLRI consider whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) operates justly, effectively and consistently with the principles that underlie it. In particular, the TLRI has been asked to consider whether the process of determining fitness to stand trial can be improved. There are several aspects to this question including the test that is used to make a finding of unfitness, the procedure that is used to determine unfitness and the nature of the special hearing that follows a finding of unfitness. These are all interrelated issues that need to be addressed in order to facilitate access to justice for individuals with mental health and cognitive impairments, as well as to ensure that the community is appropriately protected. Part 5 of this Report makes recommendations about the process by which a determination of fitness to stand trial is made and Part 6 makes

¹¹⁶ TLRI (n 1) vi–vii.

¹¹⁷ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 9.

¹¹⁸ *Ibid* s 10.

¹¹⁹ *Ibid* s 10(5).

¹²⁰ *Heapes v The Queen* [2000] TASSC 77, [17] (Evans J) citing *Kesavarajah v R* (1994) 181 CLR 230, 245 and *R v Enright* [1990] 1 Qd R 563.

recommendations for the conduct of special hearings. This Part makes recommendations in relation to the test used to determine fitness to stand trial. The Institute stresses that all these recommendations need to be viewed as a package of reforms that work together to address concerns about the current approach to fitness to stand trial.

4.1.4 This Part addresses a key component of the process for determining fitness to stand trial — the test applied by the court when determining whether defendants are fit or unfit to stand trial. This Part sets out the current test for determining unfitness to stand trial in Tasmania and considers options for reform set out in the Issues Paper as well the submissions received during the consultation process.

4.1.5 The current focus of the fitness test is on a person’s cognitive capacity or intellectual ability to understand features of the criminal trial. Based on submissions received and its research, the TLRI is of the view that this test is deficient in that it does not give adequate recognition to whether the accused can participate meaningfully in his or her trial. The answer to this question necessarily depends on two key interrelated matters, first whether the accused has the capacity to make decisions in relation to key elements of the trial and, second, whether the necessary conditions exist or can be created to enable him or her to exercise that decision-making capacity. Accordingly, in this Part, the Institute recommends a shift from the current focus on cognitive capacity to a supported decision-making approach based on facilitating an individual’s ability to exercise his/her decision-making capacity and effectively participate in the trial. The determination of an accused’s decision-making capacity needs to be clearly grounded in relevant determinative criteria. Consequently, what these criteria are should also be determined and specified in reforming the fitness test. The purpose of such criteria is to guide courts when applying what might otherwise appear to be a relatively vague and subjective test. The Institute makes recommendations in this regard. In summary, the approach recommended by the Institute has three interrelated components:

- the reformulation of the fitness test to replace the current ‘Presser’ test with a decision-making test;
- the specification of guidance/criteria in the application of that test to give it content and avoid subjectivity in its application;
- a requirement for assessment of the need for and, where necessary, creation of the conditions that optimise and/or enable people to exercise their decision-making capacity and therefore participate in trials. These might include making necessary accommodations in court processes and/or providing decision-making supports through the use of communication assistants/intermediaries.

4.1.6 These three components work together. Accordingly, in the discussion that follows, this Report examines these three interlocked components of the recommended revised test: the test itself, the criteria underpinning its application and the need to assess available accommodations and supports that may create conditions that optimise and render an accused’s decision-making capacity a reality.

4.2 Reforming the test for determining unfitness to stand trial: the current test

Tasmania

4.2.1 The *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 sets out the test to determine if a person is unfit to stand trial:

- (1) A person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired or for any other reason, the person is –
 - (a) unable to understand the nature of the charge; or
 - (b) unable to plead to the charge or to exercise the right of challenge; or
 - (c) unable to understand the nature of the proceedings; or
 - (d) unable to follow the course of the proceedings; or
 - (e) unable to make a defence or answer the charge.
- (2) Notwithstanding subsection (1)(e), a person is not unfit to be tried if the only reason that the person is unable to make a defence or answer a charge is that he or she is suffering from memory loss.

4.2.2 These criteria reflect the *Presser* criteria, set out in the Victorian case of *R v Presser*,¹²¹ where seven factors were identified as relevant to the determination of fitness:

- ability to understand the charge;
- ability to plead to the charge and exercise the right to challenge jurors;
- ability to understand the nature of the proceedings;
- ability to follow the course of the proceedings in broad terms;
- ability to understand the substantial effect of any evidence;
- ability to make a defence or answer to the charge;
- ability to instruct counsel.

In order to be unfit to stand trial, an accused only needs to satisfy one of the criteria, set out above, as each criterion stands alone.

4.2.3 In Tasmania, there is little case law on the operation of the test. However, guidance can be sought from other jurisdictions as indicated in the following extract from the DPP's prosecution guidelines:

Where fitness to stand trial is an issue requiring investigation, the principles discussed by Smith J in *R v Presser* [1958] VR 45 at 48; [1958] ALR 248 cited with approval in

¹²¹ [1958] VR 45.

Ngatayi v R (1980) 147 CLR 1 at 8, are of consequence when considering the criteria laid out in s 8:

‘A mere lack of formal education, a mere lack of familiarity with court forms and procedures, would not, of course, render a man unfit to be tried, but he may, upon the test of fitness for the purposes of the section that has been laid down in the cases, be held unfit to be tried when he is far from being insane in the colloquial sense. Dixon, J, as he then was, mentioned in *Sinclair v R* (1946) 73 CLR 316, that it does not seem to have been noticed by the text writers how high a degree of intelligence the test might demand if it were literally applied. But he is not there, in my view, suggesting that it should be applied in any extreme sense, or in any over-literal sense. It needs, I think, to be applied in a reasonable and commonsense fashion. And the question, I consider, is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him.

He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.’¹²²

4.2.4 Although there is no express reference in the Tasmanian provision to the requirement that the accused be able to give evidence, provide an account of his or her version of the facts or provide instructions to a legal practitioner, these requirements may be implicit in the requirement that the accused be able to make a defence.¹²³ Similarly, there is no requirement in the Tasmanian provision for a person to understand the substantial effect of the evidence. However, the requirement that a person follow the course of the proceedings has been interpreted to mean that the defendant is able to follow the evidence: ‘The accused must have at least a rudimentary understanding of the reception of evidence adverse to him, whether orally or by exhibits’.¹²⁴

4.2.5 The DPP’s guidelines also recognise the need for the court, in determining a person’s fitness to stand trial, to take account of any accommodations that can be made to enable the person to participate in the trial process. These include such accommodations as ‘regular

¹²² Director of Public Prosecutions (DPP), *Prosecution Policy and Guidelines*, 119–120.

¹²³ *R v Chanthasaeng, Songsagkong* [2008] NSWCS 122, [48] (Nicolson SC DCJ).

¹²⁴ *Ibid* [47].

breaks, slowing the pace of proceedings, monitoring the type and length of questioning of witnesses, including the defendant, and allowing for adjournments where necessary'.¹²⁵ This approach reflects Australian decisional law that accepts the availability of support as a relevant factor in the determination of whether someone is unfit to stand trial. In *R v Fisher*,¹²⁶ Refshauge J stated that:

Where steps can reasonably be taken to accommodate the difficulties of the accused, including adjournments, 'one-on-one' assistance to follow the proceedings, insistence on brief, clear questions to the accused if he or she is examined on oath, an opportunity for the accused to narrate his or her version of events without interruption and the like, the implementation of these will mean the accused is not unfit to plead: *Kesavarajah v The Queen* (1994) 181 CLR 230 at 246; 111, *R v Smith* [2008] NSWDC 23 at [36]; *R v Tuigamala* [2007] NSWSC 493 at [22].¹²⁷

However, the requirement to take into account accommodations or supports is not yet recognised in Tasmanian legislation as a matter relevant to an assessment of fitness to stand trial.

The position in other jurisdictions

4.2.6 All Australian jurisdictions have legislation dealing with fitness to stand trial, and although there are some variations, the criteria are broadly similar to the *Presser* criteria (as set out at [4.2.2]).¹²⁸ This is also the approach in England and Wales and New Zealand.¹²⁹ These factors focus on an accused's cognitive capacity, particularly the capacity to 'understand, comprehend and assist counsel, in order to allow a satisfactory level of participation in the court process'.¹³⁰ The test is not concerned with whether a person is able to act in their own best interests or engage in rational decision-making.¹³¹ However, it is noted that the position in South Australia provides an exception to this in that the test for fitness set out in the *Criminal Law Consolidation Act* (SA) s 269H provides that the accused is mentally unfit to stand trial if his or her mental processes are so disordered or impaired that he or she is unable to:

- understand, or respond *rationally*, to the charge or allegations on which the charge is based; or
- exercise or give *rational* instructions about the exercise of procedural rights (such as, for example, the right to challenge jurors); or
- understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.¹³²

¹²⁵ DPP Guidelines (n 122) 120.

¹²⁶ (2011) 210 A Crim R 199.

¹²⁷ *Ibid* [29].

¹²⁸ VLRC (n 22) 68.

¹²⁹ *Ibid*.

¹³⁰ A White, S Meares and J Batchelor, 'The Role of Cognition in Fitness to Stand: A Systematic Review' (2014) 25 *Journal of Forensic Psychiatry and Psychology* 77, 77.

¹³¹ NSWLRC (2013) (n 56) 17; Law Commission of England and Wales, *Unfitness to Plead: A Consultation Paper*, Consultation Paper No 197 (2010) 59–60.

¹³² Emphasis added.

4.3 The need for reform

4.3.1 Law reform bodies in several jurisdictions have considered the need to reform fitness to stand trial tests and procedures, identifying a number of problems in their formulation and application. The ALRC has summarised the key criticisms of the test as follows:

- (1) The test, by focusing on intellectual ability, generally sets too high a threshold for unfitness and is inconsistent with the modern trial process. There is undue emphasis on a person's intellectual ability and too little focus on a person's decision-making ability.¹³³
- (2) The test is difficult to apply to individuals with mental illness because the criteria were not designed for them.¹³⁴
- (3) A defendant may not be unfit to stand trial even where the court takes the view that he or she is incapable of making decisions in his or her own interests.¹³⁵

In relation to the last two matters, the following illustration is provided by the Law Commission of England and Wales:

A defendant, A (who has paranoid schizophrenia), has a good understanding of the trial process and understands the purpose of the proceedings and roles played by the different parties. A is also able to instruct his representative and could give evidence. However, as a result of his highly delusional state he is convinced that if he pleads not guilty he will be destroyed by the devil. He has no insight into his condition and insists on pleading guilty to an assault charge even though the evidence suggests that he may have acted in lawful self-defence. Under the current test the defendant would be likely to be found fit to plead.¹³⁶

This example echoes the concerns of the VLRC that a person with a mental illness 'may have a factual understanding of the nature of the trial. However, their delusional beliefs may hinder their capacity to make decisions concerning their trial, or to make such decisions in an appropriate manner'.¹³⁷

4.3.2 Some criticisms of fitness to stand trial relate to the practical operation of the current test with concerns being expressed about its arbitrary and subjective application.¹³⁸ Criticisms in this regard have focused on the difficulties facing experts in assessing an accused's fitness to stand trial resulting from the vagueness of most legal formulations of the test and the opaque nature of the assessment process.¹³⁹ Freckelton contends that 'decision-making in this area is effectively delegated to clinical evaluators making low visibility and essentially unreviewed

¹³³ ALRC (n 40) [7.14], [7.18]; Department of the Attorney-General, Western Australia (n 108) 46; VLRC (n 22); Law Commission of England and Wales, *Unfitness to Plead Volume 1: Report* (Law Com No 364, 2016) 61; Northern Ireland Law Reform Commission, *Unfitness to Plead*, Report (2013) 27–28.

¹³⁴ ALRC (n 40) 136; VLRC (n 22) 70; Law Commission of England and Wales (n 131) 27, 32; Law Commission of England and Wales (n 133) 61, 64.

¹³⁵ Law Commission of England and Wales (n 131) 28; Law Commission of England and Wales (n 133) 61–62.

¹³⁶ Law Commission of England and Wales (n 133) 62.

¹³⁷ VLRC (n 22) 70.

¹³⁸ I Freckelton, 'Rationality and Flexibility in Assessment of Fitness to Stand Trial' (1996) 19(1) *International Journal of Law and Psychiatry* 39, 54–55; VLRC (n 22) 99; Law Commission of England and Wales (n 133) 61.

¹³⁹ Freckelton (n 138) 49.

decisions pursuant to a vague open-textured standard'.¹⁴⁰ Research conducted in other jurisdictions has identified similar concerns about the assessment process undertaken by experts. In England and Wales, empirical research has found that there is considerable variability in clinicians' assessments and a failure by some clinicians to address all the criteria for unfitness to stand trial.¹⁴¹ Comparable findings have been made in Australia. For example, White et al have found, in a study of assessment reports in New South Wales, that 'there was significant variability in the practices and assessment methods of assessors'¹⁴² with a 'large number of experts (67.6%) failing to address all six elements of the *Presser* criteria, with some experts failing to address any of them.'¹⁴³

4.3.3 Other commentators have criticised current approaches to fitness on human rights grounds. They argue that fitness to stand trial should be abolished in order to accord with the requirements of the *CRPD*. This is because the adoption of a separate legal process for people with disabilities is inherently discriminatory.¹⁴⁴ In particular, it is argued that it is contrary to a number of *CRPD* articles including Art 12 of the *CRPD*,¹⁴⁵ which sets out the right to 'equal recognition before the law' for people with disability,¹⁴⁶ Art 13 which sets out 'the right to access to justice on an equal basis with others',¹⁴⁷ and Art 14, which prohibits the deprivation of liberty on the basis of a disability.¹⁴⁸ Accordingly, the United Nations Committee on the Rights of Persons with Disabilities ('UNCRPD') 'has directed countries to abandon the emphasis on identifying the point at which a person should be deemed unfit to plead, and instead places an obligation on States Parties to provide support to the exercise of legal capacity'.¹⁴⁹ In this context, Minkowitz asserts that the *CRPD*:

Views all measures by which a person is treated unequally in legal proceedings or in the adjudication of responsibility, including the insanity defence, unfitness to plead and incompetence to stand trial, as well as the disposition to forensic psychiatric institutions, as inherently suspect and discriminatory based on disability. Therefore it

¹⁴⁰ Ibid.

¹⁴¹ Law Commission of England and Wales (n 133) 64 citing R MacKay, B Mitchell and L Howe, 'A Continued Upturn in Unfitness to Plead – More Disability in Relation to the Trial Under the 1991 Act' [2007] *Criminal Law Review* 530.

¹⁴² A White et al, 'The Role of Cognitive Assessment in Determining Fitness to Stand Trial' (2012) 11 *International Journal of Forensic Mental Health* 102, 102.

¹⁴³ Ibid 108. See also A White et al, 'Fitness to Stand Trial in One Australian Jurisdiction: The Role of Cognitive Abilities, Neurological Dysfunction and Psychiatric Disorder' (2016) 23 *Psychiatry, Psychology and Law* 499; S van der Wijngaart, R Hawkins and P Golus, 'The Role of Psychologists in the South Australian Fitness to Stand Trial Process' (2015) 22 *Psychiatry, Psychology and Law* 75.

¹⁴⁴ See T Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 *Griffith Law Review* 434. See also discussion in P Gooding and C O'Mahoney, 'Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122, 137–138.

¹⁴⁵ This critique is summarised by Gooding et al (n 35) 842–845.

¹⁴⁶ *CRPD* Art 12(1). See discussion in A Arstein-Kerslake et al, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (2017) 17(3) *Human Rights Law Review* 399 <<https://doi.org/10.1093/hrlr/ngx025>>.

¹⁴⁷ Gooding and O'Mahoney (n 144) 131. See also discussion in Arstein-Kerslake et al (n 146) 406–7.

¹⁴⁸ Melbourne Social Equity Institute, *Addressing the Indefinite Detention of People with Cognitive and Psychiatric Impairment Due to Unfitness to Plead Law* (Submission to the Senate Community Affairs Reference Committee, 2016) 5–6.

¹⁴⁹ Gooding et al (n 35) 843. See UNCRPD, *Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The Right to Liberty and Security of Persons with Disabilities* (2015).

is necessary to abolish these measures in order to comply with the equality and non-discrimination obligations under various provisions of the CRPD.¹⁵⁰

4.3.4 Others do not consider that the *CRPD* requires the abolition of the doctrine of fitness to stand trial.¹⁵¹ These commentators instead argue that the uncertain yet potentially significant implications of the *CRPD* for the current doctrine establish the need for its significant reform.¹⁵² For example, Arstein-Kerslake et al have argued that:

One challenge is ensuring that there is a process that protects the rights of persons with cognitive disabilities to legal capacity on an equal basis with others. This would, at a minimum, require that unfitness to plead regimes are disability neutral on their face and in their application. This will likely require a dismantling of unfitness to plead regimes and the construction of a system that never denies legal capacities but instead provides support for the individual to participate in a trial and a court structure that ensures fairness of the trial proceedings without depending on the accused's particular abilities to enforce those rights.¹⁵³

On this basis, it is argued that the focus of the current inquiry on identifying “‘the line’ over which someone is incapable of expressing a valid will or undertaking some function’ should be abandoned. Instead the inquiry should ‘turn to the support and accommodations necessary to enable every person with a disability to function as a legal actor’.¹⁵⁴ Accordingly, Gooding argues that ‘the measure of a person’s decision-making capability, or their legal capacity, [should] no longer [be] their inherent abilities, but rather the range and quality of supports and accommodations around them’.¹⁵⁵ This approach concentrates on supports and accommodations that may be available ‘[to make] the *mainstream* legal processes accessible rather than creating a “special” alternative measure’ for people with cognitive difficulties.¹⁵⁶

4.3.5 While the need to identify supports and accommodations that may facilitate participation in the trial process for as many people as possible has been recognised by various law reform bodies (as discussed at [4.4]), there is less agreement about the approach that should be taken in ‘hard’ cases — that is, cases where people are not able to participate in the proceedings even with supports.¹⁵⁷ In such cases, Arstein-Kerslake et al write that:

A system should exist where the individual is not denied his or her legal capacity to participate in the trial, but is instead provided with an advocate who has responsibility of interpreting the will and preference of the individual to the best of that person’s ability and to convey that to the court and the relevant professionals involved in the

¹⁵⁰ Minkowitz (n 144) 434.

¹⁵¹ However, the dismantling of the regime suggested by Arstein-Kerslake et al (n 146) 417–418 seems to require reshaping of the law to such a degree as to amount to fundamental changes to the current fitness to stand trial doctrine that are akin to abolition. However, the authors acknowledge that there will be cases where a person is unable to participate in their trial even with supports and that some alternative approach will be necessary. They also acknowledge that the reforms ‘will take time and will probably require incremental change’: at 418.

¹⁵² See for example, discussion in Arstein-Kerslake et al, *ibid*; Gooding and O’Mahoney (n 144); Melbourne Social Equity Institute (n 148); Gooding et al (n 35).

¹⁵³ Arstein-Kerslake et al (n 146) 417.

¹⁵⁴ P Gooding, ‘Evolving Conceptualisations of Legal Capacity and Criminal Law in Australia’ (Presentation to the Legal Intersections Resource Centre: Disability at the Margins Vulnerability, Empowerment and the Criminal Law, University of Wollongong, November 2013).

¹⁵⁵ *Ibid*.

¹⁵⁶ Gooding and O’Mahoney (n 144) 138.

¹⁵⁷ Arstein-Kerslake et al (n 146) 418.

trial process. Any such system must be non-discriminatory in order to encompass all individuals — those with disabilities and those without disabilities — who are unable to participate in the trial process and also to protect the rights of persons with disabilities to be free from discriminatory treatment.¹⁵⁸

These authors argue that reforms to the law should ensure that ‘[w]here there is a question of whether the accused can stand trial, the ensuing procedure must not take place on the basis of disability alone and must not serve to create a segregated criminal justice process that only applies to persons with cognitive disabilities’.¹⁵⁹ In contrast, law reform bodies have taken a different approach to the interpretation of the *CRPD* and have understood it as only requiring that the test for unfitness should incorporate the use of supports and accommodation.¹⁶⁰ This approach still retains a threshold functional test to determine whether a person is able to participate in the trial process and operates to divert some individuals into a special procedure.¹⁶¹

4.3.6 In light of this commentary the TLRI sought feedback on the need to reform the doctrine of fitness to plead in Tasmania. In the Issues Paper, the Institute asked the following questions:

Does the current test for unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 continue to be a suitable basis for determining unfitness to stand trial?

Are there any difficulties that arise from the current application of the criteria contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8? For example, are there difficulties with the test that give rise to a subjective interpretation of the criteria by medical experts?

Is the current test under-inclusive and not able to appropriately reflect the issues that arise for individuals with mental illness?

4.3.7 Only one submission received by the Institute suggested that the current approach to fitness to stand trial in s 8 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) does not require reform. The DPP acknowledged that the test does involve subjective interpretation, but did ‘not believe changing the criteria would enhance experts’ ability to assess an accused’s fitness to stand trial’. The other submissions received by the Institute supported reform. Most supported fundamental change to the approach for determining fitness to stand trial. However, only minimal reform was proposed by ForensiClinic who agreed that the current criteria are suitable with one exception – the ability to exercise the right to challenge jurors.

4.3.8 Based on the submissions received and its review of the expert commentary, the Institute’s view is that there is a need to reform the current test for unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 so that it provides a more suitable basis for determining unfitness to stand trial.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid 409–412.

¹⁶¹ This is discussed further at [4.4].

Recommendation

2. There is a need to reform the current test for unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8.

4.4 Approaches to reform

4.4.1 Several options for reform were outlined in the Issues Paper including the abolition of the doctrine or, alternatively, reformulating and refocusing the current test for determining fitness to stand trial. Broadly speaking, the approaches to reformulating the current test considered in the Issues Paper were to:

- (1) give explicit statutory recognition to the fundamental principle that underpins the operation of the test — the right to a fair trial;
- (2) retain the current test with its focus on the defendant’s cognitive capacity as in the *Presser* approach but update and expand its criteria;
- (3) change the focus of the test from cognitive capacity to the defendant’s decision-making capacity and/or include in the decision-making capacity test a requirement for *rational* decision-making;
- (4) specify the criteria to be applied in assessing an accused’s decision-making capacity;
- (5) require the courts, in assessing an accused’s decision-making capacity, to have regard to the available supports and accommodations that may enable them to exercise that capacity.

Abolition of the doctrine

4.4.2 As discussed at [4.3.3], some commentators have argued that fitness to stand trial should be abolished in light of the obligations under the *CRPD*. Accordingly, the Issues Paper sought feedback on this question.

Should the doctrine of fitness to stand trial be abolished in Tasmania?

If so, how should the law be changed to ensure that individuals who are not able to participate in the trial process (even with the provision of supports) receive a fair trial?

4.4.3 Seven submissions to the Institute addressed these questions either by directly answering them or implicitly by proposing reforms to the current test.¹⁶² None of these submissions supported the complete abolition of the doctrine of fitness to stand trial in Tasmania. However, six of the submissions identified problems with the current test and set out proposals for its reform.¹⁶³

4.4.4 Submissions that contained the strongest support for the fitness to stand trial doctrine tended to focus on fairness principles and the need to ensure that people are genuinely able to

¹⁶² DPP, Walvisch, EOT, ForensiClinic, QAI (proposed reform to test), ALA (proposed reform to test), O’Connell (proposed reform to the test).

¹⁶³ Only the submission of the DPP did not consider reform to be necessary.

participate in the criminal justice process. This critique was particularly concerned with the injustice of subjecting people to a criminal process that they cannot properly engage in. For example, ForensiClinic wrote that:

fitness to stand trial is an important matter to establish for defendants with major mental illness, and neurological/intellectual impairments. It is important for all defendants to have the opportunity to participate fairly in proceedings that may have a significant bearing on their lives.

Similarly, Walvisch wrote that:

the purpose of the criminal trial should be to call to account those who are accused of perpetrating public wrongs. If the accused lacks the capacities necessary to understand the charge that has been brought against him or her, or to account for his or her actions (despite the provision of appropriate supports ...), then he or she cannot properly engage in the criminal trial and must not be held responsible.

4.4.5 Other submissions centred on the fair trial implications of fitness to stand trial processes. For example, EOT observed that fair trials may simply not be possible in some cases, regardless of the efforts made to achieve defendants' participation. After reviewing the literature, EOT noted that:

whilst improvements to the way in which people with disability are assisted to exercise legal capacity may greatly minimise the circumstances in which a person is deemed unfit to plead, there [are] likely to remain occasions [when] supports will not be enough to guarantee a fair trial.

4.4.6 Walvisch also focussed on the fair trial implications of particular procedures. Whilst he strongly supported the provision of suitable accommodations (see discussion at [4.4.50] – [4.4.65]), he argued that suitable supports would not be sufficient to allow participation in some cases. He dismissed suggestions that human rights principles might be met in such cases by giving legal representatives the power to interpret defendants' purported will and preferences. He wrote that in these cases, 'it would not be acceptable for the trial to proceed with the use of an advocate who has the "responsibility of interpreting the will and preference of the individual to the best of that person's ability", as suggested by Arstein-Kerslake et al'.¹⁶⁴ Walvisch's view was that:

While such an advocate would be of great assistance in many other legal fora, they would be incapable of *accounting* for the accused's actions in the ways required for a criminal trial to properly proceed. This is a role that only an individual is able to perform for themselves (with appropriate supports).

4.4.7 In contrast, Queensland Advocacy Incorporated ('QAI') suggested that suitable supports would enable all people to participate. Nevertheless, QAI submitted that the current test for fitness to stand trial is inherently discriminatory towards people who have intellectual impairment but did not recommend that the doctrine should be abolished. Instead QAI recommended that it be significantly reformed, stating that:

It is not controversial to suggest that even some lawyers, let alone those with no legal training, struggle to understand trial processes, yet the courts do not even apply the

¹⁶⁴ Quoting Arstein-Kerslake et al (n 146).

tests for fitness to run-of-the-mill defendants. The fitness tests are discriminatory because they treat some people with disability less favourably, placing an undue emphasis on a defendant’s cognitive capacity to understand specific aspects of the legal proceedings and trial process. The tests place too little emphasis on a person’s decision-making ability.

4.4.8 QAI criticised the justification for the fitness test in its current form ‘to shield the person from harm, mischief, exploitation or abuse’ as offering protection at the expense of autonomy:

people with intellectual impairments are no less capable than anyone of making decisions about their own lives, even if their cognitive impairment means that (all other things being equal) they may be less capable of understanding the relevant criminal law and trial process. Impairment on its own, however defined, is not, nor should be a basis on which to deny anyone participation in criminal proceedings.

As noted, it was QAI’s view that appropriate legal supports and, if needed, decision-making support would ensure that ‘all people with intellectual impairments are capable of participating in a trial process’.

4.4.9 After considering the submissions received, and noting the obligations created by the *CRPD*, the Institute’s view is that while there is a need to reform the test for determining fitness (as outlined below), the doctrine of fitness to stand trial should not be abolished in Tasmania.

Recommendation

3. The doctrine of fitness to stand trial should not be abolished in Tasmania.

Reforming fitness to stand trial

4.4.10 Although the Institute does not consider that the doctrine of fitness to stand trial should be abolished, it does recommend that the basis of the test should be fundamentally reformed. The options in this regard were set out at [4.4.35] and considered in detail in the following sections.

Explicitly grounding the fitness test in the right to a fair trial

4.4.11 In its review of the options available to reform the *Presser* test, the NSWLRC recommended that the requirement for a fair trial should be statutorily prescribed as the overarching foundational principle to be applied in its application.¹⁶⁵ This requirement is also made explicit in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic). A fair trial requirement could be incorporated into the assessment of fitness to stand trial in the *Criminal Justice (Mental Impairment) Act 1999* (Tas), and the Institute sought feedback on this in the Issues Paper.

¹⁶⁵ NSWLRC (2013) (n 56) 30. See draft provision in Appendix 1. The adoption of an underlying principles of a fair trial approach was not contained in recommendation of the VLRC (see draft provision Appendix 1) but was adopted in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 8. This legislation has not been passed by the Victorian Parliament.

Should the test of unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 include an overarching requirement of a fair trial in the application of the criteria?

4.4.12 There was only limited support in the submissions received for the statutory specification of the right to a fair trial as the fundamental principle governing determinations of fitness to plead. The DPP stated that such a requirement should not be included in *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 because there is no need to do so, '[t]he right to a fair trial [being] implicit in the criminal law'. In contrast, Walvisch stated that 'courts should always be aiming to ensure that an accused's trial is fair' and so it is appropriate to make statutory provision to this effect. However, he considered that it should not be the sole touchstone for the application of the test due to its vagueness. Instead, he stated that 'effective participation' more clearly addresses the key issue of 'the accused's ability to account for his or her actions in the trial process and will provide better guidance to expert witnesses and decision-makers'.

4.4.13 The Institute is of the view that while the right to a fair trial implicitly governs all criminal proceedings in Tasmania, there is value in making explicit legislative provision to this effect in the context of the fitness to stand trial doctrine. Doing so serves declaratory and educative purposes for the general community which, unlike the legal profession, may not be aware of its implicit application. It will also promote the explicit and consistent consideration of this principle in this context. Further, it may help to ensure that other concerns, like case management considerations or the assumed best interests of the accused are not substituted for or allowed to become a proxy for the right to a fair trial. Accordingly, the Institute recommends that an overarching requirement for a fair trial be included in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8.

Recommendation

4. The right to a fair trial should be given legislative recognition as the fundamental principle governing the determination of whether a defendant is fit to stand trial within the meaning of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8.

Retention of the current Presser test but with up-dated criteria

4.4.14 One approach to reform has been simply to review and update the current Presser criteria. This involves only modest reform because it does not require any alteration of the fundamental nature and basis of the test. This is the approach recommended by the NSWLRC and the VLRC.

4.4.15 In the Issues Paper, the Institute sought feedback on whether any changes need to be made to the current criteria in the Presser test.

What changes to the criteria contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) can be made, if any, to enhance the ability of experts to assess an accused person's fitness to stand trial?

4.4.16 There were seven submissions that addressed the question of the criteria that should be relevant to the assessment of fitness to stand trial. However, most did so in conjunction with recommending more profound reform to the nature and focus of the test itself. One submission

did not favour any reform to the current criteria with or without further reforms to the test. As noted earlier, the DPP did not consider any additional criteria are required or that any change is necessary to the current criteria. ForensiClinic supported the current criteria but made an exception in relation to the requirement that the accused be able to challenge jurors, which it submitted should be removed. ForensiClinic wrote that:

In our view, it does not sit well with the assessment of other capacities. Jury selection is a more sophisticated process relying on legal acumen, other than the defendant being able to advise if they know one of the potential jurors.

This change was also the recommended by the VLRC for Victoria because the decision to challenge jurors is usually exercised by counsel or by the accused on advice from counsel.¹⁶⁶

4.4.17 As already noted, other submissions that recommended changes to the Presser criteria did so concomitantly with recommending profound reform to the focus of the test. These changes are detailed below. The majority of submissions received supported this more extensive reform rather than simply revising the Presser criteria. In accord with these views the Institute does not support merely reforming the test’s current criteria without more fundamental reform to it. The form that any such reform should take is examined in the following sections where the adoption of a decision-making model, whether that model should include a rationality requirement, what criteria should be applied in making determinations under that model and what conditions should supplement and support its application are considered.

Recommendation

5. The TLRI does not support the minimalist reform approach of simply up-dating the criteria for the current cognitive capacity fitness test (the *Presser* test) without making additional reforms to that test. More profound reform is needed.

Decision making capacity/effective participation

4.4.18 Possibly the most significant reform to the test in s 8 that has been advocated by commentators and endorsed by respondents to the Issues Paper is to move the focus of the test from cognitive capacity to decision-making capacity as a means of assessing effective participation in the trial. A prominent proponent of this reform, the Law Commission of England and Wales recommended replacing the *Pritchard* test (the English equivalent of the *Presser* test) with a test of decision-making capacity that focuses on an assessment of the defendant’s capacity to participate effectively in a trial.¹⁶⁷ Its view was that the lack of emphasis on decision-making capacity in the test for fitness is difficult to reconcile with the requirements of Art 6 of the *European Convention on Human Rights*, which stipulate that an accused be able to participate effectively in his or her trial.¹⁶⁸ The Law Commission also considered that a test of decision-making capacity and effective participation would modernise the current approach and replace it with one that better reflects ‘current medical understanding and legal practice in the field of incapacity.’¹⁶⁹ The Law Commission’s recommended model comprises a ‘process’

¹⁶⁶ See Appendix 4.

¹⁶⁷ Law Commission of England and Wales (n 133) Recommendation 10.9, 66–67.

¹⁶⁸ Ibid 63.

¹⁶⁹ W Brookbanks and R Mackay, ‘Decisional Competence and “Best Interests”: Establishing the Threshold for Fitness to Stand Trial’ (2010) 12 *Otago Law Review* 265, 266. See also Law Commission of England and Wales (n 133) 87.

or ‘functional’ approach, focusing on the decision-making processes of the accused, rather than an ‘outcome’ or ‘status’ approach, focusing on the rationality of the decision.¹⁷⁰

4.4.19 The decision-making test was also said to be consistent with the test of decision-making capacity in the *Mental Capacity Act 2005* (UK).¹⁷¹ The Law Commission also relied on the approach in this Act when recommending that an accused should be found to lack capacity only if he or she is unable:

- to understand the information relevant to the decisions that he or she will have to make in the course of his or her trial;
- to retain that information; to use or weigh that information as part of the decision-making process; or
- to communicate his or her decisions.¹⁷²

4.4.20 This is also the ALRC’s preferred approach. Accordingly, the ALRC has recommended that the *Crimes Act 1914* (Cth) be amended to provide that a person is unfit to stand trial if he or she cannot be supported to:

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
- (b) retain that information to the extent necessary to make decisions in the course of the proceedings;
- (c) use or weigh that information as part of the process of making decisions; or
- (d) communicate the decisions in some way.¹⁷³

The ALRC reasoned that making decision-making ability, in the context of the particular criminal proceedings, central to the question of fitness is mandated by the *CRPD*.¹⁷⁴

4.4.21 Concerns about a focus on decision-making capacity and effective participation centre principally on the possibility that it may introduce too much subjectivity into the assessment process, with concomitant problems for expert assessments.¹⁷⁵ This view was endorsed in the review conducted by the Attorney General’s Department in Western Australia.¹⁷⁶ The NSWLRC further suggested that an ‘effective participation’ approach may not only create uncertainty but also be over-inclusive and so result in too many people being found to be unfit. The NSWLRC, therefore, did not recommend adoption of this model.¹⁷⁷

¹⁷⁰ Law Commission of England and Wales (n 131) 53.

¹⁷¹ Law Commission of England and Wales (n 133) 62–63.

¹⁷² *Ibid* Recommendation 10.22; Law Commission of England and Wales (n 131) 54.

¹⁷³ ALRC (n 40) Recommendation 7-1.

¹⁷⁴ *Ibid* 201.

¹⁷⁵ VLRC (n 22) 72.

¹⁷⁶ Department of the Attorney General, Western Australia (n 108) 47.

¹⁷⁷ NSWLRC (2013) (n 56) 26–27.

4.4.22 It has been argued that the assessment of an accused’s capacity based on a ‘functional’ approach is problematic under the *CRPD* because it violates the right to equal recognition before the law for people with disabilities.¹⁷⁸ Despite these concerns, the ALRC maintains that ‘it is not practicable to do away completely with some functional tests of ability that have consequences for participation in legal processes’.¹⁷⁹ Further, the ALRC stated that:

The integrity of a criminal trial (and, arguably, the criminal law itself) would be prejudiced if the defendant does not have the ability to understand and participate in a meaningful way. It may also breach the person’s human rights by denying them a fair trial, implicating arts 12 and 13 of the *CRPD*.¹⁸⁰

Instead, the ALRC recommended a test that takes into account an accused’s fitness to stand trial in the context of the supports and accommodations that may be made available to maximise his or her decision-making/participation capacity.

4.4.23 Based on this commentary, the Institute sought feedback on whether a decision-making approach should be adopted in Tasmania in the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

Should the test of unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 include consideration of an accused person’s decision-making capacity and/or ability for effective participation?

4.4.24 While respondents to the Issues Paper expressed a range of views about possible changes to the fitness to stand trial test, predominantly, submissions supported replacing the current test which focuses on defendants’ intellectual ability with a test that requires assessment of their decision-making capacity. QAI justified this proposition on the basis that the current test unfairly discriminates against people with intellectual disabilities because it focuses on ‘their ability to understand rather than their ability to function or to do something’. QAI submitted that the test for fitness to stand trial ‘should not be a de facto test of a person’s cognitive capacity: that is, it should not be about a person’s intellectual ability to comprehend specific aspects of legal proceedings and trial process’, because this contravenes obligations under the *CRPD*. Instead, QAI recommended that the test ‘should focus on a person’s decision-making ability, with support, and in the context of the particular criminal proceedings which they face’. Accordingly, QAI supported the ALRC approach (set out above) with its focus on decision-making ability.

4.4.25 Walvisch similarly supported the ALRC and the Law Commission of England and Wales recommendations that the fitness assessment should focus on:

- (1) The accused’s capacity to *understand* the relevant trial processes;
- (2) The accused’s capacity to *make decisions* relevant to his or her trial; and
- (3) The accused’s capacity to *communicate* those decisions to the court or his or her lawyer.

¹⁷⁸ Gooding and O’Mahoney (n 144) referring to the UNCRPD, *General Comment No 1: Equal Recognition Before the Law (Article 12)* (2014).

¹⁷⁹ ALRC (n 40) 73.

¹⁸⁰ *Ibid.*

Walvisch favoured this model because it more closely aligns with the rationale for the fitness to stand trial test itself:

While the ability to understand trial processes is important, the accused must also be able to account for his or her actions. This requires more than mere intellectual understanding. It also requires the accused to be able to make decisions relevant to the trial, and to be able to effectively communicate those decisions.

The Australian Lawyers Alliance ('ALA') and EOT also expressed support for the ALRC decision-making model.

4.4.26 The Institute acknowledges that there are concerns that adoption of a decision-making test of fitness to stand trial may result in a greater degree of subjectivity in the application of the test with associated problems for expert assessment. Both the DPP and ForensicClinic expressed objection to the decision-making model on this basis, arguing that it constitutes too broad and vague a basis of assessment and that it may therefore increase the number of people found to be unfit.

4.4.27 However, on balance, the Institute considers that the current cognitive capacity *Presser* test in s 8 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be replaced by a test that focuses on defendants' decision-making capacity. This reflects a decisive shift from the current emphasis on 'mere factual understanding' (passive participation) to more active participation in the trial through an assessment of defendants' decision-making ability.¹⁸¹ Further, the determination of fitness to stand trial based on decision-making capacity reflects the approach to capacity in the *Mental Health Act 2013* (Tas), which is also based on a person's decision-making capacity.¹⁸² Accordingly, the Institute recommends that the central focus of the test in s 8 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be on the defendant's decision-making capacity as a means of determining whether he or she can effectively participate in the trial. The Institute considers that concerns about the breadth, subjectivity and potentially inconsistent application of a decision-making test can be addressed by legislating guideline criteria for its application. The Institute also considers that concerns that this test may increase unfitness findings may be ameliorated by requiring that it be applied in light of the supports and accommodations that can be provided to defendants to enable them to exercise their decision-making ability and participate effectively in trials. Both these matters are considered in detail below. As noted above, all these reforms work together and therefore should be implemented together.

Recommendation

6. The test for assessing fitness to stand trial in s 8 of the *Criminal Justice (Mental Impairment) Act 1999* should be reformed so that its focus is on the accused's decision-making capacity as means of determining whether he or she can effectively participate in

¹⁸¹ VLRC (n 22) 70.

¹⁸² S 3, 7. It is noted that there is a review of the *Mental Health Act 2013* (Tas) being undertaken by the Department of Health and Human Services. A consultation has been released with the date for submissions closing on the 8 November 2019: see Department of Health and Human Services, Statewide Mental Health Services, *Mental Health Act 2013: Review of the Act's Operation* (Consultation Paper, 2019). Questions asked are whether the test for decision-making capacity set out in section 7 of the Act operate effectively and whether it is easy to understand and apply for both adults and children?

the trial rather than on his or her cognitive capacity. This recommendation is to be understood in conjunction with two other factors:

- (1) an identification of the key matters about which a person must be able to make decisions in the trial in order for them to be able to meaningfully participate (see Recommendation 8); and
- (2) the need for the court to take into account any accommodations and supports that would assist a person to be able to exercise their decision-making capacity in the trial process (see Recommendations 9 and 10).

Rationality

4.4.28 A further issue the Institute considered was whether the recommended decision-making test should be narrowed by including a requirement for the decision-making to be *rational*. Although there is some suggestion that the law already requires a court to take account of whether the applicable criteria are able to be exercised rationally, this is not expressly stated.¹⁸³ For this reason, an approach taken to address the deficiencies of the current test in some jurisdictions has been to incorporate into it a requirement for rationality. This approach has been implemented in South Australia, where the test explicitly refers to rationality (as noted at [4.2.6]). The NSWLRC also incorporated a requirement for rational decision-making into its recommendations for reform of the statutory fitness test.¹⁸⁴ In Victoria, the Law Reform Committee recommended that rationality be incorporated into components of the recommended test so that consideration is given to defendants' ability to understand, or respond rationally to the charges or their ability to exercise or give rational instructions about the exercise of procedural rights.¹⁸⁵

4.4.29 This approach can be justified on the basis that it addresses concerns about people with mental illness who may be able to understand the trial process but whose capacity to make decisions is impaired by delusional beliefs.¹⁸⁶

4.4.30 The VLRC also examined whether the test should consider the accused's ability to make rational decisions. Arguments in favour of this approach include that it would provide more clarity in situations where an accused has a delusional disorder that affects his or her understanding and that the current test sets the threshold too high.¹⁸⁷ However, a number of concerns have been identified with this model:

- the current criteria already implicitly include rationality;
- that rationality is difficult to define, assess clinically and apply in practice;
- that it would introduce too much subjectivity into the test; and
- that it would inappropriately widen the number of people who could be found unfit to stand trial.¹⁸⁸

¹⁸³ VLRC (n 22) 74 referring to Freckelton (n 138) 57.

¹⁸⁴ See Appendix 4.

¹⁸⁵ Law Reform Committee (n 56) Recommendation 29.

¹⁸⁶ VLRC (n 22) 74.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid* 75.

There is also concern that incorporating rationality may ‘unjustifiably limit accuseds’ autonomy and their choice to make decisions, including “unwise” choices’.¹⁸⁹ On balance, the VLRC’s view was that there is a risk that introducing a requirement of ‘rationality’ would add to the complexity of the test and increase its subjectivity.¹⁹⁰

4.4.31 In addition, the introduction of a requirement for rationality is difficult to reconcile with the *CRPD* which recognises the right of people with disabilities to make choices for themselves even if they are not in their ‘best interests’.¹⁹¹ The ALRC expressed concerns about a requirement for rationality which ‘may lead to a person’s decision-making ability being assessed on its likely outcome’.¹⁹² This would be inconsistent with the National Decision-Making Principles (recommended by the ALRC), as well as the *CRPD*, which focus on the ‘rights, will and preferences’ of the person instead of an approach based on the ‘best interests’ of the person.¹⁹³

4.4.32 In light of reforms proposed in other jurisdictions, the Institute sought feedback on whether the test of unfitness to stand trial in s 8 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should include a requirement that the accused person is able to exercise his or her decision-making capacity rationally.

Should the test of unfitness to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 include a requirement that the accused person is able to exercise his or her decision-making capacity rationally?

4.4.33 There was limited support in submissions for the inclusion of a rationality requirement in any decision-making test adopted in Tasmania, with two submissions rejecting its inclusion and only one submission suggesting a limited role for rationality as a criterion for determining fitness to stand trial.

4.4.34 Walvisch suggested that ‘[r]ationality is important but it is also essential to respect a person’s autonomy and their choice to make unwise decisions, and so it is necessary to take great care in developing the bounds of any rationality test’. Walvisch stressed that ‘it is essential that people not be considered unfit simply because the content of their decisions differs from the decisions that would be made by expert witnesses, the judge or the jury’. For these reasons, Walvisch submitted that ‘the notion of rationality should be incorporated into the test by requiring the accused to be able to make decisions that are “reasons-responsive”’. This was explained as follows:

this is not simply about being unable to recognise a sufficient reason for action on one particular occasion. It is about failing to exhibit a pattern of reason-recognition that is understandable to those who are judging the agent’s responsibility, and that is grounded in reality. According to this view, a person will not be fit to stand trial if he or she is unable to recognise how reasons fit together, to see why one reason is stronger than another, or to understand how the acceptance of one reason as sufficient implies

¹⁸⁹ Ibid referring to the submission of the Victorian Equal Opportunity and Human Rights Commission.

¹⁹⁰ Ibid 76.

¹⁹¹ ALRC (n 40) 63.

¹⁹² Ibid 202.

¹⁹³ See *ibid* 76–77.

that a stronger reason must also be sufficient. However, he or she will not be unfit simply because poor or seemingly irrational decisions have been made.

This would allow a finding of unfitness to be made where a person's delusional beliefs may mean that they do not have the capacity to make decisions their trial.¹⁹⁴

4.4.35 In contrast, the DPP and ForensiClinic opposed the inclusion of a requirement of rationality. The DPP wrote that 'this is implicit in the existing criteria. Any irrational behaviour that impacted upon a person's fitness to stand trial would be identified by an expert psychiatrist in a report addressing the s 8 criteria'. ForensiClinic's view was that the inclusion of rationality may lower the threshold for a finding of unfitness and would be problematic from a clinical point of view:

In relation to the concept of rationality, this is contentious in mental health practice and its application in legal proceedings. It is often a subjective judgement made by clinicians and there is a lack of methodological standardisation in determining whether a thought process is rational or not. Rational thinking can be affected by clinical and non-clinical factors. Non-clinical factors may include personality (e.g., antagonism, oppositional), motivation, and naivety. Non-clinical factors would not form a reasonable basis for unfitness. Clinical factors may include psychosis and dementia. Additionally, a rational decision from one cultural background might be considered irrational from another cultural background. Rationality is temporally unstable. A person's degree of rationality or irrationality can change very quickly due to environmental and personal circumstances (e.g., stress).

4.4.36 In Tasmania, an approach that incorporates an assessment of an accused's capacity to make rational decisions would reflect the *current* approach in the *Guardianship and Administration Act 1995* (Tas), which allows the Guardianship and Administration Board to appoint a guardian or administrator where a person with a disability is unable by reason of that disability to make *reasonable* judgements in respect of all or any matters relating to his or her person or circumstances and is in need of a guardian.¹⁹⁵ However, it is important to note that, the requirements of the *Guardianship and Administration Act 1995* (Tas), including the basis on which assessments are made of a person's decision-making capacity, have been reviewed recently by the TLRI which has recommended that assessments should not focus on people's rationality but rather on their ability to make a decisions with support, if necessary.¹⁹⁶ That recommendation accords closely with the approach ultimately recommended in this Report and supports the conclusions reached here. Accordingly, the maintenance of consistency with the *current* test in the *Guardianship and Administration Act 1995* (Tas) does not provide a sound basis for incorporating a requirement of rationality into the fitness test. A requirement for rationality is also contrary to the approach in the *CRPD* and the *National Decision-Making Principles*.¹⁹⁷

¹⁹⁴ See [4.4.18] and following for a discussion of the decision-making model.

¹⁹⁵ *Guardianship and Administration Act 1995* (Tas) s 20. It is noted that the UNCRPD has argued that substitute decision-making regimes such as guardianship 'must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others': UNCRPD, *General Comment No 1* (2014), *Article 12: Equal Recognition Before the Law* (2014).

¹⁹⁶ TLRI (n 7) Part 6.

¹⁹⁷ See discussion at [4.3.3], [4.4.31].

4.4.37 Consequently, the Institute does not recommend the inclusion of any requirement of rationality or rational decision-making into the test for determining whether a person should be required to stand trial in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8.

Recommendation

7. Rationality or rational decision-making should not be included in the test for determining whether a person should be required to stand trial contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8.

Criteria to be applied in assessing defendants' decision-making capacity

4.4.38 Decision-making capacity will necessarily fall to be assessed according to prescribed criteria in order to ensure that those assessments are consistently carried out. Prescription of applicable criteria will also give content to the decision-making test and reduce potential subjectivity in its application by providing guidance in this regard. This begs the question, what these criteria should be. At the core of the recent reviews of the test of fitness to stand trial is a desire to ensure that the criteria governing the assessment of decision-making capacity reflect a need for an accused to be 'able to make "true choices" concerning the crucial decisions in the trial that are not substantially prejudiced by their mental condition'.¹⁹⁸ The Law Commission of England and Wales identified the need to ensure that there is meaningful participation in the trial process stating that it would be 'an abuse of the process of the law to subject someone to a trial when he or she is unable to play any real part in that trial'.¹⁹⁹ Similarly, the VLRC's view is that fairness requires that accused only be subject to the trial process where they are able to make crucial decisions relevant to their trial.²⁰⁰ Accordingly, the VLRC considered that the most appropriate way to ensure that the test takes this into account is to:

- evaluate the current criteria for unfitness to stand trial against the crucial decisions an accused should be expected to make
- supplement the criteria with a requirement that the accused be able to make these specific decisions, where the current criteria do not cover them.²⁰¹

Other jurisdictions have also examined the criteria used to assess fitness to stand trial and considered whether they are appropriate in the modern trial context.²⁰²

4.4.39 Appendix 4 contains a comparison of the criteria that are used in other jurisdictions, as well as new criteria that have been recommended by law reform bodies.

4.4.40 Criteria that have been identified as essential that are not explicitly contained in the Tasmanian legislation are:

- The accused's ability to understand the significance of entering a plea.

¹⁹⁸ VLRC (n 22) 76.

¹⁹⁹ Law Commission of England and Wales (n 133) 4.

²⁰⁰ VLRC (n 22) 72.

²⁰¹ *Ibid.*

²⁰² See Department of the Attorney-General, Western Australia (n 108) 47.

- The accused’s ability to communicate *meaningful* instructions to his or her legal practitioner.
- The accused’s ability to decide whether to give evidence to support his/her case, and if he or she wishes to give evidence, his/her ability to do so.

4.4.41 In recommending reform of the basis of the fitness test, the Law Commission of England and Wales also reviewed the guideline criteria to be applied in its application. This is also the approach adopted in Scotland. The Law Commission of England and Wales specified a number of abilities as relevant to the assessment of the defendant’s decision-making capacity and therefore capacity for effective participation in the trial. These included the ability to:

- understand the charges (what the charges mean, their nature and the evidence on which the prosecution rely to establish the charges);
- understand the trial process and the consequences of being convicted;
- give instructions to a legal representative;
- follow proceedings in courts;
- give evidence;
- make a decision about whether to plead guilty or not guilty;
- make a decision about whether to give evidence;
- make a decision about whether to elect Crown Court trial; and
- make any other decision that might need to be made by the defendant in connection with the trial.²⁰³

This approach was also endorsed by the Northern Ireland Law Commission.²⁰⁴

4.4.42 The requirements for effective participation are set out in legislation in Scotland. Following recommendations of the Scottish Law Commission,²⁰⁵ the *Criminal Procedure (Scotland) Act 1995* was amended to provide that ‘a person is unfit for trial if it is established ... that the person is incapable, by reason of a mental or physical condition, of participating effectively in a trial.’²⁰⁶ In making the determination of fitness, the court is to have regard to the following factors:

- (a) the ability of the person to — understand the nature of the charge; understand the requirement to tender a plea to the charge and the effect of such a plea; understand the purpose of, and follow the course of, the trial; understand the

²⁰³ Law Commission of England and Wales (n 133) Recommendations 10.14–10.21. The draft legislation prepared by the Law Commission appears in Appendix 1.

²⁰⁴ Northern Ireland Law Reform Commission (n 133) 52.

²⁰⁵ Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (2004) Recommendation 19.

²⁰⁶ *Criminal Procedure (Scotland) Act 1995* s 53F(1) inserted by *Criminal Justice and Licensing (Scotland) Act 2010* s 170.

evidence that may be given against the person; instruct and otherwise communicate with the person's legal representative; and

(b) any other factor which the court considers relevant.²⁰⁷

4.4.43 Based on these different approaches, the Institute sought feedback on the current criteria contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and the need for their reform particularly in the context of reform of the basis of the fitness test. Two questions were asked in this regard.

Are changes required to the criteria contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 to allow for an accused to participate meaningfully in the trial process?

What changes to the criteria contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 can be made, if any, to enhance the ability of experts to assess an accused person's fitness to stand trial?

4.4.44 Respondents who supported the replacement of the current cognitive capacity test with a decision-making test also proposed the legislative prescription of new criteria to reflect the key decisions to be made in participating in trials. Walvisch and the ALA made broadly similar recommendations in this regard. Walvisch suggested that the legislative criteria should include all the current factors, as well as the following additional criteria:

- the accused's ability to understand the actual significance of entering a plea
- the accused's ability to communicate *meaningful* instructions to his or her legal practitioner
- the accused's ability to decide whether to give evidence to support his/her case and his/her ability to give evidence and
- that the accused be able to understand the meaning of conviction and punishment.²⁰⁸

4.4.45 The ALA proposed the following criteria relating to the abilities of the accused, as matters that should be included in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8. These criteria were the ability:

- to understand the charges (what the charges mean, their nature and the evidence on which the prosecution relies to establish them)
- to understand the trial process and the consequences of being convicted
- to give instructions to a legal representative
- to follow proceedings in courts
- to give evidence
- to make a decision about whether to plead guilty or not guilty
- to make a decision about whether to give evidence

²⁰⁷ Ibid s 53F(2) inserted by *Criminal Justice and Licensing (Scotland) Act 2010* s 170.

²⁰⁸ It is noted that the first three criteria were recommended by the VLRC: see VLRC (n 22) 76.

- to make a decision about whether to elect a trial in the Criminal Court and, if so, by jury or by judge alone,²⁰⁹ or any other decision that might need to be made by the defendant in connection with the trial.

4.4.46 Because the Institute acknowledges that there are concerns about the broad and potentially imprecise nature of a decision-making capacity test, and considers that this could be addressed by identifying the matters about which a person will need to make decisions, it recommends that these matters be legislatively specified as criteria to guide the application of the test. This was the approach recommended by the Law Commission of England and Wales, the Northern Ireland Law Commission and that has been legislated in Scotland.²¹⁰ It is also the approach suggested by Walvisch and the ALA.

4.4.47 After reviewing the submissions received and approaches in other jurisdictions, the Institute's view is that criteria should be legislatively prescribed to guide assessments of defendants' decision-making capacity. They should consist of critical understandings and abilities that defendants must have in order to make key decisions during trials. These criteria should include:

- an understanding of the actual significance and effect of entering a plea
- the ability to communicate *meaningful* instructions to his or her legal practitioner
- the ability to decide whether to give evidence to support his/her case and his/her ability to give evidence (that is, the ability to give a coherent account in his/her defence and to answer questions put to him/her)
- an understanding of the meaning and consequences of a finding of guilt including that he/she may be punished and in jeopardy of imprisonment, if so advised that they are at risk of such a penalty
- an understanding of the nature of the offence(s) with which he/she is charged
- the ability to understand the nature of the proceedings as a process to determine whether it has been proved that he/she has committed the offence(s) charged
- the ability to understand and follow the substance of the evidence that may be given at trial
- the ability to understand the course of the proceedings and what is going on in a general sense at each stage of the trial process.

4.4.48 While these matters contain features that are similar to the current factors courts use to determine fitness under the *Presser* approach, they are used for a different purpose. Their purpose is to throw light on defendants' ability to participate in their trials by making decisions, by being able to account for their actions and communicate their decisions. The inclusion of these criteria should be understood as providing guidance in the application of the decision-

²⁰⁹ It is noted that the option for a judge alone trial does not exist in Tasmania.

²¹⁰ See [4.4.41]–[4.4.42].

making test, as giving it content and inhibiting subjectivity in its application. In other words, these criteria provide a basis for the assessment of decision-making capacity.

4.4.49 There may be concern about the possible increase in the number of people found to be unfit under the new test given that it requires more than a capacity for passive involvement through understanding of key features of the trial and also requires an ability to participate actively in the trial process by making decisions. However, it is important to recognise that this revised test does not sit alone but is part of three interrelated changes and the proposed revised test is to be understood alongside a recommendation to implement a legislative requirement to take into account how a person can be supported to be able to exercise their decision-making capacity. This involves the need to assess available accommodations and supports that may create conditions that optimise an accused's decision-making capacity. Combined, this approach reflects the justification for the requirement that an individual is fit to stand trial and reflects the need to ensure that a person is able to have a fair trial and is able to make the link between their conduct (which allegedly is a crime) and the court process and punishment.

Recommendation

8. Criteria should be legislatively prescribed to guide assessments of defendants' decision-making capacity. These criteria should consist of critical understandings and abilities that defendants must have in order to make key decisions during trials including:

- an understanding of the actual significance and effect of entering a plea
- the ability to communicate *meaningful* instructions to his or her legal practitioner
- the ability to decide whether to give evidence to support his/her case and his/her ability to give evidence (that is, the ability to give a coherent account in his/her defence and to answer questions put to him/her)
- an understanding of the meaning and consequences of a finding of guilt including that he/she may be punished and in jeopardy of imprisonment, if so advised that they are at risk of such a penalty
- an understanding of the nature of the offence(s) with which he/she is charged
- the ability to understand the nature of the proceedings as a process to determine whether it has been proved that he/she has committed the offence(s) charged
- the ability to understand and follow the substance of the evidence that may be given at trial
- the ability to understand the course of the proceedings and what is going on in a general sense at each stage of the trial process.

Supports and accommodations

4.4.50 As indicated, the availability of supports and accommodations has been identified by the Institute as a key aspect of its reform proposals. Although case law recognises the relevance of accommodations and supports, it has been contended that 'the application of such accommodations is arguably ad hoc' and that a 'more formalised, systematic application of procedural accommodations ... could be achieved through the training of judicial officers and greater statutory protections for support persons to assist accused persons at risk of being

deemed unfit to plead'.²¹¹ Accordingly, Gooding et al criticise the current test for failing to 'incorporate a requirement to consider whether support or assistance could help the accused to optimise fitness to stand trial'.²¹²

4.4.51 The need for greater emphasis on the supports and accommodations that could be made available to an accused to facilitate fitness for trial has also been recognised by various law reform bodies. For example, the Victorian Law Reform Committee has stated that the test 'sets a low threshold for determining the fitness of an accused with an intellectual disability or cognitive impairment'.²¹³ It indicated that it had received evidence to suggest that 'the provision of court support services could provide a mechanism for overcoming barriers that [such] a person ... may experience when interacting with the courts and may therefore minimise the potential for findings of unfitness to be made against them'.²¹⁴ The ALRC recommended that there be a reformulation of the test 'to focus on whether, and to what extent, a person can be supported to play their role in the justice system, rather than on whether they have capacity to play such a role at all'.²¹⁵ Similarly, the VLRC indicated that 'the importance of support measures in the unfitness to stand trial process was one of the strongest themes to come out of the Commission's review'.²¹⁶ In England and Wales, the Law Commission expressed the view that the test should take 'into account assistance available to the defendant' and that 'a finding of lack of capacity should only be made as a last resort'.²¹⁷ It also noted that this reflected the current law as applied by the courts but considered that support should be explicitly recognised in the test.²¹⁸ The NSWLRC also recommended that in determining whether a person is unfit for trial, the court must consider where modifications to the trial process can be made or assistance provided to facilitate the person's understanding and effective participation.²¹⁹ The Western Australian review conducted by the Department of the Attorney General recommended that the concept of 'fitness with support' should be specifically included as a factor in the determination of an accused's fitness to stand trial.²²⁰ 'Fitness with support' refers to 'modifications to court processes that are made to assist an individual to participate in court processes'.²²¹ There thus appears to be a wide consensus in favour of requiring courts to consider the availability of supports and accommodations to maximise defendants' opportunity to participate in the criminal justice process. Explicitly incorporating this requirement into the test also reduces the likelihood for inconsistency in its application.

4.4.52 Despite widespread support for this approach, concerns have been expressed that to use special measures to allow an accused to become fit for trial is not necessarily in his/her best

²¹¹ Gooding et al (n 35) 840.

²¹² Ibid 837.

²¹³ Law Reform Committee (n 56) 230.

²¹⁴ Ibid.

²¹⁵ ALRC(n 40) 192.

²¹⁶ VLRC (n 22) 89. The recommendation of the VLRC for courts to consider support measures that may assist an accused to stand trial when determining fitness was adopted in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 8. This legislation has not been passed by the Victorian Parliament.

²¹⁷ Law Commission of England and Wales (n 133) 72.

²¹⁸ Ibid 73.

²¹⁹ NSWLRC (2013) (n 56) Recommendation 2.2.

²²⁰ Department of the Attorney-General, Western Australia (n 108) Recommendation 8.

²²¹ Ibid 50.

interests. In the view of the Northern Ireland Law Reform Commission, it may be inherently unfair for special measures to be used to ‘make’ an accused fit for trial.²²² This is because:

The individual has not changed and might be better served by the disposals which are available following a determination of unfitness rather than following a criminal trial, where the focus is on sentencing and rehabilitation rather than medical treatment and care.²²³

Accordingly, its view was that special measures should only be considered once the issue of unfitness to plead has been considered and a finding of fitness determined.²²⁴

4.4.53 In Tasmania, as indicated, the issue of supports and accommodations for people with communication needs involved in the criminal justice system was the subject of recent review by the TLRI. The TLRI examined the feasibility of instituting a communication assistant/intermediary scheme in Tasmania, and its principal recommendation was that such a scheme should be established in Tasmania with a view to enabling ‘people with communication needs to participate to the best of their ability in the criminal justice process’.²²⁵ The proposed scheme would involve expertly trained intermediaries/communication assistants who have a range of functions including advisory and interpretive roles as well as the power to intervene in inappropriate questioning and to suggest how such questioning should be altered. The intermediaries/communication assistants would be able to provide advice to courts, legal practitioners and the police and communication assistance to people with communication needs who are involved in the criminal justice process. This will facilitate communication with the police and legal practitioners and will support individuals with communication needs during court hearings and trials.²²⁶ Accordingly, the creation of such a scheme is likely to reduce the need to hold fitness hearings, and/or reduce the number of people found unfit to stand trial and enhance the human rights of people with communication needs in their interactions with the criminal justice system. The TLRI has also made recommendations in relation to the importance of appropriate decision-making supports as a means to facilitate decision-making to maximise a person’s autonomy and promote a will, preference and rights approach to decision-making for people requiring support.²²⁷

4.4.54 In addition to the benefits offered by an intermediary scheme in facilitating participation in the criminal process, other means available to increase the level of support for people with intellectual disabilities and/or cognitive impairments have been identified as follows:²²⁸

- the provision of a formal education program that may facilitate fitness such as the provision of education about the nature of the trial process, the nature of the criminal charge and the role of court staff;

²²² Northern Ireland Law Reform Commission, *Unfitness to Plead*, Consultation Paper 13 (2012) 120; Northern Ireland Law Reform Commission (n 133) 85–87.

²²³ Northern Ireland Law Reform Commission, Consultation Paper 13 (n 222)120.

²²⁴ Northern Ireland Law Reform Commission (n 133) 86–87; *ibid* 122.

²²⁵ TLRI (n 4) vi.

²²⁶ *Ibid*.

²²⁷ See TLRI (n 7) Part 7.

²²⁸ See VLRC (n 22) 87–94, Law Commission of England and Wales (n 133) 31–32, 37–55. See also Gooding et al (n 35) 838–840.

- court familiarisation processes;
- the modification of court procedures to suit people with intellectual disabilities or cognitive impairments, such as shorter sessions, additional breaks, reduced formalities, allowing the giving of evidence via videolink;
- improved communications methods, such as use of visual aids and clear language.

These measures may also allow individuals with intellectual disabilities and/or cognitive impairments to participate more effectively in an ordinary trial and support their fitness to stand trial. The provision of procedural accommodations to facilitate a person's access to justice accords with the requirements of the *CRPD*,²²⁹ and may, according to Gooding and O'Mahoney, 'circumvent the need for any assessment of fitness for trial in the first place'.²³⁰

4.4.55 On this basis, in the Issues Paper, the Institute suggested that it may be desirable to incorporate the relevance of supports and accommodations specifically into the statutory test, including the use of expert intermediaries/communication assistants. Further, to enable judicial officers to make an assessment about fitness taking into account necessary supports and accommodations, they should be empowered to obtain expert advice about the requisite accommodations and supports that are available and that should be used.

4.4.56 Accordingly, feedback was sought from stakeholders and members of the Tasmanian community on the need to include the availability of accommodations and support measures, including the potential use of an intermediary/communication assistant in s 8 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) as a factor to be taken into account when determining fitness to stand trial. The Issues Paper asked the following question in this regard:

Should the availability of accommodations and support measures, including the potential use of an intermediary/communication assistant (if the scheme is adopted) be specified in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) as a factor that needs to be taken into account when determining unfitness to stand trial?

4.4.57 There was clear support in the submissions for the legislative recognition of supports and accommodations. While not otherwise supporting reform of the current fitness criteria, the DPP was not opposed to legislative amendment that requires consideration of any special measures that might be implemented to support an accused to meet fitness to stand trial criteria. The DPP explained that such a requirement would, in any event, simply reflect current practice. However, the DPP stated that:

Any such amendment would need to be considered in light of what special measures are reasonably and practically available. This would require extensive consultation with the court and other stakeholders. Intermediaries or communication assistance, as proposed by the TLRI in Final Report 23, may enable a person to be supported to such an extent that they are fit to stand trial.

4.4.58 ForensiClinic also agreed that 'the potential use of an intermediary/communication assistant is a helpful concept, particularly for those on the borderline threshold of fitness, or

²²⁹ Melbourne Social Equity Institute (n 148) 4–5.

²³⁰ Ibid 5 referring to Gooding and O'Mahoney (n 144). A report that outlines the nature of supports that may be effective for persons with cognitive disabilities in the criminal justice system was published in September 2017, in a project funded by the National Disability Research and Development Grants, see McSherry et al (n 38).

with specific communication impediments’. Support for legislative recognition of the importance of intermediaries/communication assistants in facilitating fitness to stand trial was found in several other submissions received. O’Connell wrote that:

I am of the view that an intermediary could assist defendants with mental illness or mental impairment. There often exists a tension between the law and psychiatry and a communication expert could assist all parties in maximising the defendants participation in the court process. There are a number of defendants that are charged with matters, deemed fit to stand trial but the lawyer is dissatisfied with the quality of instructions provided. An intermediary would assist in these matters.

4.4.59 Walvisch recognised the value of using intermediary/communication assistants to facilitate participation given that ‘[i]t is in the community’s interests that people who are accused of committing crimes be called to account for those crimes’. He agreed with Gooding’s argument that ‘the measure of a person’s decision-making capability, or their legal capacity, [should] no longer [be] their inherent abilities, but rather the range and quality of supports and accommodations around them’.²³¹ However, Walvisch placed some caveats on this proposition:

- (1) ‘in implementing such measures, great care should be taken to ensure that the accused person’s impairment is *also* properly taken into account in the sentencing process’;
- (2) ‘it is essential that the decision-maker be certain that such measures will actually be available to the accused throughout the trial, and that there is evidence to support the fact that they will assist the accused to reach the requisite standards’; and
- (3) that there is ‘provision to revise the fitness assessment if the support becomes unavailable, or it becomes apparent that it is not assisting the accused to meet the requisite standards’.

4.4.60 EOT stressed the role that supports and accommodations, including communication assistance could play in reducing the number of people found unfit to stand trial. This reflects EOT’s view that the rights of people with disability are not always upheld in practice. EOT has undertaken significant work with stakeholders to develop the *Disability Justice Plan for Tasmania 2017–2020*. In this regard EOT noted that:

A key action identified in the DJPT [was] the need to ‘improve the justice system’s capacity to recognise an individual’s disability at the earliest opportunity and make available appropriate supports and adjustments to enable them to participate in those services on an equitable basis with others’.

EOT stated that ‘[c]apacity can be removed in circumstances where it is not clear that a rigorous assessment has been made or where the capacity for decision making ... with the assistance of aids and supports has not been tested’.²³²

4.4.61 Accordingly, in light of its research and the submissions received, the Institute recommends that there should be legislative recognition of the need to take into account support measures and accommodations that are available to defendants with a view to optimising their fitness to stand trial, in circumstances where they may otherwise be unfit. Greater use of special

²³¹ Gooding (n 154).

²³² VLRC (n 22) 77.

measures to support an accused’s fitness to stand trial is recommended on the basis that the optimum approach is for defendants to proceed through the normal trial process, wherever this can be fairly achieved.²³³ This is both beneficial to defendants and in the public interest.²³⁴ Accordingly, the law should aim to reduce the number of people who take part in special hearings so that a finding of fitness is only a last resort where a person cannot be supported to participate in the ordinary trial process. This approach is consistent with the obligations that arise under the *CRPD*.²³⁵ Further, as recognised by the ALRC, explicitly incorporating the concept of supports and accommodation into the test for fitness ‘reflects the National Decision-Making Principles in that any assessment of decision-making ability should be considered in the context of available support’.²³⁶

4.4.62 These recommendations are also aligned to the previous recommendations of the Institute contained in its Final Report, *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania*.²³⁷

4.4.63 In the Institute’s view, a focus on supports and accommodations combined with a decision-making approach aligns strongly with the purpose of the test and identifies the factors that will allow defendants to participate in a meaningful way in their own trial. A decision-making model for assessing fitness to stand trial also aligns closely with human rights considerations. As Walvisch observes, ‘[t]he key issue in this regard is *not* whether the accused suffered from a particular type of mental or physical disability (which would clearly be discriminatory), but whether the accused is able to account for his or her actions if provided with the appropriate supports’.

4.4.64 This approach to assessing fitness to stand trial for an accused is also consistent with the approach contained in the *Evidence Act 2001* (Tas) s 13, which deals with the competence of witnesses to give evidence. There is a presumption of competence, set out in s 13(6), ‘unless the contrary is proved’. Section 13 further provides:

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability) –
 - (a) the person does not have the capacity to understand a question about the fact; or
 - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact –

and that incapacity cannot be overcome.
- ...
- (8) For the purpose of determining a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person’s training, study or experience.

²³³ Law Commission of England and Wales (n 133) 29.

²³⁴ VLRC (n 22) 86.

²³⁵ See [2.4.5].

²³⁶ ALRC (n 40) 204.

²³⁷ TLRI (n 1).

Clearly, under s 13, a witness will only be incompetent if a lack of capacity cannot be overcome. The Institute recommends that this approach be adopted in relation to fitness to plead and an accused's capacity to participate in trials. In common with the recommendation of the Law Commission of England and Wales, the Institute recommends findings of lack of capacity, and therefore unfitness to stand trial, should only be made as a last resort.

4.4.65 The Institute recognises that the court's assessment of the supports and accommodations that may assist an accused to be fit for trial must be based on the supports/accommodations that are actually available and that will be effective to assist the accused. This should be the subject of expert reports provided to the court in relation to its consideration of the fitness to stand trial test. Again, this is consistent with the *Evidence Act 2001* (Tas) s 13(8).

Recommendations

9. There should be legislative recognition in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8 of the need for courts to take into account support measures and accommodations that are available to an individual with a view to optimising an accused's fitness to stand trial in circumstances where they may otherwise be unfit. Further, the legislation should specify that a finding of lack of capacity is only to be made as a last resort, that is, in the event that support measures have been exhausted.
10. The court's assessment of the supports and accommodations that may assist an accused to be fit for trial must be based on the supports/accommodations that are actually available and would be effective to assist the accused. This should be the subject of expert reports in relation to the court's determination of the fitness to stand trial test.

Pleas of guilty

4.4.66 A related issue is whether the test for determining fitness should be adapted in cases where an accused wishes to plead guilty. This question has been considered in several reviews of the law on the basis that a person may be able to understand the nature of the charge and may be able to enter a plea to the charge but may not be able to understand more complex aspects of the trial process.²³⁸ Under the current law, such a person is unfit to stand trial and is not able to enter a plea of guilty but instead is subject to the special hearing procedures.²³⁹ However, anecdotal evidence is that such people do plead guilty rather than rely on the fitness to stand trial provisions, if their legal representative is satisfied of their capacity to plead and participate in the sentencing hearing, in order to avoid the onerous consequences of a finding of unfitness.²⁴⁰

4.4.67 There have been differing views expressed in relation to the appropriateness of adapting the test if an accused wishes to plead guilty.

²³⁸ VLRC (n 22) 80.

²³⁹ Ibid. See [6.2.6].

²⁴⁰ NSWLRC (2013) (n 56) 36; VLRC (n 22) 81.

Arguments in favour of a separate test

4.4.68 The following arguments have been advanced in favour of a separate test:

- The minimum standards to enter a plea are less onerous than those required to stand trial.²⁴¹
- It would enable defendants who are able to enter a plea to participate in the usual criminal process.²⁴²
- Where an accused is able to make a particular decision, this should be given effect as far as possible.²⁴³ This accords with human rights considerations.²⁴⁴
- It allows an accused to ‘get on with treatment’ without concerns in relation to fitness procedures and the prospect of proceedings being resumed on recovery.²⁴⁵
- If an accused can plead guilty, this is better for victims and witnesses.²⁴⁶
- The law requires flexibility to take account of differing levels of capacity.²⁴⁷

Arguments against a separate test

4.4.69 The following arguments have been advanced against a separate test:

- The concerns about capacity are the same for both fitness to plead and fitness to stand trial, and so the test should be the same.²⁴⁸
- A separate test would be an unnecessary complication and would be confusing.²⁴⁹
- Expert assessment can already take into account the differing demands depending on the nature of the proceedings.²⁵⁰
- Concerns that an accused may not truly understand the nature of the guilty plea and that difficulties with understanding the trial process may mean that they see no option other than to plead guilty.²⁵¹

²⁴¹ NSWLRC (2013) (n 56) 36.

²⁴² VLRC (n 22) 80.

²⁴³ *Ibid* 81.

²⁴⁴ See [2.4].

²⁴⁵ Law Commission of England and Wales (n 133) 93.

²⁴⁶ *Ibid*.

²⁴⁷ VLRC (n 22) 81.

²⁴⁸ NSWLRC (2013) (n 56) 36.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid* 36–37.

²⁵¹ VLRC (n 22) 80.

- Concerns that such a test may undermine the legitimacy of the criminal justice system if it allows ‘individuals who are otherwise unable to participate effectively in proceedings to plead guilty, especially to serious matters’.²⁵²

4.4.70 The NSWLRC made no recommendation on this issue in view of the strength of opposition from key stakeholders.²⁵³ The VLRC and the Law Commission of England and Wales supported varying the test for pleas of guilty.²⁵⁴ The VLRC expressed the view that adequate safeguards should be built into the model so that the revised test for guilty pleas would only apply if a defendant was legally represented.²⁵⁵ The criteria that were identified as relevant for fitness to enter a plea were that the person:

- Understands the nature of the charge.
- Understands the nature of the hearing if they pleaded not guilty.
- Understands the significance of entering a plea of guilty and its consequences.
- Meaningfully communicates to his or her legal practitioner his/her decision to plead guilty.
- Follows the course of the plea and sentencing hearing that will follow a plea of guilty.²⁵⁶

It is noted that the test for capacity recommended by the ALRC does not make a distinction between the test to enter a guilty plea and the test to stand trial but does allow the differing decisions that a defendant will need to make to be taken into account in the assessment of capacity.²⁵⁷

4.4.71 In the Issues Paper, the Institute sought feedback on whether there should be a separate test in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to determine whether a person is fit to enter a plea and if so, the requirements of that test.

Should there be a separate test in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to determine whether a person is fit to enter a plea?

If so, what should be the requirements of the test?

4.4.72 The Institute received two submissions that addressed these questions. The DPP clearly supported a separate test based on the test proposed by the VLRC. The DPP wrote that:

I would support the inclusion of a separate test in the *Criminal Justice (Mental Impairment) Act* to determine whether a person is fit to enter a plea. There is a difference between being fit to stand trial and being fit to plead guilty. The nature and course of the proceedings is simpler in uncontested matters, and a person may be able

²⁵² Law Commission of England and Wales (n 133) 93.

²⁵³ NSWLRC (2013) (n 56) 37.

²⁵⁴ VLRC (n 22) 81.

²⁵⁵ *Ibid* 81–82.

²⁵⁶ *Ibid* 81. It is noted that a new provision that created a test for determining whether an accused was fit to plead guilty to a charge was adopted in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 8. This legislation has not been passed by the Victorian Parliament.

²⁵⁷ See [4.4.20].

to understand and follow the nature and course of proceedings on a plea of guilty but not a trial. It is in the interests of justice for victims, witnesses and accused that matters are dealt with as quickly as possible.

In circumstances where a person has impaired mental functioning, this can be readily and appropriately managed in the sentencing process. ...

The test proposed by the VLRC, as set out in 4.4.35 of the [issues] paper seems appropriate.²⁵⁸

4.4.73 While Walvisch recognised the difference between being fit to stand trial and being fit to enter a guilty plea, he did not consider that it was essential to have two separate tests if there was one test with sufficient flexibility to accommodate both situations. In Walvisch's view, the essential matter is the 'law should be able to differentiate between fitness to enter a plea and fitness to stand trial' and 'is clearly able to differentiate between these two situations'. In Walvisch's view, it was necessary to take care:

to ensure that the requisite capacities are not too strictly circumscribed in any test that applies to fitness to plead, and that the accused properly understands the nature of the guilty plea. In such cases, the accused must still be able to:

- Understand the nature of the charge;
- Understand that he or she has a right to contest that charge, and what that would generally involve (e.g., a trial involving witnesses giving evidence, determined by a jury/magistrate);
- Understand the nature and strength of the evidence that may be given in support of the prosecution, and the nature and strength of any legal defences open to him or her;
- Understand the meaning of conviction and punishment, and the nature of the sanctions which may be imposed;
- Enter a plea to the charge;
- Make reasons-responsive decisions about the relevant issues; and
- Give meaningful instructions to his or her legal practitioner.

Each of these matters should be clearly spelt out in any separate test.

4.4.74 The focus of the Institute's recommendations are to maximise an individual's participation in regular criminal justice process wherever possible and a separate test that would allow for a person's fitness to enter a guilty plea to be assessed would facilitate this. Further, as noted by the VLRC and NSWLRC, there is anecdotal evidence that individuals who may be unfit to stand trial may enter guilty pleas to avoid the onerous consequences of a finding of unfitness in circumstances where their legal representative was satisfied of their capacity to plead.²⁵⁹ While it is unclear the extent to which this occurs in Tasmania, it is reasonable to assume that it does happen on occasion. A legislative provision that outlines the nature of the matters to be addressed and also the need to consider supports and accommodations that may facilitate fitness to plead would formalise this process and make the relevant factors more transparent. Accordingly, the Institute recommends that a specific test be included in the

²⁵⁸ See [4.4.70].

²⁵⁹ See [4.4.66].

Criminal Justice (Mental Impairment) Act 1999 (Tas) to set out the circumstances in which a person is unfit to enter a plea. This test should largely reflect the test for fitness to stand trial (and so, focus on the accused's decision-making ability) but it should also incorporate changes that reflect the differences between a guilty plea and a trial.

4.4.75 The Institute's view is that the following factors are relevant to a person's fitness to enter a guilty plea:

- The accused's understanding of the nature of the offence with which he or she is charged.
- The accused's understanding that he or she has a right to contest that charge.
- The accused's understanding of the nature of the hearing if he or she entered a plea of not guilty as a process to determine whether it has been proved that the person committed the offence charged.
- The accused's understanding of the consequences of entering a plea of guilty, including what is being admitted when a plea of guilty is entered, the effect of a plea of guilty, that the court may impose punishment and a general understanding of the punishment that the person is in jeopardy of receiving.
- The accused's understanding of the course of the sentencing hearing and a general understanding of what is occurring at each stage and the right to challenge the facts stated by the prosecution.

These factors relate to the key decisions that an accused will need to make in deciding whether to enter a guilty plea. In addition, the accused must be able to communicate to his or her legal practitioner his/her decision to plead guilty and his/her version of facts relevant to the sentencing hearing.

Recommendations

11. There should be a separate test in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to determine whether a person is fit to enter a plea of guilty.
12. The test for fitness to enter a plea of guilty should reflect the decision-making and communication approach contained in the proposed test for determining fitness to stand trial (see Recommendation 6) with necessary alterations to reflect the difference between entering a plea of guilty and participating in a defended trial.
13. The following trial processes are relevant to a person's decision-making capacity to be fit to enter a guilty plea (see Recommendation 6):
 - the nature of the offence with which he or she is charged.
 - the right to contest that charge.
 - the nature of the hearing if he or she entered a plea of not guilty as a process to determine whether it has been proved that the person committed the offence charged.

- the consequences of entering a plea of guilty, including what is being admitted when a plea of guilty is entered, the effect of a plea of guilty, that the court may impose punishment and a general understanding of the punishment that the person is in jeopardy of receiving.
- the accused's understanding of the course of the sentencing hearing and a general understanding of what is occurring at each stage and the right to challenge the facts stated by the prosecution.

Part 5

Unfitness to Stand Trial: Procedure to Determine Unfitness to Stand Trial

5.1 Introduction

5.1.1 This Part sets out the current Tasmanian procedure to determine unfitness to stand trial, the position in other jurisdictions and options that are available to reform the current procedure. Concerns that arise in this area include:

- the role of experts and experts' reports in the process of determining unfitness to stand trial,
- the appropriate decision-maker (judge or jury) in making fitness determinations in the Supreme Court, and
- the appropriateness of the current procedure for determining fitness in the Magistrates Court.

5.1.2 In order to address these problems, Part 5 makes recommendations for reform that relate to the need for best practice guidelines to be developed in relation to the preparation of expert reports to be used by the court to make a determination of fitness to stand trial or to enter a guilty plea. Related to Recommendation 10, the recommendations here highlight the need for experts to provide information to the court in relation to supports and accommodations that may support the accused's decision-making capacity and assist him/her to participate in the criminal justice process. Other significant recommendations for reforms set out in Part 5 are that determinations of fitness to stand trial in the Supreme Court should be determined by a judge rather than a jury (Recommendation 16) and the introduction of a simplified alternative pathway for appropriate cases in the Magistrates Court (Recommendations 17–18).

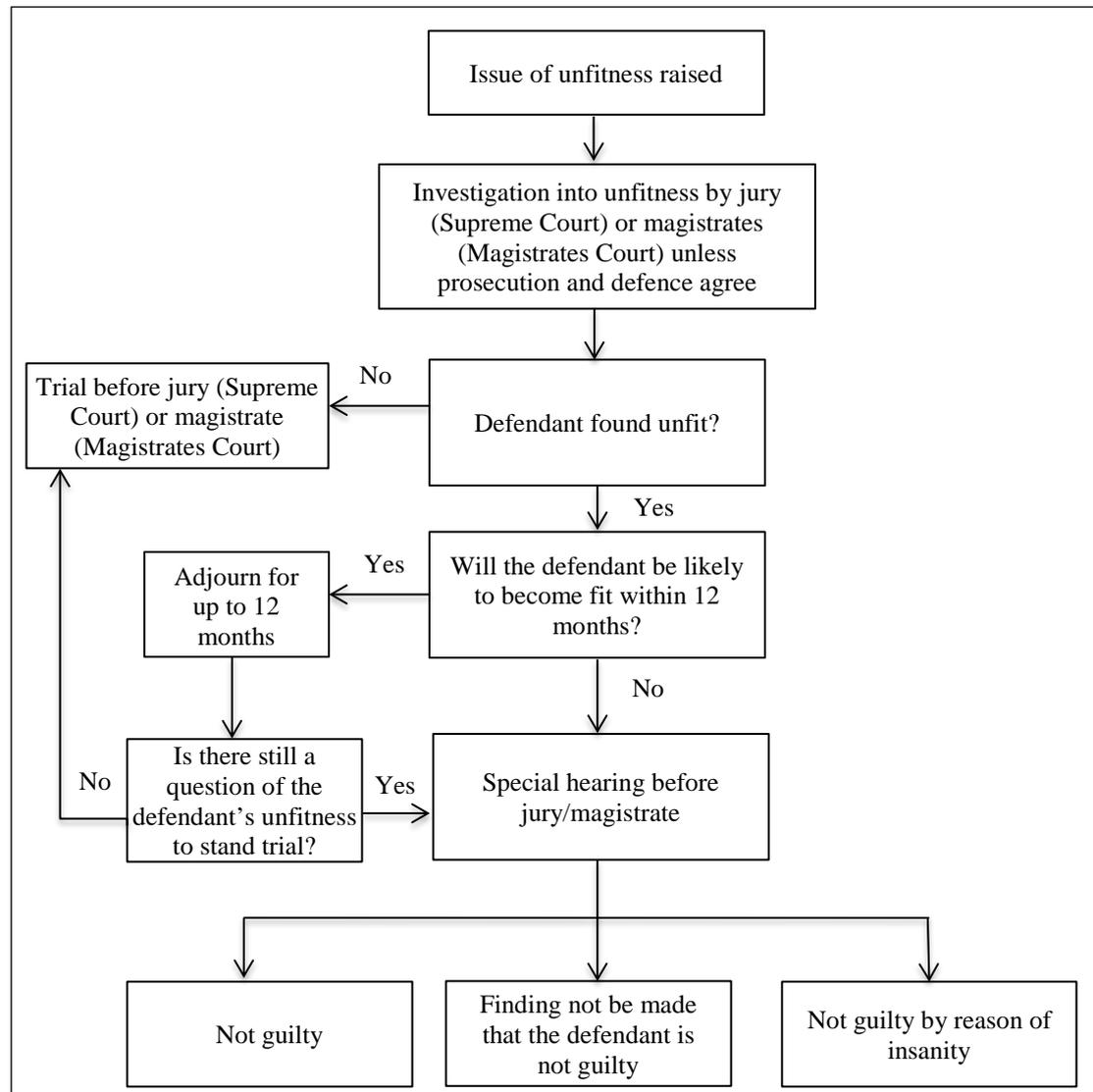
5.2 The Tasmanian position

5.2.1 In Tasmania, subject to the potential referral of an accused to the Diversion List,²⁶⁰ the same procedure applies in relation to fitness to stand trial and insanity regardless of whether the matter is an indictable offence heard in the Supreme Court or a summary offence dealt with in the Magistrates Court. The only difference is that the magistrate makes decisions in relation to fitness and the relevant findings at a special hearing rather than a jury.

²⁶⁰ See [2.2.2]–[2.2.3].

5.2.2 Figure 5.1 shows the stages of the unfitness to stand trial process under the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

Figure 5.1: Unfitness to stand trial in the Supreme Court and Magistrates Court



5.2.3 The question whether a person is unfit to stand trial is a question of fact.²⁶¹ It is determined in the Supreme Court by a jury and by a magistrate in the Magistrates Court.²⁶² However, there is no need to conduct an investigation (by a jury or a magistrate) if the prosecutor and defendant agree, in which case the court may record a finding that the defendant is unfit to stand trial.²⁶³ On an investigation, a court must hear any relevant and probative evidence and representations put to the court by the prosecutor or the defendant, it may call evidence on its own initiative and may require the defendant to undergo an examination by a psychiatrist or other appropriate expert and require the results to be reported to the court.²⁶⁴

²⁶¹ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 5.

²⁶² *Ibid* s 12.

²⁶³ *Ibid* s 19; *Tasmania v Drake* [2006] TASSC 21.

²⁶⁴ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 11.

5.2.4 If, on an investigation, a defendant is found unfit to stand trial, the court must determine whether or not the defendant is likely to become fit to stand trial during the next 12 months.²⁶⁵ If a jury determines that a defendant is unfit to stand trial, then it determines whether or not the defendant is likely to become fit to stand trial during the next 12 months.²⁶⁶ If the defendant and the prosecution agree, and a finding that an individual is unfit is recorded (under *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 19) or the matter is dealt with in the Magistrates Court, then the judicial officer (judge or magistrate) makes the determination about the likelihood of a person becoming fit to stand trial.²⁶⁷ If it is determined that the defendant is likely to become fit to stand trial during the next 12 months, the court must adjourn the proceedings for a period not exceeding 12 months. If, after the adjournment, the court is of the opinion that the grounds on which the investigation was thought to be necessary no longer exist, the court may decide not to proceed with the investigation.²⁶⁸ However, if the defendant does not become fit to stand trial within 12 months, then the court must proceed to hold a special hearing.²⁶⁹

5.3 The position in other jurisdictions

Higher courts

5.3.1 As with Tasmania, in higher courts in the Northern Territory and Victoria, the jury determines whether or not an accused is fit to stand trial.²⁷⁰ In the Northern Territory and South Australia (as with Tasmania), there is power to dispense with the investigation if the prosecution and defence agree.²⁷¹ In South Australia a defendant can also elect to have the investigation into fitness to stand trial determined by a judge instead of a jury.²⁷²

5.3.2 In contrast, in New South Wales, Western Australia, the Australian Capital Territory and for federal offences, the judge makes the determination of whether an accused is fit to stand trial.²⁷³ This is also the position in England and Wales.²⁷⁴

²⁶⁵ Ibid s 14.

²⁶⁶ Ibid s 12(4).

²⁶⁷ *Tasmania v Bosworth* (2005) 13 Tas SR 457, [14] (Crawford J).

²⁶⁸ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 14(3).

²⁶⁹ Ibid s 15(1). The requirements for a special hearing are discussed in detail in Part 6.

²⁷⁰ VLRC (n 22) 230 fn 32; *Criminal Code* (NT) s 43L; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 11. It is noted that the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 9 provides that responsibility for determining fitness to stand trial is to be decided by a judge (and not the jury). This legislation has not been passed by the Victorian Parliament.

²⁷¹ VLRC (n 22) 230 fn 32.

²⁷² *Criminal Law Consolidation Act 1935* (SA) s 269B.

²⁷³ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 9; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 12; *Crimes Act 1900* (ACT) s 314; *Crimes Act 1914* (Cth) s 20B(2).

²⁷⁴ *Criminal Procedure (Insanity) Act 1964* (UK) s 4(5).

5.3.3 In Queensland, there is a dual track system, with decisions being made by the jury under the *Criminal Code* (Qld) s 613 or the Mental Health Court under the *Mental Health Act 2016* (Qld) s 118.²⁷⁵

The Magistrates Court

5.3.4 In relation to magistrates' courts, there are different approaches taken in relation to fitness to stand trial.

5.3.5 As with Tasmania, in the Australian Capital Territory, South Australia and Western Australia, magistrates have the power to determine the issue of unfitness to stand trial.²⁷⁶ In the ACT, greater flexibility exists in relation to the powers that a magistrate may exercise for summary offences where fitness to stand trial is raised as a genuine issue. Instead of carrying out an investigation into fitness to plead and the special hearing process (following a finding of unfitness), the magistrate has a power to dismiss the charge, if:

- (a) the court is satisfied that there is a real and substantial question about the defendant's fitness to stand trial; and
- (b) the court considers that because of the trivial nature of the charge or the nature of the defendant's mental impairment, it would be inappropriate to inflict any punishment on the defendant in relation to the offence.²⁷⁷

5.3.6 In Victoria, the Magistrates' Court does not have the power to determine unfitness to stand trial. Similarly, in the Northern Territory, the Local Court does not have an express power to determine unfitness to stand trial.²⁷⁸ If the issue of unfitness is raised in relation to a summary offence, the matter is discontinued.²⁷⁹

5.3.7 The VLRC has considered the process that should apply when questions of unfitness to stand trial are raised in relation to summary offences in the Magistrates' Court. It recommended that the Magistrates' Court should have the power to determine whether a person is unfit to stand trial and to conduct special hearings after a finding of unfitness.²⁸⁰ The VLRC also recommended that there be flexibility for a magistrate to discharge an accused with or without conditions for a summary offence if there was a 'real and substantial question as to the unfitness of the accused' where the magistrate considers that the accused does not pose an unacceptable risk of causing physical or psychological harm to another person, or other people generally, as a result of the discharge and the accused is receiving treatment, support or services in the community.²⁸¹ This reflects the view that:

²⁷⁵ It is noted that the procedure under the *Criminal Code* (Qld) has fallen into disuse, and fitness to stand trial is routinely dealt with by the Mental Health Commission (MHC): J O'Leary, S O'Toole and B Watt, 'Exploring Juvenile Fitness for Trial in Queensland' (2013) 20 *Psychiatry, Psychology and Law* 853, 854.

²⁷⁶ *Crimes Act 1900* (ACT) s 310; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 11; *Criminal Law Consolidation Act 1935* (SA).

²⁷⁷ *Crimes Act 1900* (ACT) s 315.

²⁷⁸ See VLRC (n 24) 121.

²⁷⁹ VLRC (n 22) 128.

²⁸⁰ *Ibid* Recommendation 27, 136.

²⁸¹ *Ibid* Recommendation 28.

it was important to retain flexibility by having the option of not proceeding with charges in particular circumstances. This was seen as important so that accused were not picked up by the CMIA pathway and made subject to compulsory treatment or services where it was considered unnecessary or inappropriate having regard to the risk posed to the community and the person's need for treatment or services. This may be appropriate where the offending behaviour is such that the risk posed to the community is low, where the accused's condition has stabilised and there are appropriate supports in place for the person in the community, and there is no need for supervision of the accused under the CMIA.²⁸²

5.3.8 In Queensland, until recent amendments introduced by the *Mental Health Act 2016* (Qld), the Magistrates Court did not have power to determine issues of unfitness to stand trial.²⁸³ Now, a magistrate has the power to dismiss a complaint for a simple offence if 'reasonably satisfied, on the balance of probabilities, that the person charged with the offence was or appears to have been, of unsound mind when the offence was allegedly committed; or is unfit for trial'.²⁸⁴ Magistrates can also dismiss the charge and refer the defendant to an appropriate body for care and/or treatment if certain conditions are satisfied.²⁸⁵ They can also dismiss the matter following the receipt of a Mental Health Assessment, which is a report prepared by a Senior Mental Health Clinician with the support of a Consultant Psychiatrist and includes: (i) mental health assessment court liaison service feedback; or (ii) mental health and fitness for trial assessment court liaison service feedback; or (iii) mental health, fitness and soundness assessment court liaison service feedback.²⁸⁶

5.3.9 In New South Wales, there is no legislative provision in relation to fitness to stand trial in the Local Court and so the common law applies. However, the Local Court generally deals with accused people with a mental impairment using its diversionary powers under ss 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).²⁸⁷ As set out in Table 5.1, this procedure differs from the ACT, Queensland and the proposed Victorian approach as the magistrate's power to dismiss the charges conditionally or unconditionally does not rely on a finding in relation to a person's unfitness for trial or criminal responsibility. Instead, the procedure relies on a magistrate's assessment that the person has the requisite condition, and in relation to s 32, that on an outline of the facts alleged in the proceedings, or such other evidence as the magistrate may consider, it is more appropriate to deal with the defendant in accordance with the provisions in s 32.²⁸⁸

5.3.10 As shown in Table 5.1, the legislation in each jurisdiction sets out a different threshold that allows the magistrate to exercise a discretion to dismiss the charge (and impose assessment and treatment conditions). These range from the lowest standard that 'it appears to the magistrate' (NSW), to the requirement that 'there is a real and substantial question' (ACT) and

²⁸² VLRC (n 24) 146-7.

²⁸³ Ibid 121, 126.

²⁸⁴ *Mental Health Act 2016* (Qld) s 172.

²⁸⁵ Ibid s 174.

²⁸⁶ Magistrates Court (Qld), *Practice Direction 1 of 2017: Mental Health Act 2016 Proceedings in the Magistrates Court* (2017) 1.

²⁸⁷ VLRC (n 24) 123.

²⁸⁸ It is noted that proposed reforms will strengthen the framework in NSW for diverting people with cognitive and mental health impairment charged with low level offending into the health and disability sector, see NSW Government (Justice), *Forensic Mental Health Reforms* <<https://www.justice.nsw.gov.au/Pages/Reforms/forensic-mental-health.aspx>>.

the highest standard that the magistrate is satisfied on the balance of probabilities (Queensland). The ‘real and substantial question’ test was also recommended in Victoria.

Table 5.1: Magistrates Court powers, ACT, New South Wales and Queensland

Jurisdiction	Legislation	Statutory criteria for exercise	Order available
New South Wales	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW) s 32	<ul style="list-style-type: none"> It appears to the magistrate that the defendant was cognitively impaired, suffering from mental illness or suffering from a mental condition for which treatment is available in a mental health facility (but is not mentally ill).²⁸⁹ On an outline of the facts alleged in the proceedings or such other evidence as the magistrate may consider, it is more appropriate to deal with the defendant in accordance with the provisions.²⁹⁰ 	<ul style="list-style-type: none"> Adjourn the proceedings Remand the defendant on bail Dismiss the charge and discharge the defendant into the care of a responsible person, either unconditionally or subject to conditions Dismiss the charge and discharge the defendant unconditionally In relation to defendants who are mentally ill, there is power for the magistrate to grant bail.
	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW) s 33	<ul style="list-style-type: none"> If it appears that a defendant is mentally ill. 	<ul style="list-style-type: none"> Order that the person be detained in mental health facility for assessment Discharge the defendant into the care of a responsible person, either unconditionally or subject to conditions Order a community treatment order.
Australian Capital Territory	<i>Crimes Act 1900</i> (ACT) s 315	<ul style="list-style-type: none"> Court is satisfied that there is real and substantial question about the defendant’s fitness to stand trial and the court considers because of the trial, nature of the charge or the nature of the defendant’s mental impairment, it would be inappropriate to inflict any punishment on the defendant in relation to the offence the court may decide not to carry out or continue an investigation into fitness to plead. 	<ul style="list-style-type: none"> Dismiss the charge.
Queensland	<i>Mental Health Act 2016</i> (Qld) ss 172–177	<ul style="list-style-type: none"> Reasonably satisfied on the balance of probabilities that the person charged with the offence was of unsound mind when the offence was committed or was unfit for trial. 	<ul style="list-style-type: none"> Dismiss the complaint Make an examination order.

²⁸⁹ Mentally ill is defined under the *Mental Health Act 2007* (NSW) s 14 as a person who is suffering from a mental illness and because of that illness, there are reasonable grounds for believing that care, treatment or control of that person is necessary of the person’s own protection from serious harm, or for the protection of others from serious harm.

²⁹⁰ See NSWLRC (n 8) 247–248. The court takes into account the seriousness of the offence, the likely sentence if convicted, the availability of a treatment plan, the defendant’s criminal history and failure of previous diversion: at 248–251.

5.4 Issues for consideration

Assessment reports

5.4.1 Reports provided by experts provide the evidentiary foundation for findings of unfitness and so are fundamental to the determination of fitness to stand trial.²⁹¹ Under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), in addition to requiring the court to hear evidence and representations by defendants or prosecutors as to fitness, there is also provision for the court to call evidence on its own initiative and order an assessment of a defendant by a psychiatrist or other appropriate expert.²⁹²

5.4.2 In its consideration of the procedure in relation to determining unfitness to stand trial, the VLRC observed that '[p]otential 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'.²⁹³ As a result, the VLRC sought feedback in relation to these issues, as well as other issues that may exist in relation to the process for determining unfitness to stand trial.

5.4.3 In response, it was noted that, despite the general recognition of expertise and objectivity of experts on issues of unfitness and the acknowledgment of the difficult task faced by experts, some problems did arise in this area. These included:

- discrepancies in experts' training and expertise;
- reports sometimes lacking a forensic direction or familiarity with CMIA legal concepts;
- assessments conducted inappropriately (for example, questions not communicated effectively to people with an intellectual disability or in a culturally appropriate manner);
- a small pool of experts, which could compromise objectivity.²⁹⁴

5.4.4 Suggestions made by the VLRC to improve expert assessment in relation to unfitness to stand trial included:

- Unfitness assessments should be conducted by a multi-disciplinary specialised team of psychologists, psychiatrists and speech pathologists. ...
- There should be careful regulation of experts who assess unfitness in terms of qualifications and expertise through registration or accreditation of their competency to conduct these assessments. ...
- There should be clearer guidance to experts about the test for unfitness. This could be achieved through the development of best practice guidelines on what should be included in a report, or through training.

²⁹¹ VLRC (n 24) 73.

²⁹² *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 11.

²⁹³ VLRC (n 24) 73.

²⁹⁴ VLRC (n 22) 97.

- A component of every assessment should be standardised. For example, there should be standard information that should be included as part of every report. ...
- Assessments should be conducted using appropriate communication techniques.²⁹⁵

5.4.5 The VLRC concluded that it is necessary to make changes to ‘address unnecessary variability and to ensure the fairness and accuracy of expert assessments of unfitness to stand trial’.²⁹⁶ However, it considered that ‘experts themselves are the best people to determine the changes’ that would be necessary to address these issues.²⁹⁷

5.4.6 Anecdotally, the TLRI understands that there is a lack of standardisation in assessments provided by experts in Tasmania, and consequently there is considerable diversity in the assessment reports. This is a concern given the importance of the expert advice in the court process. Accordingly, in the Issues Paper, the TLRI sought feedback on whether there are any issues that arise in relation to the role of experts and expert reports in the process of determining unfitness to stand trial. Further, the TLRI sought feedback in relation to how any difficulties might be resolved, for example whether there should be a specified minimum number of expert reports that should be required, whether there is a need for greater control in relation to the expertise or accreditation of the person conducting the assessment and writing the report for the court, and/or the information that should be contained in the report.

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?

If so, how do you think these problems might be resolved?

5.4.7 Five submissions addressed the questions in relation to the role of experts and expert reports and some of the potential problems that may arise. A common theme in several submissions related to need to bridge the gap between the legal context in which the information would be used and the assessment made by medical experts. Accordingly, solutions proposed tended to focus on the use of guidelines or other strategies to facilitate better communication and consistency in approach. O’Connell’s submission focused on the expense of seeking expert evidence for a defendant who is not funded by Legal Aid.²⁹⁸ The submission of EOT expressed the view that there is a need for a multi-disciplinary approach in making assessments of fitness involving experts in speech pathology and communications.²⁹⁹ EOT stated that ‘[r]eports should include an assessment of whether the provision of supports would assist the defendant to participate in the trial and the nature of the supports that should be provided to enable this to be so’.

5.4.8 The DPP indicated that ‘[o]n occasion, issues arise in relation to the role of experts and expert reports in the process of determining unfitness to stand trial. This is often due to an expert not being given sufficient material to enable an assessment of the Crown and defence

²⁹⁵ VLRC (n 22) 98.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

²⁹⁸ Marita O’Connell (Submission).

²⁹⁹ EOT (Submission).

case’. In response, the DPP indicated that there is ‘merit in the development of best practice guidelines that include a list of materials that must be provided to an expert who is preparing a report assessing a person’s fitness to stand trial’.

5.4.9 Walvisch saw problems arising ‘due to the lack of a neat fit between legal and clinical concepts of “mental disorder”’. His response was to have ‘clear guidance ... provided to experts working in the field about both the *purpose* of the test and its precise *scope*. This could be done through the development of a handbook for use by practitioners, as well as through the implementation of training courses for people working in the field’. Walvisch also observed that the development of a Practice Note by the court with the assistance of relevant experts may be useful for this purpose. In this regard, he noted that the Practice Note dealing with expert reports on mental functioning of offenders for sentencing hearings was a possible model that could be adapted for use in fitness reports.³⁰⁰ This was developed by the Forensic Evidence Working Group for use in the Supreme and County Courts in Victoria. Its purpose is to enhance the quality and reliability of expert evidence, as well as the utility of the evidence.

5.4.10 ForensiClinic also saw issues arising from a lack of knowledge and standardisation in the approach taken by experts to make an assessment in relation to fitness:

When issues arise regarding the interpretation of the legal test by assessing practitioners, these tend to come from a lack of education about fitness to stand trial, a lack of education about the legal process, and a lack of standardisation of methods used to evaluate fitness. Methodological diversity is influenced by qualifications (e.g., psychiatry, forensic psychology, neuropsychology) and the defendant’s diagnosis. Methodological diversity and a lack of understanding about fitness causes heterogeneous interpretation of the fitness criteria. A united understanding of precedent and expectation would resolve this issue.

Accordingly, ForensiClinic’s approach to the improvement of the role of experts and expert reports included:

- Providing ‘[e]ducational opportunities for collaboration between legal and forensic mental health practitioners’
- Standardising assessment methodology
- Having feedback provided from the courts and legal practitioners to medical experts about the strengths and weaknesses of the report.

5.4.11 In light of the submissions received, the Institute’s view is that there is scope to improve the use of experts to inform the court about a person’s fitness to stand trial. There is a need for clearer guidance to experts about the test of fitness through the development of best practice guidelines. This could be developed through an expert working group (as occurred in Victoria) involving judges, forensic psychiatrist and psychologists and legal practitioners. This expert group should also include appropriate expertise in language and communications. In developing the guidelines, the expert group should consider how to address challenges arising in the assessment of fitness to stand trial by experts posed by cultural and ethnic factors, as well as other communication difficulties. This may include taking into account the efficacy of

³⁰⁰ See Supreme Court of Victoria, *Sentencing Hearings: Experts Reports on Mental Functioning of Offenders* (Practice Note SC CR 7, 2017).

psychometric instruments, where relevant, that were developed through studies of Western, English-speaking populations. In addition to developing guidelines, this collaboration would allow for educational opportunities for legal and medical practitioners. Further, the scope of the best practice guidelines would need to accommodate proposed changes to the fitness test, particularly in relation to supports and accommodations reports that may assist defendants to participate in the criminal justice process.

Recommendations

14. Best practice guidelines should be developed for the preparation of expert reports to be used by the court to make a determination of fitness to stand trial or enter a guilty plea. These should be developed by an expert working group, which should consider how to address challenges arising in the assessment of fitness to stand trial by experts posed by cultural and ethnic factors, as well as other communication difficulties. This may include taking into account the efficacy of psychometric instruments, where relevant, that were developed through studies of Western, English-speaking populations.
15. The scope of the best practice guidelines should accommodate the proposed changes to the fitness test and should provide information to the court in relation to the supports and accommodations that may support the person's decision-making capacity and assist an individual to participate in the criminal justice process.

Determination of the issue of fitness by a judge rather than jury in the Supreme Court

5.4.12 In Victoria, consideration has been given to removing the requirement for investigations into fitness to be determined by a jury. The Victorian Law Reform Committee recommended a judge-alone procedure for investigations of fitness to stand trial on the grounds that:

- fitness investigations primarily involve technical matters and therefore it is more suitable for a hearing to be conducted by a judge alone;
- a fitness hearing is not designed to be adversarial and no decisions are made about the person's criminal responsibility;
- a judge hearing evidence alone may be quicker, less formal and less confusing or stressful for the accused with an intellectual disability or cognitive impairment, particularly if experts from both sides agree that the accused is clearly unfit to be tried.³⁰¹

5.4.13 The VLRC, similarly, recommended that unfitness to stand trial should be determined by a judge or a magistrate on the basis that this was a pre-trial issue that need not be determined by a jury.³⁰² The VLRC observed the narrowing of the role of the jury in relation to pre-trial matters more generally.³⁰³ It also noted that changing the criteria for a determination of fitness

³⁰¹ Law Reform Committee (n 56) 227.

³⁰² VLRC (n 22) 230–231.

³⁰³ Ibid.

to stand trial meant that a judge (rather than a jury) was more appropriately able to undertake the nuanced nature of pre-trial decision-making.³⁰⁴

5.4.14 In Tasmania, as noted, there is provision for the investigation into fitness to be determined by a trial judge where the defence and prosecution agree. However, consideration could be given to removing the jury's role in relation to the determination of the issue of fitness to stand trial in all cases. Accordingly, the Institute sought feedback on this issue in the Issues Paper.

Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to provide that unfitness to stand trial is to be determined by a judge in the Supreme Court instead of a jury in all cases?

5.4.15 Five submissions addressed whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to provide that unfitness to stand trial should be determined by a judge in the Supreme Court instead of a jury in all cases. This option for reform was clearly supported in four of the submissions on the basis that the decision to be made aligns more closely with the judicial role in a trial than with the jury, that it involves a test that is more readily applied by judicial officers given their understanding of the trial process and would be likely to lead to a more timely and less stressful process.

5.4.16 The DPP supported such an amendment on the basis that it was consistent with the procedure in other jurisdictions, including New South Wales, Western Australia, the Australian Capital Territory and also with other provisions in the *Criminal Justice (Mental Impairment) Act 1999* (Tas). The DPP also considered that it would streamline the process, create efficiencies and reduce stress and confusion for the accused. In addition, the DPP argued that 'determining the issue of fitness should not be unnecessarily adversarial. The issues that require determination are technical; they are not determinations about a person's criminal responsibility'.

5.4.17 Walvisch also observed that the judge should always have the power to determine the issue of unfitness to stand trial. In support of this view, he noted the views of the VLRC (as set out at [5.4.7] of the *Issues Paper*), as well as the following:

- The decision that is being made in this context is a procedural one, rather than a substantive one. Consequently, it fits more neatly within the general role of the judge to practically manage the course of the trial, than with the role of the jury to determine the facts surrounding the offence;
- The decision relates to the accused's ability to meaningfully participate in the trial process. The judge, with his or her specialised knowledge of trial procedure and processes, is far better placed to make a determination in this regard;
- Contested matters will require the application of highly specialised expert evidence to complex legal issues. Judges with experience in these matters are more likely to be able to adequately perform this task than lay jurors.

5.4.18 CLC Tas reported that '[a]necdotally, lawyers who appear as counsel in these applications observe that the jury is reliant on expert reports provided by psychiatrists and other

³⁰⁴ Ibid 231.

medical expertise'. On this basis, CLC Tas considered that 'it should be sufficient for a judge alone, after analysing expert medical opinion, to determine the question of fitness to stand trial'. This would be likely to result in fewer delays and finalisation of the issue in a timelier manner.

5.4.19 ForensiClinic supported reform to provide that fitness to stand trial should be determined by a judge and not a jury. This was supported on the basis that it provides greater transparency of decision-making in the event of an appeal.

5.4.20 The Department of Police, Fire and Emergency Management ('DPFEM') did not express clear agreement with the amendment proposal but gave support to the idea by expressing the view that 'consideration could be given to removing the jury's role in determining the issue of fitness to stand trial in all cases'. This was because of the complicated nature of the assessment required (and the potential for conflicting expert evidence) and that it is an extension of the provision in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) that allows the judge to determine fitness in cases where the defence and prosecution agree.

5.4.21 Based on the support for reform in the submissions received by the Institute, the relevant literature and the approach taken in other jurisdictions, the Institute's view is that the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to provide that the investigation into fitness to stand trial must be determined by a judge (rather than the jury). The Institute's view is that the determination of fitness to stand trial is a pre-trial matter that the judge is best placed to assess. The recommendation of the Institute in relation to reforms to the test for determining fitness strengthen arguments for this position because it is appropriate that a judge makes the decisions (based on information provided to the courts by relevant experts) about the supports and accommodations that may facilitate fitness for trial as part of the decision making process.

Recommendation

16. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to provide that the investigation into fitness to stand trial is to be determined by a judge (rather than the jury).

Procedure in the Magistrates Court

5.4.22 In Tasmania, if an issue of fitness to stand trial arises, the procedure for determining fitness and the conduct of special hearings applies in both the Supreme Court and in the Magistrates Court (as set out at [5.2]). This is a complex process (and a potentially costly and time consuming one) and unlike the ACT and Queensland, and as recommended in Victoria, there is no provision in Tasmania for a magistrate to dismiss the charge without conducting a special hearing. In New South Wales, there is also power for a magistrate to dismiss the charge. Accordingly, it may be argued that it is appropriate to have a simpler and more flexible approach available in the Magistrates Court. An option for reform would be to amend the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to provide for greater flexibility to allow the magistrate to dispose of a matter in a timelier manner in circumstances where it appears that a defendant is unfit for trial and this is appropriate in the context of the particular case.³⁰⁵ This reform would mean that the magistrate could make an assessment of whether it appears that an

³⁰⁵ This was considered by the VLRC: see VLRC (n 22) 140.

accused is unfit to stand trial (and/or has a defence of insanity) and then discharge the person and divert them from the *Criminal Justice (Mental Impairment) Act* pathway, if this is appropriate.

5.4.23 Possible models for reform are found in other jurisdictions. The power to discharge could be made following a determination that the court is satisfied that it appears that the accused is cognitively impaired, suffering a mental illness or suffering from a mental condition for which treatment is available in a mental health facility, or that the accused is mentally ill (the New South Wales position) or that there is a real and substantial question about the defendant's fitness to stand trial (the ACT position and that proposed in Victoria) or following a finding that on the balance of probabilities the accused is unfit to stand trial or unsound (Queensland approach and current Tasmanian test for unfitness to stand trial). In addition, in the ACT, the power of discharge can be exercised where the matter is trivial or, taking into account the nature of the defendant's mental impairment, it would be inappropriate to inflict any punishment on the defendant. In Victoria, it was recommended that the magistrate's power of discharge would depend on an assessment of the risk posed to the community and the treatment, support or services received in the community by the accused.

5.4.24 There is also scope to improve the effectiveness of the process, for example, by adopting the Queensland approach of allowing Court Liaison Officers to provide advice to magistrates on a person's state of mind at the time of the offence or fitness for trial.³⁰⁶ Similarly, in Victoria, the VLRC's view was that the operation of the Mental Health Liaison Service (with appropriate funding) could be expanded to allow the service to provide information to magistrates to 'assist them in determination whether there is a real and substantial question as to the unfitness of the accused'.³⁰⁷

5.4.25 In the Issues Paper, feedback was sought about possible amendment to the application of the fitness to stand trial procedure in the Magistrates Court.

Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to allow a magistrate to discharge an individual without making a determination of their fitness to stand trial or criminal responsibility?

What (if any) limitations should be set out in relation to the exercise of the power of discharge?

5.4.26 Seven responses addressed these questions, and all agreed that amendment to the current procedure that applies in the Magistrates Court is appropriate so that the magistrate has power to discharge an individual under the *Criminal Justice (Mental Impairment) Act 1999* (Tas). However, differences of opinion were expressed about the test that should be applied in relation to the exercise of the power of discharge.

5.4.27 CLC Tas expressed its strong belief that 'there should be an emphasis on diverting persons with cognitive and mental health impairments away from the criminal justice system and into treatment.' For matters in the Magistrates Court, CLC Tas highlighted the financial constraints that may pose a barrier to justice for some individuals. The cost of obtaining a report

³⁰⁶ Queensland Health, *Role of the Court Liaison Service in the Magistrates Court* <https://www.health.qld.gov.au/__data/assets/pdf_file/0021/640335/FAQ_Court_Liaison_Service.pdf>.

³⁰⁷ VLRC (n 22) 149.

from a psychiatrist or other appropriate expert (in the absence of legal aid funding) may result in some people not being able to prove their incapacity to stand trial. This was also noted by Marita O'Connell who wrote that '[s]eeking expert evidence is also a very expensive endeavour and places the onus on the defendant to provide such evidence. If the defendant does not have a grant of Legal Aid, this can be a complex and expensive route to take'. O'Connell also supported the introduction of diversionary provisions. The cost and complexity of the legal process in raising fitness to stand trial and/or insanity and the value of diversion was also a focus in the submission from TasCOSS.

5.4.28 CLC Tas also pointed to the lack of 'provision in the Magistrates Court for a magistrate to dismiss a charge without conducting a special hearing, a process that is both complex and time-consuming'. To address this, CLC Tas supported a simpler and more flexible approach (as found in other jurisdictions) but did not have a view of which threshold test was the most appropriate. It did, however, strongly believe that magistrates must be provided with the discretion, available in all three jurisdictions mentioned above, to dismiss the offence and/or divert the person to treatment, a reform that would reduce the court backlog, improve access to services and support recovery. O'Connell, in her submission, also highlighted the value of providing diversionary provisions for defendants with mental illness or mental impairment appearing in the magistrates court from the point of view of the individual and the court system. In O'Connell's view, a diversionary process would 'provide a mechanism for more timely treatment/support' as well as cutting 'down on lengthy and expensive hearing times and the need for expensive expert evidence for summary matters.'

5.4.29 In terms of approach, O'Connell pointed to the recent measures introduced in Queensland:

that allow magistrates to make pre-plea determinations once satisfied that a defendant is complying with appropriate treatment and support to reduce the risk of reoffending. This involves a boosting of the Court Liaison staff (Forensic Mental Health Services, FMHS) whose assessments inform the magistrates. These assessments are all overseen by a FMHS psychiatrist.

5.4.30 The DPP indicated that 'in some circumstances it may be appropriate to allow a magistrate to discharge an individual without making a determination of their fitness to stand trial or their criminal responsibility' and that 'an amendment to facilitate this would be consistent with some other jurisdictions'. However, the DPP stated that the power to discharge would need to be limited:

[f]or example, a magistrate should be required to be satisfied, on the balance of probabilities, that a person was unfit to stand trial. Further, consideration would need to be given to the strength of the case, the seriousness of the alleged offence, the need to protect the community and any treatment that may be available to the accused.

5.4.31 Walvisch also considered that reform is appropriate. However, he considered that the test should be whether there is a 'real and substantial question' about the accused's fitness to plead or stand trial'. This is the same trigger that was suggested by the VLRC.³⁰⁸ However, in terms of the nature of the test to be applied in determining whether discharge is appropriate, Walvisch suggested a more flexible test than that proposed in Victoria. As indicated, the test proposed by the VLRC involves consideration of whether the accused poses an unacceptable

³⁰⁸ See [5.4.23].

risk of causing physical or psychological harm to another person or other people generally as a result of the discharge and whether the accused is receiving treatment, support or services in the community.³⁰⁹ In contrast, Walvisch's view was that:

The test should provide magistrates with the power to discharge if appropriate in light of (i) the nature of the offence; (ii) the nature of the impairment; (iii) the risk to the community; and (iv) the treatment, support or services available to the accused.

5.4.32 EOT also considered that the threshold for the test should be whether the magistrate is satisfied that there is a real and substantial question about the defendant's fitness to stand trial. This threshold was suggested because it provides sufficient protection for the defendant:

We are concerned to ensure, however, that any presumption made about an accused's fitness to trial is done on the basis of transparent criteria and isn't used as a mechanism to undermine the rights of the charged person. Of particular concern, given the capacity to restrict the rights of the accused, would be any authority provided to a Magistrate to place the accused on any restriction or supervision orders in the absence of a proper testing of the issues surrounding the case.

5.4.33 The DPFEM also supported a change to the process that operates in the Magistrates Court. In its submission, it indicated that:

the merit of the proposed amendment is that it would provide for greater flexibility to allow the magistrate to dispose of a matter in a timelier manner in circumstances where it appears that a defendant is unfit for trial and this is appropriate in the context of the particular case or exercised where the matter is trivial.

The DPFEM considered that this power should only be exercised where the prosecution and defence agree that the individual has a mental or cognitive impairment that meets the required threshold. Otherwise, the concern was expressed that 'some magistrates could dismiss matters at a very low threshold for this test' and that without consensus, there would be scope for a greater number of appeals.

5.4.34 In its Issues Paper, the Institute did not directly seek feedback on how to implement any recommendation for a power to discharge. However, a view expressed in three of the submissions was that the Tasmanian Magistrates Court Diversion List may provide the appropriate framework to exercise the power to discharge.³¹⁰ For example, the DPP wrote that:

The Tasmanian Magistrates Court Diversion List (the list) may provide an appropriate framework to facilitate magistrates to discharge accused persons in the above circumstances. The list has a therapeutic jurisprudence approach; court liaison officers (employed by the Department of Health and Human Services) act as a conduit between defendants and health care providers to assist in the provision of better and more timely treatment. Offences that are deferred to the list may, in the main, be suitable for the disposition of matters in this way. For example, in 2009 the most common charges dealt with in the list were offences against justice procedures, government and government operations and theft-related offences (Mental Health Diversion List

³⁰⁹ See VLRC (n 22) Recommendation 28(m).

³¹⁰ DPP (Submission), Marita O'Connell (Submission) and TasCOSS (Submission). It is also noted that both TasCOSS and O'Connell made submissions in relation to the need to establish a legislative basis for the Diversion List.

Evaluation, Final Report, May 2009). Participation in this list is voluntary and thus would not adversely affect the rights of an accused.

The list aims to address the mental health issues of participants and to reduce offending behaviour. In this sense, it is to the benefit of the community, accused persons, victims and witnesses.

The Institute can certainly see the logical connections that exist between the operation of the Diversion List and a flexible procedure for magistrates to discharge a person where there is a real and substantial question about their fitness to stand trial. However, as with the approach adopted in Victoria, the Institute's view is that 'it is best to leave it to the courts to determine how to operationalise the [Institute's] recommendations'.³¹¹

5.4.35 Based on the support for reform in the submissions received by the Institute and the approach taken in other jurisdictions, the Institute's view is that the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to allow a magistrate to discharge an individual without making a determination of their fitness to stand trial or criminal responsibility. It is the Institute's view that the power to discharge should operate as follows:

- (1) It should apply to summary offences and indictable offences dealt with summarily. This will provide consistency of approach for all matters involving adult offenders dealt with in the jurisdiction of the Magistrates Court. However, the discharge power should not apply to matters that are referred to the Magistrates Court for trial from the Supreme Court by virtue of the *Criminal Code* (Tas) s 308, as it is the Institute's view that matters of fitness are more appropriately resolved in the Supreme Court prior to the judge taking a view that the matter should be tried summarily.
- (2) The threshold test for the operation of the discretion to discharge should be that there is a real and substantial question in relation to the defendant's fitness to stand trial and not the lesser standard of 'it appears' (as exists in New South Wales) or the higher standard of balance of probabilities (as exists in Queensland). In the view of the Institute, the 'real and substantial' test should be adopted because it is the same test as contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 10(5) that limits the power of a court to conduct an investigation into a defendant's fitness to stand trial. It is not appropriate that the test be on the balance of probabilities as this is the same test that applies for actual determination of fitness and so this approach is unlikely to provide for a more efficient or streamlined process in appropriate cases.
- (3) Expert advice in relation to the issue of fitness for the purpose of exercising the discretion should be able to be provided to the magistrate by the Court Liaison Officers. This will require that appropriate resources are made available to the Court Liaison Service.³¹²
- (4) While it is acknowledged that it is likely that there will generally be agreement between the defence and prosecution that a discharge is an appropriate course for the magistrate

³¹¹ VLRC (n 22) 148.

³¹² It is noted that this reference does not involve a review of the Diversion List. However, resource issues for the list were raised in three submissions, including in the submission of TasCOSS who outlined the funding limitations of the service and the need for an increase in funding for the Diversion List and for the Court Liaison Officers.

to take, the power should operate as a genuine discretion vested in the magistrate and should not require the consent of the prosecution and defence.

- (5) There should be legislative guidance on factors that are relevant to the exercise of the discretion to discharge. Such an approach may be appropriate, for example, when the risk posed to the community is low, where the defendant's condition has stabilised or the defendant has accessed appropriate services or treatment in the community and a more interventionist response from the court is not necessary.³¹³ Accordingly, legislative guidance should include a non-exhaustive list of matters that are relevant to the decision to dismiss the charge, including the following matters: (1) the nature of the offence, (2) the nature of the impairment, (3) the risk to the community, (4) the treatment, support or services available to the accused.³¹⁴ The Institute's view is that such an approach protects the rights of the individual as well as the safety of the community consistent with the least restrictive alternative.³¹⁵
- (6) Although the power to discharge a person conditionally exists in some jurisdictions (for example, New South Wales and proposed in Victoria) or to require a person to undergo examination (for example, in Queensland), the Institute's view is that it is not appropriate to allow the court to impose conditions on the discharge of the defendant under the flexible pathway proposed for the Magistrates Court. The person has not had their fitness determined by an investigation and the prosecution case has not been tested by having their responsibility determined by a special hearing. However, the treatment needs and the willingness and ability of the person to access treatment and/or other services appropriate to their needs are factors that are relevant to the power to discharge.

Recommendations

17. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to allow a magistrate to discharge people without making determinations of their fitness to stand trial or their criminal responsibility.
18. The power to discharge should operate as follows:
 - (a) It should apply to summary offences and indictable offences dealt with summarily. The discharge power should not apply to matters that are referred to the Magistrates Court for trial from the Supreme Court by virtue of the *Criminal Code* (Tas) s 308.
 - (b) The threshold test for the operation of the discretion to discharge should be that there is a real and substantial question about the defendant's fitness to stand trial.
 - (c) Advice in relation to the issue of fitness for the purpose of exercising the discretion should be provided to the magistrate by the Court Liaison Officers. Appropriate resources should be made available to the Court Liaison Service for this purpose.³¹⁶

³¹³ See VLRC (n 22) 146–7.

³¹⁴ These matters were contained in the submission of Walvisch.

³¹⁵ See [2.4].

³¹⁶ It is noted that this reference does not involve a review of the Diversion List. However, resource issues for the list were raised in CLC Tas submissions, including in the submission of TasCOSS who outlined the funding limitations of the service and the need for an increase in funding for the Diversion List and for the Court Liaison Officers.

- (d) The power should operate as a genuine discretion vested in the magistrate and should not require the consent of the prosecution and defence.
- (e) Legislative guidance as to the factors that are relevant to the exercise of the discretion to discharge the charges should be provided and include: (1) the nature of the offence, (2) the nature of the impairment, (3) the risk to the community, (4) the treatment, support or services available to the accused.
- (f) The power to discharge should only provide for an unconditional discharge and not a conditional discharge or the power to order other therapeutic intervention by the magistrate.

Part 6

Unfitness to Stand Trial: Procedure Following a Determination of Unfitness to Stand Trial

6.1 Introduction

6.1.1 This Part sets out the procedure following a determination of unfitness to stand trial in Tasmania and in other comparable jurisdictions. It then examines options for reform of this procedure. Aligned with the approach of the Institute to facilitate supported decision-making (as set out in Part 4), the Institute makes recommendations to use intermediaries and communication assistants in special hearings. Recommendations are also made to allow for a special hearing to be heard by a judge alone where the prosecution and the defence agree in relation to the defence of insanity (or, as recommended in the Report, the defence of mental or cognitive impairment).

6.2 The Tasmanian position

6.2.1 As shown in Figure 5.1, following a finding that a defendant is unfit to stand trial, the court makes a determination of whether or not the he or she is likely to become fit to stand trial during the next 12 months.³¹⁷ If the court determines that the person is likely to become fit to stand trial during the next 12 months, the court adjourns the proceedings. However, if the court determines that the defendant is unlikely to become fit to stand trial within 12 months or the defendant does not become fit to stand trial within 12 months, then the court holds a special hearing.³¹⁸

6.2.2 As noted at [2.4.1], prior to the introduction of the *Criminal Justice (Mental Impairment) Act 1999* (Tas), if a person was found to be unfit to stand trial, then they would be detained under a restriction order, notwithstanding that the prosecution case had not been tested.³¹⁹ Under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), a process is set out for a special hearing to determine ‘whether, despite the unfitness of the defendant to stand trial, on the limited evidence available the defendant is not guilty of an offence’.³²⁰ In the Supreme Court this question is determined by a jury,³²¹ and in the Magistrates Court it is determined by the magistrate.

³¹⁷ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 14(1).

³¹⁸ *Ibid* s 15(1).

³¹⁹ Department of Health and Human Services (DHHS), *Mental Health Act Guide*, 97.

³²⁰ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 15(2).

³²¹ *Ibid* s 15(3).

6.2.3 The *Criminal Justice (Mental Impairment) Act 1999* (Tas) provides that the special hearing ‘is to be conducted so that the onus of proof and standard of proof are the same as in a trial of criminal proceedings and in other respects as nearly as possible as if it were a trial of criminal proceedings’.³²² At a special hearing:

- (a) the defendant is taken to have pleaded not guilty to the offence; and
- (b) the defendant’s legal representatives may exercise the defendant’s rights to challenge jurors or the jury; and
- (c) the defendant may raise any defence that could properly be raised if the special hearing were an ordinary trial of criminal proceedings; and
- (d) the defendant is entitled to give evidence.³²³

In *Tasmania v Bosworth*,³²⁴ Crawford J explained that the hearing ‘is an opportunity for the State and the accused to call evidence, in the usual way, relevant to the question whether the accused is guilty of the offence or offences charged.’³²⁵ If the accused is unable to give instructions to his or her legal representative, the legal representative may act, in the exercise of an independent discretion, in what he or she genuinely believes to be the defendant’s best interests.³²⁶ In addition, the court has a discretion to permit an accused to be absent from a special hearing.³²⁷

6.2.4 Although the original intention was for ‘the special hearing ... to determine the external facts of the case — excluding the question of intent — to ascertain whether the basic prosecution case can be proved beyond reasonable doubt’,³²⁸ it appears that an accused’s intention is relevant to the jury’s assessment in special hearings. In *Tasmania v W*,³²⁹ the defendant faced a special hearing in relation to one count of committing an unlawful act intended to cause bodily harm and, in the alternative, causing grievous bodily harm. The defendant was found not guilty of the first count, but the jury was not able to find that he was not guilty of the alternative crime of causing grievous bodily harm. In making orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), Wood J stated that:

Clearly, the jury was not satisfied beyond reasonable doubt that the defendant had held the necessary intention required for the charge of committing an unlawful act intended to cause bodily harm. The jury was not satisfied beyond reasonable doubt that ... W had intended to cause Mr S grievous bodily harm. The jury must have been satisfied that he realised that striking Mr S and causing him grievous bodily harm was a likely consequence of driving at him, and that he went ahead disregarding that risk.³³⁰

³²² Ibid s16(1).

³²³ Ibid s 16(3).

³²⁴ (2005) 13 Tas R 457.

³²⁵ Ibid [15].

³²⁶ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 38.

³²⁷ Ibid s 16(1); *Criminal Code* s 369(2); *Tasmania v Bosworth* (2005) 13 Tas R 457 [33] (Crawford J).

³²⁸ DHHS, above n 319, 98; *Tasmania, Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

³²⁹ 15 June 2015, Wood J (Sentence).

³³⁰ Ibid.

Accordingly, in order for a jury to be unable to find that an accused is not guilty, the prosecution must prove the external facts and mental element for the offence, as well as disprove any relevant defence (such as self-defence) beyond reasonable doubt. If the defence of insanity is raised, this must be proved by the accused on the balance of probabilities.³³¹

6.2.5 At a special hearing, there are three findings available to the court.³³² The court may:

- (a) find the defendant not guilty of the offence. This has the same effect as a finding of not guilty following a trial of criminal proceedings;³³³
- (b) find the defendant not guilty on the ground of insanity; or
- (c) indicate that a finding cannot be made that the defendant is not guilty of the offence charged. This finding is made if the jury ‘concluded beyond reasonable doubt, on the evidence before it, that the accused appeared to be guilty’.³³⁴

6.2.6 It is not possible for the prosecution and defence to dispense with the need for a special hearing by agreeing that the accused should be found not guilty on the grounds of insanity. Similarly, it is not possible for the defendant who is found unfit to stand trial to enter a plea of guilty.³³⁵ However, it is noted that the Institute has made recommendations that would create a new test to determine fitness to stand trial (see Recommendations 4–9) and has also recommended that the prosecution and defence be able to agree to a finding of not guilty on the basis of mental or cognitive impairment with judicial oversight (see Recommendation 21).

6.3 Other jurisdictions

6.3.1 In Australia, while there is broad similarity in the criteria used to assess fitness to stand trial, different procedures are followed if an accused is found to be unfit to stand trial.

6.3.2 In Western Australia and Queensland (as set out in Appendix 5), there is no provision for a special hearing to be held.³³⁶ This means that the prosecution case is not tested and a determination is not made as to whether the accused is entitled to an acquittal.³³⁷ In contrast, in other jurisdictions, there are provisions for special hearings following a finding that the accused is unfit to stand trial. However, there are differences in regard to the conduct of the hearing. For example, in several jurisdictions the prosecution is only required to prove the physical elements

³³¹ See [7.3.26] for further discussion of onus and standard of proof for insanity.

³³² *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 17.

³³³ *Ibid* s 18(1).

³³⁴ *Tasmania v Bosworth* (2005) 13 Tas R 457 [16] (Crawford J).

³³⁵ This is discussed at [4.4.66]–[4.4.75].

³³⁶ In Western Australia, a review conducted into the operation of fitness to stand trial did not recommend that a special hearing be adopted, but instead recommended that the judicial officer was to have regard to whether there was a case to answer on the balance of probabilities after inquiring into the question and informing him or herself in any way the judicial officer thinks fit: Department of the Attorney-General, Western Australia, (n 108) Recommendation 9.

³³⁷ Gooding et al (n 35) 845–846;

of the offence (South Australia, ACT, England and Wales, New Zealand),³³⁸ while in others the standard of proof differs from a regular trial (Commonwealth and New Zealand).³³⁹

6.4 Issues for consideration

6.4.1 There are issues that arise in relation to the procedure following a determination of unfitness to stand trial. They are:

- whether the special hearing process complies with the human rights obligations under the *CRPD*.
- whether there should be provision for a judge-alone process for special hearings.

CRPD obligations

6.4.2 Special hearing provisions in Australia (and comparable jurisdictions) have been criticised by those concerned with the human rights obligations arising under the *CRPD*. These criticisms have focused on the removal of the accused from the mainstream criminal justice system and the extent to which the modified process of the special hearing differs from a criminal trial.³⁴⁰ Gooding et al have suggested that, in order to meet *CRPD* obligations, the minimum requirements that should apply to any alternative procedure are:

- The same standard of proof and probative value of prosecution evidence as in typical trial;
- The same presumption of innocence, with the associated requirement for proof of all elements;
- The availability to the accused of all defences; and
- That proceedings against the accused must be based on his or her ‘rights, wishes and preferences’ (and not his or her ‘best interests’).³⁴¹

6.4.3 The *Criminal Justice (Mental Impairment) Act 1999* (Tas) does appear to comply substantially with the minimum requirements under the *CRPD* as identified by Gooding et al. The provisions require that the same standard of proof apply and that the special hearing is to be conducted ‘as nearly as possible’ to normal criminal trials. The prosecution must prove the external and fault elements of the offence beyond reasonable doubt and the defendant can rely on any defences that would have been available in a mainstream criminal trial.

6.4.4 Nevertheless, specific criticism has been directed at the Tasmanian provision on the ground that it allows the jury to determine that ‘a finding cannot be made that the defendant is

³³⁸ See Appendix 5.

³³⁹ See Arstein-Kerslake et al (n 146) 404.

³⁴⁰ See McSherry et al (n 38) 19; *ibid* 403–404; Gooding et al (n 35) 845–850.

³⁴¹ Gooding et al (n 35) 862–863.

not guilty of the offence charged or any offence available as an alternative'.³⁴² Gooding et al, write that:

A literal reading of this provision suggests that in order for the accused to secure an unconditional acquittal, the special hearing jury must make a positive finding that the accused is not guilty. The Tasmanian Supreme Court has suggested that a qualified finding is accordingly available “if the jury concluded beyond reasonable doubt, on the evidence before it, that the accused appeared to be guilty”. It is not clear what it means for an accused to ‘appear to be guilty’, but this ruling raises concern about the integrity of the presumption of innocence.

6.4.5 However, a contrary view is that Gooding et al’s interpretation of the legislation does not accord with the interpretation of the provision or the approach adopted by the court at a special hearing. In the Tasmanian context, it is clear that the special hearing does not result in a reversal of the onus of proof as the jury is directed that an accused is deemed to be innocent unless and until the jury is satisfied beyond reasonable doubt that the accused committed the particular offence and the Crown has the burden of proving this.

6.4.6 Further, as the Law Commission of England and Wales has argued, the purpose of the special hearing is to provide an accused with an equal opportunity for an acquittal.³⁴³ This means that at a special hearing the jury makes a determination (as with the usual criminal trial process) as to whether the prosecution has established the case beyond reasonable doubt. If the prosecution has not established its case, then the accused at a special hearing (like an accused in the mainstream criminal process) is entitled to an acquittal. In a mainstream trial, if the jury is satisfied that the prosecution has established its case beyond reasonable doubt, then it will find the accused guilty. However, at a special hearing, given the limitations of the accused’s capacity to participate in a trial, it is not considered appropriate to find the accused guilty of the offence (and hence the wording of *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 17(d) that a finding cannot be made that the defendant is not guilty of the offence charged or any offence available as an alternative).

6.4.7 Further concerns have been raised that the special hearing process removes the benefits of entering an early guilty plea in sentence mitigation as it assumes that the person has pleaded not guilty.³⁴⁴ However, it should be remembered that a person dealt with under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) is not ‘sentenced’ and the usual sentencing principles (including a discount for a guilty plea) do not apply to the determination of the appropriate court order. Instead, the court applies the principles under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) that focus on the nature of the defendant’s mental impairment and the likely danger that he or she poses to other people, and the need to ensure that restrictions on the defendant’s freedom and personal autonomy are kept to a minimum consistent with the safety of the community.³⁴⁵ However, a comparison of the potential sentences (taking into account a plea of guilty and the person’s mental or cognitive impairment

³⁴² *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 17.

³⁴³ See Law Commission of England and Wales (n 133) 157.

³⁴⁴ P Gooding et al, ‘Supporting Accused Persons with Cognitive Disabilities to Participate in Criminal Proceedings in Australia: Avoiding the Pitfalls of Unfitness to Stand Trial Laws’ (2017) 35 *Law in Context* 64, 69 citing K Eagle and A Ellis, ‘The Widening Net of Preventative Detention and the Unfit for Trial’ (2016) 90(3) *Australian Law Journal* 174.

³⁴⁵ See Part 8 for a discussion of disposition.

as mitigating factors) and a finding of unfitness and the dispositions that may follow a special hearing may inappropriately influence an accused’s decision to proceed with a guilty plea.³⁴⁶

6.4.8 An additional criticism that could be made is in relation to the requirement for the accused’s legal representative to exercise his or her independent decision-making discretion in the best interests of the accused. This is in conflict with the *CRPD* requirement that proceedings against an accused should be based on his or her ‘rights, wishes and preferences’ rather than their best interests. It is also inconsistent with the National Decision-Making Principles.³⁴⁷

6.4.9 Accordingly, in the Issues Paper, the Institute sought feedback on the nature of the special hearing to explore concerns about the differences between a special hearing and an ordinary trial, concerns about the presumption of innocence and the role of legal practitioners in special hearings. The Issues Paper asked the following questions:

Do you consider that the conduct of a special hearing differs from an ordinary trial in terms of the evidence adduced or the conduct of the hearing? If so, in what ways?

Do you consider that the conduct of the special hearing is consistent with the presumption of innocence?

Do issues arise in relation to the conduct of legal practitioners in acting in the ‘best interests’ of a person rather than based that person’s ‘rights, wishes and preferences’?

6.4.10 Four submissions to the Institute addressed these questions.

6.4.11 The DPP and O’Connell identified the streamlining of the evidence as a key difference between a special hearing and an ordinary trial. The DPP observed that in special hearings ‘it is common for the parties to more readily agree matters that are not in dispute’ but considered that that the ‘conduct of the special hearing is consistent with the presumption of innocence’. The DPP noted that the onus and standard of proof were the same for a special hearing as in a criminal trial. Accordingly, the ‘jury still has to be satisfied beyond reasonable doubt of an accused’s guilt for the offence charged; if they are not so satisfied an outright acquittal is returned’. This point was also made by Walvisch.³⁴⁸ In contrast, O’Connell submitted that:

there are a number of cases where the elements of the special hearing are generally agreed and so the special hearing differs from an ordinary hearing in that all facts and evidence are agreed to by both parties. This can make the process something of a ‘rubber stamp’ exercise.

6.4.12 EOT highlighted the human rights implications of the special hearing process noting in particular the inconsistency between the *CRPD* principles and the procedures in several jurisdictions. EOT stressed that ‘of particular concern are limitations placed on the accused to participate in a meaningful way in proceedings which risks diminishing the ability of the court

³⁴⁶ See Appendix 8.

³⁴⁷ See ALRC (n 40) Recommendation 3-1. See also TLRI (n 7) Part 3, where recommendations were made for a shift from the paternalistic ‘best interests’ approach to representative decision-making based on a person’s will, preferences and rights.

³⁴⁸ It is noted that Walvisch considered that: ‘To be fully consistent with the presumption of innocence (and the right to a fair trial), however, I believe that there should be provision for an accused (at his or her discretion) to have a matter re-heard, even if a special hearing has been held, if he or she regains fitness. This will provide the accused with an opportunity to properly account for his or her actions, and to potentially clear his or her name’.

to test the case against the accused’ and ‘that the holding of special hearings may compromise the common law principle that a trial not be held when the defendant’s abilities are so limited that the trial would be unfair or unjust’. EOT cited the concerns about the special process hearing expressed by Arstein et al:

Even though many jurisdictions explicitly strive to emulate the trial process as closely as possible, a special hearing is fundamentally not a trial. The procedures are different. The available verdicts are different. Ultimate dispositions – potentially including indefinite detention – are radically different. Therefore, a special hearing may not adequately uphold the CRPD obligations for persons with disabilities to have an equal right to a fair trial.³⁴⁹

However, in circumstances where an accused cannot participate in a trial under the ordinary criminal procedures, EOT recommended adoption of the following criteria (as identified by Gooding et al) as the standards to be met to ensure minimum compliance with the *CRPD*:

- The same standard of proof and probative value of prosecution evidence
- The same presumption of innocence and the need for the prosecution to prove all elements of offences
- The availability of all defences
- Proceedings based on ‘rights, wishes and preference’ and not ‘best interests’.

6.4.13 As noted, in the Tasmanian context, most of these criteria currently apply. There is the same standard and onus of proof for a special hearing as applies in ordinary criminal procedures, there is the same presumption of innocence and the same availability of all defences to an accused. Further, as noted in the submissions received by the Institute and in the Issues Paper, there are concerns about the role of the legal practitioners, particularly where accused are unable to give instructions. According to O’Connell, ‘the presumption of innocence is compromised for matters that proceed to special hearing. In the absence of sound instructions, it is difficult to refute the charges.’ Similarly, O’Connell noted that:

issues do arise in relation to the conduct of legal practitioners in acting in the ‘best interests’ of a person rather than based on that person’s ‘rights, wishes and preferences’, particularly when a defendant may be opposed to any kind of mandated treatment or oversight, which is the likely outcome of any special hearing procedures.

6.4.14 Walvisch also commented on the inconsistency of the current legislative approach with the *CRPD* and the National Decision-Making Principles. In his view reform should be enacted:

to provide that legal practitioners should act in accordance with the accused’s rights, wishes and preferences where these can be ascertained. However, it may be necessary to have a fall-back position (such as a ‘best interests’ test) for use in cases where no rights, wishes or preferences can be determined.

6.4.15 The DPP also noted the ethical difficulties created for a legal practitioner in determining what is in the ‘best interests’ of an accused person. The DPP stated that this:

³⁴⁹ Arnstein-Kerslake (n 146) 415.

requires the legal practitioner to consider the person’s rights, wishes and preferences. However, as the procedure follows a finding that the person is unfit to stand trial, the very purpose of the procedure is that the person may not be capable of acting in their own best interests and exercising their rights. This requires the legal practitioner acting on behalf of such a person to determine what is in the best interests of their client. This in and of itself may create ethical issues.

Likewise, the NSWLRC has noted the ‘legal and ethical “grey area”’ faced by legal practitioners when clients are unable to give proper instructions³⁵⁰ stating that problems arise when an unfit defendant is ‘unable accurately and coherently to give evidence’ and in determining the scope of a legal practitioner’s discretion in cases where a person is unable to give ‘sound instructions’.³⁵¹

6.4.16 Based on its detailed consideration in the Issues Paper and the submissions received, the Institute’s view is that compliance with the *CRPD* requires that the special hearing should reflect the conduct of an ordinary trial as far as is possible. Further, following a finding of unfitness, it is absolutely necessary to have some mechanism to provide an individual with an opportunity for an acquittal. Given the finding of unfitness this cannot be an ordinary trial. It is the Institute’s assessment that the special hearing provisions in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) allow for this to happen in a way that is compliant with the *CRPD* with one exception — the role of the legal practitioner in circumstances where the accused is unable to give instructions.

6.4.17 As noted at [4.2.4], one of the criteria for a finding of unfitness relates to the ability to give instructions to a legal practitioner. This has clear implications for cases where a special hearing is held, and an individual is not able to communicate his or her instructions effectively to his or her legal representative. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 38 provides for a legal representative to exercise an independent discretion in such cases and to act in what he or she genuinely believes to be the defendant’s best interests on any question relating to an investigation or special hearing. A key component of the Institute’s approach to this reference is to maximise the participation of defendants with mental health or cognitive impairments. There is scope for the use of intermediaries and other supports to assist defendants in providing instructions to legal practitioners. Where an individual’s rights, wishes and preferences can be ascertained, then a legal practitioner should act in accordance with them. In this regard, the Institute notes the potential role of intermediaries and communication assistants and the vital role that education and training of legal professionals will play as outlined in the Institute’s *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?* Final Report. However, there may be cases where these mechanisms are not available or are ineffective. This will necessarily raise questions about how legal practitioners are to proceed in the absence of instructions.

6.4.18 The Institute’s view is that this issue requires further attention given that the intermediary/communication assistant scheme has not yet been implemented and the approach taken to the use of intermediaries and communication assistants in special hearings should reflect the approach of that scheme. This will require legislative amendment to the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to make provision in this regard. Further, there should be legislative recognition that in the conduct of an investigation and a special hearing

³⁵⁰ NSWLRC (2013) (n 56)150.

³⁵¹ *Ibid* 150 – 151.

the defendant's rights, wishes and preferences should be given effect where he or she is capable of giving instructions. Nevertheless, a decision needs to be made about the obligations of legal practitioners in circumstances where defendants' rights, wishes and preferences cannot be ascertained even with assistance. The Institute's view is that, in these circumstances, legal practitioners must act to promote and uphold defendants' personal and social wellbeing and in a way that is least restrictive of their human rights.³⁵²

Recommendations

19. The approach taken to the use of intermediaries and communication assistants in special hearings should reflect the approach recommended in the Institute's Final Report on the establishment of an Intermediary/Communication Assistant scheme in Tasmania. This will require legislative amendment of the *Criminal Justice (Mental Impairment) Act 1999* (Tas).
20. There should be legislative recognition that, in the conduct of an investigation into fitness to enter a guilty plea/to stand trial and in special hearings, a person's rights, wishes and preferences should be given effect where a person is capable of giving instructions. However, in circumstances where defendants are not capable of giving instructions even with support, legal practitioners must act to promote and uphold the person's personal and social wellbeing in a way least restrictive of their human rights.

Judge only proceedings

6.4.19 Law reform enquiries in England and Wales and Victoria have considered whether or not there should be a judge-only alternative procedure — either in all cases (England and Wales) or in cases where the prosecution and defence agree that the evidence establishes the defence of mental impairment/insanity (Victoria). It is also noted that in South Australia, the defendant may elect to have the matter dealt with by a judge sitting alone rather than having the investigation conducted by a jury.³⁵³ Recent reforms in the Northern Territory allow for the special hearing to be dispensed with if the parties to the prosecution of the offence agree that the evidence establishes the defence of mental impairment.³⁵⁴

6.4.20 In Victoria, there is provision for a 'consent mental impairment' hearing if the prosecution and defence agree that the evidence establishes the defence of mental impairment.³⁵⁵ However, this option is not available for a person who has been found unfit to stand trial and the determination of mental impairment needs to be made by a jury.³⁵⁶ Accordingly, the VLRC gave consideration to whether a judge-alone procedure should be available in place of a special hearing where the prosecution and defence agree that the evidence establishes the defence of mental impairment.

³⁵² This reflects the approach to decision making taken in the TLRI, *Review of the Guardianship and Administration Act 1995 (Tas)*, Final Report No 26 (2018), see 192.

³⁵³ *Criminal Law Consolidation Act 1935 (SA)* s 269B.

³⁵⁴ *Criminal Code (NT)* s 43XA inserted by *Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act 2017 (NT)*.

³⁵⁵ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)* s 21(4). It is noted that the VLRC has now recommended repeal of this provision: see VLRC (n 22) 234 Recommendation 52.

³⁵⁶ *SM v The Queen* VSCA 342. See discussion in VLRC (n 22) 235.

6.4.21 In submissions to the VLRC, the following reasons were advanced in support of such a consent process:

- There is little utility or benefit in court and jury resources being allocated to a special hearing in these circumstances. A judge-alone procedure would avoid the delay, inconvenience and expense of a special hearing.
- The court is able to determine the accused’s criminal responsibility in a robust manner.
- A judge-alone process would avoid putting the parties through the stress of a special hearing.³⁵⁷

The Law Commission of England and Wales also outlined the following matters in support of a judge-only process:

- [It would] be less formal, less time-consuming and may lead to fewer delays in concluding the proceedings.
- A judge may be better positioned than a jury to analyse the expert evidence adduced.
- Empirical research suggests that in the majority of cases the [special] hearing is not contested.³⁵⁸
- Judges have to give reasons for their decisions which in this context would be valuable.
- The objection based upon the apparent loss of a trial by jury is properly met by the fact that this is not a decision which attributes criminal liability.³⁵⁹

6.4.22 Opponents of a judge-alone process observed that a person who is unfit to stand trial will not be able to instruct their lawyer to agree to the process.³⁶⁰ This concern was also shared by the VLRC.³⁶¹ In addition, the VLRC expressed the view that the jury (as community representative) should be involved in determining the issues at a special hearing in the interests of the community and the victims and as a means to protect the rights of the accused.³⁶² It observed that:

the determination of criminal responsibility by a jury provides a greater level of acknowledgement to victims and their families of the harm they have experienced. The importance of acknowledgment of victims and their family members is not diminished in cases where an accused has been found under law not to be criminally responsible due to a finding of not guilty because of mental impairment. The Commission recognises the importance of victims and their families witnessing the process of the hearing, and listening to the psychiatric or psychological evidence and the reasons for dealing with accused within the forensic mental health or disability

³⁵⁷ VLRC (n 22) 235–236.

³⁵⁸ Law Commission of England and Wales (n 133) 181.

³⁵⁹ *Ibid* 184.

³⁶⁰ VLRC (n 22) 236.

³⁶¹ *Ibid*.

³⁶² *Ibid* 233, 236.

system rather than the prison system. In the Commission's view, this will promote the acceptance and understanding of the finding of not guilty because of mental impairment and its underlying causes, such as a mental illness, intellectual disability or other cognitive impairment.³⁶³

Opposition to a judge-alone process reported by the Law Commission of England and Wales also focused on the erosion of the jury trial and the role of the jury as the fact-finder as a vital component of the criminal justice system. It was thought that to remove the jury may reduce public willingness to accept the findings following special hearings and may undermine the legitimacy of the criminal justice system.³⁶⁴ In addition, a judge-alone process would be in conflict with the requirements for equality under the *CRPD* given that this process would differ from fact-finding in the usual trial process.³⁶⁵

6.4.23 Responses received by the VLRC and the Law Commission of England and Wales were divided on this issue. Similarly, the approaches taken by the law reform bodies were different. Ultimately, the VLRC recommended against allowing a judge-alone process and the Law Commission of England and Wales considered that a judge-alone process should be available at the election of the defendant.³⁶⁶

6.4.24 The Issues Paper sought feedback on whether there should be a judge-alone process for special hearings:

Should any changes be made to the procedure for a special hearing?

Should there be a judge-alone process available instead of a special hearing? If so, should this be available in circumstances where the prosecution and defence agree that the evidence establishes the defence of insanity at a special hearing? Or should there be a judge-alone process available instead of a special hearing in all cases?

6.4.25 Three submissions to the Institute addressed these questions, and, as with other inquiries into the issue, differing views were expressed. Walvisch, for the reasons outlined at [6.4.22], did not support the introduction of a judge-alone process for a special hearing. In contrast, the DPP's view was that the 'need for a special hearing should be able to be dispensed with in circumstances where two or more experts agree that the accused should be found not guilty on the grounds of insanity and the prosecution and defence agree'. The DPP noted that '[i]t is not uncommon for experts to agree on their findings. In such circumstances, it is difficult to see how a properly instructed jury could reach a verdict that was inconsistent with expert evidence given at trial'. The DPP also noted that there may be scope to limit the use of special hearings in some other circumstances:

There is a distinction between the physical elements and the mental elements of an offence. It is possible that two or more experts will agree that an accused person should be found not guilty on the grounds of insanity and for prosecution and defence to agree on that issue. However, prosecution and defence may disagree as to the physical elements of the crime. In such circumstances, a special hearing to consider simply the physical elements of the offence, to be determined by a jury, may be

³⁶³ Ibid 234.

³⁶⁴ Law Commission of England and Wales (n 133) 183–184.

³⁶⁵ See discussion at [6.4.2]–[6.4.6].

³⁶⁶ VLRC (n 22) 234; Law Commission of England and Wales (n 133) 186.

beneficial. I would support consideration being given to legislative reform that would divide the trial into objective physical elements and the mental elements, as is the approach in South Australia.

O’Connell stated that ‘in the most serious of matters, I do support a judge-alone model or even a model of a panel of Justices and a psychiatrist to consider matters in an inquisitorial manner as is the case for the mental health court in Queensland.’

6.4.26 After considering these submissions, the approaches to the issue in other jurisdictions and the relevant literature, the Institute recommends that provision should be made for a ‘consent verdict’ of not guilty by reason of mental or cognitive impairment to be available at a special hearing where the prosecution and defence agree that the defence would be available on the evidence. This reflects the Institute’s recommendation that there should be provision for ‘insanity by consent’ in cases where a person is fit for trial.³⁶⁷ However, as with the process in cases where the person is fit for trial, the Institute’s view is that this process requires judicial oversight to provide appropriate safeguards.³⁶⁸ Accordingly, the Institute’s view is that the court should have the power to review the evidence and hear from the experts in order to be satisfied that the evidence establishes the defence of mental or cognitive impairment in a case where the prosecution and defence agree that the proposed evidence establishes the defence.

6.4.27 Further, it is the Institute’s view that in all other cases the special hearing should be heard by a jury in the Supreme Court. This reflects the principle that special hearings should be, as far as possible, consistent with ordinary trials. At a special hearing, a jury is not able to make a finding that a person is guilty but they have the responsibility for determining whether a person is acquitted or whether the evidence is such that a finding cannot be made that the defendant is not guilty of the offence.

Recommendation

21. There should be provision in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) for a special hearing by a judge alone where the prosecution and defence agree that the defence of mental or cognitive impairment would be established on the evidence. However, safeguards are required and the court should have the power to review the evidence (including hearing from expert witnesses) in order to be satisfied that the evidence establishes the defence of mental or cognitive impairment in a case where the prosecution and defence agree that the proposed evidence establishes the defence.

³⁶⁷ See Recommendation 38.

³⁶⁸ See [7.5.177].

Part 7

Insanity

7.1 Introduction

7.1.1 The Terms of Reference request that the TLRI consider the operation of the law of insanity in Tasmania with particular reference to:

- (a) the operation of s 16(3) of the *Criminal Code*;
- (b) whether evidence of insane delusions arising from mental illness should form the basis of self-defence;
- (c) if insane delusions arising from mental illness form the basis of self-defence, whether defendants relying on insane delusions should be liable to supervision under the *Criminal Justice (Mental Impairment) Act 1999*; and
- (d) if insane delusions arising from mental illness form the basis of self-defence, whether the *Criminal Justice (Mental Impairment) Act 1999* requires amendment in relation to treatment options for such defendants.

Aspects of this reference have already been considered by the TLRI in its review of the law of self-defence, where the TLRI's view was that the *Criminal Code* (Tas) s 16(3) should be repealed and that a provision be included in s 46 of the *Criminal Code* (Tas) to the effect that evidence of delusions arising from a mental illness cannot be relied on for the purposes of self-defence. In this review, the Institute also stated that a review of the insanity defence was warranted given that the law of insanity 'pre-dates the inception of modern psychiatry and psychology as professional disciplines.'³⁶⁹ Particular concerns identified were the scope of the legal concept of mental disease (compared to the medical understanding of mental illness) and the focus on an accused's incapacity rather than his or her actual awareness or understanding.³⁷⁰

7.1.2 This Part provides an overview of the law of insanity in Tasmania, identifies concerns in relation to the existing law and outlines recommendations for reform. The key reforms recommended are to retain and reform the defence of insanity in the *Criminal Code* (Tas) s16 by:

- Changing the name of the defence of the mental or cognitive impairment.
- Changing the scope of the qualifying condition by replacing the term 'mental disease' with a detailed definition of mental and cognitive impairment.

³⁶⁹ A Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 2015) [17.1.2].

³⁷⁰ See A Simester and W Brookbanks, *Principles of Criminal Law* (Thomson Reuters, 4th ed, 2012) 322–340, 347; S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) [4.30]–[4.35]; B McSherry, 'Defining What is a "Disease of the Mind": The Untenability of Current Legal Interpretations' (1993) 1 *Journal of Law and Medicine* 76; VLRC (n 24) [5.11]–[5.44]; NSWLRC (2013) (n 56) [3.13]–[3.109].

- Changing the terminology in s 16(1)(a)(i) from ‘understanding the physical character’ to ‘understanding the nature and quality’ of such act or omission.
- Repealing s16(3).
- Making legislative provision for the prosecution to raise the defence of mental or cognitive impairment against the wishes of the defendant with the leave of the court.
- Providing the court with the power to dispense with a trial if the prosecution and defence agree that the evidence in a case raises the defence of mental or cognitive impairment. This should operate with judicial oversight.

7.2 Overview of the law of insanity in Tasmania

History

7.2.1 The law of insanity in Tasmania has its origins in the rules laid down in 1843 by the House of Lords’ decision in *M’Naghten*.³⁷¹ In this case, medical evidence was presented that the accused held a delusional belief that he was being persecuted by the police, on instruction from the Tory party. At his trial, evidence was presented that the accused, acting under that delusion, killed a man believing him to be the Home Secretary, Sir Robert Peel.³⁷² M’Naghten was acquitted on the grounds of insanity and, as a result of the considerable public uproar that followed, the Queen asked the House of Lords to review the matter. In response, the House of Lords set out the rules of insanity. These rules first create a presumption of sanity by stating that ‘in all cases that every man [or woman] is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his [or her] crimes, unless the contrary be proved’.³⁷³

7.2.2 The *M’Naghten* rules then define the circumstances in which a person may rely on the defence of insanity. The substance of the defence of insanity is contained in the statement by the House of Lords that:

To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.³⁷⁴

The House of Lords also considered the situation where a person was acting under a delusion:

Making the assumption ... that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the

³⁷¹ (1843) 10 Cl&F 200; 8 ER 718. See F McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Round Hall Press, 1993) 18–26. For a summary of the history of the insanity defence see R Mackay, *Mental Condition Defences in the Criminal Law* (Clarendon Press, 1995) 92–96.

³⁷² See summary in A Norrie, *Crime, Reason and History: A Critical Introduction to the Criminal Law* (LexisNexis, 2001) 179–180.

³⁷³ (1843) 10 Cl and Finn 200, 210; 8 ER 718, 722.

³⁷⁴ *Ibid.*

act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

These aspects of the *M’Naghten* rules find expression in ss 15 and 16 of the *Criminal Code*, which are set out at [7.3].

Rationale

7.2.3 The theoretical basis of the defence of insanity rests on a fundamental principle of modern criminal law — the idea of individual responsibility: ‘the idea of the subject as a rational agent with capacities of both cognition and self-control, and hence the idea of criminal liability is rooted in individual agency’.³⁷⁵ Individual responsibility is seen to be dependent on ‘the principle of capacity and a fair opportunity to act otherwise’.³⁷⁶ It is for this reason that the criminal law has long recognised ‘the notion that ... the insane lack the ability to reason’ and this is reflected in ‘laws excusing them from responsibility for criminal acts’.³⁷⁷ As noted by Lacey, Wells and Quick:

A plea of exemption such as insanity goes to the defendant’s capacity to be addressed as a normal subject of criminal law: if a defendant’s mental capacity is such that fundamental questions can be raised about her cognitive or, perhaps, volitional capacities, it might be argued that they are not even the kind of subject whom criminal law aspires to address.³⁷⁸

Fairall and Yeo recognise that ‘the law would be unduly harsh to punish people who are unable to choose or control their conduct’.³⁷⁹ They also point to the lack of utility in punishing people who are mentally impaired given that they ‘would not have been deterred by a threat of punishment’.³⁸⁰ Accordingly, the function of the law of insanity has been said to ‘define the point at which mental disorder dissolves [criminal] responsibility’.³⁸¹

7.2.4 In its consideration of the foundations of criminal responsibility, the Law Commission of England and Wales stated that:

³⁷⁵ N Lacey, C Wells and O Quick, *Reconstructing Criminal Law* (Cambridge University Press, 4th ed, 2010) 95.

³⁷⁶ C Wells, ‘Provocation: The Case for Abolition’ in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press, 1984). Bronitt and McSherry write that ‘[t]he concept of criminal responsibility is based on the notion that individuals possess the capacity to make rational choices in performing or refraining from performing acts’: Bronitt and McSherry (n 370) 201, [4.05]. See also P Fairall and S Yeo, *Criminal Defences* (Lexis Nexis, 4th ed, 2005) [13.1]; S Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate, 2012) 51–52.

³⁷⁷ Bronitt and McSherry (n 370) [4.10].

³⁷⁸ Lacey, Wells and Quick (n 375) 120.

³⁷⁹ Fairall and Yeo (n 376) [13.1]. This is an argument from the perspective of retributive theory.

³⁸⁰ *Ibid.* In *R v Porter* (1933) 55 CLR 182, Dixon J stated that ‘it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment ... what is the point of punishing people if they be beyond the control of the law for reasons of mental health’.

³⁸¹ R Heaton and C De Than, *Criminal Law* (Oxford University Press, 2011) 229.

Criminal law is generally thought to be founded on the principle that a person must have been responsible for his or her actions in order to be held culpable and to be punished.

It would be unfair for those whose serious disorders caused them to lack criminal responsibility at the time of an alleged offence to be at risk of the same outcome (criminal conviction) as people without that serious condition ...³⁸²

Accordingly, the Law Commission addressed ‘the concept of responsibility as part of the essential inquiry: when does the fact that a person has a particular condition make it unfair to hold him or her responsible for his or her otherwise criminal conduct?’³⁸³ The Law Commission concluded that, ‘people should not be held criminally responsible for their conduct if they lack the capacity to conform their behaviour to meet the demands imposed by the criminal law regulating that conduct’.³⁸⁴

7.2.5 In his submission, Walvisch also considered the nature of criminal responsibility:

a person should only be called to account for their wrongdoing if they are responsible for that wrongdoing. At the very minimum, this means they must be a ‘responsible agent’ — a person who can be expected to recognise and discharge the responsibilities laid down by the criminal law. This requires them to be reasons-responsive: ‘a responsible agent is one who is capable of recognising and responding to the reasons that bear on his situation’.³⁸⁵

In order to be reasons-responsive, it is not just ‘a matter of acting in conformity with appropriate reasons’, and so failing to be a ‘responsible agent’ is described as ‘failing to exhibit a pattern of reason-recognition that is understandable to those who are judging the agent’s responsibility, and that is grounded in reality’. Walvisch wrote in his submission that a person is not a responsible agent and so should be exempted from criminal responsibility if at the time of the offence, ‘the beliefs, attitudes and emotions that informed the accused’s deliberations and actions were “so disordered, so detached from reason, that he was not operating within that realm at all?”’.³⁸⁶ In these circumstances, it is not appropriate to attribute criminal responsibility to someone if they were incapable of understanding the nature and scope of their duty to avoid those actions and so are unable to be properly guided by them.

7.2.6 In addition to fairness to the individual, the protection of the public is a (competing) rationale for the defence of insanity with the law of insanity being concerned to ‘protect society against recurrence of dangerous conduct’.³⁸⁷ Concerns about public protection underpin the scope of ‘mental disease’ within the insanity defence in the *Criminal Code* s 16 that operates to separate sane from insane automatism and the forward focused nature of the assessment made in relation to the dispositions available under the *Criminal Justice (Mental Impairment) Act*

³⁸² Law Commission of England and Wales, *Criminal Liability: Insanity and Automatism A Discussion Paper* (2013) 197.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ Quoting A Duff, *Punishment, Communication, and Community* (Oxford University Press, 2001) 72.

³⁸⁶ Quoting A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford University Press, 2007) 290–1.

³⁸⁷ *Sullivan* [1983] 2 All ER 673 (Lord Diplock) quoted in Heaton and De Than (n 381) 229.

1999 (Tas).³⁸⁸ The development of the law of insanity has been said to reflect a need to identify ‘those defendants who seem more likely to pose a danger to others in the future’ and so those who ‘should be subject to supervision and restraint rather than released unconditionally’.³⁸⁹

7.3 The current law of insanity in Tasmania

7.3.1 In Tasmania, the presumption of sanity is set down in s 15 of the *Criminal Code*, which provides, ‘[e]very person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved’. This means that the prosecution does not need to prove in every trial that the defendant is sane. It can rely on the presumption of sanity until it is displaced by evidence to the contrary.³⁹⁰

7.3.2 The defence of insanity is set out in s 16 of the *Criminal Code* (Tas), which provides:

- (1) A person is not criminally responsible for an act done or an omission made by him —
 - (a) when afflicted with mental disease to such an extent as to render him incapable of —
 - (i) understanding the physical character of such act or omission; or
 - (ii) knowing that such act or omission was one which he ought not to do or make; or
 - (b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.
- (2) The fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he did such act or made such omission under an impulse which by reason of mental disease he was in substance deprived of any power to resist.
- (3) A person whose mind at the time of his doing an act or making an omission is affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.
- (4) For the purpose of this section the term mental disease includes natural imbecility.

³⁸⁸ J Child and G Sullivan, ‘When Does the Insanity Defence Apply? Some Recent Cases’ (2014) *Criminal Law Review* 787, 789.

³⁸⁹ Ibid. McSherry outlines the ‘the tortuous legal interpretations of the term “disease of the mind”’ and stated that the question which underlies ‘I believe, [is] simply this: is this individual likely to cause harm to others if not confined? If so then his or her mental condition will be considered to be disease of the mind for the purposes of the insanity defence’: McSherry (n 370) 82.

³⁹⁰ *Hawkins* (1994) 179 CLR 500, 507. Leader-Elliott suggests that ‘it must now be taken that the object of the presumption is to ensure that the issues of fault, voluntariness and insanity can be resolved without speculation about possible mental abnormalities unless there is acceptable evidence — usually medical — of abnormality, disorder or disease’: I Leader-Elliott, ‘Case Comment: *Hawkins v the Queen*’ (1994) 18 *Criminal Law Journal* 351, 351.

Key components of the defence

Mental disease

7.3.3 Central to the operation of the insanity defence is the scope of the concept of ‘mental disease’. In order to rely on the defence of insanity under ss 16(1) and (2), it must be established on the balance of probabilities that the defendant was suffering a mental disease. Significantly, the definition of a mental disease is a legal rather than a medical construct.³⁹¹ It is a legal question rather than a medical question as to whether any particular condition is a ‘mental disease’ for the purposes of the insanity defence. Further, it is for the jury to determine whether the accused was suffering from a condition that answers the description of a ‘mental disease’.³⁹² In other words, the jury must determine whether a condition is a mental disease according to the legal definition of the term and whether the accused actually has that condition. However, expert medical evidence is clearly likely to be crucial to the jury’s determination of these issues.

7.3.4 Mental disease is not defined in the *Criminal Code* (Tas) other than to specify that it includes natural imbecility,³⁹³ and so its meaning is found in the common law term ‘disease of the mind’.³⁹⁴ A ‘disease of the mind’ is ‘a state of disease or disorder or mental disturbance arising from infirmity, temporary or longstanding’³⁹⁵ but does not include transient conditions caused by external factors unconnected with disease.³⁹⁶ An accepted definition is found in the judgment of King CJ in *R v Radford*, where his Honour stated that:

The expression ‘disease of the mind’ is synonymous, in my view, with ‘mental illness’ ... The essential notion appears to be that in order to constitute insanity in the eyes of the law, the malfunction of mental faculties called ‘defence of reason’ in the M’Naghten rules, must result from an underlying pathological infirmity of mind, be it of long or short duration and be it permanent or temporary, which can be properly termed mental illness, as distinct from the reaction of a healthy mind to extraordinary external stimuli.³⁹⁷

This statement focuses on the distinction to be drawn between the reaction of a sound mind to external stimulus and the reactions of an unsound mind (sound/unsound mind distinction) as a basis for determining whether a condition was a ‘disease of the mind’. The key is whether the mental state is caused by an external influence compared to an internal condition of the defendant. This approach reflects the explicit policy of the law, which is concerned ‘that certain persons likely to be involved in repeated episodes of dangerous behaviour should be subject to restraint rather than be given an unqualified acquittal on the basis of automatism or lack of mens rea’.³⁹⁸

³⁹¹ Bronitt and McSherry (n 370) [4.30].

³⁹² D Howard and B Westmore, *Crime and Mental Health Law in New South Wales* (LexisNexis Butterworths, 2nd ed, 2010) [6.28]; J Blackwood and K Warner, *Tasmanian Criminal Law: Texts and Cases* (University of Tasmania Law Press, 2014) vol 1, 247; Jeffrey [1982] Tas SR 35.

³⁹³ This has been interpreted to mean intellectual disability.

³⁹⁴ See McSherry (n 370) 78.

³⁹⁵ *R v Porter* (133) 55 CLR 182, 188 (Dixon J).

³⁹⁶ *Falconer* (1990) 171 CLR 30.

³⁹⁷ (1985) 42 SASR 266, 274. This was adopted by the High Court in *R v Falconer* (1990) 171 CLR 30, 53 (Mason CJ, Brennan and McHugh JJ), 60 (Deane and Dawson JJ); 78 (Toohey J), 85 (Gaudron J).

³⁹⁸ A Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 2013) 719.

7.3.5 The legal tests to determine whether or not a condition comes within the definition of a ‘disease of the mind’ have largely been developed to distinguish ‘sane’ and ‘insane’ automatism. Sane automatism results in a complete acquittal on the basis that the prosecution has not proved beyond reasonable doubt that the act was voluntary and intentional as required by the *Criminal Code* s 13(1). In contrast, ‘insane’ automatism results in a qualified acquittal (not guilty by reason of insanity) according to the insanity defence by virtue of the *Criminal Code* s 16.³⁹⁹ The law provides that an accused cannot rely on automatism if the involuntary conduct is attributable to a condition falling within the legal definition of a mental disease/disease of the mind — in this case, the defendant can only rely on insanity.

7.3.6 The scope of the concept of a ‘mental disease’/disease of the mind is also relevant to the distinction made between the defences of intoxication contained in s 17 of the *Criminal Code* (Tas), insanity and automatism. The issue in this context is whether an accused’s involuntary state at the time of the offence was attributable to intoxication or a ‘mental disease’. There are limits on the relevance of intoxication as a denial of criminal responsibility as evidence of intoxication is not relevant in determining whether an act is voluntary and intentional. It is also necessary to determine whether the accused’s state of mind was attributable to intoxication (a temporary and external factor) or whether it was attributable to a ‘mental disease’. Evidence of intoxication is not relevant to the defence of insanity unless the person is suffering from disease of the mind caused by intoxication, such as delirium tremens.⁴⁰⁰

7.3.7 At common law, conditions that have been accepted within the definition of mental disease include: schizophrenia,⁴⁰¹ reactive depression,⁴⁰² psychomotor epilepsy,⁴⁰³ hyperglycaemia,⁴⁰⁴ cerebral arteriosclerosis⁴⁰⁵ and post-traumatic stress disorder.⁴⁰⁶ As explained, the common thread in the application of the concept of ‘mental disease’ in these cases is that the conditions have been held to arise from an internal rather than an external cause.⁴⁰⁷ This approach highlights the unusual results that can be created by the current legal test given that ‘mental disease’ has been held to extend to conditions that are not normally associated with mental illness, such as diabetes,⁴⁰⁸ cerebral arteriosclerosis (hardening of arteries causing reduced flow of blood to the brain),⁴⁰⁹ and epilepsy.⁴¹⁰ There are differing views about whether somnambulism (sleepwalking) is a ‘disease of the mind’ depending on the

³⁹⁹ See further Blackwood and Warner (n 392) vol 1, Chapter 5.

⁴⁰⁰ *Criminal Code* (Tas) s 17(1); *Dearnley* [1947] St R Qd R 51, 61. It is noted that complex questions arise in relation to the interaction of mental illness and alcohol and/or drugs for the purposes of the insanity and intoxication defences, see Blackwood and Warner, *ibid*, 330.

⁴⁰¹ *Bratty v A-G (Northern Ireland)* [1963] AC 386.

⁴⁰² *Milloy* [1993] 1 Qd R 298.

⁴⁰³ *Bratty v A-G (Northern Ireland)* [1963] AC 386.

⁴⁰⁴ *Hennessy* [1989] 2 All ER 9, 14.

⁴⁰⁵ *Kemp* [1957] 1 QB 399.

⁴⁰⁶ *Walsh* [1993] TASSC 91.

⁴⁰⁷ *Schloenhardt* (n 369) 560.

⁴⁰⁸ *Hennessy* [1989] 2 All ER 9, which was a case involving hyperglycaemia which is high blood sugar resulting from a failure to take insulin. In contrast, in *Quick* [1973] 3 WLR 26, hypoglycaemia was held not to be a mental disease because the condition resulted in low blood sugar from an excess of insulin (which the defendant had administered as prescribed by the doctor).

⁴⁰⁹ *Kemp* [1957] 1 QB 399.

⁴¹⁰ *Sullivan* [1983] 2 All ER 673.

evidence, with a Canadian court in *Parks* finding that sleepwalking was not a mental disease⁴¹¹ and the English Court of Appeal finding that it was a disease of the mind.⁴¹² In Australia, it appears that sleepwalking has generally been regarded as involving non-insane automatism.⁴¹³

7.3.8 There is uncertainty in relation to the status of personality disorders for the purpose of the *Criminal Code* s 16, and their status as a mental disease appears to depend on the evidence adduced in a particular case.⁴¹⁴ In some cases, the trial judge has refused to leave insanity on the basis of a personality disorder,⁴¹⁵ while in other cases, insanity (although not successful) has been left for the jury on this basis.⁴¹⁶

Limbs of the defence

7.3.9 Further, evidence of a mental disease alone will not provide the defendant with a defence. Under ss 16(1) and (2), it must also be established that the effect of the mental disease was either that:

- the defendant did not have the capacity to *understand the physical character of the act*; or
- the defendant did not have the capacity to know that the *act or omission was one which he or she ought not do or make*; or
- the defendant acted under an *uncontrollable impulse*.

7.3.10 Physical character of act. This reflects the first limb of *M’Naghten’s* case that D be ‘labouring under such defect of reason, from a disease of the mind as not to know the nature and quality of the act he was doing.’ In *R v Porter*, Dixon J explained that a person would not know the physical nature of what they were doing if he or she:

had so little capacity for understanding the nature of life and the destruction of life, that to him [or her] it is no more than breaking a twig or destroying an inanimate object. He [or she] would not know the implications and what it really amounted to.⁴¹⁷

Illustrations of when a person does not understand the physical character of the act include placing a baby on a fire thinking it is a log of wood or smashing a baby’s head believing it to be a melon.⁴¹⁸

⁴¹¹ (1992) 75 CCC (3d) 287.

⁴¹² *Burgess* [1991] 2 QB 92. See further discussion in Blackwood and Warner (n 392) vol 1, 232–234.

⁴¹³ See *Lusted v Kingston* [2016] TASM 1 referring to *Coulsen v The Queen* [2010] VSCA 146.

⁴¹⁴ *Jeffrey* [1982] TAS SR 35.

⁴¹⁵ *Hodges* (1985) 19 A Crim R 129.

⁴¹⁶ *Jeffrey* [1982] TAS SR 35; *Willgoss* (1960) 105 CLR 295; *Williams v The Queen* [1978] Tas SR 98. This has been considered in various law reform reports: Law Reform Commission of Western Australia (‘LRCWA’), *A Review of the Law of Homicide*, Final Report 97 (2007) 229–230; NSWLRC (2013) (n 56) 56–60. It is noted that Bronitt and McSherry observe that the weight of psychiatric opinion is that antisocial personality disorder should not be equated with mental illness: Bronitt and McSherry (n 370) [4.45].

⁴¹⁷ (1933) 55 CLR 182, 188.

⁴¹⁸ E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 6th ed, 2011) 464.

7.3.11 However, it is unclear whether s 16(1)(a)(i) is limited only to the physical character of the act (eg strangling another under the impression of squeezing a lemon) or whether it extends also to the significance of the conduct.⁴¹⁹ It has been pointed out in academic critique of the insanity defence that different results may occur if a narrow (physical act only) or a broad interpretation (physical act and its consequence) is applied. For example, in a case where an accused hits another person repeatedly with a golf club to try to stop the person from teasing him or her but does not know that the act of striking will kill, can this person rely on the defence of insanity? Applying a narrow interpretation, the accused would not be able to rely on insanity as they understand the physical character of the act (hitting with the club). However, applying a broader interpretation they would be able to rely on insanity, as they did not appreciate that their conduct could kill someone.⁴²⁰ Another example given in textbooks of the application of a broader interpretation of the incapacity to understand the physical character of the act would be where a person decapitates someone just to see what that person looks like without a head.⁴²¹

7.3.12 The precise scope of being ‘incapable of understanding the physical character’ of the act is not settled in Tasmania. There is support for the narrow view in *Williams v The Queen*,⁴²² where the accused stabbed and killed the victim. Medical evidence was given at trial which ‘amounted ... to an opinion that the appellant at the time he did this act ... was probably totally unaware that he was so acting or even unaware that he was acting at all’.⁴²³ The basis for the insanity defence was that the accused’s act was not voluntary and intentional because he had a ‘gross personality disorder’. In outlining the scope of the first limb of the insanity defence, Neasey J relied on the approach taken in *R v Cottle*.⁴²⁴

it has become the practice to regard a person as ‘incapable of understanding the nature and quality’ of his act when in truth he was not conscious of having acted at all; and so to treat the formula as applicable to cases of automatism.⁴²⁵

Accordingly, Neasey J stated that if the individual ‘was totally unaware of what he was doing, he was at that time incapable of understanding the physical character of his act, because he was at that time incapable of considering the physical character of it, or anything else about it, at all’.⁴²⁶ This approach would seem to limit the scope of this limb of the insanity defence significantly.

7.3.13 In contrast, a broader approach is evident in the judgment of Crawford J in *Hawkins (No 2)*,⁴²⁷ where his Honour cited the interpretation of the common law rule ‘as not to know the nature and quality of the act’ found in *Willgoss v R*⁴²⁸ and *R v Porter*.⁴²⁹ This interpretation encompassed the act and its consequences: ‘whether the accused “was in such a condition that

⁴¹⁹ See discussion in Blackwood and Warner (n 392) vol 1, 248–251.

⁴²⁰ This illustration is provided by D Caruso in D Caruso et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) 396.

⁴²¹ Schloenhardt (n 369) 563.

⁴²² [1978] Tas SR 98.

⁴²³ *Ibid* 102 (Neasey J).

⁴²⁴ (1958) NZLR 999.

⁴²⁵ *Ibid* 109 (Neasey J) citing *R v Cottle* (1958) NZLR 999, 1009 (Gresson P).

⁴²⁶ *Ibid* 109.

⁴²⁷ (1993) 68 A Crim R 1.

⁴²⁸ (1960) 105 CLR 295, 300.

⁴²⁹ (1933) 55 CLR 182, 188–889.

he could not appreciate what death amounted to or that he was bringing it about or that he was destroying life and all that is involved in the destruction of life”⁴³⁰.

7.3.14 However, it is difficult to determine the approach that the court is likely to adopt given that this provision is rarely used in practice.⁴³¹ Other than the case of *Williams v The Queen* (where insanity was rejected by the jury), the TLRI is not aware of any case decided in the Supreme Court where this ground for establishing insanity has been successfully relied on by the defendant.

7.3.15 Act or omission which ought not do or make. This reflects the second limb of *M’Naghten’s* case that the defendant did not know what he was doing was wrong. In *R v Porter*, Dixon J stated that:

The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by ‘wrong’? What is meant by wrong is wrong having regard to the everyday standards of reasonable people.⁴³²

Accordingly, a key feature of the test is that the defendant could not think rationally about whether the matter was right or wrong. Further, the defendant’s understanding of ‘wrong’ is concerned with the defendant’s failure to understand that the act was morally wrong rather than the defendant’s failure to understand that the act was legally wrong.

7.3.16 It has been observed that this is the most common basis on which insanity is established.⁴³³ In Tasmania, this was the ground of insanity used in all of the cases where insanity was successfully argued in Supreme Court cases identified by the TLRI from 2010.⁴³⁴ Typically, the defence was based on the accused’s impaired judgement arising from delusions resulting from a pre-existing mental health impairment. For example, in making orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) in the case of *Tasmania v S*,⁴³⁵ Porter J observed that ‘the mental condition and the delusions from which he suffered were of such intensity in nature that it impaired and reduced his ability to judge the situation in an ordinary manner. The disorder deprived him of the capacity to know the acts were ones which he ought not to do’. In another case, the medical evidence was that the defendant was mentally ill and experiencing auditory hallucinations and the crimes were committed in response to the voice

⁴³⁰ (1993) 68 A Crim R 1, 28.

⁴³¹ Blackwood and Warner (n 392) vol 1, 250.

⁴³² (1933) 55 CLR 182, 189–190 cited by Gibson J in *Hitchens* [1959] Tas SR 209, 221.

⁴³³ Sentencing Advisory Council, South Australia (‘SASAC’), *Mental Impairment and the Law: A Report on the Operation of Part 8A of the Criminal Law Consolidation Act 1935 (SA)* (2014) 36. In South Australia, it has been estimated that approximately 87% of all findings of ‘mental incompetence’ are based on this limb of the test and two per cent of mental impairment defences are based on both limbs of the test, Appendix B, Table 6.

⁴³⁴ It is noted that the Institute has also identified one case where this limb and the irresistible impulse limb were relied on and the defence of insanity was successful.

⁴³⁵ 18 July 2014 (Sentence).

he heard and a belief that his family would be at risk if he did not commit the crimes.⁴³⁶ In *R*, the defendant's condition caused him to experience 'acute psychotic symptoms including auditory and visual hallucinations and persecutory and referential delusions'.⁴³⁷

7.3.17 A further illustration of the operation of this limb of the insanity defence (in the Western Australian context) is the case of *McHenry v Western Australia (No 2)*.⁴³⁸ In this case, the accused killed his brother under the deluded belief that his brother was a threat to him personally and to the world. He believed that his brother was an alien linked to spiders and Satan and that they were planning to blow up the planet. By killing his brother, he thought he would destroy the spider and save many from Satan. He also believed he would protect his brother from Satan. Expert evidence was given that the accused suffered from paranoid schizophrenia evidenced by auditory hallucinations (hearing voices) and delusional beliefs (religious and in extra-terrestrial aliens), and that this deprived him of the capacity to know that he ought not to do the act of killing. The accused was acquitted on account of his unsoundness of mind.

7.3.18 Uncontrollable impulse. This is described as the 'volitional' limb of the insanity defence and this basis to establish the defence of insanity was not contained in *M'Naghten's* rules (and so does not exist at common law).⁴³⁹ Section 16(1)(b) of the *Criminal Code* (Tas) states that a person is not criminally responsible for an act or omission 'when such act or omission was done or made under an impulse which, by reason of mental disease, he [or she] was in substance deprived of any power to resist'. Section 16(2) provides that:

the fact that a person was, at the time at which he is alleged to have done an act or made an omission, incapable of controlling his conduct generally, is relevant to the question whether he [or she] did such act or made such omission under an impulse which by reason of mental disease he [or she] was in substance deprived of any power to resist.

7.3.19 The operation of this limb of the insanity defence was considered in the case of *Hitchens*, where the Court of Criminal Appeal expressed the view that the issue for the jury was:

whether the appellant did the acts complained of under an impulse which by reason of mental disease he was in substance deprived of any power to resist. It was for the appellant to satisfy the jury upon the balance of probabilities:

- that the acts were in fact done under an impulse;
- that it was an impulse which by reason of mental disease he was in substance deprived of any power to resist.⁴⁴⁰

The degree of impairment of violation was addressed by the High Court in *O'Neill v The Queen*, where the court held that to succeed, it must be established on the balance of probabilities that

⁴³⁶ *Tasmania v P*, Blow CJ, 13 November 2013 (Sentence).

⁴³⁷ *Tasmania v R*, Pearce J, 14 March 2017 (Sentence).

⁴³⁸ [2010] WASCA 71.

⁴³⁹ See Blackwood and Warner (n 392) vol 1, 256–261.

⁴⁴⁰ *Hitchens* [1962] Tas SR 35, 55 (Burbury CJ, Crisp and Cox JJ).

‘the accused had lost all power to resist: that mental disease had left him with no power of resistance to the impulses to do the fatal act’.⁴⁴¹

7.3.20 There are some illustrations of circumstances in which this provision has been used in practice.⁴⁴² However, it appears to be difficult to establish based on the pre-existing case law. There have been three decisions of the Court of Criminal Appeal that have considered the operation of s 16(1)(b), all involving cases where the accused was appealing a conviction of murder.⁴⁴³ In these cases, the difficulties in relying on this limb of the insanity defence were apparent, as it was noted that the medical evidence was not sufficient to establish that the person *could not* resist the impulse (rather than *did not* resist the impulse). The TLRI has identified one further case where this ground was unsuccessfully relied on in the Supreme Court on the ground that the mental illness ‘greatly diminished’ but did not result in a total loss of power.⁴⁴⁴ An exception arose in a recent arson case where the accused relied on both s 16(1)(a) (did not know the act was wrong) and the uncontrollable impulse limb of the insanity defence and insanity was accepted by the jury.⁴⁴⁵

7.3.21 Delusions. Section 16(3) of the *Criminal Code* (Tas) substantially reproduces the statement in *M’Naghten’s* case that a defendant’s responsibility is judged by reference to the facts as he or she supposes them to be and not by the actual facts.⁴⁴⁶ It specifically refers to the effects of delusions on a defendant’s criminal responsibility. This provision was considered by the Court of Criminal Appeal in *Walsh*,⁴⁴⁷ a case in which the accused was charged with murder after he shot and killed an acquaintance at close range. At trial, the defence did not seek to rely on insanity. Instead, the accused sought to rely on self-defence on the basis of a hallucinatory belief that at ‘the time of the discharge of the weapon the accused believed that he was in Korea defending himself from an enemy soldier’.⁴⁴⁸ The accused had been a soldier in the Korean War where he had been severely wounded by a mortar explosion. Subsequently, he had on-going health problems that required hospital admission and on some occasions shock treatment. The defence sought to adduce the accused’s medical files that ‘showed a history consistent with a longstanding mental disorder caused by war experience.’⁴⁴⁹ The defence also sought to lead expert evidence from a psychiatrist that the accused was suffering from post-traumatic stress disorder and, as a manifestation of that disorder, might have believed that he was on active service in Korea.⁴⁵⁰

7.3.22 The trial judge, Slicer J, ruled that the accused’s delusions could be relied upon under s 16(3) for the purpose of self-defence in s 46 of the *Criminal Code* (Tas). However, his Honour held that self-defence would only be available in this way once the jury rejected the defence of insanity under ss 16(1) and 16(2). This could occur where the jury was not satisfied on the balance of probabilities that the accused’s disorder amounted to a ‘mental disease’ for the

⁴⁴¹ (1977) 51 ALJR 499, 501 (Barwick CJ and Mason J).

⁴⁴² Bronitt and McSherry (n 370) 248–249.

⁴⁴³ *Hitchens* [1962] Tas SR 35; *O’Neill* [2015] VSCA 325; and *Jeffrey* [1982] Tas SR 199.

⁴⁴⁴ *Tasmania v G*, Estcourt J, 4 September 2013 (Sentence).

⁴⁴⁵ Information provided by Rochelle Mainwaring, Legal Aid.

⁴⁴⁶ Blackwood and Warner (n 392) vol 1, 261.

⁴⁴⁷ [1993] TASSC 91.

⁴⁴⁸ (1991) 60 A Crim R 419, 421 (Slicer J).

⁴⁴⁹ *Ibid* 422.

⁴⁵⁰ *Ibid*.

purposes of the insanity defence or that the mental disease affected him in one of the ways set out in ss 16(1) and (2). In these circumstances, Slicer J ruled that the jury could consider the accused's delusion, pursuant to s 16(3), for the purposes of self-defence.

7.3.23 The jury convicted Walsh of murder. The Court of Criminal Appeal rejected his appeal stating that the trial judge's direction that the accused's deluded beliefs could be considered for the purposes of self-defence after the defence of insanity had been properly considered was unduly favourable to the accused. Further, the Court considered that the accused's action in shooting his acquaintance could not be regarded as a reasonable response, if he was sane. However, the Court accepted the expert evidence in relation to the accused's mental disease and quashed the accused's conviction for murder and substituted a verdict of not guilty on the grounds of insanity.

7.3.24 The Court of Criminal Appeal's view was that the accused's insane delusions were not relevant to self-defence and would only be relevant to the defence of insanity. Only the accused's sane beliefs could provide a basis for the accused's subjective belief in the need for self-defence. The Court considered that, if accepted by the jury, the evidence of the accused's deluded belief brought him within s 16(1)(a)(ii) of the *Criminal Code*, and so that limb of the insanity defence governed the accused's criminal responsibility. In the words of Crawford J:

On the evidence, if the appellant believed that he was being attacked or approached by an enemy soldier or by some assailant from Sydney the cause of that belief was his mental disease, that is to say the post traumatic stress disorder. If he acted in defence of himself under the influence of such a belief he was insane within the second limb of the M'Naghten rules because he was affected with mental disease to such an extent as to render him incapable of knowing that his act was one which he ought not to do (s 16(1)(a)(ii)).⁴⁵¹

The effect of the Court of Criminal Appeal's decision in *Walsh* is to restrict the relevance of insane delusions to the defence of insanity. Accordingly, if the jury reject the defence of insanity, they must judge the reasonableness of the accused's conduct on the basis that he is sane.⁴⁵² Section 16(3) cannot be applied to extend the relevance of an insane delusion to the defence of self-defence. However, as discussed at [7.5.122]–[7.5.139], there remains some uncertainty in relation to the scope of s 16(3).

7.3.25 The TLRI has not identified any other Tasmanian cases where s 16(3) of the *Criminal Code* (Tas) has been relied on.

Procedural matters

Onus of proof

7.3.26 As indicated at [7.3.1], s 15 of the *Criminal Code* (Tas) contains a presumption of sanity. Thus, the onus is on the defendant to prove that he or she was insane within s 16 on the balance of probabilities. This is reinforced by s 381(3) of the *Criminal Code* (Tas), which provides that 'the onus of proving the insanity of any such person shall be upon the defence, but the same may be established upon the evidence of the prosecution'.

⁴⁵¹ [1993] TASSC 91 [22] (Crawford J).

⁴⁵² *Ibid* [24].

7.3.27 The language used in ss 381(3), 399 and 401 of the *Criminal Code* (Tas) assumes that insanity can be raised by someone other than the defence.⁴⁵³ Section 381(3) provides that ‘the onus of proving the insanity of any such person shall be upon the defence, but the same may be established upon the evidence of the prosecution’. Section 401 of the *Code* provides that a person convicted may appeal. ‘Person convicted’ includes, according to s 399, ‘an accused person who, not having set up insanity as a defence, has been acquitted on the ground of insanity.’ Case authority establishes that the prosecution can allege and call evidence to prove insanity if the defendant puts his or her state of mind in issue by alleging non-insane automatism or the absence of intent.⁴⁵⁴ However, the prosecution cannot introduce evidence probative of insanity until the matter is put in issue by the defence.⁴⁵⁵

Role of judge and jury

7.3.28 As indicated, the definition of mental illness is a matter of law, but whether the defendant suffered from a mental disease is a question of fact. This was set out in *Jeffrey v R*,⁴⁵⁶ where Green CJ stated that:

the jury have the sole responsibility for making all necessary findings of fact and for determining the verdict. The functions of the judge and jury are no different in cases in which a defence of insanity has been raised. In such cases it is for the judge to inter alia direct the jury as to the meaning of the expression ‘mental disease’ in s 16 but it is for the jury to decide whether the evidence satisfies them that the accused was at the relevant time suffering from a mental disease.⁴⁵⁷

Accordingly, it is a matter for the jury whether the defendant was affected by a mental disease, and also whether the mental disease deprived the defendant of one of capacities in s 16 of the *Criminal Code* (Tas). There is no provision for the prosecution and the defence to agree on a verdict of not guilty by reason of insanity.

7.4 Law in other jurisdictions

7.4.1 Although not identical, all Australian jurisdictions have comparable laws in relation to insanity based on the *M’Naghten* rules. A summary of the defence of insanity (Western Australia and Queensland), mental illness (New South Wales), mental impairment (Victoria, the Northern Territory, the Australian Capital Territory, and in Commonwealth legislation) and mental incompetence (South Australia) are set out in Table 7.1.

⁴⁵³ Blackwood and Warner (n 392) vol 1, 275.

⁴⁵⁴ *Ibid* 276.

⁴⁵⁵ *Ibid* citing *Jeffrey*, unreported 7/1991.

⁴⁵⁶ [1982] Tas R 199.

⁴⁵⁷ *Ibid* 209.

Table 7.1 Elements of the defence of mental impairment in Australian jurisdictions

Jurisdiction and relevant law	Name of defence	Components of mental state	Nature and quality of conduct	Knowledge that conduct is wrong	Inability to control conduct	Delusions
Cth <i>Criminal Code</i>	Mental Impairment	Mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder. Mental illness is a reference to an underlying pathological infirmity of mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.	Did not know the nature or quality of the conduct.	Did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).	Unable to control conduct.	If carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.
	s 7.3	ss 7.3(8), (9)	s 7.3(1)(a)	s 7.3(1)(b)	s 7.3(1)(c)	s 7.3(7)
ACT <i>Criminal Code</i>	Mental Impairment	Mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder. Mental illness is a reference to an underlying pathological infirmity of mind, whether of long or short duration and whether permanent or temporary, but does not include a condition (a reactive condition) that results from the reaction of a healthy mind to extraordinary external stimuli. However, a reactive condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.	Did not know the nature or quality of the conduct.	Did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).	Unable to control conduct.	If carried out conduct as a result of a delusion caused by a mental impairment, but the person may rely on the mental impairment to deny criminal responsibility.
	s 28	ss 27(1), (2), (3)	s 28(1)(a)	ss 28(1)(b), (2)	s 28(1)(c)	s 29(1)(a)

Jurisdiction and relevant law	Name of defence	Components of mental state	Nature and quality of conduct	Knowledge that conduct is wrong	Inability to control conduct	Delusions
NSW Common law <i>M’Naghten rules</i> <i>Mental Health (Forensic Provisions) Act 1990</i> ⁴⁵⁸	Mental Illness	Defect of reason caused by a disease of the mind. This is contrasted with ‘mere excitability of the normal man, passion, even stupidity, obtuseness, lack of self-control and impulsiveness.’ ⁴⁵⁹ Any mental disorder which ‘manifests itself in violence and is prone to recur’ may be a <i>M’Naghten</i> disease of the mind. ⁴⁶⁰ Mental malfunctioning of a transitory nature caused by some external factor such as violence, drugs, alcohol has been held not be due to disease. ⁴⁶¹ A ‘gross psychopath’, that is, one who has a gross lack of self-control and emotional feeling is not <i>M’Naghten</i> mentally ill. ⁴⁶² Irresistible impulse does not by itself raise a defence of mental illness. ⁴⁶³	Did not know the nature and quality of the act he or she was doing	Did not know that what he or she was doing was wrong. ‘Wrong’ means ‘wrong’ according to ‘ordinary standards adopted by reasonable men’. ⁴⁶⁴	-	If labours under a partial delusion only, and is not in other respects insane, must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.
	s 38					

⁴⁵⁸ It is noted that changes are proposed to the defence in reforms to the forensic mental health system in NSW. These will include changing the legal term from ‘not guilty by reason of mental illness’ to ‘act proven but not criminally responsible by reason of cognitive or mental health impairment’ and the terms ‘cognitive impairment’ and ‘mental health impairment’ defined, see NSW Government (Justice), *Forensic Mental Health Reforms: Supporting Victims Factsheet* (2018) <<https://www.justice.nsw.gov.au/Pages/Reforms/forensic-mental-health.aspx>>.

⁴⁵⁹ *R v Porter* (1933) 55 CLR 182, 188.

⁴⁶⁰ *Bratty v AG (Northern Ireland)* [1963] AC 386, 412.

⁴⁶¹ *R v Quick* (1973) QB 910 cf *Radford v The Queen* (1985) 42 SASR, 274–275, where the contrast is drawn between a pathologically infirm mind and ‘the reaction of a healthy mind to extraordinary external stimuli’.

⁴⁶² *Willgoss v The Queen* (1960) 105 CLR 295.

⁴⁶³ *Sodeman v The King* (1936) CLR 192; *R v Hodges* (1985) 19 A Crim R 129.

⁴⁶⁴ *Stapleton v The Queen* (1952) 86 CLR 358, 375.

Jurisdiction and relevant law	Name of defence	Components of mental state	Nature and quality of conduct	Knowledge that conduct is wrong	Inability to control conduct	Delusions
NT <i>Criminal Code</i>	Mental impairment	Mental impairment includes senility, intellectual disability, mental illness, brain damage and involuntary intoxication. Mental illness is a reference to an underlying pathological infirmity of mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli (although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur).	Did not know the nature and quality of the conduct.	Did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).	Unable to control conduct.	-
	s 43C	s 43A	s 43C(1)(a)	s 43C(1)(b)	s 43C(1)(c)	
QLD <i>Criminal Code</i>	Insanity	Mental disease or natural mental infirmity	Capacity to understand what the person is doing.	Capacity to know that the person ought not to do the act or make the omission.	Capacity to control the person's action.	Affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of sub-s (1), is criminally responsible to the same extent as if the real state if things had been such as the person as induced by the delusions to believe to exist.
	s 27	s 27(1)	s 27(1)	s 27(1)	s 27(1)	s 27(2)
SA <i>Criminal Law Consolidation Act 1935</i>	Mental incompetence	Mental impairment includes mental illness, intellectual disability or a disability or impairment of mind resulting from senility.	Does not know nature and quality of conduct.	Does not know that the conduct is wrong, that is the person could not reason about whether the conduct,	Totally unable to control conduct.	-

Jurisdiction and relevant law	Name of defence	Components of mental state	Nature and quality of conduct	Knowledge that conduct is wrong	Inability to control conduct	Delusions
		Mental illness means a pathological infirmity of the mind (including a temporary one of short duration).		as perceived by reasonable people, was wrong. ⁴⁶⁵		
	s 269C	s 269A [intoxication provision]	s 269C(1)(a)	s 269C(1)(b)	s 269C(1)(c)	
TAS <i>Criminal Code</i>	Insanity	Mental disease includes ‘natural imbecility’.	Incapable of understand the physical character of the act or omission.	Incapable of knowing that the act or omission was one that he or she ought not to do or make.	Under an impulse which he or she was in substance deprived of any power to resist.	Affected by a delusion on some specific matter, but who is not otherwise exempted from criminal responsibility under the foregoing provisions of this section, is criminally responsible for the act or omission to the same extent as if the fact which he was induced by such delusion to believe to exist really existed.
	s 16	s 16(1), (4)	s 16(1)(a)(i)	s 16(1)(a)(ii)	s 16(1)(b)	s 16(4)
VIC <i>Crimes (Mental Impairment and Fitness to be Tried) Act 1997</i>	Mental impairment	No definition ⁴⁶⁶	Did not know the nature and quality of the conduct.	Did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).	-	-
	s 20		s 20(1)(a)	s 20(1)(b)		

⁴⁶⁵ It is noted in s 269C(1)(b) that this excludes from consideration whether the defendant could reason with a moderate degree of sense and composure as set out in *R v Porter* (1936) 55 CLR 182.

⁴⁶⁶ Note that a definition of mental impairment was contained in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 5. This legislation has not been passed by the Victorian Parliament.

Jurisdiction and relevant law	Name of defence	Components of mental state	Nature and quality of conduct	Knowledge that conduct is wrong	Inability to control conduct	Delusions
WA <i>Criminal Code</i>	Insanity	Unsoundness of mind; mental impairment means intellectual disability, mental illness, brain damage or senility. Mental illness means an underlying pathological infirmity of mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.	Capacity to understand what the person is doing.	Capacity to know that the person ought not to do the act or make the omission.	Capacity to control the person's action.	Affected by delusions on some specific matter or matters, but who is not otherwise entitled to the benefit of sub-s (1), is criminally responsible to the same extent as if the real state if things had been such as the person as induced by the delusions to believe to exist.
	s 27	ss 1, 27(1),	s 27(1)	s 27(1)	s 27(1)	s 27(2)

7.5 Issues for consideration

7.5.1 The law of insanity has been controversial, and as Norval Morris observed in 1970 (quoted in Blackwood and Warner): ‘Rivers of ink, mountains of printer’s lead, and forests of paper have been expended’ on the issue of the defence of insanity.⁴⁶⁷ Since that time, there have been further reviews of the law of insanity in many jurisdictions and despite concerns and significant criticism, the law of insanity has remained essentially unchanged since the mid-nineteenth century.⁴⁶⁸ Key difficulties are in relation to the terminology used and the disconnect between the legal concept of insanity and contemporary psychological understanding.

7.5.2 In the discussion that follows, four options for reform are considered with a view to ensuring that ‘the law has the right test to distinguish between those who should be held criminally responsible for what they have done, and those who should not because of their condition’.⁴⁶⁹

- (1) Make no change to the current defence of insanity
- (2) Abolish the defence of insanity
- (3) Abolish the current defence of insanity and introduce a replacement defence
- (4) Reform the current defence of insanity
- (5) Make no change to the current defence of insanity.

Make no change to the current defence of insanity

7.5.3 An option would be to make no change to the current defence of insanity. As noted, despite the extensive review undertaken of the defence of insanity, it has ‘weathered [this] constant criticism’⁴⁷⁰ and, despite its flaws, has not changed significantly. The New Zealand Law Commission (‘NZLC’) suggested that this intractability may reflect the core decision that needed to be made by a jury: ‘regardless of what the rules may say, in the end, the question jurors will put to themselves when they retire is simply: “Is this man mad or not?”’.⁴⁷¹ Accordingly, despite recognising the ‘not insignificant’ problems with the defence and the outdated language, the NZLC did not recommend reform to the defence.⁴⁷²

7.5.4 None of the submissions received by the Institute (which made comment on the defence of insanity) indicated that the defence should not be changed. Further, based on the Institute’s analysis of the defence and its consideration of other law reform reports and expert

⁴⁶⁷ Blackwood and Warner (n 392) vol 1, 280; See also S Yeo, ‘Commonwealth and International Perspectives on the Insanity Defence’ (2008) 32 *Criminal Law Journal* 7; N Morris, *Madness and the Criminal Law* (University of Chicago Press, 1982).

⁴⁶⁸ Simester et al (n 398) 724. See Appendix 7 for a summary of recent law reform considerations.

⁴⁶⁹ Law Commission of England and Wales (n 382) 4.

⁴⁷⁰ NZLC, *Mental Impairment Decision-making and the Insanity Defence*, Report 120 (2010) 7.

⁴⁷¹ *Ibid.*

⁴⁷² *Ibid.*

commentary, the Institute considers that reform is necessary. Accordingly, the Institute does not recommend making no changes to the defence of insanity.

Recommendation

22. The Institute recommends making changes to the current defence of insanity contained in the *Criminal Code* s 16.

Abolish the defence of insanity

7.5.5 An option for reform at the other extreme would be for Tasmania to abolish the defence of insanity all together. In some states in the United States, the insanity defence has been abolished.⁴⁷³ In 1989, the Law Reform Commissioner of Tasmania recommended that the defence of insanity be abolished and that evidence of mental or psychological disorder be admissible as relevant to deny the mental element for the offence in all cases.⁴⁷⁴ The abolition of the insanity defence has also been advocated by some legal academics⁴⁷⁵ and disability rights academics.⁴⁷⁶ The Scottish Law Commission, the Law Commission of England and Wales, the New Zealand Law Reform Commission, the New South Wales Law Reform Commission and the Law Reform Commission of Victoria have also considered the abolition of the defence of insanity.⁴⁷⁷ The Law Commission of England and Wales was the only review to propose a provisional abolition of the insanity defence. Nevertheless, the Commission considered that there is a need for a special defence of non-responsibility and rejected the adequacy of general principles of criminal law to address cases where an accused's mental disorder resulted in a total loss of capacity. This is discussed further at [7.5.16]–[7.5.31].

7.5.6 Abolition of the insanity defence (without a comparable replacement) would mean that the criminal liability of a person with a mental illness or intellectual disability would be determined according to the general principles of criminal law. This would allow evidence of mental illness or intellectual disability to be used to deny the elements of the offence (the voluntary and intentional act, intention, knowledge, subjective recklessness etc) or to establish a defence of general application (such as self-defence).⁴⁷⁸ According to this approach, concerns about the protection of the public following an acquittal could be resolved through civil rather than criminal procedures.⁴⁷⁹

⁴⁷³ This is the summary of Morris' argument for the abolition of the insanity defence provided by M Hathaway, 'The Moral Significance of the Insanity Defence' (2009) 73 *The Journal of Criminal Law* 310, 313.

⁴⁷⁴ Law Reform Commissioner of Tasmania, *Insanity, Intoxication and Automatism*, Report No 61 (1989) Recommendations 1 and 2.

⁴⁷⁵ See Morris (n 467); N Morris, 'Psychiatry and the Dangerous Criminal' (1968) 41 *Southern California Law Review* 514.

⁴⁷⁶ See Minkowitz (n 144); C Slobogin, 'Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Person With Disabilities on the Insanity Defence, Civil Commitment, and Competency Law' (2015) 40 *International Journal of Law and Psychiatry* 36.

⁴⁷⁷ See Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report 34 (1990).

⁴⁷⁸ It is noted that, in Tasmania, evidence of mental illness falling short of insanity can be used to deny specific intention and actual or imputed knowledge, see *Hawkins* (1994) 179 CLR 500; (1994) 4 Tas R 376. This case is discussed at [7.5.124].

⁴⁷⁹ Simester et al (n 398) 719–720. It is noted that some commentators have argued that civil commitment would not be appropriate following acquittal as this 'is equally discriminate under the CRPD and relies on discriminatory perception of risk based on the existence of a disability: Minkowitz (n 144) 455 referring to Beaupert and Steele (2014).

Reasons advanced for the abolition of the defence

7.5.7 The following reasons have been advanced in support of the abolition of the defence:

- (a) It is inherently discriminatory based on disability and contrary to the CRPD right to equality before the law, including the right to recognition of legal capacity. The United Nations High Commissioner for Human Rights has stated that:

In the area of criminal law, recognition of the legal capacity of persons with disabilities requires abolishing a defence based on the negation of criminal responsibility because of the existence of a mental or intellectual disability. Instead disability-neutral doctrines on the subjective elements of crime should be applied, which take into consideration the situation of the individual defendant.⁴⁸⁰

Further, it is argued that ‘[g]ranting people with mental disability a special defence stigmatises and marginalises them. The category of “criminal insanity” perpetuates the extremely damaging myth that people with mental disability are especially dangerous or especially uncontrollable’.⁴⁸¹

- (b) It is fundamentally flawed to argue that a person who is mentally ill is less guilty than someone who is not mentally ill but is driven into criminal behaviour by circumstances beyond their control (such as social deprivation).⁴⁸² The argument is that there is no reason for distinguishing between different causes of non-responsibility.⁴⁸³
- (c) It is wrong in principle. This argument is based on the concern that the criminal law is being used inappropriately to detain people who have been acquitted on the ground that they ‘were perceived to pose a risk of harm’.⁴⁸⁴
- (d) Burden of proof and consistency with general principles of criminal law. It is argued that it is contrary to ‘notions of justice and fair play’ to require ‘the accused to prove not only that he [or she] did not have *mens rea* but that he [or she] suffered from a total incapacity to understand the physical nature of the act’.⁴⁸⁵ This represents a shifting of the burden of proof to the accused and also the imposition of a more onerous burden.⁴⁸⁶ It is argued that the abolition of the insanity defence ‘is more consistent with general principles of criminal law’ on the basis that ‘if the prosecution can prove the elements constituting the offence, the charge is made out, and if it cannot, then the accused must be acquitted’.⁴⁸⁷

⁴⁸⁰ United National High Commissioner for Human Rights, ‘Thematic Study on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities’ UN Doc A/HRC/10/48 (26 January 2009) [47] <<http://www.ohchr.org/EN/Issues/Disability/Pages/ThematicStudies.aspx>>. See also Minkowitz (n 144); Slobogin (n 476).

⁴⁸¹ Slobogin (n 476) 39.

⁴⁸² Law Commission of England and Wales (n 382) 33 summarising Morris’ argument.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid 32.

⁴⁸⁵ Law Reform Commissioner of Tasmania (n 474) 8.

⁴⁸⁶ Ibid.

⁴⁸⁷ Law Commission of England and Wales, (n 382) 30.

7.5.8 The following reasons have been advanced to support the retention of the defence:

- (a) The insanity verdict reflects the true ground for the verdict.⁴⁸⁸ Insanity reflects the foundations of the defence as a ‘denial of criminal responsibility due to a person’s lack of capacity’.⁴⁸⁹ The NZLC observed that:

It is not, in fact, true to say, as the abolitionists do, that the insanity defence is ill-founded because criminal liability in general turns on the presence or absence of criminal intent. The criminal law, and society more generally, across all like-minded jurisdictions, does recognise other circumstances in which factual guilt, and criminal actions with intent, are justified or excused, resulting in acquittal, because the offender was placed in a position in which he or she did not have a “real” choice. Self-defence, and duress or necessity, are examples.⁴⁹⁰

Further, there may be some individuals who were proved to have the relevant intent at the time of the offence but where the intent was affected by a delusion. It is argued that it would be unfair to convict such a person where they were ‘grossly out of touch with reality at the time of the crime’.⁴⁹¹ It also does not account for strict liability offences, where the prosecution does not need to prove any intention beyond a voluntary and intentional act.

- (b) The requirement for legal capacity under the CRPD (which refers to one’s power to act within the legal system)⁴⁹² is not undermined by the insanity defence. After considering the views expressed by those who would advocate for the abolition of the insanity defence on human rights grounds, Wondemaghen argues that:

Adherence to Article 12 demands that persons with mental and psychosocial disabilities are recognised as free agents with legal capacity who may or may not choose to employ the defence of insanity to negate reasoning, not as a perpetual and continuous state, but solely at the time of the commission of a criminal act.⁴⁹³

This can be contrasted with the position of children where lack of criminal responsibility is an on-going state for children under the age of 10 and a rebuttable presumption for children aged between 10 and 14 years.⁴⁹⁴ For individuals who seek to raise insanity, there is a presumption of sanity and it must be established on the balance of probabilities that the person had a mental disease, which gave rise to one of the relevant incapacities at the time of the offence. Accordingly, it is not a permanent or on-going lack of legal capacity based on disability. Indeed, a person may be found

⁴⁸⁸ Ibid 34.

⁴⁸⁹ Ibid.

⁴⁹⁰ NZLC (n 470) 32.

⁴⁹¹ Law Commission of England and Wales (n 382) 37 citing S Morse and M Hoffman, ‘The Uneasy Entente Between Insanity and Mens Rea: Beyond *Clark v Arizona*’ (2007) *Scholarship at Penn law*, Paper 143, 64.

⁴⁹² M Wondemaghen, ‘Testing Equality: Insanity, Treatment Refusal and the CRPD’ (2018) 25(2) *Psychiatry, Psychology and Law* (online) 2 referring to the Commissioner for Human Rights, ‘Who Gets to Decide? Right to Legal Capacity for Persons with Intellectual and Psychosocial Disabilities’ (2102) Council for Europe, Strasbourg 7.

⁴⁹³ Wondemaghen, *ibid* 10.

⁴⁹⁴ *Criminal Code* (Tas) s 18.

guilty of some offences and not guilty by reason of insanity in relation to other offences for offending that occurs in a relatively close time span.⁴⁹⁵

- (c) The underlying rationale for the insanity defence is still valid. This was the view expressed by the NSWLRC:

Is there still a need to provide a legal mechanism for excusing from criminal responsibility those offenders whose mental capacity is significantly impaired, for protecting them from themselves or the community where their impaired mental capacity makes them susceptible to dangerous behaviour, and for providing them with the opportunity for treatment, rather than punishment?⁴⁹⁶

The Commission's view was that 'the answer to that question is uncontroversial, and the underlying rationale for the defence of mental illness remains as valid today as it did when it first evolved'.⁴⁹⁷

- (d) Public protection requires the courts to have special powers beyond civil powers of detention.⁴⁹⁸ The Law Commission stated that:

A person with mental disorder who has done what would amount to a criminal offence is not, it seems to us, in the same position as a person who has been acquitted without any reliance on a mental disorder defence. It is justifiable, on the grounds of public protection, to detain a person who has been found to have committed what would have been a criminal offence but for his or her medical condition (whether physical or mental).⁴⁹⁹

7.5.9 In the Issues Paper, the Institute sought feedback about whether the defence of insanity should be abolished:

Should the defence of insanity in s 16 of the *Criminal Code* (Tas) be abolished?

If you consider that the insanity defence should be abolished, do you think that a new defence should be created, or should general principles of criminal responsibility apply?

If the defence of insanity is abolished, do you consider that the powers under the *Mental Health Act 2013* (Tas) are sufficient to address community protection concerns following the acquittal of an individual with mental health impairments? If not, what changes would be necessary?

7.5.10 Five submissions addressed the question of whether the defence of insanity in s 16 of the *Criminal Code* (Tas) should be abolished. No submissions called for the abolition of the defence of insanity without replacement. In other words, there was no support for amending the law so that individuals who were affected by a mental health or cognitive impairment at the time of the offence (to such an extent that the defence of insanity would apply) would be dealt

⁴⁹⁵ See *P*, 13 November 2013 (Blow J).

⁴⁹⁶ NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper 6 (2010) 50.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ Law Commission of England and Wales (n 382) 35.

⁴⁹⁹ *Ibid* 33.

with according to the general rules of criminal responsibility, and the powers of civil detention under the *Mental Health Act 2013* (Tas). However, the issue on which there was a greater divergence of views was whether the current defence should be abolished and replaced with a new defence.

7.5.11 The DPP and ForensiClinic supported the retention of s 16 of the *Criminal Code* (Tas). The DPP wrote that ‘the provision works well in practice. Established and well understood principles would be eroded if the defence were to be abolished. I would strongly oppose any proposal to remove this defence from the Code’. ForensiClinic also expressed the view that ‘the insanity defence is extremely important’ but proposed reform to the terminology used in s 16. The need to change the terminology used in the defence was raised in many of the submissions received by the Institute. This is discussed further at [7.5.33]–[7.5.41].

7.5.12 On the other hand, there was support in three submissions for the replacement of the insanity defence with a new defence — either based on the England and Wales Law Commission’s provisional recommendations⁵⁰⁰ or by the introduction of a new defence based in ‘lack of reasons-responsiveness’.⁵⁰¹

7.5.13 The introduction of a new defence based on the England and Wales proposal was supported by EOT and the ALA. Broadly speaking, this defence is grounded in the defence of insanity but has an expanded operation in that it applies to physical and mental conditions (recognised medical conditions). In addition, it employs different incapacity tests.⁵⁰² The ALA’s view was that this new defence should be introduced to replace the insanity defence. EOT’s submission indicated that it was ‘attracted’ to the Law Commission proposal, but it also proposed other reforms to the current defence in the alternative. The ALA supported the reform because it would overcome ‘the disconnection between the legal definition of “disease of the mind” and medical understanding of mental illness, and conditions affecting mental functioning such as hypoglycaemia’. Similarly, the appeal of the approach proposed by the Law Commission for EOT was that it would ‘more clearly reflect the broad range of conditions that have previously been captured by the umbrella of “insanity”, including cognitive impairment and conditions such as sleep apnoea syndrome or narcolepsy’. EOT considered that the concept of ‘recognised medical condition’ ‘would also help to raise awareness of the diversity of various disability types and importantly the difference between cognitive impairment (which may include intellectual disability, learning difficulties, acquired brain injury and so on) and psychiatric impairments which are linked to mental illness’. Its view is that this may enable utilisation of a broader range of orders than those available under the forensic mental health system.

7.5.14 Walvisch, instead, proposed a new defence based in a lack of reasons-responsiveness. He argued that a specific legal defence is required as it is inappropriate to hold individuals responsible for their wrongdoing if they:

- Were not capable of recognising and responding to the reasons that bore on their situation (i.e. they were not reasons-responsive); and

⁵⁰⁰ See discussion from [7.5.16].

⁵⁰¹ See discussion from [7.2.29].

⁵⁰² In this regard, the most significant difference was that the defence would apply if a person wholly lacked the capacity to rationally form a judgment about the relevant conduct. This replaced the test that the person did not know the nature and quality of their act, see [7.5.27].

- They were not responsible for their lack of reasons-responsiveness.

Walvisch considered that the scope of the defence should reflect its purpose which is ‘to exculpate people who should not be held criminally responsible for blameless conduct’. Accordingly, his view is that the defence should have two main requirements:

1. That the accused lacked reasons-responsiveness at the time of the offence; and
2. That the accused should not be held responsible for that lack of reasons-responsiveness.

In his view, this approach avoids many of the problems with the current law because it avoids definitional questions and focuses solely on the nature of the accused’s impairment (that is, whether the person was ‘operating outside the realm of reason at the relevant time’) rather than its cause. Further details of this proposal are set out from [7.5.29].

7.5.15 As noted above, there are competing arguments for the retention and abolition of the defence of insanity. While a case can be made for the abolition of the defence, the Institute’s view is that there remains a need for a special defence so that the criminal justice system can respond in cases where it is not appropriate to attribute criminal responsibility given the individual’s state of mind at the time of the offence (as outlined at [7.5.8]). The absence of criminal responsibility is clear in the finding that the person is not guilty on the basis of insanity or mental impairment. The Institute’s view is that abolition of the defence would give rise to unfairness because the inevitable consequence would be that individuals with mental or cognitive impairments would be found guilty of offences in circumstances where their mental state rendered them unable or unaware of the fact that they should act otherwise. However, having agreed that there is the need for the defence, the Institute acknowledges that the current law is problematic (as outlined below) and that there is a need for reform. The Institute’s approach is to retain and reform the defence.

Recommendations

23. The Institute does not recommend abolition of the defence of insanity simpliciter.
24. The Institute recommends retaining and reforming the current defence of insanity.

Abolish the defence of insanity and introduce a replacement defence (a ‘radical’ change)

7.5.16 As indicated above, an alternative to the complete abolition of the defence of insanity would be to replace it with an alternative means of deciding the circumstances in which people ought not be criminally responsible for their conduct.

7.5.17 In England and Wales, the Law Commission provisionally proposed a ‘radical’ change to the defence.⁵⁰³ Its view was that the defence in its current form should be abolished and that a special defence based on the accused’s lack of capacity at the time of the offence should be created that would apply to physical as well as mental conditions that led to a relevant loss of capacity.⁵⁰⁴ It proposed a new defence of ‘not criminally responsible by reason of a recognised

⁵⁰³ Law Commission of England and Wales (n 382) 19.

⁵⁰⁴ Ibid 29. This is set out in Appendix 7.

medical condition’. This defence applies where the defendant, as a result of a qualifying ‘recognised medical condition’, wholly lacked the capacity to:

- (a) Rationally form a judgment about the relevant conduct or circumstances (ie ‘could not have reasoned rationally about what he or she was doing’);
- (b) Understand the wrongfulness of what he or she is charged with; or
- (c) Control his or her physical acts in relation to the relevant conduct.⁵⁰⁵

Accordingly, the Law Commission proposed changing the current requirement that the defendant ‘did not know the nature and quality of the act’ (the equivalent of s 16(1)(a)(i) of the *Criminal Code* (Tas)) to a test based on the capacity to rationally form a judgment about conduct or circumstances. In the Law Commission’s view, the ability to rationally form a judgment required at least three types of ‘cognitive competency’: (1) an ability to form accurate beliefs; (2) an ability to draw on their existing wants and beliefs; and (3) ‘an accurate reasoning process that allows them to draw warranted conclusions about the probable relationships among various wants, acts and consequences’.⁵⁰⁶ In the Law Commission’s view, the new test encapsulates these ideas about rational judgment and better reflects the underlying rationale for the defence.⁵⁰⁷

7.5.18 Another significant change contained in the provisional proposal is the shift from ‘mental disease’ to ‘recognised medical condition’. The Commission’s view was that the boundary between ‘sane’ and ‘insane’ automatism should be re-defined, so that a special verdict would be available if a mental or a physical disorder deprived the defendant of a relevant loss of capacity. It outlined the following reasons for this approach:

- (a) It removes the artificial division between physical and mental disorders and focuses on the essential point, which is ‘whether the accused had the relevant criminal capacity’.⁵⁰⁸ There is no principled reason to treat mental disorders differently from physical disorders when they gave rise to a loss of capacity.⁵⁰⁹
- (b) It would reduce the stigma attached to mental illness arising from the use of terminology of the nineteenth century by introducing a verdict of ‘not criminally responsible by reason of a recognised medical condition’.⁵¹⁰ This is ‘crafted in modern terms with flexibility to accommodate developing medical knowledge’.⁵¹¹
- (c) It would result in more appropriate labelling.⁵¹² The Law Commission provides the example of a person who is charged with causing death by dangerous driving in circumstances where they fell into a hypoglycaemic coma. They would be acquitted

⁵⁰⁵ Ibid 20. Note that the proposal in relation to wrongfulness represented a shift in English law which currently requires a lack of understanding that the act was legally wrong to a new position (as with Tasmania) that required a lack of understanding that the act was morally wrong (one that the person sought not to do): at 59.

⁵⁰⁶ Ibid 54 quoting R Schopp, *Automatism, Insanity and the Psychology of Criminal Responsibility* (1991) 189.

⁵⁰⁷ Ibid 54.

⁵⁰⁸ Ibid 26.

⁵⁰⁹ Ibid 43.

⁵¹⁰ Ibid.

⁵¹¹ Ibid 26.

⁵¹² Ibid 43–44.

outright but the Law Commission argued that this ‘situation more appropriately fits within a defence of not criminally responsible by reason of a medical condition’.⁵¹³ It would also be more appropriate than labelling as ‘insane’ people with diabetes (hyperglycaemia) and epilepsy.

- (d) It would result in more appropriate outcomes by providing the court with powers over cases where there is a risk of reoccurrence arising from a physical disorder (hypoglycaemia),⁵¹⁴ such as, for example, where someone operates machinery and suffers from sleep apnoea. If such a person harmed someone, they may have a defence of automatism with an acquittal and no power for preventive measures to be imposed by the court. Under the new defence, if the person was found ‘not criminally responsible by reason of recognised medical condition’, ‘the court could require him or her to obtain the necessary medical treatment or supervision’.⁵¹⁵
- (e) It would address problems that arise from narrow construction of the incapacities, particularly the fact that insanity is unavailable where a person has knowledge of the physical aspect of the act even if they do not understand the moral dimension.⁵¹⁶

7.5.19 A further reason that could be advanced for supporting such an approach is that it more readily reflects the requirement for equality under the *CRPD* by creating a defence that applies to recognised medical conditions (both physical and mental) that give rise to a relevant incapacity. In this respect, it is disability neutral in form and substance as it will not only apply to individuals with mental health or cognitive impairments.

7.5.20 Although the Law Commission proposed the introduction of a broad test for the qualifying condition (recognised medical condition), some limits were recommended for policy reasons. The Law Commission’s provisional proposals were that there be two non-qualifying conditions — acute intoxication/drug induced psychosis and anti-social personality disorders.⁵¹⁷ These are conditions that currently fall outside the qualifying condition of a ‘disease of the mind’ but would be included within the scope of a ‘recognised medical condition’. In relation to acute intoxication, the Commission’s view was that the existing approach of the law in relation to intoxication based on prior fault should continue to apply.⁵¹⁸ However, this does not exclude the possibility that alcohol dependency syndrome (as distinct from drunkenness) may be a qualifying medical condition.⁵¹⁹ In addition, the Commission proposed, on policy grounds, that antisocial personality disorder should not be a condition that qualifies as a ‘recognised medical condition’.⁵²⁰

7.5.21 The Law Commission’s proposed reform to the insanity defence has generally been well received in the academic literature.⁵²¹ For example, Rumbold and Wasik write that ‘[t]he

⁵¹³ Ibid 43.

⁵¹⁴ Ibid 44.

⁵¹⁵ Ibid 27.

⁵¹⁶ Ibid 10.

⁵¹⁷ Ibid 48–49.

⁵¹⁸ Ibid 75.

⁵¹⁹ Ibid 74.

⁵²⁰ Ibid 76.

⁵²¹ See J Rumbold and M Wasik, ‘Special Feature on Automatism’ (2015) 55 *Medicine, Science and the Law* 147; R Mackay, ‘An Anatomy of Automatism’ (2015) 55 *Medicine, Science and the Law* 150; L Claydon and P

changes proposed in the discussion document provide a logical and consistent framework for mental condition defences that will reflect modern medical science'.⁵²² In contrast, Duff argued that there are problems with the proposals. He suggested that the three incapacities set out in the Law Commission's proposal should be reduced to one overarching incapacity — the person must 'wholly lack the capacity to guide his conduct for the legally relevant reasons'.⁵²³ Further, Duff argued that there is no need for there to be a qualifying condition from which the incapacity resulted and to include such a requirement is either unnecessary or unjust.⁵²⁴ He maintained that if someone has proven a total incapacity to conform to the relevant law then this should be enough.⁵²⁵ For this reason, Duff proposed an alternative defence — a defence of 'lack of rational capacity'. This would be 'available to anyone whose commission of the offence could be attributed to their lack of rational capacity to conform their conduct to the relevant law, or to guide their conduct by the reasons that, according to the law, bear on their conduct'.⁵²⁶

7.5.22 Despite the largely positive commentary, a drawback of adopting the Law Commission approach in Tasmania is that it is not known how it would operate in practice. It has not been implemented in England or Wales and so, it is not possible to determine whether it would be a better option for defendants than the current insanity defence.⁵²⁷ Ashworth has observed that increased reliance on this defence compared with the current defence is not guaranteed because '[a]s now, some defendants may prefer to take their chances with ordinary sentencing powers', and further, the new defence is narrowly drawn by requiring a total lack of capacity.⁵²⁸

7.5.23 In addition, it can be asked whether it is appropriate that medical conditions which would currently result in an unqualified acquittal on the basis of 'sane automatism' (that is, that the act was not voluntary and intentional) should be included in a new defence that results in a qualified acquittal. Consider, for example, the situations where a driver suffers a sudden medical condition that results in a loss of consciousness causing a crash and resulting in the serious injury or death of another; or where a person faints and falls onto another person causing injury; or where a person commits an offence as a result of concussion.

7.5.24 An additional disadvantage arising from adopting a new approach to insanity and automatism is that the long-settled law in this area would be lost.⁵²⁹ As the NSWLRC has observed, despite concerns in relation to the operation of the *M'Naghten* rules, there are advantages to their retention:

Catley, 'Abolishing the Insanity Verdict in the United Kingdom: A Better Balance Between Legal Rules and Scientific Understanding?' in S Moratti and D Patterson (eds), *Legal Insanity and the Brain: Science, Law and European Courts* (Hart Publishing, 2016) 207.

⁵²² Rumbold and Wasik (n 521)148.

⁵²³ A Duff, 'Incapacity and Insanity: Do We Need the Insanity Defence?' in B Livings, A Reid and N Wake (eds) *Mental Condition Defences and the Criminal Justice System* (Cambridge Scholars Publishing, 2015) 166. However, it was noted that the three incapacities set out by the Law Commission may be included as being relevant to establish this incapacity, for example if a person had 'some radical impairment or deficiency in at least one of these three sub-capacities'.

⁵²⁴ *Ibid* 170.

⁵²⁵ *Ibid*.

⁵²⁶ *Ibid* 173.

⁵²⁷ A Ashworth, 'Insanity and Automatism: A Discussion Paper' [2013] *Criminal Law Review* 787, 788.

⁵²⁸ *Ibid*.

⁵²⁹ NSWLRC (2013) (n 56) 50.

- Consistency with other Australian jurisdictions and comparable jurisdictions that have a version of the *M’Naghten* rules.
- The rules have stood the test of time, and despite numerous reviews, ‘most cognate jurisdictions have not taken a fundamentally different route in dealing with this legal issue’.⁵³⁰

In the Issues Paper, the Institute sought feedback on the introduction of a new defence to replace the insanity defence in s 16 of the *Criminal Code* (Tas):

Should a new defence be introduced to replace the insanity defence that provides for a verdict of not guilty on the grounds of a recognised medical condition (as proposed in England and Wales)?

If so, should there be any non-qualifying conditions?

7.5.25 As indicated at [7.5.13], the Institute received two submissions (from the ALA and EOT) that were supportive of the introduction of a new defence that provides for a verdict of not guilty on the grounds of a recognised medical condition (as proposed in England and Wales). In its submission, the ALA also addressed the issue of non-qualifying conditions and, contrary to the views of the Law Commission, did not think that policy considerations justified the exclusion of temporary drug-induced disorders or anti-social personality disorder ‘given that the ultimate test would be the defendant’s ability to form capacity’.

7.5.26 In contrast, the DPP was strongly opposed to the replacement of s 16 on the ground that long-settled law would be lost. This concern has been a key factor in the lack of legislative reform in other jurisdictions. As noted at [7.5.1], despite the well-recognised concerns about the law of insanity, there has generally been little political appetite to move away from its long-established legal principles that are well understood and generally do not give rise to difficulties in practice. For this reason, as noted, the defence proposed by the Law Commission was recognised by its proponents to be a ‘radical proposal’. Similarly, the Institute acknowledges that a recommendation based on the Law Commission’s proposals would be a bold initiative, and one that would require very careful consideration. Further, as noted, the Law Commission proposals were set out in a Discussion Paper rather than a Consultation Paper which means that feedback was not sought.⁵³¹ The reforms have not been implemented and so it is not possible to assess their practical operation and any difficulties or problems that may have arisen with their application.

7.5.27 There are two key changes that would be made to the law in Tasmania if the Law Commission’s proposals were adopted:

⁵³⁰ Ibid.

⁵³¹ It is noted that the use of provisional recommendations in a Discussion Paper instead of a Consultation Paper reflected the need to allocate resources within the project to where there was a greater need for practical reforms identified and this was in relation to fitness to stand trial. In contrast, in response to the Scoping Paper, there was little evidence of a practical problem in relation to the operation of the insanity defence’: Law Commission of England and Wales (n 382) 2. The Law Commission indicated that it had published its provisional proposals ‘to contribute to the broader public debate on the reform of the criminal justice system as it relates to mentally disordered defendants: at 3.

- (1) The requirement that the person was **afflicted with a mental disease** would be replaced with the requirement that the person had a **recognised medical condition**.
- (2) Instead of being **incapable of understanding the physical character** of their act or omission, the test would be whether the accused was **incapable of rationally forming a judgment** about the relevant conduct or circumstance.

Another change would be the explicit exclusion of certain personality disorders (anti-social personality disorder) from the definition of ‘recognised medical condition’. Currently in Tasmania, personality disorders are neither expressly included nor excluded from the scope of a ‘mental disease’ (see [7.3.8]).

7.5.28 Other features of the defence would remain essentially the same:

- (1) a test based on understanding of the wrongfulness of the conduct (knowing the act or omission was one which he or she ought not to do or make)
- (2) a test based on incapacity to control conduct
- (3) the exclusion from the defence of temporary drug induced psychosis.

7.5.29 Another model for reform (as indicated at [7.5.14]) was suggested by Walvisch — the defence of ‘lack of reasons-responsiveness’. In terms of assessing a person’s lack of reasons-responsiveness, Walvisch says the ‘key issue is whether, *at the time of the offence*, the accused’s psychological condition was such that the accused was not functioning as a responsible agent *in relation to the offending behaviour*’. Expressed differently, this means that:

we need to ask whether, at the time of the relevant conduct, the beliefs, attitudes and emotions that informed the accused’s deliberations and actions were ‘within the realm of reason; or were they so disordered, so detached from reason, that he was not operating within that realm at all?’

7.5.30 This proposal is different from the current approach in s 16 of the *Criminal Code* (Tas) in several ways:

- (1) There is no qualifying condition — ‘the defence should be available to *anyone* who non-culpably lacked reasons-responsiveness, regardless of cause’. This would include personality disorders, substance use or physical illness. However, the defence would not be available in cases of ‘self-induced reasons responsiveness’ — where the lack of reasons responsiveness at the time of the offence can be traced back to an earlier time when the individual made a decision while they were reasons-responsive. This may arise in cases where the accused’s lack of reasons-responsiveness is attributable to their own behaviour such as a failure to take prescribed medication or the decision to take illicit drugs. However, this prior ‘reasons-responsiveness’ would not preclude the defendant from relying in the defence in all cases but would require a balancing of the circumstances in each case.⁵³²

⁵³² Walvisch illustrates how this might work in the following example: ‘where prescribed medication controls a small risk of an individual becoming violent, but the side-effects of taking the medication are so unpleasant for the individual that he or she is starting to seriously consider committing suicide, the reasons for stopping the medication may outweigh the reasons for continuing to take it. Thus, in determining whether or not an individual has breached his or her prospective responsibilities, a judge will need to balance his or her reasons for acting in

- (2) The tests of incapacity would be changed to a focus on the person’s lack of reasons-responsiveness (capable of recognising and responding to the reasons that bear on his/her situation). In Walvisch’s words:

a person will generally not be responsible if he or she is unable to recognise how reasons fit together, to see why one reason is stronger than another, or to understand how the acceptance of one reason as sufficient implies that a stronger reason must also be sufficient.

While this proposed defence is expressed very differently from the current tests of incapacity in s 16 of the *Criminal Code* (Tas), Walvisch’s view is that ‘many (if not all) of the individuals captured by the current defence would continue to be captured by this revised defence’. This is because ‘that understanding the physical and moral nature of one’s conduct, and being able to act in accordance with one’s deliberations, constitute essential elements of reasons-responsiveness’. In addition, it would appear under the model that individuals whose lack of reasons-responsiveness can be attributed to prior fault (such as drug taking or drinking) would be excluded from the defence.

7.5.31 As outlined above, the Institute acknowledges that there are benefits in adopting the English or Walvisch’s proposal. However, as the DPP has indicated, the law of insanity reflects well-established legal principles and to move to a completely new and untested approach may create new and unforeseen difficulties in practice, where no difficulties currently exist. While the Institute accepts that there are problematic aspects in the current defence, it is preferable to try to resolve those difficulties rather than introduce a new defence. The Institute’s view is that the legislative statement of the scope of the defence serves an important function of community education, and so the qualifying condition should not be too broad. Accordingly, after considering the alternative defences proposed by the Law Commission of England and Wales and Walvisch, the Institute’s view is that the preferred approach is to retain the current defence of insanity but make reforms to address its defects.

Recommendation

25. The insanity defence in s 16 of the *Criminal Code* (Tas) should not be wholly replaced by a new defence.

Retain but amend the insanity defence in s 16 of the Criminal Code

7.5.32 As indicated, the view of the Institute is to retain but amend the insanity defence in s 16 of the *Criminal Code*. Extensive academic literature has outlined deficiencies with the current law of insanity. An overview of these concerns is set out below as well as the feedback received on whether these problems create difficulties in practice and how and what reform(s) might ameliorate them. The amendments considered are:

- To change the name of the defence of insanity

the relevant way against the reasons for not doing so. The individual should only be considered to have breached his or her responsibilities if, on balance, the judge finds that he or she should not have acted in that way’. In addition, it would be necessary to take into account ‘practical factors such as access to mental health services and affordability of treatment’ as ‘an individual should not be held responsible for failing to manage his or her mental health if doing so was not reasonably practicable in the circumstances.’

- To change the scope of the qualifying conditions for the defence including the terminology used
- To clarify the interrelationship between insanity and self-defence.

Inadequacy of the current insanity defence

7.5.33 Inappropriate and outdated terminology. Problems with the current defence are said to be created by the mismatch between the ‘outmoded *M’Naghten* rules’⁵³³ (legal insanity) and contemporary psychiatric knowledge about mental illness (medical insanity).⁵³⁴ As Ormerod writes, ‘[i]t is surprising that in the twenty-first century the law is based not on any medical understanding of mental illness but on a distinct legal criterion of responsibility’.⁵³⁵

7.5.34 A specific criticism directed at the insanity defence is the use of inappropriate and outdated terminology such as ‘insanity’, ‘mental disease’ and ‘natural imbecility’, as well as the concept of a ‘disease of the mind’. These terms are considered to be stigmatising, and, as recognised by the Law Commission of England and Wales, not medical terms but rather outdated legal terms.⁵³⁶

7.5.35 In many other jurisdictions, the name of the insanity defence has been changed to reflect the inappropriateness of using such terminology. In the Northern Territory, the Australian Capital Territory, Victoria, and at the Commonwealth level, the defence is now called the defence of mental impairment, and in South Australia it is called ‘mental incompetence’.⁵³⁷ In Western Australia, while the defence is still called insanity and refers to ‘unsoundness of mind’, the substance of the defence uses the term ‘mental impairment’, which means ‘intellectual disability, mental illness, brain damage or senility’.⁵³⁸ The Law Reform Commission of Western Australia (LRCWA) has recommended that the defence be renamed ‘defence of mental impairment’ and similarly, the Scottish Law Commission has recommended a name change. In New South Wales, the defence is called ‘mental illness’ and the NSWLRC has recommended that the defence be renamed ‘defence of mental health impairment or cognitive impairment’. Proposed reforms in NSW will rename the legal terms for the defence to, ‘Act proven but not criminally responsible by reason of cognitive or mental health impairment’.⁵³⁹ In contrast, the NZLC, despite acknowledging that the terminology is outdated, recommended that the terminology not be changed simply to fulfil semantic purposes: ‘the rationale for reforming it really boils down to no more than desire to make the defence “look and feel” more modern, without adding anything of substance or changing anything’.⁵⁴⁰

7.5.36 In the Issues Paper, the Institute sought feedback on changing the name of the defence of insanity:

⁵³³ Fairall and Yeo (n 376) [13.65].

⁵³⁴ See the VLRC, *Defences to Homicide*, Final Report (2004) [5.11]–[5.44]; NSWLRC (2013) (n 56) Chapter Three; Bronitt and McSherry (n 370) [4.30]; Schloenhardt (n 369) [17.1.2].

⁵³⁵ D Ormerod, *Smith and Hogan’s Criminal Law* (Oxford University Press, 13th ed, 2011) 294.

⁵³⁶ Law Commission of England and Wales (n 382).

⁵³⁷ See Table 7.2.

⁵³⁸ See Table 7.2.

⁵³⁹ See NSW Government (Justice) (n 288).

⁵⁴⁰ NZLC (n 470) 41.

Do you consider that the name of the defence of insanity in s 16 of the *Criminal Code* (Tas) should be changed? If so, what should the defence be called?

7.5.37 Seven submissions addressed this issue, and there was general agreement that the language of the defence is outdated and inappropriate.⁵⁴¹ EOT highlighted the changing understandings of the conditions that affect responsibility for criminal action and the inability of the term ‘insanity’ to reflect this. Similarly, the ALA commented on the failure of the language of ‘insanity’ to reflect modern psychiatry. The DPFM wrote that ‘it is an outdated title for mental impairment and reflects thinking from 100 years ago’.

7.5.38 In addition to the failure of the label ‘insanity’ to reflect the scope of the defence, other submissions stressed its discriminatory and stigmatising connotations. The MHCT wrote that the term ‘insanity’ is equated with ‘a historical concept of institutionalisation, community fear and misunderstanding of mental ill-health’. It suggested that the stigmatising nature of the language perpetuated fear and discrimination when associated with people with mental illness:

Reforming the language within the defence of insanity will achieve significantly more than just modernising the ‘look and feel’ of the law. An updated use of language will provide a legal basis for the systemic reduction of stigma within our communities and support upholding the dignity and self-respect of people with a mental illness through the use of appropriate and respectful language.

The MHCT suggested that the name be changed to the ‘defence of mental health and cognitive impairment’. It wrote that ‘[f]rom the perspective of upholding the dignity of the individual, [this term] provides a respectful description of the condition or conditions’. The DPFM also recommended use of this terminology.

7.5.39 Similarly, TasCoss submitted: ‘[t]he language of Tasmania’s *Criminal Code* needs to be modernised. The current *Criminal Code* at section 16 uses inappropriate and outdated terminology (insanity) which is stigmatising and reinforces damaging and incorrect perceptions that people with mental illness are dangerous’. TasCoss supported the MHCT, in advocating for the name to be changed to the ‘defence of mental health and cognitive impairment’, to achieve three things: (1) a better reflection of contemporary understandings of mental illness; (2) a reduction in stigma; and (3) upholding the dignity of people with disability through the use of appropriate and respectful language. Walvisch also submitted that ‘the term “insanity” is inappropriately stigmatising and should be replaced.’⁵⁴²

7.5.40 The DPP indicated that he was ‘not opposed to modernising the language of the Code so it is not inconsistent with modern medical terms’ but expressed caution: ‘any amendment would need to be carefully considered to ensure that the existing case law was not eroded’.

7.5.41 In the Issues Paper, the Institute noted previous concerns about the label of ‘insanity’. These concerns were clearly reflected in the submissions received. The Institute does not consider that name change would achieve nothing more than a semantic change to make the defence feel more modern (a view expressed by the NZLC). Rather, in the Institute’s view a name change is essential to remove stigmatising and offensive terminology from the *Criminal*

⁵⁴¹ ForensiClinic, MHCT, TasCoss, EOT, DPFEM.

⁵⁴² Walvisch’s proposal was that ‘the name of the defence should reflect its legal basis (rather than any underlying medical concepts). For example, were the test suggested in the previous paragraph implemented, it should be called ‘Not criminally responsible due to a lack of reasons-responsiveness’ (or something similar)’.

Code (Tas). Accordingly, the Institute recommends that the name of the defence in s 16 of the *Criminal Code* (Tas) be changed. Based on the approach taken by the Institute to the reform of the defence more broadly, the name should be changed to the defence of mental or cognitive impairment. This broadly aligns with the recommendations of the NSWLRC and the views of mental health and disability experts.

Recommendations

26. The name of the insanity defence in s 16 of the *Criminal Code* (Tas) should be changed.
27. The name of the defence in s 16 of the *Criminal Code* (Tas) should be changed to the defence of mental or cognitive impairment.

7.5.42 The qualifying mental state: mental disease. In addition to the name of the defence, concepts of mental disease and disease of the mind are regarded as ‘limited, outdated and offensive’.⁵⁴³ To address to this concern, other jurisdictions have defined the required mental state according to contemporary medical terminology.⁵⁴⁴ However, different formulations have been adopted. For example, in South Australia, the *Criminal Law Consolidation Act 1935* (SA) uses the term, ‘mental impairment’, which is defined to include ‘mental illness, intellectual disability or a disability or impairment of mind resulting from senility’.⁵⁴⁵ The Commonwealth, the Australian Capital Territory, the Northern Territory and Western Australia, define mental impairment to mean, ‘intellectual disability, mental illness, brain damage or senility’.⁵⁴⁶ The ACT and the Commonwealth legislation, unlike other jurisdictions, include ‘severe personality disorder’ in the definition of mental impairment). The Northern Territory includes involuntary intoxication in the definition of mental impairment.

7.5.43 Reviews conducted in other Australian jurisdictions that do not currently have a definition of mental impairment have all recommended legislative change to provide for such a definition. Again, however, there are variations in terminology recommended. The VLRC has recommended that mental impairment should be defined to include, but not be limited to, ‘mental illness, intellectual disability and cognitive impairment’.⁵⁴⁷ The Law Reform Committee (Victoria) recommends that the definition of mental impairment should encompass mental illness, intellectual disability, acquired brain injury and severe personality disorders.⁵⁴⁸ The NSWLRC recommends that the terms, ‘mental health impairment’ and ‘cognitive impairment’ be used and that detailed definitions be provided for these terms (this is discussed below).⁵⁴⁹ It also recommends that personality disorders be excluded from the definition. The Scottish Law Commission has recommended that a brief definition be introduced to define mental disorder to mean: (a) mental illness, (b) personality disorder or (c) learning disability.

⁵⁴³ NSWLRC (2013) (n 56) 51.

⁵⁴⁴ See Tables 7.1 and 7.2.

⁵⁴⁵ Section 269A *Criminal Law Consolidation Act 1935* (SA).

⁵⁴⁶ See Table 7.2.

⁵⁴⁷ See Appendix 7. It is noted that ‘mental impairment’ was defined in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 5. This Bill has not been passed by the Victorian Parliament.

⁵⁴⁸ See Appendix 7.

⁵⁴⁹ Reforms proposed in NSW define cognitive impairment and mental health impairment: NSW Government (Justice) (n 288).

However, it should exclude psychopathic personality disorders.⁵⁵⁰ In contrast, the NZLC’s view is that there is no need to change the terminology used.⁵⁵¹

7.5.44 An additional criticism is that the legal interpretation of ‘disease of the mind’ has created arbitrary and unsatisfactory outcomes. As discussed at [7.3.4]–[7.3.7], the common law tests for determining if a condition is a disease of the mind focus on the division between internal and external causes and the boundary between a sound and unsound mind. This approach has been adopted in Tasmania in determining whether a person has a ‘mental disease’, and in New South Wales and Victoria (where there is no legislative definition). It is also generally adopted by jurisdictions that have defined the concept of mental illness in legislation (set out in Table 7.2).

Table 7.2: Australian legislative definitions of mental illness contained in the defence of mental impairment

Jurisdictions	Test
Cth ACT ⁵⁵² NT	Mental illness is a reference to an underlying pathological infirmity of mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli. However, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.
South Australia	Mental illness means a pathological infirmity of the mind (including a temporary one of short duration). There is a note to the definition that provides that ‘a condition that results from the reaction of a healthy mind to extraordinary external stimuli is not a mental disease, although, such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur (see <i>R v Falconer</i> (1990) 171 CLR 30).
Western Australia	Mental illness is a reference to an underlying pathological infirmity of mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli.
Proposed in NSW ⁵⁵³	Mental health impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.

7.5.45 As noted at [7.3.4], the concept of ‘disease of the mind’ and the legal tests that have developed to distinguish sane and insane automatism have reflected a need to strike ‘the right balance ... between fairness to mentally disordered accused persons and societal protection against their misconduct’.⁵⁵⁴ The conflict between the two rationales has created confusion and a ‘mix up [of] the defendant-focused question of criminal responsibility with a second and different question: who needs to be detained for the protection of the public’.⁵⁵⁵ This has focused on internal factors that are prone to recur as providing the basis for the classification

⁵⁵⁰ See Appendix 7.

⁵⁵¹ See Appendix 7.

⁵⁵² There is a slight difference in wording in the ACT legislation, where the reaction of a healthy mind to extraordinary stimuli is referred to as a ‘reactive condition’, see Table 7.1.

⁵⁵³ See NSW Government (Justice) (n 288).

⁵⁵⁴ P Fairall and S Yeo (n 376) [13.66]; See also VLRC, *Defences to Homicide*, Options Paper (2003) [5.15]–[5.19]; VLRC (n 534); VLRC (n 24); NSWLRC (2013) (n 56); NZLC (n 470); Law Commission of England and Wales (n 382).

⁵⁵⁵ NZLC (n 470) 5.

of a ‘disease of the mind’ and has resulted in unusual and inappropriate results. As observed by Child and Sullivan, ‘the first thing to strike anyone studying the current defence is that it labels as insane persons who are manifestly not insane within any natural or medical meaning.’⁵⁵⁶ Individuals with such conditions as diabetes, epilepsy and sleepwalking have been labelled insane. The test for insanity has also created illogical results following the internal/external cause test so that a person with diabetes may be insane (hyperglycemia) or not insane (hypoglycaemia). As Ashworth has observed:

There can be no sense in classifying hypoglycaemic states as automatism and hyperglycaemic states as insanity, when both states are so closely associated with such a common condition as diabetes.⁵⁵⁷

However, as noted at [7.3.16], in Tasmania a review of cases decided in the Supreme Court since 2010 revealed that insanity has most commonly been relied on in cases where the accused had a condition that would be regarded as a mental illness (such as bipolar disorder and schizophrenia).

7.5.46 Possible models for an alternative approach that may resolve the unsatisfactory and arbitrary division between internal and external causes are found in other jurisdictions. The solution provisionally proposed by the Law Commission of England and Wales to the problems created by the definition of ‘disease of the mind’ and the arbitrary distinction between medical conditions that arise from an internal or external cause is a defence that would apply to ‘recognised medical conditions’. As noted, this would apply to medical conditions arising from a physical or mental condition and from an internal and external cause (subject to an accused also meeting the relevant incapacities).⁵⁵⁸ Applying this approach would mean that issues of automatism arising from any medical condition (concussion, sleep apnoea, diabetes, mental illness, epilepsy for example) would all fall within the scope of the special defence giving rise to a qualified acquittal. This proposal formed part of larger proposed changes that would replace insanity with a new defence of ‘recognised medical condition’. This is discussed from [7.5.17].

7.5.47 In contrast, the VLRC proposed a ‘broad and inclusive definition of mental impairment’ that would ‘provide flexibility to include any mental condition (subject to specific exclusions)’.⁵⁵⁹ As discussed at [7.5.91], these specific exclusions relate to self-induced conditions that result from the temporary effects of ingesting substances. The meaning recommended was that mental impairment should be defined for the purposes of the defence as a condition that ‘includes, but is not limited to, mental illness, intellectual disability and cognitive impairment’.⁵⁶⁰ This definition was said to include but not be ‘limited to the common law notion of a “disease of the mind.”’ In the VLRC’s view, the broad scope of this definition would not ‘open the floodgates for people claiming the defence of mental impairment’ due to the limits on its operation imposed by the ‘high standard required in meeting the operational elements of the defence’.⁵⁶¹

⁵⁵⁶ Child and Sullivan (n 388) 787.

⁵⁵⁷ A Ashworth and J Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 94.

⁵⁵⁸ This is discussed from [7.5.17].

⁵⁵⁹ VLRC (n 22) 113.

⁵⁶⁰ Recommendation 24.

⁵⁶¹ VLRC (n 22) 113.

7.5.48 A different approach is found in the Western Australian *Criminal Code*, which specifies that mental illness ‘does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli’. Unlike the position in other jurisdictions, this provision does not specify that the ‘extraordinary stimuli’ must be *external*, and so it has been argued that there is greater flexibility to deal with conditions resulting from a healthy mind’s reaction to *internal* stimuli within the automatism defence. It has been argued that this means that cases of involuntariness arising from hyperglycaemia, epilepsy and arteriosclerosis would be treated as automatism rather than giving rise to a mental illness for the purposes of the insanity defence.⁵⁶² However, this approach still adopts the sound/unsound mind division, which has been criticised because it is not helpful as ‘it is not obvious what “unsound mind” means; it is not defined in the case law; nor is it consistent with [the] policy aim of avoiding language that is out of step with modern psychiatric thinking’.⁵⁶³

7.5.49 Another approach to addressing the deficiencies in using outdated concepts of ‘disease of the mind’, ‘defect of reason’ and ‘mental disease’ is found in the review of the law conducted by the NSWLRC. It recommended the introduction of a detailed definition of ‘mental health impairment’ and ‘cognitive impairment’. It was recommended that mental health impairment be defined as follows:

- (a) Mental health impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.
- (b) Such mental health impairment may arise from but is not limited to the following:
 - (i) anxiety disorders
 - (ii) affective disorders
 - (iii) psychoses
 - (iv) substance induced mental disorders.

“Substance induced mental disorders” include ongoing mental health impairments such as drug-induced psychoses, but do not include substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.

For the purposes of this section “mental health impairment” does not include a personality disorder.

7.5.50 The NSWLRC further recommended that cognitive impairment be defined as:

- (a) an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.
- (b) Such cognitive impairment may arise from, but is not limited to, the following:

⁵⁶² LRCWA (n 416) 143, 228–229.

⁵⁶³ Law Commission of England and Wales (n 382) 41.

- (i) intellectual disability
- (ii) borderline intellectual functioning
- (iii) dementias
- (iv) acquired brain injury
- (v) drug or alcohol related brain damage
- (vi) autism spectrum disorders.

The NSWLRC argued that the definitions are appropriate for the defence of mental illness because they: (1) capture the appropriate people; (2) are consistent with the definitions recommended for diversion and bail; (3) reflect contemporary psychological and psychiatric understandings; (4) are respectful of people with such impairments; and (5) are tighter and more precise than the current outdated terminology.⁵⁶⁴ The NSWLRC considered that the fit between cognitive impairments and ‘disease of the mind’ is not a good one, and that it should be made clear that the defence applies to people with cognitive impairments.⁵⁶⁵

7.5.51 The NSWLRC addressed concerns that such a broad test is inappropriate as the basis for an exculpatory defence. It argued that the broad test is appropriate as it is only the preliminary ‘gate’ that the defendant must pass to succeed in the defence, and that ‘defendants must also pass through a second, and much narrower, “gate” by demonstrating the required nexus between their impairment and the offence’.⁵⁶⁶

7.5.52 In the Issues Paper, the Institute sought feedback on a number of issues connected with the language and the scope of the qualifying conditions:

Does the definition of ‘mental disease’ cause problems in practice?

Should the terminology in s 16 of the *Criminal Code* (Tas) be changed to replace the terms ‘mental disease’ and ‘natural imbecility’? If so, what terminology should be used? Should s 16 refer to mental health and cognitive impairments (as recommended in NSW)? Or mental impairment (as used in a majority of other jurisdictions)? Or what other terminology would you recommend be used?

Should there be a statutory definition of the terms used?

If so, should this be a definition that defines mental impairment to include all or any of the following: mental illness, intellectual disability, cognitive impairment, senility, dementia?

⁵⁶⁴ NSWLRC (2013) (n 56) 53.

⁵⁶⁵ Ibid 54. Note the proposed definition of mental health impairment (as set out in Table 7.2) does not refer to personality disorders (either to include or exclude). Cognitive impairment is also defined as an ongoing impairment in comprehension, reason, adaptive functioning, judgment, learning or memory that affects the functioning of the person in daily life to a material extent, and that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind. Cognitive impairment may arise from conditions such as intellectual disability, dementia and acquired brain injury: see NSW Government (Justice) (n 288).

⁵⁶⁶ NSWLRC (2013) (n 56) 53.

Should there be a definition, such as is recommended in New South Wales, that separates mental health impairment and cognitive impairment? If so, should the New South Wales definition be adopted?

Should mental illness be defined, and if so, how?

Should cognitive impairment be defined, and if so, how?

7.5.53 There was a range of viewpoints expressed in the submissions, but a common view was that the terminology is outdated and inappropriate. Problems caused by the inappropriate use of language relate to stigma, and also to the failure of the defence to reflect contemporary understanding of mental impairment or cognitive impairment.

7.5.54 The stigma caused by the use of language was identified by the MHCT:

Outdated and offensive terms such as ‘mental disease’ and ‘natural imbecility’ significantly contribute to the systemic stigmatisation of people with mental illness and intellectual disability in our communities. These outdated terms do not communicate dignity and self-respect for individuals experiencing mental ill health or cognitive impairment.

The term ‘mental disease’, as explained by MHCT ‘is not a term commonly used within the community-managed mental health sector, or across the system in a contemporary setting’. Similarly, O’Connell wrote that, ‘all terms associated with a s16 defence do need review including insanity and imbecility due to the stigma they attract.’

7.5.55 The submissions also identified issues arising from the language used beyond its stigmatising effect. EOT wrote that:

As outlined in the Issues Paper the use of terms such as ‘mental disease’ and ‘natural imbecility’ has led to a body of case law that is both arbitrary and inaccurate. It has the capacity to, for example, capture actions arising from the side-effects of diabetes such as hyperglycaemia or epilepsy as ‘mental diseases’. Not only is the use of the term ‘mental disease’ inaccurate, in the context of making out an insanity defence it has the capacity to be highly stigmatising

ForensiClinic, noted that:

the term ‘mental disease’ does cause a problem in practice, as many mental health/cognitive impairments are not the result of disease, and a medical expert is not necessarily best placed to assess the implications of an impairment on criminal behaviour and associated defence. For example, a medical expert may not be an expert in the assessment of intellectual disability.

O’Connell wrote that:

The term mental disease does cause some difficulty in practice and there exists a tension between medical concepts and the law. This is especially true with the rise in cases of serious psychosis (in the absence of an underlying mental illness) as a result of methamphetamine use.

7.5.56 As noted at [7.5.40], the DPP was not opposed to modernising the language to reflect modern medical terms but expressed the need for careful consideration to ensure that the existing case law is retained.

7.5.57 Submissions to the Institute proposed a number of solutions and reforms to eliminate these problems. EOT suggested that ‘clearer and less stigmatising terminology such as ‘mental health impairment’ or ‘cognitive impairment’ should be considered’. This approach was also supported by the MHCT on the basis that it ‘is respectful to the individual and family and additionally is more reflective of current medical terminology. The MHCT also suggested that the Tasmanian Communications Charter be used ‘as a reference point for contemporary use of language within the defence of insanity law reforms’.⁵⁶⁷ The Charter uses the term ‘mental ill health’ which includes both mental illness and mental health problems, and defines mental illness as a ‘disorder diagnosed by a medical professional that significantly interferes with a person’s cognitive, emotional or social abilities’.⁵⁶⁸

7.5.58 A different source of description was proposed by O’Connell, who suggested that ‘consideration could be given to utilising terms consistent with the *Mental Health Act* and as with the *Mental Health Act*, the inclusion of specific personality disorders should be avoided’. The *Mental Health Act 2013* (Tas) defines mental illness as follows:

- (1) For the purposes of this Act –
 - (a) a person is taken to have a mental illness if he or she experiences, temporarily, repeatedly or continually –
 - (i) a serious impairment of thought (which may include delusions); or
 - (ii) a serious impairment of mood, volition, perception or cognition; and
 - (b) nothing prevents the serious or permanent physiological, biochemical or psychological effects of alcohol use or drug-taking from being regarded as an indication that a person has a mental illness.

7.5.59 The DPP indicated his support for ‘consideration being given to using the terminology “mental impairment” as it is most consistent with other jurisdictions’. His view was that ‘it seems appropriate to [define this to] include mental illness, intellectual disability and senility, but not cognitive impairment or dementia (so as to be consistent with other jurisdictions)’.

7.5.60 Walvisch approached the issue from the perspective of the underlying purpose of the defence, which is primarily ‘to identify individuals who lacked reasons-responsiveness at the time of the offence, and so should not be held responsible (in the absence of prior fault)’. Walvisch argued that the focus of lack of reasons-responsiveness meant that it is not necessary to address the cause of an accused’s impairment but rather its nature. In Walvisch’s view, this approach overcomes many of the problems with the current law (and many alternative suggestions) and would appear to be compliant with the *CRPD* as it is disability neutral. Walvisch argued that ‘[w]hile in most cases an individual’s lack of reasons-responsiveness will result from a mental illness or cognitive impairment, this need not be the case: the defence

⁵⁶⁷ See Everymind, *Tasmanian Communications Charter: A State-Based Approach to Mental Health and Suicide Prevention, Adapted from the National Communications Charter* (2018).

⁵⁶⁸ See *ibid* 16.

should be available to anyone who non-culpably lacked reasons-responsiveness, regardless of the cause'. Accordingly, it isn't necessary to consider if the disorder was internally or externally caused, whether the accused 'suffered from a mental illness or a personality disorder, or whether the accused's use of drugs caused his or her disorder or triggered an underlying pathology. Instead, the focus will be squarely on the key question: did the accused lack reasons-responsiveness'.

7.5.61 There was cautious support for the inclusion of more detailed definitions in some of the submissions. The DPP considered that the terms 'mental illness' and 'intellectual disability' 'may ... benefit from non-exhaustive definitions. I would recommend consultation with appropriate medical experts in considering appropriate definitions'.

7.5.62 EOT wrote that:

We are supportive of the inclusion of statutory definitions covering these concepts [mental health and cognitive impairment]. Definitions should be flexible enough, however, to capture evolving understanding of medical conditions. For example, as cognitive impairment associated with dementia evolves a more detailed understanding is developing regarding how it can impact on behaviour.

7.5.63 The MHCT expressed its agreement with the NSWLRC's recommendation of separating the definitions of mental health and cognitive impairment and supported the definitions of those conditions provided by the NSWLRC. Its view was that:

The descriptions are aligned with contemporary understandings and provide a more updated and respectful use of terminology. Utilising such terminology within court proceedings would support more respectful language within court documents, media reporting and subsequently within the community.

7.5.64 Walvisch argued that:

If the relevant conditions are to be defined, this should be done by reference to relevant legal (rather than medical) considerations. Medical diagnoses, such as those contained in the DSM, have been developed for treatment and research purposes. They are not targeted at the normative concerns of the insanity defence, which address issues of criminal responsibility. This is a *legal* issue not a *medical* one – so it is appropriate to have a *legal* test in place.

7.5.65 After considering the literature and the submissions received, the Institute agrees that the language in the *Criminal Code* (Tas) should be reformed. The more difficult question is how it should be amended. In this regard there is little uniformity in the approaches adopted in other law reform proposals and the submissions to the Institute. However, it is possible to identify a number of approaches to reform:

7.5.66 (1) **Minimal reform.** This would involve changing the language in the *Criminal Code* (Tas) but largely preserving the existing approach to the scope of qualifying mental states. Precedents for this approach are found South Australia, the Commonwealth, the Australian Capital Territory, the Northern Territory and Western Australia, where the defence has been changed to mental impairment, which is defined to include mental illness, intellectual disability or a senility (or words to a similar effect). In these jurisdictions, the definition of mental illness

generally reflects the pre-existing test of ‘disease of mind’ from *R v Radford*.⁵⁶⁹ This approach has the advantage of retaining the pre-existing case law on the scope of the qualifying conditions. However, it does not resolve the difficulties and anomalies created by the internal/external cause test. These criticisms also apply to the approach of the VLRC, which defined mental impairment to include mental illness (which was to incorporate the common law notion of ‘disease of the mind’). However, it could be argued that the current anomalies (for example, hypo/hyperglycaemia) are well-understood and that any new definition will give rise to new ‘anomalies and that its novelty would cause more uncertainty than presently arises’.⁵⁷⁰ However, other concerns with this approach are that it does not appear to address the problems of disparity between legal and medical understandings of mental illness or claims that such a defence is discriminatory and contrary to the *CRPD*.

7.5.67 (2) Remove the requirement for extraordinary stimuli to be external. This approach would involve a minimal change to language (as set out above) by adopting the Western Australian definition of mental illness that does not specify that the extraordinary stimuli must be external. Instead, as noted at [7.5.44], the test of mental illness specifies that it ‘does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli’. The LRCWA observed that some commentators have suggested that ‘conditions resulting from a healthy mind’s reaction to *internal* extraordinary stimuli (such as ... [hyperglycaemia, epilepsy and arthrosclerosis]) are excluded from the defence’.⁵⁷¹ For this reason the LRCWA argued that no reform is necessary because ‘the definition of mental illness under the Code enables a more “holistic” approach when considering whether a particular condition should be classified as a mental illness. On this basis, it is arguable that the exclusion of the word ‘external’ from the test would mean involuntariness arising from such conditions would be dealt with as automatism rather than as a mental illness for the purposes of the mental impairment defence. This seems appropriate and preferable to option (1). However, it is uncertain whether conditions such as diabetes and epilepsy would actually be considered extraordinary stimuli. Further, this approach does not address broader concerns about the existence of a defence based on disability and the legal/medical divide.

7.5.68 (3) Redefinition of qualifying conditions within mental health and cognitive impairment framework. This approach would change the *Radford* test by providing a detailed definition of mental and cognitive impairment as proposed by the NSWLRC. This is set out in Table 7.3 and, as shown, has similarities with the definition contained in the *Mental Health Act 2013* (Tas).

Table 7.3: Comparison of definition of mental illness

NSWLRC recommendation	<i>Mental Health Act 2013</i> (Tas)
(a) Mental health impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.	(1) For the purposes of this Act – (a) a person is taken to have a mental illness if he or she experiences, temporarily, repeatedly or continually –

⁵⁶⁹ See Table 7.2.

⁵⁷⁰ SASAC (n 433) 64 quoting NZLC, 4.8.

⁵⁷¹ LRCWA (n 416) 229.

NSWLRC recommendation	<i>Mental Health Act 2013 (Tas)</i>
<p>(b) Such mental health impairment may arise from but is not limited to the following:</p> <ul style="list-style-type: none"> (i) anxiety disorders (ii) affective disorders (iii) psychoses (iv) substance induced mental disorders. <p>‘Substance induced mental disorders’ include ongoing mental health impairments such as drug-induced psychoses, but do not include substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.</p> <p>For the purposes of this section ‘mental health impairment’ does not include a personality disorder.</p>	<ul style="list-style-type: none"> (i) a serious impairment of thought (which may include delusions); or (ii) a serious impairment of mood, volition, perception or cognition; and <p>(b) nothing prevents the serious or permanent physiological, biochemical or psychological effects of alcohol use or drug-taking from being regarded as an indication that a person has a mental illness.</p>

7.5.69 The NSWLRC preferred this approach as it reflects contemporary psychiatric and psychological understanding and is more precise than the current outdated terminology. It also considered that it is more respectful and more consistent with behavioural science to provide separate definitions for cognitive impairment and mental health impairment.⁵⁷² As set out at [7.5.50], the definition of cognitive impairment is as follows:

- (a) an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.
- (b) Such cognitive impairment may arise from, but is not limited to, the following:
 - (i) intellectual disability
 - (ii) borderline intellectual functioning
 - (iii) dementias
 - (iv) acquired brain injury
 - (v) drug or alcohol related brain damage
 - (vi) autism spectrum disorders.

7.5.70 The definitions set out by the NSWLRC were developed as a result of consultation with a broad range of stakeholders including legal and medical experts and an Expert Advisory Panel (consisting of Professor Eileen Baldry, Dr Jonathan Phillips, Mr Jim Simpson and Professor Ian Webster).⁵⁷³ Further, this approach would move away from the outdated *Radford* definition of mental illness (internal/external) and more appropriately reflect medical understanding. It reduces stigma and is more respectful in the separation of mental health impairment from cognitive impairment.

⁵⁷² See [7.5.50].

⁵⁷³ NSWLRC (n 8) xiii, 6–7, 138.

7.5.71 (4) **Redefinition of the qualifying condition outside the mental health impairment and cognitive impairment framework.** This was the approach of the Law Commission of England and Wales (recognised medical condition) and Walvisch (defence of lack of reasons-responsiveness). The Law Commission argued that the ‘recognised medical condition’ defence is preferable to amending a special defence based on mental disorder because there is no reason to treat mental disorder differently from physical disorders and it would reduce stigma.⁵⁷⁴ Walvisch’s proposal does not require an inquiry into the cause of the defendant’s lack of reasons-responsiveness and instead focuses on its effect. Walvisch’s defence would not have qualifying conditions. Both these models have moved away from tying the defence to a mental or cognitive impairment framework and, on this basis, can be argued to reflect a disability neutral approach. As noted at [7.5.7], the defence of insanity or mental impairment has been criticised as being inherently discriminatory to those with disabilities and contrary to the *CRPD* right to equality before the law. However, as noted, other commentators have argued that the defence does not offend against the provisions of the *CRPD*.

7.5.72 The approaches of the Law Commission of England and Wales and Walvisch would also have the advantage of removing the internal/external division of the current test of mental disease. As noted by the Law Commission, an approach based on a ‘recognised medical condition’ means that the ‘illogical and hair-splitting’ distinctions arising from the internal cause (insanity) and external factor (automatism) can be avoided.⁵⁷⁵ Instead, the effect of the impairment is the focus of the legal test. However, this could also be achieved by a less fundamental reform such as that as set out in Option (2). It may also be questioned whether a special defence is appropriate in cases involving conditions like diabetes and that issues of voluntariness arising from this condition should be dealt with according to the general rules of criminal responsibility. Another category of cases that would be brought within the scope of the ‘recognised medical condition’ would be involuntariness attributed to concussion or drivers who fall asleep as a result of sleep apnoea. These cases have previously been decided according to the general principles of criminal responsibility.

7.5.73 In developing its recommendations about the most appropriate reform path to be adopted in Tasmania, the Institute stresses that the scope of the defence is a legal issue and not a medical issue. Nevertheless, it is critical that the reform of the defence is informed by and reflects contemporary medical understanding and does not perpetuate stigma and stereotypes. It is also important (as recognised by the NSWLRC) that the qualifying condition (and associated definitions) must be appropriate for their purpose, and in the context of a defence of mental impairment, ‘the function of the definition of the person’s mental state in the defence is to provide a preliminary “gate” through which a defendant must pass’.⁵⁷⁶

7.5.74 After considering these approaches to reform and the submissions received, the Institute’s view is that the most appropriate reform is to amend the defence by changing the qualifying conditions from a ‘mental disease’ to definitions that reflects a mental and cognitive impairment model as set out by the NSWLRC with one exception in relation to personality disorders (see from [7.5.75]). The Institute’s view is that the NSWLRC definitions provide well-considered definitions to be included in the renamed ‘defence of mental or cognitive impairment’ given the consultation process undertaken in the development of those definitions.

⁵⁷⁴ See [7.5.18].

⁵⁷⁵ See Law Commission of England and Wales (n 382) 8.

⁵⁷⁶ NSWLRC (2013) (n 56) 53.

The NSW government has announced that it is in process of reforming the *Mental Health (Forensic Provisions) Act 1990* (NSW) and it is proposed to include an updated definition of mental health impairment.⁵⁷⁷ These reforms have been the subject of further consultation and broadly reflect the NSWLRC recommendations.⁵⁷⁸ Once publicly released, this draft legislation could further assist in the development of the definitions to be used in the Tasmanian legislation.

7.5.75 Further issues that require consideration in relation to the definition of mental impairment are the approach that should be adopted for personality disorders and for substance use.

7.5.76 Personality disorders. As set out at [7.5.68], the NSWLRC made recommendations to exclude personality disorders from the definition of mental health impairment. The Scottish Law Commission similarly recommended that the condition of psychopathic personality disorder be excluded from the scope of the defence.⁵⁷⁹ The Law Commission of England and Wales likewise expressed the view that an antisocial personality disorder should not be a condition which qualifies for a special verdict.⁵⁸⁰ Most statutory definitions of mental illness or mental impairment do not include personality disorders (exceptions to this are found in Commonwealth and ACT legislation). However, there is no express exclusion in Western Australia, South Australia and the Northern Territory.⁵⁸¹ There is also uncertainty in relation to the status of personality disorders within the scope of the insanity defence that rely on common law definitions.⁵⁸²

7.5.77 The NSWLRC summarised the arguments in favour of excluding personality disorders from the insanity defence:

- The inclusion of personality disorders would open the floodgates as many people who commit crimes have personality disorders. Its view was that to include personality disorders is to throw ‘the net too wide. In particular, ... [it is not] appropriate for those with anti-social personality disorder or psychopathy to be exculpated substantially because of their criminal behaviour.’⁵⁸³
- It is against the weight of community opinion, the approach in the majority of Australian jurisdictions and academic expert opinion.⁵⁸⁴
- The evidence base for policy development needs to be developed as ‘the psychiatric understandings of personality disorders, and the precision with which they are defined,

⁵⁷⁷ Angus Thompson, ‘Only a Quarter of Mentally Ill Offenders Diverted to Treatment: Report’ 18 August 2019, *Sydney Morning Herald* <<https://www.smh.com.au/national/nsw/only-a-quarter-of-mentally-ill-offenders-diverted-to-treatment-report-20190816-p52hvx.html>>.

⁵⁷⁸ Personal Communication, Sallie Mclean email 4 October 2019.

⁵⁷⁹ Scottish Law Commission (n 205) 27.

⁵⁸⁰ Law Commission of England and Wales (n 382) 76.

⁵⁸¹ See Table 7.2. There is no express inclusion or exclusion of personality disorders in the reforms proposed in NSW: see NSW Government (Justice) (n 288).

⁵⁸² See NSWLRC (2013) (n 56) 58.

⁵⁸³ *Ibid* 59.

⁵⁸⁴ *Ibid*.

is not sufficient to allow their inclusion with any degree of confidence at this present time'.⁵⁸⁵

7.5.78 The NSWLRC also set out reasons in favour of the inclusion of personality disorders as follows:

- The gate can be narrowed by the requirement that the personality disorder is severe, and further that the 'person must pass through the second, and narrower, gate and show that the personality disorder had the effect that he or she did not know what they were doing, or know that it was wrong, or that he or she was unable to control their actions'.⁵⁸⁶
- There is no evidence of over-reliance on the defence in jurisdictions that allow personality disorders to be included.⁵⁸⁷

Other reasons identified in favour of including (or at the least not excluding) personality disorders include the view that particular conditions should not be singled out in legislation for exclusion, and that there should be flexibility to consider whether a particular condition, including a personality disorder, qualifies for the defence.⁵⁸⁸ The Law Commission of England and Wales also noted that it can be difficult to distinguish personality disorders from other mental illnesses.⁵⁸⁹

7.5.79 As indicated, another approach is neither to expressly exclude nor include personality disorders for the purposes of the insanity defence. This is the approach in New Zealand, where the NZLC recommended no change be made to this position.⁵⁹⁰ Similarly, in South Australia, Victoria and the Western Australia, reviews of the relevant legislation recommended no change to the approach in those jurisdictions in relation to personality disorders.⁵⁹¹ However, these jurisdictions rely on the common law concept of 'disease of the mind' and this provides an additional safeguard to allow for courts to exclude personality disorders where appropriate.

7.5.80 In the Issues Paper, the Institute sought feedback on the approach that should be taken to personality disorders:

Should the definition of mental impairment include some or all personality disorders or expressly exclude some or all personality disorders, or should the definition not specifically refer to personality disorders? If the definition of mental impairment is to distinguish between personality disorders, which should be included or excluded from the scope of s 16?

7.5.81 There were different views about the approach that should be taken to personality disorders in the submissions received.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ibid 57.

⁵⁸⁷ Ibid 58.

⁵⁸⁸ LRCWA (n 416) 230.

⁵⁸⁹ Law Commission of England and Wales (n 382) 79.

⁵⁹⁰ NZLC (n 470) 37.

⁵⁹¹ See Appendix 7. It is noted that personality disorders were expressly excluded from the definition of mental impairment in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 5. This legislation has not yet been passed by the Victorian Parliament.

7.5.82 The DPP did not support the express inclusion of any personality disorders:

This is consistent with the majority of other jurisdictions which do not include personality disorders in the statutory definition of mental impairment. There are a range of personality disorders and there is a divergence of opinion whether or not they amount to a psychiatric illness. For example, the Victorian Supreme Court of Appeal found that the Verdins principles were inapplicable to personality disorders in *DPP v O’Neill* [2015] VSCA 325. The inclusion of personality disorders may open the floodgates. The NSWLRC, as summarised in 7.5.29 of the paper, stated the “evidence base for policy development needs to be developed as the psychiatric understandings of personality disorders, and the precision with which they are defined, is not sufficient to allow their inclusion with any degree of confidence at the present time.” However, if a person with personality disorder otherwise fits the criteria for the defence as provided in s 16 of the Code, the defence should be available to them.

O’Connell also did not support the inclusion of specific personality disorders.

7.5.83 On the other hand, EOT and the MHCT did not recommend the express exclusion of personality disorders. EOT wrote that:

Exclusion of personality disorders risks scoping out some major conditions that might ordinarily be associated with mental health impairment, including paranoia, schizophrenia and/or borderline personality disorder. Accordingly EOT does not support excluding these conditions.

Similarly, MHCT did not support express exclusion. MCHT highlighted the high prevalence of co-morbidity of personality disorders with other mental health conditions as well as the ‘complexity of personality disorders and that the condition is a diagnosed mental illness’. MHCT also noted that meeting the criteria for a mental health impairment does not mean that the defence would be successfully made out, as the defence has a second component (in terms of the relevant incapacities) and that narrows the gate.

7.5.84 The ALA addressed the issue of personality disorders in the context of a new defence applying to ‘recognised medical conditions’. As noted at [7.5.25], its view was that policy considerations do not justify excluding anti-social personality disorders.

7.5.85 Similarly, Walvisch’s approach would not exclude personality disorders, as the focus should be on the nature of the accused’s impairment rather than its cause. In his proposal, the additional threshold for the operation of the defence of lack of reasons-responsiveness would provide a difficult threshold to meet — namely that the accused ‘must have been operating outside the realm of reason at the relevant time’. Further, under this approach, the defendant would be precluded from relying on the defence due to prior fault (for example, in some cases where the person had failed to take medication or otherwise manage their mental health).

7.5.86 After considering the submissions received and the different approaches and views on the issue, the Institute’s view is that the legislative definition of mental impairment and cognitive impairment should neither expressly include or exclude personality disorders from the defence. This provides flexibility in relation to whether a particular disorder qualifies for the defence in the circumstances of the case and reflects the current approach in Tasmania.

7.5.87 Substance use. Currently, s 17(1) of the *Criminal Code* (Tas) recognises that intoxication may bring an accused within the insanity rules contained in the *Criminal Code*

(Tas) s 16 if the accused's intoxication has caused a disease of the mind. This is relatively uncontroversial. It is also uncontroversial that a person who is temporarily intoxicated as a result of substance use should rely on the intoxication defence (and not the defence of insanity). However, as the TLRI's report on self-defence noted, there are complexities that arise from the interaction of the defences of intoxication, insanity and self-defence in cases where a person experiences substance related psychosis.⁵⁹²

7.5.88 In Carroll et al's analysis of drug-associated psychosis and criminal responsibility, the authors have identified at least four ways in which drug-associated psychosis may arise:

- (1) a person may experience a drug induced psychotic episode that is part of an intoxication syndrome that resolves rapidly with the excretion of the drug from the body;
- (2) a person may experience relatively short-lived psychotic symptomatology due to the direct psychological effects of an ingested substance and the symptoms may persist for a short period (days or weeks) after the excretion of the substance;
- (3) a person's use of drugs may be associated with the development of a psychotic illness that then has an independent long-term existence;
- (4) a person with an established psychotic illness may engage in substance abuse, which appears to precipitate psychotic relapses.⁵⁹³

Currently, in Tasmania, defendants can rely on the insanity defence if they suffer from a disease of the mind caused by intoxication and this would encompass (3) and (4) where a person has an independent psychotic illness.⁵⁹⁴ However, issues remain as to the appropriateness of excluding an accused from the insanity defence where his or her psychosis is attributable to the intoxicating effects of the substance or short-term symptoms associated with drug use, (the states of minds in (1) and (2)) which may give rise to 'temporary insanity'.⁵⁹⁵

7.5.89 The weight of commentary by academics and law reform bodies has taken the view that there should be a distinction between self-induced independent conditions resulting from substance use (which should be included in the definition of mental disorder) and the temporary effects of ingesting drugs (which should be excluded from the definition of mental disorder).⁵⁹⁶ For example, in its review the NSWLRC recommended that 'substance induced mental disorders' be included within the definition of mental health impairment but that this should not include substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances. It drew a distinction between casual intoxication, substance use disorder or addiction, and ongoing cognitive and mental impairments induced by the use of such substances.⁵⁹⁷ Casual intoxication refers to the temporary effects of the use of alcohol, drugs and other substances and its relationship to criminal responsibility is contained in the law of intoxication as set out the *Criminal Code* (Tas) s 17. Substance use disorder refers 'to the abuse

⁵⁹² See TLRI, *Review of the Law Relating to Self-Defence*, Final Report No 20 (2015) 48–49.

⁵⁹³ A Carroll et al, 'Drug-induced Psychoses and Criminal Responsibility' (2008) 26 *Behavioral Sciences and the Law* 633, 633–634.

⁵⁹⁴ TLRI (n 592) 48.

⁵⁹⁵ *Ibid* 49.

⁵⁹⁶ See *ibid* 44–49.

⁵⁹⁷ NSWLRC (n 8) 129.

of, and dependence on, drugs, alcohol and/or other substances “to the extent that the person’s functioning is affected.”⁵⁹⁸ Accordingly, the NSWLRC indicated that substance use disorder is:

distinguished from casual substance use or temporary intoxication. It is also to be distinguished from a substance-induced mental disorder, an impairment that is caused by a person’s “substance use, abuse, intoxication or withdrawal”. Such disorders can be the product of long-term abuse of drugs and alcohol or, in some instances, can be triggered after a single use.⁵⁹⁹

It indicated that this approach would include within the definition of mental health impairment ongoing mental health impairments such as long-term drug induced psychiatric disorders like Korsakoff’s Syndrome and drug induced psychosis.⁶⁰⁰

7.5.90 The NSWLRC stated that the approach it had taken is consistent with the common law and the exclusion of the ‘reaction of a healthy mind to extraordinary external stimuli, including psychoactive substances’ from the definition of ‘disease of the mind’.⁶⁰¹ This approach would appear to encompass (as with Tasmania) the states set out in (3) and (4) above within the definition of mental health impairment. However, it appears that a temporary drug induced psychosis (being the temporary effect of ingesting substances) would be excluded. This reflects the common law approach that ‘a drug induced psychosis (unaccompanied by a separate psychiatric illness) does not constitute a disease of the mind as understood at common law’.⁶⁰²

7.5.91 In its consideration of the issue, the VLRC also expressed the view that ‘self-induced conditions that result from the temporary effects of ingesting substances’ should be excluded from the definition of mental impairment. However, it considered that self-induced independent conditions that result from ingesting substances that persist after the drugs have left the person’s system should be included in the definition.⁶⁰³ The VLRC acknowledged that this distinction would create considerable practical difficulties for mental health experts in cases where it is difficult to determine whether the person was suffering from the temporary effects of substance use or a permanent condition.⁶⁰⁴ For example, as Bourget has written, ‘it is not often possible to distinguish substance-induced psychosis from a first-episode psychosis in the context of a primary mental disorder due to the very high level of comorbidity.’⁶⁰⁵ Nevertheless, her view was that the distinction is supported on sound public policy grounds.⁶⁰⁶

7.5.92 The definition of ‘mental impairment’ in the *Criminal Law Consolidation Act 1935* (SA) also excludes intoxication, which is defined as ‘a temporary disorder, abnormality or impairment of the mind that results from the consumption or administration of intoxicants and

⁵⁹⁸ Ibid 127–128 referring to T Butler and S Allnut, *Mental Illness Among NSW Prisoners* (NSW Corrections Health Service, 2003) 30.

⁵⁹⁹ Ibid 128.

⁶⁰⁰ NSWLRC (2013) (n 56) 60.

⁶⁰¹ Ibid.

⁶⁰² *Fang v R* (2018) 97 NSWLR 876 [76] (the Court).

⁶⁰³ See VLRC (n 22) 114, Recommendation 24.

⁶⁰⁴ Ibid 114–115.

⁶⁰⁵ D Bourget, ‘Forensic Considerations of Substance-Induced Psychosis’ (2013) 41 *Journal of American Academy of Psychiatry and the Law* 168, 168.

⁶⁰⁶ VLRC (n 22) 114.

will pass on metabolism or elimination of intoxicants from the body’.⁶⁰⁷ This approach is similar to the approach recommended in New South Wales and Victoria.⁶⁰⁸ Additionally, the review by the Sentencing Advisory Council, South Australia (‘SASAC’) concluded that the provisions of the legislation that set out the relationship between intoxication and mental impairment should be retained without amendment.⁶⁰⁹

7.5.93 In the Issues Paper, the Institute sought feedback on the relationship between drug induced psychosis and the insanity defence:

How should drug induced psychosis be treated within the insanity defence? Should a distinction be made between psychosis arising from the temporary effects of drug use and mental health impairments resulting from drug use (as recommended in NSW and Victoria)?

7.5.94 The interaction of drug-induced psychosis and a defence of mental impairment was addressed by the DPP, who wrote that:

Section 17(1) of the Code allows the provisions of s 16 to apply to a person suffering from disease of the mind caused by intoxication. In my view, there should be a distinction between ongoing mental health impairments such as drug-induced psychoses and the temporary effects of ingesting drugs. The latter should not be captured within the insanity defence.

7.5.95 The ALA addressed the issue of drug-induced psychosis in the context of a new defence applying to ‘recognised medical conditions’. As noted at [7.5.25], its view was that policy considerations did not justify excluding temporary drug-induced disorders.

7.5.96 Walvisch also considered that there is no need to exclude drug-induced psychosis given that the focus should be on the nature of the accused’s impairment rather than its cause (and whether the individual was reasons-responsive).

7.5.97 The Institute agrees with the position of the DPP and considers that it is appropriate to make a distinction between drug-induced psychosis that arises from the temporary effects of drug use and ongoing mental impairments arising from drug use. This reflects the current position in Tasmanian law and the recommendations of the Institute in relation to the qualifying condition and associated definitions are not meant to result in a change to this approach. This is important from a policy point of view and prevents reliance on a defence of mental or cognitive impairment where the reason for the person’s psychosis is substance use (unaccompanied by a separate psychiatric illness). Accordingly, as with the VLRC and the NSWLRC, the Institute’s view is that self-induced conditions that result from the temporary effects of ingesting substance should be excluded from the defence.

7.5.98 Based on this discussion, the Institute’s view is the defence of mental and cognitive impairment should apply to ongoing mental impairments arising from substance use. In the words of the NSWLRC, this would include ‘a person who has a psychiatric disorder at the time

⁶⁰⁷ Section 269A(1) *Criminal Law Consolidation Act 1935* (SA).

⁶⁰⁸ It is noted that was the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) cl 5 defined mental impairment to exclude the case of a person whose mental functioning is impaired solely as the result of drugs or alcohol. This legislation has not been passed by the Victorian Parliament.

⁶⁰⁹ SASAC (n 433) 97 Recommendation 11.

of the offence, albeit one brought on by abusing substances'.⁶¹⁰ However, it should not include any temporary conditions resulting from the effects of ingesting substances. It should also not include substance use disorders (addiction to substances).

Recommendations

28. The qualifying condition contained in the *Criminal Code* (Tas) s 16 should be changed from a 'mental disease' to mental or cognitive impairment with detailed definition of these terms included in the section.

29. The definition of mental and cognitive impairment should be based on the definitions set out by the NSWLRC as follows:

Mental impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.

Such mental impairment may arise from but is not limited to the following:

- (i) anxiety disorders
- (ii) affective disorders
- (iii) psychoses
- (iv) substance induced mental disorders.

'Substance induced mental disorders' include ongoing mental impairments, but do not include substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.

Cognitive impairment means an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.

Such cognitive impairment may arise from, but is not limited to, the following:

- (i) intellectual disability
- (ii) dementias
- (iii) acquired brain injury
- (iv) drug or alcohol related brain damage
- (v) autism spectrum disorders.

30. Section 16(4) of the *Criminal Code* (Tas) should be repealed.

31. The legislative definition of mental impairment and cognitive impairment should not expressly include or exclude personality disorders from the defence.

⁶¹⁰ NSWLRC (2013) (56) 60.

7.5.99 Narrow scope of incapacities. It has been argued that some ‘persons with medical conditions whom we would regard as insane are outside the scope of the defence’.⁶¹¹ This is because of the very narrow interpretation of the relevant incapacities set out in the insanity defence. As noted at [7.3.14], the first limb of the insanity defence (that the person does not understand the physical character of their act) is rarely used because of its narrow interpretation. The Law Commission of England and Wales has observed that it is very rare for a person not to know the nature and quality of his or her actions in a physical sense (as distinct from the moral aspects of their conduct) and that, further, its ‘exclusive focus on cognitive questions excludes other sorts of problems in the functioning of minds and brains, such as mood disorders or emotional problems’.⁶¹² The limited utility of this limb of the insanity defence has also been noted by other legal commentators.⁶¹³

7.5.100 In addition, in Tasmania the tests are focussed on people’s ‘capacity’ to know or understand rather than their actual knowledge or understanding. This is also the position in Queensland and Western Australia.⁶¹⁴ The NSWLRC has observed that capacity tests may create problems ‘because a person with a mental illness may have capacity at one time but not at another, or may have capacity to understand some things but not others’.⁶¹⁵ In contrast, in other jurisdictions, the test is whether the accused knew the nature or quality of the conduct or that the conduct was wrong.⁶¹⁶ Yeo has written that:

The element of incapacity is narrower than lack of knowledge because it is possible for a person to generally possess the cognitive capacity to know the nature of his or her act or that it was wrong, but not to have known of it at the time when the crime was committed.⁶¹⁷

Yeo suggests that courts have taken a pragmatic approach to the issue and avoided applying an overly restrictive approach to ‘incapacity’, but has expressed the view that:

Ideally, however, the word “incapacity” should be avoided so as to enable the defence to succeed so long as the accused was dispossessed of the relevant mental faculty at the time of the offence, even if he or she might have possessed such a faculty on other occasions.

However, the precise difference between ‘capacity’ and ‘knowledge’ is unclear. For example, the VLRC has written that ‘there is some contention over whether a “knowledge” or “capacity” approach is more restrictive’.⁶¹⁸

7.5.101 As indicated, there is also uncertainty about whether an understanding of the physical character of the act relates just to physical character of the act or whether it extends to ‘the

⁶¹¹ Simester et al (n 398) 713. It is noted that in England, the second limb of the insanity defence has been interpreted as referring to ‘legally’ wrong rather than morally wrong and this had significantly restricted the operation of the defence, see Law Commission of England and Wales (n 382) 10–11.

⁶¹² Law Commission of England and Wales, (n 382) 10.

⁶¹³ See Yeo (n 467) 12; Bronitt and McSherry (n 370) 246.

⁶¹⁴ See Table 7.1.

⁶¹⁵ NSWLRC (2013) (n 56) 64.

⁶¹⁶ See Table 7.1.

⁶¹⁷ Yeo (n 467) 10.

⁶¹⁸ VLRC (n 24) 100.

capacity to know and understand the significance of the act’ or the ‘consequences of the act’.⁶¹⁹ Allnutt, Samuels and O’Driscoll have suggested that the broader view (for example, that would require an understanding that a stabbing could result in death) is reflected in the Queensland and WA criminal codes, which refer to the ‘capacity to understand what the accused is doing’.⁶²⁰

7.5.102 In relation to the requirement that the person not have the capacity to know that the act was one which he or she ought not do or make contained in s 16(1)(a)(i), the Tasmanian approach has been to adopt the common law interpretation.⁶²¹ This interpretation has been widely accepted and adopted in legislation in other jurisdictions.⁶²² As indicated, this is the limb of the insanity defence most commonly relied upon in Tasmania (and other jurisdictions). In the Issues Paper, the Institute sought feedback in relation to whether this requirement causes any difficulties in practice.

Does the narrow interpretation of the ‘incapacity’ and/or the physical character of the act contained in the *Criminal Code* (Tas) s 16(1)(a)(i) cause any problems in practice?

Does the requirement to establish that the person was incapable of knowing that the act was one which he or she ought not do or make contained in the *Criminal Code* (Tas) s 16(1)(a)(ii) cause any problems in practice?

Do you consider that there should be any change made to the qualifying conditions for the defence of insanity contained in the *Criminal Code* (Tas) s 16(1)(a)?

7.5.103 These questions were addressed in two submissions. The DPP’s response was that he was not aware of any problems from the operation of s 16(1)(a)(i) and s 16(1)(a)(ii). Walvisch’s response addressed how the requirement contained in the *Criminal Code* (Tas) s 16 would be captured in his proposed defence of ‘reasons-responsiveness’:

As noted above, in my view the test should be changed to focus on the accused’s lack of reasons-responsiveness, rather than on the requirements currently set out in Criminal Code (Tas) s 16. I note, however, that many (if not all) of the individuals captured by the current defence would continue to be captured by this revised defence. This is due to the fact that understanding the physical and moral nature of one’s conduct, and being able to act in accordance with one’s deliberations, constitute essential elements of reasons-responsiveness.

7.5.104 While the Institute notes that the scope of the limbs in s 16(1)(a) do not give rise to difficulties in practice, there is uncertainty in the interpretation of the first limb of the insanity defence (that is, the understanding of the physical character of the act) as a result of the different interpretations in case law.⁶²³ One interpretation is that s 16(1)(a)(i) is limited only to the physical character of the act and on this narrow view, the defence is only available if the person was totally unaware of what he or she was doing. The broader view (and one reflecting the common law) is that the defence is available if the defendant is incapable of understanding the nature and quality of the act. This interpretation extends to understanding the act and its

⁶¹⁹ S Allnutt, A Samuels and C O’Driscoll, ‘The Insanity Defence: from Wild Beasts to M’Naghten’ (2007) 15(4) *Australasian Psychiatry* 292, 296.

⁶²⁰ *Ibid.*

⁶²¹ See [7.3.15].

⁶²² See Table 7.1.

⁶²³ See [7.3.12]–[7.3.13].

consequences. It is the Institute's view that it is not desirable for the law to be uncertain and that there should be reform to make the interpretation clear. Further, the Institute considers that s 16(1)(a)(i) should be amended to refer to an incapacity to understand the nature and quality of the act. This is consistent with the law in most other jurisdictions.⁶²⁴

7.5.105 The Institute's view is that it is not necessary to make any other changes to the qualifying conditions for the defence of insanity contained in the *Criminal Code* (Tas) s 16(1)(a).

Recommendation

32. The *Criminal Code* (Tas) s 16(1)(a)(i) should be amended to refer to 'understanding the nature and quality of such act or omission'.

7.5.106 Irresistible impulse. Concerns have also been raised in relation to the 'irresistible impulse' limb of the insanity defence in s 16(1)(b) of the *Criminal Code* (Tas). This has been described as the 'most controversial' aspect of the insanity defence because:

it is difficult to determine objectively whether or not the action is the consequence of 'an irresistible impulse or an impulse not resisted', that is, whether or not the person was genuinely incapable of controlling the behaviour or whether or not he or she chose not to inhibit the behaviour.⁶²⁵

In addition to the difficulty of determining whether an accused was unable or unwilling to resist the impulse, Bronitt and McSherry criticise the 'volitional' limb as being contradictory to modern psychology as it requires the separation of cognition and action: it 'assume[s] that a person can know what he or she is doing is wrong, yet be unable to control his or her actions'.⁶²⁶ This is more forcefully stated by Kenny, who asserts that 'the notion of irresistible impulse is an incoherent piece of nonsense'.⁶²⁷

7.5.107 The majority of Australian jurisdictions have a volitional element in the insanity defence.⁶²⁸ However, it does not exist in Victoria and New South Wales. This issue has also been subject to review, and as noted by the SASAC, 'of the six reviews which have recently addressed this issue, three recommended incorporating a volitional element ... (NSW, WA and England) and three opposed its adoption (Victoria, New Zealand and Scotland)'.⁶²⁹

7.5.108 Reasons for the inclusion of a volitional element are that:

- (a) It exists in most other jurisdictions.
- (b) Even if it may be difficult to differentiate, there are people who are genuinely unable to control behaviour and as a matter of principle, such people should be exculpated.⁶³⁰

⁶²⁴ See Table 7.1.

⁶²⁵ Allnutt, Samuels and O'Driscoll (n 619) 296–297.

⁶²⁶ Bronitt and McSherry (n 370) 250.

⁶²⁷ A Kenny, 'The Psychiatric Expert in Court' (1984) 14 *Psychological Medicine* 291, 299 quoted in Allnutt, Samuels and O'Driscoll (n 619) 297.

⁶²⁸ Table 7.1.

⁶²⁹ SASAC (n 433) 47.

⁶³⁰ *Ibid* 48.

7.5.109 Reasons for rejecting a volitional element are that:

- (a) It is difficult to differentiate between irresistible impulses and non-resisted impulses.
- (b) The other limbs of the insanity defence are sufficient to accommodate cases where a defendant was unable to control his or her conduct, and so a volitional element is unnecessary.⁶³¹

7.5.110 In the Issues Paper, the Institute sought feedback on whether the volitional test in the *Criminal Code* (Tas) s 16(1)(b) should be retained or amended.

Do you consider that the volitional test for insanity contained in the *Criminal Code* (Tas) s 16(1)(b) should be retained?

Do you consider that any amendment should be made to the *Criminal Code* (Tas) s 16(1)(b)?

7.5.111 The volitional limb of the insanity defence relates to uncontrollable impulses — the requirement for a person to have done the acts under an impulse and the impulse was by reason of a mental disease one which he or she was in substance deprived of any power to resist.

7.5.112 There were two responses that addressed these questions.

7.5.113 The DPP supported retaining the current provision in the *Criminal Code* (Tas) s 16(1)(b) without amendment. The DPP wrote that:

This provision is consistent with the majority of other jurisdictions. I note the commentary in par 7.5.41 of the paper to the effect that this limb is contrary to modern psychology. However, this is a legal concept and it is almost inevitable that there will be some divergence between legal and medical terminology. Without more detailed submissions from suitably qualified medical experts I consider it would be unwise to remove this limb.

7.5.114 The other response addressing the volitional component of the defence was provided by Walvisch. He noted the similarities between the scope of the current provision and his proposed defence of reasons-responsiveness:

As noted above, in my view the test should be changed to focus on the accused's lack of reasons-responsiveness, rather than on the requirements currently set out in *Criminal Code* (Tas) s 16. I note, however, that many (if not all) of the individuals captured by the current defence would continue to be captured by this revised defence. This is due to the fact that understanding the physical and moral nature of one's conduct, and being able to act in accordance with one's deliberations, constitute essential elements of reasons-responsiveness

7.5.115 The Institute's view is that the *Criminal Code* (Tas) s 16(1)(b) should be retained without amendment. Although not frequently used, it has been relied upon, and reflects the law in most other Australian jurisdictions.

⁶³¹ Ibid 47.

Recommendation

33. The *Criminal Code* (Tas) s 16(1)(b) should be retained without amendment.

7.5.116 Further consideration of the practical difficulties with the use of the insanity defence. Despite well-established theoretical concerns, it is less clear to what extent these matters give rise to difficulties in practice. Accordingly, the TLRI sought stakeholder feedback about such difficulties.

7.5.117 In England and Wales, consultations with stakeholders reported that the ‘insanity and automatism defences are so outmoded, inappropriate and complicated that they are seen as irrelevant. Practitioners work round them’.⁶³² Consequently, despite the ‘significant problems with the law when examined from a theoretical perspective’, there were few practical problems actually reported with the defence given the approach taken by legal and medical practitioners.⁶³³ Further, as in Tasmania, insanity is rarely pleaded, and research in other jurisdictions suggests that this is because:

practitioners take a pragmatic approach, and achieve the ‘correct’ outcome, in the view of the practitioner and/or the accused, without having to consider the insanity defence: defendants often prefer the certainty of a prison term to the uncertainty of a release date from hospital.⁶³⁴

Similarly, in New South Wales, stakeholders reported that ‘broadly speaking, the defence of mental illness works in practice without any significant difficulty and that the right results are achieved.’⁶³⁵

7.5.118 The TLRI has undertaken a review of insanity cases decided in the Supreme Court. This has allowed the TLRI to consider the types of cases where insanity has been successful. It does not provide a picture of how the defence is operating in the Magistrates Court or how often the insanity defence is considered (and rejected) by practitioners representing clients and how often it is unsuccessfully relied upon at trial.⁶³⁶ As discussed in Part 3, the available information suggests that only a small number of individuals with mental health impairments or cognitive impairments are able to rely on the insanity defence. In the Issues Paper, the Institute welcomed feedback on stakeholders’ views on why this is the case, and, in particular, whether it is attributable to problems with the law:

⁶³² Law Commission of England and Wales (n 382) 225.

⁶³³ Ibid 2. As discussed below, the Law Commission has proposed a radical change to the law. However, most reform projects have made recommendations in relation to aspects of the law but essentially retained the *M’Naghten* approach. For example, in New Zealand it was observed that the defence of insanity is ‘troubled in principle, and has occasionally produced off or anomalous results in practice. Furthermore, the fact that the insanity defence is not very often relied upon is not in itself a reason for failing to formulate morally and legally sound criteria for it’: NZLC (n 470) 29. However, despite the ‘not insignificant problems’ with the insanity defence, the NZLC did not recommend its reform: at 7.

⁶³⁴ Law Commission of England and Wales (n 382) 18.

⁶³⁵ NSWLRC (2013) (n 56) 46.

⁶³⁶ These difficulties were observed by the Law Commission of England and Wales, *Insanity and Automatism: A Scoping Paper* (2012) 8. The exception is where the offender has appealed their conviction on the basis of unsuccessful reliance on insanity.

Do you have an explanation as to why successful reliance on the defence of insanity is so low?

Do you consider that there are practical difficulties with the current operation of the insanity defence contained in the *Criminal Code* (Tas) s 16?

Does the current test work well in practice or does it wrongly include or exclude defendants from the scope of the defence?

Do medical practitioners experience cases where a person's mental state at the time of the offence was such that their opinion was that he or she ought not to have been held criminally responsible, but the mental condition did not meet the tests contained in s 16 of the *Criminal Code* (Tas)?

Does the insanity test contained in s 16 of the *Criminal Code* (Tas) create difficulties for experts in writing reports and/or in giving evidence at trial?

7.5.119 The Institute received two submissions that addressed these questions.

7.5.120 As noted, the DPP's view is that the substance of the insanity defence should not be changed as the law is well understood and does not give rise to difficulties in practice. This reflects the experience reported in other jurisdictions.⁶³⁷ The DPP wrote that:

In my view, this provision does not require amendment. One reason why successful reliance on s 16(1)(b) may be so low is because although a person may have a delusion the delusion is generally in relation to the situation as opposed to the act. For example, a person may know they have a gun which they can and do shoot; but the reason they do so is due to a delusional belief as to the circumstances that exist at the time of the relevant act.

7.5.121 O'Connell suggested that there may be difficulties reliably capturing reliance on insanity in statistical data and that reliance is low 'because it is a long and expensive process'.

Section 16(3): The interrelationship between insanity and self-defence

7.5.122 Another area of concern in relation to the law of insanity in Tasmania is the role of s 16(3) of the *Criminal Code* (Tas) and the interrelationship of the insanity and self-defence. The law of self-defence in s 46 of the *Criminal Code* (Tas) provides that a person is justified in using such force in defence of him or herself or another person as is reasonable in the circumstances as the defendant believes them to be. The test for self-defence requires that: (1) the defendant believes that he or she was acting in self-defence; and (2) the force used by the defendant was reasonable in the circumstances that the defendant believed to exist. In cases where the accused's perception of the need to use defensive force corresponds with the actual need to do so, the application of the law of self-defence is unproblematic. However, difficulties arise when there is a difference between the actual circumstances and the circumstances as the accused mistakenly believed them to be. And, in the context of this review, key issues are: (1) whether an accused can rely on a mistaken belief arising from a delusion caused by a mental illness for the purposes of self-defence; and (2) the role of s 16(3) of the *Criminal Code* (Tas).

⁶³⁷ See [7.5.3].

7.5.123 These issues are a focus of the Terms of Reference for this Report and, as discussed at [1.1.1], were the subject of a previous TLRI law reform report. Accordingly, in this section, the TLRI sets out its previous views and stakeholder feedback about whether it is necessary to revisit these recommendations.

7.5.124 In its report *Review of the Law Relating to Self-defence*, the TLRI observed that considerable uncertainty remains in relation to the meaning and consequences of s 16(3).⁶³⁸ In particular, the TLRI observed that it is unclear:

- (1) Whether there are any circumstances where the jury might have regard to evidence of a mental disease and its effects when considering s 46 of the *Criminal Code* in circumstances where the defence of insanity has been rejected? In *Walsh*, the Court of Criminal Appeal left unresolved the question whether ‘evidence concerning a mental disease and its effects may ever be taken into account by a jury when considering s 46 in circumstances where the defence of insanity has been rejected’.⁶³⁹
- (2) To what extent does the High Court decision in *Hawkins v the Queen*⁶⁴⁰ undermine the authority of the Court of Criminal Appeal decision in *Walsh*? This uncertainty arises because the High Court in *Hawkins v the Queen* adopted a different approach to that of the Tasmanian Court of Criminal Appeal in *Walsh* in relation to the relevance of expert opinion evidence of mental illness in circumstances where the jury has rejected the defence of insanity. In both *Walsh* and *Hawkins*, the defence wished to use evidence about the accused’s mental impairment caused by a mental illness to deny the unlawfulness of the accused’s conduct. However, different grounds were advanced for denying the unlawfulness of the accused’s conduct in each case. In *Walsh*, the defence sought to deny that the act was unlawful on the basis that the accused was acting in self-defence. In *Hawkins*, the defence sought to deny the specific intention for the offence. In both cases, the issue for the court to decide was whether the expert opinion evidence of mental impairment could be used for a dual purpose — first, in relation to the insanity defence, and then, if insanity was rejected, as the basis for a claim of self-defence (*Walsh*) or to deny the specific intent of the offence (*Hawkins*). In *Walsh*, the Court of Criminal Appeal ruled that, in the circumstances of that case, the evidence could not be used for a dual purpose. In contrast, in *Hawkins*, in the context of a denial of specific intent, the High Court said that the expert evidence could be used for the dual purpose sought. While *Walsh* is still binding authority in Tasmania in relation to the interaction of insanity and self-defence, it remains to be seen how, in light of the approach of the High Court in *Hawkins*, the issue might be approached if the Court of Criminal Appeal reconsidered the matter.
- (3) Is s 16(3) limited to insane delusions or does it apply to delusions more generally? On the basis that s 16(3) does not refer to insane delusions, some commentators have suggested that ‘specific delusions may be exempt from criminal responsibility even though they are not caused by mental illness’.⁶⁴¹ Read in this way, s 16(3) could apply to a delusion arising from drug-induced psychosis rather than from an underlying

⁶³⁸ See TLRI (n 592) Part 2, in particular [2.2.14].

⁶³⁹ [1993] TASSC 91, [26] (Crawford J).

⁶⁴⁰ (1994) 179 CLR 500.

⁶⁴¹ Fairall and Yeo (n 376) [13.32].

mental disease. However, the opposing view is that s 16(3) should be read as applying only to delusions that are produced by a mental disease. This interpretation is supported by the location of s 16(3) within the provision that sets out the insanity defence. This issue is unresolved.

- (4) If an accused is able to rely on a sane delusion under s 16(3) as a basis for raising self-defence, is the accused entitled to a complete or a qualified acquittal? In Tasmania, reliance on s 16(3) has more commonly been understood to provide the accused with a basis for raising self-defence under s 46, and if the prosecution cannot prove beyond reasonable doubt that the accused's use of force was excessive, the accused would receive a complete acquittal.⁶⁴² A contrary position is that s 46 works within s 16 to provide the accused with an additional way of proving insanity and obtaining a qualified acquittal; that is, not guilty by reason of insanity.⁶⁴³

7.5.125 Accordingly, the TLRI expressed the view that there is a need to clarify the interaction of the law of self-defence and insanity.⁶⁴⁴

7.5.126 The Terms of Reference for this current review ask the TLRI to provide advice as to whether evidence of insane delusions arising from mental illness should form the basis for self-defence. This has previously been addressed by the TLRI, and it was recommended that:

The *Criminal Code* (Tas) be amended to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas).⁶⁴⁵

7.5.127 This recommendation reflects the TLRI's view that to allow all evidence of mental illness to be relevant to self-defence is contrary to community expectations and does not reflect the respective purposes of the insanity defence and the defence of self-defence. While, as a matter of policy, it may be accepted that an accused should be able to rely on sane though unreasonable mistakes for the purposes of self-defence, it does not follow that an accused should similarly be entitled to rely on insane delusions. As suggested by Baker, a belief arising

⁶⁴² This was the view expressed in Blackwood and Warner (n 392) vol 1, 230. It would also appear to be the approach of both Slicer J and the Court of Criminal Appeal in *Walsh*, who viewed the competing claims as being of reliance on insanity (qualified acquittal) or reliance on s 16(3) for the purposes of self-defence (complete acquittal).

⁶⁴³ This is certainly the effect of the *M'Naghten* rules on delusions. As Sullivan observes in relation to the third limb of *M'Naghten*, '[t]he remarks that D will be "exempt from punishment", is intended to mean that D will be able to rely on the insanity defence, not because of a reliance on self-defence': Child and Sullivan (n 388) 792. See D Baker, *Glanville Williams Textbook of Criminal Law* (Sweet & Maxwell, 3rd ed, 2012) [27–017]; Law Commission of England and Wales, *Insanity and Automatism: Supplementary Material to the Scoping Paper* (2012) 4.59 fn 62. See also *Western Australia v Macdonald [No 2]* [2010] WASC 355. It was also the approach in New Zealand before the provision dealing with delusions was removed: see Simester and Brookbanks (n 370), who write that 'the McNaghten Rules and earlier New Zealand legislation contained a provision that persons suffering "specific delusions", but otherwise sane, were not to be acquitted on the grounds of insanity unless the delusions would, if true, have justified or excused the act': at 328. Although more recently, in the United Kingdom, an offender relied on an insane delusion to provide the basis for his genuine belief in the need for self-defence but not for the purposes of assessing whether the amount of force used was reasonable: see *R v Oye* [2014] 1 WLR 3354; [2013] EWCA Crim 1725, [36] (Davis LJ); R Mackay, 'R v SO: Defendant Charged with Affray and Assault After Attacking Police — Crown Accepting Psychiatric Evidence that Defendant Believed Evil Spirits were Trying to Harm Him' (2014) *Criminal Law Review* 544; T Storey, 'Self-Defence: Insane Delusions and Reasonable Force' (2014) 78 *Journal of Criminal Law* 12.

⁶⁴⁴ TLRI (n 592) 15 Recommendation 2.

⁶⁴⁵ *Ibid* 42 Recommendation 6.

from a delusion is not a ‘mistake’.⁶⁴⁶ Further, in the case of a (sane) mistake the jury can apply their common sense and may refuse to accept a patently absurd and unreasonable mistake as one that is not genuinely held. This ‘reality testing’ is unlikely to be possible for an insane delusion. This means that the prosecution will only be able to establish beyond reasonable doubt that the accused was not acting in self-defence by proving either that the delusion was not one of immediate/imminent harm⁶⁴⁷ or that the force used was excessive in the circumstances as the accused believed them to be. But exactly how would the prosecution be able to do this? It would require them to engage with the insane delusion as though it had some basis in reality. This gives rise to the possibility of trials in which the ‘facts’ to be established would consist entirely of the content of the delusion.⁶⁴⁸ Similarly, asking jurors to assess the reasonableness of an accused’s response to an insane delusion obliges them to engage in fantastical reasoning. This begs the question, just how can a jury realistically or rationally assess the reasonableness of a response generated by an insane delusion.⁶⁴⁹ Additionally, to permit complete acquittals in cases of insane delusions does not enable appropriate treatment to be provided to deluded defendants or take into account the need for community protection.⁶⁵⁰

7.5.128 Illustrative cases where a defendant relied on insanity but where the nature of the delusion meant that the defendant believed that he was acting in self-defence include:

- (a) A case where the accused suffered from severe schizophrenia and was described by a forensic psychologist as ‘seriously unwell’. The accused’s condition caused acute psychotic symptoms including auditory and visual hallucinations and persecutory and referential delusions. The accused believed that the police officers were trying to kill them.
- (b) A case where the accused suffered from schizophrenia, with the most prominent symptoms being a belief that family members were being impersonated, delusions and other abnormal beliefs. The accused repeatedly hit and injured their family member, believing that the person was impersonating their family member (rather than actually being the family member). The accused believed the ‘impersonator’ was dangerous as the accused believed the ‘impersonator’ had killed the family member.
- (c) A case where the accused threatened police officers because, due to a psychotic illness, the accused believed that the police were a source of profound danger.

7.5.129 In addition, in its previous report, the TLRI considered the repeal of the *Criminal Code* (Tas) s 16(3) and recommended that it should be repealed.⁶⁵¹

7.5.130 This is the approach adopted in the *Criminal Code* (Cth) s 7.3(7) and the *Criminal Code* (ACT) s 29(2). The *Criminal Code* (ACT) s 29 provides:

⁶⁴⁶ Baker (n 643) [27-019].

⁶⁴⁷ This was the situation in two Western Australian cases where the delusions did not provide basis for self-defence: see *Garrett v R* [1999] WASCA 169; *Western Australia v McDonald* [2010] WASC 355.

⁶⁴⁸ D Klinck, ‘“Specific Delusions” in the Insanity Defence’ (1982–3) 25 *Criminal Law Quarterly* 458, 464 referring to comments made by Glanville Williams.

⁶⁴⁹ This was the approach in *R v Oye* [2014] 1 WLR 3354.

⁶⁵⁰ See *Child and Sullivan* (n 388) 792.

⁶⁵¹ See TLRI (n 592) [4.2.1]–[4.2.19].

- (2) If the trier of fact is satisfied that a person carried out conduct because of a delusion caused by a mental impairment, the delusion itself cannot be relied on as a defence, but the person may rely on the mental impairment to deny criminal responsibility.

The *Criminal Code* (Cth) s 7.3(7) provides that:

If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.

These provisions reflect the view of the Model Criminal Code Officers Committee ('MCCOC') that 'delusions are symptoms of underlying pathology and that such defendants should be confined to the mental impairment defences'.⁶⁵² While this approach precludes reliance on a delusion for self-defence, it does not prevent a person who suffers from an insane delusion from relying on self-defence in circumstances where the person is actually under threat (rather than relying solely on an imagined threat that is a product of psychosis).⁶⁵³ This approach was also supported by the DPP, who expressed the view that:

An accused should not be allowed to rely on evidence of a delusion caused by mental impairment as a basis for self-defence. Evidence of delusions caused by mental impairment should be dealt with by a consideration of insanity under s 16 of the *Criminal Code*. It is contrary to community expectations that an accused person could be acquitted based on a deluded belief or view of the facts. The community would expect that such a person would be caught by the insanity provisions and in that way the community would be protected from the risk that they might behave in a similar way in the future due to ongoing delusions.

7.5.131 Further, this model accords with the approach of the Court of Criminal Appeal in *Walsh*, where it was held that expert evidence of an insane delusion is not generally admissible in relation to the defence of self-defence in the *Criminal Code* (Tas) s 46. In these circumstances, evidence of the accused's delusions is confined to the insanity defence contained in s 16 of the *Criminal Code* (Tas).

7.5.132 This model also prevents people who are suffering psychotic illnesses from relying on their deluded beliefs to obtain a complete acquittal. This approach is supported on policy grounds that the public requires protection from potential future harms.⁶⁵⁴ It can also be said to accord with community sentiments that a person who inflicts violence as a result of a deluded belief of danger 'should be confined to a place of safety but not be punished'.⁶⁵⁵ The dispositional options available following a finding of not guilty by reason of insanity means that the court can appropriately respond to treatment needs of the individual and the need for community protection.

7.5.133 In addition, the TLRI's view was that repealing s 16(3) of the *Criminal Code* (Tas) had the advantage of promoting clarity and the modernisation of the law through the removal of a redundant provision. The scope and operation of this provision has remained obscure with some

⁶⁵² MCCOC, *Model Criminal Code — Chapter 2, General Principles of Criminal Responsibility*, Report (1992) [43].

⁶⁵³ See *R v Resnik* [2003] ATCSC 96.

⁶⁵⁴ Child and Sullivan (n 388) 792.

⁶⁵⁵ Simester at al (n 398) 817.

commentators, courts and law reform bodies expressing the view that it is redundant and out of step with modern psychiatry.⁶⁵⁶ In Canada, these concerns led to the repeal in 1991 of the equivalent provision in the Canadian *Criminal Code*.⁶⁵⁷ The utility of s 16(3) is particularly questionable in circumstances where a person has a deluded belief in the need for self-defence arising from a mental illness. It is difficult to envisage a scenario where such a case would not fall within s 16(1)(ii) of the *Criminal Code* (Tas). This section has been interpreted to mean that the defendant did not know that what they were doing was wrong according to the ‘everyday standards of reasonable people’.⁶⁵⁸

7.5.134 The possibility that the jury might reject the defence of insanity yet consider it possible that the accused acted in self-defence when under the influence of an insane delusion is problematic. As noted in the Canadian decision of *R v Chaulk*:

An accused will be able to bring his claim within the scope of the second branch of the test set out in s 16(2) [the equivalent of *Criminal Code* (Tas) s 16(1)(ii)] if he proves that he was incapable of knowing that his conduct was morally wrong in the particular circumstances, for example, if he believes that the act was necessary to protect his life. If he is not able to establish this fact, it must be concluded that he either knew or was capable of knowing that the act was wrong in the circumstances. He cannot then possibly succeed in claiming that the act would have been justified or excused had the perceived facts been true.⁶⁵⁹

A similar view was expressed by Simester et al, who observed that the rule on delusions in *M’Naghten’s* case:

does not appear to add anything to the substance of the Rules; the illustrations provided by the judges who formulated the Rules indicate that the effect of the delusion must be to prevent D knowing the nature and quality of his actions or from knowing that his actions were wrong. The superfluity of this aspect of the *M’Naghten* Rules is borne out by the lack of case law arising thereunder.⁶⁶⁰

If the jury accepts the expert opinion evidence concerning the accused’s delusional belief in the need to use self-defence, then a qualified acquittal on the grounds of insanity is available on the basis that the accused did not know that the act was wrong. On the other hand, if the jury rejects

⁶⁵⁶ Bronitt and McSherry (n 370) 213–218; Fairall and Yeo (n 376) [13.30]; W Brookbanks, ‘Insanity’ in W Brookbanks and A Simpson (eds), *Psychiatry and the Law* (LexisNexis, 2007) 142; G Williams, *Criminal Law: The General Part* (2nd ed, 1961) [160]; Law Reform Commission of Canada, *Criminal Law, The General Part: Liability and Defences*, Working Paper 29 (Ottawa: Minister of Supply and Services Canada, 1982) 48 cited in Bronitt and McSherry (n 370) 218; *R v Chaulk* (1990) 62 CCC (3d) 193. See also Colvin and McKechnie (n 418) 17.20; J Devereux and M Blake, *Kenny Criminal Law in Queensland and Western Australia* (Lexis Nexis, 8th ed, 2013) [8.115]; Klinck (n 648); P Fairall, ‘The Exculpatory Force of Delusions – A Note on the Insanity Defence’ (1994) 6 *Bond Law Review* 57, 59; Ormerod (n 535) 304.

⁶⁵⁷ It should be noted that the former Canadian provision, s 16(3) of the *Criminal Code*, made it clear that such an accused would receive an acquittal on the grounds of insanity (not a complete acquittal). Its repeal followed the Report of the Law Reform Commission of Canada that stated that ‘[m]edical opinion rejects the idea of partial insanity and legal scholarship stresses the injustice and illogicality of applying to the mentally abnormal a rule requiring normal reactions within their abnormality; a paranoiac killing his [or her] persecutor will be acquitted only if the imagined persecution would have justified the killing by way of self-defence — the law requires him [or her] to be sane in his [or her] insanity. For this reason, it is suggested that the rule on insane delusions be abandoned’: Law Reform Commission of Canada (n 656) 218.

⁶⁵⁸ *R v Porter* (1933) 55 CLR 182, 189–190 cited by Gibson J in *Hitchens* [1959] Tas SR 209, 221.

⁶⁵⁹ (1990) 62 CCC (3d) 193, 236 (Lamer CJ). Note that Slicer J distinguished this case in *Walsh* (1991) 60 A Crim R 419, 426–427.

⁶⁶⁰ Simester et al (n 398) 723.

the defence of insanity, it seems difficult (if not impossible) to argue that the accused can rely on evidence of his or her delusion for the purposes of self-defence on the basis that he or she is ‘criminally responsible for the act or omission to the same extent as if the fact which ... [he or she was] induced by such delusion to believe to exist really existed’.⁶⁶¹ There is no evidentiary foundation to support the contention that the accused had a genuine belief in the need to act in self-defence.

7.5.135 However, the TLRI observed that contrary views had been expressed in relation to the repeal of s 16(3). Some commentators have suggested that arguments that s 16(3) is an anachronism fail to take account of the difference between the medical and legal definitions of insanity and the role of the jury in applying the insanity defence.⁶⁶² Further, the TLRI noted that retaining s 16(3) of the *Criminal Code* (Tas) acknowledges the possibility that there may be cases where juries are able to take evidence concerning a mental disease and its effects into account when applying s 46 of the *Criminal Code* (Tas) in circumstances where the other limbs of the defence of insanity have been rejected. The Court of Criminal Appeal in *Walsh*⁶⁶³ left unanswered the question whether there are any circumstances where this may be possible. Accordingly, an alternative model considered by the TLRI is to retain s 16(3) of the *Criminal Code* (Tas) but to specify that delusions would result in a qualified acquittal (and not a complete acquittal via s 46). This is the approach recommended by the LRCWA.

7.5.136 This model is advocated on the basis that it permits evidence of delusions to be relied on for the purposes of self-defence, but provides that, in these circumstances, only a qualified acquittal is possible (that is, not guilty on the grounds of insanity). This would mean that a person who held a deluded belief in the need for self-defence but did not meet the test for insanity contained in the *Criminal Code* (Tas) ss 16(1) and (2) could rely on s 16(3) if his or her response was reasonable in the circumstances as they believed them to be. The onus of proof would be on the defendant (as with the other provisions of the insanity defence) to establish this on the balance of probabilities. However, if the defendant discharged the onus of proof in this regard, the result would be a qualified acquittal only.

7.5.137 This approach reflects both the original *M’Naghten* rule on delusions and arguably the intended operation of the *Criminal Code* (Tas) s 16(3).⁶⁶⁴ It also reflects the approach of the LRCWA which recommended that the equivalent Western Australian provision be retained and that it be made clear that successful reliance on the provision would result in a special verdict of not guilty by reason of mental impairment rather than a complete acquittal.⁶⁶⁵ The LRCWA recommended this approach because it is in the public interest and it allows for the appropriate

⁶⁶¹ *Criminal Code* (Tas) s 16(3).

⁶⁶² This was the view of Slicer J in *Walsh* (1991) 60 A Crim R 419, 427. See Howard and Westmore (n 392) [6.47–6.50].

⁶⁶³ [1993] TASSC 91, [26] (Crawford J).

⁶⁶⁴ The *Criminal Code* (Tas) s 16(3) substantially reproduces the statement of the House of Lords in *M’Naghten*’s case about the effect of insane delusions on criminal responsibility, where the accused is not otherwise legally insane — in this case ‘the defendant’s responsibility is judged by reference to the facts as he supposed them to be and not the actual facts’. See Baker (n 643) [27–017]; Law Commission of England and Wales (n 382) 4.59 fn 62. Although note *R v Oye* [2014] 1 WLR 3354 where the accused was able to rely on insanity and self-defence in tandem: see discussion in Child and Sullivan (n 388); Mackay (n 643).

⁶⁶⁵ LRCWA (n 416) 233.

treatment of a deluded accused.⁶⁶⁶ It ensures that a person with a deluded belief in the need for self-defence receives a qualified acquittal. It can be argued that this reflects community expectations.

7.5.138 Accordingly, this model would retain s 16(3). This model and the model previously recommended by the TLRI, which would repeal s 16(3), are similar in that they achieve the same end — limiting the use of evidence of delusions arising from a mental illness to the insanity defence. However, the difference rests on the desirability of retaining s 16(3) of the *Criminal Code* (Tas).

7.5.139 An alternative model (and one previously rejected by the TLRI) would be to allow evidence of delusions arising from mental illness to form the basis for self-defence with the result that a successful argument of self-defence results in a complete acquittal. This model would make no distinction between mistakes and delusional beliefs arising from mental illness. This approach may satisfy concerns arising about the unequal treatment and discrimination for individuals with disabilities under the *CRPD*.⁶⁶⁷ However, given that a person acquitted by reason of self-defence is free to leave and there is no provision for any disposition to be imposed under the provisions of the *Criminal Justice (Mental Impairment) Act 1999* (Tas), it does raise questions about whether community safety is adequately protected. This depends on the options available under the civil process contained in the *Mental Health Act 2013* (Tas). This issue was also addressed at [7.5.6] and [8.3.52]–[8.3.53].

7.5.140 In the Issues Paper, the Institute sought further feedback on the operation of 16(3) and the relationship between insanity and self-defence in s 46 of the *Criminal Code*:

Can you outline any circumstances where an accused would not be able to rely on insanity within s 16(1) but would be able to rely on insanity within 16(3)?

Do you agree with the view of the TLRI that s 16(3) of the *Criminal Code* should be repealed and a provision inserted in the *Code* to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas)? (A possible model would be the legislation in the ACT or the Commonwealth Act).

Alternatively, do you consider that s 16(3) of the *Criminal Code* should be retained, and an amendment made to the *Code* to provide that successful reliance on s 16(3) would result in a special verdict of not guilty by reason of insanity rather than a complete acquittal? (A possible model for the legislation would be the amendment proposed by the Western Australian Law Reform Commission).

Alternatively, do you consider that evidence of delusions arising from mental illness should be able to be relied on for the purposes of the self-defence in s 46 of the *Criminal Code* (Tas) with the result being that a successful argument of self-defence receives a complete acquittal?

⁶⁶⁶ Ibid. However, the LRCWA relied on the first instance judgment of Slicer J in *Walsh* (1991) 60 A Crim R 419 as justification for a continued need for the provision and did not refer to the subsequent Court of Criminal Appeal judgment.

⁶⁶⁷ See discussion at [7.5.7].

If so, what (if any) protections need to be put in place in the case of an accused who is acquitted on the basis of self-defence arising from a deluded belief attributable to a mental illness?

7.5.141 Two submissions addressed these questions. In response to the first question, the DPP indicated that he could not ‘readily outline any circumstances where an accused would not be able to rely on insanity within s 16(1) but would be able to rely on insanity within s 16(3)’. Accordingly, his view was that he would not be opposed to the repeal of this provision. Walvisch also supported the repeal of s 16(3). This conforms to the previous recommendation of the Institute, and the Institute’s view remains unchanged. Accordingly, it reiterates its previous recommendation that the *Criminal Code* (Tas) s 16(3) be repealed.

Recommendation

34. The *Criminal Code* (Tas) s 16(3) should be repealed.

7.5.142 With regard to the relationship between self-defence contained in s 46 of the *Code* and delusional beliefs, as noted, the Institute has previously stated that a delusional belief should not form the basis for self-defence and that a provision should be inserted in the *Code* to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas). Both the DPP and Walvisch agreed with this recommendation.

7.5.143 The DPP wrote:

I repeat the comments I made in response to Issues Paper 20 on self-defence –

An accused should not be allowed to rely on evidence of a delusion caused by mental impairment as a basis for self-defence. Evidence of delusions caused by mental impairment should be dealt with by a consideration of insanity under s 16 of the *Criminal Code*. It is contrary to community expectations that an accused person could be acquitted based on a deluded belief or view of the facts. The community would expect that such a person would be caught by the insanity provisions and in that way the community would be protected from the risk that they might behave in a similar way in the future due to ongoing delusions. ...

such an amendment would allow a jury to take into account evidence of psychiatric conditions falling short of establishing s 1 insanity when determining the circumstances as the accused reasonably believed them to be. Therefore when an accused was in fact under attack a jury could take into account their mental state when determining if their reasonable belief was that they needed to use force to defend themselves, but when there was in fact no attack, evidence as to an accused’s delusions would be dealt with under s 16. This amendment would clarify the law but still be consistent with the approach taken by the Court of Criminal Appeal in *Walsh v The Queen* 68/1993.

7.5.144 Walvisch also stressed the need to distinguish between self-defence and beliefs attributable to mental illness:

In addressing this issue, it is useful to consider the differing purposes of the defences of traditional (non-mistaken) self-defence and mistaken self-defence. Traditional self-defence is a defence of justification: the accused is acquitted because he or she acted correctly in the circumstances, all things considered. By contrast, an accused who acts

on the basis of mistaken self-defence has not acted in a justified fashion: when all things are considered, he or she acted wrongfully (due to the mistake). However, as the accused has acted in response to what reasonably appeared to be good reasons, his or her actions are considered warranted in the circumstances, relieving him or her of criminal liability.

It can be seen from this description that self-defence arising from a deluded belief does not properly fall within either of these categories: it is neither justified (as it was not the correct thing to do in the circumstances) nor warranted (as it was not committed in response to what reasonably appeared to be good reasons). Consequently, if the accused is to be relieved of liability it should be on a different basis: namely due to his or her lack of reasons-responsiveness (or whatever other form of the ‘insanity’ defence is enacted).

Consequently, I agree with the view of the TLRI that s 16(3) of the Criminal Code should be repealed and a provision inserted in the Code to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas).

7.5.145 Accordingly, the Institute reaffirms its earlier recommendation that a delusional belief should not form the basis for self-defence and that a provision should be inserted in the *Code* to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental disease, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas). However, this prior recommendation needs be changed to refer to mental or cognitive impairment in light of the Institute’s recommendations in relation to terminology used in s 16 in this Report.

Recommendation

35. A delusional belief should not form the basis for self-defence and a provision should be inserted in the *Code* to provide that if a person does an act or makes an omission as a result of a delusion caused by a mental or cognitive impairment, the delusion can only be used as a defence under s 16 of the *Criminal Code* (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the *Criminal Code* (Tas).

Procedural aspects of the defence

Burden of proof

7.5.146 As indicated at [7.3.26], the burden of proof is on the defendant to prove that he or she was insane within the meaning of the *Criminal Code* (Tas) s 16. Concerns have been expressed about the burden of proof that is cast on the defendant to prove the insanity defence on the balance of probabilities. This is contrary to the general rule of criminal law that the legal burden of proof is on the prosecution. It is also different from other defences where an accused raises the defence of mistake or self-defence or seeks to rely on evidence of automatism or intoxication to deny criminal responsibility. In relation to these matters, the accused has an evidentiary onus only.

7.5.147 Arguments in favour of placing the burden of proof on the defendant are based on the view that if the burden were placed on the prosecution, ‘it would be impossible for the prosecution to disprove an assertion of insanity, resulting in unmeritorious acquittals’.⁶⁶⁸ Similarly, Bronitt and McSherry write that the ‘modern rationale ... lies in the fear that if an accused only has to bear an evidentiary burden in relation to mental impairment, more individuals would be found not criminally responsible than should be the case.’⁶⁶⁹ However, they observe that this argument is difficult to support in relation to insanity when it does not apply for other defences, given that ‘[t]here appears little support for the proposition that it may be easier to fake a claim of mental impairment’ than these other defences.⁶⁷⁰

7.5.148 Other law reform reviews, including those conducted by the Scottish Law Commission, the NZLC and the LRCWA, did not recommend a change to the current burden of proof that is placed on the defendant.⁶⁷¹ In contrast, in relation to its new defence of ‘not criminally responsible by reason of a recognised medical condition’, the Law Commission of England and Wales recommended that there should be an evidential burden only on the defendant (discharged by the provision of supporting expert evidence) but that the prosecution should bear the burden of disproving the defence once it has been raised.⁶⁷²

7.5.149 In the Issues Paper, the Institute sought feedback on the burden of proof for the insanity defence:

Should the *Criminal Code* (Tas) be amended to provide that the burden of proof for the insanity defence rests on the prosecution and that the defendant bears an evidential burden only in relation to this defence?

7.5.150 There were two submissions that addressed this question with opposing views expressed.

7.5.151 The DPP opposed a change to the burden of proof to place it on the prosecution with the defendant bearing only an evidential burden. The DPP considered that this ‘would be illogical ... [as] the defence have more information in respect of this issue than the prosecution. Further, it only becomes an issue once guilt has been established’.

7.5.152 On the other hand, Walvisch supported this amendment on the ground that ‘there seems little reason in principle to differentiate the insanity defence from other defences in this regard’. Further, Walvisch expressed the view that ‘it is arguable that requiring people to prove their impairment to a greater extent than they are required to prove other defences (such as self-defence or duress) constitutes discrimination on the grounds of disability’.

7.5.153 The Institute recognises that there are arguments that would support placing the burden of proof on the prosecution in cases where it is raised by the defence given that other defences (such as self-defence (s 46) and mistake (s 14, 14A, 14B)) contain elements that relate to the defendant’s state of mind at the time of the offence, and the prosecution still bears the onus of proof in these cases. However, the Institute considers that this is a controversial reform and

⁶⁶⁸ Law Commission of England and Wales (n 382) 176.

⁶⁶⁹ Bronitt and McSherry (n 370) 251.

⁶⁷⁰ Ibid 251–252. Similar comments were made by the Law Commission of England and Wales (n 382) 178.

⁶⁷¹ Law Commission of England and Wales (n 382) 181.

⁶⁷² Ibid 182.

should only be made if there is very strong justification for it. The Institute did not receive any submissions indicating that the current position is causing difficulties for defendants. Further, if the burden of proof changed, the standard of proof would necessarily change from on the balance of probabilities to beyond reasonable doubt, and this may create difficulties in respect of expert evidence. Accordingly, the Institute’s view is that the burden of proof should remain with the defence. This is consistent with the approach in other jurisdictions and the recommendations made by a clear majority of other law reform bodies.

Recommendation

36. The burden of proof in relation to the defence of mental or cognitive impairment should remain with the defence in cases where it is raised by the defence.

Raising the defence of insanity

7.5.154 As indicated at [7.3.27], the prosecution cannot raise the defence of insanity unless the defendant has put his or her state of mind in issue. In contrast, in other Australian jurisdictions, mental impairment may be raised by the prosecution, the defence and/or the court.⁶⁷³ Under the Commonwealth *Criminal Code* and legislation in the Australian Capital Territory, the Northern Territory, South Australia and Victoria, the prosecution may raise the defence.⁶⁷⁴ Similarly, the NSWLRC recommended that the defence of mental illness should be able to be raised by the court or the prosecution (with the permission of the court) if it is in the interests of justice.⁶⁷⁵ It is also noted that s 37 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) ‘requires an explanation as to the availability of the defence to be put to the jury if the question of mental illness “is raised”, regardless of whether it is embraced as a defence by the accused at trial’.⁶⁷⁶

7.5.155 The ability for the prosecution to raise the defence of insanity (absent the accused putting the state of mind in issue) is supported on the basis that the public interests of both fairness and community safety are better served when a person who has committed a serious offence by reason of a cognitive or mental health impairment is detained as a forensic patient to allow the person to receive treatment.⁶⁷⁷ This was recognised in *Falconer* by Deane and Dawson JJ, who observed that ‘nowadays it is often in the interests of the prosecution (or, at all events, the community) to raise the question of insanity, rather than in the interests of the accused.’⁶⁷⁸ The NSWLRC considered that there are very few cases where the absence of a prosecution power to raise the defence of mental impairment posed a difficulty in practice.⁶⁷⁹

⁶⁷³ *Criminal Code* (Cth) s 7.3(4) (prosecution may raise if the court gives leave); *Criminal Code* (ACT) s 28(6) (prosecution may raise if the court gives leave); *Criminal Code* (NT) s 43F(1) (may be raised by court, on application by prosecution, or on own initiative); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 22(1) (prosecution may raise if the court gives leave), s 22(2) (if admissible evidence raises the issue, judge must direct the jury to consider); *Criminal Law Consolidation Act 1935* (SA) s 269E(1)(b) (may be raised by prosecution, or by court on own initiative ‘in the interests of the proper administration of justice’).

⁶⁷⁴ See above n 673.

⁶⁷⁵ NSWLRC (2013) (n 56) 75 and Recommendation 3.3.

⁶⁷⁶ S Beckett, ‘Appearing for the Mentally Impaired: Not Guilty Mental Illness Conference to In-house Solicitors Legal Aid NSW’ (2018) <http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_papers_pd.aspx> 2.

⁶⁷⁷ NSWLRC (2013) (n 56) 69.

⁶⁷⁸ *R v Falconer* (1990) 171 CLR 30, 62.

⁶⁷⁹ NSWLRC (2013) (n 56) 75.

However, it considered that the prosecution should have such a power to ensure that the public interest is served in the appropriate case.⁶⁸⁰

7.5.156 The contrary view is that to allow the prosecution to raise the insanity defence is contrary to fundamental rights of the defendant given the indeterminate consequences that follow from a finding of not guilty by reason of insanity.⁶⁸¹ It is also inconsistent with ‘the interests of the defendant in retaining control of his or her defence’.⁶⁸² In addition, the NZLC commented on the significant stigma that attaches to the insanity defence.⁶⁸³ For these reasons, the NZLC recommended that the Crown should only be able to adduce evidence of insanity (with the leave of the court) where the defence has put his or her mental capacity for criminal intent in issue without raising the insanity defence.⁶⁸⁴

7.5.157 Accordingly, a fundamental issue in Tasmania is whether the Crown should be able to raise the defence of insanity contrary to the wishes of the defence. Feedback on this issue was sought in the Issues Paper:

Should the prosecution have the power to raise the defence of insanity against the wishes of the defendant?

Should the leave of the court be required for the prosecution to do this?

7.5.158 Three submissions to the Institute addressed these questions.

7.5.159 Both ForensiClinic and the DPP supported legislative imprimatur for the prosecution to raise the defence of insanity. ForensiClinic stated that this ‘may result in a more appropriate therapeutic outcome and associated risk reduction’. Similarly, the DPP focused on the protection of the community and fairness to the accused to allow insanity to be raised by the prosecution:

The prosecution would need to be able to establish an evidentiary basis on the facts of the case to raise the issue of insanity. It would be appropriate for the leave of the court to be required for the prosecution to do this.

If the prosecution has evidence that an accused may have a defence of insanity it is appropriate that it be raised. It may be that defence counsel, acting in the best interests of their client as permitted by s 38 of the *Criminal Justice (Mental Impairment) Act*, may choose not to explore or rely on the defence given the orders that may follow. The fact that an accused person does not wish to raise insanity, perhaps perceiving it is not in his best interests to do so, does not mean it should not be raised. It is in the public interest that the defence be raised; it is a matter of fairness to an accused and protection of the community.

As noted by the DPP, this is the position in the Australian Capital Territory, Northern Territory, Victoria and South Australia. It was also supported by the NSWLRC.

⁶⁸⁰ Ibid.

⁶⁸¹ NSWLRC (2013) (n 56) 74; NZLC (n 470) 59.

⁶⁸² NSWLRC (2013) (n 56) 75.

⁶⁸³ NZLC (n 470) 59.

⁶⁸⁴ Ibid 61.

7.5.160 On the other hand, Walvisch outlined the arguments both in favour and against allowing the prosecution to raise the defence against the wishes of the accused, and strongly argued that there are powerful reasons not to provide the prosecution with this power.

7.5.161 In Walvisch's submission, there were two main policy grounds that would support the view that the prosecution should be given such a power:

First, it can help to ensure that people who are not criminally responsible for their actions are not improperly punished. This is important both from the perspective of the individual (who only deserves to be punished if he or she has committed a blameworthy act) and society (which has an interest in ensuring that 'insane' people are not incorrectly labelled as criminals).

Secondly, it aims to protect the public, by ensuring that people who have committed 'criminal' acts and who meet the requirements of the insanity defence are subjected to the supervisory dispositions available in relation to mentally impaired offenders. In this regard, it is at least arguable that such people are potentially 'dangerous' to others, and should be monitored rather than set free.

Walvisch also set out a number of arguments that can be advanced against allowing the prosecution to raise the defence of insanity:

Foremost amongst these is the contention that, in a system which claims to respect the autonomy and dignity of its participants, an accused person should have the right to control his or her own defence.⁶⁸⁵

This is an issue that affects all people who are charged with offences, and who, by virtue of the *Pemble* principle, are denied the ability to conduct their own defence. However, it is a particular problem for offenders who suffer from mental illnesses, due to the discrimination and stereotyping often faced by such people:

In denying the mentally disabled personal autonomy in decision-making, it reinforces the stereotype that they are incapable of rational thought and the ability to look after their own interests [*R v Swain* [1991] 1 SCR 933].

In addition, the whole trial process may be distorted if the insanity defence is raised against the wishes of the accused. In particular:

- The accused may be placed in a position where inconsistent defences must be advanced;
- The accused's credibility may be undermined, potentially prejudicing the other defences he or she wishes to raise; and
- The jury may be left with the impression that, because of the mental illness, the accused is the 'type of person' who would have committed the offence. [reference omitted]

These last two matters are a particular problem due to the stigma that is attached to mental illness in our society. This factor was highlighted by the Canadian Supreme Court in *Swain*, with Chief Justice Lamer suggesting that the 'irrational fear of the

⁶⁸⁵ In support Walvisch referred to *Faretta v California*, 422 US 806, 834 (1975).

mentally ill in our society’ could result in an accused’s credibility being irreversibly damaged where the issue of insanity is raised [39].

In fact, it is arguable that this ‘irrational fear’ underlies the public protection aim of the current law. This aim is premised on the view that offenders who meet the requirements of the mental impairment defence are potentially dangerous, and need to be contained in the interests of public safety. Yet there is no empirical evidence that firmly establishes that offenders with mental illnesses are any more likely to reoffend, or to reoffend in a more serious way, than offenders without mental illnesses. To subject people with mental illnesses to a different legal outcome on account of an unproven and stereotyped view that they are ‘dangerous’ therefore appears discriminatory.

This is a particular problem given that, under the current scheme, an individual can be deprived of his or her liberty on a standard of proof which is less than the ordinary criminal standard. This is because it appears that the prosecution may only need to prove that the accused committed the physical act alleged beyond reasonable doubt, rather than all of the elements of the charged offence. If they can then prove, on the balance of probabilities, that the requirements of the insanity defence have been met, the result may be lengthy detention in a secure facility.

This concern is compounded by the possibility that the jury will return a compromise verdict of not guilty by reason of insanity where they are not convinced of the accused’s guilt beyond reasonable doubt, but are satisfied that the accused ‘is mentally ill and perhaps dangerous’. Furthermore, it is important to note that the consequences of a qualified acquittal may be more harmful to the accused than a conviction. He or she may ultimately be detained or subjected to supervision for a longer period than had he or she been found guilty of the offence. In addition, he or she must ‘live with the stigma of being held to be both a criminal and insane, and may face conditions worse than those obtaining in prison’.

7.5.162 Accordingly, in Walvisch’s view, these arguments seem ‘to far outweigh the policy goals which the suggested amendment seeks to achieve. Rather than being protected, the accused is denied the right to autonomy and dignity, and placed at risk of greater state intervention’. Further, it was argued that ‘[t]he aim of “public protection” seems to be based on a discriminatory view of the dangers posed by individuals with mental illnesses. Moreover, where there is a genuine need to protect the community from a truly dangerous person, civil commitment laws can be relied upon’. In this case, Walvisch argued that:

That simply leaves the problem of potentially convicting some people who are truly not blameworthy. This could largely be overcome by the use of prosecutorial discretion — the prosecution could decide not to proceed with charges against an individual who is believed to have a valid defence. Alternatively, the judge could direct an acquittal in such circumstances, perhaps accompanied by a recommendation that an investigation be undertaken into the possible need for civil commitment. While a few individuals may slip between the cracks of these approaches, and may be convicted despite the fact that they were not criminally responsible for their actions, the numbers are likely to be extremely limited. In light of this fact, there does not seem to be sufficient justification for allowing the insanity defence to be raised against the accused’s wishes.

Instead, a competent accused should be allowed to waive his or her right to raise the defence, just as he or she can waive other rights. This is the approach that has been taken in a number of cases in the United States, such as *Frendak*:

Because the defendant must bear the ultimate consequences of any decision, we conclude that if a defendant has acted intelligently and voluntarily, a trial court must defer to his or her decision to waive the insanity defense [408 A 2d 364, 378 (DC App Ct, 1979)].

7.5.163 Walvisch also gave consideration to the limits that should be placed on the power of the prosecution to raise the defence (if such a power were recognised in Tasmania). His view was that ‘the ability to do so should be heavily circumscribed’. Accordingly:

the trial judge should not be required to give leave insanity whenever there is sufficient evidence to raise the defence. Instead, the judge should be given a broad discretion to focus on whether the interests of justice require the prosecution to raise the matter, taking into account factors such as:

- The amount of evidence addressing the accused’s impairment;
- The extent to which that evidence raises a question about the accused’s criminal responsibility for his or her actions;
- The likelihood that the accused committed the criminal act in question;
- The nature and seriousness of the offence;
- The extent to which the accused poses a threat to society; and
- The prejudice that will be caused to the accused by raising the defence.⁶⁸⁶

Such an approach has the benefit of ensuring that the defence will only be raised against the accused’s will where it is seen to be absolutely necessary, rather than potentially being addressed in every case where there is some evidence of mental illness.

7.5.164 As noted above, the power of the prosecution to raise the defence of insanity/mental impairment exists in statute in many jurisdictions. While there is no equivalent statutory provision in Tasmania, the prosecution can raise the defence of insanity if the defendant puts their mental state in issue.⁶⁸⁷ As explained, this includes cases where the defendant raises non-insane automatism or absence of intent. This would seem to reduce the need to make specific provision for the Crown to have the power to raise insanity. As the NSWLRC observed, there may only be a ‘few cases where the absence of a prosecution power to raise [the defence] arises as a practical problem’ given a defendant’s mental state will frequently be in issue.⁶⁸⁸ However, it observed that ‘they may be some cases where the defence wishes to avoid raising the issue of the defendant’s mental state ... but where the prosecution believes it to be in the public interest to raise the defence’.⁶⁸⁹ The issue is whether it is appropriate that the prosecution be given the power to raise the defence in these circumstances, and, as noted by Walvisch, there are competing arguments that involve balancing the interests of the defendant in maintaining control of their defence, particularly given the indefinite nature of forensic orders, and the

⁶⁸⁶ Referring to *R v Simpson* (1977) 16 OR (2d) 129; *R v Saxell* (1980) 33 OR (2d) 78; *R v Swain* [1991] 1 SCR 933, [219]–[222] (L’Heureux-Dubé J).

⁶⁸⁷ See [7.3.26]–[7.3.27].

⁶⁸⁸ NSWLRC (2013) (n 56) 75.

⁶⁸⁹ *Ibid* 73.

public interest in community protection by allowing the defendant to be detained and receive treatment.⁶⁹⁰

7.5.165 After considering these complex issues, the Institute’s view is that the prosecution should have power to raise the defence of insanity with the leave of the court. As recognised by the NSWLRC, there may be cases where the court determines that it is in the public interest for the prosecution to raise the defence when the defendant wishes to avoid raising his or her mental state.⁶⁹¹ As indicted, this reflects the approach under the Model Criminal Code, in Victoria, South Australia, Northern Territory and the Australian Capital Territory. In such cases, the onus of proof should rest with the prosecution.⁶⁹² A model for reform in this regard can be found in Victoria, where the *Crimes (Mental Impairment and Unfitness to be tried) Act 1997* (Vic) provides that:

21(1) A person is presumed not to have been suffering from a mental impairment having the effect referred to in section 20(1) until the contrary is proved.

...

(3) If the defence of mental impairment is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption.

22(1) The question of mental impairment may be raised at any time during a trial by the defence or, with the leave of the trial judge, by the prosecution.

Recommendation

37. The prosecution should have the power to raise the defence of mental or cognitive impairment against the wishes of the defendant with the leave of the court. In this case, the onus of proof should be on the prosecution and the standard of proof should be the balance of probabilities.

A ‘consent defence’

7.5.166 Unlike the criminal law generally, where the prosecution can accept a plea by a defendant, currently in Tasmania it is not possible for the defendant to enter a plea of not guilty by reason of insanity. In the Supreme Court a verdict of not guilty by reason of insanity must be delivered by a jury, and in the Magistrates Court it must be given by a magistrate. In the letter to the TLRI setting out the Terms of Reference, the then Attorney-General indicated that the DPP had requested that consideration be given to reforming the law in relation to the criminal procedure relating to the defence of insanity and to legislating to remove the necessity for a jury to determine the question of insanity in certain circumstances. Similarly, the NSWLRC recommended that if the prosecution and defence agree that evidence in a case establishes the defence of mental health or cognitive impairment, then the court must enter a verdict of not criminally responsible by reason of mental health or cognitive impairment if satisfied that the defence is established on the evidence.⁶⁹³ This has been described as a defence

⁶⁹⁰ Ibid 75.

⁶⁹¹ Ibid 73.

⁶⁹² See *Criminal Code* (Cth) s 7.3(3); *Criminal Code* (ACT) s 28(5)–(6); *Criminal Code* (NT) s 43D(2); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 21(3).

⁶⁹³ NSWLRC (2013) (n 56) Recommendation 3.4.

of mental illness by ‘consent’.⁶⁹⁴ Similarly, the Scottish Law Commission and the Law Commission of England and Wales recommended that there should be provision for the verdict of insanity by consent.⁶⁹⁵ The absence of a ‘consent defence’ in Tasmania contrasts with the position in Victoria, Western Australia, South Australia, the Australian Capital Territory and the Northern Territory, as well as in New Zealand.⁶⁹⁶

7.5.167 Reasons for allowing a consent defence are that:

- (a) It ‘avoid[s] farcical trials where insanity is not in issue’.⁶⁹⁷ It avoids the jury process becoming ‘artificial’ or a ‘formality’.⁶⁹⁸ This may result in a loss of faith in the jury system as the jury is essentially confirming the view of the defence and prosecution.⁶⁹⁹
- (b) It saves court time and consequently money.⁷⁰⁰
- (c) It reduces stress on the defendant (who may still be ill at the time of the trial) and witnesses including victims and family members’ in cases where this is the obvious result.⁷⁰¹
- (d) In the case of an accused who is unfit to stand trial in Tasmania, it is possible to determine this issue by consent but it is not possible to resolve the question of criminal responsibility by consent.

7.5.168 The VLRC noted that where the prosecution and defence agree that the evidence establishes the defence of mental impairment, ‘it is unlikely that the jury will arrive at a different conclusion.’⁷⁰²

7.5.169 The importance of the role of the jury in representing the community in determining criminal responsibility has been identified as the predominant reason provided for not allowing a consent defence of insanity.⁷⁰³ On this basis, the VLRC changed its view from prior recommendations it had made and recommended that the law be changed to require a jury to determine criminal responsibility in all criminal trials in higher courts under the Act.⁷⁰⁴ The VLRC observed that the jury protects the interests of the community by ensuring the sound administration of justice, and that this is particularly important in these types of matters ‘which often involve the occurrence of a serious event that has profound and lasting consequences for

⁶⁹⁴ Ibid 76.

⁶⁹⁵ Scottish Law Commission (n 205) 64–65; Law Commission of England and Wales (n 382).

⁶⁹⁶ *Crimes Act 1900* (ACT) s 321(2)(b); *Criminal Law Consolidation Act 1935* (SA) ss 269F(A)(5), 269G(B)(5); *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 21(4); *Criminal Procedure Act 2004* (WA) s 93(1); *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) s 20(2).

⁶⁹⁷ LRCWA (n 416) 235 quoting Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Final Report (2007) 47.

⁶⁹⁸ VLRC (n 22) 232.

⁶⁹⁹ VLRC (n 534) 229 referred to in VLRC (n 24) 103.

⁷⁰⁰ Law Commission of England and Wales (n 382) 76; LRCWA (n 416) 235 quoting Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Final Report (2007) 47.

⁷⁰¹ LRCWA (n 416) 235 quoting Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Final Report (2007) 47; Law Commission of England and Wales (n 382) 164.

⁷⁰² VLRC (n 22) 233.

⁷⁰³ Ibid.

⁷⁰⁴ Ibid 234 Recommendation 52.

the accused, victims and the community'.⁷⁰⁵ It allows for public examination of the issues 'in a way that is comprehensible to the accused, victims and the community'. This has an educative function for the public.⁷⁰⁶ It also protects the accused by requiring their criminal responsibility to be determined by independent members of the community. In addition, 'the determination of criminal responsibility by a jury provides a greater level of acknowledgement to victims and their families of the harm that they have experienced'.⁷⁰⁷

7.5.170 Other reasons in favour of retaining the jury are that the trial process operates as a check and a safeguard not just by the involvement of the community but also in that the scrutiny inherent in the trial process may promote caution in the formulation of opinion by expert witnesses. Further, expert opinion is only as good as the information that is provided to the expert as the basis for the opinions expressed, and the factual matrix that may emerge at trial may differ from the facts that appear in the Crown papers. This means that experts may refine their opinions contained in the pre-trial reports to reflect the change in facts that emerge at trial. This caution and refinement may be lost if the trial process is replaced by a 'defence consent' process.

7.5.171 On the other hand, it is noted that the DPP routinely makes decisions about criminal responsibility. A primary function of the DPP is to make decisions about whether or not to institute proceedings and this involves decisions in relation to the charges laid (for example, whether an accused is charged with attempted murder or causing grievous bodily harm), the acceptance of pleas of guilty to particular charges and/or in relation to decisions not to proceed with a matter (such as where the prosecution accepts that a defence of self-defence is made out on the facts).⁷⁰⁸ In making these decisions, fairness is the overarching principle and it may be questioned as to why decisions in relation to acceptance of the insanity defence should be treated any differently.

7.5.172 In the Issues Paper, the Institute sought feedback on whether a consent defence should be permitted:

Should there be legislative change to allow the prosecution and defence to agree that a defendant is not guilty by reason of insanity?

If so, are there any protections in the interests of the defendant that need to be put in place?

7.5.173 There were three submissions that addressed this issue and all supported allowing the prosecution and defence to agree that a defendant is not guilty by reason of insanity.⁷⁰⁹

7.5.174 The DPP provided detailed consideration of the issue, highlighting the problems that potentially arise when a trial is conducted in circumstances where both parties agree that the defendant satisfies the requirements for a finding of not guilty on the grounds of insanity:

⁷⁰⁵ Ibid 233.

⁷⁰⁶ Ibid.

⁷⁰⁷ Ibid 234.

⁷⁰⁸ For more information in relation to the role of the Director of Public Prosecutions see <http://www.dpp.tas.gov.au/about_us>.

⁷⁰⁹ ForensiClinc, DPP and DPFEM.

In recent years this Office has conducted a significant number of trials where both the prosecution and defence have agreed that the accused was insane. Our Office only reaches such a position after having had the accused independently assessed and receiving independent psychiatric evidence that the accused is insane.

These trials have been considerably traumatic for the accused (who is generally mentally very unwell), the victim(s), their families and witnesses. Juries find it difficult to understand why they are there because, as a matter of practicality, there is only one possible result with Crown counsel, the defence counsel and the judge telling the jury although it is a matter for them there is only one appropriate verdict. It turns the trial into a farce. Further, the cost involved in these unnecessary hearings is a relevant, albeit minor, consideration.

In circumstances where the independent evidence suggests the accused is not insane, the Crown strongly disputes any assertion to the contrary.

If the Crown, having received independent advice, was able to accept a plea of not guilty on the grounds of insanity, the above problem would be removed where it is not accepted the trial would take place in the usual manner.

The argument that these matters should be determined by a jury, as representatives of the community, is erroneous:

- In circumstances where experts give unchallenged evidence that the defendant is not guilty by reason of insanity but the jury makes an alternative finding, the matter would inevitably be successfully appealed on the grounds the verdict was unsafe and unsatisfactory, see *Walsh v R* (1993) 22 Tas R 368. In *Pennicott v State of Tasmania* CCA 1183 of 2013, the Court of Criminal Appeal quashed the appellant's convictions and substituted verdicts of not guilty by insanity, the court published reasons to the parties only.
- At a plea hearing the prosecution must state the facts. The facts will inevitably include information as to the medical evidence relied upon to support the plea. The prosecution will be accountable in open court for the decision.
- The Director of Public Prosecutions makes decisions which affect the criminal liability and responsibility of accused persons routinely, for example, when determining whether to charge with manslaughter or murder, or whether to accept a plea to a lesser charge.

Thus the law routinely entrusts an independent, statutorily appointed person, to make such decisions. There is no reason to depart from this in circumstances where prosecution and defence agree that a defendant is not guilty by reason of insanity.

7.5.175 DPFEM also agreed that a consent verdict should be available. Its view was that this would result in a saving of court time and money in avoiding trials if both the prosecution and defence agree. DPFEM also indicated that removing the need for a trial may protect a person with mental health impairments from the trauma of the trial process. DPFEM considered that a defence of mental impairment by consent is an extension of the power of the Prosecution Services and the Office of the DPP to discontinue matters according to the balance of public interest and chance of success determinations.

7.5.176 Although the Institute recognises the importance of the role of the jury in representing the community, the Institute agrees with the DPP, ForensicClinic and DPFEM that the

prosecution and the defence should be able to agree that the evidence establishing the defence of mental impairment. Contrary to the current position in Tasmania, this is possible in Victoria, Western Australia, South Australia, the Australian Capital Territory, the Northern Territory and in New Zealand. It avoids unnecessary trials that cause trauma to victims and families, and to individuals who are mentally unwell, and reflects the responsibility placed in the Office of the DPP and Prosecution Services to represent the public interest. It also consistent the power of the court contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 19 to dispense with an investigation into the defendant’s fitness to stand trial if the prosecution and defendant agree.

7.5.177 However, the Institute’s view is that safeguards are required in this process and that the ‘consent defence’ should operate with judicial oversight. Accordingly, as with the view expressed by the NSWLRC, the Institute’s view is that the court should have the power to review the evidence in order to be satisfied that it establishes the defence of mental or cognitive impairment in a case where the prosecution and defence agree that the proposed evidence establishes the defence. If the court is satisfied that the evidence establishes the defence, then the judge will enter a verdict of not guilty by reason of mental or cognitive impairment. If the trial judge is not satisfied, then the case must proceed to a jury trial.⁷¹⁰ The court should have access to the expert reports as well as the power to require oral evidence to be given by the expert.

Recommendation

38. The court should have the power to dispense with a trial if the prosecution and defence agree that evidence establishes the defence of mental or cognitive impairment. However, safeguards are required and the court should have the power to review the evidence (including hearing from expert witnesses) in order to be satisfied that the evidence establishes the defence of mental or cognitive impairment in a case where the prosecution and defence agree that the proposed evidence establishes the defence.

The operation of s 16 in the Magistrates Court

7.5.178 There are two matters that require attention in relation to the operation of the proposed defence of mental or cognitive impairment in the Magistrates Court:

- (1) The introduction of a simplified procedure (such as recommended in this Report for fitness to stand trial).
- (2) The application of the new defence of mental or cognitive impairment to summary offences.

7.5.179 Simplified procedure. A further issue that should be considered is the operation of the recommended power to discharge in the Magistrates Court for the new defence of mental or cognitive impairment (or the defence of insanity if this is retained). In Part 5, the Institute recommended that magistrates be provided with a power to discharge people without making a determination of their fitness to stand trial or their criminal responsibility in some circumstances (Recommendations 17 and 18). This was not raised in the Issues Paper in relation to the defence of insanity. However, similar issues arise in relation to the complexity and

⁷¹⁰ See NSWLRC (2013) (n 56) 77.

expense of raising the defence of insanity for relatively minor matters in the Magistrates Court. It is noted that in Queensland the discharge powers of the court operate in relation to both fitness and insanity. Accordingly, the Institute suggests that consideration be given to allowing magistrates to discharge for the defence as well as for fitness matters and that discussions with stakeholders take place during the implementation of Recommendations 17 and 18.

7.5.180 Summary offences. The current position in the Magistrates Court is that the *Criminal Code* (Tas) s 16 applies to summary offences where there is a parallel offence.⁷¹¹ This includes assault, assaulting a police officer, indecent assault and unlawfully injuring property.⁷¹² However, common law principles of criminal responsibility (including the defence of insanity) apply to other summary offences.⁷¹³ While this may not have created any particular difficulty when the common law and the *Code* provision in relation to insanity were very similar, it is the Institute's view that the new defence of mental or cognitive impairment should apply to all offences in Tasmania — indictable and summary offences. Accordingly, the Institute recommends that the new defence of mental or cognitive impairment should apply to indictable and summary offences.

7.5.181 The Institute notes that this problem extends further than the *Criminal Code* (Tas) s 16 and exists in relation to all principles of criminal responsibility (including defences) that operate in Tasmania. Previously, the Institute has highlighted the complexity and inconsistency created by the operation of fundamentally different rules in its consideration of evidence of intoxication used to deny criminal responsibility.⁷¹⁴ It is the Institute's view that this requires further examination for all principles of criminal responsibility for summary offences without *Code* parallels in Tasmania and suggests that this matter could be pursued as a separate project.

Recommendation

39. The new defence of mental or cognitive impairment introduced to amend the current defence of insanity contained in the *Criminal Code* (Tas) s 16 should apply to indictable and summary offences.

⁷¹¹ *Acts Interpretation Act 1931* (Tas) s 36; *Criminal Code Act* (Tas) s 4(3).

⁷¹² Blackwood and Warner (n 392) vol 1.

⁷¹³ *Criminal Code Act* (Tas) s 4(3); *Gow v Davies* [1992] 1 Tas R 1.

⁷¹⁴ See TLRI, *Intoxication and Criminal Responsibility* (2006).

Part 8

Disposition: Forensic and Treatment Orders

8.1 Introduction

8.1.1 This Part examines the orders that can be made under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) following a finding that an individual is not guilty by reason of insanity (either at a trial or a special hearing) or if a finding cannot be made that the defendant is not guilty of an offence (at a special hearing).

8.1.2 The Terms of Reference ask the TLRI to address the following matters relevant to disposition:

- (a) if insane delusions arising from mental illness form the basis of self-defence, whether defendants relying on insane delusions should be liable to supervision under the *Criminal Justice (Mental Impairment) Act 1999* (Tas); and
- (b) if insane delusions arising from mental illness form the basis of self-defence, whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) requires amendment in relation to treatment options for such defendants.

Based on the Institute's recommendation that insane delusions arising from mental illness should only be used in relation to a defence under s 16 of the *Criminal Code* (Tas) and not for the basis of self-defence, there is no need to address these matters further. Individuals who consider that they need to use force against another person based on a delusion will be able to rely on the defence of mental or cognitive impairment, and if found not guilty on that basis, the court will be able to impose any of the orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

8.1.3 The Terms of Reference also require the TLRI to consider the just and effective operation of the *Criminal Justice (Mental Impairment) Act 1999* (Tas), in particular the operation of Part 4 of the Act, including in relation to the discharge and review of forensic and treatment orders and whether there is a need for 'step-down' options. In light of these considerations, this Part also sets out recommendations for reform that will abolish the current indefinite detention scheme for forensic orders and replace it with a new model with the following features:

- (1) a limiting term set by the court following a finding of not guilty by reason of mental or cognitive impairment or where a finding of cannot be made that the defendant is not guilty.
- (2) The limiting term should be set on the basis of the hypothetical sentence model. This means that the court must nominate a limiting term, which would be the court's best

estimate of the length of the sentence that would have been imposed had the person been found guilty at a normal trial.

- (3) A limiting term should not operate as an absolute limit of the duration of an order. The DPP can make an application to the Supreme Court prior to the expiration of the limiting term for an extension of a restriction order or a supervision order. The DPP can also apply for a restriction order to be replaced with a supervision order instead of an extension of the restriction order.
- (4) A forensic patient should be able to apply to the Supreme Court for a discharge of a restriction order or the variation or revocation of a supervision order prior to the expiry of the limiting term.
- (5) The test for making, varying or removing orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) should be changed from ‘likely to endanger’ to refer to whether the defendant does, or would if released, pose an unacceptable risk of causing physical or psychological harm to a person or persons generally.
- (6) The test for making, varying or removing orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1) should be amended to require the Mental Health Tribunal and the court to have regard to the person’s recovery or progress in terms of treatment progression and personal improvement in making a decision to discharge a restriction order, or vary or revoke a supervision order.

8.2 Consequences of findings under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)

Orders available under the Criminal Justice (Mental Impairment) Act 1999 (Tas)

8.2.1 Under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), there are five orders that a court can make if a defendant is found not guilty of the offence on the ground of insanity or if a finding cannot be made that the defendant is not guilty. These are to impose:

- (a) a restriction order;
- (b) release the defendant and make a supervision order;
- (c) a treatment order;
- (d) a conditional release order; or
- (e) an unconditional release order.⁷¹⁵

8.2.2 As noted at [2.3.6], under the *Sentencing Act 1997* (Tas) s 75, a court may also impose a restriction, supervision or treatment order on a person found guilty, if the court is satisfied that the person appears to be suffering from a mental illness that requires treatment.⁷¹⁶

⁷¹⁵ *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(2), 21(1).

⁷¹⁶ *Sentencing Act 1997* (Tas) s 75.

8.2.3 In any case, only the Supreme Court is able to make a restriction order or a supervision order, and so, if a magistrate considers that either of these orders are appropriate, the matter must be referred to the Supreme Court.⁷¹⁷ Restriction and supervision orders are classified as forensic orders.⁷¹⁸

Table 8.1: Explanation of orders available under *Criminal Justice (Mental Impairment) Act 1999 (Tas)*

Order	Details of orders	Time limit for order	Consequences of breach
Restriction order	This is an order requiring the person to be admitted to and detained in a secure mental health unit until the order is discharged by the Supreme Court. ⁷¹⁹ The Wilfred Lopes Centre is designated secure mental health facility in Tasmania. It is a 35 bed facility that is situated near Risdon Prison. It is a health owned facility managed by the Department of Health and Human Services. ⁷²⁰	No limit required but subject to annual review by Mental Health Tribunal and the option to apply to Supreme Court for discharge of the order after 2 years. ⁷²¹	N/A
Supervision order	This is an order releasing the person under the supervision of the Chief Forensic Psychiatrist and any such conditions as the court considers appropriate. ⁷²² Conditions may include requiring the person to: <ul style="list-style-type: none"> • Take medication • Submit to specified mental treatment • Comply with direction given by the Chief Forensic Psychiatrist around supervision and treatment.⁷²³ 	No limit required but subject to annual review by the Mental Health Tribunal and the option to apply to the Supreme Court for variation or revocation of the supervision order. ⁷²⁴	May be apprehended if, a prescribed person believes on reasonable grounds if there is a breach or a likely breach of the supervision order or a serious deterioration of the person's mental health; and as a result, there is risk that person will harm themselves or another person. ⁷²⁵ Person must be taken to a secure mental health unit or an approved hospital. The person can be detained for: <ol style="list-style-type: none"> (a) A period not exceeding 24 hours; and (b) If the Chief Forensic Psychiatrist authorises it, for

⁷¹⁷ *Criminal Justice (Mental Impairment) Act 1999 (Tas)* ss 18(2), 21(2); *Sentencing Act 1997 (Tas)* s 75(3).

⁷¹⁸ *Criminal Justice (Mental Impairment) Act 1999 (Tas)* s 3.

⁷¹⁹ *Ibid* s 24.

⁷²⁰ For more information about the Wilfred Lopes Centre, see Department of Health and Human Services, <http://www.dhhs.tas.gov.au/service_information/services_files/mental_health_services/forensic_mental_health_service/wilfred_lopes_centre>.

⁷²¹ *Criminal Justice (Mental Impairment) Act 1999 (Tas)* ss 26(1), 37(1).

⁷²² *Ibid* s 29A(1).

⁷²³ *Sentencing Act 1997 (Tas)* s 75; *Criminal Justice (Mental Impairment) Act 1999 (Tas)* s 29A(2).

⁷²⁴ *Criminal Justice (Mental Impairment) Act 1999 (Tas)* ss 30(1), 37(1).

⁷²⁵ *Ibid* s 31.

Order	Details of orders	Time limit for order	Consequences of breach
			<p>one further period not exceeding 72 hours; and</p> <p>(c) If the Mental Health Tribunal authorises it, for one or more further periods each of a length to be determined by that Tribunal.⁷²⁶</p> <p>A person detained can also be detained on authorisation of a member of the MHT until the determination of an application to the MHT for further detention ((c) above).⁷²⁷</p> <p>A person can also be detained until the Supreme Court has made a determination if an application has been made to vary or revoke the supervision order.⁷²⁸</p>
Treatment order	<p>A treatment order has the same meaning as a treatment order made under the <i>Mental Health Act 2013</i> (Tas).</p> <p>This allows a person to be given treatment without the person's informed consent.</p> <p>It may require a person to be given specified treatment, require a person to be treated at a particular place, require a person to be admitted to and detained an approved facility.⁷²⁹</p>	Up to six months or until the order is discharged but can be renewed by the Mental Health Tribunal. ⁷³⁰	<p>May be involuntarily admitted to, and detained in, an approved facility if reasonable steps have been taken to obtain the person's compliance and if the person's treating medical practitioner is satisfied that the person has failed to comply despite the reasonable steps that have been taken to obtain the person's compliance; and the failure to comply has seriously harmed, or is likely to seriously harm, the person's health or safety or the safety of others, and the person's admission and detention is necessary to address the harm to the person's health or safety or the safety of others.⁷³¹</p> <p>The treating medical practitioner can make an application to the MHT to vary the treatment order.⁷³²</p> <p>There are also powers to admit a person to prevent possible harm (even if the person has complied) if the treatment order provides for a combination of treatment setting and for the admission and re-</p>

⁷²⁶ Ibid s 31(6).

⁷²⁷ Ibid s 31(7).

⁷²⁸ Ibid s 31(8).

⁷²⁹ *Mental Health Act 2013* (Tas) s 42.

⁷³⁰ Ibid ss 44, 48.

⁷³¹ Ibid s 47. The medical practitioner may also apply to the MHT to vary the order or authorise or seek authorisation for urgent circumstances treatment.

⁷³² *Mental Health Act 2013* (Tas) s 47(2).

Order	Details of orders	Time limit for order	Consequences of breach
			admission of the patient to those settings. ⁷³³ If a person is admitted due to failure to comply, the person can be detained either under the original treatment order until the order is varied so as to provide for a different treatment setting or if person's treatment order authorises admission to and if necessary, detention in an approved hospital, until the order ceases to have effect. ⁷³⁴
Conditional release	Release on such conditions that the court considers appropriate.	There is no limit to the time period allowed for the conditions other than those set out in the court order. ⁷³⁵	If a person breaches a condition of release, an application may be made to the court. The court may confirm the conditions as originally imposed; impose new conditions or may revoke the order and deal with the person for the offence in respect of which the order was made. ⁷³⁶ This does not involve the MHT.
Unconditional release	Release without conditions	n/a	n/a

8.2.4 As shown in Table 8.1, other than a restriction order, which authorises detention in a secure mental health facility, there are several means by which a court is able to direct a person to take part in treatment in the community. This may include seeing medical practitioners, the requirement to take medications, to attend treatment centres and to comply with residential directions. However, there are key differences in the orders:

- (a) A supervision order remains in force until discharged by the Supreme Court and the person is under the supervision and direction of the Chief Forensic Psychiatrist. This person is a forensic patient. On breach of the order, the person can be detained in a SMHU. While the decision in *Horacek*⁷³⁷ suggests that this detention is only intended to be for a relatively short time, the legislation allows the MHT to authorise extended periods of detention in a SMHU for people on a supervision order. Application can also be made to the Supreme Court to vary or discharge the order. The court can then discharge the supervision order and impose a restriction order or can vary or confirm the supervision order.

⁷³³ Ibid s 47A.

⁷³⁴ Ibid s 42(2).

⁷³⁵ It is noted that in two of the three conditional release orders imposed in the Supreme Court, the limits were 12 months and three years. However, in one case, it appears that an order was imposed where some conditions were indefinite. The person was released on condition that: (1) For a period of two years he attend such educational and other programs as directed by the Chief Forensic Psychiatrist or officer acting on his behalf; (2) He submit to testing for drug use as directed by the Chief Forensic Psychiatrist or his nominee; (3) He submit to medical, psychological or psychiatrist assessment or treatment as directed by the Chief Forensic Psychiatrist or his nominee, see *D*, 22 July 2008 (Slicer J).

⁷³⁶ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 21A.

⁷³⁷ *Secretary of the Department of Health and Human Services v Horacek* [2009] TASSC 65, [10].

- (b) The term of a treatment order is set by legislation and it remains in force for six months. However, it can be renewed by the MHT. A treatment order is not a forensic order. If a person does not comply with the order, there are provisions for the person to be detained in an approved hospital under the provisions of the *Mental Health Act 2013* (Tas). A treatment order made under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) is administered under the *Mental Health Act 2013* (Tas). This process does not involve the Supreme Court. However, there is power for a treatment order to be renewed if this is required.
- (c) A conditional release order remains in force for the period specified in the order. If a person does not comply with the order, there is power for the Supreme Court to confirm the order, impose new orders or revoke the order and impose another order on the person.⁷³⁸ This process does not involve the MHT and the conditional release order does not make a person subject to the *Mental Health Act 2013* (Tas).

Use of orders under the Criminal Justice (Mental Impairment) Act 1999 (Tas)

8.2.5 Table 8.2 sets out the use of these orders for individuals found not guilty by reason of insanity and/or unfit to stand trial and where a finding cannot be made that the defendant is not guilty in the Supreme Court during the period 2005–June 2018.

Table 8.2: Dispositions made in the Supreme Court 2005–June 2018 under *Criminal Justice (Mental Impairment) Act 1999* (Tas) for individuals found not guilty by reason of insanity and/or unfit to stand trial and where a finding cannot be made that the defendant is not guilty

Order	No of cases
Restriction	10
Supervision	26
Treatment	2
Conditional release	6
Unconditional release	2

8.2.6 Table 8.3 sets out the number of individuals who have been supervised by the Mental Health Tribunal in relation to a forensic order during the period 2005–June 2018. This includes people who were found not guilty by reason of insanity and/or not guilty following a special hearing, as well as those who had a restriction or supervision order imposed following a finding of guilt, in addition to a sentence of imprisonment.

Table 8.3: Individuals supervised by the Mental Health Tribunal in relation to forensic orders during the period 2005–June 2018

Order	No of cases
Restriction	16
Supervision	37

⁷³⁸ These enforcement provisions were introduced in 2016 by the *Crimes (Miscellaneous Amendments) Act 2016* (Tas) to address an oversight in the *Criminal Justice (Mental Impairment) Act 1999* (Tas). In the second reading speech, it was noted that ‘forensic orders are often not appropriate options for defendants who have an intellectual disability. In such cases, release of conditions may be appropriate orders for the court to consider but the absence of a mechanism to enforce the conditions imposed is problematic and means judicial officers rarely use the section’: Tasmania, *Parliamentary Debates*, House of Assembly, 24 May 2016, 3.20 pm (M Ferguson).

8.2.7 In the Magistrates Court, 12 people were identified who were found unfit to stand trial and where a finding could not be made that the defendant was not guilty. Order information was recorded for nine of those cases. In those cases, the following orders were imposed under s 18(2) of the *Criminal Justice (Mental Impairment) Act 1999* (Tas):

- (a) six were released on conditions;
- (b) three were released unconditionally.

The conditions imposed often referred to attendance at medical appointments and compliance with medical advice, for example, ‘attend appointments with your [general practitioner/Forensic Mental Health Services/Community Mental Health Services/Forensic Disability Service]’, ‘comply with your [Mental Health Plan/National Disability Insurance Scheme approved support plan]’, ‘take medications as prescribed’, and to abstain from using drugs and alcohol.

8.2.8 Of the nine defendants found not guilty by reason of insanity, order information was recorded for eight matters with the following orders imposed under s 21 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas):

- (a) one treatment order;
- (b) six conditional release orders;
- (c) one referral to the Supreme Court.

Again, the conditions imposed were similar to those imposed for defendants where a finding cannot be made that the defendant was not guilty following a special hearing (following a finding of unfitness).

Process for making orders

8.2.9 In making orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(2) or 21(1), the court is directed by s 34 to apply, where appropriate, the principle that restrictions on the defendant’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.⁷³⁹ In exercising its powers under Part 4, the court is also directed by s 35(1) to have regard to the following:

- (a) the nature of the defendant’s mental impairment or other condition or disability;
- (b) whether the defendant is, or would, if released, be likely to endanger another person or other persons generally;
- (c) whether there are adequate resources available for the treatment and support of the defendant in the community;
- (d) whether the defendant is likely to comply with the conditions of a supervision order; and
- (e) other matters that the court thinks relevant.⁷⁴⁰

⁷³⁹ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 34.

⁷⁴⁰ *Ibid* s 35(1). Although ss 18(2) and 21(1) do not appear in Part 4, it appears that the courts rely on this provision in making a determination of the appropriate order.

For the purposes of assisting a court to determine proceedings under Part 4, s 33 provides that the Attorney-General must provide the court with a report stating, so far as reasonably ascertainable, the views of the next of kin of the defendant and the victims, if any, of the defendant's conduct.⁷⁴¹ The court must not release a defendant under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(2) or 21(1) unless it has considered an expert report on the condition of the defendant and the possible effects of the proposed action on the behaviour of the defendant. The court also must have considered the report of the attitudes of victims, if any, and next of kin, and be satisfied that the defendant's next of kin and victims have been given reasonable notice of the proceedings.⁷⁴²

8.2.10 A review of cases indicates that factors such as the nature of the mental illness or intellectual disability, including its amenability to treatment, an individual's compliance with treatment and insight into their condition, the person's previous history of offending and/or violence are relevant to the exercise of the court's discretion. In cases where restriction orders were imposed, individuals typically had chronic mental illnesses that were difficult to treat and had a lack of insight into their condition and a history of non-compliance with treatment. In contrast, supervision orders, treatment orders and conditional release orders were typically imposed where the person had an awareness of their condition and no history of offending or violence.⁷⁴³ Similar conditions were imposed in most cases where supervision, treatment or conditional release orders were made and these involved submission to treatment, taking medication and residential restrictions. Factors that seemed to influence the making of a supervision order as opposed to a treatment order or a conditional release order were the need to ensure long-term compliance with treatment and the more limited powers that existed in the event of non-compliance with the conditions of the order in the case of treatment and supervision orders.

8.2.11 In the Supreme Court cases where the person was found not guilty, or not guilty by reason of insanity, and details of the mental illness or intellectual disability were known (n = 23), there were 15 cases involving mental illness (predominately schizophrenia), seven cases involving intellectual disability and one case involving cognitive impairment. In relation to the seven cases where the defendant was classified as having an intellectual disability, in two cases the person received a conditional release order and in five cases a supervision order. In relation to defendants with a mental illness, five defendants received a restriction order, six defendants received a supervision order, two defendants received a treatment order and two defendants were conditionally released.

Review of orders

8.2.12 During the term of restriction and supervision orders, there are provisions for regular review of the order by the MHT. Under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), forensic orders are to be reviewed by the MHT within 12 months after the order was

⁷⁴¹ Ibid s 33. Although ss 18(2) and 21(1) do not appear in Part 4, it appears that the courts rely on this provision in making a determination of the appropriate order.

⁷⁴² Ibid s 35(2). If the order is made under the *Sentencing Act 1997* (Tas), the court is not able to impose a restriction order unless it would have imposed a sentence of imprisonment, s 75(2).

⁷⁴³ It is noted these factors have been identified as being relevant to the making of a forensic order in NSW for offenders found not guilty by reason of mental illness, see NSWLRC (2013) (n 56) 159. See also I Freckelton, 'Applications for Release by Australians in Victoria Found Not Guilty of Offences of Violence by Reason of Mental Impairment' (2005) 28 *International Journal of Law and Psychiatry* 375.

made and at least once in each period of 12 months afterwards.⁷⁴⁴ At a review, the MHT can issue a certificate if it determines that a forensic order is no longer warranted or that the conditions of the order are not appropriate.⁷⁴⁵ The factors set out in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 34 and 35 in relation to making of orders are also relevant the review process conducted by the MHT.⁷⁴⁶ However, the legislation does not direct the MHT to take into account the view of next of kin or victims.⁷⁴⁷ The MHT must also have regard to the mental health service delivery principles set out in the *Mental Health Act 2013* (Tas). These principles are set out in sch 1 of the *Mental Health Act 2013* (Tas) and include respecting, observing and promoting the inherent rights, liberty, dignity, autonomy and self-respect of a person with mental illness, to interfere with and restrict the rights of persons with mental illness in the least restrictive way and to the least extent consistent with the protection of those persons, the protection of the public and the proper delivery of the relevant service.

8.2.13 If a certificate is issued, the defendant may apply immediately to the Supreme Court for a discharge, revocation or variation of the forensic order.⁷⁴⁸ The MHT can recommend that a restriction order be discharged and replaced with a supervision or treatment order or that the defendant be released conditionally or unconditionally.⁷⁴⁹ It can recommend that a supervision order be revoked and may recommend that a treatment order be made or that the defendant be released conditionally or unconditionally.⁷⁵⁰ A recommendation can also be made to vary the supervision order. The MHT can also recommend that a supervision order be revoked and that a restriction order be made in respect of the defendant.⁷⁵¹ Although the MHT can make recommendations, it does not have the power to discharge a restriction order or vary or revoke a supervision order. This power must be exercised by the Supreme Court.

Review of orders by the Mental Health Tribunal and the Supreme Court

8.2.14 Tables 8.4 and 8.5 set out the number of review hearings for restriction orders and supervision orders conducted in each year since 2012–2013.

Table 8.4: Forensic statistics, Restriction Order Hearings, Mental Health Tribunal

Year	Restriction order hearings	Restriction order hearings adjourned	Restriction order certificates issued
2012–13	8	1	Nil
2013–14	9	Nil	Nil
2014–15	11	2	Nil
2015–16	12	Nil	2
2016–17	9	Nil	2
2017–18	8	unknown	0

⁷⁴⁴ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(1).

⁷⁴⁵ *Ibid* s 37(3).

⁷⁴⁶ *Ibid* s 37(2).

⁷⁴⁷ Smith (n 28) 25.

⁷⁴⁸ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(3)(b).

⁷⁴⁹ *Ibid* s 37(4).

⁷⁵⁰ *Ibid* s 37(5).

⁷⁵¹ *Ibid* s 37(7).

Table 8.5: Forensic statistics, Supervision Order Hearings, Mental Health Tribunal

Year	Supervision order hearings	Supervision order hearings adjourned	Supervision order certificates issued
2012–13	26	4	9
2013–14	25	Nil	9
2014–15	21	3	10
2015–16	28	4	11
2016–17	31	2	13
2017–18	27	unknown	10

Source: MHT Annual Report

8.2.15 As shown in Tables 8.6 and 8.7, as at June 2018, there were nine people under the jurisdiction of the MHT who were subject to restriction orders and 26 who were subject to supervision orders. There are no people still subject to restriction orders who have a certificate issued. In one case, it is noted that there has not been a review hearing as the restriction order was made in 2018. In the period 2005–June 2018, there were six people in respect of whom the restriction order was discharged, and a supervision order was imposed and one person where the restriction order was discharged. In cases where a supervision order was imposed following the discharge of the restriction order, none of these individuals have had the supervision order revoked.

8.2.16 In relation to supervision orders, MHT data (set out in Table 8.7) show that of the 26 people currently subject to supervision orders, 18 do not and eight do have a certificate issued.⁷⁵² Of the eight people who have a certificate issued, one commenced an application to revoke with Legal Aid but withdrew the application, one sought advice but did not make an application through Legal Aid, four have applications in process and two people have not made any contact with Legal Aid.⁷⁵³

Table 8.6: People on restriction orders from 2005 to 30 June 2018, MHT data (both sentenced offenders and individuals found not guilty by reason of insanity or where a finding could not be made that the person was not guilty)

	No.	Min time on order	Max time on order	Median on order
People currently subject to order	9	134 days and continuing (4 months and 13 days)	5580 days and continuing (15 years 3 months and 11 days)	2409 days and continuing (6 years 7 months and 5 days)
Current certificate issued	0			
People who have had order discharged and supervision order imposed	6	929 days (2 years 6 months and 17 days)	6003 days (16 years 5 months and 7 days)	2819 days (7 years 8 months and 19 days)
People who have had restriction order discharged	1	1799 days (4 years 11 months and 3 days)	n/a	n/a

⁷⁵² It is noted that the MHT data identified one further person who has been subject to several supervision orders with the latest order suspended during a period of imprisonment.

⁷⁵³ Information provided by Sarah Piggott, Legal Aid Commission of Tasmania, email 3 July 2018.

Table 8.7: People on supervision orders from 2005 to 30 June 2018 (both sentenced offenders and individuals found not guilty by reason of insanity or where a finding could not be made that the person was not guilty)

	No.	Min time on order	Max time on order	Median on order
People currently subject to order	26	253 days and continuing (8 months and 9 days)	6543 days and continuing (17 years 10 months and 29 days)	2795 days and continuing (7 years 7 months and 26 days)
Current certificate issued	8	-	-	-
People who have had order revoked	16	636 days (1 year 8 months and 27 days)	4479 days (12 years 3 months and 5 days)	2552 days (6 years 11 months and 26 days)

Process to discharge or vary forensic orders

8.2.17 As noted in Table 8.1, restriction and supervision orders are indefinite orders, subject to the discharge/revocation of the orders by the Supreme Court. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) sets out the requirements for making an application, including the time at which an application can be made:

- (1) If the person has received a certificate from the MHT, a person may apply to the Supreme Court for the discharge, variation or revocation immediately on the issue of the certificate.⁷⁵⁴
- (2) In other cases, an application for discharge of a restriction order can be made after two years and then a subsequent application can be made every two years. There are no time constraints placed on the ability to initially apply for variation or revocation of a supervision order. However, if the Supreme Court has refused an application of a defendant for a variation or revocation of a supervision order, another application cannot be made for six months or such other period as the Supreme Court may direct.⁷⁵⁵

Discharge of orders in Tasmania

8.2.18 The MHT Annual Report 2015–2016, indicated that in this period, two certificates were issued and both forensic patients made an application to the Supreme Court to have the restriction orders revoked. In both cases, the Supreme Court revoked the restriction order and imposed a supervision order.⁷⁵⁶ In the same period, the MHT issued 11 certificates for supervision orders. As noted above, there are eight people who are being supervised under a supervision order who have a current certificate and four who have an application under way with the Legal Aid Commission to discharge the order. The MHT reported that in 2017–2018, 10 certificates were issued to patients on supervision orders and two patients made an application to the Supreme Court — both applications were successful.⁷⁵⁷ In the same period, there were no certificates issued to forensic patients on restriction orders.⁷⁵⁸

⁷⁵⁴ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(3).

⁷⁵⁵ *Ibid* 30(3).

⁷⁵⁶ Mental Health Tribunal (Tasmania), *Annual Report 2015–16* (2016) 18.

⁷⁵⁷ Mental Health Tribunal (Tasmania), *Annual Report 2017–18* (2018) 31.

⁷⁵⁸ *Ibid*.

8.2.19 In a review of forensic orders conducted by Smith, it was reported that in 2010 there had been 64 reviews undertaken since February 2006. From these reviews, a total of 25 certificates had been issued. Those 25 certificates related to 15 people, four in relation to restriction orders and 11 in relation to supervision orders.⁷⁵⁹ It was also reported that only four people had applied successfully for a discharge from a forensic order since 2003 and these were all supervision orders.⁷⁶⁰ However, data provided by the Legal Aid Commission of Tasmania indicate that from 2010 to 2018 (see Table 8.8), there have been five applications made to discharge restriction orders and all of these were successful (with the restrictions being replaced by supervision orders).

8.2.20 Data provided by the Legal Aid Commission of Tasmania also show that since 2010, 13 applications were made to revoke supervision orders. In relation to these applications, there were three that resulted in the orders being revoked and four that resulted in revoked supervision orders being replaced by conditional orders. In relation to the unsuccessful applications, one had the conditions of the supervision order varied, three have a new application on foot, one person withdrew the application, one has a new application on foot and one is ongoing.

Table 8.8: Applications undertaken by Legal Aid to revoke or discharge supervision and restriction orders, 2010–June 2018

Application to Revoke/Discharge	Granted	Not granted	Outcome
Supervision Orders			
13	4		Conditional orders made, 12–24 mths
	3		Revoked
		1	SO varied
		3	New application on foot
		1	Client withdrew
		1	Ongoing
Restriction Orders			
5	5		Supervision order made in substitution

8.2.21 MHT data indicate that from 2005 to 2018, seven people had their restriction orders discharged. In six of these cases, a supervision order was imposed, and all these people remain subject to the supervision order. Current certificates have been issued for two of these six people. As noted, no one is subject to restriction orders who has a current certificate issued from the MHT. MHT data indicate that there were 16 supervision orders that were revoked in this period. As noted, there are eight people still subject to supervision orders who have a current certificate from the MHT and 18 who do not. Of those with certificates, there are four people who currently have an application to revoke the supervision order ongoing with the Legal Aid Commission of Tasmania. The fact that a number of people on restriction orders have had their orders discharged (unlike Smith's earlier findings where no restriction orders were discharged despite having certificates issued) and that there have been a number of supervision orders revoked, suggests that for those with current certificates, there has been more success in having orders discharged/revoked by the Supreme Court. However, this does not mean that there are no remaining difficulties in the process for some people or that the statutory test for discharge does not require reform.

⁷⁵⁹ Smith (n 28) 22.

⁷⁶⁰ Ibid 23.

Factors relevant to the discharge or revocation of orders

8.2.22 The factors set out at [8.2.9] in relation to making of orders are also relevant to the discharge of a restriction order and the variation or revocation of a supervision order by the Supreme Court.⁷⁶¹ In making a decision to impose an order, or vary or discharge an order, the relevant legislative sections involve the exercise of judicial discretion as they require a value judgment to be made.⁷⁶² In *CJS v Tasmania*,⁷⁶³ the Court of Criminal Appeal considered the interaction of the principle that ‘where appropriate, restrictions on the defendant’s freedom and personal autonomy should be kept to a minimum consistent with the safety of the community’ contained in *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 34 with the matters set out in 35(1). The Court stated that,

if a court, by reference to the matters set out in s 35(1) considers it is not appropriate to apply that principle, for example it concludes by reference to the s 35(1) factors that a less restrictive order is not consistent with the safety of the community, then it is entitled to make an order disregarding the first part of the principle.⁷⁶⁴

This weighs the balance in favour of community safety at the expense of the minimal restriction on the defendant’s freedom and autonomy. Similarly, in *Secretary of the Department of Health and Human Services v Horacek*,⁷⁶⁵ the Court of Criminal Appeal stated that ‘the issue of the respondent’s freedom and personal autonomy is not one which should override all else. It is an issue to be considered “where appropriate” and in the context of community safety. It is also to be considered in the context of the factors identified in s 35’.⁷⁶⁶

8.2.23 A key factor identified in *CJS v Tasmania*⁷⁶⁷ is the need to assess the risk that the defendant poses to other people. In making an assessment of the likelihood of the person being a danger to others (as required by *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b)), the view was expressed that the court is required to do more than simply approach the issue on the basis that ‘the greater the degree of likelihood of danger found, the less likely a court would be to order revocation’.⁷⁶⁸ Instead, the Court has to make a finding, on the balance of probabilities, whether or not a state of affairs is ‘likely’.⁷⁶⁹ The Court noted that different interpretations of ‘likely’ include that there is a ‘real or substantial chance or possibility’⁷⁷⁰ or that something is ‘more likely than not’.⁷⁷¹ However, the precise meaning of ‘likely’ was not resolved with the Court of Criminal Appeal indicating that in that case, the primary judge ‘was

⁷⁶¹ See *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 33–35.

⁷⁶² *NOM v DPP & Ors* [2012] VSCA 198, [47].

⁷⁶³ [2008] TASSC 85.

⁷⁶⁴ *Ibid* [25] (Tennent J).

⁷⁶⁵ [2009] TASSC 65.

⁷⁶⁶ *Ibid* [75] (Tennent J).

⁷⁶⁷ [2008] TASSC 85.

⁷⁶⁸ *Ibid* [74], [75].

⁷⁶⁹ *Ibid* [75] (Tennent J) applying *Percy* (1998) 104 A Crim R 29.

⁷⁷⁰ *Ibid* [76] (Tennent J) citing *Bouhey v R* (1986) 161 CLR 10; *Tillmanns Butcheries Pty Ltd v Australian Meat Industries Employees’ Union* (1979) 42 FLR 331.

⁷⁷¹ *Ibid* [77] (Tennent J) citing *Attorney-General (NSW) v Winters* (2007) 176 A Crim R 249.

entitled to be satisfied that there was, at least, a real chance or possibility of the appellant again becoming a danger to members of the community'.⁷⁷²

8.2.24 The Court also considered the meaning of 'freedom and personal autonomy' and examined whether this encompasses restrictions arising from the way in which the order could be revoked or varied (for example if the order had to be revoked by the Supreme Court or lapsed through the passing of time).⁷⁷³ It was held that it does not extend to the difficulties, 'in practical terms, for the person to make an attempt to be relieved of some or all of the consequences of the order'.⁷⁷⁴ This means that the indefinite nature of the supervision order compared to the finite nature of a treatment order is not considered relevant to an assessment of the restrictions that either order may place on a defendant's freedom and personal autonomy. Instead, 'freedom and personal autonomy' mean the 'ability to move freely and function within the community, and to be self-regulatory and self-sufficient as far as possible, in all matters'.⁷⁷⁵

8.2.25 In making decisions in relation to the revocation of orders, the Supreme Court has been particularly concerned about the powers that exist under orders in the event that the person is non-compliant with their treatment regime. In cases where the Supreme Court refused to revoke a supervision order and replace it with a treatment order, the applicants had long-standing mental illnesses requiring ongoing medication to manage the illnesses. The concern was expressed that, while they did not present a risk to the community when appropriately treated, there was a risk of harm to others if the medication regimes were not complied with. Accordingly, the court considered that supervision orders were required (rather than treatment orders) to ensure compliance with medication treatment and mental health management.⁷⁷⁶ This allowed for oversight by the Supreme Court and the power to detain the person in a SMHU, if necessary. It also meant that orders would not lapse (unlike treatment orders that require administrative action if they are to be renewed).

8.2.26 Subsequent to the decisions in *CJS v Tasmania*⁷⁷⁷ and *Secretary of the Department of Health and Human Services v Horacek*,⁷⁷⁸ in *NOM v DPP* the Victorian Court of Appeal considered in detail the interaction between the Victorian equivalents to ss 34 and 35 of the *Criminal Justice (Mental Impairment) Act 1999* (Tas), in particular the meaning of 'likely to endanger'.⁷⁷⁹ In this case, the primary judge refused to revoke a supervision order on the basis that he had concluded that the risk of danger to the public was significant if the individual was non-compliant with treatment (a risk assessed as low). This approach was rejected by the Court of Appeal:

His Honour, in our respectful opinion, wrongly focused upon the gravity of the potential harm to others involved with such a risk in assessing the likely danger to others as 'significant'. In assessing the likely danger ... the low likelihood of such a

⁷⁷² Ibid [78] (Tennent J).

⁷⁷³ In this case, the identified restriction on the defendant's freedom and personal autonomy created by the supervision order as distinct from the community treatment order arose for the way in which the order could be revoked or varied: *ibid* (Tennent J) [55].

⁷⁷⁴ *Ibid* [57].

⁷⁷⁵ *Ibid* [58].

⁷⁷⁶ *Ibid*.

⁷⁷⁷ [2008] TASSC 85.

⁷⁷⁸ [2009] TASSC 65.

⁷⁷⁹ (2012) 38 VR 618.

risk materialising should have been the critical consideration, rather than the gravity of the harm in the event that the risk eventuated.

Endangerment is about the risk of harm. The gravity of the harm may be relevant to assessing the nature of the risk, but the probability of any risk, be it high or low, is the critical concept of endangerment. ... The ordinary meaning of endangerment entails the concept of chance or risk. The terms of [the provision] require a court to assess whether a person is ‘likely to endanger themselves or others’. This serves to emphasise that the focus is upon the extent of the chance, risk or peril of some harm materialising. If the harm or injury which is likely to result is substantial but the ‘chance’, ‘risk’ or ‘peril’ of it eventuating is minimal, then a person subject to a supervision order is not necessarily ‘likely to endanger’ ...

It is an assessment of the likelihood of the risk materialising and whether or not that risk is more than merely possible that is the critical consideration, not the gravity of the harm that may eventuate.⁷⁸⁰

This interpretation reflects the approach evident in the decisions of the Court of Criminal Appeal in Tasmania, where the focus is on the risk of danger rather than the magnitude of the danger.

8.2.27 An additional issue considered in *NOM v DPP*⁷⁸¹ was the relevance of any change in the practical restrictions on the defendant arising from the removal of the supervision order in considering the balance between the safety of the community and the person’s freedom and autonomy. The primary judge had expressed the view that the continuation of the order would not impose any significant practical restrictions on the defendant as his treatment would remain the same with or without the order. However, the Court of Appeal accepted that ‘the finding that the nature and degree of the restrictions on the appellant’s freedom and autonomy would have no “significant practical effect” does not provide a basis for refusing to revoke the supervision order’.⁷⁸² The Court’s view was that supervision ‘is a restriction on liberty and autonomy and it can be justified only where it is found to be necessary’ and ‘if it was not necessary to impose any restriction on the appellant to ensure the safety of the community, the statutory regime, informed by the principle of parsimony, did not allow for the consideration of the degree of inconvenience to the appellant to justify non-revocation of the order’.⁷⁸³ This differs from the approach of the Court of Criminal Appeal in *CJS v Tasmania*.⁷⁸⁴

Leave provisions

8.2.28 Under the *Mental Health Act 2013* (Tas), the MHT may grant a forensic patient who is subject to a restriction order leave of absence from a secure mental health unit.⁷⁸⁵ The Chief Forensic Psychologist (‘CFP’) may grant leave to a forensic patient who is not subject to a restriction order.⁷⁸⁶ Leave may be granted for clinical or personal reasons, for a particular purpose, or a particular period, or both and may be granted unconditionally or subject to

⁷⁸⁰ Ibid [57]–[59].

⁷⁸¹ Ibid.

⁷⁸² Ibid [71].

⁷⁸³ Ibid.

⁷⁸⁴ [2008] TASSC 85.

⁷⁸⁵ *Mental Health Act 2013* (Tas) s 78(1).

⁷⁸⁶ Ibid s 82(1).

conditions.⁷⁸⁷ The criteria set out in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) do not apply to leave provisions, with the MHT or the CFP being required to exercise responsibility subject to the service delivery principles set out in sch 1 of the *Mental Health Act 2013* (Tas).⁷⁸⁸ This takes into account the need to respect, observe and promote the inherent rights, liberty, dignity, autonomy and self-respect of persons with mental illness and the need to ensure that the interference with or restriction of the rights of persons with mental illness is done in the least restrictive way and to the least extent consistent with the protection of the individual and the community.⁷⁸⁹ Table 8.9 sets out the number of leave applications determined by the MHT in the period 2014–2015 to 2016–2017.

Table 8.9: Leave application requested and granted by the MHT, 2014–15 to 2017–18

Year	Leave applications requested	Leave applications granted
2014–15	6	6
2015–16	12	10
2016–17	6	6
2017–18	11	8 ⁷⁹⁰

Source: MHT Annual Report

8.3 Issues for consideration

8.3.1 There are a number of issues in relation to the imposition and discharge/revocation of forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas). Broadly speaking, they include:

- (1) Whether it is necessary to make a change to the indefinite nature of forensic orders imposed under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)? And if so, how?
- (2) Whether there is a need to make a change to the statutory test contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) for making, varying, discharging and revoking an order?
- (3) Whether there should be change to the judicial model of decision-making to allow the MHT to exercise powers of variation, discharge or revocation of forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)?
- (4) Whether there is a need for a change the leave provisions and/or to make other changes to provide an appropriate pathway for gradual reintegration of a person subject to a forensic order into the community?
- (5) Whether the orders are appropriate for people with intellectual disabilities and cognitive impairments rather than mental illness?

⁷⁸⁷ Ibid ss 78(2), (9), 82(2), (10).

⁷⁸⁸ Ibid s 15.

⁷⁸⁹ Ibid sch 1.

⁷⁹⁰ There were also two leave of absence applications that involved varying the leave of absence and one case involving the extension of a leave of absence, Mental Health Tribunal (n 757) 32.

8.3.2 Another issue is whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended to provide for a limiting term for conditional release orders to replace the current position where it is possible for the court to make an indefinite order. This order is not a forensic order and does not involve the CFP or the MHT. Instead, it is an order made and supervised by the court.

Indefinite nature of forensic orders

8.3.3 In Tasmania, restriction orders and supervision orders are indefinite, subject to review by the MHT and revocation or discharge by the Supreme Court. This aspect of the insanity and fitness to stand trial regime has been the subject of significant criticism (as discussed below). Although the move away from the traditional ‘Governor’s Pleasure’ regime (in Tasmania and elsewhere) was intended to remove the arbitrary and political nature of indefinite detention, criticism has been directed at the Tasmanian system on the basis that the Governor’s Pleasure model is retained ‘in substance, if not in form’.⁷⁹¹ It can be argued that the current system is unfair to individuals and does not reflect the principles underlying the *Criminal Justice (Mental Impairment) Act 1999* (Tas) which seek to provide an appropriate balance between individual freedom and autonomy and community safety.

Position in other jurisdictions

8.3.4 As shown in Appendix 3 Table A3.3, several other Australian jurisdictions also provide for indefinite detention of forensic patients, subject to mechanisms for review and ending the orders. This is the position in New South Wales (for those found not guilty by reason of insanity), Victoria, Western Australia, Queensland and the Northern Territory. In Victoria and the Northern Territory, a period is set for a major review of the order, referred to as a nominal term, either by reference to a specified statutory period (Victoria) or by the court (Northern Territory). At the major review, there is a presumption that the level of supervision will be reduced.⁷⁹² In Queensland, Western Australia and New South Wales (as with Tasmania), there is provision for periodic reviews, which may result in the orders being varied or revoked. In Queensland, orders may be revoked or varied by the Mental Health Tribunal, subject to any non-revocation period that may have been set for prescribed offences. In Western Australia, an order may be revoked by the Governor on advice from the Minister following a recommendation from the Mental Impairment Accused Review Board. In New South Wales, the court or the Mental Health Review Tribunal (‘MHRT’) may make an order for releasing a person.⁷⁹³

8.3.5 Other jurisdictions provide for finite terms through the use of limiting terms.⁷⁹⁴ In New South Wales (for those found unfit and not acquitted following a special hearing), South Australia, the Australian Capital Territory and the Commonwealth, the court is required to set

⁷⁹¹ Melbourne Social Equity Institute (n 148) 18. Smith writes that ‘it is arguable that changing the decision maker from the Cabinet to the Courts has resulted in few if any improvements to a rehabilitated defendant’s prospects of release’: Smith (n 28) 22.

⁷⁹² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 35(3); *Criminal Code* (NT) s 43ZG(6). See discussion in VLRC (n 22) 363. It is noted that changes were proposed to the review provisions in Victoria in the *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic) including the introduction of initial progress reviews, further progress reviews and major progress reviews. This legislation has not been passed by the Victorian Parliament.

⁷⁹³ See Appendix 3 for more details.

⁷⁹⁴ See Appendix 3 Table A3.3 for details of the provisions in each jurisdiction.

a limiting term when imposing a detention or supervision order. The limiting term sets the longest period of detention and there is a possibility that the person may be released before the expiry of the limiting term. However, evidence in New South Wales suggests release before the expiration of the limiting term is rare. The MHRT indicated that it did not know of any patients being unconditionally released prior to the expiry of their limiting terms and that conditional release was also rare.⁷⁹⁵ In New South Wales, the Australian Capital Territory and the Commonwealth, the limiting term is set by the court making a best estimate of the sentence that would have been considered appropriate in a normal trial. In South Australia, the limiting term is the equivalent to the period of imprisonment that would have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established, without taking into account the defendant's mental impairment.

Approach to reform

8.3.6 In Tasmania, there are several options for reform:

- (1) **Make no change to the current position** under the *Criminal Justice (Mental Impairment) Act 1999* (Tas). This would mean that forensic orders would remain indefinite, with provision for certificates to be issued by the MHT, and orders to be varied, discharged or revoked by the Supreme Court. The test contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) would continue to refer to 'likely to endanger' (see [8.2.9], [8.2.22]–[8.2.27]). This approach is not recommended by the Institute.
- (2) **Make no change to the current position under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) in relation to indefinite detention but amend the discharge procedure** to create a presumption in favour of a reduced level of supervision in circumstances where the MHT has issued a certificate and the person makes an application to the Supreme Court. This approach is also not recommended by the Institute.
- (3) **Change the indefinite nature of forensic orders to require the court to set a limiting term.** This is the approach recommended by the Institute and so it is necessary to decide:
 - (a) the approach to setting the term (see [8.3.38]–[8.3.47]).
 - (b) whether a preventative detention scheme should be introduced that would allow for an extension of the person's forensic patient status beyond the limiting term (see [8.3.48]–[8.3.64]).
 - (c) any presumptions that should exist in the legislation in favour of or against reduced supervision or release (see [8.3.80]–[8.3.85]).

8.3.7 **Further**, it is necessary to decide whether:

- (a) the current test in the Act of 'likely to endanger' should be changed to a test of 'significant risk of serious harm', or an 'unacceptable risk of causing physical or psychological harm' (see [8.3.65]–[8.3.77]). The Institute recommends that the

⁷⁹⁵ NSWLRC (n 56) 171.

current test be changed to a test of unacceptable risk of causing physical or psychological harm.

- (b) to change the judicial model of decision-making to allow the MHT to exercise powers of variation, discharge or revocation of forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) (see [8.3.86]–[8.3.94]). The Institute does not support this reform.

8.3.8 Replacement of indefinite terms with a limiting term. The first decision that needs to be made is whether to retain the indefinite nature of forensic orders contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) or whether to introduce a limiting term. As noted, limiting terms exist in New South Wales (for those found unfit and not acquitted following a special hearing), the Australian Capital Territory, South Australia and the Commonwealth. In contrast, as with Tasmania, indefinite detention of forensic patients exists in New South Wales (for those found not guilty by reason of insanity), Victoria, Western Australia, Queensland and the Northern Territory.

8.3.9 Several law reform bodies have examined the period of supervision or detention that is appropriate for forensic patients following a finding of not guilty by reason of insanity or unfit to stand trial (and not acquitted at the special hearing). The NSWLRC recommended that a limiting term apply for both defendants found not guilty by reason of insanity and following a finding that the person was unfit to stand trial (and not acquitted at the special hearing).⁷⁹⁶ The view of the NSWLRC was that there should be a time limit because it provides an important protection for forensic patients.

8.3.10 The SASAC's view was also that limiting terms should be retained.⁷⁹⁷ Similarly, a key recommendation of the ALRC was that there should be limits placed on the detention that can be imposed.⁷⁹⁸ This approach was also recommended by the Senate Committee examining indefinite detention of people with cognitive and psychiatric impairment in Australia.⁷⁹⁹ The LRCWA also recommended introducing the use of limiting terms.⁸⁰⁰

8.3.11 In contrast, the VLRC and the Western Australian review conducted by the Department of the Attorney-General preferred to retain indefinite terms with regular reviews. The VLRC considered this was the preferred approach in combination with reforms to ensure that 'the decision-making framework in place once an order is made is rigorous and ensures that the period a person is supervised closely reflects the minimum period necessary to address the person's risk to the community'.⁸⁰¹

8.3.12 Arguments in favour of making provision for a limiting term. The following arguments can be identified in relation to making provisions for a limiting term.

⁷⁹⁶ NSWLRC (n 56) 180–181 Recommendation 7.2.

⁷⁹⁷ SASAC (n 433) Recommendation 15.

⁷⁹⁸ ALRC (n 40) Recommendation 7-2.

⁷⁹⁹ Senate Community Affairs Reference Committee, *Indefinite Detention of People with Cognitive Impairment in Australia*, Report (2016) 70–71.

⁸⁰⁰ LRCWA (n 416) 244–245 Recommendation 36.

⁸⁰¹ VLRC (n 22) 360, 361 Recommendation 83.

- (1) An indefinite term creates uncertainty and this is potentially an incentive for innocent people to plead guilty rather than rely on unfitness to stand trial/and or insanity.⁸⁰² The NSWLRC observed that ‘anecdotally it appears that the indeterminate orders may deter people with mental impairment from relying on the defence of mental illness’.⁸⁰³ Further, it stated that ‘[i]f this is correct, then it may lead to outcomes which fail to meet the interests of justice, public safety, or the person’s treatment needs’.⁸⁰⁴ Conversely, the benefits of a limiting term are that it facilitates fairness so that ‘forensic patients are not detained or managed within the forensic system for longer than they would have been following conviction.’⁸⁰⁵ This may encourage people to raise unfitness to stand trial or the defence of insanity. In addition, it ensures that people who require treatment are able to access it given that these people should be managed in the forensic system rather than the correctional system.⁸⁰⁶
- (2) People who are detained indefinitely may spend longer under supervision than if they had been sentenced following the usual process.⁸⁰⁷ This has implications for decisions about whether to rely on unfitness to stand trial/and or insanity. As observed by the Office of Public Prosecution Victoria, ‘a person who is able to understand the process involved in a plea of guilty will often be better off being dealt with by a criminal sanction, rather than being placed on an indefinite supervision order’.⁸⁰⁸ It also raises questions of fairness.

The relationship between the time spent in detention/under supervision compared to the sentence a person would have received had they been sentenced following a finding of guilty has been examined in Tasmania. Research suggests that ‘the consequences of an insanity plea or unfitness to plead [are] likely to restrict the liberty of the subject to a greater degree than an actual sentence in all cases except murder and rape’.⁸⁰⁹ This is confirmed by recent research undertaken by the TLRI with the assistance of the MHT, which shows that the period of restriction of liberty is considerably longer for individuals subject to forensic orders following a finding of not guilty by reason of insanity or where a finding could not be made that the defendant is not guilty at a special hearing than for offenders sentenced following a finding of guilt.⁸¹⁰ In addition, it has been suggested that for persons subject to a supervision or restriction order ‘it is highly unlikely, for practical reasons, that any person could be discharged from an order in under in 2 years’.⁸¹¹ This was on the basis that the MHT will not review the order until the person is at or near the completion of the first twelve months under the order and, if a certificate is issued, the experience has been that it takes 12 months after the

⁸⁰² ALRC (n 40) 198; SASAC (n 433) 145; NSWLRC (2013) (n 56) 167; VLRC (n 22) 359.

⁸⁰³ NSWLRC (n 496) 219.

⁸⁰⁴ Ibid.

⁸⁰⁵ NSWLRC (2013) (n 56) 179.

⁸⁰⁶ Ibid.

⁸⁰⁷ Ibid 167; ALRC (n 40) 198; SASAC (n 433) 145; VLRC (n 22) 359.

⁸⁰⁸ Office of Public Prosecutions, Victoria, *Submission to Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Consultation Paper* (2013) 2.

⁸⁰⁹ Smith (n 28) 24. See also Office of the Anti-Discrimination Commissioner, *Submission of the Anti-Discrimination Commissioner, Tasmania, to the Australian Law Reform Commission’s Inquiry into Equality, Capacity and Disability in Commonwealth Laws* (2014) 43–44.

⁸¹⁰ The findings from this research are set out in Appendix 8.

⁸¹¹ Smith (n 28) 24.

certificate is issued for an application for discharge to be filed with and considered by the court.⁸¹² This appears contrary to the principle of least restriction consistent with community safety and fairness to the accused person that underpin the *Criminal Justice (Mental Impairment) Act 1999* (Tas). Accordingly, it could be argued that changes are necessary to ensure that the Act operates justly and consistently with the principles that underlie it.

- (3) Indefinite detention may affect a forensic patient’s self-esteem and response to treatment.⁸¹³ It has been suggested that indefinite terms cause ‘supervised people to feel trapped or lack the motivation to get better’.⁸¹⁴
- (4) Indefinite terms reinforce negative perceptions about a forensic patient’s criminality.⁸¹⁵
- (5) A limiting term may encourage the provision of resources and greater planning towards a person’s release from supervision in comparison to indefinite terms.⁸¹⁶
- (6) Indefinite terms are contrary to international obligations arising under Art 5 (prohibition of disability-based discrimination) and Art 14 (rights to liberty and security of the person) of the *CRPD*.⁸¹⁷ Gooding et al have argued that indefinite terms ‘clearly deviate from the *CRPD* by establishing separate processes with lesser safeguards to deprive the liberty of accused persons with disabilities deemed unfit to plead’.⁸¹⁸ Arstein-Kerslake et al have suggested that compliance with international obligations would require that procedures following a finding of unfitness to stand trial ‘must never result in a longer or more severe sentence than would have resulted if a standard trial had proceeded’.⁸¹⁹ Other commentators argue, that all mental health detentions are contrary to the *CRPD* Art 14(b) which provides that ‘the existence of a disability shall in no case justify a deprivation of liberty’.⁸²⁰ This is on the basis of views expressed by the UNCRPD that laws enabling involuntary detention should be abolished in cases where disability is a criterion, even if other criteria are used in making the assessment (such as dangerousness or risk).⁸²¹

8.3.13 Arguments against a limiting term. The following arguments have been made in relation to not introducing a limiting term and retaining indefinite detention:

- (1) A limiting term may result in some people reaching the end of the time limit and being unconditionally released, in circumstances where he or she is at risk of causing harm to the public.⁸²² In addition, the length of the time limit is set at the time of disposition,

⁸¹² Ibid 25.

⁸¹³ NSWLRC (n 56) 168.

⁸¹⁴ VLRC (n 22) 359.

⁸¹⁵ NSWLRC (2013) (n 56) 170.

⁸¹⁶ J Hunyor, ‘A Kangaroo Loose in the Top Paddock: Criminal Justice, Mental Impairment and Fitness for Trial in the Northern Territory’ (Uluru Criminal Law Conference, 2012) 20.

⁸¹⁷ Melbourne Social Equity Institute (n 148) 21.

⁸¹⁸ Gooding et al (n 35) 853.

⁸¹⁹ Arstein-Kerslake et al (n 146) 418.

⁸²⁰ Minkowitz (n 144) 449.

⁸²¹ Ibid. See also Gooding and O’Mahoney (n 144) 133.

⁸²² NSWLRC (2013) (n 56) 169.

when the progress of the defendant's treatment and rehabilitation is hard to predict.⁸²³ However, this concern is true in relation to sentenced offenders, 'who are ordinarily entitled to be released at the expiry of the sentence, even if they still pose a risk to others'.⁸²⁴ In addition, concerns about community safety at the end of the limiting term could be managed within the civil mental health system.⁸²⁵ Further, a system of continued restriction or supervision could be introduced to address any concern about community safety in circumstances where a person poses a serious risk of harm to other people at the end of the limiting term.⁸²⁶

- (2) The forensic system has quite different objectives to sentencing.⁸²⁷ It is concerned with a person's treatment and safety, and on this basis indefinite terms are 'a way of recognising that [the] orders were based on a therapeutic framework, rather than one that is corrections-based (where orders have a definite term)'.⁸²⁸ The VLRC considered that:

Indefinite term orders ... are consistent with the therapeutic focus of the CMIA. Such orders are also consistent with the principle of community protection underlying the CMIA that recognises that the recovery of a supervised person should proceed on a gradual basis so that their risk can be managed to a point where they can ultimately be reintegrated into the community.

The supervision of people under the CMIA is justified on these principles and not on the basis of proportionality or deterrence which would form the basis of a criminal sentence. In the Commission's view, the duration of orders should therefore be based on the time a supervised person needs to recover or progress through the system of gradual reintegration before they can safely return to the community. The length of time it takes for this to happen varies from person to person and is difficult to predict at the time of the making of a supervision order.⁸²⁹

Similar concerns were expressed in submissions to the SASAC that 'the amount of time the defendant spends in custody should be determined by the defendant's treatment needs and the protection of the community, rather than the nature of the offence committed'.⁸³⁰ This accords with the view of Boyd-Caine and Chappell, that indefinite detention is 'able to respond to the individual needs of each patient on a forensic order.' In contrast, 'definite orders would not necessarily be capable of responding to the complexities of diagnoses, responsiveness to treatment, and access to leave privileges that are critical to the care, treatment and rehabilitation of forensic patients'.⁸³¹ There may also be advantages for an unwell person in accessing services within the forensic

⁸²³ Ibid.

⁸²⁴ NSWLRC (n 496) 220.

⁸²⁵ NSWLRC (2013) (n 56) 169.

⁸²⁶ Ibid 179. This is discussed further at [8.3.16]–[8.3.32].

⁸²⁷ NSWLRC (2013) (n 56) 169.

⁸²⁸ VLRC (n 22) 359.

⁸²⁹ Ibid 360. See Recommendation 83.

⁸³⁰ SASAC (n 433) 142.

⁸³¹ T Boyd-Caine and D Chappell, 'The Forensic Patient Population in New South Wales' (2005) 17 *Current Issues in Criminal Justice* 5, 26.

mental health system given that the level of support and treatment may be more difficult to access in the civil mental health system.

- (3) A related concern is that the use of a time limit set by reference to a hypothetical sentence may create the impression that the time limit is a sentence (see further at [8.3.40]).⁸³² A person who has been found not guilty by reason of insanity or where a finding cannot be made that the person is not guilty at a special hearing (following a finding of unfitness) is not found guilty of any offence and is not sentenced. However, in requiring the court to specify a limiting term, the court is engaged in an exercise ‘akin to sentencing’, which may create an impression that ‘the person is being punished, despite not having been tried and convicted of any offence’.⁸³³

8.3.14 Other commentators have supported indefinite detention provided there are sufficient protections and supports to ensure that forensic patients are able to progress through the system and ultimately be released. The former President and the former Forensic Team Leader of the MHRT in New South Wales have highlighted the risk that indefinite detention is ‘susceptible to facilitating preventive detention’ as the forensic system is ‘susceptible to a privileging of preventative aims over therapeutic or rehabilitative aims’.⁸³⁴ Ultimately, however, their view was that indefinite detention is appropriate as it is able to respond to individual needs whereas a definite order ‘would not necessarily be capable of responding to the complexities of diagnoses, responsiveness to treatment, and access to leave privileges that are critical to the care, treatment and rehabilitation of forensic patients.’⁸³⁵ The NSW Consumer Advisory Group (in its submission to the NSWLRC) argued that:

step up and step down processes need to be enhanced to provide forensic patients with transparent avenues to progress through the system, which would also assist in developing goals and support a recovery focused system. That is, forensic patients need guidance and resources to access and understand pathways to unconditional release.⁸³⁶

Similarly, it may be that concerns in relation to indefinite detention can be addressed by reforms to the review process and the management of forensic patients in Tasmania. This is considered further below.

8.3.15 Previous analysis of the Tasmanian forensic mental health system has raised concerns about the difficulty that patients experience in having a forensic order discharged. As noted at [8.3.12], there are concerns that under restriction orders, forensic patients are detained for ‘substantially more than what [they] would have been if they had been found guilty of the offence’ (other than in cases of murder).⁸³⁷ Similar observations have been made in relation to supervision orders, where concerns have been expressed about the length of time that a forensic patient is subject to supervision.⁸³⁸ The Anti-Discrimination Commissioner has illustrated the problems in having an order discharged with a case study.

⁸³² NSWLRC (2013) (n 56) 169.

⁸³³ *Ibid* 174.

⁸³⁴ Boyd-Caine and Chappell (n 831) 26.

⁸³⁵ *Ibid*.

⁸³⁶ NSWLRC (2013) (n 56) 170.

⁸³⁷ Office of the Anti-Discrimination Commissioner (n 809) 44; Smith (n 28) 24.

⁸³⁸ Smith (n 28) 24.

Case Example

A man was subject to a restriction order for 16 years. Despite reports from the Tasmanian Forensic Review Tribunal suggesting that the restriction order be lifted and replaced by a supervision order allowing him to reside in the community subject to the supervision of the Chief Forensic Psychiatrist, the courts were reluctant to revoke the restriction order on the basis that they had no evidence of how the person would operate in the community.

This was described as presenting a ‘catch 22’ situation given that it would be ‘almost impossible to gather evidence to present to the court to demonstrate how they would operate in a different setting’.⁸³⁹

8.3.16 There also appears to be a traditional reluctance on the part of the Supreme Court to allow an individual to transition from an indefinite supervision order to a limited term treatment order in cases where a person has a mental illness that requires long-term (potentially life-long) treatment, such as schizophrenia. This is illustrated in the cases of *CJS v Tasmania* and *Secretary of the Department of Health and Human Services v Horacek*, where in both cases the person committed an offence while unmedicated and, on the evidence, was not a danger to the community while medicated. However, the concern expressed by the court was that the person may become non-compliant with a medication regime once the supervision order was revoked, and so the potential for danger to the community would re-emerge. While under both a supervision order and a treatment order there is power to impose a compulsory medication regime, the court was concerned about the need to renew a treatment order (in contrast to the indefinite nature of the supervision order) and the lack of any judicial oversight. In these circumstances, it was considered that the long-term management regime provided by a supervision order was necessary. Again, this appears to be a ‘catch 22’ situation given that there is little ability for a forensic patient to demonstrate an ability to comply with treatment without a supervision order, until provided with this opportunity. Further, Smith has argued that these cases show that ‘too little weight is attached to the fact that the commission of the offences occurred when a person was undiagnosed and untreated’ while the ‘single most important aspect [from the court’s point of view] with respect to schizophrenia is that it requires lifelong treatment and, in their view, mandatory treatment’.⁸⁴⁰ This approach is evident in other decisions of the Supreme Court where applications to revoke supervision orders were rejected because the person had a chronic mental health condition and there was a concern about the ability of a treatment order to ensure compliance with medication requirements.

8.3.17 However, more recently, people with schizophrenia or a schizoaffective disorder have had supervision orders revoked. Data from the MHT show that since November 2010, there have been six people with schizophrenia or a schizoaffective disorder who have had their supervision orders revoked. Other orders revoked since 2010 include those for four people with a primary diagnosis of intellectual disability and two with acquired brain injury. In this period, there have also been three people with schizophrenia or a schizoaffective disorder and two with intellectual disability who have had restriction orders discharged and supervision orders made.

8.3.18 There has also been disquiet about the inconsistency in outcomes between decisions of the MHT in issuing certificates and the Supreme Court in refusing to discharge orders once

⁸³⁹ Ibid 45.

⁸⁴⁰ Ibid 25.

applications have been made. Smith, then President of the Guardianship and Administration Board and ex officio member of the Forensic Tribunal, noted the ‘marked difference between the approaches of the Forensic Tribunal in issuing the certificate and the Supreme Court in considering discharge’.⁸⁴¹ This difference was attributed to the different legislative considerations governing determinations of each body (see [8.2.12]) and to their different experiences:

the members of the Tribunal, unlike the Court, regularly see a range of people with more severe or more acute levels of disability than the person who is the subject of forensic orders. Such people also require lifelong treatment and Tribunal members are familiar with the non-punitive facilities which exist to ensure that they have it.⁸⁴²

However, it may be that there has been a narrowing of the division between the approach of the MHT and the Supreme Court given that there are no people on restriction orders who have a current certificate and eight people with current certificates on supervision orders four of whom are currently making applications for the revocation of those supervision orders.

8.3.19 Similar concerns exist in other jurisdictions, where commentators have identified ‘over-cautiousness or undue “conservatism” in the approach of people involved in the system, from psychiatrists to the Forensic Leave Panel [Victoria] and the court’.⁸⁴³ In Victoria, it has been observed that one of the main obstacles in the progression of a forensic patient towards release is the desire to avoid complete revocation of the non-custodial supervision order.⁸⁴⁴ Freckelton notes that ‘the [Victorian] Supreme Court has been more liberal in varying orders from a custodial supervision order to non-custodial supervision order than in revoking supervisory status completely’.⁸⁴⁵ This is because under a non-custodial supervision order, the court retains a ‘continued capacity ... to order acquittees to return to inpatient status if they breach the terms of a non-custodial supervision order’. In contrast, ‘if the court revokes an acquittee’s supervisory status, he or she reverts to being simply another patient in the community with a diagnosis of a mental illness’.⁸⁴⁶

8.3.20 The Tasmanian Supreme Court has also commented on the differing approach of the MHT and the Court to the revocation of supervision orders and has been critical of the MHT for its ‘lenient approach to the issue of certificates’.⁸⁴⁷ In one case, Evans J noted that ‘this is the fourth occasion since March 2008 on which I have formed a different view to the Forensic Tribunal on whether a supervision order should be removed’. His Honour stated that:

Where the primary purpose for a supervision order or a community treatment order is to impose an indefinite requirement on the subject of the order to take medication, those involved in the supervision and annual review of the order may well deem those

⁸⁴¹ Ibid.

⁸⁴² Ibid.

⁸⁴³ VLRC (n 22) 344. See also J Ruffles, *The Management of Forensic Patients in Victoria: The More Things Change, the More They Remain the Same* (PhD thesis, unpublished Monash University 2010) 175–178.

⁸⁴⁴ VLRC (n 22) 344.

⁸⁴⁵ I Freckelton, ‘The Preventative Detention of Insanity Acquittes: A Case Study in Victoria’ in B McSherry and P Keyzer (eds), *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 83, 94. See also B McSherry, ‘Legal Issues: Criminal Detention of Those with Mental Impairment’ (1999) 6 *Journal of Law and Medicine* 216, 221.

⁸⁴⁶ Freckelton (n 845) 83, 94.

⁸⁴⁷ Smith (n 28) 25.

tasks to be an unwarranted burden. My experience is that notwithstanding that the person subject to a supervision order is content with its continuance, that person may be encouraged to apply for its discharge: by those involved in its supervision or review; and on the basis of a misunderstanding of the effects of the order or the likely effects of a community treatment order which might replace it.

The observation appears to rest on the notion that from a patient's perspective there is little practical difference between a compulsory treatment regime imposed by a supervision order and a treatment order. Accordingly, community safety warrants retaining the indefinite order rather than imposing an order that will expire. However, this approach overlooks the prospect of the person progressing to a treatment regime outside of the forensic context.

8.3.21 More recently, however, decisions of the Supreme Court have accepted that the revocation of a supervision order may be appropriate even if the person has an enduring mental impairment and will require life-long medication. There has been acceptance that Community Mental Health Services are able to manage these conditions through life-long treatment and assertive case management and support as required, and that the ongoing supervision of the court is not required. The court has noted the importance of comprehensive information about future care and treatment being provided to satisfy the requirement that the revocation of the order is consistent with community safety.

8.3.22 An additional problem Smith identified was the lack of statistical information about the operation of forensic mental health orders.⁸⁴⁸ It is difficult to access information that allows for an assessment to be made of periods of restriction or supervision for forensic patients. While the MHT reports on the number of certificates issued, it is not known publicly how many certificates result in a discharge or revocation of order by the Supreme Court (other than if the MHT reports on this). Although some applications for discharge are publicly available (either on the Inglis Clark sentencing database or in appeal decisions), it appears that many are not publicly available.⁸⁴⁹ While this is understandable given the sensitive nature of the cases, it makes it difficult for legal practitioners to provide advice to their clients about the likely long term consequence of relying on insanity or fitness to stand trial, beyond needing to 'be mindful of how difficult it can be to discharge a forensic order'.⁸⁵⁰

8.3.23 Based on these concerns, in the Issues Paper, the TLRI sought feedback about whether a limiting term should be adopted in Tasmania for supervision and restriction orders. The Issues Paper asked whether, in the alternative, any concerns about the indefinite nature of these orders and the balancing of the interests of the individual and the community could be more appropriately dealt with through a system of indefinite detention with periodic reviews.

Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to provide for a limiting term for restriction and supervision orders to replace the current indefinite nature of these orders?

⁸⁴⁸ Ibid 22.

⁸⁴⁹ See *D*, where Evans J referred to four cases where an application to revoke a supervision order was refused. Only one of these cases was publicly available as it involved an unsuccessful appeal against the refusal of the judge to revoke the supervision order.

⁸⁵⁰ Smith (n 28) 26.

8.3.24 The Institute received five submissions addressing the issue of limiting terms for restriction and supervision orders to replace the current indefinite nature of these orders. Differing views were expressed in relation to reform.

8.3.25 EOT argued that the indefinite nature of restriction orders risks leading to human right breaches. EOT argued that ‘while section 34 of the [Act] requires that restrictions on a defendant’s freedom should be kept to the minimum consistent with the safety of the community’, there are no time limits on the period a person may be detained after a restriction order has been made. Accordingly, EOT observed that this has the effect that ‘persons on restriction orders may be detained for periods of time well in excess of those applied to persons committing similar offences whose cases had proceeded through the court’.

8.3.26 QAI also commented on the unfairness of indefinite detention when compared to the sentence that a person receives following a finding of guilt for the same offence, and the fact that individuals with intellectual impairment or mental impairments are treated differently to those without such conditions. QAI argued that contrary to the perception that a finding of unfitness is a ‘get out of jail free card’, it may instead ‘have devastating consequences for the accused, who may languish in forensic detention for longer than they would have had they been found fit and steered through the usual criminal court process’:

It is likely that the longer people are detained the more their capacities will diminish, particularly given the sterile environment and limited opportunities to use those capacities. While the courts have a duty to the public to manage risk, the cost to the defendant is high. The indefinite detention of those with intellectual impairments on the basis of a risk of harm to others is discriminatory. Those without mental or intellectual impairments are not, as a general rule, indefinitely detained on this basis.

8.3.27 In addition to the comparison in outcomes between a sentence and an order made following a finding of unfitness, QAI described some of the damaging consequences for individuals subject to indefinite detention:

The purpose of the order may be in part therapeutic, but here in Queensland the detainee has no idea when, or if, they will be released. The substantive long-term effects are de-habilitation and institutionalisation, because in Queensland all but a few of the accused are placed into purpose-built facilities that in appearance and structure are little different to prisons. With lack of use, communication and other skills erode, and the transitioning detainee, many years down the track, must attempt to relearn them.

QAI described the limitations of the detention process as follows:

According to anecdotal evidence, the staff at Queensland forensic facilities lack the skills to promote [re]habilitation and reintegration, and while there is clinical expertise to develop behaviour support plans, there is a disconnect between the plans and their implementation. The plans are often extremely detailed and complex, but their implementation is left to unskilled support workers who do not read them anyway.

In addition, the artificial, hierarchical, structured living arrangements atrophies detainees’ capacities and living skills. The longer a person stays in detention the less likely it is that they will ever emerge from it. It is almost impossible to prove a reduction in risk when the person’s risk environment is so sterile and artificial. Extraneous factors play on risk too. No matter how accurately the Court/Tribunal

predicts risk the calculation still depends upon the availability of accommodation and support outside forensic detention

8.3.28 In the Tasmanian context, O’Connell’s submission commented upon the practical delivery of rehabilitation for individuals held in the SMHU. O’Connell supported a time limit restriction for restriction orders and stated that this should be ‘perhaps with a proviso that it can be extended under extenuating circumstances’. In her view, this reform would improve the delivery of services to individuals detained under a restriction order by providing a better framework to give effect to the principles of rehabilitation and least restriction:

The current legislation essentially allows for rehabilitation but in practice, there is no onus on services to provide it. It is common that people’s leave is frequently delayed or cancelled due to staffing pressures. The availability of suitable accommodation is lacking and both of these issues undoubtedly lengthen a person’s detention under a RO. Whilst the legislation states that principles of least restriction must apply, the culture of the Secure Mental Health Unit is one of risk adverse practice with increasingly poor rehabilitative outcomes. The legislation needs amendment to allow not only for the provision of gradual rehabilitation into the community but [also for] a mandated pathway for it.

O’Connell also advocated the introduction of time limits for supervision orders:

In my experience, the downgrading of SOs is slow and difficult and there is no onus on the court to lift the order when certain provisions are met. This means that all the evidence can be supporting the downgrading of the order but the Judge takes an opposing view to maintain the status quo.

8.3.29 In contrast, Walvisch and the DPP supported the retention of indefinite orders. The DPP did not consider that any change is required:

In my view the current system in which orders are reviewed annually by the Mental Health Tribunal is appropriate. The system enables regular review and management of an order. The removal of orders should not be considered unless and until the Tribunal considers that an order is no longer warranted or the conditions are inappropriate.

Whilst other jurisdictions have limiting or nominal terms for orders, I would not recommend adopting such an approach. These orders focus on community protection and therapeutic care determined by a person’s treatment needs. In reality it is the Tribunal who is best placed to make the initial assessment as to the appropriateness of the orders. If the Tribunal issues a certificate and an application is made to the court the factors contained in ss 34 and 35 of the Act will be considered.

8.3.30 Walvisch also supported retaining indefinite orders for restriction and supervision orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas). However, he proposed changes to the current system to facilitate the discharge of orders. Walvisch stressed that in considering this issue:

it is essential to keep in mind the purpose which restriction and supervision orders serve. Given that people subject to such orders have not been convicted of an offence, it is clear that they do not serve a penal purpose — their aim is not to punish. Instead, they serve a protective function, aiming to prevent people who have committed acts that are ordinarily classified as ‘criminal’ from harming other people. Consequently,

as far as possible their reach should be limited to the supervision of people who continue to pose a risk to others.

Bearing this in mind, I am supportive of the introduction of measures that seek to provide a safeguard against the arbitrary and indefinite detention of people who no longer pose a risk to the community. In an era of increasing punitivism and risk aversion, it is essential that there be specific measures that ensure that people are not detained for longer than their condition warrants.

8.3.31 However, Walvisch opposed the setting limiting of nominal terms based on a method akin to imposing sentence given that the person has not been found guilty, and so is not blameworthy and is not being sentenced for what they have done. He wrote that:

maintaining a link between the required term of supervision and the maximum penalty/hypothetical sentence implicitly suggests that the individual bears some responsibility for the offence, thereby undermining the purpose of the qualified acquittal. For example, requiring a person who is found not guilty of murder because of insanity to serve a longer period of supervision than a person found not guilty of rape because of insanity suggests that the former person is more culpable than the latter. Whilst this may be the popular perception of the issue (with the public perhaps thinking that a person receiving a qualified acquittal for murder should serve a longer time under supervision), it is not the purpose of the order. The length of supervision should solely be related to the question of whether or not the person continues to pose a risk to the community

8.3.32 Instead, Walvisch proposed reforms (discussed further below) to ensure that any restriction imposed is for the shortest time necessary to reflect the risk posed to the community. The necessary reforms include:

- maintaining a system of regular review by the MHT where the timing of the reviews is not referable to the alleged offence but should be held annually;
- specifying that the purpose of the review is to determine whether the individual continues to pose a sufficient risk to the community to justify continuing the current restrictions on his or her liberty, and thus whether or not the supervision or restriction order should be maintained or varied;
- incorporating a presumption in favour of reducing the level of supervision, unless there is evidence that members of the public will be seriously endangered as a result of reducing the supervision status of the person;
- giving the MHT an appealable power to vary, discharge or revoke orders made under the *Criminal Justice (Mental Impairment) 1999* (Tas).

Walvisch argued that while this approach maintains a system of indefinite detention (with its drawbacks), the impact of the ‘drawbacks should be limited by a strong presumption that the level of supervision should be reduced, and the capacity of the MHT to vary, discharge or revoke orders’. In his view, under such a system, ‘it is anticipated that the term of supervision for many offenders would be significantly reduced’.

8.3.33 The Institute recognises that this is complex issue. As noted, the reason for having the doctrine of fitness of stand trial and a defence of mental impairment and cognitive impairment

rest on notions of fairness to the individual — that it is not fair to require someone to participate in a trial if they are unable to do so and that it is not fair to attribute criminal responsibility to those who are not able to act otherwise. It then seems counterintuitive to detain such people indefinitely under restriction orders or to subject them to indefinite supervision under supervision orders when this would not happen if they were found guilty and given finite sentences. Accordingly, there are strong arguments in favour of introducing limiting terms on the grounds of fairness. Further, limiting terms may encourage individuals to rely on unfitness and/or the defence of mental impairment where this is appropriate by removing the uncertainty of an indefinite order. This will enable people to receive appropriate rehabilitation and treatment in the forensic system rather than in prison. The knowledge that orders are for a finite period may also facilitate better pathway planning for reintegration into the community.

8.3.34 On the other hand, the rationales for imposing forensic orders are conceptually different to imposing criminal sanctions — the person has not been found guilty and is not sentenced by the court. This distinction appears to be undermined if the term of a forensic order is set on the basis of a ‘hypothetical sentence’. Different considerations do apply where an individual has not been found guilty and is not sentenced and so a forensic order is imposed on a forward looking (risk posed by individual) rather than backward looking (proportionate sentence for the offence). However, that said, there are very limited circumstances where a court is able to detain individuals found guilty on basis of prospective risk (other than dangerous offender legislation which is infrequently used).⁸⁵¹

8.3.35 After considering the competing views and the submissions received, the Institute’s view is that indefinite detention should be abolished and limiting terms should be introduced. While the introduction of the *Criminal Justice (Mental Impairment) Act 1999* (Tas) was intended to provide a pathway to release, it would appear that this objective has not been effectively realised. Moreover, while further reforms could be made to the indefinite detention/supervision scheme to facilitate a more predictable and accessible pathway to release, the Institute’s concern is that this model is too susceptible to an undue focus on risk and prevention rather than rehabilitation. In addition, the Institute’s assessment is that current system does not reflect the Act’s underlying principles, in that it does not provide an appropriate balance between individual freedom and autonomy and community safety. In fact, the Institute’s view is that the current model may potentially impede community safety by acting as a disincentive for offenders to seek special orders and that the protection of forensic patients and the community would be better served by the introduction of a finite order.

8.3.36 The uncertain nature of release for individuals subject to an indefinite order and the likelihood that many individuals will spend longer under supervision than if sentenced by a court acts as a disincentive to rely on fitness to stand trial and/or the defence of insanity in circumstances where this may well be appropriate. As discussed at [3.3.2], there are significant issues with the treatment and rehabilitation services available to individuals with mental health impairments and cognitive impairments who are incarcerated. Clearly, these unmet needs have significant consequences for the individual but also for the community. While the community is protected while the person is in prison, this protection is only short-term and does not address community safety in the longer term. Indefinite terms also affect the practical delivery of rehabilitation services for forensic patients and the Institute’s view is that a finite term will provide a clearer framework to plan for the release from a forensic order. There is also clear

⁸⁵¹ See TLRI (n 100).

support for this approach in other jurisdictions. As indicated, this is the approach in New South Wales (for those found unfit and not acquitted following a special hearing), the Australian Capital Territory, South Australia and the Commonwealth. It was also recommended by the ALRC, a Senate Committee, the SASAC and the LRCWA.

8.3.37 Although the Institute is recommending the introduction of limiting terms for restriction and supervision orders, the Institute still recognises the legitimate concerns about the unpredictability of progress in a defendant’s treatment and rehabilitation in these cases. While the Institute does not recommend the retention of indefinite detention as the appropriate response to these concerns, the Institute’s view is that the model that should be adopted is the introduction of limiting terms **and** the introduction of a preventative detention scheme that would allow for an extension of the person’s forensic patient status. A forensic patient should also be able to apply for an order to be removed or varied prior the end of the limiting term. Accordingly, Recommendations 40, 42 and 43 are to be read together.

Recommendation

40. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be amended by abolishing the indefinite nature of forensic orders and introducing limiting terms.

Setting the limiting terms for restriction and supervision orders in Tasmania

8.3.38 Once a limiting term is adopted for restriction and supervision orders in Tasmania, it is necessary to decide the manner in which the limiting term is set.

8.3.39 In addressing the process of setting the limiting term, the NSWLRC identified four basic models:

- (1) Using the **hypothetical sentence** that would have been imposed had the person been convicted in the ordinary way of the offence.⁸⁵² This is the current approach in New South Wales, the Commonwealth and the Australian Capital Territory.
- (2) Using a **modified sentencing approach** such as exists in South Australia, where the hypothetical sentence is imposed on the basis of the objective facts only. Another variation would be to specify that it relates to the hypothetical non-parole period rather than the total sentence or to provide that certain mitigating factors are to be presumed (such as a guilty plea or remorse).⁸⁵³
- (3) Using a **fixed statutory formula** to determine the limiting term.⁸⁵⁴
- (4) Using a **time limit formulated by adopting a risk management approach** that determines a time limit taking into account ‘the likelihood of rehabilitation, the likely length and success of treatment (and impact on offending behaviour) and future risk.’⁸⁵⁵

⁸⁵² See NSWLRC (2013) (n 56) 172–173.

⁸⁵³ See *ibid* 174.

⁸⁵⁴ See *ibid* 175.

⁸⁵⁵ See *ibid* 176.

8.3.40 Table 8.10 sets out arguments in favour and against the different models considered by the NSWLRC for setting the limiting terms.⁸⁵⁶

Table 8.10: Models identified by the NSWLRC for setting limiting terms

Model	Arguments in favour	Arguments against
Hypothetical sentence-based approach	<ul style="list-style-type: none"> • Approach that courts are familiar with. • Fairness requires that forensic patients should not be detained for longer than if convicted in a normal trial. • Sentencing principles recognise the interests of the community and the victims. • This is the least arbitrary. 	<ul style="list-style-type: none"> • Sentencing principles may not be appropriate as defendants who are unfit to stand trial or not guilty by reason of insanity require treatment not punishment. Under sentencing principles, proportionality is constrained by community safety. • Sentencing principles cannot be applied with reasonable accuracy given the artificiality of imposing sentence on a person who has not been found guilty. • Limiting terms do not achieve outcomes commensurate with sentences given that the person does not get a benefit from an early guilty plea, may not be able to put all the facts before the court and focuses on the total sentence (not taking account of the fact that sentenced offenders may be eligible for parole). • Creates the impression that the person is being punished, despite not having been found guilty of an offence. Hunyor writes that ‘this approach suggests that there is a desire to hold people responsible and see them punished that needs to be satisfied such that a person isn’t perceived to “get off more lightly.”’⁸⁵⁷ • Encourages the development of informal tariffs related to just deserts for the offence.⁸⁵⁸
Modified sentencing approach	<ul style="list-style-type: none"> • Could address some of the limitations identified with the hypothetical sentence model by imposing a time limit equivalent to a hypothetical non-parole period. • Could provide that certain mitigating factors are presumed or provide for a percentage-based discount for unknown mitigating factors. 	<ul style="list-style-type: none"> • Using a non-parole period ignores the role of supervision on release on parole. • Presuming mitigating factors would be very artificial.
Fixed statutory time limits (often based on	<ul style="list-style-type: none"> • Certainty and consistency. 	<ul style="list-style-type: none"> • Difficult to apply in Tasmania as all offences under the <i>Criminal Code</i> (other than murder and treason) have the same maximum penalty.

⁸⁵⁶ See *ibid* 172–178, 180.

⁸⁵⁷ Hunyor (n 816) 13.

⁸⁵⁸ A Freiberg, ‘The Disposition of Mentally Disordered Offenders in Australia: “Out of Mind, Out of Sight” Revisited’ (1994) 1 *Psychiatry, Psychology and the Law* 97, 105.

Model	Arguments in favour	Arguments against
maximum penalties) ⁸⁵⁹		<ul style="list-style-type: none"> • Ignores the range of sentences imposed for offences. • The relationship between the time limit and the offending conduct ceases to be proportionate and becomes arbitrary.
Risk management approach	<ul style="list-style-type: none"> • This would be able to take into account the likelihood of rehabilitation, the likely length and success of treatment (and impact on offending behaviour). • The length of the term should be set by the need to protect the community balanced against the principle that a person's liberty should be subject to the minimum restriction necessary.⁸⁶⁰ 	<ul style="list-style-type: none"> • Not an approach that the court is familiar with. • Predictions of risk factors may be difficult at an early stage.

8.3.41 The application of the hypothetical sentence approach is the preferred approach in other jurisdictions. In other words, the term is set by reference to the sentence of imprisonment the court would have imposed if the person had been found guilty in an ordinary criminal trial. This means that, so far as is possible, general sentencing principles such as retribution, denunciation, proportionality apply 'as well as special principles that apply when sentencing offenders with cognitive and mental health impairments'.⁸⁶¹ However, as noted, it is recognised that this approach is 'not without difficulties, both conceptually and in practice'.⁸⁶²

8.3.42 This approach was reaffirmed as the most appropriate approach by the NSWLRC. This was also the recommendation of the ALRC⁸⁶³ and the LRCWA.⁸⁶⁴ However, to address some of the limitations of the model, the NSWLRC also recommended the following measures to make sure that the hypothetical sentence approach does not overestimate the commensurate sentence:

- (a) The court should estimate the sentence as if the person has been found guilty at a normal trial, and also taking into account the person's cognitive or mental health impairment; and
- (b) In order to make sure that the limiting term is fair in comparison with those imposed where a person is found guilty at a normal trial, the court should have a broad discretion to discount the sentence taking into account that it may not be possible to demonstrate particular mitigating factors such as remorse or a guilty plea.⁸⁶⁵

⁸⁵⁹ For example, in New Zealand, the limiting term is 10 years from the date of making the order if the offence is punishable by life imprisonment, or otherwise half the maximum term of imprisonment for the offence, *Criminal Procedure (Mentally Impaired Person) Act 2003* (NZ) ss 30(1)–(2) (unfit only as people found not guilty by reason of insanity are subject to an indefinite order: s 33). In Victoria, legislation sets the nominal term for offences based on the maximum term for the offence: see Appendix 3.

⁸⁶⁰ Hunyor (n 816) 20.

⁸⁶¹ NSWLRC (2013) (n 56) 173.

⁸⁶² NSWLRC (n 496) 220.

⁸⁶³ ALRC (n 40) 210.

⁸⁶⁴ LRCWA (n 416) 244.

⁸⁶⁵ NSWLRC (2013) (n 56) 180.

8.3.43 In the Issues Paper, the TLRI sought feedback in relation to how a limiting term should be set for supervision and restriction orders if one is adopted in Tasmania.

If there is a time limit for restriction and supervision orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), on what basis should it be determined?

8.3.44 The Institute received two submissions that addressed the method of setting the limiting term.

8.3.45 As noted above, Walvisch did not support the introduction of limiting terms given his views about the inappropriateness of using sentencing principles/maximum penalties as a reference point. Walvisch argued that:

The maximum penalty for an offence bears no connection to the time at which it is appropriate to assess the risk a person may continue to pose to the community. That is an issue that relates to matters such as the nature of the person's impairment and the treatment available for that impairment, rather than the penalty for a charged offence.

For a similar reason, the measures should also not refer to the sentence that would have been appropriate if the person had been convicted of the offence concerned. The extent of a person's hypothetical blameworthiness for an offence for which they have not been convicted (even if modified to take into account specific mitigating factors) bears no connection to the length of time they should serve under a supervision order before a review or release.

While EOT acknowledged the concerns about setting limiting terms based on a sentencing approach, the submission expressed support for the model proposed by Legal Aid NSW. In their model, Legal Aid NSW proposed that nominal or limiting terms be set equivalent to the non-parole periods of the sentences that would have been imposed had the person been found guilty. This approach was advocated by EOT as providing an identifiable release date which would benefit the wellbeing of the individual and conform to broader human rights concerns:

Importantly, it would also provide those in detention with identifiable future release dates which they could work toward. It would also satisfy the requirement to introduce improved human rights safeguards for those on restriction orders. Under the present arrangements persons who are detained may express feelings of frustration and hopelessness about the uncertainty of their future, in large part because of the uncertainty of their period of detention. Having no expected future release date gives little motivation to aim for self-improvement or to address the underlying factors contributing toward their original offending behaviour.

8.3.46 Clearly, there are conceptual and practical difficulties in setting a limiting period regardless of the method chosen (see Table 8.10). However, the Institute does not consider that the difficulties in setting limits should mean that indefinite terms should be retained. Therefore, regardless of the problems that have been identified, the Institute's view is that a method should be adopted to allow courts to set the term. On this basis, the Institute's view is that the best approach to setting the limiting terms is to adopt the hypothetical sentencing method. This means that the court identifies the hypothetical sentence that would have been imposed had the person been convicted in the ordinary way of the offence. The Institute recognises that there is a degree of artificiality in such a process. Furthermore, inevitably there are concerns about linking the length of an order imposed following a qualified acquittal or where a finding cannot be made that the defendant is not guilty, with the setting of terms using sentencing principles.

However, this approach appears to be favoured by a majority of jurisdictions that have adopted limiting terms. It addresses issues of arbitrariness and fairness arising from the current indefinite period of detention and allows a term to be set that is broadly comparable with the sentence that would have been imposed.

8.3.47 In recommending that limiting terms be based on hypothetical sentences, the Institute stresses that the objectives of the forensic system are different to the objectives of sentencing. Even though the limiting term is set by reference to a notional sentence, the limiting term is not intended to be a sentence and does not operate as a sentence in the ordinary way. The limiting term is instead a signal to the individual and the forensic mental health system that there is a defined release date in the future, and the intention is that the treatment and rehabilitation of the person should be focused on release by that date. However, this does not preclude earlier release or longer restriction/supervision where this is appropriate.

Recommendations

41. In imposing a forensic order under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), the court must nominate a limiting term, which would be the court's best estimate of the length of the sentence that would have been imposed had the person been found guilty at a normal trial (a hypothetical sentence).
42. A forensic patient should be able to apply to the Supreme Court for a discharge of a restriction order or the variation or revocation of a supervision order prior to the expiry of the limiting term.

Consequences of reaching the limiting term

8.3.48 The consequences of reaching the limiting term for the release of the individual must also be addressed. The term could be an absolute limit (ie, the time at which the individual is released) or a limit that is imposed with an option to extend. As noted, a system of limiting terms does not preclude an individual making an application to have their order revoked or varied prior the expiry of the limiting term (if the legislative test is satisfied).⁸⁶⁶ However, if a limiting term is adopted, it is necessary to decide the consequences of reaching the term set. It is necessary to determine whether the limiting term would operate as an **absolute limit** (as in the Australian Capital Territory and the Commonwealth) or a **limit imposed with provision to extend** the period of restriction or supervision prior to the end of the limiting term (as exists in New South Wales where limiting terms apply for unfitness matters following a special hearing and South Australia).

8.3.49 As discussed, in New South Wales provision was made in 2013 to allow the Supreme Court to make extension orders for forensic patients. This followed recommendations of the NSWLRC. The threshold in the *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1, pt 1 cl 2 is that an extension order can be made:

- (1) ... if and only if the Supreme Court is satisfied to a high degree of probability that:

⁸⁶⁶ See from [8.3.65] for a discussion of the test for making, varying or revoking an order.

- (a) the forensic patient poses an unacceptable risk of causing serious harm to others if he or she ceases being a forensic patient, and
 - (b) the risk cannot be adequately managed by other less restrictive means.
- (2) The Supreme Court is not required to determine that the risk of a person causing serious harm to others is more likely than not in order to determine that the person poses an unacceptable risk of causing serious harm to others.

The NSWLRC had identified a gap in the ability to transfer some forensic patients to the civil mental health system at the end of their limiting term in circumstances where they still presented a risk of harm to the community. This related to individuals who did not satisfy the criteria for admission into the civil mental health system.⁸⁶⁷ In addition, the guardianship system does not provide a means to detain a person for reasons of community safety.⁸⁶⁸

8.3.50 The NSWLRC stressed that this power is exceptional and should be exercised sparingly, with strong justification and suitable protections.⁸⁶⁹ It emphasised that the only justification for the making of the order should be the need to protect the community. An order should not be made for the purposes of treatment or punishment.⁸⁷⁰ It considered that this approach would ensure community protection and provide ‘an appropriate counterbalance to our recommendation that limiting terms be applied to people found NGMI’.⁸⁷¹ This cautious approach reflects the principles that apply to preventative detention for offenders sentenced following a finding of guilt, in cases involving high-risk sex and violent offenders. Such offenders may be detained at the end of their sentence where the Supreme Court considers that they continue to pose an unacceptable risk of serious offending.⁸⁷²

8.3.51 In South Australia, recent amendments have also made it possible for the Supreme Court to make continuing supervision orders.⁸⁷³ The test in South Australia is that the ‘court is satisfied, on the balance of probabilities, that the defendant to whom the application relates could, if unsupervised, pose a serious risk to the safety of the community or a member of the community.’⁸⁷⁴ Again, these provisions are intended to address concerns that a limited number of people may pose an unacceptable risk of causing harm to other people if released from supervision at the end of the limiting term, and that such a risk cannot be adequately managed under the civil mental health regime.

8.3.52 Similarly, in Tasmania it can be argued that extension orders are necessary because there are gaps in the civil system. There is provision for the MHT to make a treatment order under the *Mental Health Act 2013* (Tas), which authorises treatment for an involuntary patient.

⁸⁶⁷ In New South Wales, the NSWLRC reported that 10 out of 54 (19 per cent) forensic patients have been detained beyond their limiting term as an involuntary patient under the *Mental Health Act 2007* (NSW): NSWLRC (2013) (n 56) 172.

⁸⁶⁸ Ibid 318–319.

⁸⁶⁹ Ibid 321, 332–333.

⁸⁷⁰ Ibid 322.

⁸⁷¹ Ibid 333.

⁸⁷² Ibid.

⁸⁷³ *Mental Health (Forensic Provisions) Act 1990* (NSW) amended by *Mental Health (Forensic Provisions) Amendment Act 2013* (NSW) s 54A, sch 1; *Criminal Law Consolidation Act 1935* (SA) ss 269UA–269UB inserted by *Criminal Law Consolidation (Mental Impairment Act) 2017* (SA).

⁸⁷⁴ *Criminal Law Consolidation Act 1935* (SA) s 269UA(7) inserted by *Criminal Law Consolidation (Mental Impairment Act) 2017* (SA).

A treatment order lasts for up to six months and sets out treatment in a treatment plan. This can take place in a hospital, in the community or a combination of both.⁸⁷⁵ The criteria that must be met for the MHT to make a treatment order are that: the person has a mental illness; without treatment, the mental illness will, or is likely to, seriously harm the person's health or safety or the safety of other persons; the treatment will be appropriate and effective; treatment cannot be adequately given except under a treatment order; and the person does not have decision-making capacity.⁸⁷⁶ Under the Act, an adult has decision-making capacity unless it is established that they are unable to make a decision because of an impairment of, or disturbance in, the functioning of the brain and he or she is unable to understand information relevant to the decision, retain information relevant to the decision, use or weigh information relevant to the decision or communicate the decision.⁸⁷⁷ However, there may be people who refuse treatment but do not lack decision-making capacity. Further, individuals may not meet the definition of mental illness, such as a person with an intellectual disability or acquired brain injury.⁸⁷⁸

8.3.53 There are also powers for intervention under the *Guardianship and Administration Act 1995* (Tas). Under this Act, there is power for the Guardianship and Administration Board to appoint a guardian, who can be provided with accommodation powers and health care powers.⁸⁷⁹ Accommodation powers mean that the guardian has the authority to decide where and with whom the person lives. This might include accommodation in a group home or supported residential facility.⁸⁸⁰ A guardian with health care powers can consent to medical treatment as well as care provided by allied medical practitioners but does not have the power to authorise psychiatric treatment of a person with mental illness.⁸⁸¹ A guardian can also consent to or make decisions about a behaviour management plan.⁸⁸² However, a guardian can only be appointed where a person has a disability and because of that disability they cannot make reasonable personal and lifestyle decisions and the person is in need of a guardian.⁸⁸³ The Board must consider whether the needs of the person could be met by other means less restrictive of that person's freedom of decision and action and must be satisfied that the order would be in the best interests of the person.⁸⁸⁴ Further, as noted by the NSWLRC, the principles underpinning guardianship 'focus solely on the best interests of the person subject to the order. The need for community protection is not a relevant principle'.⁸⁸⁵ On this basis, '[i]t is not the guardian's role to safeguard the community, although the guardian's decisions may have that effect'.⁸⁸⁶ Accordingly, there are limitations in relation to the effectiveness of guardianship arrangements to provide an appropriate means to address concerns about community safety.

⁸⁷⁵ For a discussion of a treatment order, see Mental Health Tribunal, *The Mental Health Tribunal: Orders, Hearing and Reviews: Information for Patients, their Carers and Support People* (2017).

⁸⁷⁶ *Mental Health Act 2013* (Tas) s 40.

⁸⁷⁷ *Ibid* s 7(1).

⁸⁷⁸ See discussion in Part 7 in relation to the meaning of mental illness.

⁸⁷⁹ For detailed discussion of the nature of guardianship, see Guardianship and Administration Board, *Private Guardian's Handbook: Information for Guardians Appointed by the Guardianship and Administration Board* (2017).

⁸⁸⁰ *Ibid* 17.

⁸⁸¹ *Ibid* 23, 25.

⁸⁸² *Ibid* 26.

⁸⁸³ *Guardianship and Administration Act 1995* (Tas) s 20(1).

⁸⁸⁴ *Ibid* ss 20(2), (3).

⁸⁸⁵ NSWLRC (2013) (n 56) 317. It is noted that the TLRI has recommended a shift to representative decision-making rather than acting in the 'best interests' of a person: see TLRI (n 7) Part 3.

⁸⁸⁶ NSWLRC (2013) (n 56) 317.

The Institute has made recommendations for reform in relation to the functions and powers of guardians. These reforms would allow guardians to take into account harm to others as a relevant consideration when making representative decisions.⁸⁸⁷ However, a guardian could only exercise this decision-making power if the person does not have the ability to make his/her own decision or to consent to the decision.⁸⁸⁸

8.3.54 On the other hand, there are strong arguments against a preventative detention scheme, including that forensic patients ‘should not be subject to further restriction on their liberty following the expiry of their limiting term, apart from those that may be imposed under the civil regimes’.⁸⁸⁹ For this reason, many stakeholders in the NSW review process expressed considerable concern about the creation of a preventative detention scheme.⁸⁹⁰ Further, preventative detention schemes for forensic patients are said to violate Art 14 of the *CRPD* which ‘prohibits the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria are also used to justify the deprivation of liberty’.⁸⁹¹ More generally, preventative detention schemes that apply to convicted offenders are controversial because they offend against the principles of proportionality and finality in sentencing, they amount to double punishment and because prediction of future risk is problematic.⁸⁹² As the TLRI has written previously:

an assessment of the merits and the use of indefinite and preventative detention regimes necessarily involves the balancing of potentially conflicting rights of victims, offenders, and society as a whole. This conflict of rights unsurprisingly results in tensions at the policy level, as Parliament and the judiciary must grapple with the balance of ostensibly irreconcilable interests. Secondly, indefinite and preventative detention regimes are justified as a means of preventing future harm, but the task of predicting future dangerousness is fraught with uncertainty and predictive models have been extensively criticised for a tendency to over-predict risk.⁸⁹³

⁸⁸⁷ Ibid Part 11.

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid.

⁸⁹⁰ Ibid 322, 332–333.

⁸⁹¹ UNRPD (n 149) [7] cited in Gooding et al (n 35) 834.

⁸⁹² See Sentencing Advisory Council, Tasmania (‘TSAC’), *Sex Offence Sentencing*, Final Report No 4 (2015) 107; TLRI (n 100) 7–9.

⁸⁹³ TLRI (n 100) 1–2 citing *Veen v The Queen* (1979) 143 CLR 458, 463–465 (Stephen J); *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575, 623 [124]–[125] (Kirby J); *McGarry v The Queen* (2001) 207 CLR 121, 141–142 [61] (Kirby J); *Kable* (1996) 189 CLR 51, 122–123 (McHugh J); *Buckley v The Queen* (2006) 80 ALJR 605, [7], [21], [43]; *R v Carr* (1996) 1 VR 585, 592; *Director of Public Prosecutions (WA) v Mangolamara* (2007) 169 Crim R 379, [165] (Hasluck J); *Director of Public Prosecutions (WA) v GTR* [2007] WASC 318, [112] (McKechnie J); *Director of Public Prosecutions (WA) v Comeagain* [2008] WASC 235, [20] (McKechnie J); *DPP v McIntosh* [2013] TASSC 21, [50] (Wood J); Bernadette McSherry, ‘Throwing Away the Key: The Ethics of Risk Assessment for Preventative Detention Schemes’ (2014) 21(5) *Psychiatry, Psychology and Law* 779; David Ruschena, ‘Determining Dangerousness: Whatever Happened to the Rules of Evidence?’ (2003) 10(1) *Psychiatry, Psychology and Law* 122; Jessica Black, ‘Is the Preventative Detention of Dangerous Offenders Justifiable?’ (2011) 6(3) *Journal of Applied Security Research* 317; Russ Scott, ‘Risk Assessment and Sentencing of Serious Sex Offenders’ (2008) 15(2) *Psychiatry, Psychology and Law* 188; Stephen J Morse, ‘Preventative Confinement of Dangerous Offenders’ (2004) 32 *Journal of Law, Medicine and Ethics* 56; Susan Dimock, ‘Criminalizing Dangerousness: How to Preventatively Detain Dangerous Offenders’ (2015) 9 *Criminal Law and Philosophy* 537; Kate Warner, ‘Sentencing Review 2002–2003’ (2003) 27 *Criminal Law Journal* 325; Charles Ewing, ‘Preventative Detention and Execution: The Constitutionality of Punishing Future Crimes’ (1991) 15 *Law and Human Behavior* 139; Tamara Tulich, ‘Post-Sentence Preventive Detention and Extended Supervision of High Risk Offenders in New South Wales’ (2015) 38(2) *University of New South Wales Law Journal* 823; Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 201.

Such schemes are also contrary to international human rights instruments and for this reason the courts and international tribunals have stressed that their powers must be exercised only in exceptional circumstances.⁸⁹⁴

8.3.55 In the Issues Paper, the TLRI sought feedback on whether, if a limiting term is adopted, there is a need for a preventative scheme that would allow for an extension of supervision or detention or whether the current Tasmanian civil arrangements sufficiently enable risk to community safety to be managed.

If the *Criminal Justice (Mental Impairment) Act 1999* (Tas) is amended to provide for a limiting term for restriction and supervision orders, is it necessary and appropriate to introduce a preventative detention scheme that would allow for an extension of the person's forensic patient status?

8.3.56 Only three submissions addressed this question. The DPP reiterated that restriction and supervision orders should be indefinite. In contrast, as noted above, O'Connell considered that it may be appropriate to make provision for a preventative detention scheme if a time limit is introduced for restriction orders (which she supported).

8.3.57 EOT suggested an alternative approach to the consequences of a limiting term for restriction orders. This derived from a model suggested by Legal Aid NSW. EOT's view was that two periods should be set for limiting terms: (1) a non-parole period; and (2) a sentence. Based on these two periods, EOT suggested the following approach:

- During the non-parole period, a person should only be released from a restriction order if a certificate is issued by the MHT and confirmed by the Supreme Court;
- After the non-parole period has expired, the presumption should be that the person is released in the following sequence:
 - Conditional release at the end of the non-parole period
 - Unconditional release at the end of the sentence period.

It was argued that this would 'shift the legal presumption against detention' after the expiry of the notional non-parole period. However,

Importantly, it would not derogate the current powers of the Mental Health Tribunal to issue a certificate that would enable the release of a person conditionally or unconditionally prior to the expiry of their nominal term. Nor would it prevent the Supreme Court from putting in place other orders or conditions to come into effect on release after a nominal non-parole period, such as a treatment order.

This model creates a rebuttable presumption of unconditional release at the expiry of the sentence period, which means that the court can order either conditional release or no release at that time.

8.3.58 As indicated, the Institute's view is that if limiting terms are introduced for forensic orders, provision should be made to allow those orders to be extended in exceptional cases.

⁸⁹⁴ NSWLRC (2013) (n 56) 320–321, 332.

Despite legitimate disquiet about the implications for human rights of preventative detention, the Institute’s view is that accommodation needs to be made for the unpredictability of treatment and rehabilitation. A power for the prosecution to apply to the court to extend the term of a restriction or supervision order is necessary to address the issues of community protection in circumstances where it would be unsafe to release a forensic patient at the end of a finite term. Accordingly, the Institute proposes a ‘half-way’ model between indefinite detention (where the onus is on the individual to justify release) and a finite term where an individual is automatically released at the end of the term in all cases.

Recommendation

43. A limiting term should not operate as an absolute limit on the duration of an order. There should be power for the prosecution to make an application to extend the order.

8.3.59 A further issue that requires resolution is how should a preventative detention scheme be structured. The NSWLRC considered four possible models in this regard as set out in Table 8.11.⁸⁹⁵

Table 8.11: Advantages and disadvantages of models of preventative detention

Model	Details	Advantages/disadvantages of model
Apply or adapt the scheme for continued supervision of high-risk offenders.	<ul style="list-style-type: none"> • The <i>Crimes (High Risk Offenders) Act 2006</i> (NSW) provides for the continued supervision or detention of high-risk sex or violent offenders who are due to be released. • This model could be adapted to manage forensic patients who present a risk of harm. The nature of the risk would need to be framed differently given that forensic patients have not been convicted of an offence. 	<ul style="list-style-type: none"> • Decision to extend detention is made by Supreme Court. • Safeguards: having two independent experts review the person and the high threshold for making the order. • Consistency in processes and procedures for forensic patients and convicted offenders.
Allow the Mental Health Review Tribunal to classify the person as a ‘compulsory patient’ to provide for continued detention or supervision in the community.	<ul style="list-style-type: none"> • Allow the MHRT to make the decision to classify the person as a ‘compulsory patient’ to allow for continued detention in a mental health facility or discharge into the community under supervision. 	<ul style="list-style-type: none"> • Concerns regarding lack of a judicial safeguard. • No general system of preventative detention for convicted offenders who pose a risk of harm at the end of their sentence and so a system for forensic patient may operate to treat people with cognitive and mental health impairments in a discriminatory manner. • However, this model would be developed specially for forensic patients rather than being an adaption of a scheme designed for convicted high-risk offenders. • Allows for ongoing supervision and review by the MHRT.

⁸⁹⁵ This information set out in *ibid* 323–333.

Model	Details	Advantages/disadvantages of model
Amend the limiting term provision to provide that the court must release a patient unless satisfied that the release of the person will seriously endanger the public.	<ul style="list-style-type: none"> Provides the MHRT with a discretion to extend the limiting term for individuals if they present a clear risk. 	<ul style="list-style-type: none"> Greater flexibility than having a limiting term that cannot be extended. However, may be viewed as effectively removing the limiting term as there will no longer be a definite end date for release for any forensic patients.
Change the civil scheme of involuntary detention to include people with cognitive impairments.	<ul style="list-style-type: none"> Amend the civil scheme of involuntary detention for people with cognitive impairments by allowing for a parallel scheme for involuntary detention.⁸⁹⁶ 	<ul style="list-style-type: none"> Significant resource implications to create a civil detention scheme for the involuntary detention of people with cognitive impairments.

8.3.60 After considering these options, the NSWLRC recommended (and the Parliament adopted) a model that is consistent with the provisions that apply to offenders who are subject to a sentence of imprisonment but adapted to accommodate the management of forensic patients.

8.3.61 Key features of the NSW model are that:

- (a) The Supreme Court makes the order on the basis of a twofold assessment of the unacceptable risk of serious harm to others posed by the forensic patient if released from detention or supervision and the inadequacy of other less restrictive means of managing the risk.

Considerations that the court has regard to include: the safety of the community, expert reports, any orders or decisions of the MHRT, the person's level of compliance with any obligations imposed while being a forensic patient, especially while they were on leave or conditional release; the view of the court at the time the limiting term was imposed and a report from the forensic patient's treatment team which would include information about the need for ongoing management of the person and the reasons why arrangements that do not involve continued supervision or detention are not appropriate.⁸⁹⁷

- (b) The term of the extension order is five years subject to further extension.
- (c) The MHRT conducts regular reviews.
- (d) The Supreme Court can revoke the extension order on the ground that circumstances have changed significantly so as to render the extension order unnecessary.

The relevant NSW legislation is set out in full in Appendix 6. This also reflects the South Australian approach (also set out in Appendix 6).

8.3.62 In the Issues Paper, the Institute sought feedback as to the most appropriate model if a preventative detention scheme were to be adopted in Tasmania. The Institute noted that the scheme could be based on the models considered by the NSWLRC or some other model

⁸⁹⁶ For example, the *Disability Act 2006* (Vic).

⁸⁹⁷ NSWLRC (2013) (n 56) 334–335; *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1 div 2 cl 7.

proposed by stakeholders. For example, a model based on the NSWLRC approach would allow an application to be made to the Supreme Court to extend the order. This would require determination of the threshold test for extension and the term of the extension order. The Supreme Court could also be given a power to revoke the extension order and the MHT could have responsibility for ongoing review.

If a preventative detention scheme is introduced, what model should be used? What should the threshold test for an extension order be and how long should an extension order operate?

8.3.63 No submissions to the Institute addressed these questions.

8.3.64 The Institute's view is that the NSW model should be adopted in Tasmania to allow for the extension of orders beyond the limiting term set by the court, with appropriate changes to reflect the Tasmanian approach to decision-making and the role of the MHT. This model is based on the approach to the scheme of preventative detention that applies in New South Wales for the continued supervision or detention of high-risk sex or violent offenders. It recognises the need to balance the risk of the discharge or revocation of the order with the least restriction principle and accommodates the role of the MHT and the Supreme Court in the process. Accordingly, the Institute's recommendation is that the scheme for the extension of orders should have the following key features:

1. The DPP should be able to make an application to the Supreme Court prior to the expiration of the limiting term for an extension of a restriction order or a supervision order. The DPP should also be able to apply for a restriction order to be replaced with a supervision order instead of an extension of the restriction order.
2. The Supreme Court should consider the request for the extension order on the basis of a twofold assessment of the unacceptable risk of serious harm to others posed by the forensic patient if released from detention or supervision and the inadequacy of other less restrictive means of managing the risk. This regime reflects the principles contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 34, which provides that the 'court is to apply, where appropriate, the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.'
3. Considerations that the court should have regard to include:
 - the safety of the community
 - expert reports
 - any certificates issued by the MHT
 - the person's level of compliance with any obligations imposed while being a forensic patient, especially while they were on leave
 - the view of the court at the time the limiting term was imposed
 - a report from the forensic patient's treatment team which would include information about the need for ongoing management of the person and the reasons

why arrangements that do not involve continued supervision or detention are not appropriate

- a report on the attitudes of victims, if any, and next of kin

(These factors are broadly consistent with the provisions set out in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35).

4. The term of the extension order should be five years subject to further extension.
5. The MHT should be mandated to conduct annual reviews of the extended forensic order.
6. The Supreme Court should have the power to make an interim extension order if it appears that the limiting term or existing extension order will expire before the proceedings are determined and that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.
7. The Supreme Court should at any time be able to vary or revoke an extension order on the application of the DPP or the person subject to the forensic order if satisfied that circumstances have changed sufficiently to render the order unnecessary.

Recommendation

44. The NSW model should be adopted in Tasmania to allow for the extension of orders beyond the limiting term set by the court, with appropriate changes to reflect the Tasmanian approach to decision-making and the role of the Mental Health Tribunal. The scheme for the extension of orders should have the following key features:

- (a) The DPP should be able to make an application to the Supreme Court prior to the expiration of the limiting term for an extension of a restriction order or a supervision order. The DPP should also be able to apply for a restriction order to be replaced with a supervision order instead of an extension of the restriction order.
- (b) The Supreme Court should make the extension order on the basis of a twofold assessment of the unacceptable risk of serious harm to others posed by the forensic patient if released from detention or supervision and the inadequacy of other less restrictive means of managing the risk. This regime reflects the principles contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 34, which provides that the ‘court is to apply, where appropriate, the principle that restrictions on the defendant’s freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.’
- (c) Considerations that the court should have regard to include:
 - the safety of the community
 - expert reports
 - any certificates issued by the MHT

- the person’s level of compliance with any obligations imposed while being a forensic patient, especially while they were on leave
 - the view of the court at the time the limiting term was imposed
 - a report from the forensic patient’s treatment team which would include information about the need for ongoing management of the person and the reasons why arrangements that do not involve continued supervision or detention are not appropriate
 - a report on the attitudes of victims, if any, and next of kin.
- (d) The term of the extension order should be five years subject to further extension.
- (e) The MHT should be mandated to conduct annual reviews of the extended forensic order.
- (f) The Supreme Court should have the power to make an interim extension order if it appears that the limiting term or existing extension order will expire before the proceedings are determined and that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.
- (g) The Supreme Court should at any time be able to vary or revoke an extension order on the application of the DPP or the person subject to the forensic order if satisfied that circumstances have changed sufficiently to render the order unnecessary.

Test for making, varying, discharging or revoking orders under the Criminal Justice (Mental Impairment) Act 1999 (Tas)

8.3.65 In Tasmania, the *Criminal Justice (Mental Impairment) Act 1999* (Tas) sets out the test for the Supreme Court to apply when making, varying, discharging or revoking orders. The same principles apply to all decision-making by the Supreme Court and are discussed in detail at [8.2.9] and [8.2.22]–[8.2.27]. As noted, these provisions aim to provide an appropriate balance between the need to protect the safety of the community and the principle of least restriction with the defendant’s freedom and personal autonomy. In making this assessment, there is a focus in the legislation (and by the court) on the likely danger that the defendant poses to other people if released. In other words, a key feature of the test is an assessment of whether the defendant is, or would if released be, likely to *endanger* another person or other persons generally.

8.3.66 This section of the Report focuses on whether there is a need to reform the test of endangerment contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) for making an assessment of whether to detain a person under a supervision order, impose a supervision order or a treatment order or release a person conditionally or unconditionally. In addition, it considers the basis on which a forensic patient should be released from detention or supervision before the end of the limiting term. Consideration is also given to whether it is desirable to introduce statutory presumptions (in favour of release or detention) that would operate to guide the Supreme Court’s decision-making when considering the release of an individual before the end of the limiting terms. Accordingly, it is necessary to decide:

- (a) on what basis an order should be made, and
- (b) on what basis a person can be discharged or have an order varied prior to the expiry of the limiting term.

8.3.67 In the Issues Paper, the Institute outlined several reform options that could be considered in the context of the Tasmanian forensic mental health system. These included:

- (a) revisiting the role of dangerousness in making, varying and revoking orders;
- (b) including statutory presumptions in relation to the detention or release of defendants;
- (c) making changes to the model of decision-making;
- (d) making changes to the leave system.

The endangerment test

8.3.68 The NSWLRC identified two common features in cases following a finding at a special hearing or a finding of not guilty by reason of insanity:

- (a) the absence of established criminal responsibility, and therefore the absence of any principled basis for punishment; and
- (b) the possibility that the person’s cognitive or mental health impairment may give rise to a risk of harm, and a consequent need for restrictions on the person’s liberty to ensure the safety of the community ...⁸⁹⁸

This means that punishment is irrelevant in these cases. Accordingly, the limits of the person’s detention are guided by the requirement to achieve a balance between community safety and the individual’s freedom and personal autonomy,⁸⁹⁹ informed by the concept of risk. However, as McSherry has written, ‘the problem really lies in drawing up appropriate criteria which will lead to the detention of those who really may do harm in the future, whilst allowing for the absolute discharge of those who do not pose a risk to the public’.⁹⁰⁰ As indicated, the test in Tasmania is ‘likely to endanger’.

8.3.69 **Position in other jurisdictions.** While there are differences in the process for making orders, the management and review of forensic patients and the discharge of orders in other Australian jurisdictions, there are some broad similarities that are useful to note in the context of this review. A brief summary of the approaches in other jurisdictions is provided in Appendix 3. In particular, it can be seen that the concept of endangerment is often used as a decision-making criterion for making, varying or revoking forensic orders. However, as shown in Table 8.12, the way in which the test of endangerment is framed differs between jurisdictions and also varies at different decision-making stages.

⁸⁹⁸ NSWLRC (n 496) 157.

⁸⁹⁹ VLRC (n 22) 375; NSWLRC *ibid* 157–158.

⁹⁰⁰ McSherry (n 845) 221.

Table 8.12: Comparison of tests for making and discharging forensic orders, Australian jurisdictions

Test	Making orders	Varying or discharging orders
Serious endangerment	New South Wales (NGMI)	New South Wales Victoria ⁹⁰¹ South Australia
Likely to endanger	Tasmania South Australia Northern Territory Victoria ⁹⁰² Australian Capital Territory	Tasmania
Unacceptable risk to the safety of the community	Queensland	Queensland
Not a threat or danger		Commonwealth
Safety will or is likely to be seriously at risk		Northern Territory
Degree of risk		Western Australia

8.3.70 A key difference (as seen in Table 8.12) is that some jurisdictions have adopted the requirement that the court consider whether public safety would be *seriously* endangered by the person’s release (rather than ‘likely to endanger’) as the threshold test for the release of an individual.⁹⁰³ The ‘serious endangerment’ test encompasses ‘concepts of the degree of harm and the degree of risk’.⁹⁰⁴ In other words, ‘it encompasses the gravity of the possible harm in the event that the risk eventuates’.⁹⁰⁵ So ‘a small risk of serious harm occurring may amount to serious endangerment, while a high risk of relatively trivial harm may not’.⁹⁰⁶ In *State of New South Wales v XY*,⁹⁰⁷ the Court of Appeal confirmed that the test involves a consideration of the gravity of the risk and the likelihood of the risk: this means that it is necessary ‘to identify the nature of the harm which might follow from release, and the chance of the harm eventuating’.⁹⁰⁸ It was indicated that if the conduct ‘which may occur would probably not have serious consequences for any member of the public if it did occur, a reasonably high chance of occurrence would be tolerable’.⁹⁰⁹ However, if ‘the anticipated conduct ... involved serious physical harm and possibly homicide, a much lower level of risk of occurrence would need to be established’.⁹¹⁰ In contrast, as set out at [8.2.26], ‘likely to endanger’ is predominately concerned with the degree of risk of harm occurring rather than its gravity. ‘Likely to endanger’

⁹⁰¹ It is noted that the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) changed the test from one of dangerousness to one of risk (whether the person poses an unacceptable risk of serious harm). This legislation has not been passed by the Victorian Parliament.

⁹⁰² It is noted that the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) changed the test from one of dangerousness to one of risk (whether the person is likely to pose a risk of serious harm). This legislation has not been passed by the Victorian Parliament.

⁹⁰³ It is noted that South Australia adopted a serious endangerment test to strengthen the test for release, see *Criminal Law Consolidation Act 1935* (SA) s 269T(2)(ba) which stipulates that the court cannot release a defendant or significantly reduce the degree of supervision unless satisfied on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person’s release.

⁹⁰⁴ NSWLRC (n 496) 161.

⁹⁰⁵ VLRC (n 22) 377.

⁹⁰⁶ NSWLRC (2013) (n 56) 208 citing *NOM v DPP* [2012] VSCA 198 [63].

⁹⁰⁷ [2014] NSWCA 466.

⁹⁰⁸ *Ibid* [169] (Basten JA).

⁹⁰⁹ *Ibid* [168] (Basten JA).

⁹¹⁰ *Ibid*.

involves an assessment of the risk of harm — ‘both the probability of the harm occurring and the gravity of the possible harm are relevant to assessing the nature of the risk, but the probability of a risk occurring is the “critical concept of endangerment”’.⁹¹¹

8.3.71 Need for reform. Other jurisdictions have reviewed the circumstances in which a person may be made a forensic patient and the process by which the order is able to be varied or discharged and have examined the principles and factors that should be considered by the court. This discussion has generally focused on the concepts of risk of harm and dangerousness.

8.3.72 In Victoria, the VLRC sought feedback on whether the concept of endangerment is an appropriate basis for the court’s assessment of whether to detain or release a forensic patient. A common view was that ‘endangerment’ is an imprecise concept that involves too much subjective interpretation.⁹¹² The NSWLRC considered that there is ‘very little guidance on what [endangerment] meant’.⁹¹³ Similarly, other commentators have observed that the focus on dangerousness provides little guidance as to how the court should exercise its broad discretion. They argue that this has resulted in the courts according ‘higher weight to factors relating to community protection than factors related to treatment and ongoing evidence of mental disorder’.⁹¹⁴ The NSWLRC concluded that a test based on an assessment of dangerousness is inadequate as it is inconsistent with the test for determining the detention of a patient in the civil mental health system (which requires an assessment of whether it is necessary for the protection of the person or others from serious harm). It is also inconsistent with contemporary language of risk assessment.⁹¹⁵ The notion of dangerousness is said to be inappropriate because it is ‘a vague and unhelpful way of expressing the risk of a particular individual causing harm’.⁹¹⁶ Instead, the NSWLRC suggested that the language of risk better reflects the approach taken by clinicians and health professionals in the mental health field.⁹¹⁷

8.3.73 In response to concerns about the inadequacy of the current test, the NSWLRC recommended ‘a risk-based threshold for release [that] should require that there be no significant risk of serious harm’.⁹¹⁸ This test would constitute an appropriate hurdle that protects both community safety and the interests of the individual.⁹¹⁹ In Victoria, a different approach was recommended to address concerns about the language of ‘dangerousness’ and to move to a ‘risk’-based test. The VLRC recommended that ‘an “unacceptable risk” [is] an appropriate measure of the likelihood of risk the supervised person pose[s]’.⁹²⁰ This approach was proposed for four reasons:

⁹¹¹ NSWLRC (2013) (n 56) citing *NOM v DPP* [2012] VSCA 198 [64].

⁹¹² VLRC (n 22) 378.

⁹¹³ NSWLRC (2013) (n 56) 208.

⁹¹⁴ Ruffles (n 843) 178.

⁹¹⁵ NSWLRC (2013) (n 56) 213–214.

⁹¹⁶ *Ibid* 214 referring to Howard and Westmore (n 392) 476–477.

⁹¹⁷ NSWLRC (2013) (n 56) 215.

⁹¹⁸ *Ibid* 216. It is noted that the operation of the release provisions in New South Wales was the subject of a review: see NSW Government (Health), *Mental Health Review Tribunal: A Review in Respect of Forensic Patients* (2017).

⁹¹⁹ NSWLRC (2013) (n 56) 216.

⁹²⁰ VLRC (n 22) 378.

- (1) it demonstrates that ‘there is some level of risk that will be acceptable and will counteract any assumption that the person must prove that they pose no risk before their level of supervision can be reduced’;⁹²¹
- (2) it ‘recognises that assessing risk requires a level of subjective judgment by the decision-maker on the level of risk that society is prepared to accept when balanced against the supervised person’s right to liberty and freedom’;⁹²²
- (3) although ‘it incorporates some level of social judgement. A test based on unacceptable risk is more in line with modern risk assessment than a test based on dangerousness’;⁹²³ and
- (4) it ‘will encourage decision-makers to engage in more nuanced assessments of a supervised person’s risk, rather than a “black and white” assessment of whether a person is “dangerous” or “not dangerous”’.⁹²⁴

8.3.74 The VLRC also suggested that the test should specify the type of harm it seeks to prevent in order to provide clarity to decision-makers and experts applying the test. Accordingly, it recommended a test based on physical or psychological harm to a person.⁹²⁵ In New South Wales, ‘serious harm’ is nominated as the degree of harm to be judged because it aligns closely with the approach adopted in the civil mental health system.⁹²⁶ Similarly, in Tasmania, one of the criteria the MHT applies in making a treatment order uses the terminology of ‘serious harm’.⁹²⁷

8.3.75 In the Issues Paper, the TLRI sought feedback on the wording of the Tasmania test in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and any possible concerns about its operation either generally or with regard to particular categories of people, such as those with cognitive impairments or those with long-term mental illnesses. In particular, the TLRI sought feedback on whether there should be a change to the threshold for making, varying or discharging an order under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to achieve a better balance between the risk to the community and the interests of the individual.

Are there any difficulties that exist under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) in relation to the making, varying or discharging of orders for forensic patients?

Is the current approach to decision-making in relation to individuals subject to forensic orders overly cautious? For example, is too much emphasis placed on the risk to the community and too little emphasis placed on the interests of the person?

Do you think that the test contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) referring to ‘likely to endanger’ should be changed to refer to a ‘significant risk of serious harm’, an ‘unacceptable risk of causing physical or psychological harm’ or

⁹²¹ Ibid.

⁹²² Ibid 379.

⁹²³ *Mental Health Act 2013* (Tas) s 40.

⁹²⁴ VLRC (n 22) 379.

⁹²⁵ Ibid 380.

⁹²⁶ NSWLRC (2013) (n 56) 216.

⁹²⁷ See [8.3.52].

some other test? Are there any other factors that should be included or removed from the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35?

8.3.76 Two submissions to the Institute addressed these questions. The DPP stated that ‘the decision making is in accordance with the principles encapsulated in the legislation’ and it was his view that the current ‘likely to endanger’ test is appropriate. Accordingly, he did not support any change. In contrast, in the context of reduced supervision levels, Walvisch wrote that the test should require ‘evidence that members of the public will be seriously endangered as a result of reducing the supervision status of the person’.

8.3.77 After considering the competing views, the Institute has concerns about the current test for the making, varying and revocation of the orders which requires the court to determine whether the applicant is ‘likely to endanger’ the community. As noted, this test is imprecise because it focuses on the likelihood of danger materialising (understood to be a real chance or possibility) rather than the level of harm. Moreover, this approach does not reflect contemporary approaches to risk assessment. Accordingly, the Institute’s view is that the test should be changed by removing the imprecise concept of ‘dangerousness’ and replacing it with a test that sets out the nature of the harm contemplated. Further, the Institute considers that the test should be reformulated so that it requires a risk assessment. This accords with modern risk assessment approaches that move away from the conflation of mental illness with dangerousness. With regard to these matters, the VLRC’s recommended model provides a useful precedent for Tasmania. In accordance with that model, the Institute recommends that the level of harm should be an unacceptable risk of causing physical or psychological harm to a person or persons generally. The use of ‘unacceptable’ risk recognises that some level of risk is acceptable and allows the court to balance the level of risk that society is prepared to accept that is consistent with the person’s freedom and personal autonomy. (other options unacceptable risk to the safety of the community/no significant risk of serious harm).

Recommendation

45. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1)(b) should be changed to refer to whether the defendant does, or would if released, pose an unacceptable risk of causing physical or psychological harm to a person or persons generally.

Other factors to be included in the test for making, varying or discharging the order

8.3.78 The VLRC also nominated other factors that may provide relevant guidance to courts in making, varying and revoking treatment orders. It recommended legislative amendments to require courts to take into account an individual’s recovery and progress, in terms of treatment and personal improvement, when making decisions about changing their status from a custodial supervision order to a non-custodial supervision order or releasing them from a non-custodial supervision order.⁹²⁸ This change was recommended to allow courts to be more responsive to people with intellectual disabilities or other cognitive impairments, and to recognise more positive aspects of people’s recovery or progress.⁹²⁹ These matters could also be the focus of inquiry at annual reviews conducted by the MHT, so that its certificates can contain useful

⁹²⁸ VLRC (n 22) 390–391.

⁹²⁹ Ibid 390.

information for the court on compliance with treatment and rates of recovery, which will then inform the court's own decisions.

8.3.79 As with the approach of the VLRC, the Institute considers that an individual's recovery and progress should be expressly set out in legislation as matters to be taken into account by the MHT in issuing a certificate and by the court in making decisions about whether to change a person's status from a restriction order to a supervision order or to revoke a supervision order prior to the expiration of the limiting term.⁹³⁰

Recommendation

46. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35(1) should be amended to require the Mental Health Tribunal and the court to have regard to the person's recovery or progress in terms of treatment progression and personal improvement in making a decision to discharge a restriction order, or to vary or revoke a supervision order prior to the expiration of the limiting term.

Need for statutory presumptions in relation to detention/supervision

8.3.80 In Tasmania, there is currently no presumption in favour of release or detention/supervision based on the assessment of risk in the *Criminal Justice (Mental Impairment) Act 1999* (Tas). Rather, the court makes its decision in relation to variation, discharge or revocation by balancing a number of factors prescribed in the Act.

8.3.81 **Position in other jurisdictions.** Jurisdictions also differ with respect to their statutory presumptions for and against release or detention. For example, in New South Wales, the MHRT must not release a forensic patient unless it is satisfied that the public will not be seriously endangered. This creates a presumption in favour of detention unless the decision-maker is satisfied that the public will not be seriously endangered. This presumption applies to those found not guilty by reason of insanity and to those found not fit to stand trial and not acquitted at a special hearing prior to expiry of the limiting term. This is also the case under the *Crimes Act 1914* (Cth), in Queensland⁹³¹ and in Victoria during the nominal term.⁹³² In contrast, in some jurisdictions the decision-maker must order the release of a forensic patient unless satisfied that the person poses a risk (as defined in that jurisdiction). This creates a presumption in favour of release. This is the case in the Northern Territory and in Victoria (after the expiry of the nominal term).⁹³³ In some jurisdictions there is no presumption in favour of release or detention — this is the case in Tasmania and Western Australia.⁹³⁴

8.3.82 **The need for reform.** If a system of limiting terms is adopted in Tasmania, consideration should be given to introducing statutory presumptions against release or reduced supervision prior to the expiry of the limiting term. This is the approach in New South Wales, where there is a presumption in favour of detention when making decisions about release prior to the end of the limiting term. The presumption is that a 'person will remain in detention unless

⁹³⁰ See VLRC (n 22) Recommendation 91.

⁹³¹ *Crimes Act 1914* (Cth) s 20BL(2); *Mental Health Act 2016* (Qld) ss 442(1), 473(1).

⁹³² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 32(2).

⁹³³ *Ibid* s 35(3)(i).

⁹³⁴ *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(5).

it can be positively established that their release ... will not present a serious danger'.⁹³⁵ The *Mental Health (Forensic Provisions) Act 1990* (NSW) s 43(a) provides that the court 'must not make an order for the release of a forensic patient unless it is satisfied ... that the safety of the patient or any member of the public will not be seriously endangered by the patient's release'. The NSWLRC recommended that this presumption should be retained because it is necessary for community safety.⁹³⁶ There is also a presumption against release in South Australia, where the *Criminal Law Consolidation Act 1935* (SA) provides that 'the court cannot release a defendant ... or significantly reduce the amount of supervision ... unless the court is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person's release'. This is also the case in Queensland and under the *Crimes Act 1994* (Cth).⁹³⁷

8.3.83 Accordingly, in the Issues Paper, the Institute asked:

If a system of limiting terms is adopted in Tasmania, should a presumption against release or reduced supervision be created prior to the expiry of the limiting term and then a presumption in favour of release from detention/discharge from supervision after the expiry of the limiting term?

8.3.84 Only one submission to the Institute addressed this question. EOT supported the introduction of a system of limiting terms in Tasmania, and as indicated at [8.3.57], considered that there should be shifting presumptions within the model proposed. A court should be required to set a nominal non-parole period and a nominal head sentence when imposing a supervision or restriction order. In EOT's view, there should be a presumption in favour of conditional release at the end of the non-parole period and unconditional release at the end of the sentence period.

8.3.85 In relation to the specific question whether a presumption against release or reduced supervision should be introduced into the legislation to specify that the court must not release the person unless it is satisfied in relation to risk, the Institute's view is that this not necessary. There are clearly enumerated legislative factors and principles that give effect to the need to ensure that any order is consistent with the safety of the community. There is also the need to give explicit consideration to the risk of harm to the community.

Recommendation

47. The *Criminal Justice (Mental Impairment) Act 1999* (Tas) should not be amended to introduce a presumption that prior to the expiry of the limiting term a court cannot discharge a restriction order or revoke a supervision order unless the court is satisfied in relation to the risk of harm test.

Making changes to the current decision-making model

8.3.86 In Tasmania, the MHT reviews forensic orders within 12 months of their making and then in each 12-month period afterwards. The MHT can issue a certificate if it determines that a forensic order is no longer warranted or that the conditions of the order are not appropriate.

⁹³⁵ NSWLRC (2013) (n 56) 222.

⁹³⁶ *Ibid* 223.

⁹³⁷ See Appendix 3.

However, it does not have the power itself to discharge or vary the forensic order. This can only be done by the Supreme Court.⁹³⁸ Accordingly, there is usually a two-step process (MHT review and Supreme Court hearing) to revoke or discharge forensic orders, and this may operate as a barrier for forensic patients making an application to the Supreme Court to revoke or discharge an order.⁹³⁹ Data from the MHT show that it is not uncommon for a person to have received several certificates at reviews conducted by the MHT before a court application is made to discharge the restriction or supervision order. Further, there are some individuals on supervision orders who have received numerous certificates from the MHT and have not made applications to the Supreme Court for the revocation of their orders. Nevertheless, the two-step process may be viewed as providing an additional safeguard for the community given that a person's mental health may fluctuate. In this context, it is noted that the MHT data show that there are some patients who receive certificates at the MHT review (and who remain on the forensic order) and subsequently have a review hearing where no certificate is issued. In addition, the Institute has identified differing approaches to the issue of certificates by the MHT and the discharge of orders by the Supreme Court.⁹⁴⁰

8.3.87 As identified in the Issues Paper, a possible way to deal with difficulties in varying or discharging forensic orders is to empower the MHT to vary, discharge or revoke orders made under the *Criminal Justice (Mental Impairment) 1999* (Tas). Some of these difficulties may, of course, be ameliorated by the introduction of finite terms for forensic orders and by enacting changes to the test to be applied in varying or removing them. However, these measures do not exclude the possibility of arming the MHT with an appealable power to vary, discharge or revoke orders prior to the end of the limiting term. Extending the power of the MHT in this way would remove the unnecessary duplication in the current two-step process where the MHT reviews matters and issues certificates, but the forensic patient must then apply to the Supreme Court for variation or discharge of forensic orders. The MHT already has power to make, vary, renew and discharge treatment orders and to determine leave from the SMHU for patients subject to restriction orders.⁹⁴¹ Any disquiet about extending the MHT's powers in relation to forensic orders might be allayed by making its decisions appealable. This model would accord with the approach in many other jurisdictions, as recognised by the NZLC.⁹⁴²

8.3.88 Other models of decision-making in relation to the review and release of people subject to forensic orders have been adopted in Australian jurisdictions.⁹⁴³

8.3.89 In the Issues Paper, the Institute sought feedback on whether there should be change in the decision-making model that would provide expanded powers to the MHT to exercise powers of variation, discharge or revocation of forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas).

⁹³⁸ See [8.2.17].

⁹³⁹ It is noted that a certificate issued by the MHT is not a pre-requisite for the discharge of the order and an offender may apply under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), see [8.2.17].

⁹⁴⁰ See [8.3.18].

⁹⁴¹ *Mental Health Act 2013* (Tas) s 168.

⁹⁴² NZLC (n 470) 80. It was noted that this is also the position in Canada.

⁹⁴³ See VLRC (n 24) 199.

Should there be a change in the judicial model of decision-making to allow the Mental Health Tribunal to exercise powers of variation, discharge or revocation of forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)?

If there is a change to the decision-making model in Tasmania, is it necessary to make changes in relation to the composition of the panel that is constituted to make decisions to discharge, revoke or vary forensic orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)?

8.3.90 The Institute received two submissions addressing this issue. The DPP stated that there should be no change: ‘The orders are made by the court and as such it would be inappropriate for the orders to be varied, discharged or revoked by the Tribunal’.

8.3.91 In contrast, Walvisch’s said that the MHT should have ‘an appealable power to vary, discharge or revoke orders made under the *Criminal Justice (Mental Impairment) 1999* (Tas)’:

Requiring individuals to attend the Supreme Court in order to finalise any changes is unnecessarily burdensome. Moreover, given that such a step is not required for those who seek release from civil detention, this process appears to be based on the fact that the accused has committed a criminal offence. However, as they have been acquitted of that offence (due to their impairment), this factor should be irrelevant to the mechanism for release.

8.3.92 After considering this issue, the Institute recommends that the dual process of decision-making be retained so that the MHT conducts annual reviews and the Supreme Court makes decisions about the variation, discharge or revocation of forensic orders prior to the expiration of the limiting term. The Institute believes that this model is most likely to ensure public confidence in the process. However, as noted, the Institute acknowledges that there are problems with the current process including impediments to applications being made to the Supreme Court, a duplication of process and no legislative requirement for the Supreme Court to give weight to the MHT’s recommendations. Accordingly, the Institute recommends the enactment of a requirement for the court to take account of the certificates and recommendations made by the MHT and of a presumption in favour of varying, revoking or discharging a forensic order if a certificate is issued.

8.3.93 Another problem that was brought to the attention of the Institute during the consultation process, is the effect of publicity and media reporting of cases which can discourage people from making applications to the Supreme Court to have orders discharged, varied or revoked. Media reporting may cause ‘setbacks in treatment and recovery due to publicity, the stigma associated with negative reporting of mental illness in the media and problems associated with successful reintegration’.⁹⁴⁴ In Tasmania, courts have inherent power to suppress the publication of proceedings conducted in open court when this is considered necessary for the administration of justice.⁹⁴⁵ However, this power has received legislative recognition in Victoria in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). The court can exercise this power where it is in the public interest to do so.⁹⁴⁶ This test is different than that under the *Open Court Act 2013* (Vic) s 18(1)(a), which allows a court to

⁹⁴⁴ VLRC (n 22) 297.

⁹⁴⁵ See *Tasmania v G and T* [2014] TASSC 71, 6–7 (Pearce J).

⁹⁴⁶ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 75(1).

make a suppression order if it is ‘necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available’. The need to provide further protections was considered by the VLRC:

The Commission acknowledges and supports the powerful principle of open courts. However, in recognition of the special vulnerability of a person accused of an offence under the CMIA, the importance of reintegration for community safety and the rehabilitation prospects of a person on a supervision order, the Commission agrees with the views expressed in submissions and consultations that there should be a presumption in favour of suppressing information that may identify a person under the CMIA.⁹⁴⁷

8.3.94 Providing anonymity for applicants to the Supreme Court who seek to vary, discharge or revoke forensic orders was not discussed in the Issues Paper. However, based on the approach taken by the VLRC and information provided to the Institute, the Institute recommends that consideration be given to the addition of a new provision in the *Criminal Justice (Mental Impairment) 1999* (Tas) that expressly provides for suppression orders to be made and that prescribes the purposes of such orders as being to enable the long-term recovery of people subject to the Act and to facilitate their reintegration for the protection of the community.⁹⁴⁸

Recommendations

48. There should be a statutory requirement in the *Criminal Justice (Mental Impairment) 1999* (Tas) for the court to take account of the certificates and recommendations made by the Mental Health Tribunal with a presumption in favour of varying, revoking or discharging a forensic order if the Mental Health Tribunal has issued a certificate.
49. Consideration should be given to the enactment of a new provision in the *Criminal Justice (Mental Impairment) 1999* (Tas) that expressly empowers courts to make suppression orders and that sets out that the purpose of making suppression orders is to enable the long-term recovery of people subject to the Act and to facilitate their reintegration into the community for the protection of the community.

Transition from forensic patient status

8.3.95 In Tasmania, there is concern about the difficulty that forensic patients encounter when transitioning from a restriction order to a supervision order or from a supervision order to a treatment order under the *Mental Health Act 2013* (Tas). This difficulty stems from what has been described as a ‘catch-22’ situation: because forensic patients are not able to demonstrate how they may behave with a lower level of supervision, they are not granted a lower level of supervision.⁹⁴⁹

8.3.96 There also appear to be difficulties in providing ‘step-up’ and ‘step-down’ options for a forensic patient seeking to transition from a restriction order (with detention at the Wilfred Lopes Centre) to detention in a community-based facility. In *Secretary of the Department of*

⁹⁴⁷ VLRC (n 22) 300.

⁹⁴⁸ Ibid Recommendation 63.

⁹⁴⁹ See [8.3.16].

Health and Human Service v Horacek,⁹⁵⁰ the trial judge attempted to construct a release order that would allow for the defendant to move from the Wilfred Lopes Centre to Tyenna Blue but with an option to have the defendant moved back to Wilfred Lopes if necessary.⁹⁵¹ His Honour outlined the dilemma:

The dilemma can be readily stated. The aim is to permit greater flexibility in the treatment of the applicant without the present level of incarceration. That flexibility requires compulsory return to the Wilfred Lopes Centre if the regime is found to be unworkable. Release to a less intensive institution or centre is desirable if the Chief Forensic Psychiatrist believes, as a consequence of medical judgment, such a course to be apposite. Return to the community simpliciter is not a present option. The Court is reluctant to leave the present order in force without variation.⁹⁵²

However, the Court of Criminal Appeal found that the orders of the judge, in attempting to permit, at the direction of the Chief Forensic Psychiatrist, the movement of the defendant in and out of the SMHU as deemed necessary and treatment as an involuntary patient under the *Mental Health Act 2013* (Tas) were not lawful.⁹⁵³ It held that it is not possible to use the conditions attached to a supervision order ‘as a means of expanding the role of a supervision order, and creating a hybrid order somewhere between a supervision and restriction order’.⁹⁵⁴

8.3.97 Features of forensic mental health systems in other jurisdictions may provide possible models to address such problems. These include amendments to leave provisions, the use of technology to enable better supervision of forensic patients on leave or conditional release and/or the creation of step-up and step-down facilities.

8.3.98 **Amendment to leave provisions.** Boyd-Caine and Chappell have observed that leave privileges:

are critical to the patient’s ability to progress through the forensic system towards release. In the first instance, leave privileges provide an opportunity for patients to be tested in terms of responsibility, trust, insight into their illness, and the general progress of their rehabilitation. Leave privileges are also gradual steps towards greater liberty and access to family, friends and the broader community.⁹⁵⁵

Leave in Tasmania is also critical to rehabilitation of forensic patients and operates over the longer term with the aim of supporting and facilitating the discharge of restriction orders. However, this is not explicitly recognised in the *Mental Health Act 2013* (Tas).

In the Issues Paper, an option identified for reform is to make changes to the leave system so that there are more options in relation to the type of leave available, including the ability of the MHT to make extended leave orders to provide forensic patients with an opportunity to

⁹⁵⁰ [2009] TASSC 65.

⁹⁵¹ Tyenna Blue is an approved hospital under the MHA and is a ‘six bed, high dependency unit which provides 24 hour care to individuals with a serious mental illness who require treatment in a secure environment’: Department of Health and Human Services, *Your Statewide and Mental Health Services Placement* <http://www.dhhs.tas.gov.au/career/home/careers_archive/education/rntp/practice_settings/rntp_mental_health_nurses>.

⁹⁵² *Secretary of the Department of Health and Human Service v Horacek* [2009] TASSC 65, [51].

⁹⁵³ *Ibid* [54].

⁹⁵⁴ *Ibid* [60].

⁹⁵⁵ T Boyd-Caine and D Chappell (n 831) 24–25.

demonstrate their progress towards rehabilitation. This reflects a graduated approach to release from detention and is closely tied to rehabilitation and reintegration.⁹⁵⁶ It would also address the concerns raised by the court in *Horacek* about the limitations of the supervision order as it would allow a person on a restriction order to live outside the secure mental health unit for extended periods of time (with the ability to move the person back to the SMHU if required).

8.3.99 In Victoria, there is a unique system of leave that ‘specifies the type of leave that is available based on the location and duration of the leave’.⁹⁵⁷ The VLRC summarised the types of leave as follows.⁹⁵⁸

- (a) Special leave – this allows a forensic patient on a custodial supervision order to leave their place of detention and receive services for a period not exceeding seven days for the purposes of receiving medical treatment, or 24 hours for non-medical treatment purposes. This can be granted by an authorised psychiatrist and can be suspended by the Chief Psychiatrist.
- (b) On-ground leave – this allows a forensic patient to leave their place of detention and receive services but requires them to remain ‘within the surrounds’ of the place of detention. It can be authorised by the Forensic Leave Panel and suspended by the Chief Psychiatrist.
- (c) Limited off-ground leave – this allows a forensic patient, for a maximum of six months, to leave their place of detention between the hours of 6 am and 9 pm and outside those hours on a maximum of three days in any seven-day period. It can be authorised by the Forensic Leave Panel and suspended by the Chief Psychiatrist.
- (d) Extended leave – this allows forensic patients to leave the place where they are being detained for a period of time not exceeding 12 months. The Supreme Court can make an extended leave order and it can be revoked by the Chief Psychiatrist. It is also a requirement that a custodial supervision order not be varied unless a 12-month period of extended leave has been completed.⁹⁵⁹

8.3.100 **Use of technology.** In New South Wales, changes are being introduced with a view to ensuring that people with cognitive and mental health impairments are better managed to improve community safety.⁹⁶⁰ One of the changes is to the *Mental Health (Forensic Provisions) Act 1990* (NSW) which will be amended to allow the Mental Health Review Tribunal to impose ‘requirements for the purposes of monitoring (including by electronic means) compliance with the conditions of release or leave’.⁹⁶¹ This reform adopts recommendations of a review of forensic patients by the MHRT to allow the use of GPS technology by treatment teams and the MHRT ‘to better supervise forensic patients on leave or conditional release’.⁹⁶² It reflects a review of the operation of the MHRT that proposed the amendment of the Forensic Mental

⁹⁵⁶ VLRC (n 22) 350.

⁹⁵⁷ VLRC (n 24) 168.

⁹⁵⁸ VLRC (n 22) 350; VLRC, above n 24, 169.

⁹⁵⁹ VLRC (n 22) 372.

⁹⁶⁰ See NSW Government (Justice) (n 288).

⁹⁶¹ *Mental Health (Forensic Provisions) Act 1990* (NSW) s 75(1)(l) inserted by the *Mental Health (Forensic Provisions) Amendment (Victims) Act 2018* (NSW) (yet to commence).

⁹⁶² NSW Government (Justice) (n 288).

Health Services Policy ‘to recognise advances in technology and the readily available non-obtrusive technological solutions, including potential for the use of mobile phone apps, which enable supervision of patients via GPS’.⁹⁶³ It was also recommended that:

additional GPS mechanisms for supervising patients, and other technological options as may be appropriate, be considered by treating teams and the Tribunal for use in developing the risk-management plan for supervising patients on leave or conditional release; and that the Tribunal have the power and discretion to direct the use of GPS monitoring through mobile apps. These options are intended to enhance community and victim confidence in the supervision of patients on leave.⁹⁶⁴

However, it was not recommended that permanent ankle bracelets be used.⁹⁶⁵

8.3.101 Step-down/step-up facilities. Reviews conducted in other jurisdictions have highlighted the need for step-down and step-up facilities for forensic patients leaving custodial supervision.

8.3.102 In South Australia, the SASAC reported that there is a recognised need for an intermediate step between secure forensic mental health detention and being released — either conditionally or unconditionally — into the community.⁹⁶⁶ The secure forensic facility in South Australia is James Nash House and it has a ‘step-down’ unit (Ashton House). However, while the court was able to order the release of a person from detention to release under licence in the community to reside at Ashton House, Ashton House did not operate as a step-up unit.⁹⁶⁷ There was no provision for the Clinical Director to return a person to James Nash House without applying to the court to suspend or revoke a licence.⁹⁶⁸ Accordingly, the SASAC concluded that there needed to be more flexibility to allow licensees to be easily transferred between James Nash House and Ashton House according to clinical need with the MHT being empowered to assist with the efficient operation of the step-up and step-down process without need to apply to the court.⁹⁶⁹

8.3.103 The VLRC also considered that incorporating more flexibility in accommodation options and the type of order that could be made could assist in supporting the person and would be consistent with recovery oriented practice.⁹⁷⁰ It recommended the ‘establishment of a medium-secure facility as an approved mental health service under the CMIA to provide an intermediate step between the high-security facility of Thomas Embling Hospital and community accommodation’.⁹⁷¹ It could also be used where people have breached conditions of a non-custodial supervision order.⁹⁷²

⁹⁶³ NSW Government (Health) (n 918) 13 (Recommendation 20).

⁹⁶⁴ Ibid 13 (Recommendation 21).

⁹⁶⁵ Ibid 47.

⁹⁶⁶ SASAC (n 433) 204.

⁹⁶⁷ Ibid.

⁹⁶⁸ Ibid 205.

⁹⁶⁹ Ibid 208.

⁹⁷⁰ VLRC (n 22) 425.

⁹⁷¹ Ibid xxxv, 430 Recommendation 100.

⁹⁷² Ibid 424.

8.3.104 In Tasmania, the Anti-Discrimination Commissioner has argued that a step-down unit or other forms of transitional facilities would enable forensic patients to transition back to the community.⁹⁷³ This ‘would help to ensure that people are not kept on orders unnecessarily and diminish the risk of breaching Australian obligations under the *ICCPR* and the *UNCRPD*’.⁹⁷⁴ However, there are resourcing difficulties in using leave as a step towards discharge of a restriction order as there is a lack of appropriate accommodation in the community (such as a step-down unit). There are also difficulties with staffing so that forensic patients may have leave cancelled due to a lack of available staff to escort the person on supervised leave and this has potential implications for the length of time that a patient is subject to a supervision order.

8.3.105 In the Issues Paper, the TLRI sought feedback about whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and the leave provision in the *Mental Health Act 2013* (Tas) provide an appropriate pathway for gradual reintegration of a forensic patient into the community, consistent with the principles of least restriction and community safety. In this regard, the Institute noted that options for reform could include changing the conditions that may attach to a supervision order, making changes to the leave provisions and the creation of step-down/step-up facilities to provide for appropriate levels of supervision and flexibility to respond to patient need.

Are there any difficulties with the operation of the leave provisions under the *Mental Health Act 2013* (Tas) that limit its utility in providing an appropriate pathway for the gradual reintegration of a forensic patient into the community?

Does the *Criminal Justice (Mental Impairment) Act 1999* (Tas) provide an appropriate pathway for gradual reintegration of a forensic patient into the community?

If not,

- (a) Are the provisions regarding the conditions that may attach to a supervision order adequate and appropriate? If not, what changes should be made? For example, would it be desirable for the provisions in relation to supervision orders in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to be amended to allow the court to impose conditions that the person reside in an approved hospital if directed by the Chief Forensic Psychiatrist or the Mental Health Tribunal?
- (b) Would changes to the leave provisions, such as providing for extended leave, provide a more appropriate pathway for gradual reintegration of a patient into the community?
- (c) Is there a need for a medium secure environment to operate as a step-down/step-up facility for patients who are subject to a restriction order? If so, should the Chief Forensic Psychiatrist, the Mental Health Tribunal and/or the court have the ability to move a forensic patient between Wilfred Lopes and the medium secure facility? On what basis?
- (d) Is there a technological solution that may be used to monitor forensic patients to address concerns in relation to risk and community safety?
- (e) What are the cost implications of making these changes, including the costs of supervision and of treatment services?

⁹⁷³ Office of the Anti-Discrimination Commissioner (n 809) 45.

⁹⁷⁴ *Ibid.*

8.3.106 The Institute received two submission in response to these questions.

8.3.107 O’Connell made observations in relation to need for a step-down model:

In relation to the need for a medium secure unit, I do agree that a step-down model is required. There is a stand-alone unit within the WLC grounds that is not utilized but could be used as a medium secure unit with access to more lenient leave provisions. A forensic hostel (as used in the UK) would also be helpful as an accommodation option for people on leave and on their release. There is no doubt that the poverty of appropriate supported accommodation delays people’s rehabilitation and release by years. Community-based supervision is a much more cost effective option compared to a SMHU.

O’Connell believed that to address problems in the current system, the legislation needed to be amended to ‘not only allow for a provision of gradual rehabilitation into the community but a mandated pathway for it’. As noted, O’Connell highlighted a lack services available to provide for rehabilitation under the current system, with leave frequently cancelled or delayed due to staffing pressures.

8.3.108 EOT also believed that a legislative pathway for discharge from a restriction order would lead to better planning to release (and so facilitate the reintegration of the person into the community):

The adoption of legislative changes enabling conditional or unconditional release after a fixed period of detention would increase the importance of rigorous release planning, including the identification of community-based support and rehabilitation pathways.

Whereas secure mental health facilities such as the Wilfred Lopes Centre may be successful in addressing acute illness and provide for the needs of high risk patients, there is also a need to provide transitional arrangements that encourage behaviour improvements and enable those who are on restriction orders to transition to community living options.

Ongoing support and risk management is best achieved by a graduated transition from a forensic disability setting to a supported ‘step-down’ option and thereon to eventual release into the community. This would enable the implementation of ongoing risk management arrangements to ensure both the client and the community are safeguarded and that individuals are connected with the appropriate supports and services to meet their individual reintegration needs.

Whilst the Mental Health Tribunal currently has the capacity to determine applications for leave from secure mental health units for patients subject to restriction orders, there are limited options outside of the Wilfred Lopes Centre available for those who would benefit from a more step-wise approach.

What this means in practice is that there are few transitional arrangements between detention and release. Calls have previously been made for a second secure mental health centre similar to a group home for this purpose.

Providing a range of forensic services would require close and cooperative multi-agency collaboration, with independent health and social care services and stakeholders committed to improving services for people with disability. When transitioning clients from facilities such as the Wilfred Lopes Centre to community living options, adequate funding is required for the provision of specialist assessments

and maintenance services to provide the requisite interventions to ensure ongoing support and future risk management.

At a minimum, it should be a requirement that through-care plans be developed for all patients on restriction orders. Such plans would identify and support treatment and rehabilitation services, including arrangements to enable the person to transition into progressively less restrictive environments and eventually be reintegrated into the community.

Linkages to funding under the National Disability Insurance Scheme (NDIS) may provide avenues to develop more flexible options for forensic patients ready to be conditionally released to live in the community.

8.3.109 These submissions highlight the practical barriers in the forensic mental health system for individuals to progress from a restriction order to a supervision order. There are resourcing problems that affect the availability of leave as well as the lack of a ‘step-down’ facility in the community. These issues at a crucial stage in the forensic mental health system pathway appear to undermine the intent of the *Criminal Justice (Mental Impairment) Act 1999* (Tas). The submissions suggest that the lack of a legislated pathway ‘out’ suggest that transitional arrangements back to community living are not a priority. It is the Institute’s view that this gap in the system needs to be addressed to ensure that it operates more effectively. If this is to be achieved, additional resourcing will be required in the short-term as will the cooperation of stakeholders. The Institute recommends that this deficit in the system be addressed as a priority by government. It is likely that such an approach will ultimately result in greater community safety, better protection of human rights of people with mental health and cognitive impairments and an overall cost saving to the community.

8.3.110 No submission addressed the introduction of an extended leave provision (as exists in Victoria). However, as noted, extended leave is a key feature of the transition pathway in Victoria, and the Institute’s view is that this model should be introduced into the transition process. This would allow people to have an extended period living in the community to demonstrate their progress towards reintegration and rehabilitation.

8.3.111 Submissions did not address technological solutions that may be used to deal with concerns about risk and community safety. Legislation (yet to commence) will make such technology available in New South Wales so that the MHRT will be able to order its use as a condition of leave or conditional release. However, it is noted that there are concerns about the necessity for electronic monitoring as well as its negative impact on rehabilitation and human rights.⁹⁷⁵ This is an issue that requires further consideration and could be addressed as part of a review of transition arrangements in Tasmania.

Recommendations

50. The Tasmanian Government should initiate a review to identify the barriers in the forensic mental health system to patients’ reintegration into the community with a view to ensuring that appropriate pathways are available for the gradual reintegration of forensic patients into the community, consistent with the principles of least restriction and community safety.

⁹⁷⁵ See Royal Australian and New Zealand College of Psychiatrists, *Electronic Monitoring of People Utilising Forensic Mental Health Services: Position Statement 95* (2018).

51. As part of the review of the transition pathways from a restriction order to a supervision order, consideration should be given to the amendment of the leave provisions so that an order can be made allowing forensic patients to leave the SMHU for an extended period.
52. As part of the review, the use of technological solutions to overcome concerns in relation to risk and community safety should be considered.

Conditional release orders

8.3.112 There is no statutory limit contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) for conditional release orders. This means that a conditional release order (or some conditions of an order) may be indefinite and there is no provision in the legislation to have the conditions varied or removed.⁹⁷⁶ This inflexibility may potentially cause unfairness.

Position in other jurisdictions

8.3.113 Only New South Wales (for defendants where a finding of not guilty was unable to be made following a special hearing), Western Australia (for defendants found not guilty by reason of insanity) and the Commonwealth make provision for a conditional release order to be made by the court.⁹⁷⁷ A bond may be made for up to five years in New South Wales, three years in the Commonwealth legislation and 24 months in Western Australia.⁹⁷⁸ In South Australia, the court can make a conditional release order for five years for summary and minor indictable offences.⁹⁷⁹

Approach to reform

8.3.114 In relation to conditional release orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(e) and 21(e), there appears to be a deficiency in the legislation as it does not provide a limiting or maximum term for the bond or provide any mechanism that would allow a person to apply to have the terms of the conditional release order varied or discharged. So, if a court wished, it could provide for a person to be conditionally released into the community under the supervision of Forensic Mental Services or the Chief Forensic Psychiatrist, for example, or to take medication, comply with medical treatment, notify of a change of address, employment or training or comply with directions and these could be imposed indefinitely and with no option to have them removed or changed. In contrast, the term of a treatment order under the *Mental Health Act 2013* (Tas) is six months and the limit for a conditional release order imposed by the court as a sentence, is five years.⁹⁸⁰ Other indefinite

⁹⁷⁶ In contrast, under the *Sentencing Act 1997* (Tas) s 7(f) the court may conditionally release an offender on the offender giving an undertaking with conditions attached for a period not exceeding 60 months.

⁹⁷⁷ See Appendix 3 Table A3.1.

⁹⁷⁸ See *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9; *Crimes Act 1914* (Cth) s 20BJ(4); *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 22(3); *Sentencing Act 1995* (WA) ss 48(3) (conditional release order), 62(5) (community-based order) and 69(6) (intensive supervision order). It is noted that the LRCWA has recommended the removal of these sentencing options and their replacement with a supervised release order with the conditions set by the Mentally Impaired Accused Review Board (MIARB): see LRCWA (n 416) 243 Recommendation 35.

⁹⁷⁹ See *Criminal Law Consolidation Act 1935* (SA) div 3A.

⁹⁸⁰ See *Mental Health Act 2013* (Tas) ss 44, 48; *Sentencing Act 1997* (Tas) s 7(f).

orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) have provision for review and revocation.

8.3.115 Accordingly, the TLRI sought feedback on whether a limiting term should be set for conditional release orders.

Should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to provide for a limiting term for a conditional release order to replace the current indefinite nature of these orders?

8.3.116 No submissions received by the Institute addressed this issue. However, the Institute's view is there is a need for reform. As noted, a deficiency in the *Criminal Justice (Mental Impairment) Act 1999* ss 18(e) and 21(e) is that there is no mechanism that would allow a person to apply to have the terms of the order varied or discharged (and no statutory limit for the term of the order limiting). Accordingly, the Institute's view is that a limit should be set. Based on the approach in other jurisdictions, where the period of the order is generally the same as the limit for good behaviour bonds/conditional release orders imposed as a sentence, the time limit for a conditional release order under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) should be equivalent to the period for a conditional undertaking under the *Sentencing Act 1997* (Tas) s 7(f), that is, five years.

Recommendation

53. The *Criminal Justice (Mental Impairment) Act 1999* ss 18(e) and 21(e) should be amended to provide for a maximum time limit for a conditional release order of five years.

The appropriateness of orders under the Criminal Justice (Mental Impairment) Act 1999 (Tas) for people with intellectual disabilities

8.3.117 The Tasmanian forensic mental health system has been criticised for failing to provide a suitable framework for people with intellectual disability.⁹⁸¹ It has been argued that people with intellectual disability 'can sometimes be subject to a restriction order largely as a result of the failure to provide an appropriate level of community support to prevent offending behaviours'.⁹⁸² In addition, a failure to provide appropriate services in the community may result in people on supervision orders behaving 'in a manner that places both themselves and others at substantial risk' and being apprehended and detained at the SMHU.⁹⁸³ Further, there are problems in relation to patients with intellectual disability being able to obtain discharge of orders because 'the behavioural manifestations of their intellectual disability ... are unlikely over time to be seriously modified and thus the level of risk to the community is unlikely to substantially decline. It is only with appropriate levels of supervision that the risk of reoffending can be mitigated'.⁹⁸⁴ On this basis, the Forensic Mental Health Tribunal expressed concern 'that Tasmania's secure mental health facility is effectively being used to "warehouse" people for whom the State is unable to provide support'.⁹⁸⁵

⁹⁸¹ Office of the Anti-Discrimination Commissioner (n 809) 45.

⁹⁸² Ibid.

⁹⁸³ Ibid 46 citing Tasmanian Forensic Mental Health Tribunal, *Annual Report 2011–2012* (2012) 6.

⁹⁸⁴ Ibid citing Tasmanian Forensic Mental Health Tribunal, *Annual Report 2011–2012* (2012) 6.

⁹⁸⁵ Ibid.

Case example⁹⁸⁶

B was placed on a supervision order after being found unfit to stand trial for a charge of arson. He had a well-established history of moderate intellectual disability. He does not suffer from a major mental illness.

B worked in a full-time capacity and was a reliable worker. He maintained stable accommodation in a shared flat over 15 months. He was successful in adhering to his supervision order for a period of approximately two years. During this period, a 24 hour one-to-one care package was in place.

According to reports received by the Tribunal, B only began to breach his order when his support funding was pared back, resulting in reduced supervision. As a result, he absconded from his supervision program for five or so weeks culminating in his apprehension and detention at Wilfred Lopes Centre.

He remained in detention for a period of 16 months until an adequate support package was made available.

8.3.118 Recently, amendments have been made to the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to provide enforcement provisions in relation to conditional release orders made under ss 18 or 21. In the second reading speech, it was stated that:

Forensic orders are often not appropriate options for defendants who have an intellectual disability. In such cases, release on conditions may be appropriate orders for the court to consider but the absence of a mechanism to enforce the conditions imposed is problematic and means judicial officers rarely use this section.⁹⁸⁷

As noted, the TLRI's examination of fitness to stand trial and insanity cases between 2005 and June 2018, identified 12 cases in the Supreme Court involving individuals with intellectual disabilities with conditional release orders being imposed in two cases, restriction orders imposed in one case and supervision orders being imposed in nine cases.

8.3.119 Similar concerns have been raised in other jurisdictions in relation to the appropriateness of forensic orders for people with cognitive impairments, as have concerns that facilities and services designed primarily for people with mental illnesses are not appropriate. This latter issue was identified in South Australia where the SASAC expressed the view that there needs to be a dedicated secure facility for people with cognitive impairments, as well as 'suitable purpose-built facilities or accommodation for licensees with cognitive impairments'.⁹⁸⁸ The SASAC also considered measures that could be put in place in the absence of a purpose-built facility and stated that it is 'essential that supported accommodation tailored to the needs of individuals with cognitive impairments be developed'.⁹⁸⁹ In Queensland, the Butler Report highlighted the inappropriateness of forensic orders and detention in mental

⁹⁸⁶ Ibid 46–47.

⁹⁸⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 24 May 2016 [3.20 pm], (M Ferguson).

⁹⁸⁸ SASAC (n 433) 168–169.

⁹⁸⁹ Ibid 174.

health units for people with an intellectual disability and pointed to the lack of appropriate facilities for such people.⁹⁹⁰

8.3.120 Likewise, in Victoria, the VLRC highlighted disquiet about the suitability of the system for people with intellectual or other cognitive impairment:

While arrangements for mental health treatment for people on supervision orders are relatively well established, the same does not exist for people with an intellectual disability under the CMIA. Unlike people with a mental illness, people with an intellectual disability under the CMIA:

- (a) rarely have their supervision order revoked
- (b) lack a clear treatment pathway
- (c) are not subject to clinical oversight by the Senior Practitioner
- (d) lack secure accommodation facilities and accommodation options in the community.⁹⁹¹

In response, the VLRC made recommendations that would clarify supervision responsibility for people with cognitive impairments and mandate the preparation of treatment plans.⁹⁹²

8.3.121 The NSWLRC observed that '[a]n issue that has arisen repeatedly ... is that the criminal justice and forensic systems do not deal effectively with people with cognitive impairment'.⁹⁹³ In the context of dispositional orders, these inadequacies are said to relate to the very limited nature of services for people with cognitive impairment in the community, such as secure accommodation.⁹⁹⁴ The NSWLRC stated that many of the issues were primarily operational rather than legal, and accordingly recommended the development of a working group to 'develop an action plan to deal with detention, care and community support of forensic patients with cognitive impairment'.⁹⁹⁵ It also made recommendations to acknowledge cognitive impairment in the law including renaming the relevant legislation the *Mental Health and Cognitive Impairment (Forensic Provisions) Act*.⁹⁹⁶

8.3.122 In light of these concerns, as part of its review, the Institute sought feedback on the operation of the the current *Criminal Justice (Mental Impairment) Act 1999* (Tas) model for people with an intellectual disability or cognitive impairment:

Are the orders available following a finding of not guilty by reason of insanity or that a finding cannot be made that the defendant was not guilty of the offence charged under the current *Criminal Justice (Mental Impairment) Act 1999* (Tas) model appropriate for people with an intellectual disability or cognitive impairment?

⁹⁹⁰ Butler Report (n 50) 101.

⁹⁹¹ VLRC (n 22) 433.

⁹⁹² Ibid 439 Recommendations 103, 104.

⁹⁹³ NSWLRC (2013) (n 56) 8.

⁹⁹⁴ Ibid 9.

⁹⁹⁵ Ibid 9, 10 Recommendation 1.1.

⁹⁹⁶ Ibid 12 Recommendation 1.2.

Are changes needed to the *Criminal Justice (Mental Impairment) Act 1999* (Tas) in terms of the orders available and the process to vary or discharge an order to better meet the needs of people with an intellectual disability or cognitive impairment? What are the likely cost implications of making these changes?

Are changes needed to the services that support the *Criminal Justice (Mental Impairment) Act 1999* (Tas) model to ensure that it meets the needs of people with an intellectual disability or cognitive impairment? What are the likely cost implications of making these changes?

8.3.123 The Institute received two submissions that addressed these questions, both of which focused on the differences between mental illness and cognitive impairment and the need for services to address the needs of people with a cognitive impairment.

8.3.124 The submission from QAI concentrated on the needs of people with cognitive impairments and distinguished these needs from those with mental illness:

In Queensland, the majority of defendants whom the court has determined to be unfit have some form of intellectual impairment, and the majority of those found ‘unsound’ have some form of mental illness. It is important to distinguish the two. The first group may need habilitation and education, particularly in relation to offending behaviour, but intellectual impairment is not an illness. The second group are more likely to have a mental illness requiring treatment.

Further, it was argued that the staff at the major Queensland facilities do not have the skills to cope with the rehabilitation needs of people with cognitive impairments.

8.3.125 In the Tasmanian context, EOT also made observations about the appropriateness of the services provided at Wilfred Lopes for people with cognitive impairment:

The Wilfred Lopes Centre provides specialist mental health treatment for prisoners with mental health issues that require specialist treatment, people who are on remand who require inpatient specialist care, and people who are found unfit to plead or not guilty by reasons of insanity and are under a restriction order.

At the same time, however, the Centre is also in exceptional circumstances used as a place of detention for prisoners with cognitive or intellectual disability and in many cases patients on restriction orders have comorbid diagnoses, including intellectual disability, cognitive disorders, physical disability, substance or alcohol abuse disorders, dementia and/or acquired brain injury.

The fact that a person who does not have a mental illness or whose mental illness is one factor among a range of diagnoses can be placed on a restriction order has several implications. Not only does this mean that treatment for mental illness may be secondary to other therapeutic needs, it also means that other forensic orders (such as a supervision order which places the person under the responsibility of the Chief Forensic Psychiatrist or a treatment order which makes provision for treatment as specified under the *Mental Health Act 2013* (Tas)) may not be suitable or applicable.

The default position then becomes one where a person is at risk of being detained indefinitely because of a permanent impairment. There are no less restrictive options.

This means that the pathways out of detention are more complex and may require more flexibility during detention and in planning for release.

The underlying principle for those who are held unaccountable for their behaviour due to a finding of unfitness to plead should be to provide appropriate treatment and care. In the case of those with intellectual disability, cognitive impairment or other complex needs this may require more extensive treatment and more complex rehabilitation services. In turn this will require better integrated models of clinical and non-clinical service provision and more effective services aimed at transition to living in the community, including community-based accommodation suitable for people with high and complex needs.

These factors raise the question about whether there is a need to provide a greater range of alternatives when imposing restriction orders to enable more flexible options for compulsory treatment and custody for people with cognitive impairment or other intellectual disability.

8.3.126 It appears that there are problems in the current forensic system for people who do not have a mental illness, but who have an intellectual disability or cognitive impairment. These problems are clearly outlined in the submission of EOT, which stresses the unsuitability of many aspects of the current system for people with intellectually disability and cognitive impairments. Rehabilitation pathways should be developed for people with intellectual disabilities or cognitive impairments. The Institute recommends that this matter be addressed in the review of the ‘step-down’ pathways for forensic orders.

Recommendation

54. Rehabilitation pathways should be developed for people with intellectual disabilities or cognitive impairments. The Institute recommends that this matter be addressed in the review of the ‘step-down’ pathways for forensic orders.

Appendix 1: Proposed reforms to unfitness to stand trial test

England and Wales – Criminal Procedure (Lack of Capacity) Bill

3. Capacity to participate effectively in a trial

- (1) This section has effect for the purposes of section 1.
- (2) A defendant is to be regarded as lacking the capacity to participate effectively in a trial if the defendant's relevant abilities are not, taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged.
- (3) In determining that question, the court must take into account the assistance available to the defendant as regards the proceedings.
- (4) The following are relevant abilities—
 - (a) an ability to understand the nature of the charge;
 - (b) an ability to understand the evidence adduced as evidence of the commission of the offence;
 - (c) an ability to understand the trial process and the consequences of being convicted;
 - (d) an ability to give instructions to a legal representative;
 - (e) an ability to make a decision about whether to plead guilty or not guilty;
 - (f) an ability to make a decision about whether to give evidence;
 - (g) an ability to make other decisions that might need to be made by the defendant in connection with the trial;
 - (h) an ability to follow the proceedings in court on the offence;
 - (i) an ability to give evidence;
 - (j) any other ability that appears to the court to be relevant in the particular case.
- (5) For the purposes of subsection (4)(e) to (g), an ability to make a decision is to be regarded as consisting of—
 - (a) an ability to understand information relevant to the decision,
 - (b) an ability to retain that information,
 - (c) an ability to use and to weigh the information when making the decision, and
 - (d) an ability to communicate the decision.⁹⁹⁷

New South Wales – The *Mental Health (Forensic Provisions) Act 1990* (NSW) should be amended to include a statutory fitness test, as follows:

A person is unfit to stand trial if the person cannot be afforded a fair trial because it is established on the balance of probabilities that the person is unable to do any one or more of the following:

- (a) understand the offence with which the person is charged

⁹⁹⁷ Law Commission of England and Wales, *Unfitness to Plead – Volume 2: Draft Legislation* (Law Com No 364, 2016) 16–17.

- (b) understand generally the nature of the proceeding as an inquiry into whether it has been proved that the person committed the offence charged
- (c) follow the course of proceedings and understand what is going on in a general sense
- (d) understand the substantial effect of any evidence that may be given against the person
- (e) understand the information relevant to the decisions that the person will have to make before and during the trial, and use that information as part of a rational decision making process
- (f) communicate effectively with, and understand advice given by, legal representatives, and
- (g) provide the person's version of the facts to the court, if necessary.⁹⁹⁸

Victoria – Section 6(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) should be amended to provide that a person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the hearing, will be:

- (a) unable to understand the nature of the charge
- (b) unable to understand the actual significance of entering a plea to the charge
- (c) unable to enter a plea to the charge
- (d) unable to understand the nature of the hearing (that it is an inquiry as to whether the person committed the offence)
- (e) unable to follow the course of the hearing
- (f) unable to understand the substantial effect of any evidence that may be given in support of the prosecution
- (g) unable to decide whether to give evidence in support of his or her case
- (h) unable to give evidence in support of his or her case, if he or she wishes to do so, or
- (i) unable to communicate meaningful instructions to his or her legal practitioner.⁹⁹⁹

Commonwealth – The *Crimes Act 1914* (Cth) should be amended to provide that a person is unfit to stand trial if the person cannot be supported to:

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
- (b) retain that information to the extent necessary to make decisions in the course of the proceedings;
- (c) use or weigh that information as part of the process of making decisions; or
- (d) communicate the decisions in some way.¹⁰⁰⁰

⁹⁹⁸ NSWLRC (2013) (n 56) 31–32 Recommendation 2.1.

⁹⁹⁹ VLRC (22) 79 Recommendation 15.

¹⁰⁰⁰ ALRC (n 40) Recommendation 7-1.

Appendix 2: Schedule 1 – Mental health service delivery principles

1. The mental health service delivery principles are as follows:
 - (a) to respect, observe and promote the inherent rights, liberty, dignity, autonomy and self-respect of persons with mental illness;
 - (b) to interfere with or restrict the rights of persons with mental illness in the least restrictive way and to the least extent consistent with the protection of those persons, the protection of the public and the proper delivery of the relevant service;
 - (c) to provide a service that is comprehensive, accessible, inclusive, equitable and free from stigma;
 - (d) to be sensitive and responsive to individual needs (whether as to culture, language, age, religion, gender or other factors);
 - (e) to emphasise and value promotion, prevention and early detection and intervention;
 - (f) to seek to bring about the best therapeutic outcomes and promote patient recovery;
 - (g) to provide services that are consistent with patient treatment plans;
 - (h) to recognise the difficulty, importance and value of the role played by families, and support persons, of persons with mental illness;
 - (i) to recognise, observe and promote the rights, welfare and safety of the children and other dependants of persons with mental illness;
 - (j) to promote the ability of persons with mental illness to make their own choices;
 - (k) to involve persons receiving services, and where appropriate their families and support persons, in decision-making;
 - (l) to recognise families, and support persons, of persons with mental illness as partners, with mental health service providers, in the provision of their treatment and care to the extent that this is appropriate and consistent with their own wishes;
 - (m) to respect the wishes of persons receiving services, and the wishes of their families and support persons, to the maximum extent consistent with the health and safety of those persons and the safety of others;
 - (n) to promote and enable persons with mental illness to live, work and participate in their own community;
 - (o) to operate so as to raise community awareness and understanding of mental illness and to foster community-wide respect for the inherent rights, liberty, dignity, autonomy and self-respect of persons with mental illness;
 - (p) to be accountable;
 - (q) to recognise and be responsive to national and international clinical, technical and human rights trends, developments and advances.

Appendix 3: Orders available and making and discharging orders

Table A3.1: Orders available

Jurisdiction	Details
Commonwealth	The court may order detention or make an order for release either absolutely or subject to conditions. ¹⁰⁰¹
New South Wales	
<i>Unfit and not acquitted (following special hearing) (UNA)</i>	If would not have imposed a sentence of imprisonment, then can impose any other penalty or make any other order in normal trial of criminal proceedings. ¹⁰⁰² If would have imposed sentence of imprisonment, then must nominate a limiting term. ¹⁰⁰³ This can be in a mental health facility (if the person is mentally ill or has a mental condition and doesn't object) or in a place other than a mental health facility (where not mentally ill or has mental condition but objects to determination in mental health facility). ¹⁰⁰⁴
<i>Not guilty by reason of insanity (NGMI)</i>	Four orders: detention, conditional release, unconditional release and any other order the court thinks appropriate. ¹⁰⁰⁵
South Australia	If a person is declared liable to supervision, the court may release unconditionally or make a supervision order committing the D to detention or releasing the defendant on licence. ¹⁰⁰⁶ In relation to summary and minor indictable offences the court can dismiss the charge and release the person unconditionally, make a supervision order or make an order releasing the person on licence. ¹⁰⁰⁷
Victoria	The court must declare the person is liable to supervision under Part 5 or order the person to be released unconditionally. ¹⁰⁰⁸ A supervision order can be a custodial supervision order or a non-custodial supervision order. ¹⁰⁰⁹
Western Australia	
<i>Unfit</i>	Release the accused or make a custody order. ¹⁰¹⁰
<i>Unsound mind</i>	If offence from Schedule 1 – the court must make a custody order and if not a Schedule 1 offence, the court may release the accused conditionally, make a conditional release order, a community-based order or an intensive supervision order or a custody order. ¹⁰¹¹
Queensland	A court may either discharge the person or may order the person to be admitted to an authorised mental health service to be dealt with under the <i>Mental Health Act 2016</i> (Qld). ¹⁰¹² The Mental Health Review Tribunal

¹⁰⁰¹ *Crimes Act 1914* (Cth) ss 20BC(2), (5), 20BJ(1), (4).

¹⁰⁰² *Mental Health (Forensic Procedure) Act 1990* (NSW) s 23(2).

¹⁰⁰³ *Ibid* s 23(1)(b).

¹⁰⁰⁴ *Ibid* s 27.

¹⁰⁰⁵ *Ibid* s 39.

¹⁰⁰⁶ *Criminal Law Consolidation Act 1935* (SA) s 269O.

¹⁰⁰⁷ *Ibid* s 269NB.

¹⁰⁰⁸ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 18(4), 23.

¹⁰⁰⁹ *Ibid* s 26(2).

¹⁰¹⁰ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19(4).

¹⁰¹¹ *Ibid* ss 20–22. Schedule 1 includes murder, manslaughter, sexual penetration without consent and sexual coercion, assault occasioning bodily harm, indecent assault, stealing a motor vehicle in circumstances of aggravation and criminal damage.

¹⁰¹² *Criminal Code* (Qld) ss 613, 647.

	<p>may make a forensic order (mental health) or forensic order (disability).¹⁰¹³ In addition, if a person is acquitted on the grounds of insanity, the Governor may order the safe custody of the person during the Governor's pleasure.¹⁰¹⁴</p> <p>There is also provision for the Mental Health Court to deal with the matter under the <i>Mental Health Act 2016</i> (Qld) for some offences.¹⁰¹⁵ In this case, the Mental Health Court may make a forensic order (mental health) or forensic order (disability) or make a treatment support order.¹⁰¹⁶</p>
Australian Capital Territory	<p>In the Supreme Court, for non-serious offences, the court can make the orders it considers appropriate, including that the accused be detained in custody for review by ACAT under the <i>Mental Health Act 2015</i> s 180 or that the accused submit to the jurisdiction of ACAT to allow the ACAT to make a mental health order or a forensic mental health order under the <i>Mental Health Act 2015</i>. For serious offences, the court must make an order for review and must, if taking into account the relevant criteria (outlined below) order the accused to submit to the jurisdiction of ACAT for the purposes of making the order.¹⁰¹⁷</p>
Northern Territory	<p>The court must declare the person is liable to supervision under Division 5 or order the person to be released unconditionally.¹⁰¹⁸ A supervision order can be a custodial supervision order or a non-custodial supervision order.¹⁰¹⁹</p>

Table A3.2: Test for making orders

Jurisdiction	Details
Commonwealth	<p>Detained in hospital if the person is suffering a mental illness or a mental condition for which treatment is available in a hospital and the person does not object, otherwise, order detention in a place other than a hospital, including a prison.¹⁰²⁰ The court can order release if it is more appropriate to do so.¹⁰²¹</p>
New South Wales	
<i>UNA</i>	<p>Whether or not imprisonment would have been imposed in course of normal trial. There is no prerequisite in relation to endangerment of the public but this is taken into account in applying principles of sentencing.</p>
<i>NGMI</i>	<p>Can only order conditional or unconditional release where satisfied on balance that the safety of the person or any member of the public will not be seriously endangered if the person is released.</p> <p>There are very limited decisions considering factors relevant to courts decisions to detain or conditionally (or unconditionally) release following a finding of NGMI. In cases where courts have ordered that the person be released, the factors that were considered included the person's diagnosis</p>

¹⁰¹³ *Mental Health Act 2016* (Qld) s 461.

¹⁰¹⁴ *Criminal Code* (Qld) s 647(2).

¹⁰¹⁵ *Mental Health Act 2016* (Qld) s 21(1).

¹⁰¹⁶ *Ibid* ss 21(2), 130(1).

¹⁰¹⁷ *Crimes Act 1900* (ACT) ss 318, 319, 323, 324.

¹⁰¹⁸ *Criminal Code Act* (NT) ss 43I, 43X.

¹⁰¹⁹ *Ibid* s 42ZA(1).

¹⁰²⁰ *Crimes Act 1914* (Cth) s 20BC(2). Note that for acquittal because of mental illness, the court must order detention in safe custody in prison or in a hospital, subject to discretion to release the person: ss 20BJ(1), (4).

¹⁰²¹ *Crimes Act 1914* (Cth) ss 20BC(5), 20BJ(4).

	and response to and compliance with treatment before and after the offending conduct, the extent to which the person understands the need for, and is willing to accept ongoing treatment, the recommendations of treating and other psychiatrists and accommodation arrangements. ¹⁰²²
South Australia	<p>Must take into account views of next of kin of the D and any victim (or next of kin of the victim).¹⁰²³</p> <p>The paramount consideration of the court in determining whether to release a defendant must be to protect the safety of the community. This outweighs the principle that restrictions on the defendant's freedom and personal autonomy should be kept to a minimum.¹⁰²⁴</p> <p>Court should have regard to: the nature of the mental impairment; whether the D is, or would if released be, likely to endanger another person or other persons generally; whether there are adequate resources available for the treatment and support of the defendant in the community; and whether the defendant is likely to comply with the conditions of a licence and other matters that the court thinks relevant.¹⁰²⁵</p> <p>If going to release the defendant, require expert reports on the mental condition of the defendant and the possible effects of the proposed action on the behaviour of the defendant. The court must also not release a person unless satisfied on the balance of probabilities that the safety of the person or any member of the public will not be seriously endangered, and the attitudes of victims and next of kin.¹⁰²⁶</p>
Victoria	<p>Court must apply the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.¹⁰²⁷</p> <p>Court should have regard to: the nature of the mental impairment or other condition or disability; the relationship between the impairment, condition or disability and the offending conduct; whether the D is, or would if released be, likely to endanger themselves or another person or other persons generally; the need to protect people from such danger; whether there are adequate resources available for the treatment and support of the defendant in the community; and other matters that the court thinks relevant.¹⁰²⁸</p> <p>If going to release the defendant, require expert reports on the mental condition of the defendant and the possible effects of the proposed action on the behaviour of the defendant.¹⁰²⁹</p>
Western Australia	
<i>Unfit</i>	Custody order can only be made if the penalty is imprisonment and it is appropriate having regard to the strength of the evidence against the accused; the nature of the alleged offence and the alleged circumstances of

¹⁰²² NSWLRC (2013) (n 56) 159 referring to *R v Line* [2004] NSWSC 1148 [19]; *R v Shan Shan Xu (no 2)* [2005] NSWSC 70 [71].

¹⁰²³ *Criminal Law Consolidation Act 1935* (SA) s 269R.

¹⁰²⁴ *Ibid* s 269NI.

¹⁰²⁵ *Ibid* s 269T.

¹⁰²⁶ *Ibid*.

¹⁰²⁷ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39(1).

¹⁰²⁸ *Ibid* s 40(1).

¹⁰²⁹ *Ibid* s 40(2). There were changes proposed to the test in the *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic). This legislation has not been passed by the Victorian Parliament.

	its commission; the accused's character, antecedents, age, health and mental conditions; and the public interest. ¹⁰³⁰
<i>Unsound mind</i>	Custody order if sch 1 offence. Otherwise release the accused unconditionally if it is just to do so having regard to the nature of the offence and circumstances of its commission, the accused's character, antecedents, age, health and mental conditions and the public interest. The court can only impose a conditional release order, a community-based order or an intensive supervision order if the order could have been made had the person been found guilty of the offence. ¹⁰³¹
Queensland	In making a decision in relation to an order for a person, the Mental Health Court must have regard to the following: the relevant circumstances of the person; the nature of the offence to which the reference relates and the period of time that has passed since the offence was allegedly committed; and any victim impact statement. ¹⁰³² The Court must make a forensic order if it is necessary because of the person's mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property. ¹⁰³³ The court can decide that a forensic order for treatment in the community only if the court considers there is not there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property. ¹⁰³⁴
Australian Capital Territory	In making a decision which could include an order for detention, the court must consider: the nature and extent of the accused's mental impairment, including the effect it is likely to have on the person's behaviour in the future, whether or not, if released, the accused's health and safety is likely to be substantially impaired or the accused is likely to be a danger of the community, the nature and circumstances of the offence with which the accused is charged, the principle that a person should not be detained in a correctional centre unless no other reasonable options are available and any recommendations made by the ACAT about how the accused should be dealt with. ¹⁰³⁵
Northern Territory	Court must apply the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community. ¹⁰³⁶ Court should have regard to: the nature of the mental impairment or other condition or disability; the relationship between the impairment, condition or disability and the offending conduct; whether the D is, or would if released be, likely to endanger themselves or another person or other persons generally; the need to protect people from danger; whether there are adequate resources available for the treatment and support of the defendant in the community; whether the D is complying with or likely to comply with the conditions of a supervision order; and other matters that the court thinks relevant. ¹⁰³⁷ If going to release the defendant, require expert reports. ¹⁰³⁸

¹⁰³⁰ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19(5).

¹⁰³¹ *Ibid* s 22(1), (2).

¹⁰³² *Mental Health Act 2016* (Qld) s 133(1).

¹⁰³³ *Ibid* s 133(4).

¹⁰³⁴ *Ibid* s 138(2).

¹⁰³⁵ *Crimes Act 1900* (ACT) s 308.

¹⁰³⁶ *Criminal Code Act* (NT) s 43ZM.

¹⁰³⁷ *Ibid* s 43ZN(1).

¹⁰³⁸ *Ibid* s 43ZN(2).

Table A3.3: Term of order

Jurisdiction	Details
Commonwealth	Maximum term is maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged. ¹⁰³⁹
New South Wales	
<i>UNA</i>	Limiting term – best estimate of sentence would have considered appropriate in normal trial. Must be released unconditionally when the limiting term expires. ¹⁰⁴⁰ The limiting term is governed by sentencing principles. ¹⁰⁴¹ This is an upper limit and the person may be released sooner.
<i>NGMI</i>	Indefinite but subject to review
Victoria	Indefinite ¹⁰⁴² but the court must set a nominal term (murder = 25 years, a serious offence = a period equivalent to the maximum penalty, any other offence with a statutory maximum = half the maximum, any other offence = period specific by court. ¹⁰⁴³) The court undertakes a major review at least three months before the end of the nominal term. ¹⁰⁴⁴
South Australia	A limiting term equivalent to the period of imprisonment that would have been appropriate if the defendant had been convicted of the offence of which the objective elements have been established. The court should not take into account the defendant's mental impairment. ¹⁰⁴⁵
Western Australia	Indefinite ¹⁰⁴⁶ but subject to review.
Queensland	Indefinite with power to review. For prescribed offences, a period of not more than 10 years (the non-revocation period) during which the tribunal may not revoke the forensic order, other than under s 457. ¹⁰⁴⁷ In deciding the non-revocation period, the court must have regard to the object of this Act in relation to protecting the community. ¹⁰⁴⁸
Australian Capital Territory	Nominal term is set that is the best estimate of the sentence it would have considered appropriate if the special hearing had been a normal criminal proceeding and must not order that the accused be detained for a period greater than the nominated term. ¹⁰⁴⁹
Northern Territory	Indefinite ¹⁰⁵⁰ but the court must fix a term for the major review of the order (nominal term). This term is set according to the following rules: if offence carries a mandatory life penalty or the court's view that life imprisonment would have been an appropriate penalty, the court must fix the period that it would have set as the non-parole period and in other cases, equivalent to the

¹⁰³⁹ *Crimes Act 1914* (Cth) ss 20BC(2), 20BJ(1). Section 20BJ has been interpreted to mean that 'the length of the period of detention should be fixed by reference to the sentence which would have been imposed if the person had been found guilty': *R v Goodfellow* (1994) 33 NSWLR 308; *R v Robison* (2004) 11 VR 165.

¹⁰⁴⁰ *Mental Health (Forensic Procedure) Act 1990* (NSW) s 23(1)(b).

¹⁰⁴¹ NSWLRC (2013) (n 56) 166.

¹⁰⁴² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27.

¹⁰⁴³ *Ibid* s 28.

¹⁰⁴⁴ *Ibid* s 35. Changes to the review system were set out in the *Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016* (Vic). This legislation has not been passed by the Victorian Parliament.

¹⁰⁴⁵ *Criminal Law Consolidation Act 1935* (SA) s 269O(2).

¹⁰⁴⁶ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 24(1), 38(1).

¹⁰⁴⁷ *Mental Health Act 2016* (Qld) s 137(2). Prescribed offences are murder, manslaughter, grievous bodily harm and rape. Section 457 applies in relation to a person with a dual disability.

¹⁰⁴⁸ *Ibid* s 137(3).

¹⁰⁴⁹ *Crimes Act 1900* (ACT) ss 301(2), 302(2), 303.

¹⁰⁵⁰ *Criminal Code Act* (NT) s 43ZC.

	term of imprisonment or supervision that would have been appropriate to impose if he or she had been found guilty of the offence. ¹⁰⁵¹
--	---

Table A3.4: Test for discharging or varying orders

Jurisdiction	Details
Commonwealth	Attorney-General must be satisfied that the person is not a threat or danger either to himself or herself or the community. ¹⁰⁵²
New South Wales	The Tribunal must not make an order for the release of a forensic patient unless it is satisfied, on the evidence available to it, that: the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care. ¹⁰⁵³ Without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what order to make about a person under this Part: whether the person is suffering from a mental illness or other mental condition; whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm; the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration; in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release; in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody. ¹⁰⁵⁴
South Australia	As with making order but test is serious endangerment.
Victoria	As with making the order. ¹⁰⁵⁵ At the end of the nominal period, there is a major review and there is a presumption that a custodial supervision order will be varied: the court must vary the order to a NCSO unless satisfied on the evidence available that the safety of the person the subject of the order or members of the public will be seriously endangered. ¹⁰⁵⁶
Western Australia	The Governor on advice from the Minister following a recommendation from the Mental Impairment Accused Review Board. ¹⁰⁵⁷ In making this recommendation the MIARB takes into account: the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community; the likelihood that, if released on conditions, the accused would comply with the conditions; the extent to which the accused's mental impairment, if any, might benefit from treatment, training or any other measure; the likelihood that, if released, the accused would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation; the objective of imposing the least restriction of the freedom of choice and movement of the

¹⁰⁵¹ Ibid ss 43ZG(2), (3).

¹⁰⁵² *Crimes Act 1914* (Cth) ss 20BE(2), 20BL(2).

¹⁰⁵³ *Mental Health (Forensic Procedure) Act 1990* (NSW) s 43.

¹⁰⁵⁴ Ibid s 74.

¹⁰⁵⁵ *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 32(2), 35(3), 40(1).

¹⁰⁵⁶ Ibid s 35(3)(b). It is noted that the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic) changed the test from one of dangerousness to one of risk (whether the person poses an unacceptable risk of serious harm). This legislation has not been passed by the Victorian Parliament.

¹⁰⁵⁷ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 33, 34.

	accused that is consistent with the need to protect the health or safety of the accused or any other person; and any statement received from a victim of the alleged offence in respect of which the accused is in custody. ¹⁰⁵⁸
Queensland	On review by the MHT, the Tribunal must confirm the forensic order if the order is necessary, because of the person’s mental condition, to protect the safety of the community, including from the risk of serious harm to other persons or property. ¹⁰⁵⁹ It must have regard to the relevant circumstances of the person subject to the order, the nature of the unlawful act and the period of time that has passed, any victim impact statement and if the MHC made a recommendation in the order about an intervention program for the person — the person’s willingness to take part in the program. ¹⁰⁶⁰ It must also be confirmed during any non-revocation period. ¹⁰⁶¹
Australian Capital Territory	The Civil and Administrative Tribunal can consider the detention under a court order and must consider: (a) that detention in custody is to be regarded as a last resort and ordered only in exceptional circumstances; (b) the nature and extent of the person’s mental disorder or mental illness, including the effect it is likely to have on the person’s behaviour in the future; (c) whether or not, if released— (i) the person’s health or safety would be, or would be likely to be, substantially at risk; or (ii) the person would be likely to do serious harm to others; (d) if the court nominated a term under the Crimes Act, part 13— the nominated term. ¹⁰⁶² May also make and review mental health orders and forensic mental health orders.
Northern Territory	On the major review, the court must release the supervised person unconditionally unless the court considers that the safety of the supervised person or the public will or is likely to be seriously at risk. ¹⁰⁶³ At periodic reviews, the court must vary a custodial supervision to a non-custodial supervision order unless satisfied on the evidence that the safety of the supervised person or the public will or is likely to be seriously at risk. ¹⁰⁶⁴ Other factors as with making the order.

¹⁰⁵⁸ *Ibid* s 33(5).

¹⁰⁵⁹ *Mental Health Act 2016* (Qld) s 442(1).

¹⁰⁶⁰ *Ibid* s 432.

¹⁰⁶¹ *Ibid* ss 442(2), 452.

¹⁰⁶² *Mental Health Act 2015* (ACT) s 180.

¹⁰⁶³ *Criminal Code Act* (NT) s 43ZG(6).

¹⁰⁶⁴ *Ibid* s 43ZH.

Appendix 4: Fitness to stand trial

	Understand the nature of the charges	Enter a plea	Right to challenge juror	Understand the nature of the trial	Follow course of trial	Understand substantial effect of the evidence	Give instructions to legal practitioner	Other
Tasmania	Y	Y	Y	Y	Y			<ul style="list-style-type: none"> • Make a defence
Presser criteria (NSW, Commonwealth, Queensland)	Y	Y	Y	Y	Y	Y	Y	
ALRC recommendations								<ul style="list-style-type: none"> • Understand the information relevant to the decisions that they will have to make in the course of the proceedings • Retain that information to the extent necessary to make decisions in the course of the proceedings • Use or weigh that information as part of the process of making decisions • Communicate decisions in some way
Victoria (current)	Y	Y	Y	Y	Y	Y	Y	
VLRC recommendations ¹⁰⁶⁵	Y	Y and ability to understand the actual significant	N	Y	Y	Y	Communicate meaningful instructions	<ul style="list-style-type: none"> • Decide whether to give evidence • Able to give evidence

¹⁰⁶⁵ See also the test set out in the Crimes (Mental Impairment and Unfitness to be Tried) Amendment Bill 2016 (Vic). This legislation has not been passed by the Victorian Parliament.

	Understand the nature of the charges	Enter a plea	Right to challenge juror	Understand the nature of the trial	Follow course of trial	Understand substantial effect of the evidence	Give instructions to legal practitioner	Other
		of entering a plea to the charge						
NSWLRC recommendations	Y	Not explicitly but general power to make decisions	Not explicitly but general power to make decisions.	Y	Understand what is going on in a general sense	Y	Communicate effectively with and understand advice given	<ul style="list-style-type: none"> • Understand the information relevant to the decisions that the person will have to make before and during the trial and use that information as part of a rational decision making process • Provide a version of facts to the court
South Australia	Y and respond rationally	Respond rationally to the charge	Y	Y	Y	Follow the evidence	Give rational instructions	
Western Australia (current)	Y	Y and effect of a plea	Y and understand the right	Y	Y	Y		<ul style="list-style-type: none"> • Able to defend the charge
WA AG's review	Y	Y	Y	Y	Y	Y	Y	<ul style="list-style-type: none"> • Decide whether to give evidence • Ability to give evidence
Northern Territory	Y	Y	Y	Y	Y	Y	Y	
Australian Capital Territory	Y	Y	Y	Y	Y	Y	Y	

	Understand the nature of the charges	Enter a plea	Right to challenge juror	Understand the nature of the trial	Follow course of trial	Understand substantial effect of the evidence	Give instructions to legal practitioner	Other
Pritchard/John criteria (England and Wales, Northern Ireland)	Y	Y	Y		Y		Y	<ul style="list-style-type: none"> • Give evidence in own defence
Law Commission	Y	Y – ability to make a decision	Not explicitly but incorporated in ability to make decisions that may need to be made	Y and consequences of being convicted	Y	Y	Y	<ul style="list-style-type: none"> • Make a decision about whether to give evidence • To give evidence • Make other decisions that might need to be made by the D in connection with the trial • Any other ability that appears relevant
Northern Ireland Law Reform Commission	Y	Not explicitly but incorporated in ability to make decisions that may need to be made	Not explicitly but incorporated in ability to make decisions that may need to be made	Not explicitly but incorporated in ability to make decisions that may need to be made	Y		Not explicitly but incorporated in ability to make decisions that may need to be made	<ul style="list-style-type: none"> • Give evidence in own defence • Understand the information relevant to the decisions that they will have to make in the course of the proceedings • Retain that information • Use or weigh that information as part of the process of making decisions • Communicate decisions
Scotland	Y	Y and effect of plea		Y and its purpose	Y	Y	Y	<ul style="list-style-type: none"> • Any other factor that the court considers relevant

	Understand the nature of the charges	Enter a plea	Right to challenge juror	Understand the nature of the trial	Follow course of trial	Understand substantial effect of the evidence	Give instructions to legal practitioner	Other
New Zealand (statute supplemented by Presser)	Y	Y	Y	Y and its purpose and consequences	Y	Y	Communicate adequately	<ul style="list-style-type: none"> • Make a defence
Canada				Y and possible consequences			Y	<ul style="list-style-type: none"> • Conduct a defence

Appendix 5: Special hearing provisions

Jurisdiction	Judge or jury	Conduct of hearing	Findings available	Legislation
New South Wales	Hearing is by judge alone unless election for a jury made	Conducted as close to a normal trial as is practicable, including: <ul style="list-style-type: none"> • proof beyond a reasonable doubt • may raise defences • is entitled to give evidence • to have legal representation 	<ul style="list-style-type: none"> • Not guilty of the offence • Not guilty on the grounds of mental illness • On the limited evidence available, the accused committed the offence charged or an alternative offence (finding of qualified guilt) 	<i>Mental Health (Forensic Provisions) Act 1990 (NSW)</i> ss 19(2), 21, 21A, 22
Australian Capital Territory	Jury unless the accused makes an election to have judge alone	Physical elements of the offence Conducted as nearly as possible as if it were an ordinary criminal proceeding	<ul style="list-style-type: none"> • Not guilty • Satisfied beyond reasonable doubt that the accused engaged in the conduct required for the offence 	<i>Crimes Act 1990 (ACT)</i> ss 317, 335(2)(b)
Northern Territory	Jury unless parties to the prosecution agree that the evidence established the defence of mental impairment, the court may accept plea	Conducted as nearly as possible as if it were an ordinary criminal proceeding including: <ul style="list-style-type: none"> • Proof beyond reasonable doubt • Rules of evidence apply • May give evidence • Raise any defence that could raise at trial 	<ul style="list-style-type: none"> • Not guilty • Not guilty because of mental impairment • Committed the offence (qualified finding of guilt) 	<i>Criminal Code (NT)</i> ss 43V, 43X, 43XA ¹⁰⁶⁶
Victoria	Jury	Conducted as nearly as possible as if it were an ordinary criminal proceeding: <ul style="list-style-type: none"> • Proof beyond reasonable doubt • Rules of evidence apply • May give evidence Raise any defence that could raise at trial	<ul style="list-style-type: none"> • Not guilty • Not guilty because of mental impairment • Committed the offence (qualified finding of guilt) 	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)</i> ss 15, 16, 17

¹⁰⁶⁶The provision to dispense with special hearings was inserted by the *Criminal Code Amendment (Mental Impairment and Unfitness to be Tried) Act 2017 (NT)* s 6.

South Australia	Judge	Trial of objective elements of the offence Exclude from consideration any question of whether the defendant's conduct is defensible	<ul style="list-style-type: none"> • Not guilty • Objective elements are established 	<i>Criminal Law Consolidation Act 1935 (SA)</i> ss 269M, 269N
Queensland	No special hearing			<i>Criminal Code (Qld)</i> s 613; <i>Mental Health Act 2016 (Qld)</i> s 118
Western Australia	No special hearing but judge takes into account evidence against the accused in determining the appropriate disposition			<i>Criminal Law (Mentally Impaired Accused) Act 1996 (WA)</i> ss 16, 19
England and Wales	Jury	Trial of facts (s 4A hearing) – proof that D did the act or made the omission Can rely on certain defences (self-defence, mistake or accident) in limited circumstances. This is where there is objective evidence of the defence. Insanity cannot be relied on	<ul style="list-style-type: none"> • Not guilty • Finding that D did the act or made the omission 	<i>Criminal Procedure (Insanity) Act 1964</i> s 4A
New Zealand	Judge	Satisfied on balance of probabilities that the evidence against the defendant is sufficient to establish that the D caused the act or omission	<ul style="list-style-type: none"> • Dismiss charges • Record finding that satisfied of D's involvement in the offence 	<i>Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ)</i> s 9

Appendix 6: Extension of orders beyond limiting terms (New South Wales and South Australia)

***Mental Health (Forensic Provisions) Act 1990* (NSW) Schedule 1 Extension of status as forensic patient**

(Section 54A)

Part 1 Extension of status as forensic patient

1 Extension orders for forensic patients

- (1) The Supreme Court may, on application under Part 2 of this Schedule, make an order for the extension of a person's status as a forensic patient.
- (2) An order made under this clause is an extension order.

2 Forensic patients in respect of whom extension orders may be made

- (1) A forensic patient can be made the subject of an extension order as provided for by this Schedule if and only if the Supreme Court is satisfied to a high degree of probability that:
 - (a) the forensic patient poses an unacceptable risk of causing serious harm to others if he or she ceases being a forensic patient, and
 - (b) the risk cannot be adequately managed by other less restrictive means.
- (2) The Supreme Court is not required to determine that the risk of a person causing serious harm to others is more likely than not in order to determine that the person poses an unacceptable risk of causing serious harm to others.

Note.

Less restrictive means of managing a risk includes, but is not limited to, a patient being involuntarily detained or treated under the Mental Health Act 2007.

Part 2 Extension orders

Division 1 Application for extension order

3 Minister may apply for extension order

A Minister administering this Act may apply to the Supreme Court for an extension order against a forensic patient.

4 Application for extension order

- (1) An application for an extension order may be made in respect of a forensic patient only if the forensic patient is subject to:
 - (a) a limiting term, or
 - (b) an existing extension order.
- (2) An application in respect of a forensic patient may not be made more than 6 months before:
 - (a) the end of the forensic patient's limiting term, or
 - (b) the expiry of the existing extension order,

as appropriate.

5 Requirements with respect to application

An application for an extension order must be supported by documentation:

- (a) that addresses each of the matters referred to in clause 7 (2) (to the extent relevant to the application), and
- (b) that includes a report (prepared by a qualified psychiatrist, registered psychologist or registered medical practitioner):
 - (i) that assesses the risk of the forensic patient causing serious harm to others, and
 - (ii) that addresses the need for ongoing management of the patient as a forensic patient and the reasons why the risk of the forensic patient causing serious harm to others cannot be adequately managed by other less restrictive means.

6 Pre-hearing procedures

- (1) An application under this Part for an extension order must be served on the forensic patient concerned within 2 business days after the application is filed in the Supreme Court or within such further time as the Supreme Court may allow.
- (2) The Minister applying for the extension order must notify the Tribunal as soon as practicable after making the application.
- (3) Subject to subclauses (7)–(9), the Minister applying for the extension order must disclose to the forensic patient such documents, reports and other information as are relevant to the proceedings on the application (whether or not intended to be tendered in evidence):
 - (a) in the case of anything that is available when the application is made, as soon as practicable after the application is made, and
 - (b) in the case of anything that subsequently becomes available, as soon as practicable after it becomes available.
- (4) A preliminary hearing into the application is to be conducted by the Supreme Court within 28 days after the application is filed in the Supreme Court or within such further time as the Supreme Court may allow.
- (5) If, following the preliminary hearing, it is satisfied that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order, the Supreme Court must make orders:
 - (a) appointing:
 - (i) 2 qualified psychiatrists, or
 - (ii) 2 registered psychologists, or
 - (iii) 2 registered medical practitioners, or
 - (iv) any combination of 2 persons referred to in subparagraphs (i)–(iii),to conduct separate examinations of the forensic patient and to furnish reports to the Supreme Court on the results of those examinations, and
 - (b) directing the forensic patient to attend those examinations.
- (6) If, following the preliminary hearing, it is not satisfied that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order, the Supreme Court must dismiss the application.

- (7) A forensic patient in respect of whom an application for an extension order has been made is, unless the Supreme Court otherwise determines, entitled to inspect or otherwise have access to any medical records in the possession of any person relating to the forensic patient.
- (8) A representative of the forensic patient is entitled, at any time before or during the proceedings on the application, to inspect or otherwise have access to any medical records in the possession of any person relating to the forensic patient.
- (9) Subject to any order or direction of the Supreme Court, in relation to an inspection under subclause (8) of, or other access under that subclause to, any medical record relating to a forensic patient:
 - (a) if a medical practitioner warns the representative of the forensic patient that it may be harmful to communicate to the forensic patient, or any other person, specified information contained in those medical records, the representative is to have full and proper regard to that warning, and
 - (b) the representative is not obliged to disclose to the forensic patient any information obtained by virtue of the inspection or other access.

Division 2 Determination of application

7 Determination of application for extension order

- (1) The Supreme Court may determine an application under this Part for an extension order:
 - (a) by making the order, or
 - (b) by dismissing the application.
- (2) In determining whether or not to make an extension order, the Supreme Court must have regard to the following matters in addition to any other matter it considers relevant:
 - (a) the safety of the community,
 - (b) the reports received from the persons appointed under clause 6 (5) to conduct examinations of the forensic patient,
 - (c) the report of the qualified psychiatrist, registered psychologist or registered medical practitioner provided under clause 5 (b),
 - (d) any other report of a qualified psychiatrist, registered psychologist or registered medical practitioner provided in support of the application or by the forensic patient,
 - (e) any order or decision made by the Tribunal with respect to the forensic patient that is relevant to the application,
 - (f) any report of the Secretary of the Ministry of Health, the Commissioner of Corrective Services, the Secretary of the Department of Family and Community Services or any other government Department or agency responsible for the detention, care or treatment of the forensic patient,
 - (g) the level of the forensic patient's compliance with any obligations to which he or she is or has been subject while a forensic patient (including while released from custody subject to conditions and while on a leave of absence in accordance with section 49 or 50),

- (h) the views of the court that imposed the limiting term or existing extension order on the forensic patient at the time the limiting term or extension order was imposed,
 - (i) any other information that is available as to the risk that the forensic patient will in future cause serious harm to others.
- (3) If the Supreme Court makes an extension order in respect of a forensic patient, the Court is to notify the Tribunal of the making of the order.

8 Term of extension order

- (1) An extension order:
- (a) commences when it is made, or when the limiting term or existing extension order to which the forensic patient is subject expires, whichever is the later, and
 - (b) expires at the end of the period (not exceeding 5 years from the day on which it commences) that is specified in the order.
- (2) Nothing in this clause prevents the Supreme Court from making a second or subsequent extension order against the same forensic patient.

9 Continuation of order relating to forensic patient

The making of an extension order or interim extension order in respect of a forensic patient does not affect the operation of any order as to the forensic patient's care, detention, treatment or release from custody to which the forensic patient was subject immediately before the making of the extension order.

Division 3 Interim extension orders

10 Interim extension order

The Supreme Court may make an order for the interim extension of a person's status as a forensic patient if, in proceedings on an application for an extension order, it appears to the Court:

- (a) that the limiting term or existing extension order to which the forensic patient is subject will expire before the proceedings are determined, and
- (b) that the matters alleged in the supporting documentation would, if proved, justify the making of an extension order.

11 Term of interim extension order

- (1) An interim extension order commences on the day fixed in the order for its commencement (or, if no such day is fixed, as soon as it is made) and expires at the end of such period (not exceeding 28 days from the day on which it commences) as is specified in the order.
- (2) An interim extension order may be renewed from time to time, but not so as to provide for the extension of the person's status as a forensic patient under such an order for periods totalling more than 3 months.

11A Interim extension order to continue in force for 24 hours in certain circumstances

- (1) If the Supreme Court dismisses an application for an extension order in respect of a forensic patient who is detained only as a result of an interim extension order, the Court may (on its own motion or on application) order that the patient be detained for a further period of up to 24 hours to enable a medical practitioner or accredited person to assess

whether a mental health certificate should be given in respect of the patient under section 19 of the *Mental Health Act 2007*.

- (2) The order ceases to authorise the detention of the person if the medical practitioner or accredited person making the assessment decides not to give that mental health certificate about the person.

Division 4 General

12 Extension order or interim extension order may be varied or revoked

- (1) The Supreme Court may at any time vary or revoke an extension order or interim extension order:
 - (a) on the application of a Minister administering this Act or the forensic patient, or
 - (b) on the recommendation of the Tribunal under section 47 (2A).
- (2) The period of an order must not be varied so that the total period as varied is greater than that otherwise permitted under this Part.
- (3) Without limiting the grounds for revoking an extension order or interim extension order, the Supreme Court may revoke an extension order or interim extension order if satisfied that circumstances have changed sufficiently to render the order unnecessary.

Part 3 Supreme Court proceedings

13 Nature of proceedings

Proceedings under this Schedule (including proceedings on an appeal under this Schedule) are civil proceedings and, to the extent to which this Schedule does not provide for their conduct, are to be conducted in accordance with the law (including the rules of evidence) relating to civil proceedings.

14 Right of appeal

- (1) An appeal to the Court of Appeal lies from any determination of the Supreme Court to make, or to refuse to make, or to vary or revoke an extension order.
- (2) An appeal may be on a question of law, a question of fact or a question of mixed law and fact.
- (3) An appeal against the decision of the Supreme Court may be made, as of right, within 28 days after the date on which the decision was made or, by leave, within such further time as the Court of Appeal may allow.
- (4) The making of an appeal does not stay the operation of an extension order.
- (5) If the Court of Appeal remits a matter to the Supreme Court for decision after an appeal is made, the extension order the subject of the appeal continues in force, subject to any order made by the Court of Appeal.
- (6) Without limiting any other jurisdiction it may have, if the Court of Appeal remits a matter to the Supreme Court for decision after an appeal is made, the Court of Appeal may make an interim order revoking or varying an extension order the subject of the appeal.
- (7) This clause does not limit any right of appeal that may exist apart from this Schedule.

15 Costs not to be awarded against forensic patient

An order for costs may not be made against a forensic patient in relation to any proceedings under this Schedule (including proceedings on an appeal under this Schedule).

16 Preservation of Supreme Court jurisdiction

Nothing in this Schedule limits the jurisdiction of the Supreme Court apart from this Act.

Part 4 Miscellaneous

17 Minister may require provision of certain information

- (1) A Minister administering this Act may, by order in writing served on any person, require that person to provide to the Minister any document, report or other information in that person's possession, or under that person's control, that relates to the behaviour, or physical or mental condition, of any forensic patient who is subject to a limiting term.
- (2) A person who fails to comply with the requirements of an order under this clause is guilty of an offence.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

- (3) A Minister administering this Act may request a court or the Tribunal to provide to the Minister any document, report or other information held by the court or Tribunal that relates to the behaviour, or physical or mental condition, of any forensic patient who is subject to a limiting term.
- (4) Despite any Act or law to the contrary, any document or report of a kind referred to in subclause (1) or (3), or any copy of any such document or report, is admissible in proceedings under this Act (whether admission is sought by the Minister to whom the document or report was provided or by another Minister administering this Act).

17A Information sharing

- (1) A Minister administering this Act may disclose forensic patient information obtained under this Act to any other Minister administering this Act:
 - (a) for the purpose of enabling or assisting either Minister to exercise functions under this Act, or
 - (b) for the purpose of the administration or execution of this Act.

- (2) In this clause:

forensic patient information means any document, report or other information that relates to a forensic patient, including any such information that is:

- (a) personal information within the meaning of the *Privacy and Personal Information Protection Act 1998* or *Health Records and Information Privacy Act 2002*, or
- (b) health information within the meaning of the *Health Records and Information Privacy Act 2002*.

18 Protection of certain persons from liability

No action lies against any person (including the State) for or in respect of any act or omission done or omitted by the person if it was done or omitted in good faith for the purposes of, or in connection with the administration or execution of, this Schedule.

19 Hearings

This Schedule does not affect the right of any party to proceedings under this Schedule:

- (a) to appear, either personally or by the party's legal representative, or
- (b) to call witnesses and give evidence, or
- (c) to cross-examine witnesses, or
- (d) to make submissions to the Supreme Court on any matter connected with the proceedings.

20 Bail Act 2013 not to apply

The *Bail Act 2013* does not apply to or in respect of a person who is the subject of proceedings under this Schedule.

21 Rules of court

- (1) Rules of court may be made under the *Supreme Court Act 1970* for regulating the practice and procedure of the Supreme Court in respect of proceedings under this Schedule.
- (2) This clause does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

22 Qualification of psychiatrists

For the purposes of this Schedule, a psychiatrist is not a qualified psychiatrist unless he or she is a registered medical practitioner who is a fellow of the Royal Australian and New Zealand College of Psychiatrists.

Criminal Law Consolidation Act 1935 (SA)

Part 8A Division 4 Subdivision 3 – Continuing supervision orders

269UA—Application for continuing supervision

- (1) If a defendant is declared to be liable to supervision under Subdivision 2, whether before or after the commencement of this section, the Crown may, while the defendant remains liable to supervision, apply to the Supreme Court to have the defendant declared to be liable to supervision under a continuing supervision order.
- (2) An application cannot be made under subsection (1) more than 12 months before the end of the limiting term fixed in respect of the relevant supervision order (and the limiting term will be taken to continue until the application is determined by the Court).
- (3) The Court must give the defendant at least 14 days written notice of the date on which it intends to conduct the proceedings to determine the application.
- (4) The Court must, before determining an application under this section, direct that 1 or more legally qualified medical practitioners (to be nominated by a prescribed authority for the purpose) inquire into the mental condition of the defendant and report to the Court on the mental condition of the defendant, including—
 - (a) a diagnosis and prognosis of the condition; and
 - (b) a suggested treatment plan for managing the defendant's condition.
- (5) Each of the following persons is entitled to appear and be heard in proceedings under this section and must be afforded a reasonable opportunity to call and give evidence, to examine or cross-examine witnesses, and to make submissions to the Court:
 - (a) the defendant (personally or by counsel);
 - (b) the Director of Public Prosecutions;
 - (c) the Commissioner for Victims' Rights;
 - (d) with the permission of the Court—any other person with a proper interest in the matter.
- (6) The Court may also take the following matters into consideration when determining an application under this section:
 - (a) any relevant remarks made by the court by which the defendant was declared to be liable to supervision under Subdivision 2;
 - (b) the behaviour of the defendant while under supervision;
 - (c) any treatment, care and rehabilitation of the defendant while under supervision;
 - (d) any reports tendered, and submissions made, to the Court under this section;
 - (e) the likelihood of the defendant committing an offence of a violent nature should the defendant no longer be liable to supervision;
 - (f) the character, antecedents, age, means and physical and mental condition of the defendant;
 - (g) the probable circumstances of the defendant should the defendant no longer be liable to supervision;
 - (h) any other matters that the Court thinks are relevant.

- (7) If the Court is satisfied, on the balance of probabilities, that the defendant to whom the application relates could, if unsupervised, pose a serious risk to the safety of the community or a member of the community, the Court must declare that, on the expiry of the supervision order under Subdivision 2, the defendant is liable to continuing supervision under this Subdivision.

269UB—Continuing supervision orders

- (1) If, under section 269UA, the Supreme Court declares a defendant to be liable to continuing supervision, the Court may make an order (a *continuing supervision order*)—
 - (a) committing the defendant to detention under this Subdivision; or
 - (b) releasing the defendant on licence.
- (2) If a continuing supervision order is made releasing the defendant on licence, the licence is subject to the following conditions:
 - (a) the conditions imposed by subsection (3);
 - (b) any other condition decided by the Court and specified in the licence.
- (3) Subject to this Act, every licence under this Subdivision is subject to the following conditions:
 - (a) a condition prohibiting the defendant from possessing a firearm or ammunition (both within the meaning of the *Firearms Act 2015*) or any part of a firearm;
 - (b) a condition requiring the defendant to submit to such tests (including testing without notice) for gunshot residue as may be reasonably required by a person or body specified by the Court.
- (4) Without limiting the generality of subsection (2)(b), release on licence under a continuing supervision order may, for example, be subject to—
 - (a) a condition that the defendant reside at specified premises; or
 - (b) a condition that the defendant undergo assessment or treatment (or both) relating to the defendant's mental condition; or
 - (c) a condition that the defendant be monitored by use of an electronic device approved under section 4 of the *Correctional Services Act 1982*; or
 - (d) any other condition that the Court thinks fit.
- (5) The Court may only vary or revoke the conditions imposed by subsection (3) if the defendant satisfies the Court, by evidence given on oath, that—
 - (a) there are cogent reasons to do so; and
 - (b) the possession of a firearm, ammunition or part of a firearm by the defendant does not represent an undue risk to the safety of the public.
- (6) A continuing supervision order remains in force against the defendant until the order is revoked by the Court.

269UC—Variation or revocation of continuing supervision order

- (1) At any time after a continuing supervision order has been made in respect of a defendant, the Supreme Court may, on the application of the Crown, the defendant, the Parole Board, the Public Advocate or another person with a proper interest in the matter, vary or revoke the order.

- (2) If the Court refuses an application by or on behalf of a defendant for variation or revocation of a continuing supervision order, a later application for variation or revocation of the order cannot be made by or on behalf of the defendant for 12 months or such greater or lesser period as the Court may direct on refusing the application.

269UD—Appeal

- (1) An appeal lies to the Full Court against a decision by the Supreme Court—
 - (a) to make a declaration and order under this Subdivision; or
 - (b) not to make a declaration and order under this Subdivision.
- (2) An appeal under this section may be instituted by the Crown or by the defendant.
- (3) Subject to a contrary order of the Full Court, an appeal cannot be commenced after 10 days from the date of the decision against which the appeal lies.
- (4) On an appeal, the Full Court—
 - (a) may—
 - (i) confirm or annul the decision subject to appeal; or
 - (ii) remit the decision subject to appeal to the Supreme Court for further consideration or reconsideration; and
 - (b) may make consequential or ancillary orders.

Appendix 7: Law reform recommendations

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
<p>Law Reform Committee (Vic) <i>Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers</i> (2013)</p>	<p>Provide a definition of mental impairment to encompass mental illness, intellectual disability, acquired brain injuries and severe personality disorders (Recommendation 33)</p>	No discussion	No discussion	No discussion	No discussion
<p>New South Wales Law Reform Commission <i>People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences: Report 138</i> (2013)</p>	<p>Defence should be renamed defence of mental health or cognitive impairment.</p> <p>The following definitions should be used:</p> <p>Mental health impairment:</p> <p>(a) Mental health impairment means a temporary or continuing disturbance of thought, mood, volition, perception, or memory that impairs emotional wellbeing, judgment or behaviour, so as to affect functioning in daily life to a material extent.</p> <p>(b) Such mental health impairment may arise from but is not limited to the following:</p>	Not in favour of changing law	<p>Define wrong to mean ‘not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong’ (enacting the ‘Porter gloss’).</p> <p>Argued test was functional, strongly supports and understood by both juries and expert witnesses. Useful in the case of delusions, where a person may believe that the victim was a danger to the safety of his or her family may not come</p>	Supported introduction of volitional component	No discussion

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
	<p>(i) anxiety disorders (ii) affective disorders (iii) psychoses (iv) substance induced mental disorders.</p> <p>‘Substance induced mental disorders’ include ongoing mental health impairments such as drug-induced psychoses, but do not include substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.</p> <p>For the purposes of this section ‘mental health impairment’ does not include a personality disorder.</p> <p>(2) Cognitive impairment:</p> <p>(a) Cognitive impairment is an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.</p> <p>(b) Such cognitive impairment may arise from, but is not limited to, the following:</p> <p>(i) intellectual disability</p>		<p>within second limb as may also know that killing is wrong but <i>Porter</i> approach enable proof that the person did not the act to be wrong by inference from an ability to reason with sense and composure about whether the conduct was wrong.</p>		

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
	<ul style="list-style-type: none"> (ii) borderline intellectual functioning (iii) dementias (iv) acquired brain injury (v) drug or alcohol related brain damage (vi) autism spectrum disorders. <p>Verdict should be changed from 'not guilty by reason of mental illness' to 'not criminally responsible by reason of mental health or cognitive impairment.</p>				
Victorian Law Reform Commission <i>Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997: Report</i> (2014)	<p>Definition of mental impairment introduced in legislation. Mental impairment should be defined as a condition that 'includes, but is not limited to, mental illness, intellectual disability and cognitive impairment'.</p> <p>Should not include self-induced temporary conditions resulting from the effects of ingesting substances.</p> <p>Should include self-induced conditions that exist independently of the effects of ingesting substances.</p>	No change recommended	Remove 'moderate degree of sense and composure' with 'did not have the capacity to think rationally about whether the conduct, as perceived by reasonable' on basis that clinicians found phrase vague, subjective and difficult to apply in situations in which most people would not be acting with calmness and composure.	Opposed introduction of volitional component	No discussion
Law Reform Commission of Western Australia	The definition of mental illness does not refer to 'external' extraordinary stimuli and so	No consideration of reform options	No consideration of reform options	No consideration of reform options	Recommended retaining s 27 in relation to delusions (equivalent of section 16(3))

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
<i>Review of the Law of Homicide: Final Report</i> (2007)	<p>greater flexibility to deal with conditions resulting from a healthy mind's reaction to <i>internal</i> extraordinary stimuli (such as hyperglycaemia, arteriosclerosis and epilepsy).</p> <p>No change recommended.</p> <p>Personality disorders should not either automatically included or excluded from the definition.</p> <p>Defence should be renamed 'mental impairment' and should replace 'unsoundness of mind' with mental impairment.</p> <p>Replace presumption of sanity with words 'A person is presumed not to have been suffering a mental impairment unless the contrary is proved'.</p> <p>No recommendation to change verdict from not guilty but replace 'unsoundness of mind' with 'by reason of mental impairment'.</p>				but amend the <i>Criminal Procedure Act 2004</i> (WA) to make it clear that gives rise to qualified acquittal (not guilty by reason of mental impairment).
Sentencing Advisory Council (SA) <i>Mental Impairment and the Law: A Report on the Operation of Part 8A of the Criminal</i>	<p>Defence still necessary as a means to protect the community and provide individuals with the opportunity for treatment.</p> <p>Three interrelated issues with definition: external factors test produce anomalous results; difficulties surrounding the</p>	<p>Not necessary to define phrase nature and quality' — well understood and not difficult to explain; consistent with approach in most other jurisdictions.</p> <p>Not replace 'knowledge' with 'understanding' —</p>	<p>Law unclear, especially in relation to whether 'Porter gloss' applies to all cases or is limited to specific types of cases (such as those involving frenzy, uncontrolled emotion or suspended reason).</p>	<p>Strong reasons to remove it but for consistency with other jurisdiction should be retained but should be made clear that D is totally able to control his or her conduct and that a partial</p>	

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
<i>Law Consolidation Act 1935 (SA)</i> (2014)	<p>soundness of mind test and confusion in relation to personality disorders.</p> <p>Recommended no change to specifically include or exclude any medical conditions, including hypoglycemia or hyperglycemia and personality disorders.</p> <p>Recommended retention of the current law in relation to intoxication and insanity.</p>	<p>concerned about broad range of mental functions that may be covered. Little difficulty with current test.</p> <p>Unlikely make any substantive different in practice.</p>	<p>Q should be not simply whether D knew that the conduct was wrong but whether the D was unable to reason that it was wrong. The defence should only apply where the D was unable to think rationally, in the same way as other people, in order to reason that the conduct was wrong.</p> <p>Adopt Model Criminal Code approach but delete words ‘with a moderate degree of sense and composure’.</p>	<p>inability to control conduct is not sufficient.</p>	
Scottish Law Commission <i>Report on Insanity and Diminished Responsibility</i> (2004)	<p>Brief definition should be introduced — define mental disorder to mean: (a) mental illness, (b) personality disorder or (c) learning disability.</p> <p>Should exclude psychopathic personality disorders</p> <p>Should be renamed.</p>	<p>Test based on D’s ability to appreciate (rather than know) the nature of his or her conduct. Eg woman who kills her children by smothering them with a pillow in belief that in doing so she will drive out demons from their souls.</p> <p>In one sense she understands the physical nature of her actions (she knows that putting a pillow over their faces will stop them breathing) but in a wider sense she</p>	<p>Test should require D to have a deeper appreciation that the conduct was wrong — and concluded test be defined in terms of D’s inability at the time of the offence to appreciate the wrongfulness of his or her conduct.</p>	<p>Opposed introduction of volitional component</p>	<p>No discussion</p>

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
		doesn't have a true or complete knowledge of her actions. A person who lacks knowledge in this broader sense should be exculpated.			
New Zealand Law Commission <i>Mental Impairment Decision-Making and the Insanity Defence: Report 120</i> (2010)	No definition be introduced because of flexibility provided. No change to verdict of acquittal on account of insanity.	Rejected move to broader concept of appreciation on basis that it does not better job than the present defence of clarifying where on the continuum the line between sanity and insanity ought to be drawn.	No change — Porter gloss already part of the law and incorporating it in legislation would make no material difference.	Opposed introduction of volitional component	No discussion
England and Wales Law Commission <i>Criminal Liability: Insanity and Automatism: Discussion Paper</i> (2013)	Abolish insanity and create a new defence of 'not criminally responsible by reason of recognised medical condition'. Should explicitly exclude intoxication and personality disorders.	Wholly lacked the capacity rationally to form a judgment about the relevant conduct or circumstances.	Wholly lacked the capacity to understand the wrongness of what he or she is charged with having done — extend 'wrong' beyond illegality	Wholly lacked the capacity to control his or her physical acts.	Discussed delusions within the context of the other rules of <i>M'Naghten</i> .

Appendix 8: Length of restriction and supervision orders in comparison with median sentence

Table A8.1: Restriction orders – Smith’s study. Excludes individuals who have been on orders for less than 2-year duration, 2006–2009

Offence	Period of incarceration of defendant	Median sentence 1990–2000
Wounding	7 years and continuing	6 months
Murder	13 years, converted to a supervision order which has run for 8 years and continuing	Head sentence 21 years Non-parole period 14 years
	2 years, converted to a supervision order which has run for 8 years and continuing	
	16 years and continuing	
Fraud	2 years and continuing	12 months
Indecent assault	6 years and continuing	8 months

Table A8.2: Restriction orders 2010 to 30 June 2018. Excludes individuals who have been on orders for less than 2 years duration

Offence	Period of incarceration of defendant	Median sentence 2008–14
Murder	6 years 9 months 29 days and continuing	Head sentence 20 years (single count) Non-parole period (single count) 12 years and 3 months
	16 years 5 months and 7 days converted to a supervision order which has run for 2 years 2 months and 23 days and continuing	
	3 years 11 months 13 days and continuing	
	1 year and 9 months and 26 days converted to a supervision order which has run for 17 years 9 months and 25 days	
	5 years 3 months 9 days and continuing	
Assault	8 years 2 months and 8 days converted to a supervision order which has run for 8 months and 9 days and continuing	7 months (48.1% custodial) (single count)
	7 years and 10 days and continuing	
GBH	6 years 7 months 5 days and continuing	1 year and 3 months (76% custodial) (single count)
Rape	Two years and 6 months and 17 days converted to a supervision order which has run for 7 years 7 months and 22 days and continuing	3 years and 4.5 months (single count)
Driving offence	4 years 11 months and three days	Not able to make comparison

Table A8.3: Supervision orders – Smith’s study. Excludes individuals who have been on orders for less than 2-year duration, 2006 – 2009

Offence	Period of supervision of defendant	Median sentence 1990–2000
Arson	3 years and continuing	12 months
	5 years and finalised	
	5.5 years and continuing	
	9 years and continuing	
Assault police	3 years set term	6 months
Assault	4.5 years and continuing	4–12 months (if custodial) depending on number of counts
	8 years and finalised	
Death by dangerous driving	2 years and continuing	9 months
False threat of danger	3 years and continuing	Generally non-custodial
	2 years and finalised	
Unlawfully injure property	4 years and continuing 6 months	6 months
Unlawfully setting fire to property	5.5 years and continuing 4 months	4 months
	3 years and continuing	
Maintain relationship with young person	2 years and continuing	18 months (single count)
Motor vehicle stealing	6 years and continuing	6 months
Rape	4 years and continuing	3 years (single count)
Robbery	4 years and continuing	9 months
Sexual intercourse with young person	4 years and continuing	3 months (single count)
Stalking	4.5 years and continuing	Not recorded
Stealing	2 years set term	6 months (single count)
Wounding	2 years set term	6 months
	5 years and continuing	

Table A8.4: Supervision orders. 2010–30 June 2018. Excludes individuals who have been on orders for less than 2 years duration

Offence	Period of supervision of defendant	Median sentence 2008–14
Maintaining relationship with young person	8 years and 9 days	30 months (single count)
GBH	8 years and 17 days	1 year and 3 months (76% custodial) (single count)
	12 years 3 months and 8 days	
	12 years 3 months and 5 days	
	3 years 15 days and continuing	
	5 years and 11 months and 5 days and continuing	
Injure property	9 years and 2 days	Not available
Assault	8 years 2 months and 8 days	

Appendix 8: Length of restriction and supervision orders in comparison with median sentence

	9 years 7 days and continuing	7 months (48.1% custodial) (single count)
	12 years 3 months and 7 days and continuing	
	9 years and 11 months and 7 days	
Set fire to vegetation/arson (include attempted)	6 years 6 months and 1 days	Arson only available (single count) 1 year and 3 months (46.2% custodial)
	6 years 11 months and 9 days	
	12 years 1 month and 12 days and continuing	
	4 years 7 months and 23 days and continuing	
	7 years and 7 months and 26 days and continuing	
	11 years 9 months and 25 days and continuing	
	5 years 6 months and 20 days and continuing	
Rape	12 years 8 months and 11 days	3 years and 4.5 months (single count)
False threat of danger	9 years 9 months and 14 days and continuing	Not available
Aggravated burglary	5 years 1 month and 12 days	Not available for single count 1 years and 2.5 months (all counts) (71% custodial)
Death by dangerous driving	10 years 5 months and 2 days	2 years (single count)
Stalking	13 years 2 months and 12 days	Not available
Motor vehicle stealing	7 years and 13 days	Not available

Appendix 9: Submissions received

	Name	Organisation
1	D L Hine	Secretary, Department of Police, Fire and Emergency Management
2	D C Coates SC	Director of Public Prosecutions, Office of the Director of Public Prosecutions
3		Mental Health Council of Tasmania
4	Jamie Walvisch	Faculty of Law, Monash University
5	Fabiano Cangelosi	Tasmanian President and State Director Australian Lawyers Alliance
6	Georgina O'Donnell Damien Minehan Grant Blake	ForensiClinic Consulting Pty Ltd Forensic and Clinical Psychology
7	Sarah Bolt	Anti-Discrimination Commissioner Equal Opportunity Tasmania
8	Marita O'Connell	Substantively Forensic Mental Health Services (THS), currently Department of Justice
9	Michelle O'Flynn	Director Queensland Advocacy Incorporated
10	Benedict Bartl	Policy Officer Community Legal Centres Tasmania
11	Confidential	
12	Confidential	
13	Confidential	