

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

ISSUES PAPER NO 27

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## 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 work of the Institute involves the review of laws with a view to:

- the modernisation of the law
- the elimination of defects in the law
- the simplification of the law
- the consolidation of any laws
- the repeal of laws that are obsolete or unnecessary
- uniformity between laws of other States and the Commonwealth.

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The Tasmania Law Reform Institute invites responses to the various issues discussed in this Issues Paper. There are a number of questions posed by this Issues Paper to guide your response. **Respondents can choose to address any or all of those questions in their submissions.** Respondents can also suggest alternative options for reform or raise other relevant matters in their responses.

There are a number of ways to respond:

- By filling in the Submission Template

The Template can be filled in electronically and sent by email or printed out and filled in manually and posted to the Institute. The Submission Template can be accessed at the Institute's webpage: <<http://www.utas.edu.au/law-reform/>>.

- By providing a more detailed response to the Issues Paper.

The Issues Paper poses a series of questions to guide your response — you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible.

The Institute uses all submissions received to inform its research. Submissions may be referred to or quoted from in a TLRI final report which will be printed, provided to the Tasmanian Government and also published on the Institute's website. Extracts may also be used in published scholarly articles and/or public media releases. However, if you do not wish your response to be referred to or identified, the Institute will respect that wish.

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After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations, will be published.

Providing a submission is completely voluntary. You are free to withdraw your participation at any time up to the time it is sent for publication, by contacting Kira White on (03) 6226 2069 or email: [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au). You can withdraw without providing an explanation. However, once the report has been sent for publication, it will not be possible to remove your comments.

All responses will be held by the Tasmania Law Reform Institute for a period of five (5) years from the date of the first publication and then destroyed. Electronic submissions will be stored on a secure, regularly backed-up University network drive. Hard copy submissions will be stored in a locked filing cabinet. At the expiry of five years, submissions will be deleted from the server, in the case of electronic submissions, or shredded and securely disposed of in the case of paper submissions.

Electronic submissions should be emailed to: [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au)

Submissions in paper form should be posted to:

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Inquiries about the study should be directed to Ms Terese Henning at the above address, or by telephoning (03) 6226 2069, or by email to [Law.Reform@utas.edu.au](mailto:Law.Reform@utas.edu.au).

**CLOSING DATE FOR RESPONSES: 24 May 2019**

This study has been approved by the Tasmanian Social Sciences Human Research Ethics Committee. If you have concerns or complaints about the conduct of this study, please contact the Executive Officer of the HREC (Tasmania) Network on +61 3 6226 6254 or email

human.ethics@utas.edu.au. The Executive Officer is the person nominated to receive complaints from research participants. Please quote ethics reference number [H0016752].

## **Final Report to the Attorney-General**

After considering all responses and stakeholder feedback it is intended that a final report, containing recommendations for reform, will be published.

## **Acknowledgments**

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# Executive Summary

This Issues Paper follows a reference provided to the TLRI by the then Attorney-General, the Hon Dr Vanessa Goodwin and 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:

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

## ***Part 1: Introduction***

Part 1 sets out the background to the reference, an overview of the structure of the Issues Paper and the scope of the reference.

## ***Part 2: Background and Principles***

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).

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, 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).

The key points of this Part are that:

- a significant proportion of people have mental and/or cognitive impairments, yet only a small number of such individuals rely on unfitness to stand trial and/or the defence of insanity. Many more with mental and/or 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.
- 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 natural imbecility) such that he or she 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.

- the principles that underlie the *Criminal Justice (Mental Impairment) Act 1999* (Tas) 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: Mental Health and Cognitive Impairments and the Criminal Justice System***

Part 3 provides an overview of mental illness and cognitive impairments and the criminal justice system.

Key points of this Part are that:

- Insanity and fitness to stand trial apply to only a small number of people compared to the number of individuals with mental health 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 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.
- An offender's mental or cognitive impairment is relevant to the sentencing process in at least six ways, including reducing moral culpability, influencing the kind of sentence that should be imposed, in relation to general and specific deterrence, the nature of a proportionate sentence and the risk of imprisonment. In addition, in some circumstances, the nature of an offender's condition may lead to a heavier sentence in view of the need to place greater emphasis on community protection.

### ***Part 4: Unfitness to Stand Trial: The Test***

Part 4 sets out the current test for determining unfitness to stand trial in Tasmania and considers the law in other jurisdictions and options for reforming the test.

Key points of this Part are that:

- The *Criminal Justice Mental Impairment Act 1999* (Tas), s 8 sets out the test to determine if a person is unfit to stand trial. This is based on the common law criteria set out in the Victorian case of *R v Presser*.<sup>1</sup> In Tasmania, 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

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<sup>1</sup> [1958] VR 45.

- (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.
- 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. This is also the approach in England, Wales and New Zealand. The test concerns cognitive capacity. However, South Australia has introduced a requirement of rationality in relation to a person's ability to respond to the charges or give instructions.
  - Some commentators have argued that fitness to stand trial should be abolished in order to accord with the requirements of the *CRPD*.
  - In many jurisdictions, consideration has been given by law reform bodies to concerns about the legal criteria used for assessing an individual's fitness to stand trial, and it has been suggested that the test for fitness to stand trial be reformed.
  - It has been argued that the test is *under-inclusive* (in other words, that it is too difficult to establish unfitness to stand trial). Key criticisms are that: (1) by focusing on intellectual ability, the test 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; (2) the test is difficult to apply to people with mental illness because the criteria were not designed for them; (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 that are in his or her own interests.
  - In other jurisdictions, recommendations for reform have included replacing the current test with a test of decision-making capacity that focuses on an assessment of the defendant's capacity to participate effectively in a trial. This reform would adopt a 'process' 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).
  - Other reform proposals have sought to address the deficiencies of the current test by specifically incorporating a requirement for rationality.
  - Another option for reform is to identify additional criteria relevant to the assessment of fitness to stand trial. At the core of the recent reviews of the test of fitness to stand trial is the desire to ensure that the criteria governing the assessment 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.'
  - Other reforms that have been proposed have been based on an argument that the test is *over-inclusive* and sets the bar too low for some individuals. This criticism is made on the basis that the test fails to take into account whether supports or accommodations within the trial process could be used to help the accused to be fit to stand trial.

- A related issue is whether the test for determining fitness should be adapted in cases where an individual 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.
- In the Tasmanian context, it is noted that allowing an accused to enter a plea of guilty does not necessarily allow the person to avoid the consequences of being found unfit to stand trial. Under the *Sentencing Act 1997* (Tas), an offender who is found guilty may still be sentenced to a restriction order or a supervision order.

### ***Part 5: Unfitness to Stand Trial: Procedure to Determine Unfitness to Stand Trial***

Part 5 sets out the current Tasmanian procedure to determine unfitness to stand trial, the position in other jurisdictions and options available to reform the current procedure.

Key points of this Part are that:

- In Tasmania, 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, rather than a jury, makes decisions in relation to fitness and other relevant findings at a special hearing.
- The question whether a person is unfit to stand trial is a question of fact. It is determined in the Supreme Court by a jury and by a magistrate in the Magistrates Court. However, there is no need to conduct an investigation (by a jury or a magistrate) if the prosecutor and defendant agree and the court may record a finding that the defendant is unfit to stand trial.
- In contrast, in some jurisdictions the judge makes the determination of whether an accused is fit to stand trial for matters in the higher courts. This could be an option for reform in Tasmania.
- In other jurisdictions, there are different approaches to fitness to stand trial in lower courts. An option for reform in Tasmania 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 an accused is unfit for trial. This reform would mean that the magistrate could make an assessment of whether it appears that an 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 1999* (Tas) pathway, if this is appropriate.
- In making an assessment of fitness to stand trial, expert reports are crucial. 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 assessment reports. This is a concern given the importance of the expert advice in the court process. Accordingly, the TLRI seeks further 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 seeks feedback in relation to how any difficulties might be resolved.

### ***Part 6: Unfitness to Stand Trial: Procedure Following a Determination of Unfitness to Stand Trial***

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.

Key points of this Part are that:

- 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.’

At a special hearing there are three findings available to the court. 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;
  - (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’.
- 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 a defendant who is found unfit to stand trial to enter a plea of guilty.
  - In other jurisdictions, there are different procedures that are to be followed if an accused is found to be unfit to stand trial.
  - 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.
  - Based on the approach in other jurisdictions, an option for reform would be to adopt a judge-only procedure for special hearings — 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).

### ***Part 7: Insanity***

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. It considers whether an insanity defence is required, and if so, whether the current defence should be amended.

Key points of this Part are that:

- The defence of insanity is contained in s 16 of the *Criminal Code* (Tas). This is based on the *McNaghten* rules. Although not identical to the Tasmanian provisions, all Australian jurisdictions have comparable laws in relation to insanity.

- 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) of the *Criminal Code* (Tas), 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.
- 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: (a) the defendant did not have the capacity to *understand the physical character of the act*; or (b) 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 (c) the defendant acted under an *uncontrollable impulse*.
- The onus is on the defendant to prove that he or she was insane within s 16 of the *Criminal Code* (Tas) on the balance of probabilities. 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. However, the prosecution cannot introduce evidence probative of insanity until the matter is put in issue by the defence.
- Some jurisdictions have abolished the defence of insanity.
- An alternative to the complete abolition of the insanity defence would be to replace it with an alternative means of deciding the circumstances in which individuals ought not be criminally responsible for their conduct. A model proposed in England and Wales is for the creation of a special defence based on the accused’s lack of capacity at the time of the offence that would apply to physical as well as mental conditions that led to the relevant loss of capacity.
- Another option for reform would be to retain and amend the insanity defence in s 16 of the *Criminal Code* (Tas). Extensive academic literature has outlined deficiencies with the law of insanity. An overview of these concerns is set out in Part 7 including:
  - (a) inappropriate and outdated terminology (insanity);
  - (b) the nature of the qualifying mental state (mental disease) is outdated, limited and offensive;
  - (c) the narrow scope of the incapacities specified as establishing the defence; and
  - (d) the inclusion of irresistible impulses in the defence.
- Despite well-established theoretical concerns, it is less clear to what extent these matters give rise to difficulties in practice. Accordingly, feedback is sought as to whether these problems create difficulties in practice and if and how the defence of insanity should be amended.
- 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 has previously been addressed by the TLRI. The previous recommendation made was 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 *Code*. In addition, in its previous report, the TLRI recommended that s 16(3) should be repealed.

- Concerns have been raised in relation to 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.
- 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. Based on the approach in other jurisdictions, an option for reform would be to reform the law to remove the necessity for a jury to determine the question of insanity if the prosecution and defence agree that evidence in a case establishes insanity.

### ***Part 8: Disposition: Forensic and Treatment Orders***

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). It identifies concerns in relation to the existing law and considers options for reform.

Key points of this Part are that:

- 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.
- 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:
  - (a) to impose a restriction order;
  - (b) release the defendant and make a supervision order;
  - (c) make a treatment order;
  - (d) make a conditional release order; or
  - (e) make an unconditional release order.
- Restriction orders and supervision orders are indefinite orders that can only be discharged or revoked by the Supreme Court.
- In making orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), 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. 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.

- During the term of restriction and supervision orders, there are provisions for regular review of the order by the Mental Health Tribunal (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 made and at least once in each period of 12 months afterwards. 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 inappropriate. 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 to the review process conducted by the MHT.
- If a certificate is issued, the defendant may apply immediately to the Supreme Court for a discharge, revocation or variation of the forensic order. The factors set out above in relation to the 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.
- 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.
- Concerns in relation to forensic orders in Tasmania include the indefinite nature of the orders.
- In some other jurisdictions, limiting terms exist to give an end date to forensic orders. If a limiting term was adopted in Tasmania, it would be necessary to determine whether this was an **absolute limit** or a **limit imposed with provision to extend** the period of restriction or supervision prior to the end of the limiting term. In addition, it would be necessary to determine the mechanism for setting the limiting term.
- Concerns also have been raised in relation to the test that the Supreme Court should apply when making, varying, discharging or revoking orders — in particular, the basis on which such orders should be made, discharged or revoked.
- In Tasmania, only the Supreme Court has the power to discharge or revoke a forensic order. In some jurisdictions there are other models of decision-making in relation to the review and release of people subject to forensic orders including review and revocation by a tribunal rather than the court.
- Concerns have also been raised about the difficulties for forensic patients to transition from a restriction order to a supervision order or from a supervision order to treatment under the *Mental Health Act 2013* (Tas). There also appear to be difficulties in providing ‘step-up’ and ‘step-down’ options for forensic patients seeking to transition from a restriction order (with detention at the Wilfred Lopes Centre) to detention in a community-based facility. Accordingly, the TLRI seeks feedback in relation to whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and the leave provision in the *Mental Health Act 2013* (Tas) currently provide appropriate pathways for gradual reintegration of a forensic patient into the community, consistent with the principles of least restriction and community safety. In this regard, 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.

- Concerns have also been raised in relation to the appropriateness of orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) for people with intellectual disabilities.

# Summary of Questions

The Institute welcomes your response to any individual question or to all questions contained within this Issues Paper. A full list of the consultation questions is contained below with page references for questions that relate to different parts of the Issues Paper.

Part 3	Mental health and cognitive impairments and the criminal justice system
3.3	<ol style="list-style-type: none"> <li>Should there be an amendment to the dangerous criminal provisions contained in the <i>Sentencing Act 1997</i> (Tas) to provide a statutory trigger for judicial consideration of the appropriateness of a making an order under the <i>Sentencing Act 1997</i> (Tas) Part 10 instead of a dangerous criminal declaration? (Page 21)</li> </ol>
Part 4	Unfitness to stand trial: The test
4.4	<ol style="list-style-type: none"> <li>Should the doctrine of fitness to stand trial be abolished in Tasmania? (Page 29)</li> <li>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? (Page 29)</li> <li>Does the current test for unfitness to stand trial contained in the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) s 8 continue to be a suitable basis for determining unfitness to stand trial? (Page 39)</li> <li>Are there any difficulties that arise from the current application of the criteria contained in the <i>Criminal Justice Mental Impairment Act 1999</i> (Tas) s 8? For example, are there difficulties with the test that give rise to a subjective interpretation of the criteria by medical experts? (Page 39)</li> <li>Is the current test under-inclusive and not able to appropriately reflect the issues that arise for individuals with mental illness? (Page 39)</li> <li>Should the test of unfitness to stand trial contained in the <i>Criminal Justice Mental Impairment Act 1999</i> (Tas) s 8 include consideration of an accused person's decision-making capacity and/or ability for effective participation? (Page 39)</li> <li>Should the test of unfitness to stand trial contained in the <i>Criminal Justice Mental Impairment Act 1999</i> (Tas) s 8 include an overarching requirement of a fair trial in the application of the criteria? (Page 39)</li> <li>Should the test of unfitness to stand trial contained in the <i>Criminal Justice Mental Impairment Act 1999</i> (Tas) s 8 include a requirement that the accused person is able to exercise the criteria rationally? (Page 40)</li> </ol>

	<p>10. Are changes required to the criteria contained in the <i>Criminal Justice Mental Impairment Act 1999</i> (Tas) s 8 to allow for an accused to participate meaningfully in the trial process? (Page 40)</p> <p>11. What changes to the criteria contained in the <i>Criminal Justice Mental Impairment Act 1999</i> (Tas) can be made, if any, to enhance the ability of experts to assess an accused person's fitness to stand trial? (Page 40)</p> <p>12. 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 <i>Criminal Justice Mental Impairment Act 1999</i> (Tas) as a factor that needs to be taken into account when determining unfitness to stand trial? (Page 40)</p> <p>13. Should there be a separate test in the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) to determine whether a person is fit to enter a plea? (Page 42)</p> <p>14. If so, what should be the requirements of the test? (Page 42)</p>
<b>Part 5</b>	<b>Unfitness to stand trial: Procedure to determine unfitness to stand trial</b>
5.4	<p>15. 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? (Page 50)</p> <p>16. If so, how do you think these problems might be resolved? (Page 50)</p> <p>17. Should the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) be amended to provide that unfitness to stand trial is determined by a judge in the Supreme Court instead of a jury in all cases? (Page 51)</p> <p>18. Should the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) be amended to allow a magistrate to discharge an individual without making a determination of their fitness to stand trial or criminal responsibility? (Page 52)</p> <p>19. What (if any) limitations should be set out in relation to the exercise of the power of discharge? (Page 52)</p>
<b>Part 6</b>	<b>Unfitness to stand trial: Procedure following a determination of unfitness to stand trial</b>
6.4	<p>20. 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? (Page 57)</p> <p>21. Do you consider that the conduct of the special hearing is consistent with the presumption of innocence? (Page 57)</p> <p>22. Do issues 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'? (Page 57)</p> <p>23. Should any changes be made to the procedure for a special hearing? (Page 59)</p> <p>24. 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</p>

	hearing? Or should there be a judge-alone process available instead of a special hearing in all cases? (Page 59)
<b>Part 7</b>	<b>Insanity</b>
7.5	<p>25. Should the defence of insanity in s 16 of the <i>Criminal Code</i> (Tas) be abolished? (Page 81)</p> <p>26. 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? (Page 81)</p> <p>27. If the defence of insanity is abolished, do you consider that the powers under the <i>Mental Health Act 2013</i> (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? (Page 81)</p> <p>28. 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)? (Page 84)</p> <p>29. If so, should there be any non-qualifying conditions? (Page 84)</p> <p>30. Do you consider that the name of the defence of insanity in s 16 of the <i>Criminal Code</i> (Tas) should be changed? If so, what should the defence be called? (Page 85)</p> <p>31. Does the definition of ‘mental disease’ cause problems in practice? (Page 92)</p> <p>32. Should the terminology in s 16 of the <i>Criminal Code</i> (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? (Page 92)</p> <p>33. Should there be a statutory definition of the terms used? (Page 92)</p> <p>34. 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? (Page 92)</p> <p>35. 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? (Page 92)</p> <p>36. 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? (Page 92)</p> <p>37. Should mental illness be defined, and if so, how? (Page 92)</p> <p>38. Should cognitive impairment be defined, and if so, how? (Page 93)</p> <p>39. How should drug induced psychosis be treated within the insanity defence? Should a distinction be made between psychosis arising from the temporary</p>

	<p>effects of drug use and mental health impairments resulting from drug use (as recommended in NSW and Victoria)? (Page 93)</p> <p>40. Does the narrow interpretation of the ‘incapacity’ and/or the physical character of the act contained in the <i>Criminal Code</i> (Tas) s 16(1)(a)(i) cause any problems in practice? (Page 94)</p> <p>41. 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 <i>Criminal Code</i> (Tas) s 16(1)(a)(ii) cause any problems in practice? (Page 94)</p> <p>42. Do you consider that there should be any change made to the qualifying conditions for the defence of insanity contained in the <i>Criminal Code</i> (Tas) s 16(1)(a)? (Page 94)</p> <p>43. Do you consider that the volitional test for insanity contained in the <i>Criminal Code</i> (Tas) s 16(1)(b) should be retained? (Page 95)</p> <p>44. Do you consider that any amendment should be made to the <i>Criminal Code</i> (Tas) s 16(1)(b)? (Page 95)</p> <p>45. Do you have an explanation as to why successful reliance on the defence of insanity is so low? (Page 96)</p> <p>46. Do you consider that there are practical difficulties with the current operation of the insanity defence contained in the <i>Criminal Code</i> (Tas) s 16? (Page 96)</p> <p>47. Does the current test work well in practice or does it wrongly include or exclude defendants from the scope of the defence? (Page 96)</p> <p>48. 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 <i>Criminal Code</i> (Tas)? (Page 96)</p> <p>49. Does the insanity test contained in s 16 of the <i>Criminal Code</i> (Tas) create difficulties for experts in writing reports and/or in giving evidence at trial? (Page 96)</p> <p>50. 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 s 16(3)? (Page 103)</p> <p>51. Do you agree with the view of the TLRI that s 16(3) of the <i>Criminal Code</i> should be repealed and a provision inserted in the <i>Code</i> 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 <i>Criminal Code</i> (Tas) and cannot be relied on to support a defence of self-defence under s 46 of the <i>Criminal Code</i> (Tas)? (A possible model would be the legislation in the ACT or the Commonwealth Act). (Page 103)</p> <p>52. Alternatively, do you consider that s 16(3) of the <i>Criminal Code</i> should be retained, and an amendment made to the <i>Code</i> 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). (Page 103)</p>
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	<p>53. 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 <i>Criminal Code</i> (Tas) with the result being that a successful argument of self-defence receives a complete acquittal? 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? (Page 104)</p> <p>54. Should the <i>Criminal Code</i> (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? (Page 104)</p> <p>55. Should the prosecution have the power to raise the defence of insanity against the wishes of the defendant? (Page 106)</p> <p>56. Should the leave of the court be required for the prosecution to do this? (Page 106)</p> <p>57. Should there be legislative change to allow the prosecution and defence to agree that a defendant is not guilty by reason of insanity? (Page 108)</p> <p>58. If so, are there any protections in the interests of the defendant that need to be put in place? (Page 108)</p>
<b>Part 8</b>	<b>Disposition: Forensic and treatment orders</b>
8.3	<p>59. Should the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) be amended to provide for a limiting term for restriction and supervision orders to replace the current indefinite nature of these orders? (Page 131)</p> <p>60. Should the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) be amended to provide for a limiting term for a conditional release order to replace the current indefinite nature of these orders? (Page 131)</p> <p>61. If the <i>Criminal Justice (Mental Impairment) Act 1999</i> (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? (Page 137)</p> <p>62. 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? (Page 137)</p> <p>63. If there is a time limit for restriction and supervision orders under the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas), on what basis should it be determined? (Page 140)</p> <p>64. If there is a time limit for conditional release orders under the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas), should it be the same as the conditional undertaking under the <i>Sentencing Act 1997</i> (Tas) s 7(f) (five years)? If not, on what basis should it be determined? (Page 140)</p> <p>65. Are there any difficulties that exist under the <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) in relation to the making, varying or discharging of orders for forensic patients? (Page 148)</p>

66. 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? (Page 148)
67. 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 some other test? Are there any of the other factors that should be included or removed from the *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35? (Page 148)
68. If the current system of indefinite detention or supervision with reviews is retained in Tasmania, should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to create a presumption in favour of a reduced level of supervision in circumstances where the Mental Health Tribunal has issued a certificate? (Page 149)
69. 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? (Page 149)
70. 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)? (Page 152)
71. 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)? (Page 152)
72. Are there any difficulties with the operation of the leave provisions under the *Mental Health 2013* (Tas) that limit its utility in providing an appropriate pathway for the gradual reintegration of a forensic patient into the community? (Page 155)
73. Does the *Criminal Justice (Mental Impairment) Act 1999* (Tas) provide an appropriate pathway for gradual reintegration of a forensic patient into the community? (Page 155)
74. 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?

	<p>(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?</p> <p>(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?</p> <p>(d) Is there a technological solution that may be used to monitor forensic patients to address concerns in relation to risk and community safety?</p> <p>(e) What is the cost implication of making these changes, including the costs of supervision and of treatment services? (Page 155)</p> <p>75. 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 <i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas) model appropriate for people with an intellectual disability or cognitive impairment? (Page 158)</p> <p>76. Are changes needed to the <i>Criminal Justice (Mental Impairment) Act 1999</i> (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? (Page 158)</p> <p>77. Are changes needed to the services that support the <i>Criminal Justice (Mental Impairment) Act 1999</i> (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? (Page 158)</p>
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## 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 of the s 46 of the *Code*.

1.1.2 Following the Report'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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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 Issues Paper.<sup>6</sup> The TLRI has also undertaken a review of the *Guardianship and Administration Act 1995* (Tas) and has released a final report that makes recommendation for reform.<sup>7</sup>

## 1.2 Structure of this Issues Paper

1.2.1 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).

1.2.2 Part 3 provides an overview of mental illness and cognitive impairments and the criminal justice system.

1.2.3 Part 4 sets out the current test for determining unfitness to stand trial in Tasmania and considers the law in other jurisdictions and options for reforming the test.

1.2.4 Part 5 sets out the current Tasmanian procedure to determine unfitness to stand trial, the position in other jurisdictions and options available to reform the current procedure.

1.2.5 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.

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

<sup>3</sup> Ibid 5. *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('CRPD').

<sup>4</sup> Tasmania Law Reform Institute (TLRI), *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?*, Final Report No 23 (2018).

<sup>5</sup> Ibid vii.

<sup>6</sup> See Parts 4 and 5.

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

1.2.6 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.

1.2.7 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.

## 1.3 Scope of the Reference

1.3.1 This Issues Paper 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 Issues Paper 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.

1.3.2 This Issues Paper 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.<sup>8</sup> However, for the purposes of this paper, the TLRI has relied on the definitions developed by the New South Wales Law Reform Commission (NSWLRC). Accordingly, a mental health impairment is understood to mean 'a temporary or continuing disturbance of thought, mood, volition, perception or memory that impairs emotional wellbeing, judgement or behaviour, so as to affect function in daily life to a material extent'.<sup>9</sup> Cognitive impairment 'refers to impairments in a person's ability to think, concentrate, react to emotions, formulate ideas and remember and process information'.<sup>10</sup> It includes intellectual disability and borderline intellectual functioning, acquired brain injury, dementia, autism spectrum disorder and drug or alcohol related brain damage.<sup>11</sup>

<sup>8</sup> 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.

<sup>9</sup> Ibid Recommendation 5.2.

<sup>10</sup> Ibid 120.

<sup>11</sup> Ibid 122–136; Recommendation 5.1.

1.3.3 This Issues Paper 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 this Act.<sup>12</sup> Further, this paper does not review the Diversion List that operates in the Magistrates Court for individuals who have mental health and/or cognitive impairments.<sup>13</sup>

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<sup>12</sup> See TLRI, above n 7.

<sup>13</sup> See discussion of the Diversion List at [2.2.2]–[2.3.3].

## Part 2

# Background and Principles

## 2.1 Introduction

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

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).<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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).<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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 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

<sup>14</sup> 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.

<sup>15</sup> Magistrates Court Tasmania, above n 14, 4.

<sup>16</sup> E Newitt and V Stojcevski, *Mental Health Diversion List* (Evaluation Report, 2009) 13.

<sup>17</sup> Magistrates Court Tasmania, above n 14, 5.

<sup>18</sup> Newitt and Stojcevski, above n 16, 6.

<sup>19</sup> Magistrates Court of Tasmania, *Annual Report 2015–16* (2016) 12–13.

<sup>20</sup> 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.

<sup>21</sup> *Ibid* 7.

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.<sup>22</sup> 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.<sup>23</sup>

#### 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.<sup>24</sup> 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.<sup>25</sup>

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

<sup>22</sup> A Loughlan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford University Press, 2012) 67.

<sup>23</sup> The specific requirements of the test contained in the *Criminal Justice (Mental Impairment) Act 1999* s 8 are discussed further at [4.2].

<sup>24</sup> Victoria Law Reform Commission (VLRC), *Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, Final Report 28 (2014) 103.

<sup>25</sup> *Criminal Code* (Tas) s 16. This is discussed further at [7.3].

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 defence**<sup>26</sup>

	<b>Unfitness to stand trial</b>	<b>Insanity</b>
<b>Issue to be determined</b>	Whether the accused is fit to stand trial	Whether the accused is not guilty by reason of insanity
<b>Relevant time</b>	Time of trial	Time of offence
<b>Process</b>	Investigation into unfitness	Trial or special hearing (if the person is unfit)
<b>Relevant legislation</b>	<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.

<sup>26</sup> 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**

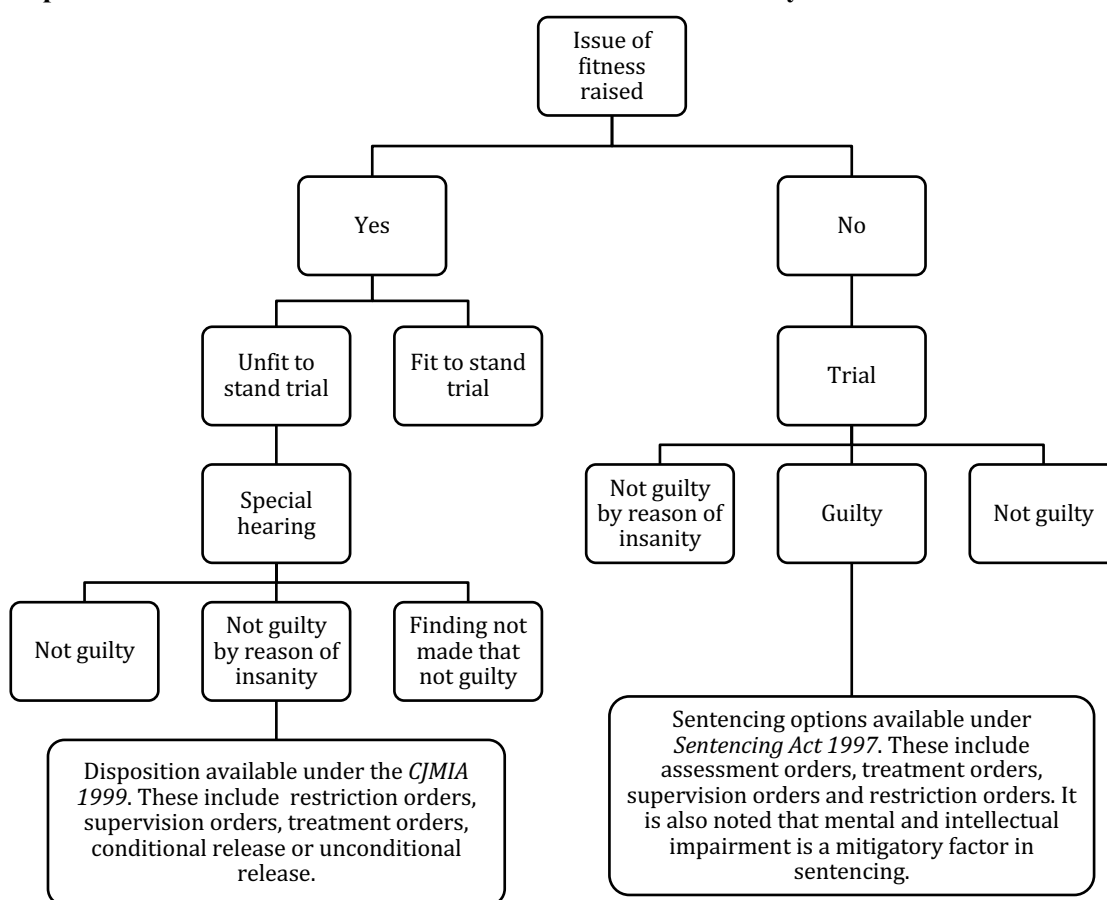


Figure 2.1 shows that the same dispositions are available to the court whether:

- (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.<sup>27</sup> 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.<sup>28</sup> There were

<sup>27</sup> *Criminal Justice (Mental Impairment) Act 1997* (Tas) ss 18, 21. These dispositions are discussed further in Part 8.

<sup>28</sup> *Sentencing Act 1997* (Tas) Part 10. A mental illness is defined as a mental illness within the meaning in the *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

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 applied 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. Previously, 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.
- (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.

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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.'

- (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.<sup>29</sup>

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’.<sup>30</sup> 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.<sup>31</sup>

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’.<sup>32</sup> 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’.<sup>33</sup> 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.<sup>34</sup> 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 from an unconditional release order up to the making of the restriction order. The court, rather than the executive, was also given the power to make orders revoking or discharging an individual. 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 Mental Health Tribunal (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 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.<sup>35</sup> Accordingly, while the *Criminal Justice Mental Impairment Act 1999*

<sup>29</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

<sup>30</sup> 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.

<sup>31</sup> 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.

<sup>32</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

<sup>33</sup> Ibid.

<sup>34</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 17.

<sup>35</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

(Tas) did not make any changes to the defence of insanity contained 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.<sup>36</sup> 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’.<sup>37</sup>

### ***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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

### ***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 and, as observed

<sup>36</sup> Ibid.

<sup>37</sup> 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.

<sup>38</sup> The identification of these principles was drawn from the VLRC’s report, see VLRC, above n 24.

<sup>39</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 14, 10, 26 (‘ICCPR’); *CRPD* arts 4, 5, 12, 13 14. For a more detailed discussion of these provisions in the context of fitness to stand trial, see [4.4].

<sup>40</sup> 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).

by the VLRC, ‘this principle is based on the “central percept of our criminal law ... that no person shall be convicted of a crime otherwise than after a trial according to law”’.<sup>41</sup>

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.<sup>42</sup> 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 *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’.<sup>43</sup> 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.<sup>44</sup> In addition, the defendant’s legal representatives are able to challenge jurors.<sup>45</sup> 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’.<sup>46</sup> 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 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.<sup>47</sup>

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.<sup>48</sup>

#### *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

<sup>41</sup> VLRC, above n 26, 18 quoting A Mason, ‘Fair Trial’ (1995) 19 *Criminal Law Journal* 7, 7.

<sup>42</sup> VLRC, above n 26, 18.

<sup>43</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 16.

<sup>44</sup> *Ibid* s 16(3)(c), (d).

<sup>45</sup> *Ibid* s 16(3)(b).

<sup>46</sup> *Ibid* s 34.

<sup>47</sup> VLRC, above n 24, 30.

<sup>48</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 37(2).

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 committed a serious criminal act, particularly a violent act, consideration must also be given to the fundamental rights of others to protection and support.<sup>49</sup>

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.<sup>50</sup> The Court is also directed to have regard to the nature of the defendant's mental impairment or other condition or disability,<sup>51</sup> 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.<sup>52</sup> In reviewing forensic orders under the *Mental Health Act 2013* (Tas), the MHT must also have regard to these principles.<sup>53</sup> 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.<sup>54</sup>

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<sup>49</sup> 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').

<sup>50</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 35(1)(b).

<sup>51</sup> *Ibid* s 35(1)(a).

<sup>52</sup> *Ibid* s 35(2)(a).

<sup>53</sup> *Ibid* s 37(2).

<sup>54</sup> *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 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 in other Australian jurisdictions has concluded that there ‘is strong evidence that people with cognitive and mental health impairments are over-represented throughout the criminal justice system’.<sup>55</sup> 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).<sup>56</sup> In Victoria, it has been estimated that ‘approximately 55% of offenders at court suffer some form of mental impairment’.<sup>57</sup> There are also high rates of cognitive impairment identified in individuals in contact with the criminal justice system.<sup>58</sup> 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.<sup>59</sup> 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’.<sup>60</sup> In this context, Gooding and his colleagues have written that, ‘[a]lthough there are significant issues with data collection,

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<sup>55</sup> NSWLRC, above 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, above n 24, 2; K Dean et al, *The Justice System and Mental Health: A Review of the Literature* (2013) 4.

<sup>56</sup> Australian Institute of Health and Welfare, *The Health of Australia’s Prisoners 2015* (2015) 36.

<sup>57</sup> 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, above n 26, 34.

<sup>58</sup> Dean et al, above n 55, 13; Law Reform Committee, above n 55.

<sup>59</sup> 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.

<sup>60</sup> 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, 2<sup>nd</sup> ed, 2003) 12.

[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'.<sup>61</sup> 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.<sup>62</sup> 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'.<sup>63</sup>

3.2.2 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'.<sup>64</sup> 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'.<sup>65</sup> 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'.<sup>66</sup> 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'.<sup>67</sup>

### 3.3 Mental health and cognitive impairment as a sentencing factor

3.3.1 Although a review of the relevance of mental health 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 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.<sup>68</sup> 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

<sup>61</sup> Gooding et al, above n 37, 827.

<sup>62</sup> Dean et al, above n 55, 5.

<sup>63</sup> M Bagaric and R Edney, *Sentencing in Australia* (Thomson Reuters, 2016) 347.

<sup>64</sup> NSWLRC, above n 55, 7; Dean et al, above n 55, 8–9.

<sup>65</sup> J Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System' *Trends and Issues in Criminal Justice* 334 (2007) 2.

<sup>66</sup> C Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Taylor and Francis, 2013) 91 (references omitted).

<sup>67</sup> Ibid 191.

<sup>68</sup> See Appendix 8.

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.<sup>69</sup> The Custodial Inspector Tasmania has recently reported that ‘current mental health services do not meet the needs of the Tasmanian prison population.’<sup>70</sup> 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’.<sup>71</sup>

3.3.2 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,<sup>72</sup> 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’.<sup>73</sup>

3.3.3 In Tasmania, as with other jurisdictions, an offender’s mental or cognitive impairment is relevant to the sentencing process.<sup>74</sup> While it is not known what number of offenders raise mental health or cognitive impairment as mitigating factors at sentencing (or, as discussed at [3.2], the number of offenders with mental health 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’.<sup>75</sup>

3.3.4 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

<sup>69</sup> 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>>.

<sup>70</sup> Custodial Inspector Tasmania, *Annual Report 2017–18* (2018) 13.

<sup>71</sup> *Ibid* 13.

<sup>72</sup> See discussion in Part 4.

<sup>73</sup> J Walvisch, submission to VLRC, above n 26.

<sup>74</sup> See Bagaric and Edney, above n 63, 347–367.

<sup>75</sup> *Ibid* 347.

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'.<sup>76</sup> As recognised in *Veen v The Queen*:<sup>77</sup>

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.<sup>78</sup>

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.<sup>79</sup>

3.3.5 More recently, in Tasmania the principles set out by the Victorian Court of Appeal in *R v Verdins*<sup>80</sup> have been adopted in relation to the mitigation of sentence.<sup>81</sup> These principles 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.<sup>82</sup>

<sup>76</sup> *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).

<sup>77</sup> (1988) 164 CLR 465.

<sup>78</sup> *Ibid* 476–477 (Mason CJ, Brennan, Dawson and Toohey JJ).

<sup>79</sup> *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1.

<sup>80</sup> (2007) 16 VR 269, 276 (Maxwell P, Buchanan and Vincent JJA).

<sup>81</sup> *Startup v Tasmania* [2010] TASCCA 5; *Groenewege v Tasmania* [2013] TASCCA 7; *Director of Public Prosecutions (Acting) v CBF* [2016] TASCCA 1.

<sup>82</sup> See Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook, 3<sup>rd</sup> ed, 2014) 289–298; Bagaric and Edney, above n 63, 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.

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,<sup>83</sup> 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.<sup>84</sup>

3.3.6 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*.<sup>85</sup> 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’.<sup>86</sup> 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).<sup>87</sup> This ambiguity has not been resolved by subsequent higher court cases in other jurisdictions.<sup>88</sup> 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) and so this is the interpretation of the law that applies in Tasmania.<sup>89</sup> 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 for drug or alcohol use).<sup>90</sup>

3.3.7 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.<sup>91</sup> 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.<sup>92</sup> 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

<sup>83</sup> 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.

<sup>84</sup> *Ibid* 423–424.

<sup>85</sup> [2015] VSCA 325.

<sup>86</sup> Walvisch and Carroll, above n 83, 425.

<sup>87</sup> *Ibid* 426.

<sup>88</sup> *Ibid* 427.

<sup>89</sup> *Ibid* 428.

<sup>90</sup> Bagaric and Edney, above n 63, 312.

<sup>91</sup> *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).

<sup>92</sup> *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).

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).

3.3.8 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.<sup>93</sup> 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.<sup>94</sup> There is also power for the court to make a treatment order or a supervision order, subject to the receipt of an expert report.<sup>95</sup> 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.

3.3.9 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 allows 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.<sup>96</sup> 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.<sup>97</sup> 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'.<sup>98</sup> The interaction of an offender's mental health and the dangerous criminal provisions can be seen in the case of *McCrosen v Tasmania*,<sup>99</sup> 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:

<sup>93</sup> See discussion at [2.3.2].

<sup>94</sup> *Sentencing Act 1997* (Tas) s 75(1).

<sup>95</sup> *Ibid* ss 75(1), (2A).

<sup>96</sup> See TLRI, *A Comparative Review of National Legislation for the Indefinite Detention of 'Dangerous Criminals'*, Research Paper No 4 (2017).

<sup>97</sup> *Sentencing Act 1997* (Tas) s 19(1)(d).

<sup>98</sup> K Warner, *Sentencing in Tasmania* (Federation Press, 2<sup>nd</sup> ed, 2002) 221.

<sup>99</sup> [2018] TASSC 49.

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.

3.3.10 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*,<sup>100</sup> 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 ... for reception into and detention in an approved hospital of a person suffering from mental disorder'.<sup>101</sup> On this basis, a possible reform may be to amend 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 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.

#### Question 1

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?

## 3.4 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 Mental Health Tribunal;
- 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.

<sup>100</sup> (1988) 165 CLR 611.

<sup>101</sup> Ibid 617–618. See also at 619.

## Supreme Court

3.4.2 Table 3.1 sets out information from the Office of the Director of Public Prosecutions. It shows that in the period 2004–2005 to 2016–2017, there were 37 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 (982 cases). In this period, individuals found unfit to stand trial or insane made up 3.8 per cent of cases.<sup>102</sup>

**Table 3.1: Person tried, Supreme Court**

Year	Convictions	Found insane or unfit to plead
2004–5	81	3
2005–6	89	4
2006–7	83	2
2007–8	76	3
2008–9	113	9
2009–10	78	2
2010–11	75	2
2011–12	76	3
2012–13	72	5
2013–14	63	2
2014–15	62	0
2015–16	55	0
2016–17	59	2

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 Mental Health Tribunal. This study located 45 cases where an individual was found unfit to stand trial and/or not guilty by reason of insanity.<sup>103</sup> 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.<sup>104</sup>

<sup>102</sup> 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 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, above n 24, 15.

<sup>103</sup> 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.

<sup>104</sup> The offence categories are taken from the Australian Bureau of Crime Statistics, *Australian and New Zealand Standard Offence Classification (ANZSOC)* (2011, 3<sup>rd</sup> ed).

**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

### *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.<sup>105</sup> 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.<sup>106</sup> In two of these three cases, the defendant was found not guilty by reason of insanity.<sup>107</sup> These cases involved assault and destroying property<sup>108</sup> and dangerous driving, failing to stop after being involved in a crash and evade police, as well as common assault.<sup>109</sup>

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.

<sup>105</sup> Information provided by Betty Evans, Department of Justice, email 2 April 2018.

<sup>106</sup> These cases were identified using a search for Magistrates Court decisions on the Australasian Legal Information Institute (AUSTLII database).

<sup>107</sup> In *Brazendale v O* [2008] TASC 3, the defendant unsuccessfully relied on the defence of insanity in relation to charges of stalking and assault with indecent intent.

<sup>108</sup> *McKenna v Smith* [2014] TASC 11.

<sup>109</sup> *Bonde v Weate* [2017] TASC 11.

## Part 4

# Unfitness to Stand Trial: The Test

## 4.1 Introduction

4.1.1 This Part sets out the current test for determining unfitness to stand trial in Tasmania and considers the law in other jurisdictions and options for reforming the test.

4.1.2 As indicated at [2.3], unfitness to stand trial relates to the issue of whether the accused has the mental ability to understand or participate in the trial. This is concerned with the accused's capacity at the *time of the trial* rather than at the time of the offence.

4.1.3 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.<sup>110</sup>

The unfitness to stand trial doctrine aims to protect accused persons with disabilities, provide a means to challenge the prosecution case and provide for appropriate treatment.<sup>111</sup> As discussed at [2.4], these concerns were reflected in the introduction of the fitness to stand trial procedure contained in the *Criminal Justice Mental Impairment Act 1999* (Tas) and are relevant to the TLRI's examination of the law and procedure relating of unfitness to stand trial. The Terms of Reference request that the TLRI consider whether the Act 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.

## 4.2 The test for determining unfitness to stand trial: 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:

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<sup>110</sup> ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report No 124 (2014), 194–195 quoting the VLRC, above 26, 52.

<sup>111</sup> See [2.4].

- (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*,<sup>112</sup> 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 that has considered 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 *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

<sup>112</sup> [1958] VR 45.

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.’<sup>113</sup>

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 would appear to be included in the requirement that the accused be able to make a defence.<sup>114</sup> 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’.<sup>115</sup>

4.2.5 The DPP’s guidelines also recognise the need for the court, in making an assessment of whether an individual is fit to stand trial, to take account of any accommodations that can be made to enable a person to participate in the trial process. These include accommodations such as ‘regular breaks, slowing the pace of proceedings, monitoring the type and length of questioning of witnesses, including the defendant, and allowing for adjournments where necessary’.<sup>116</sup> This reflects Australian case law that has accepted the availability of support as a relevant factor in the determination of whether someone is unfit to stand trial. In *R v Fisher*,<sup>117</sup> 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].<sup>118</sup>

<sup>113</sup> Director of Public Prosecutions (DPP), *Prosecution Policy and Guidelines*, 119–120.

<sup>114</sup> *R v Chanthasaeng, Songsakong* [2008] NSWCS 122, [48] (Nicolson SC DCJ).

<sup>115</sup> *Ibid* [47].

<sup>116</sup> DPP Guidelines, above n 113, 120.

<sup>117</sup> (2011) 210 A Crim R 199.

<sup>118</sup> *Ibid* [29].

## 4.3 The test for determining unfitness to stand trial: The position in other jurisdictions

4.3.1 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]).<sup>119</sup> This is also the approach in the England and Wales and New Zealand.<sup>120</sup> 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'.<sup>121</sup> The test is not concerned with whether a person is able to act in their best interests or engage in rational decision-making.<sup>122</sup> However, it is noted 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.<sup>123</sup>

## 4.4 Issues for consideration

### *Abolishing fitness to stand trial*

4.4.1 Some commentators have argued that fitness to stand trial should be abolished in order to accord with the requirements of the *CRPD*. This is on the basis that the adoption of a separate legal process that applies to people with a disability is inherently discriminatory.<sup>124</sup> In particular, it is argued that it is contrary to art 12 of the *CRPD*,<sup>125</sup> which sets out the right to 'equal recognition before the law' for people with disability,<sup>126</sup> art 13 which sets out 'the right to access to justice on an equal basis with others',<sup>127</sup> and art 14, which prohibits the deprivation

<sup>119</sup> VLRC, above n 24, 68.

<sup>120</sup> Ibid.

<sup>121</sup> 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.

<sup>122</sup> NSWLRC, above n 55, 17; Law Commission of England and Wales, *Unfitness to Plead: A Consultation Paper*, Consultation Paper No 197 (2010) 59–60.

<sup>123</sup> Emphasis added.

<sup>124</sup> 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.

<sup>125</sup> This critique is summarised by Gooding et al, above n 37, 842–845.

<sup>126</sup> *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 [online: <https://doi.org/10.1093/hrlr/ngx025>].

<sup>127</sup> Gooding and O'Mahoney, above n 124, 131. See also discussion in Arstein-Kerslake et al, above n 126, 406–7.

of liberty on the basis of a disability.<sup>128</sup> 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’.<sup>129</sup> In this context, Minkowitz has asserted 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 is necessary to abolish these measures in order to comply with the equality and non-discrimination obligations under various provisions of the *CRPD*.<sup>130</sup>

4.4.2 Other commentators on the *CRPD* have not gone as far as calling for the abolition of the doctrine of fitness to stand trial<sup>131</sup> but have highlighted the uncertain and potentially significant implications arising from the *CRPD* for the current doctrine and the need for considerable amendment to comply with the requirements of the *CRPD*.<sup>132</sup> 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.<sup>133</sup>

In this way, it is argued that the focus of the inquiry should no longer be on identifying “the line” over which someone is incapable of expressing a valid will or undertaking some function’ and instead the issue should ‘turn to the support and accommodations necessary to enable every person with a disability to function as a legal actor’.<sup>134</sup> 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’.<sup>135</sup> The focus of this approach is on supports and accommodations that may be

<sup>128</sup> 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.

<sup>129</sup> Gooding et al, above n 37, 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).

<sup>130</sup> Minkowitz, above n 124, 434.

<sup>131</sup> However, the dismantling of the regime suggested by Arstein-Kerslake et al, above n 126, 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.

<sup>132</sup> See for example, discussion in Arstein-Kerslake et al, *ibid*; Gooding and O’Mahoney, above n 124; Melbourne Social Equity Institute, above n 128; Gooding et al, above n 37.

<sup>133</sup> Arstein-Kerslake et al, above n 126, 417.

<sup>134</sup> 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).

<sup>135</sup> *Ibid*.

available ‘in making the *mainstream* legal processes accessible rather than creating a “special” alternative measure’ for people with cognitive difficulties.<sup>136</sup>

4.4.3 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 in relation to the approach that should be taken in the ‘hard’ cases — that is, the cases where people are not able to participate in the proceedings even with supports.<sup>137</sup> In relation to these 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 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.<sup>138</sup>

The authors argue that the 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’.<sup>139</sup> 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.<sup>140</sup> 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.<sup>141</sup>

### Questions

2. Should the doctrine of fitness to stand trial be abolished in Tasmania?
3. 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?

### *Reforming the test for fitness to stand trial*

4.4.4 In many jurisdictions, consideration has been given by law reform bodies to concerns about the legal criteria used for assessing an accused’s fitness to stand trial. 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

<sup>136</sup> Gooding and O’Mahoney, above n 124, 138.

<sup>137</sup> Arstein-Kerslake et al, above n 126, 418.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid 409–412.

<sup>141</sup> This is discussed further at [4.4].

on a person's intellectual ability and too little focus on a person's decision-making ability.<sup>142</sup>

- (2) The test is difficult to apply to individuals with mental illness because the criteria were not designed for them.<sup>143</sup>
- (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.<sup>144</sup>

In this context, 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.<sup>145</sup>

This example echoes the concerns raised by 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'.<sup>146</sup>

4.4.5 Other criticisms of fitness to stand trial relate to the practical application of the current test with concerns being expressed about the arbitrary and subjective application of the test.<sup>147</sup> Criticisms of the fitness to stand trial test have focused on the difficulties created for experts in providing an assessment to the court of an accused's fitness to stand trial as a result of the vagueness of most legal formulations of the test and the opaque nature of the assessment process.<sup>148</sup> Freckelton writes that 'decision-making in this area is effectively delegated to clinical evaluators making low visibility and essential unreviewed decisions pursuant to a vague open-textured standard'.<sup>149</sup> Research conducted in other jurisdictions has identified concerns about the assessment process undertaken by experts. In England and Wales, empirical research found that there was considerable variability in the application of the assessment by other

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<sup>142</sup> ALRC, above n 110, [7.14], [7.18]. Department of the Attorney-General, Western Australia, above n 102, 46; VLRC, above n 24; 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.

<sup>143</sup> ALRC, above n 110, 136; VLRC, above n 24, 70; Law Commission UK, above n 122, 27, 32; Law Commission of England and Wales, above n 142, 61, 64.

<sup>144</sup> Law Commission of England and Wales, above n 122, 28; Law Commission of England and Wales, above n 142, 61–62.

<sup>145</sup> *Ibid* 62.

<sup>146</sup> VLRC, above n 24, 70.

<sup>147</sup> 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, above n 24, 99; Law Commission of England and Wales, above n 142, 61.

<sup>148</sup> Freckelton, above n 147, 49.

<sup>149</sup> *Ibid*.

clinicians and a failure by some clinicians to address all the criteria for unfitness to stand trial.<sup>150</sup> Similar findings were made in the Australian context, where White et al found, in a study of assessment reports in New South Wales, that ‘there was significant variability in the practices and assessment methods of assessors’<sup>151</sup> 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.’<sup>152</sup>

4.4.6 In response to these concerns, there has been consideration of whether there should be a re-evaluation of the basis of the test to incorporate a requirement for decision-making capacity or effective participation or rational decision-making. In addition, there has been consideration of whether the current criteria reflect the crucial decisions that an accused makes relevant to his or her trial.

#### *Decision making capacity/effective participation*

4.4.7 The Law Commission of England and Wales has 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.<sup>153</sup> Its view was that the lack of emphasis on decision-making capacity in the test for fitness was difficult to reconcile with the requirements of art 6 of the *European Convention on Human Rights*, which require that an accused be able to participate effectively in his or her trial.<sup>154</sup> The Law Commission also considered that a test of decision-making capacity and effective participation would provide for a modernised approach that better reflects ‘current medical understanding and legal practice in the field of incapacity.’<sup>155</sup> This revised test was also said to be consistent with the test of capacity as defined in the *Mental Capacity Act 2005* (UK) that focuses on ability to make decisions.<sup>156</sup>

4.4.8 In making an assessment of an accused’s capacity, the Law Commission adopted a ‘process’ 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).<sup>157</sup> It considered that (relying on the approach in the *Mental Capacity Act 2005* (UK) s 3) an accused should be found to lack capacity 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;

<sup>150</sup> Law Commission of England and Wales, above n 142, 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.

<sup>151</sup> 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.

<sup>152</sup> 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.

<sup>153</sup> Law Commission of England and Wales, above n 142, Recommendation 10.9, 66–67.

<sup>154</sup> Ibid 63.

<sup>155</sup> 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, above n 142, 87.

<sup>156</sup> Law Commission of England and Wales, above n 142, 62–63.

<sup>157</sup> Law Commission of England and Wales, above n 122, 53.

- to retain that information; to use or weigh that information as part of the decision-making process; or
- to communicate his or her decisions.<sup>158</sup>

4.4.9 This was also the approach of the ALRC, which recommended that the *Crimes Act 1914* (Cth) 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.<sup>159</sup>

This approach reflected the ALRC's view that decision-making ability in the context of the particular criminal proceedings should be central to the inquiry in relation to fitness. This approach was informed by the *CRPD*.<sup>160</sup>

4.4.10 The Law Commission also recommended that the following abilities be specified as relevant to the assessment of the defendant's capacity for effective participation:

- to understand the charges (what the charge means, its nature and the evidence on which the prosecution rely to establish the charge);
- 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;
- to make a decision about whether to elect Crown Court trial;
- and any other decision that might need to be made by the defendant in connection with the trial.<sup>161</sup>

This approach was also endorsed by the Northern Ireland Law Commission.<sup>162</sup>

4.4.11 The requirements for effective participation are set out in legislation in Scotland. Following recommendations of the Scottish Law Commission,<sup>163</sup> the *Criminal Procedure*

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<sup>158</sup> Ibid 54; Law Commission of England and Wales, above n 142, Recommendation 10.22.

<sup>159</sup> ALRC, above n 110, Recommendation 7-1.

<sup>160</sup> Ibid 201.

<sup>161</sup> Law Commission of England and Wales, above n 142, Recommendations 10.14–10.21. The draft legislation prepared by the Law Commission appears in Appendix 1.

<sup>162</sup> Northern Ireland Law Reform Commission, above n 142, 52.

<sup>163</sup> Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (2004) Recommendation 19.

(*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.’<sup>164</sup> 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 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.<sup>165</sup>

4.4.12 Concerns have been expressed about an approach that focuses on decision-making capacity and effective participation. The VLRC considered that a test based on ‘decision-making capacity’ or ‘effective participation’ could introduce too much subjectivity into the assessment process and this would be problematic for expert assessment.<sup>166</sup> This view was endorsed in the review conducted by the Attorney General’s Department in Western Australia.<sup>167</sup> The NSWLRC was concerned that an ‘effective participation’ approach may be over-inclusive and create uncertainty.<sup>168</sup> Instead, the NSWLRC recommended that the requirement for a fair trial should be prescribed as an overarching principle for the application of the *Presser* criteria by the judge.<sup>169</sup> A fair trial requirement could be incorporated into the *Criminal Justice Mental Impairment Act 1999* (Tas). However, a difficulty would be that the ‘fair trial’ requirement would need to be applied by the jury in Tasmania rather than a judge as occurs in New South Wales.

4.4.13 Further concerns have been raised about the requirements of an accused’s fitness to stand trial based on an assessment of the person’s mental capacity. 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.<sup>170</sup> Despite these concerns, the ALRC has expressed the view that ‘it is not practicable to completely do away with some functional tests of ability that have consequences for participation in legal processes’.<sup>171</sup> Further, the ALRC has 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*.<sup>172</sup>

<sup>164</sup> *Criminal Procedure (Scotland) Act 1995* s 53F(1) inserted by *Criminal Justice and Licensing (Scotland) Act 2010* s 170.

<sup>165</sup> *Ibid* s 53F(2) inserted by *Criminal Justice and Licensing (Scotland) Act 2010* s 170.

<sup>166</sup> VLRC, above n 24, 72.

<sup>167</sup> Department of the Attorney General, Western Australia, above n 102, 47.

<sup>168</sup> NSWLRC, above n 55, 26–27.

<sup>169</sup> *Ibid* 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.

<sup>170</sup> Gooding and O’Mahoney, above n 124, referring to the UNCRPD, *General Comment No 1: Equal Recognition Before the Law (Article 12)* (2014).

<sup>171</sup> ALRC, above n **Error! Bookmark not defined.**, 73.

<sup>172</sup> *Ibid*.

Instead, as discussed at [4.4.24], the ALRC has 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.

### *Rationality*

4.4.14 Although there is some suggestion that the law already requires a court to take account of whether the relevant criteria are exercised rationally, this is not expressly stated.<sup>173</sup> For this reason, another approach taken to address the deficiencies of the current test has been to specifically incorporate a requirement for rationality. This approach was implemented in South Australia, where the test explicitly refers to rationality (as noted at [4.3.1]). The NSWLRC has incorporated a requirement for using information relevant to the decisions that a person will have to make before and during the trial as part of a rational decision-making process in its recommendations to reform the statutory fitness test.<sup>174</sup> In Victoria, the Law Reform Committee recommended that the test be amended to consider the ability to understand, or respond rationally to, the charge or the ability to exercise or give rational instructions about the exercise of procedural rights.<sup>175</sup>

4.4.15 This approach can be supported on the basis that it would address concerns that have been raised 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.<sup>176</sup>

4.4.16 The VLRC also examined whether the test should consider the accused's ability to make rational decisions or to exercise the criteria rationally. Arguments in favour included that this 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.<sup>177</sup> However, several concerns were identified, including that:

- the current criteria already implicitly considered rationality;
- that rationality was difficult to define, assess clinically and apply in practice;
- that it would introduce too much subjectivity; and
- that it would inappropriately widen the number of people who could be found unfit to stand trial.<sup>178</sup>

Concerns were also expressed that incorporating rationality may 'unjustifiably limit an accused's autonomy and their choice to make decisions, including "unwise" choices'.<sup>179</sup> On balance, the VLRC's view was that there was a risk that introducing 'rationality' would add to the complexity of the test and introduce too much subjectivity.<sup>180</sup>

4.4.17 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

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<sup>173</sup> VLRC, above n 24, 74 referring to I Freckelton, above n 147, 57.

<sup>174</sup> See Appendix 4.

<sup>175</sup> Law Reform Committee, above n 55, Recommendation 29.

<sup>176</sup> VLRC, above n 24, 74.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid* 75.

<sup>179</sup> *Ibid* referring to the submission of the Victorian Equal Opportunity and Human Rights Commission.

<sup>180</sup> *Ibid* 76.

themselves even if the decision is not in their ‘best interests’.<sup>181</sup> The ALRC expressed concerns about a focus on rationality which ‘may lead to a person’s decision-making ability being assessed on its likely outcome’.<sup>182</sup> 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.<sup>183</sup>

4.4.18 In Tasmania, an approach that incorporates an assessment of an accused’s capacity to make rational decisions or exercise the criteria rationally 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.<sup>184</sup> However, as noted, the requirements of the *Guardianship and Administration Act 1995* (Tas), including the basis on which assessments are made in relation to a person’s decision-making capacity, have been reviewed by the TLRI and its views were that the focus should not be on rationality but on the ability to make a decision.<sup>185</sup>

#### *Additional criteria*

4.4.19 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 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’.<sup>186</sup> The Law Commission of England and Wales identified the need to ensure that there was meaningful participation in the trial process: 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’.<sup>187</sup> Similarly, the VLRC’s view was that fairness required that an accused is only subject to the trial process where they are able to make crucial decisions relevant to their trial.<sup>188</sup> 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.<sup>189</sup>

<sup>181</sup> ALRC, above n 110, 63.

<sup>182</sup> Ibid 202.

<sup>183</sup> See ibid 76–77.

<sup>184</sup> *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).

<sup>185</sup> TLRI, above n 7, Part 6.

<sup>186</sup> VLRC, above n 24, 76.

<sup>187</sup> Law Commission of England and Wales, above n 142, 4.

<sup>188</sup> VLRC, above n 24, 72.

<sup>189</sup> Ibid.

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.<sup>190</sup>

4.4.20 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.

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

- 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 if he or she wishes to give evidence, his/her ability to do so.

4.4.22 In contrast to the approach of jurisdictions that have sought to identify the specific decisions that an individual would need to make in the course of a trial as a means to ensure a fair trial, the ALRC has set out the criteria relevant to the assessment of fitness to stand trial in a more general way by focusing on an accused's decision-making capacity (see [4.4.9]).

#### *Supports and accommodations*

4.4.23 In contrast to criticisms that the test of unfitness to stand trial is under-inclusive, other criticisms assert that the test is over-inclusive and therefore sets the bar too low for some defendants. For example, Gooding et al argue that the test fails to 'incorporate a requirement to consider whether support or assistance could help the accused to optimise fitness to stand trial'.<sup>191</sup> Although case law recognises the relevance of accommodations and supports, the authors contend 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'.<sup>192</sup>

4.4.24 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 Law Reform Committee stated that the test 'sets a low threshold for determining the fitness of an accused with an intellectual disability or cognitive impairment'.<sup>193</sup> 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'.<sup>194</sup> 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'.<sup>195</sup> Similarly, the VLRC indicated that 'the importance of support measures in the

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<sup>190</sup> See Department of the Attorney-General, Western Australia, above n 102, 47.

<sup>191</sup> Gooding et al, above n 37, 837.

<sup>192</sup> Ibid 840.

<sup>193</sup> Law Reform Committee, above n 55, 230.

<sup>194</sup> Ibid.

<sup>195</sup> ALRC, above n 110, 192.

unfitness to stand trial process was one of the strongest themes to come out of the Commission's review'.<sup>196</sup> 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'.<sup>197</sup> 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.<sup>198</sup> 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.<sup>199</sup> 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.<sup>200</sup> 'Fitness with support' refers to 'modifications to court processes that are made to assist an individual to participate in court processes'.<sup>201</sup>

4.4.25 Greater use of special measures to support an accused's fitness to stand trial is supported on the basis that the optimum approach is for a defendant to proceed through the normal trial process, wherever this can be fairly achieved.<sup>202</sup> This is beneficial to the defendant and is also in the public interest.<sup>203</sup> Accordingly, the law should aim to reduce the number of people who take part in special hearings. This approach is also more consistent with the obligations that arise under the *CRPD*.<sup>204</sup>

4.4.26 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 the best interests of the person. In the view of the Northern Ireland Law Reform Commission, it would be inherently unfair for special measures to be used to 'make' an accused fit for trial:<sup>205</sup>

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.<sup>206</sup>

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.<sup>207</sup>

4.4.27 In Tasmania, as indicated, the issue of supports and accommodation for people with communication needs involved in the criminal justice system was the subject of recent review

<sup>196</sup> VLRC, above n 24, 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.

<sup>197</sup> Law Commission of England and Wales, above n 142, 72.

<sup>198</sup> *Ibid* 73.

<sup>199</sup> NSWLRC, above n 55, Recommendation 2.2.

<sup>200</sup> Department of the Attorney-General, Western Australia, above n 102, Recommendation 8.

<sup>201</sup> *Ibid* 50.

<sup>202</sup> Law Commission of England and Wales, above n 142, 29.

<sup>203</sup> VLRC, above n 24, 86.

<sup>204</sup> See [2.4.5].

<sup>205</sup> Northern Ireland Law Reform Commission, *Unfitness to Plead*, Consultation Paper 13 (2012) 120; Northern Ireland Law Reform Commission, above n 142, 85–87.

<sup>206</sup> Northern Ireland Law Reform Commission, Consultation Paper 13, above n 205, 120.

<sup>207</sup> Northern Ireland Law Reform Commission, above n 142, 86–87; Northern Ireland Law Reform Commission, *ibid* 122.

by the TLRI. The TLRI undertook a project that examined the feasibility of instituting a communication assistant/intermediary scheme in Tasmania, and its principal recommendation was that an expert intermediary/communication 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’.<sup>208</sup> 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 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.<sup>209</sup> 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.<sup>210</sup>

4.4.28 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 and cognitive impairments have been identified as follows:<sup>211</sup>

- the provision of a formal education program;
- court familiarisation processes;
- the modification of court procedures to suit people with intellectual disabilities or cognitive impairments, such as shorter sessions, reduced formalities, allowing the giving of evidence via videolink;
- improved communications methods, such as visual aids, and the use of 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*,<sup>212</sup> and may, according to Gooding and O’Mahoney, ‘circumvent the need for any assessment of fitness for trial in the first place’.<sup>213</sup>

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<sup>208</sup> TLRI, above n 4, vi.

<sup>209</sup> Ibid.

<sup>210</sup> See TLRI, above n 7, Part 7.

<sup>211</sup> See VLRC, above n 24, 87–89, Law Commission of England and Wales, above n 142, 31–32, 37–55. See also Gooding et al, above n 37, 838–840.

<sup>212</sup> Melbourne Social Equity Institute, above n 128, 4–5.

<sup>213</sup> Ibid 5 referring to Gooding and O’Mahoney, above n 124. 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, above n 40.

### Summary

4.4.29 The TLRI seeks feedback from stakeholders and members of the Tasmanian community on the need for reform of the test for fitness to stand trial contained in s 8 of the *Criminal Justice Mental Impairment Act 1999* (Tas).

4.4.30 In the Tasmanian context, there is a need to ensure that the test governing fitness to stand trial and its criteria reflect the principles underpinning the *Criminal Justice Mental Impairment Act 1999* (Tas). These principles are fairness to the accused and the right to a fair trial. In addition, it is important that the criteria reflect the modern trial context and allow for an assessment to be made as to whether the accused is able to participate in his/her trial in a meaningful way and is able to make choices in relation to the crucial decisions that need to be made in the trial. It may be that, in Tasmania, the criteria are under-inclusive and do not appropriately reflect the need to ensure that an individual has the capacity to make the crucial decisions in his or her trial and that reform is necessary. However, any move to expand (or potentially expand) the category of people who are able to rely on unfitness to stand trial may give rise to human rights concerns under the *CRPD*, as noted above. Gooding et al have argued that a ‘proposal to include *more* people among those deemed unfit would diverge from the UNCRPD emphasis on moving away from alternative legal processes for people with disabilities’.<sup>214</sup> On this basis, it may be desirable to specifically incorporate the relevance of supports and accommodations into the statutory test, including the use of an expert intermediary/communication assistant. Further, in assisting judicial officers to make an assessment about fitness taking into account necessary supports and accommodations that would support a finding of fitness to stand trial, it may be necessary to consider the nature of the expert information that may be made available to judicial officers to provide expert guidance in this regard.

### Questions

4. 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?
5. 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?
6. Is the current test under-inclusive and not able to appropriately reflect the issues that arise for individuals with mental illness?
7. 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?
8. 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?

<sup>214</sup> Gooding et al, above n 37, 842.

9. 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 the criteria rationally?
10. 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?
11. 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?
12. 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?

### *Pleas of guilty*

4.4.31 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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup>

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

### *Arguments in favour of a separate test*

4.4.33 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.<sup>218</sup>
- It would enable defendants who are able to enter a plea to participate in the usual criminal process.<sup>219</sup>
- Where an accused is able to make a particular decision, this should be given effect as far as possible.<sup>220</sup> This accords with human rights considerations.<sup>221</sup>

<sup>215</sup> VLRC, above n 24, 80.

<sup>216</sup> Ibid. See [6.2.6].

<sup>217</sup> NSWLRC, above n 55, 36; VLRC, above n 24, 81.

<sup>218</sup> NSWLRC above n 55.

<sup>219</sup> VLRC, above n 24, 80.

<sup>220</sup> Ibid 81.

<sup>221</sup> See [2.4].

- 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.<sup>222</sup>
- If an accused can plead guilty, this is better for victims and witnesses.<sup>223</sup>
- The law requires flexibility to take account of differing levels of capacity.<sup>224</sup>

*Arguments against a separate test*

4.4.34 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.<sup>225</sup>
- A separate test would be an unnecessary complication and would be confusing.<sup>226</sup>
- Expert assessment can already take into account the differing demands depending on the nature of the proceedings.<sup>227</sup>
- 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.<sup>228</sup>
- 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’.<sup>229</sup>

4.4.35 The NSWLRC made no recommendation on this issue in view of the strength of opposition from key stakeholders.<sup>230</sup> The VLRC and the Law Commission of England and Wales supported varying the test for pleas of guilty.<sup>231</sup> 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.<sup>232</sup> 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.

<sup>222</sup> Law Commission of England and Wales, above n 142, 93.

<sup>223</sup> Ibid.

<sup>224</sup> VLRC, above n 24, 81.

<sup>225</sup> NSWLRC, above n 55, 36.

<sup>226</sup> Ibid.

<sup>227</sup> Ibid 36–37.

<sup>228</sup> VLRC, above n 24, 80.

<sup>229</sup> Law Commission of England and Wales, above n 142, 93.

<sup>230</sup> NSWLRC, above n 55, 37.

<sup>231</sup> VLRC, above n 24, 81.

<sup>232</sup> Ibid 81–82.

- Follows the course of the plea and sentencing hearing that will follow a plea of guilty.<sup>233</sup>

It is noted that the test for capacity recommended by the ALRC does not make a distinction between the test to enter a 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.<sup>234</sup>

#### Questions

13. 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?
14. If so, what should be the requirements of the test?

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<sup>233</sup> VLRC, above n 24, 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.

<sup>234</sup> See [4.4.9].

## 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 available to reform the current procedure.

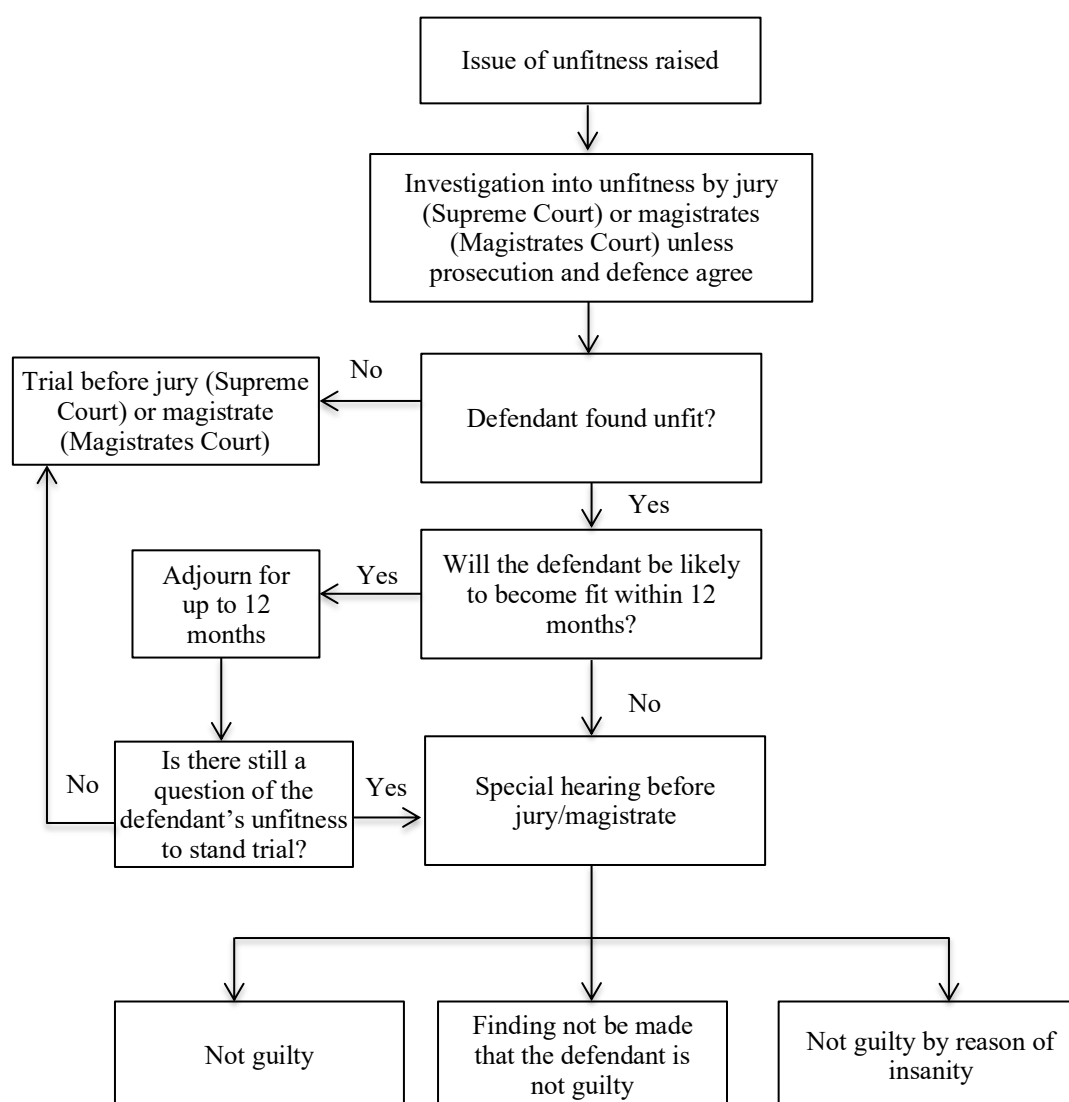
## 5.2 The Tasmanian position

5.2.1 In Tasmania, subject to the potential referral of an accused to the Diversion List,<sup>235</sup> 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.

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).

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<sup>235</sup> See [2.2.2]–[2.2.3].

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

5.2.3 There is a presumption that a person is fit to stand trial unless it is established that the person is unfit to stand trial. This is determined on the balance of probabilities.<sup>236</sup> 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.<sup>237</sup> 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 a person's fitness.<sup>238</sup> 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.<sup>239</sup>

<sup>236</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 9.

<sup>237</sup> *Ibid* s 10.

<sup>238</sup> *Ibid* s 10(5).

<sup>239</sup> *Heapes v The Queen* [2000] TASSC 77, [17] (Evans J) citing *Kesavarajah v R* (1994) 181 CLR 230, 245 and *R v Enright* [19990] 1 Qd R 563.

5.2.4 The question whether a person is unfit to stand trial is a question of fact.<sup>240</sup> It is determined in the Supreme Court by a jury and by a magistrate in the Magistrates Court.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup>

5.2.5 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.<sup>244</sup> 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.<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup> However, if the defendant does not become fit to stand trial within 12 months, then the court must proceed to hold a special hearing.<sup>248</sup>

## 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.<sup>249</sup> In the Northern Territory, and South Australia (as with Tasmania), there is power to dispense with the investigation if the prosecution and defence agree.<sup>250</sup> 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.<sup>251</sup>

<sup>240</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 5.

<sup>241</sup> *Ibid* s 12.

<sup>242</sup> *Ibid* s 19; *Tasmania v Drake* [2006] TASSC 21.

<sup>243</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 11.

<sup>244</sup> *Ibid* s 14.

<sup>245</sup> *Ibid* s 12(4).

<sup>246</sup> *Tasmania v Bosworth* (2005) 13 Tas SR 457, [14] (Crawford J).

<sup>247</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 14(3).

<sup>248</sup> *Ibid* s 15(1). The requirements for a special hearing are discussed in detail in Part 6.

<sup>249</sup> VLRC, above n 24, 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.

<sup>250</sup> VLRC, above n 24, 230 fn 32.

<sup>251</sup> *Criminal Law Consolidation Act 1935* (SA) s 269B.

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.<sup>252</sup> This is also the position in England and Wales.<sup>253</sup>

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.<sup>254</sup>

### ***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.<sup>255</sup> 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 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.<sup>256</sup>

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.<sup>257</sup> If the issue of unfitness is raised in relation to a summary offence, the matter is discontinued.<sup>258</sup>

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.<sup>259</sup> 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 considered that the accused did not pose an

<sup>252</sup> *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).

<sup>253</sup> *Criminal Procedure (Insanity) Act 1964* (UK) s 4(5).

<sup>254</sup> 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.

<sup>255</sup> *Crimes Act 1900* (ACT) s 310; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 11; *Criminal Law Consolidation Act 1935* (SA).

<sup>256</sup> *Crimes Act 1900* (ACT) s 315.

<sup>257</sup> See VLRC, above n 26, 121.

<sup>258</sup> VLRC, above n 24, 128.

<sup>259</sup> *Ibid* Recommendation 27, 136.

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.<sup>260</sup>

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.<sup>261</sup> 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’.<sup>262</sup> Magistrates can also dismiss the charge and refer the defendant to an appropriate body for care and/or treatment if certain conditions are satisfied.<sup>263</sup> 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.<sup>264</sup>

5.3.9 In New South Wales, there are no legislative provisions that apply 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).<sup>265</sup> As set out in Table 5.1, this procedure differs from the ACT, Queensland and 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.<sup>266</sup>

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 lower standard that ‘it appears to the magistrate’ (NSW), to the requirement that ‘there is a real and substantial question’ (ACT) and the higher standard that the magistrate is satisfied on the balance of probabilities (Queensland). The ‘real and substantial question’ test was also recommended in Victoria.

<sup>260</sup> Ibid Recommendation 28.

<sup>261</sup> VLRC, above n 26, 121, 126.

<sup>262</sup> *Mental Health Act 2016* (Qld) s 172.

<sup>263</sup> Ibid s 174.

<sup>264</sup> Magistrates Court (Qld), *Practice Direction 1 of 2017: Mental Health Act 2016 Proceedings in the Magistrates Court* (2017) 1.

<sup>265</sup> VLRC, above n 26, 123.

<sup>266</sup> 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>>.

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

<b>Jurisdiction</b>	<b>Legislation</b>	<b>Statutory criteria for exercise</b>	<b>Order available</b>
New South Wales	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW) s 32	<ul style="list-style-type: none"> <li>• 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).<sup>267</sup></li> <li>• 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.<sup>268</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Adjourn the proceedings</li> <li>• Remand the defendant on bail</li> <li>• Dismiss the charge and discharge the defendant into the care of a responsible person, either unconditionally or subject to conditions</li> <li>• Dismiss the charge and discharge the defendant unconditionally</li> <li>• In relation to defendants who are mentally ill, there is power for the magistrate to grant bail.</li> </ul>
	<i>Mental Health (Forensic Provisions) Act 1990</i> (NSW) s 33	<ul style="list-style-type: none"> <li>• If it appears that a defendant is mentally ill.</li> </ul>	<ul style="list-style-type: none"> <li>• Order that the person be detained in mental health facility for assessment</li> <li>• Discharge the defendant into the care of a responsible person, either unconditionally or subject to conditions</li> <li>• Order a community treatment order.</li> </ul>
Australian Capital Territory	<i>Crimes Act 1900</i> (ACT) s 315	<ul style="list-style-type: none"> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• Dismiss the charge.</li> </ul>
Queensland	<i>Mental Health Act 2016</i> (Qld) ss 172–177	<ul style="list-style-type: none"> <li>• 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.</li> </ul>	<ul style="list-style-type: none"> <li>• Dismiss the complaint</li> <li>• Make an examination order.</li> </ul>

<sup>267</sup> 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.

<sup>268</sup> See NSWLRC, above 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.<sup>269</sup> 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.<sup>270</sup>

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'.<sup>271</sup> 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.<sup>272</sup>

5.4.4 Suggestions set out 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.
- A component of every assessment should be standardised. For example, there should be standard information that should be included as part of every report. ...

<sup>269</sup> VLRC, above n 26, 73.

<sup>270</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 11.

<sup>271</sup> VLRC, above n 26, 73.

<sup>272</sup> VLRC, above n 24, 97.

- Assessments should be conducted using appropriate communication techniques.<sup>273</sup>

5.4.5 The VLRC concluded that it was necessary to make changes to ‘address unnecessary variability and to ensure the fairness and accuracy of expert assessments of unfitness to stand trial’.<sup>274</sup> However, it considered that ‘experts themselves are the best people to determine the changes’ that would be necessary to address these issues.<sup>275</sup>

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, the TLRI seeks further 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 seeks 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.

#### Questions

15. 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?
16. If so, how do you think these problems might be resolved?

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

5.4.7 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.<sup>276</sup>

5.4.8 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.<sup>277</sup> The VLRC observed the narrowing of the role of the jury in relation to pre-trial

<sup>273</sup> VLRC, above n 24, 98.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid.

<sup>276</sup> Law Reform Committee, above n 55, 227.

<sup>277</sup> VLRC, above n 24, 230–231.

matters more generally.<sup>278</sup> It also noted that changing the criteria for a determination of fitness to stand trial meant that a judge (rather than a jury) was more appropriately able to undertake the nuanced nature of the pre-trial decision-making.<sup>279</sup>

5.4.9 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.

#### Question 17

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

#### *Procedure in the Magistrates Court*

5.4.10 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.<sup>280</sup> This reform would mean that the magistrate could make an assessment of whether it appears that an 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 was appropriate.

5.4.11 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 real and substantial question about the defendant's fitness to stand trial (the ACT position and proposed in Victoria) or following a finding that on the balance of probabilities that the accused was 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.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid 231.

<sup>280</sup> This was considered by the VLRC, see above n 24, 140.

**Questions**

18. 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?
19. What (if any) limitations should be set out in relation to the exercise of the power of discharge?

## 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 the procedure following a determination of unfitness to stand trial.

## 6.2 The Tasmanian position

6.2.1 As shown in Figure 5.1, following a finding that a person is unfit to stand trial, the court makes a determination of whether or not the defendant is likely to become fit to stand trial during the next 12 months.<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup> 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’.<sup>284</sup> In the Supreme Court this question is determined by jury,<sup>285</sup> and in the Magistrates Court it is determined by the magistrate.

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 proceeding and in other respects as nearly as possible as if it were a trial of criminal proceedings’.<sup>286</sup> At a special hearing:

- the defendant is taken to have pleaded not guilty to the offence; and

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<sup>281</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 14(1).

<sup>282</sup> *Ibid* s 15(1).

<sup>283</sup> Department of Health and Human Services (DHHS), *Mental Health Act Guide*, 97.

<sup>284</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 15(2).

<sup>285</sup> *Ibid* s 15(3).

<sup>286</sup> *Ibid* s16(1).

- the defendant’s legal representatives may exercise the defendant’s rights to challenge jurors or the jury; and
- the defendant may raise any defence that could be properly raised if the special hearing were an ordinary trial of criminal proceedings; and
- the defendant is entitled to give evidence.<sup>287</sup>

In *Tasmania v Bosworth*,<sup>288</sup> 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.’<sup>289</sup> If the accused is unable to give instruction 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.<sup>290</sup> In addition, the court has a discretion to permit an accused to be absent from a special hearing.<sup>291</sup>

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’,<sup>292</sup> it appears that an accused’s intention is relevant to the jury’s assessment in special hearings. In *Tasmania v W*,<sup>293</sup> 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.<sup>294</sup>

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.<sup>295</sup>

6.2.5 At a special hearing, there are three findings available to the court.<sup>296</sup> The court may:

<sup>287</sup> Ibid s 16(3).

<sup>288</sup> (2005) 13 Tas R 457.

<sup>289</sup> Ibid [15].

<sup>290</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 38.

<sup>291</sup> Ibid s 16(1); *Criminal Code* s 369(2); *Tasmania v Bosworth* (2005) 13 Tas R 457 [33] (Crawford J).

<sup>292</sup> DHHS, above n 283, 98; *Tasmania, Parliamentary Debates*, House of Assembly, 23 March 1999, Part 2 33–114 (Patmore).

<sup>293</sup> 15 June 2015, Wood J (Sentence).

<sup>294</sup> Ibid.

<sup>295</sup> See [7.3] for further discussion of onus and standard of proof for insanity.

<sup>296</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 17.

- (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;<sup>297</sup>
- (b) find the defendant not guilty on the ground of insanity; or
- (c) indicate that a finding cannot be made 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’.<sup>298</sup>

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.<sup>299</sup>

## 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.<sup>300</sup> 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.<sup>301</sup> 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 of the offence (South Australia, ACT, England and Wales, New Zealand).<sup>302</sup> In other jurisdictions, the standard of proof differs from a regular trial (Commonwealth and New Zealand).<sup>303</sup>

## 6.4 Issues for consideration

### *CRPD obligations*

6.4.1 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

<sup>297</sup> Ibid s 18(1).

<sup>298</sup> *Tasmania v Bosworth* (2005) 13 Tas R 457 [16] (Crawford J).

<sup>299</sup> This is discussed at [4.4].

<sup>300</sup> 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, above n 102, Recommendation 9.

<sup>301</sup> Gooding et al, above n 37, 845–846;

<sup>302</sup> See Appendix 5.

<sup>303</sup> See Arstein-Kerslake et al, above n 126, 404.

criminal trial.<sup>304</sup> Gooding et al have suggested that, in order to meet *CRPD* obligations, the minimum requirements that should apply to any alternative procedure are that:

- The same standard of proof and probative value of prosecution evidence as typical trial;
- The same presumption of innocence, with the associated requirement for proof of all elements;
- Availability to the accused of all defences; and
- Proceedings against the accused to be based on his or her ‘rights, wishes and preferences’ (and not his or her ‘best interests’).<sup>305</sup>

6.4.2 The *Criminal Justice Mental Impairment Act 1999* (Tas) does appear to substantially comply 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 ‘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.

6.4.3 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 not guilty of the offence charged or any offence available as an alternative’.<sup>306</sup> 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.

6.4.4 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 that Crown has the burden of proving this.

6.4.5 Further, as the Law Commission of England and Wales have argued, the purpose of the special hearing is to allow an accused a chance of an equal opportunity for an acquittal and not to make a finding of guilt.<sup>307</sup> 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 (as with 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

<sup>304</sup> See McSherry et al, above n 40, 19; Arstein-Kerslake et al, above n 126, 403–404; Gooding et al, above n 37, 845–850.

<sup>305</sup> Gooding et al, above n 37, 862–863.

<sup>306</sup> *Criminal Justice Mental Impairment Act 1999* (Tas) s 17.

<sup>307</sup> See Law Commission of England and Wales, above n 142, 157.

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).

6.4.6 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.<sup>308</sup> 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 order of the court. 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 the person poses to other people, as well as the need to ensure that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.<sup>309</sup> However, a comparison of the potential outcomes arising from the imposition of sentence (taking into account a plea of guilty and the person's mental or cognitive impairment as mitigating factors) and a finding of unfitness and the dispositions that may follow a special hearing may influence an accused's decision to proceed with a plea of guilty.<sup>310</sup>

6.4.7 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.<sup>311</sup>

### Questions

20. 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?
21. Do you consider that the conduct of the special hearing is consistent with the presumption of innocence?
22. 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'?

### Judge only proceedings

6.4.8 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

<sup>308</sup> 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.

<sup>309</sup> See Part 8 for a discussion of disposition.

<sup>310</sup> See Appendix 8.

<sup>311</sup> See ALRC, above n 110, Recommendation 3-1. See also TLRI, above 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.

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 have the investigation conducted by a jury.<sup>312</sup> Recent amendments 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.<sup>313</sup>

6.4.9 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 for a trial conducted in the mainstream trial process.<sup>314</sup> 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.<sup>315</sup> 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).

6.4.10 In submissions received by the VLRC, the following reasons were advanced in support of 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.<sup>316</sup>

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

- [This 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.<sup>317</sup>
- 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.<sup>318</sup>

<sup>312</sup> *Criminal Law Consolidation Act 1935* (SA) s 269B.

<sup>313</sup> *Criminal Code* (NT) s 43XA inserted by *Criminal Code (Amendment (Mental Impairment and Unfitness to be Tried) Act 2017* (NT).

<sup>314</sup> *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, above n 24, 234 Recommendation 52.

<sup>315</sup> *SM v The Queen* VSCA 342. See discussion in VLRC, above n 24, 235.

<sup>316</sup> VLRC, above n 24, 235–236.

<sup>317</sup> Law Commission of England and Wales, above n 142, 181.

<sup>318</sup> *Ibid* 184.

6.4.11 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.<sup>319</sup> This concern was also shared by the VLRC.<sup>320</sup> 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.<sup>321</sup> 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 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 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.<sup>322</sup>

Opposition to a judge-alone process received 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 a special hearing and may undermine the legitimacy of the criminal justice system.<sup>323</sup> 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.<sup>324</sup>

6.4.12 Responses received by the VLRC and the Law Commission of England and Wales showed divided views 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 defendant.<sup>325</sup>

### Questions

23. Should any changes be made to the procedure for a special hearing?
24. 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?

<sup>319</sup> VLRC, above n 24, 236.

<sup>320</sup> Ibid.

<sup>321</sup> Ibid 233, 236.

<sup>322</sup> Ibid 234.

<sup>323</sup> Law Commission of England and Wales, above n 142, 183–184.

<sup>324</sup> See discussion at [6.4].

<sup>325</sup> VLRC, above n 24, 234; Law Commission of England and Wales, above n 142, 186.

## 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:

- the operation of s 16(3) of the *Criminal Code*;
- 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*; and
- 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.'<sup>326</sup> 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.<sup>327</sup>

7.1.2 This Part provides an overview of the law of insanity in Tasmania, identifies concerns in relation to the existing law and considers options for reform.

## 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*.<sup>328</sup> In this case, medical evidence was presented that the accused held a delusional belief that he was being persecuted by the police, on instruction

<sup>326</sup> A Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 2015) [17.1.2].

<sup>327</sup> See A Simester and W Brookbanks, *Principles of Criminal Law* (Thomson Reuters, 4<sup>th</sup> ed, 2012) 322–340, 347; S Bronitt and B McSherry, *Principles of Criminal Law* (Lawbook Co, 3<sup>rd</sup> 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, above n 26, [5.11]–[5.44]; NSWLRC, above n 55, [3.13]–[3.109].

<sup>328</sup> (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.

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.<sup>329</sup> 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’.<sup>330</sup>

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.<sup>331</sup>

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 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’.<sup>332</sup> Individual responsibility is seen to be dependent on ‘the principle of capacity and a fair opportunity to act otherwise’.<sup>333</sup> It is for this reason that the criminal law has long recognised ‘the notion that ... the insane lack the ability to reason’ and

<sup>329</sup> See summary in A Norrie, *Crime, Reason and History: A Critical Introduction to the Criminal Law* (LexisNexis, 2001) 179–180.

<sup>330</sup> (1843) 10 Cl and Finn 200, 210; 8 ER 718, 722.

<sup>331</sup> *Ibid.*

<sup>332</sup> N Lacey, C Wells and O Quick, *Reconstructing Criminal Law* (Cambridge University Press, 4<sup>th</sup> ed, 2010) 95.

<sup>333</sup> 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, above n 327, 201, [4.05]. See also P Fairall and S Yeo, *Criminal Defences* (Lexis Nexis, 4<sup>th</sup> ed, 2005) [13.1]; S Yannoulidis, *Mental State Defences in Criminal Law* (Ashgate, 2012) 51–52.

this is reflected in ‘laws excusing them from responsibility for criminal acts’.<sup>334</sup> 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.<sup>335</sup>

Fairall and Yeo recognise that ‘the law would be unduly harsh to punish people who are unable to choose or control their conduct’.<sup>336</sup> 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’.<sup>337</sup> Accordingly, the function of the law of insanity has been said to ‘define the point at which mental disorder dissolves [criminal] responsibility’.<sup>338</sup>

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

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 ...<sup>339</sup>

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?’<sup>340</sup> 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’.<sup>341</sup>

7.2.1 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’.<sup>342</sup> 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)*

<sup>334</sup> Bronitt and McSherry, above n 327, [4.10].

<sup>335</sup> Lacey, Wells and Quick, above n 332, 120.

<sup>336</sup> Fairall and Yeo, above n 333, [13.1]. This is an argument from the perspective of retributive theory.

<sup>337</sup> 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’.

<sup>338</sup> R Heaton and C De Than, *Criminal Law* (Oxford University Press, 2011) 229.

<sup>339</sup> Law Commission of England and Wales, *Criminal Liability: Insanity and Automatism A Discussion Paper* (2013) 197.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup> *Sullivan* [1983] 2 All ER 673 (Lord Diplock) quoted in Heaton and De Than, above n 338, 229.

*Act 1999* (Tas).<sup>343</sup> 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’.<sup>344</sup>

## 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.<sup>345</sup>

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.

<sup>343</sup> J Child and G Sullivan, ‘When Does the Insanity Defence Apply? Some Recent Cases’ (2014) *Criminal Law Review* 787, 789.

<sup>344</sup> 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, above n 327, 82.

<sup>345</sup> *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.<sup>346</sup> 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’.<sup>347</sup> 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,<sup>348</sup> and so its meaning is found in the common law term ‘disease of the mind’.<sup>349</sup> A ‘disease of the mind’ is ‘a state of disease or disorder or mental disturbance arising from infirmity, temporary or longstanding’<sup>350</sup> but does not include transient conditions caused by external factors unconnected with disease.<sup>351</sup> 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.<sup>352</sup>

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’.<sup>353</sup>

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’

<sup>346</sup> Bronitt and McSherry, above n 327, [4.30].

<sup>347</sup> D Howard and B Westmore, *Crime and Mental Health Law in New South Wales* (LexisNexis Butterworths, 2<sup>nd</sup> 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.

<sup>348</sup> This has been interpreted to mean intellectual disability.

<sup>349</sup> See McSherry, above n 327, 78.

<sup>350</sup> *R v Porter* (133) 55 CLR 182, 188 (Dixon J).

<sup>351</sup> *Falconer* (1990) 171 CLR 30.

<sup>352</sup> (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).

<sup>353</sup> A Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 2013) 719.

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.<sup>354</sup> 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 attributed 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.<sup>355</sup>

7.3.7 At common law, conditions that have been accepted within the definition of mental disease include: schizophrenia,<sup>356</sup> reactive depression,<sup>357</sup> psychomotor epilepsy,<sup>358</sup> hyperglycaemia,<sup>359</sup> cerebral arteriosclerosis<sup>360</sup> and post-traumatic stress disorder.<sup>361</sup> 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.<sup>362</sup> 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,<sup>363</sup> cerebral arteriosclerosis (hardening of arteries causing reduced flow of blood to the brain),<sup>364</sup> and epilepsy.<sup>365</sup> There are differing views about whether somnambulism (sleepwalking) is a ‘disease of the mind’ depending on the evidence, with a Canadian court in *Parks* finding that sleepwalking was not a mental disease<sup>366</sup>

<sup>354</sup> See further Blackwood and Warner, above n 347, Chapter 5.

<sup>355</sup> *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, above n 347, 330.

<sup>356</sup> *Bratty v A-G (Northern Ireland)* [1963] AC 386.

<sup>357</sup> *Milloy* [1993] 1 Qd R 298.

<sup>358</sup> *Bratty v A-G (Northern Ireland)* [1963] AC 386.

<sup>359</sup> *Hennessy* [1989] 2 All ER 9, 14.

<sup>360</sup> *Kemp* [1957] 1 QB 399.

<sup>361</sup> *Walsh* [1993] TASSC 91.

<sup>362</sup> Schloenhardt, above n 326, 560.

<sup>363</sup> *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).

<sup>364</sup> *Kemp* [1957] 1 QB 399.

<sup>365</sup> *Sullivan* [1983] 2 All ER 673.

<sup>366</sup> (1992) 75 CCC (3d) 287.

and the English Court of Appeal finding that it is a disease of the mind.<sup>367</sup> In Australia, it appears that sleepwalking has generally been regarded as involving non-insane automatism.<sup>368</sup>

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.<sup>369</sup> In some cases, the trial judge has refused to leave insanity on the basis of a personality disorder,<sup>370</sup> while in other cases, insanity (although not successful) has been left for the jury on this basis.<sup>371</sup>

#### *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.<sup>372</sup>

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.<sup>373</sup>

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.<sup>374</sup> It has been pointed out in academic critique

<sup>367</sup> *Burgess* [1991] 2 QB 92. See further discussion in Blackwood and Warner, above n 347, 232–234.

<sup>368</sup> See *Lusted v Kingston* [2016] TASM 1 referring to *Coulson v The Queen* [2010] VSCA 146.

<sup>369</sup> *Jeffrey* [1982] TAS SR 35

<sup>370</sup> *Hodges* (1985) 19 A Crim R 129.

<sup>371</sup> *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; New South Wales Law Reform Commission, above n 55, 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, above n 327, [4.45].

<sup>372</sup> (1933) 55 CLR 182, 188.

<sup>373</sup> E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2011) 464.

<sup>374</sup> See discussion in Blackwood and Warner, above n 347, 248–251.

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 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.<sup>375</sup> 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.<sup>376</sup>

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*,<sup>377</sup> 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’.<sup>378</sup> 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*:<sup>379</sup>

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.<sup>380</sup>

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’.<sup>381</sup> 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)*,<sup>382</sup> 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*<sup>383</sup> and *R v Porter*.<sup>384</sup> This interpretation encompassed the act and its consequences: ‘whether the accused “was in such a condition that 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”’.<sup>385</sup>

<sup>375</sup> This illustration is provided by D Caruso in D Caruso et al, *South Australian Criminal Law: Review and Critique* (LexisNexis Butterworths, 2014) 396.

<sup>376</sup> Schloenhardt, above n 326, 563.

<sup>377</sup> [1978] Tas SR 98.

<sup>378</sup> Ibid 102 (Neasey J).

<sup>379</sup> (1958) NZLR 999.

<sup>380</sup> Ibid 109 (Neasey J) citing *R v Cottle* (1958) NZLR 999, 1009 (Gresson P).

<sup>381</sup> Ibid 109.

<sup>382</sup> (1993) 68 A Crim R 1.

<sup>383</sup> (1960) 105 CLR 295, 300.

<sup>384</sup> (1933) 55 CLR 182, 188–889.

<sup>385</sup> (1993) 68 A Crim R 1, 28.

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.<sup>386</sup> 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.<sup>387</sup>

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.<sup>388</sup> 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. 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*,<sup>389</sup> 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 he heard and a belief that his family would be at risk if he did not commit the crimes.<sup>390</sup> In *R*, the defendant’s condition caused him to experience ‘acute psychotic symptoms including auditory and visual hallucinations and persecutory and referential delusions’.<sup>391</sup>

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)*.<sup>392</sup> In this case,

<sup>386</sup> Blackwood and Warner, above n 347, 250.

<sup>387</sup> (1933) 55 CLR 182, 189–190 cited by Gibson J in *Hitchens* [1959] Tas SR 209, 221.

<sup>388</sup> 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.

<sup>389</sup> 18 July 2014 (Sentence).

<sup>390</sup> *Tasmania v P*, Blow CJ, 13 November 2013 (Sentence).

<sup>391</sup> *Tasmania v R*, Pearce J, 14 March 2017 (Sentence).

<sup>392</sup> [2010] WASCA 71.

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 *McNaghten’s* rules (and so does not exist at common law).<sup>393</sup> 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.<sup>394</sup>

The degree of impairment of volition 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 ‘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’.<sup>395</sup>

7.3.20 As with the first limb of the insanity defence (the physical character of the act), this provision appears to be rarely used in practice.<sup>396</sup> 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.<sup>397</sup> 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

<sup>393</sup> See Blackwood and Warner, above n 347, 256–261.

<sup>394</sup> *Hitchens* [1962] Tas SR 35, 55 (Burbury CJ, Crisp and Cox JJ).

<sup>395</sup> (1977) 51 ALJR 499, 501 (Barwick CJ and Mason J).

<sup>396</sup> Bronitt and McSherry, above n 327, 248–249.

<sup>397</sup> *Hitchens* [1962] Tas SR 35; *O’Neill* [2015] VSCA 325; and *Jeffrey* [1982] Tas SR 199.

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.<sup>398</sup>

7.3.21 Delusions. Section 16(3) of the *Criminal Code* (Tas) substantially reproduces the statement in *McNaghten’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.<sup>399</sup> 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*,<sup>400</sup> 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’.<sup>401</sup> 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.’<sup>402</sup> 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.<sup>403</sup>

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 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

<sup>398</sup> *Tasmania v G*, Estcourt J, 4 September 2013 (Sentence).

<sup>399</sup> Blackwood and Warner, above n 347, 261.

<sup>400</sup> [1993] TASSC 91.

<sup>401</sup> (1991) 60 A Crim R 419, 421 (Slicer J).

<sup>402</sup> *Ibid* 422.

<sup>403</sup> *Ibid*.

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)).<sup>404</sup>

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.<sup>405</sup> Section 16(3) cannot be applied to extend the relevance of an insane delusion to the defence of self-defence. However, as discussed at [7.5.48]–[7.5.65], 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 that have relied on s 16(3) of the *Criminal Code* (Tas).

### ***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'.

7.3.27 The language used in ss 381(3), 399 and 401 of the *Criminal Code* (Tas) assume that insanity can be raised by someone other than the defence.<sup>406</sup> 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.<sup>407</sup> However, the prosecution cannot introduce evidence probative of insanity until the matter is put in issue by the defence.<sup>408</sup>

<sup>404</sup> [1993] TASSC 91 [22] (Crawford J).

<sup>405</sup> Ibid [24].

<sup>406</sup> Blackwood and Warner, above n 347, 275.

<sup>407</sup> Ibid 276.

<sup>408</sup> Ibid citing *Jeffrey*, unreported 7/1991.

### *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*,<sup>409</sup> 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.<sup>410</sup>

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 *McNaghten* 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.

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<sup>409</sup> [1982] Tas R 199.

<sup>410</sup> Ibid 209.

**Table 7.1 Elements of the defence of mental impairment in Australian jurisdictions**

<b>Jurisdiction and relevant law</b>	<b>Name of defence</b>	<b>Components of mental state</b>	<b>Nature and quality of conduct</b>	<b>Knowledge that conduct is wrong</b>	<b>Inability to control conduct</b>	<b>Delusions</b>
<b>Cth</b> <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)
<b>ACT</b> <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 Mental Health (Forensic Provisions) Act 1990</i> <sup>411</sup>	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.’ <sup>412</sup> Any mental disorder which ‘manifests itself in violence and is prone to recur’ may be a <i>M’Naghten</i> disease of the mind. <sup>413</sup> Mental malfunctioning of a transitory nature caused by some external factor such as violence, drugs, alcohol has been held not be due to disease. <sup>414</sup> 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. <sup>415</sup> Irresistible impulse does not by itself raise a defence of mental illness. <sup>416</sup>	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’. <sup>417</sup>	-	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					

<sup>411</sup> 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>>.

<sup>412</sup> *R v Porter* (1933) 55 CLR 182, 188.

<sup>413</sup> *Bratty v AG (Northern Ireland)* [1963] AC 386, 412.

<sup>414</sup> *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’.

<sup>415</sup> *Willgoss v The Queen* (1960) 105 CLR 295.

<sup>416</sup> *Sodeman v The King* (1936) CLR 192; *R v Hodges* (1985) 19 A Crim R 129.

<sup>417</sup> *Stapleton v The Queen* (1952) 86 CLR 358, 375.

<b>Jurisdiction and relevant law</b>	<b>Name of defence</b>	<b>Components of mental state</b>	<b>Nature and quality of conduct</b>	<b>Knowledge that conduct is wrong</b>	<b>Inability to control conduct</b>	<b>Delusions</b>
<b>NT</b> <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)	
<b>QLD</b> <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 of 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)
<b>SA</b> <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. <sup>418</sup>		
	s 269C	s 269A [intoxication provision]	s 269C(1)(a)	s 269C(1)(b)	s 269C(1)(c)	
<b>TAS</b> <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)
<b>VIC</b> <i>Crimes (Mental Impairment and Fitness to be Tried) Act 1997</i>	Mental impairment	No definition <sup>419</sup>	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	-	-

<sup>418</sup> 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.

<sup>419</sup> 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
				conduct, as perceived by reasonable people, was wrong).		
	s 20		s 20(1)(a)	s 20(1)(b)		
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 of 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.<sup>420</sup> 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.<sup>421</sup> 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 view of the difficulties identified in relation to the insanity defence, several other jurisdictions have reviewed the defence and have questioned whether insanity should be retained at all. The following sections consider whether an insanity defence is required, and if so, whether the current defence should be amended to ensure 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’.<sup>422</sup>

### *Is it necessary to have an insanity defence?*

7.5.3 In some states in the United States, the insanity defence has been abolished.<sup>423</sup> The Law Reform Commissioner of Tasmania has previously 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.<sup>424</sup> The abolition of the insanity defence has also been advocated by some legal academics<sup>425</sup> and disability rights academics.<sup>426</sup> 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.<sup>427</sup> The Law Commission of England and Wales was the only review to propose a provisional abolition of the insanity defence. However, the Commission still considered that there was 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 [7.5.7]–[7.5.14].

7.5.4 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

<sup>420</sup> Blackwood and Warner, above n 347, 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).

<sup>421</sup> Simester et al, above n 353, 724. See Appendix 7 for a summary of recent law reform considerations.

<sup>422</sup> Law Commission of England and Wales, above n 339, 4.

<sup>423</sup> 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.

<sup>424</sup> Law Reform Commissioner of Tasmania, *Insanity, Intoxication and Automatism*, Report No 61 (1989) Recommendations 1 and 2.

<sup>425</sup> See Morris, above n 420; N Morris, ‘Psychiatry and the Dangerous Criminal’ (1968) 41 *Southern California Law Review* 514.

<sup>426</sup> See Minkowitz, above n 124; 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.

<sup>427</sup> See Law Reform Commission of Victoria, *Mental Malfunction and Criminal Responsibility*, Report 34 (1990).

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).<sup>428</sup> According to this approach, concerns in relation to the protection of the public following an acquittal could be resolved through civil rather than criminal procedures.<sup>429</sup>

*Reasons advanced for the abolition of the defence*

7.5.5 The following reasons have been advanced in support of the abolition of the defence:

- 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.<sup>430</sup>

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'.<sup>431</sup>

- 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).<sup>432</sup> The argument is that there is no reason for distinguishing between different causes of non-responsibility.<sup>433</sup>
- 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'.<sup>434</sup>
- 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

<sup>428</sup> 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 [7.5.50].

<sup>429</sup> *Simester et al*, above n 353, 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*, above n 124, 455 referring to *Beaupert and Steele* (2014).

<sup>430</sup> 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*, above n 124; *Slobogin*, above n 426.

<sup>431</sup> *Slobogin*, above n 426, 39.

<sup>432</sup> Law Commission of England and Wales, above n 339, 33 summarising *Morris*' argument.

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid* 32.

total incapacity to understand the physical nature of the act’.<sup>435</sup> This represents a shifting of the burden of proof to the accused and also the imposition of a more onerous burden.<sup>436</sup> 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’.<sup>437</sup>

7.5.6 The following reasons have been advanced to support the retention of the defence:

- The insanity verdict reflects the true ground for the verdict.<sup>438</sup> Insanity reflects the foundations of the defence as a ‘denial of criminal responsibility due to a person’s lack of capacity’.<sup>439</sup> The New Zealand Law Commission (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.<sup>440</sup>

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’.<sup>441</sup> 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.

- The requirement for legal capacity under the CRPD (which refers to one’s power to act within the legal system’)<sup>442</sup> 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.<sup>443</sup>

<sup>435</sup> Law Reform Commissioner of Tasmania, above n 424, 8.

<sup>436</sup> Ibid.

<sup>437</sup> Law Commission of England and Wales, above n 339, 30.

<sup>438</sup> Ibid 34.

<sup>439</sup> Ibid.

<sup>440</sup> NZLC, *Mental Impairment Decision-making and the Insanity Defence*, Report 120 (2010) 32.

<sup>441</sup> Law Commission of England and Wales, above n 339, 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.

<sup>442</sup> 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.

<sup>443</sup> Wondemaghen, above n 442, (online) 10.

This can be contrasted with the position of children where lack of criminal responsibility is a permanent state for children under the age of 10 and a rebuttable presumption for children aged between 10 and 14 years.<sup>444</sup> 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 lack of legal capacity based on disability. Indeed, a person may be found 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.<sup>445</sup>

- The underlying rationale for the insanity defence is still valid. This was the view expressed by the NSWLRC, which stated:

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?<sup>446</sup>

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'.<sup>447</sup>

- Public protection requires the courts to have special powers beyond civil powers of detention.<sup>448</sup> 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).<sup>449</sup>

### Questions

25. Should the defence of insanity in s 16 of the *Criminal Code* (Tas) be abolished?
26. 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?
27. 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?

<sup>444</sup> *Criminal Code* (Tas) s 18.

<sup>445</sup> See *P*, 13 November 2013 (Blow J).

<sup>446</sup> NSWLRC, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Consultation Paper 6 (2010) 50.

<sup>447</sup> *Ibid.*

<sup>448</sup> Law Commission of England and Wales, above n 339, 35.

<sup>449</sup> *Ibid* 33.

### *A new defence (a ‘radical’ change)*

7.5.7 An alternative to the complete abolition of insanity would be to replace the insanity defence in s 16 of the *Criminal Code* (Tas) with an alternative means of deciding the circumstances in which individuals ought not be criminally responsible for their conduct.

7.5.8 In England and Wales, the Law Commission provisionally proposed a ‘radical’ change to the insanity defence.<sup>450</sup> Instead of the traditional insanity defence (and the distinction between sane and insane automatism reflecting the internal/external divide), its view was that the insanity 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.<sup>451</sup> It proposed a new defence of ‘not criminally responsible by reason of recognised medical condition’. This defence applies where the defendant, as a result of a qualifying ‘recognised medical condition’, wholly lacked the capacity to:

- Rationally form a judgment about the relevant conduct or circumstances;
- Understand the wrongfulness of what he or she is charged with; or
- Control his or her physical acts in relation to the relevant conduct.<sup>452</sup>

7.5.9 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:

- This removes the artificial division between physical and mental disorders and focuses on the essential point, which is ‘to focus on whether the accused had the relevant criminal capacity’.<sup>453</sup> There is no principled reason to treat mental disorders differently from physical disorders when they gave rise to a loss of capacity.<sup>454</sup>
- 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’.<sup>455</sup> This is ‘crafted in modern terms with flexibility to accommodate developing medical knowledge’.<sup>456</sup>
- It would result in more appropriate labelling.<sup>457</sup> The Law Commission provides the example of a person who is charged with causing death by dangerous driving in circumstances where the person fell into a hypoglycaemic coma. Such a person would be acquitted outright but the Law Commission argued that this ‘situation more appropriately fits within a defence of not criminally responsible by reason of a

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<sup>450</sup> Ibid 19.

<sup>451</sup> Ibid 29. This is set out in Appendix 7.

<sup>452</sup> Ibid 20.

<sup>453</sup> Ibid 26.

<sup>454</sup> Ibid 43.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid 26.

<sup>457</sup> Ibid 43–44.

medical condition’.<sup>458</sup> It would also be more appropriate than labelling as ‘insane’ people with diabetes (hyperglycaemia) and epilepsy.

- 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).<sup>459</sup> The Law Commission provided the example of a person who 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’.<sup>460</sup>

7.5.10 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 a mental health or cognitive impairments.

7.5.11 The Law Commission’s provisional proposals were that there be two non-qualifying conditions — acute intoxication and anti-social personality disorders.<sup>461</sup> These were both excluded on policy grounds. 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.<sup>462</sup> However, this did not exclude the possibility that an accused suffering from a recognised mental condition, such as alcohol dependency syndrome (as distinct from drunkenness) may be a qualifying medical condition.<sup>463</sup> In addition, the Commission proposed, on policy grounds, that antisocial personality disorder should not be a condition that qualified as a ‘recognised medical condition’.<sup>464</sup>

7.5.12 The Law Commission’s proposed reform to the insanity defence has been well received in the academic literature.<sup>465</sup> For example, Rumbold and Wasik write that ‘[t]he changes proposed in the discussion document provide a logical and consistent framework for mental condition defences that will reflect modern medical science’.<sup>466</sup>

7.5.13 However, it has not been implemented by the government. Accordingly, in a practical sense it is not possible to determine whether the new defence would be a more attractive option than the current insanity defence given that if successful it ‘may lead to a medical disposal’.<sup>467</sup> Ashworth has observed that greater use is not guaranteed because ‘[a]s now, some defendants

<sup>458</sup> Ibid 43.

<sup>459</sup> Ibid 44.

<sup>460</sup> Ibid 27.

<sup>461</sup> Ibid 48–49.

<sup>462</sup> Ibid 75.

<sup>463</sup> Ibid 74.

<sup>464</sup> Ibid 76.

<sup>465</sup> 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 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.

<sup>466</sup> Rumbold and Wasik, above n 465, 148.

<sup>467</sup> A Ashworth, ‘Insanity and Automatism: A Discussion Paper’ [2013] *Criminal Law Review* 787, 788.

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.<sup>468</sup>

7.5.14 Other disadvantages arising from adopting a new approach to insanity and automatism would be that the long-settled law in this area would be lost.<sup>469</sup> As the NSWLRC has observed, despite concerns in relation to the operation of the *M’Naghten* rules, there are advantages in their retention:

- 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’.<sup>470</sup>

### Questions

28. 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)?
29. If so, should there be any non-qualifying conditions?

### *Retain and amend the insanity defence in s 16 of the Criminal Code*

7.5.15 Extensive academic literature has outlined deficiencies with the law of insanity. An overview of these concerns is set out below and feedback is sought as to whether these problems create difficulties in practice and if (and how) the defence of insanity should be amended.

#### *Inadequacy of the current insanity defence*

7.5.16 Inappropriate and outdated terminology. Problems with the current defence are said to be created by the mismatch between the ‘outmoded *M’Naghten* Rules’<sup>471</sup> (legal insanity) and contemporary psychiatric knowledge about mental illness (medical insanity).<sup>472</sup> 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’.<sup>473</sup>

7.5.17 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 inappropriately stigmatising, and, as recognised by the Law Commission, not medical terms but rather outdated legal terms.<sup>474</sup>

<sup>468</sup> Ibid 788.

<sup>469</sup> NSWLRC, above n 55, 50.

<sup>470</sup> Ibid.

<sup>471</sup> Fairall and Yeo, above n 333, [13.65].

<sup>472</sup> See the VLRC, *Defences to Homicide*, Final Report (2004) [5.11]–[5.44]; NSWLRC, above n 55, Chapter Three; Bronitt and McSherry, above n 327, [4.30]; Schloenhardt, above n 326, [17.1.2].

<sup>473</sup> D Ormerod, *Smith and Hogan’s Criminal Law* (Oxford University Press, 13<sup>th</sup> ed, 2011) 294.

<sup>474</sup> Law Commission of England and Wales, above n 339.

7.5.18 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’.<sup>475</sup> 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’.<sup>476</sup> 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 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’.<sup>477</sup> In contrast, the NZLC, despite acknowledging that the terminology was outdated, considered that the terminology not be changed for semantic reasons: ‘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’.<sup>478</sup>

### Question

30. 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?

7.5.19 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’.<sup>479</sup> To address to this concern, other jurisdictions have defined the required mental state with contemporary medical terminology.<sup>480</sup> However, there are different formulations used in the legislation. 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’.<sup>481</sup> 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’.<sup>482</sup> There are also differences between the ACT and the Commonwealth legislation (which include ‘severe personality disorder’ in the definition of mental impairment). The Northern Territory includes involuntary intoxication in the definition of mental impairment.

7.5.20 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,

<sup>475</sup> See Table 7.2.

<sup>476</sup> See Table 7.2.

<sup>477</sup> See NSW Government (Justice), above n 411.

<sup>478</sup> NZLC, above n 440, 41.

<sup>479</sup> NSWLRC, above n 55, 51.

<sup>480</sup> See Tables 7.1 and 7.2.

<sup>481</sup> Section 269A *Criminal Law Consolidation Act 1935* (SA).

<sup>482</sup> See Table 7.2.

‘mental illness, intellectual disability and cognitive impairment’.<sup>483</sup> 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.<sup>484</sup> 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).<sup>485</sup> It also recommends that personality disorders be excluded. The Scottish Law Commission has recommended that a brief definition should be introduced to define mental disorder to mean: (a) mental illness, (b) personality disorder or (c) learning disability. However, it should exclude psychopathic personality disorders.<sup>486</sup> In contrast, the NZLC’s view is that there is no need to change the terminology used.<sup>487</sup>

7.5.21 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**

Test	Jurisdictions
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.	Cth ACT <sup>488</sup> NT
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).	South 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.	Western Australia
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. Mental health impairment may arise from mental illness such as psychoses.	Proposed in NSW <sup>489</sup>

<sup>483</sup> 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.

<sup>484</sup> See Appendix 7.

<sup>485</sup> Reforms proposed in NSW define cognitive impairment and mental health impairment: see NSW Government (Justice), above n 411.

<sup>486</sup> See Appendix 7.

<sup>487</sup> See Appendix 7.

<sup>488</sup> 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.

<sup>489</sup> See NSW Government (Justice), above n 411.

7.5.22 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’.<sup>490</sup> 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’.<sup>491</sup> This has focused on internal factors that are prone to recur as providing the basis for the classification 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’.<sup>492</sup> 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.<sup>493</sup>

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).

7.5.23 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).<sup>494</sup> Applying this approach would mean that issues of automatism arising from any medical condition (concussion, sleep apnoea, diabetes, mental illness, epilepsy) would all fall within the scope of the special defence.

7.5.24 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. This would mean that cases of involuntariness

<sup>490</sup> Fairall and Yeo, above n 333, [13.66]; See also VLRC, *Defences to Homicide*, Options Paper (2003) [5.15]–[5.19]; VLRC, above n 472; VLRC, above n 26; NSWLRC, above n 472; NZLC, above n 440; Law Commission of England and Wales, above n 339.

<sup>491</sup> NZLC, above n 440, 5.

<sup>492</sup> Child and Sullivan, above n 343, 787.

<sup>493</sup> A Ashworth and J Horder, *Principles of Criminal Law* (Oxford University Press, 7<sup>th</sup> ed, 2013) 94.

<sup>494</sup> This is discussed at [7.5.8]–[7.5.9].

arising from hyperglycaemia, epilepsy and arteriosclerosis would be considered as automatism rather than giving rise to a mental illness for the purposes of the insanity defence.<sup>495</sup>

7.5.25 Another approach is found in the review of the law conducted by the NSWLRC, which 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.

7.5.26 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:
  - (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 were 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.<sup>496</sup> The NSWLRC considered that the fit between

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<sup>495</sup> LRCWA, above n 371, 143, 228–229.

<sup>496</sup> NSWLRC, above n 55, 53.

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.<sup>497</sup>

7.5.27 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’.<sup>498</sup>

7.5.28 Personality disorders. As set out at [7.5.20], 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.<sup>499</sup> The Law Commission of England and Wales also expressed the view that an antisocial personality disorder should not be a condition which qualifies for a special verdict.<sup>500</sup> 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.<sup>501</sup> 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.<sup>502</sup>

7.5.29 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 was 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.’<sup>503</sup>
- It is against the weight of community opinion, the approach in the majority of Australian jurisdictions and academic expert opinion.<sup>504</sup>
- 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 this present time’.<sup>505</sup>

<sup>497</sup> 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), above n 411.

<sup>498</sup> NSWLRC, above n 55, 53.

<sup>499</sup> Scottish Law Commission, above n 163, 27.

<sup>500</sup> Law Commission of England and Wales, above n 339, 76.

<sup>501</sup> See Table 7.2. There is no express inclusion or exclusion of personality disorders in the reforms proposed in NSW: see NSW Government (Justice), above n 411.

<sup>502</sup> See NSWLRC, above n 446, 58.

<sup>503</sup> NSWLRC, above n 55, 59.

<sup>504</sup> Ibid.

<sup>505</sup> Ibid.

7.5.30 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’.<sup>506</sup>
- There is no evidence of over-reliance on the defence in jurisdictions that allow personality disorders to be included.<sup>507</sup>

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.<sup>508</sup> The Law Commission of England and Wales also noted that it can be difficult to distinguish personality disorders from other mental illnesses.<sup>509</sup>

7.5.31 Instead of expressly including or excluding personality disorder, as indicated at [7.5.28], another approach which has been adopted is to neither expressly exclude or include personality disorders for the purposes of the insanity defence. This is also the approach in New Zealand, where the NZLC recommended no change be made to this position.<sup>510</sup> Similarly in South Australia, Victoria and the Western Australia, reviews of the relevant legislation recommended no change to the approach in those jurisdictions to personality disorders.<sup>511</sup>

7.5.32 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.<sup>512</sup>

7.5.33 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;

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<sup>506</sup> Ibid 57.

<sup>507</sup> Ibid 58.

<sup>508</sup> LRCWA, above n 371, 230.

<sup>509</sup> Law Commission of England and Wales, above n 339, 79.

<sup>510</sup> NZLC, above n 440, 37.

<sup>511</sup> 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 been passed by the Victorian Parliament.

<sup>512</sup> See TLRI, *Review of the Law Relating to Self-Defence*, Final Report No 20 (2015) 48–49.

- (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.<sup>513</sup>

As noted previously by the TLRI, 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.<sup>514</sup> 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'.<sup>515</sup>

7.5.34 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).<sup>516</sup> 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 indicated that this approach would include within the definition of mental health impairment ongoing mental health impairments such as a long-term drug induced psychiatric disorders like Korsakoff's Syndrome and drug induced psychosis.<sup>517</sup> It stated that this was 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'.<sup>518</sup> 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.

7.5.35 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.<sup>519</sup> 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

<sup>513</sup> A Carroll et al, 'Drug-induced Psychoses and Criminal Responsibility' (2008) 26 *Behavioral Sciences and the Law* 633, 633–634.

<sup>514</sup> TLRI, above n 512, 48.

<sup>515</sup> Ibid 49.

<sup>516</sup> See ibid 44–49.

<sup>517</sup> NSWLRC, above n 55, 60.

<sup>518</sup> Ibid.

<sup>519</sup> See VLRC, above n 24, 114, Recommendation 24.

use or a permanent condition.<sup>520</sup> 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.’<sup>521</sup> Nevertheless, her view was that the distinction is supported on sound public policy grounds.<sup>522</sup>

7.5.36 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 will pass on metabolism or elimination of intoxicants from the body’.<sup>523</sup> This approach is similar to the approach recommended in New South Wales and Victoria.<sup>524</sup> 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.<sup>525</sup>

### Questions

31. Does the definition of ‘mental disease’ cause problems in practice?
32. 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?
33. Should there be a statutory definition of the terms used?
34. 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?
35. 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?
36. 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?
37. Should mental illness be defined, and if so, how?

<sup>520</sup> Ibid 114–115.

<sup>521</sup> D Bourget, ‘Forensic Considerations of Substance-Induced Psychosis’ (2013) 41 *Journal of American Academy of Psychiatry and the Law* 168, 168.

<sup>522</sup> VLRC, above n 24, 114.

<sup>523</sup> Section 269A(1) *Criminal Law Consolidation Act 1935* (SA).

<sup>524</sup> 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.

<sup>525</sup> SASAC, above n 388, 97 Recommendation 11.

38. Should cognitive impairment be defined, and if so, how?
39. 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)?

7.5.37 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’.<sup>526</sup> This is because of the very narrow interpretation of the relevant incapacities set out in the insanity defence. As noted at [7.3.11], the first limb of the insanity defence (that the person does not understand the physical character of their act) is very 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’.<sup>527</sup> The limited utility of this limb of the insanity defence has also been noted by other legal commentators.<sup>528</sup>

7.5.38 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.<sup>529</sup> 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’.<sup>530</sup> 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.<sup>531</sup> 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.<sup>532</sup>

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.

<sup>526</sup> Simester et al, above n 353, 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, above n 339, 10–11.

<sup>527</sup> Law Commission of England and Wales, above n 339, 10.

<sup>528</sup> See Yeo, above n 420, 12; Bronitt and McSherry, above n 327, 246.

<sup>529</sup> See Table 7.1.

<sup>530</sup> NSWLRC, above n 55, 64.

<sup>531</sup> See Table 7.1.

<sup>532</sup> Yeo, above n 420, 10.

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’.<sup>533</sup>

7.5.39 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 capacity to know and understand the significance of the act’ or the ‘consequences of the act’.<sup>534</sup> 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’.<sup>535</sup>

7.5.40 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.<sup>536</sup> This interpretation has been widely accepted and adopted in legislation in other jurisdictions.<sup>537</sup> As indicated, this is the limb of the insanity defence most commonly relied upon in Tasmania (and other jurisdictions). However, the TLRI seeks feedback in relation to whether this requirement causes any difficulties in practice.

#### Questions

40. 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?
41. 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?
42. 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)?

7.5.41 Irresistible impulse. Concerns have also been raised in relation to the ‘irresistible impulse’ limb of the insanity defence, as contained in the *Criminal Code* (Tas) s 16(1)(b). 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.<sup>538</sup>

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

<sup>533</sup> VLRC, above n 26, 100.

<sup>534</sup> S Allnutt, A Samuels and C O’Driscoll, ‘The Insanity Defence: from Wild Beasts to M’Naghten’ (2007) 15(4) *Australasian Psychiatry* 292, 296.

<sup>535</sup> *Ibid.*

<sup>536</sup> See [7.3.15].

<sup>537</sup> See Table 7.1.

<sup>538</sup> Allnutt, Samuels and O’Driscoll, above n 534, 296–297.

person can know what he or she is doing is wrong, yet be unable to control his or her actions'.<sup>539</sup> This is more forcefully stated by Kenny, who asserts that 'the notion of irresistible impulse is an incoherent piece of nonsense'.<sup>540</sup>

7.5.42 The majority of Australian jurisdictions have a volitional element in the insanity defence.<sup>541</sup> 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)'.<sup>542</sup>

7.5.43 Reasons for the inclusion of a volitional element are that:

- It exists in most other jurisdictions.
- 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.<sup>543</sup>

7.5.44 Reasons for rejecting a volitional element are that:

- It is difficult to differentiate between irresistible impulses and non-resisted impulses.
- 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.<sup>544</sup>

### Questions

43. Do you consider that the volitional test for insanity contained in the *Criminal Code* (Tas) s 16(1)(b) should be retained?
44. Do you consider that any amendment should be made to the *Criminal Code* (Tas) s 16(1)(b)?

7.5.45 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 is seeking stakeholder feedback on this issue.

7.5.46 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'.<sup>545</sup> 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

<sup>539</sup> Bronitt and McSherry, above n 327, 250.

<sup>540</sup> A Kenny, 'The Psychiatric Expert in Court' (1984) 14 *Psychological Medicine* 291, 299 quoted in Allnutt, Samuels and O'Driscoll, above n 534, 297.

<sup>541</sup> Table 7.1.

<sup>542</sup> SASAC, above n 388, 47.

<sup>543</sup> Ibid 48.

<sup>544</sup> Ibid 47.

<sup>545</sup> Law Commission of England and Wales, above n 339, 225.

practitioners.<sup>546</sup> Further, as with 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.<sup>547</sup>

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.’<sup>548</sup>

7.5.47 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.<sup>549</sup> As discussed in Part 3, the available information suggests that only a small number of individuals with mental health or cognitive impairments are able to rely on the insanity defence. The TLRI welcomes feedback on stakeholders’ views on why this is the case, and, in particular, whether it is attributable to the problems with the law.

### Questions

45. Do you have an explanation as to why successful reliance on the defence of insanity is so low?
46. Do you consider that there are practical difficulties with the current operation of the insanity defence contained in the *Criminal Code* (Tas) s 16?
47. Does the current test work well in practice or does it wrongly include or exclude defendants from the scope of the defence?
48. 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)?
49. 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?

<sup>546</sup> 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 *McNaghten* 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, above n 440, 29. However, despite the ‘not insignificant problems’ with the insanity defence, the NZLC did not recommend its reform: at 7.

<sup>547</sup> Law Commission of England and Wales, above n 339, 18.

<sup>548</sup> NSWLRC, above n 55, 46.

<sup>549</sup> 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.

### ***Section 16(3): The interrelationship between insanity and self-defence***

7.5.48 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 Issues Paper, 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).

7.5.49 These issues are a focus of the Terms of Reference for this paper and, as discussed at [1.1.1], were the subject of a previous law reform report prepared by the TLRI. Accordingly, in this section, the TLRI sets out its previous views and seeks stakeholder feedback about whether it is necessary to revisit these recommendations.

7.5.50 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).<sup>550</sup> In particular, the TLRI observed that it was 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'.<sup>551</sup>
- (2) To what extent does the High Court decision in *Hawkins v the Queen*<sup>552</sup> 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 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,

<sup>550</sup> See TLRI, above n 512, Part 2, in particular [2.2.14].

<sup>551</sup> [1993] TASSC 91, [26] (Crawford J).

<sup>552</sup> (1994) 179 CLR 500.

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’.<sup>553</sup> Read in this way, s 16(3) could apply to a delusion arising from drug-induced psychosis rather than from an underlying 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.<sup>554</sup> 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.<sup>555</sup>

7.5.51 Accordingly, the TLRI expressed the view that there is a need to clarify the interaction of the law of self-defence and insanity.<sup>556</sup>

<sup>553</sup> Fairall and Yeo, above n 333, [13.32].

<sup>554</sup> This was the view expressed in Blackwood and Warner, above n 347, 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).

<sup>555</sup> 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, above n 343, 792. See D Baker, *Glanville Williams Textbook of Criminal Law* (Sweet & Maxwell, 3<sup>rd</sup> 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, above n 327, 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.

<sup>556</sup> TLRI, above n 512, 15 Recommendation 2.

7.5.52 The Terms of Reference for this current review ask the TLRI 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).<sup>557</sup>

7.5.53 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 from a delusion is not a ‘mistake’.<sup>558</sup> 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 harm<sup>559</sup> 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.<sup>560</sup> 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.<sup>561</sup> 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.<sup>562</sup>

7.5.54 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 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.
- A case where the accused suffered from schizophrenia, with the most prominent symptoms being a belief that family members were being impersonated, delusions

<sup>557</sup> Ibid 42 Recommendation 6.

<sup>558</sup> Baker, above n 555, [27-019].

<sup>559</sup> 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.

<sup>560</sup> D Klinck, “‘Specific Delusions’ in the Insanity Defence” (1982–3) 25 *Criminal Law Quarterly* 458, 464 referring to comments made by Glanville Williams.

<sup>561</sup> This was the approach in *R v Oye* [2014] 1 WLR 3354.

<sup>562</sup> See Child and Sullivan, above n 343, 792.

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.

- 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.

7.5.55 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.<sup>563</sup>

7.5.56 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:

- (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’.<sup>564</sup> 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).<sup>565</sup> This approach was also supported by the Director of Public Prosecutions, 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.

7.5.57 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 was not generally admissible in relation to the defence of self-defence in the *Criminal Code* (Tas) s 46. In the circumstances, evidence of the accused’s delusions was confined to the insanity defence contained in s 16 of the *Criminal Code* (Tas).

<sup>563</sup> See TLRI, above n 512, [4.2.1]–[4.2.19].

<sup>564</sup> MCCOC, *Model Criminal Code — Chapter 2, General Principles of Criminal Responsibility*, Report (1992) [43].

<sup>565</sup> See *R v Resnik* [2003] ATCSC 96.

7.5.58 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 future potential harms.<sup>566</sup> 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’.<sup>567</sup> 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.

7.5.59 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 this provision has remained obscure with some commentators, courts and law reform bodies expressing the view that it is redundant and out of step with modern psychiatry.<sup>568</sup> In Canada, these concerns led to the repeal in 1991 of the equivalent provision in the Canadian *Criminal Code*.<sup>569</sup> 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’.<sup>570</sup>

7.5.60 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.<sup>571</sup>

<sup>566</sup> Child and Sullivan, above n 343, 792.

<sup>567</sup> Simester at al, above n 353, 817.

<sup>568</sup> Bronitt and McSherry, above n 327, 213–218; Fairall and Yeo, above n 333, [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* (2<sup>nd</sup> 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, above n 327, 218; *R v Chaulk* (1990) 62 CCC (3d) 193. See also Colvin and McKechnie, above n 373, 17.20; J Devereux and M Blake, *Kenny Criminal Law in Queensland and Western Australia* (Lexis Nexis, 8<sup>th</sup> ed, 2013) [8.115]; Klinck, above n 560, P Fairall, ‘The Exculpatory Force of Delusions – A Note on the Insanity Defence’ (1994) 6 *Bond Law Review* 57, 59; Ormerod, above n 473, 304.

<sup>569</sup> 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 paranoid 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, above n 568, 218.

<sup>570</sup> *R v Porter* (1933) 55 CLR 182, 189–190 cited by Gibson J in *Hitchens* [1959] Tas SR 209, 221.

<sup>571</sup> (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.

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.<sup>572</sup>

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 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’.<sup>573</sup> There is no evidentiary foundation to support the contention that the accused had a genuine belief in the need to act in self-defence.

7.5.61 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.<sup>574</sup> 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*<sup>575</sup> 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.

7.5.62 This model is supported 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.

7.5.63 This approach reflects the original *McNaghten* rule on delusions and arguably reflects the intended operation of the *Criminal Code* (Tas) s 16(3).<sup>576</sup> It also reflects the approach of the

<sup>572</sup> Simester et al, above n 353, 723.

<sup>573</sup> *Criminal Code* (Tas) s 16(3).

<sup>574</sup> This was the view of Slicer J in *Walsh* (1991) 60 A Crim R 419, 427. See Howard and Westmore, above n 347, [6.47–6.50].

<sup>575</sup> [1993] TASSC 91, [26] (Crawford J).

<sup>576</sup> 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

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.<sup>577</sup> The LRCWA supported this approach on the basis that it was in the public interest and that it allowed for the appropriate treatment of a deluded accused.<sup>578</sup> 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.

7.5.64 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).

7.5.65 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*.<sup>579</sup> However, given that a person acquitted by reason of self-defence is free to leave and there is no provision for any criminal 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 [8.3.19]–[8.3.20].

### Questions

50. 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)?
51. 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).
52. 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).

be and not the actual facts'. See Baker, above n 555, [27–017]; Law Commission of England and Wales, above n 555, 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, above n 343; Mackay, above n 555.

<sup>577</sup> LRCWA, above n 371, 233.

<sup>578</sup> Ibid 233. 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.

<sup>579</sup> See discussion at [7.5.5].

53. 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? 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?

## *Procedural aspects of the defence*

### *Burden of proof*

7.5.66 Concerns have been raised in relation to 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.

7.5.67 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’.<sup>580</sup> 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.’<sup>581</sup> 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.<sup>582</sup>

7.5.68 Other law reform reviews, including those conducted by the Scottish Law Commission and the Law Reform Commission of Western Australia, did not recommend a change to the current burden of proof that is placed on the defendant.<sup>583</sup> 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.<sup>584</sup>

### **Question**

54 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?

<sup>580</sup> Law Commission of England and Wales, above n 339, 176.

<sup>581</sup> Bronitt and McSherry, above n 327, 251.

<sup>582</sup> Ibid 251–252. Similar comments are made by the Law Commission of England and Wales, above n 339, 178.

<sup>583</sup> Law Commission of England and Wales, above n 339, 181.

<sup>584</sup> Ibid 182.

### *Raising the defence of insanity*

7.5.69 As indicated at [7.3], 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.<sup>585</sup> 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.<sup>586</sup> 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.<sup>587</sup> 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’.<sup>588</sup>

7.5.70 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.<sup>589</sup> 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’.<sup>590</sup> The NSWLRC considered that there were very few cases where the absence of a prosecution power to raise the defence of mental impairment posed a difficulty in practice.<sup>591</sup> However, it considered that the prosecution should have such a power to ensure that the public interest was served in the appropriate case.<sup>592</sup>

7.5.71 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.<sup>593</sup> It is also inconsistent with ‘the interests of the defendant in retaining control of his or her defence’.<sup>594</sup> In addition, the NZLC commented on the significant stigma that attaches to the insanity defence.<sup>595</sup> For these reasons, the NZLC recommended that the Crown should only be able to adduce evidence of insanity

<sup>585</sup> *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’).

<sup>586</sup> See *ibid*.

<sup>587</sup> NSWLRC, above n 55, 75 and Recommendation 3.3.

<sup>588</sup> 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](http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_papers_pd.aspx)> 2.

<sup>589</sup> NSWLRC, above n 55, 69.

<sup>590</sup> *R v Falconer* (1990) 171 CLR 30, 62.

<sup>591</sup> NSWLRC, above n 55, 75.

<sup>592</sup> *Ibid*.

<sup>593</sup> NSWLRC, above n 55, 74; NZLC, above n 440, 59.

<sup>594</sup> NSWLRC, above n 55, 75.

<sup>595</sup> NZLC, above n 440, 59.

(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.<sup>596</sup>

7.5.72 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.

### Questions

55. Should the prosecution have the power to raise the defence of insanity against the wishes of the defendant?

56. Should the leave of the court be required for the prosecution to do this?

### A ‘consent defence’

7.5.73 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.<sup>597</sup> This has been described as a defence of mental illness by ‘consent’.<sup>598</sup> 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.<sup>599</sup> 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.<sup>600</sup>

7.5.74 Reasons in favour of allowing a consent defence are that:

- It ‘avoid[s] farcical trials where insanity is not in issue’.<sup>601</sup> It avoids the jury process becoming ‘artificial’ or a ‘formality’.<sup>602</sup> 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.<sup>603</sup>

<sup>596</sup> Ibid 61.

<sup>597</sup> NSWLRC, above n 55, Recommendation 3.4.

<sup>598</sup> Ibid 76.

<sup>599</sup> Scottish Law Commission, above n 163, 64–65; Law Commission of England and Wales, above n 339.

<sup>600</sup> *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).

<sup>601</sup> LRCWA, above n 371, 235 quoting Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Final Report (2007) 47.

<sup>602</sup> VLRC, above n 24, 232.

<sup>603</sup> VLRC, *Defences to Homicide* (Final Report, 2004) 229 referred to in VLRC, above n 26, 103.

- It saves court time and consequently money.<sup>604</sup>
- 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.<sup>605</sup>
- 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.

7.5.75 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.'<sup>606</sup>

7.5.76 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.<sup>607</sup> 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.<sup>608</sup> 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 the accused, victims and the community'.<sup>609</sup> 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.<sup>610</sup> 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'.<sup>611</sup>

7.5.77 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.

7.5.78 On the other hand, it is noted that the Director of Public Prosecutions routinely makes decisions about criminal responsibility. A primary function of the DPP is to make decisions

<sup>604</sup> Law Commission of England and Wales, above n 339, 76; LRCWA, above n 371, 235 quoting Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Final Report (2007) 47.

<sup>605</sup> LRCWA, above n 371, 235 quoting Model Criminal Code Officers Committee, *General Principles of Criminal Responsibility*, Final Report (2007) 47; Law Commission of England and Wales, above n 339, 164.

<sup>606</sup> VLRC, above n 24, 233.

<sup>607</sup> Ibid.

<sup>608</sup> Ibid 234 Recommendation 52.

<sup>609</sup> Ibid 233.

<sup>610</sup> Ibid.

<sup>611</sup> Ibid 234.

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).<sup>612</sup> 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.

#### **Questions**

- 57. Should there be legislative change to allow the prosecution and defence to agree that a defendant is not guilty by reason of insanity?
- 58. If so, are there any protections in the interests of the defendant that need to be put in place?

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<sup>612</sup> For more information in relation to the role of the Director of Public Prosecutions see [http://www.dpp.tas.gov.au/about\\_us](http://www.dpp.tas.gov.au/about_us).

## 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 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:

- 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.

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.

## 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
- (f) an unconditional release order.<sup>613</sup>

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<sup>613</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(2), 21(1).

8.2.2 As noted at [2.3.2], 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.<sup>614</sup>

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.<sup>615</sup> Restriction and supervision orders are classified as forensic orders.<sup>616</sup>

**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. <sup>617</sup> 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. <sup>618</sup>	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. <sup>619</sup>	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. <sup>620</sup> Conditions may include requiring the person to: <ul style="list-style-type: none"> <li>• Take medication</li> <li>• Submit to specified mental treatment</li> <li>• Comply with direction given by the Chief Forensic Psychiatrist around supervision and treatment.<sup>621</sup></li> </ul>	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. <sup>622</sup>	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. <sup>623</sup>  Person must be taken to a secure mental health unit or an approved hospital.  The person can be detained for:  (a) A period not exceeding 24 hours; and

<sup>614</sup> *Sentencing Act 1997* (Tas) s 75.

<sup>615</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 18(2), 21(2); *Sentencing Act 1997* (Tas) s 75(3).

<sup>616</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 3.

<sup>617</sup> *Ibid* s 24.

<sup>618</sup> 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](http://www.dhhs.tas.gov.au/service_information/services_files/mental_health_services/forensic_mental_health_service/wilfred_lopes_centre)>.

<sup>619</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 26(1), 37(1).

<sup>620</sup> *Ibid* s 29A(1).

<sup>621</sup> *Sentencing Act 1997* (Tas) s 75; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 29A(2).

<sup>622</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 30(1), 37(1).

<sup>623</sup> *Ibid* s 31.

Order	Details of orders	Time limit for order	Consequences of breach
			<p>(b) If the Chief Forensic Psychiatrist authorises it, for 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.<sup>624</sup></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).<sup>625</sup></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.<sup>626</sup></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.<sup>627</sup></p>	Up to six months or until the order is discharged but can be renewed by the Mental Health Tribunal. <sup>628</sup>	<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.<sup>629</sup></p> <p>The treating medical practitioner can make an application to the MHT to vary the treatment order.<sup>630</sup></p>

<sup>624</sup> Ibid s 31(6).

<sup>625</sup> Ibid s 31(7).

<sup>626</sup> Ibid s 31(8).

<sup>627</sup> *Mental Health Act 2013* (Tas) s 42.

<sup>628</sup> Ibid ss 44, 48.

<sup>629</sup> 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.

<sup>630</sup> *Mental Health Act 2013* (Tas) s 47(2).

Order	Details of orders	Time limit for order	Consequences of breach
			<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-admission of the patient to those settings.<sup>631</sup></p> <p>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.<sup>632</sup></p>
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. <sup>633</sup>	<p>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.<sup>634</sup></p> <p>This does not involve the MHT.</p>
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 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

<sup>631</sup> Ibid s 47A.

<sup>632</sup> Ibid s 42(2).

<sup>633</sup> 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 used as directed by the Chief Forensic Psychiatrist or his nominee. (3) He submit to medical, psychological or psychiatrist assessment or treatment was directed by the Chief Forensic Psychiatrist or his nominee, see *D*, 22 July 2008 (Slicer J).

<sup>634</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 21A.

SMHU. While the decision in *Horacek*<sup>635</sup> 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.

- 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.
- 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.<sup>636</sup> 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.

<sup>635</sup> *Secretary of the Department of Health and Human Services v Horacek* [2009] TASSC 65, [10].

<sup>636</sup> 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).

**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

8.2.7 In the Magistrates Court, there were 12 people 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 matters. In those cases, the following orders were imposed under s 18(2) of the *Criminal Justice (Mental Impairment) Act 1999* (Tas):

- six were released on condition;
- 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):

- one treatment order;
- six conditional release orders;
- 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.<sup>637</sup> In exercising its powers under Part 4, the court is also directed by s 35(1) to have regard to the following:

- the nature of the defendant’s mental impairment or other condition or disability;
- whether the defendant 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;

<sup>637</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 34.

- whether the defendant is likely to comply with the conditions of a supervision order; and
- other matters that the court thinks relevant.<sup>638</sup>

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.<sup>639</sup> 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.<sup>640</sup>

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.<sup>641</sup> 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.

<sup>638</sup> 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.

<sup>639</sup> 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.

<sup>640</sup> 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).

<sup>641</sup> 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, above n 55, 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.

### ***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 made and at least once in each period of 12 months afterwards.<sup>642</sup> 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.<sup>643</sup> 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.<sup>644</sup> However, the legislation does not direct the MHT to take into account the view of next of kin or victims.<sup>645</sup> 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.<sup>646</sup> 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.<sup>647</sup> 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.<sup>648</sup> 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.<sup>649</sup> 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**

<b>Year</b>	<b>Restriction order hearings</b>	<b>Restriction order hearings adjourned</b>	<b>Restriction order certificates issued</b>
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

<sup>642</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(1).

<sup>643</sup> *Ibid* s 37(3).

<sup>644</sup> *Ibid* s 37(2).

<sup>645</sup> Smith, above n 30, 25.

<sup>646</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(3)(b).

<sup>647</sup> *Ibid* s 37(4).

<sup>648</sup> *Ibid* s 37(5).

<sup>649</sup> *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 where 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 have a certificate issued and eight do have a certificate issued.<sup>650</sup> 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.<sup>651</sup>

**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

<sup>650</sup> 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.

<sup>651</sup> 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.<sup>652</sup>
- (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.<sup>653</sup>

***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.<sup>654</sup> 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

<sup>652</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 37(3).

<sup>653</sup> *Ibid* 30(3).

<sup>654</sup> Mental Health Tribunal (Tasmania), *Annual Report 2015–16*, 18.

application to the Supreme Court — both applications were successful.<sup>655</sup> In the same period, there were no certificates issued to forensic patients on restriction orders.<sup>656</sup>

8.2.19 In a review of forensic orders conducted by Smith, it was reported in 2010 that 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.<sup>657</sup> 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.<sup>658</sup> 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
<b>Supervision Orders</b>				
	13	4		Conditional orders made, 12–24 mths
		3		Revoked
			1	SO varied
			3	New application on foot
			1	Client withdrew
			1	Ongoing
<b>Restriction Orders</b>				
	5	5		Supervision order made in substitution

8.2.21 MHT data indicate that from 2005 to 2018, there were seven people who 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, there are no people subject to restriction orders who have 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

<sup>655</sup> Mental Health Tribunal (Tasmania), *Annual Report 2017–18* (2018) 31.

<sup>656</sup> Ibid.

<sup>657</sup> Smith, above n 30, 22.

<sup>658</sup> Ibid 23.

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.

### ***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.<sup>659</sup> 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.<sup>660</sup> In *CJS v Tasmania*,<sup>661</sup> 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). It was 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.<sup>662</sup>

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*,<sup>663</sup> 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’.<sup>664</sup>

8.2.23 A key factor identified in *CJS v Tasmania*<sup>665</sup> was the need to assess the risk that the defendant posed 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 was 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’.<sup>666</sup> Instead, the Court had to make a finding, on the balance of probabilities, whether or not a state of affairs was ‘likely’.<sup>667</sup> The Court noted that different

<sup>659</sup> See *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 33–35.

<sup>660</sup> *NOM v DPP & Ors* [2012] VSCA 198, [47].

<sup>661</sup> [2008] TASSC 85.

<sup>662</sup> *Ibid* [25] (Tennent J).

<sup>663</sup> [2009] TASSC 65.

<sup>664</sup> *Ibid* [75] (Tennent J).

<sup>665</sup> [2008] TASSC 85.

<sup>666</sup> *Ibid* [74], [75].

<sup>667</sup> *Ibid* [75] (Tennent J) applying *Percy* (1998) 104 A Crim R 29.

interpretations of ‘likely’ include that there is a ‘real or substantial chance or possibility’<sup>668</sup> or that something is ‘more likely than not’.<sup>669</sup> However, the precise meaning of ‘likely’ was not resolved with the Court of Criminal Appeal indicating that the primary judge ‘was 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’.<sup>670</sup>

8.2.24 The Court also considered the meaning of ‘freedom and personal autonomy’ and examined whether this encompassed 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).<sup>671</sup> It was held that it did 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’.<sup>672</sup> This meant that the indefinite nature of the supervision order compared to the finite nature of a treatment order was 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’ meant 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’.<sup>673</sup>

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 illness requiring ongoing medication to manage the illness. The concern was expressed that, while the person did not present a risk to the community when appropriately treated, there was a risk of harm to others if the medication regime was not complied with. Accordingly, the court considered that a supervision order was required (rather than a treatment order) to ensure compliance with the medication treatment and mental health management.<sup>674</sup> This allowed for oversight by the Supreme Court and the power to detain the person in a SMHU, if necessary. It also would not lapse (unlike the treatment order that required administrative action to renew it).

8.2.26 Subsequent to the decisions in *CJS v Tasmania*<sup>675</sup> and *Secretary of the Department of Health and Human Services v Horacek*,<sup>676</sup> 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’.<sup>677</sup> 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

<sup>668</sup> 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.

<sup>669</sup> Ibid [77] (Tennent J) citing *Attorney-General (NSW) v Winters* (2007) 176 A Crim R 249.

<sup>670</sup> Ibid [78] (Tennent J).

<sup>671</sup> 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].

<sup>672</sup> Ibid [57].

<sup>673</sup> Ibid [58].

<sup>674</sup> Ibid.

<sup>675</sup> [2008] TASSC 85.

<sup>676</sup> [2009] TASSC 65.

<sup>677</sup> (2012) 38 VR 618.

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 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.<sup>678</sup>

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*<sup>679</sup> 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’.<sup>680</sup> 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’.<sup>681</sup> This differs from the approach of the Court of Criminal Appeal in *CJS v Tasmania*.<sup>682</sup>

### ***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.<sup>683</sup> The Chief

<sup>678</sup> Ibid [57]–[59].

<sup>679</sup> Ibid.

<sup>680</sup> Ibid [71].

<sup>681</sup> Ibid.

<sup>682</sup> [2008] TASSC 85.

<sup>683</sup> *Mental Health Act 2013* (Tas) s 78(1).

Forensic Psychologist (CFP) may grant leave to a forensic patient who is not subject to a restriction order.<sup>684</sup> 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 conditions.<sup>685</sup> 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).<sup>686</sup> 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.<sup>687</sup> 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 <sup>688</sup>

Source: MHT Annual Report

## 8.3 Issues for consideration

### *Indefinite nature of forensic orders*

8.3.1 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 provisions 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’.<sup>689</sup> 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.

8.3.2 It is also noted that 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

<sup>684</sup> Ibid s 82(1).

<sup>685</sup> Ibid ss 78(2), (9), 82(2), (10).

<sup>686</sup> Ibid s 15.

<sup>687</sup> Ibid sch 1.

<sup>688</sup> 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, above n 655, 32.

<sup>689</sup> Melbourne Social Equity Institute, above n 128, 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, above n 30, 22.

provision in the legislation to have the conditions varied or removed.<sup>690</sup> This would also appear to create the potential for unfairness and inflexibility.

### *Position in other jurisdictions*

8.3.3 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.<sup>691</sup> 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.<sup>692</sup>

8.3.4 Other jurisdictions provide for finite terms through the use of limiting terms.<sup>693</sup> 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 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.<sup>694</sup> 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.

8.3.5 Some jurisdictions with limiting terms provide, in exceptional cases, for an extension of a person's status following the expiry of the term. In New South Wales, the Supreme Court can extend a person's status as a forensic patient beyond the end of the limiting term in circumstances where the court is satisfied to a high degree of probability that the patient poses an unacceptable risk of causing serious harm to others if he or she ceased to be a forensic patient

<sup>690</sup> 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.

<sup>691</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 35(3); *Criminal Code* (NT) s 43ZG(6). See discussion in VLRC, above n 24, 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.

<sup>692</sup> See Appendix 3 for more details.

<sup>693</sup> See Appendix 3 Table A3.3 for details of the provisions in each jurisdiction.

<sup>694</sup> NSWLRC, above n 55, 171.

and the risk cannot be adequately managed by other less restrictive means.<sup>695</sup> Similarly, in South Australia, amendments (yet to commence) to the *Criminal Law Consolidation Act 1935* (SA), make provision for the Supreme Court to make a continuing supervision order where the court is satisfied, on the balance of probabilities, that the defendant could pose a serious risk to the safety of the community or a member of the community.<sup>696</sup> Continued detention is discussed further at [8.3.16]–[8.2.26].

8.3.6 In relation to conditional release orders, only New South Wales (for defendants where finding was made that unable to find not guilty following 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.<sup>697</sup> 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.<sup>698</sup> In South Australia, the court can make a conditional release order for five years for summary and minor indictable offences.<sup>699</sup>

### *Options for reform*

8.3.7 In Tasmania, an option for reform would be to make detention subject to a limiting term as exists in New South Wales, the Australian Capital Territory, South Australia and the Commonwealth. If a limiting term were adopted, it would also be necessary to determine:

- (1) whether there would be 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 and as is proposed in South Australia);
- (2) the mechanism for setting the limiting term.

8.3.8 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 defendants found not guilty by reason of insanity or following a finding that the person was unfit to stand trial (and not acquitted at the special hearing).<sup>700</sup> The view of the NSWLRC view was that there should be a time limit because it provides an important protection for forensic patients. In usual cases, concerns in relation to the safety of the community could be addressed by the civil mental health system at the end of the time limit and by also introducing a system that, with appropriate safeguards, would allow for continuing detention to be ordered.<sup>701</sup> This model was an adaptation of the rules that apply to other high-risk individuals subject to a sentence of imprisonment and would only be appropriate in cases

<sup>695</sup> *Mental Health (Forensic Provisions) Act 1990* (NSW) s 54, schs 1, 2.

<sup>696</sup> *Criminal Law Consolidation Act 1935* (SA) sub-div 3, inserted by the *Criminal Law Consolidation (Mental Impairment) Amendment Act 2017* (SA) s 23.

<sup>697</sup> See Appendix 3 Table A3.1.

<sup>698</sup> 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) s 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, above n 371, 243 Recommendation 35.

<sup>699</sup> See *Criminal Law Consolidation Act 1935* (SA), div 3A.

<sup>700</sup> NSWLRC, above n 55, 180–181 Recommendation 7.2.

<sup>701</sup> *Ibid* 179.

where the civil system did not apply and the individual posed a significant risk to the public at the end of the limiting term.<sup>702</sup> The NSWLRC was concerned to stress that the proposed model should only apply in exceptional cases.<sup>703</sup>

8.3.9 The SASAC's view was also that limiting terms should be retained.<sup>704</sup> A key recommendation of the ALRC was that there should be limits placed on detention that can be imposed.<sup>705</sup> This approach was also supported by the Senate Committee examining indefinite detention of people with cognitive and psychiatric impairment in Australia.<sup>706</sup> Similarly, the LRCWA also recommended introducing the use of limiting terms.<sup>707</sup> 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'.<sup>708</sup>

8.3.10 Other jurisdictions have also considered the most appropriate method of setting the limiting term. In addressing this issue, 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.<sup>709</sup> 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).<sup>710</sup>
- (3) Using a **fixed statutory formula** to determine the limiting term.<sup>711</sup>
- (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'.<sup>712</sup>

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<sup>702</sup> Ibid 322.

<sup>703</sup> Ibid. See further 334–336 and 337–338 Recommendation 11.1. Extended supervision was not addressed in the report of the SASAC. However, reforms to the *Criminal Law Consolidation Act 1935* (SA) that are yet to be commenced also make provision for a continued supervision order in circumstances where the court is satisfied that the defendant could, if unsupervised, pose a serious risk to the safety of the community or a member of the community, *Criminal Law Consolidation Act 1935* (SA) s 269UA(7) inserted by *Criminal Law Consolidation (Mental Impairment Act) 1935* (SA) (yet to commence).

<sup>704</sup> SASAC, above n 388, Recommendation 15.

<sup>705</sup> ALRC, above n 110, Recommendation 7-2.

<sup>706</sup> Senate Community Affairs Reference Committee, *Indefinite Detention of People with Cognitive Impairment in Australia*, Report (2016) 70–71.

<sup>707</sup> LRCWA, above n 371, 244–245 Recommendation 36.

<sup>708</sup> VLRC, above n 24, 360, 361 Recommendation 83.

<sup>709</sup> See NSWLRC, above n 55, 172–173.

<sup>710</sup> See *ibid* 174.

<sup>711</sup> See *ibid* 175.

<sup>712</sup> See *ibid* 176.

The NSWLRC recommended, acknowledging that this may not be possible to do with absolute precision, that the court should make an estimate of the sentence that it would have applied had the defendant been held criminally responsible at a normal trial.<sup>713</sup> This was also the recommendation of the ALRC<sup>714</sup> and the LRCWA.<sup>715</sup>

(1) Should there be a limiting term?

8.3.11 **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.

- (1) An indefinite term creates uncertainty and this potentially is an incentive for innocent people to plead guilty rather than rely on unfitness to stand trial/and or insanity.<sup>716</sup> 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’.<sup>717</sup> 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’.<sup>718</sup> 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.’<sup>719</sup> 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.<sup>720</sup>
- (2) People who are detained indefinitely may spend longer under supervision than if they had been sentenced following the usual process.<sup>721</sup> This has implications in relation to whether an individual would elect 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’.<sup>722</sup> 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’.<sup>723</sup> This is confirmed by recent research undertaken by the TLRI with the

<sup>713</sup> See *ibid* 180.

<sup>714</sup> ALRC, above n 110, 210.

<sup>715</sup> LRCWA, above n 371, 244.

<sup>716</sup> ALRC, above n 110, 198; SASAC, above n 388, 145; NSWLRC, above n 55, 167; VLRC, above n 24, 359.

<sup>717</sup> NSWLRC, above n 446, 219.

<sup>718</sup> *Ibid*.

<sup>719</sup> NSWLRC, above n 55, 179.

<sup>720</sup> *Ibid*.

<sup>721</sup> *Ibid* 167; ALRC, above n 110, 198; SASAC, above n 388, 145; VLRC, above n 24, 359.

<sup>722</sup> Office of Public Prosecutions, Victoria, *Submission to Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 Consultation Paper* (2013) 2.

<sup>723</sup> Smith, above n 30, 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.

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.<sup>724</sup> 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’.<sup>725</sup> 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 certificate is issued for an application for discharge to be filed with and considered by the court.<sup>726</sup> 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.<sup>727</sup> It has been suggested that indefinite terms cause ‘supervised people to feel trapped or lack the motivation to get better’.<sup>728</sup>
- (4) Indefinite terms reinforce negative perceptions about a forensic patient’s criminality.<sup>729</sup>
- (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.<sup>730</sup>
- (6) Indefinite terms are contrary to international obligations arising under the art 5 (prohibition of disability-based discrimination) and art 14 (rights to liberty and security of the person) of the *CRPD*.<sup>731</sup> 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’.<sup>732</sup> 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’.<sup>733</sup> Other commentators have argued, 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’.<sup>734</sup> This is on the basis of views expressed by the UNCRPD that laws enabling involuntary

<sup>724</sup> The findings from this research are set out in Appendix 8.

<sup>725</sup> Smith, above n 30, 24.

<sup>726</sup> Ibid 25.

<sup>727</sup> NSWLRC, above n 55, 168.

<sup>728</sup> VLRC, above n 24, 359.

<sup>729</sup> NSWLRC, above n 55, 170.

<sup>730</sup> 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.

<sup>731</sup> Melbourne Social Equity Institute, above n 128, 21.

<sup>732</sup> Gooding et al, above n 37, 853.

<sup>733</sup> Arstein-Kerslake et al, above n 126, 418.

<sup>734</sup> Minkowitz, above n 124, 449.

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).<sup>735</sup>

8.3.12 **Arguments against a limiting term.** The following arguments can be identified 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.<sup>736</sup> In addition, the length of the time limit is set at the time of disposition, when the progress of the defendant's treatment and rehabilitation is hard to predict.<sup>737</sup> 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'.<sup>738</sup> In addition, concerns about community safety at the end of the limiting term could be managed within the civil mental health system.<sup>739</sup> 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.<sup>740</sup>
- (2) The forensic system has quite different objectives to sentencing.<sup>741</sup> 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)'.<sup>742</sup> 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.<sup>743</sup>

Similar concerns were expressed in submissions received by 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

<sup>735</sup> Ibid. See also Gooding and O'Mahoney, above n 124, 133.

<sup>736</sup> NSWLRC, above n 55, 169.

<sup>737</sup> Ibid.

<sup>738</sup> NSWLRC, above n 446, 220.

<sup>739</sup> NSWLRC, above n 55, 169.

<sup>740</sup> Ibid 179. This is discussed further at [8.3.16]–[8.3.32].

<sup>741</sup> NSWLRC, above n 55, 169.

<sup>742</sup> VLRC, above n 24, 359.

<sup>743</sup> Ibid 360. See Recommendation 83.

nature of the offence committed'.<sup>744</sup> 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'.<sup>745</sup> There may also be advantages for an unwell person in accessing services within the forensic 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 expectation that the time limit is a sentence.<sup>746</sup> A person who have been found not guilty by reason of insanity or if 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', it may create an expectation that 'the person is being punished, despite not having been tried and convicted of any offence'.<sup>747</sup>

8.3.13 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 that there is a 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'.<sup>748</sup> Ultimately, however, their view was that indefinite detention was appropriate as it was 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'.<sup>749</sup> 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.<sup>750</sup>

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 further considered below.

8.3.14 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

<sup>744</sup> SASAC, above n 388, 142.

<sup>745</sup> T Boyd-Caine and D Chappell, 'The Forensic Patient Population in New South Wales' (2005) 17 *Current Issues in Criminal Justice* 5, 26.

<sup>746</sup> NSWLRC, above n 55, 169.

<sup>747</sup> Ibid 174.

<sup>748</sup> Boyd-Caine and Chappell, above n 745, 26.

<sup>749</sup> Ibid.

<sup>750</sup> NSWLRC, above n 55, 170.

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.<sup>751</sup> Other indefinite orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) have provision for review and revocation.

8.3.15 The TLRI seeks feedback in relation to whether a limiting term should be adopted in Tasmania for supervision and restriction orders. Alternatively, it may be considered that any concerns arising in relation to the indefinite nature of these orders and the balancing of the interests of the individual and the community are more appropriately dealt with through a system of indefinite detention with periodic reviews. In addition, the TLRI seeks feedback on whether a limiting term should be set for conditional release orders.

#### Questions

59. 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?
60. 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?

- (2) If a limiting term is adopted for restriction and supervision orders, should there be provision for the order to be extended?

8.3.16 As discussed, in New South Wales provision was made to allow the Supreme Court to make extension orders for forensic patients in 2013. 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:
  - (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.

This followed recommendations of the NSWLRC, which 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 fall within the criteria for admission into the civil mental health

<sup>751</sup> See *Mental Health Act 2013* (Tas) ss 44, 48; *Sentencing Act 1997* (Tas) s 7(f).

system.<sup>752</sup> In addition, the guardianship system does not provide a means to detain a person on the basis of community safety.<sup>753</sup>

8.3.17 In South Australia, amendments will make it possible for the Supreme Court to make a continuing supervision order.<sup>754</sup> The test in South Australia will be that the ‘court is satisfied, on the balance of probabilities, 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.’<sup>755</sup> 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.

8.3.18 In the Tasmanian context, if limiting terms are introduced for supervision and restriction orders, the following issues need to be addressed:

- (1) whether there would be a need for a preventative detention scheme based on the limits of the civil mental health and disability regime;
- (2) if so, should a preventative detention scheme be introduced; and
- (3) if so, how should it be structured?

8.3.19 **Are there gaps in the civil system?** In Tasmania, 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. 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.<sup>756</sup> 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.<sup>757</sup> 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.<sup>758</sup> Accordingly, there may be people who refuse treatment but do not lack decision-making capacity. Further,

<sup>752</sup> 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, above n 55, 172.

<sup>753</sup> Ibid 318–319.

<sup>754</sup> *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) 1935* (SA) (yet to commence).

<sup>755</sup> *Criminal Law Consolidation Act 1935* (SA) s 269UA(7) inserted by *Criminal Law Consolidation (Mental Impairment Act) 1935* (SA) (yet to commence).

<sup>756</sup> 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).

<sup>757</sup> *Mental Health Act 2013* (Tas) s 40.

<sup>758</sup> Ibid s 7(1).

individuals may not meet the definition of mental illness, such as a person with an intellectual disability or acquired brain injury.<sup>759</sup>

8.3.20 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.<sup>760</sup> 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.<sup>761</sup> A guardian with health care powers can consent to medical treatment as well as care provided by allied medical practitioners but does not allow the guardian to authorise psychiatric treatment of a person with mental illness.<sup>762</sup> A guardian can also consent to or make decisions about a behaviour management plan.<sup>763</sup> 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.<sup>764</sup> 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.<sup>765</sup> 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'.<sup>766</sup> On this basis, '[i]t is not the guardian's role to safeguard the community, although the guardian's decisions may have that effect'.<sup>767</sup> Accordingly, there are limitations in relation to the effectiveness of guardianship arrangements to provide an appropriate means to address concerns about community safety. The TLRI 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.<sup>768</sup> 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.<sup>769</sup>

8.3.21 **Should a preventative detention scheme be introduced?** As indicated above, in New South Wales a preventative detention scheme that would allow an extension of an individual's forensic patient status was recommended. This was based on concerns that a small number of individuals 'may pose a significant risk to the public but who do not meet the criteria for transfer into the civil system'.<sup>770</sup> The NSWLRC was concerned to highlight that this power was exceptional and should be exercised sparingly, with strong justification and suitable

<sup>759</sup> See discussion in Part 7 in relation to the meaning of mental illness.

<sup>760</sup> 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).

<sup>761</sup> Ibid 17.

<sup>762</sup> Ibid 23, 25.

<sup>763</sup> Ibid 26.

<sup>764</sup> *Guardianship and Administration Act 1995* (Tas) s 20(1).

<sup>765</sup> Ibid ss 20(2), (3).

<sup>766</sup> NSWLRC, above n 55, 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, above n 7, Part 3.

<sup>767</sup> NSWLRC, above n 55, 317.

<sup>768</sup> Ibid Part 11.

<sup>769</sup> Ibid.

<sup>770</sup> NSWLRC, above n 55, 322.

protections.<sup>771</sup> It stressed that the only justification for the making of the order should be need to protect the community and an order should not be made for the purposes of treatment or punishment.<sup>772</sup> On this basis, it considered that this was necessary for community protection and was ‘an appropriate counterbalance to our recommendation that limiting terms be applied to people found NGMI’.<sup>773</sup> This cautious approach reflected the principles that apply to preventative detention for offender’s sentenced following a finding of guilt, where there is only provision for high-risk sex and violent offenders to be detained at the end of their sentence where the Supreme Court considered there to be an unacceptable risk of serious offending.<sup>774</sup>

8.3.22 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’.<sup>775</sup> On this basis, many stakeholders in the NSW review process expressed considerable concern about the creation of a preventative detention scheme.<sup>776</sup> 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’.<sup>777</sup> More generally, preventative detention schemes that apply to convicted offenders are controversial on the basis that they offend against the principle of proportionality and finality in sentencing, that they amount to double punishment and that prediction of future risk is problematic.<sup>778</sup> As the TLRI has previously written:

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.<sup>779</sup>

<sup>771</sup> NSWLRC, above n 55, 321, 332–333.

<sup>772</sup> Ibid 322.

<sup>773</sup> Ibid 333.

<sup>774</sup> Ibid.

<sup>775</sup> Ibid.

<sup>776</sup> Ibid 322, 332–333.

<sup>777</sup> Committee on the Rights of Persons with Disabilities, above n 129, [7] cited in Gooding et al, above n 37, 834.

<sup>778</sup> See Sentencing Advisory Council, Tasmania (TSAC), *Sex Offence Sentencing*, Final Report No 4 (2015) 107; TLRI, above n 96, 7–9.

<sup>779</sup> TLRI, above n 96, 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*

Such schemes are also criticised on the basis that they are contrary to international human rights instruments, and for this reason the courts and international tribunals have stressed that the power must be exercised only in exceptional circumstances.<sup>780</sup>

### 8.3.23 If a preventative detention scheme is introduced, how should it be structured?

This issue was considered in detail by the NSWLRC, which considered four possible models as set out in Table 8.10.<sup>781</sup>

**Table 8.10: 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"> <li>The <i>Crimes (High Risk Offenders) Act 2006</i> (NSW) provides for the continued supervision or detention for high-risk sex or violent offenders who are due to be released.</li> <li>This model could be adapted to manage forensic patients who present a risk of harm. The nature of the risk would need to be differently framed given that forensic patients have not been convicted of an offence.</li> </ul>	<ul style="list-style-type: none"> <li>Decision to extend detention is made by Supreme Court.</li> <li>Safeguards having two independent experts review the person and high threshold for making the order.</li> <li>Consistency in processes and procedure between forensic patients and convicted offenders.</li> </ul>
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"> <li>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.</li> </ul>	<ul style="list-style-type: none"> <li>Concerns regarding lack of judicial safeguard.</li> <li>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.</li> <li>However, this model would be developed specially for forensic patients rather than being an adaption of a scheme designed for convicted high-risk offenders.</li> <li>Allows for ongoing supervision and review by the MHRT.</li> </ul>

*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.

<sup>780</sup> NSWLRC, above n 55, 320–321, 332.

<sup>781</sup> 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"> <li>Provides the MHRT with a discretion to extend the limiting term for individuals if they present a clear risk.</li> </ul>	<ul style="list-style-type: none"> <li>Greater flexibility than having a limiting term that cannot be extended.</li> <li>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.</li> </ul>
Change the civil scheme of involuntary detention to include people with cognitive impairments.	<ul style="list-style-type: none"> <li>Amend the civil scheme of involuntary detention for people with cognitive impairments by allowing for a parallel scheme for involuntary detention.<sup>782</sup></li> </ul>	Significant resource implications to create a civil detention scheme for the involuntary detention of people with cognitive impairments.

8.3.24 After considering these options, the NSWLRC recommended (and the Parliament adopted) a model that was 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. This was a hybrid of the scheme that applied for continued supervision of high-risk offenders and the scheme that would have decision-making power rest with the Mental Health Review Tribunal (as outlined above).<sup>783</sup>

8.3.25 Key features of the NSW model are that:

- 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 they are 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 nor detention are not appropriate.<sup>784</sup>
- the term of extension order is five years subject to further extension.
- the MHRT conducts regular reviews.
- 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.

<sup>782</sup> For example, the *Disability Act 2006* (Vic).

<sup>783</sup> NSWLRC, above n 55, 334.

<sup>784</sup> Ibid 334–335; *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1 div 2 cl 7.

8.3.26 The TLRI seeks feedback in relation to 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 Tasmanian current civil arrangements sufficient to manage the risk to community safety. If a preventative detention scheme is adopted, feedback is also sought as to the most appropriate model. The scheme could be based on the models set out by the NSWLRC or some other model 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 involve a consideration 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.

### Questions

61. 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?
62. 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?

### (3) If a limiting term is adopted, how should the limiting term be set?

8.3.27 A related matter for determination is how the limiting term should be set if a limiting term is adopted in Tasmania for forensic orders (restriction and supervision orders) and/or conditional release orders.

8.3.28 In relation to forensic orders, the preferred approach in other jurisdictions is to set the term 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, 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'.<sup>785</sup> However, as noted, it is recognised that this approach is 'not without difficulties, both conceptually and in practice'.<sup>786</sup>

8.3.29 Table 8.11 sets out arguments in favour and against the different models considered by the NSWLRC for setting the limiting terms.<sup>787</sup>

<sup>785</sup> NSWLRC, above n 55, 173.

<sup>786</sup> NSWLRC, above n 446, 220.

<sup>787</sup> See NSWLRC, above n 55, 172–178, 180.

**Table 8.11: 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"> <li>• Approach that courts are familiar with.</li> <li>• Fairness requires that forensic patients should not been detained for longer that if convicted in a normal trial.</li> <li>• Sentencing principles recognise the interests of the community and the victims.</li> <li>• This is the least arbitrary.</li> </ul>	<ul style="list-style-type: none"> <li>• Sentencing principles may not 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.</li> <li>• Sentencing principles cannot be applied with reasonable accuracy given the artificiality of the imposing sentence of a person who has not been found guilty.</li> <li>• 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).</li> <li>• 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.”’<sup>788</sup></li> <li>• Encourages the development of informal tariffs related to just deserts for the offence.<sup>789</sup></li> </ul>
Modified sentencing approach	<ul style="list-style-type: none"> <li>• Could address some of the limitations identified with the hypothetical sentence model by imposing a time limit equivalent to a hypothetical non-parole period.</li> <li>• Could provide that certain mitigating factors are presumed or provide for a percentage-based discount for unknown mitigating factors.</li> </ul>	<ul style="list-style-type: none"> <li>• Using a non-parole period ignores the role of supervision on release on parole.</li> <li>• Presuming mitigating factors would be very artificial.</li> </ul>

<sup>788</sup> Hunyor, above n 730, 13.

<sup>789</sup> 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
Fixed statutory time limits (often based on maximum penalties) <sup>790</sup>	<ul style="list-style-type: none"> <li>• Certainty and consistency.</li> </ul>	<ul style="list-style-type: none"> <li>• Difficult to apply in Tasmania as all offences under the <i>Criminal Code</i> (other than murder and treason) have the same maximum penalty.</li> <li>• Ignores the range of sentences imposed for offences.</li> <li>• The relationship between the time limit and the offending conduct ceases to be proportionate and becomes arbitrary.</li> </ul>
Risk management approach	<ul style="list-style-type: none"> <li>• This would be able to take into account the likelihood of rehabilitation, the likely length and success of treatment (and impact on offending behaviour).</li> <li>• 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.<sup>791</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Not an approach that the court is familiar with.</li> <li>• Predictions of risk factors may be difficult at an early stage.</li> </ul>

8.3.30 As indicated, the application of the hypothetical sentence approach is the preferred approach in other jurisdictions. This was reaffirmed as the most appropriate approach by the NSWLRC. 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 did not overestimate the commensurate sentence:

- The court should estimate the sentence as if the person had been found guilty at a normal trial, and so taking into account the person's cognitive or mental health impairment; and
- In order to make sure that the limiting term is fair in comparison with those 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.<sup>792</sup>

8.3.31 In relation to the conditional release orders, in other jurisdictions the period of the order is generally the same as the limit for good behaviour bonds/conditional release orders imposed as a sentence and range from 24 months to five years.<sup>793</sup> These have not been the subject of review in other jurisdictions. In Tasmania, an option would be to have the time limit for a conditional release order under the *Criminal Justice (Mental Impairment) Act 1999* (Tas)

<sup>790</sup> 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.

<sup>791</sup> Hunyor, above n 730, 20.

<sup>792</sup> NSWLRC, above n 55, 180.

<sup>793</sup> See [8.3.6].

equivalent to the period for a conditional undertaking under the *Sentencing Act 1997* (Tas) s 7(f), that is, five years.

8.3.32 The TLRI seeks feedback in relation to how a limiting term should be set for supervision and restriction orders if one is adopted in Tasmania. In addition, the TLRI seeks feedback on whether the limiting term for conditional release orders should be the same as the conditional undertaking under the *Sentencing Act 1997* (Tas) s 7(f) (five years).

#### Questions

63. 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?

64. If there is a time limit for conditional release orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas), should it be the same as the conditional undertaking under the *Sentencing Act 1997* (Tas) s 7(f) (five years)? If not, on what basis should it be determined?

#### ***Test for making, varying, discharging or revoking orders under the Criminal Justice (Mental Impairment) Act 1999 (Tas)***

8.3.33 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, the 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.

8.3.34 This section of the Issues Paper focuses on whether there is a need to reform the test 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. It also addresses concerns that have been raised about the difficulties that arise for forensic patients in having these orders discharged. These issues will require resolution in Tasmania, even if a limiting term is introduced in Tasmania for forensic patients, as it will still be necessary to decide on what basis the order should be made and on what basis a person can be discharged or have an order varied prior to the expiry of the limiting term.

8.3.35 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 [8.3.11], 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).<sup>794</sup> Similar observations have been made in relation to supervision orders, where concerns have been raised about the length of time that a forensic

<sup>794</sup> Office of the Anti-Discrimination Commissioner, above n 723, 44; Smith, above n 30, 24.

patient is subject to supervision.<sup>795</sup> The Anti-Discrimination Commissioner has illustrated the issues that exist in relation to having an order discharged with a case study.

#### 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’.<sup>796</sup>

8.3.36 There also appears to be a traditional reluctance for 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 for a compulsory medication regime, the court was concerned about need to renew a treatment order (in contrast to the indefinite nature of the supervision order) and the lack of judicial oversight. In these circumstances, it was considered that the long-term management regime provided by a supervision order was necessary. Again, there appears to be the ‘catch 22’ given that there is little ability for a forensic patient to demonstrate compliance 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’ with 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’.<sup>797</sup> This approach is evident in other decisions of the Supreme Court where applications to revoke supervision orders were rejected on the basis the person had a chronic mental health condition and that there was a concern about the suitability of a treatment order as a means to ensure compliance with medication requirements.

8.3.37 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 included 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.

<sup>795</sup> Smith, above n 30, 24.

<sup>796</sup> Ibid 45.

<sup>797</sup> Ibid 25.

8.3.38 Concerns have also been raised about the inconsistency in outcomes between decisions of the MHT in issuing certificates and the Supreme Court in refusing to discharge the order once an application has been made. Smith, then President of the Guardianship and Administration Board and ex officio member of the Forensic Tribunal, highlighted the ‘marked difference between the approaches of the Forensic Tribunal in issuing the certificate and the Supreme Court in considering discharge’.<sup>798</sup> This difference was attributed to the different legislative considerations for each body (see [8.2.12]) but also the different experiences of the Forensic Tribunal and the Supreme Court:

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.<sup>799</sup>

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 and four of those have current applications to revoke the supervision order.

8.3.39 Concerns have been raised 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’.<sup>800</sup> In Victoria, it has been observed that one of the main obstacles in the progression of a forensic patient towards release is the complete revocation of the non-custodial supervision order.<sup>801</sup> 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’.<sup>802</sup> This is on the basis that under a non-custodial supervision order, the court still 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’.<sup>803</sup>

8.3.40 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 MHT for its ‘lenient approach to the issue of certificates’.<sup>804</sup> In one case, Evans J expressed concern 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

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<sup>798</sup> Ibid.

<sup>799</sup> Ibid.

<sup>800</sup> VLRC, above n 24, 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.

<sup>801</sup> VLRC, above n 24, 344.

<sup>802</sup> I Freckelton, ‘The Preventative Detention of Insanity Acquittees: 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.

<sup>803</sup> Freckelton, above n 802, 83, 94

<sup>804</sup> Smith, above n 30, 25.

those 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 view seems to have been taken that from the point of view of the patient, there is little practical difference in a compulsory treatment regime imposed by a supervision order or 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.

8.3.41 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.

8.3.42 An additional concern raised by Smith was the lack of statistical information about the operation of the forensic mental health orders.<sup>805</sup> It is difficult to access information that allows for an assessment to be made of the period 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 would appear that many are not publicly available.<sup>806</sup> While this is understandable given the sensitive nature of the cases, this makes it difficult for legal practitioners to provide advice to their clients about the likely 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’.<sup>807</sup>

#### *Position in other jurisdictions*

8.3.43 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 in the context of this review. A brief summary of the approach 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.

<sup>805</sup> Ibid 22.

<sup>806</sup> 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.

<sup>807</sup> Smith, above n 30, 26.

**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 <sup>808</sup> South Australia
Likely to endanger	Tasmania South Australia Northern Territory Victoria <sup>809</sup> 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

8.3.44 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.<sup>810</sup> The 'serious endangerment' test encompasses 'concepts of the degree of harm and the degree of risk'.<sup>811</sup> In other words, 'it encompasses the gravity of the possible harm in the event that the risk eventuates'.<sup>812</sup> So 'a small risk of serious harm occurring may amount to serious endangerment, while a high risk of relatively trivial harm may not'.<sup>813</sup> In *State of New South Wales v XY*,<sup>814</sup> 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'.<sup>815</sup> 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'.<sup>816</sup> 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'.<sup>817</sup> 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'

<sup>808</sup> 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.

<sup>809</sup> 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.

<sup>810</sup> 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 requires 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.

<sup>811</sup> NSWLRC, above n 446,161.

<sup>812</sup> VLRC, above n 24, 377.

<sup>813</sup> NSWLRC, above n 55, 208 citing *NOM v DPP* [2012] VSCA 198 [63].

<sup>814</sup> [2014] NSWCA 466.

<sup>815</sup> Ibid [169] (Basten JA).

<sup>816</sup> Ibid [168] (Basten JA).

<sup>817</sup> 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”’.<sup>818</sup>

8.3.45 Another difference that exists between jurisdictions is the existence of statutory presumptions in favour of release or detention. For example, in New South Wales, in relation to the release of a forensic patient, the MHRT must not release a 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 is also the case under the *Crimes Act 1914* (Cth) and in Queensland.<sup>819</sup> It is also the case in Victoria during the nominal term.<sup>820</sup> 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).<sup>821</sup> In some jurisdictions there is no presumption in favour of release or detention — this is the case in Tasmania and Western Australia.<sup>822</sup>

#### *Options for reform*

8.3.46 There are several reform options that could be considered in the context of the Tasmanian forensic mental health system. These include:

- revisiting the role of dangerousness in making, varying and revoking orders;
- including statutory presumptions in relation to the detention or release of defendants;
- making changes to the model of decision-making;
- making changes to the leave system.

8.3.47 **The role of dangerousness.** As the NSWLRC has identified, there are two common features in cases following a finding at a special hearing of not guilty by reason of insanity:

- the absence of established criminal responsibility, and therefore the absence of any principled basis for punishment; and
- 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 ...<sup>823</sup>

This means that punishment should not have application 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,<sup>824</sup> 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

<sup>818</sup> NSWLRC, above n 55, citing *NOM v DPP* [2012] VSCA 198 [64].

<sup>819</sup> *Crimes Act 1914* (Cth) s 20BL(2); *Mental Health Act 2016* (Qld) ss 442(1), 473(1).

<sup>820</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 32(2).

<sup>821</sup> *Ibid* s 35(3)(i).

<sup>822</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 35; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 33(5).

<sup>823</sup> NSWLRC, above n 446, 157.

<sup>824</sup> VLRC, above n 24, 375; NSWLRC, *ibid* 157–158.

future, whilst allowing for the absolute discharge of those who do not pose a risk to the public'.<sup>825</sup> 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.

8.3.48 In Victoria, the VLRC sought feedback on whether endangerment was appropriate as the basis for the court's assessment of whether to detain or release a forensic patient. The view was expressed that 'endangerment' was an imprecise concept that allowed too much subjective interpretation.<sup>826</sup> The NSWLRC considered that endangerment provided 'very little guidance on what this phrase meant'.<sup>827</sup> Similarly, other commentators have observed that the focus on dangerousness provided little guidance as to how the court should exercise broad discretion and have argued 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'.<sup>828</sup> The NSWLRC also considered that a test based on an assessment of dangerousness was inadequate as it was inconsistent with the test for determining the detention of a patient in the civil mental health system (which required an assessment of whether it was necessary for the protection of the person or others from serious harm) and it was inconsistent with contemporary language of risk assessment.<sup>829</sup> Dangerousness was said to be inappropriate because it was 'a vague and unhelpful way of expressing the risk of a particular individual causing harm'.<sup>830</sup> Instead, its view was that the language of risk better reflected the approach taken by clinicians and health professionals in the mental health field.<sup>831</sup>

8.3.49 In response to concerns about the inadequacy of the current test, the NSWLRC recommended a 'a risk-based threshold for release [that] should require that there be no significant risk of serious harm'.<sup>832</sup> The 'significant' risk of 'serious' harm was viewed as an appropriate hurdle to protect community safety and the interests of the individual.<sup>833</sup> 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's view was that 'an "unacceptable risk" [was] an appropriate measure of the likelihood of risk the supervised person pose[s]'.<sup>834</sup> This was proposed for four reasons:

- (1) it demonstrates that 'there is some level of risk that will be acceptable and will counteract any assumption that person must prove that they pose no risk before their level of supervision can be reduced';<sup>835</sup>

<sup>825</sup> McSherry, above n 802, 221.

<sup>826</sup> VLRC, above n 24, 378.

<sup>827</sup> NSWLRC, above n 55, 208.

<sup>828</sup> Ruffles, above n 800, 178.

<sup>829</sup> NSWLRC, above n 55, 213–214.

<sup>830</sup> Ibid 214 referring to Howard and Westmore, above n 347, 476–477.

<sup>831</sup> NSWLRC, above n 55, 215.

<sup>832</sup> 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).

<sup>833</sup> NSWLRC, above n 55, 216.

<sup>834</sup> VLRC, above n 24, 378.

<sup>835</sup> Ibid.

- (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’;<sup>836</sup>
- (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’;<sup>837</sup> 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”’.<sup>838</sup>

8.3.50 The VLRC also considered that the test should specify the type of harm required to provide more clarity to decision-makers and experts applying the test. Accordingly, it recommended a test based on physical or psychological harm to a person.<sup>839</sup> In New South Wales, ‘serious harm’ was the degree of harm that was specified given that it aligned more closely with the civil mental health system.<sup>840</sup> Similarly, in Tasmania, under the civil mental health system, ‘serious harm’ forms part of the treatment criteria for the MHT in making a treatment order.<sup>841</sup>

8.3.51 Other factors that may be necessary to provide more guidance to the court in relation to making, varying and revoking orders were also considered by the VLRC. It recommended that the legislation should be amended to require consideration of an individual’s recovery and progress, in terms of treatment and personal improvement, to be taken into account in making a decision about whether to change a person’s status from a custodial supervision order to a non-custodial supervision order or release the person from a non-custodial supervision order.<sup>842</sup> This change was recommended to allow the test to be more responsive to people with intellectual disability or other cognitive impairments, and to recognise more positive aspects of a person’s recovery or progress.<sup>843</sup>

8.3.52 The TLRI seeks feedback on the wording of the Tasmania test contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and any concerns that exist about its operation either generally or in the context of particular types of individuals, such as those with cognitive impairment or those with long-term mental illness. In particular, the TLRI seeks 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 more appropriately balance the risk to the community and the interests of the individual.

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<sup>836</sup> Ibid 379.

<sup>837</sup> *Mental Health Act 2013* (Tas) s 40.

<sup>838</sup> VLRC, above n 24, 379.

<sup>839</sup> Ibid 380.

<sup>840</sup> NSWLRC, above n 55, 216.

<sup>841</sup> See [8.3.9].

<sup>842</sup> VLRC, above n 24, 390–391.

<sup>843</sup> Ibid 390.

**Questions**

65. 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?
66. 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?
67. 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 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?

8.3.53 **Need for statutory presumptions in relation to detention or release.** In the NSWLRC’s review of forensic orders, it considered whether the presumption in favour of detention should be retained when making decisions about release. This presumption applies in the context of a limiting term where prior to the expiry of the limiting term, a ‘person will remain in detention unless it can be positively established that their release ... will not present a serious danger’.<sup>844</sup> The NSWLRC recommended that this presumption should be retained because it considered that this was necessary for community safety.<sup>845</sup> In Victoria, different presumptions apply at different stages of the forensic mental health process (either in favour of detention, release or no presumption),<sup>846</sup> and these were also reviewed by the VLRC.<sup>847</sup>

8.3.54 The VLRC’s view was that the state should be required to justify continued detention given that the person had not been found to be criminally responsible.<sup>848</sup> It was the VLRC’s view that placing the onus on the supervised person had the effect of slowing down the progression of the person through the forensic mental health system and also was inconsistent with the principle of least restriction.<sup>849</sup> For this reason, the VLRC recommended that there should only be a presumption that a person’s level of supervision should not be reduced if a person applied for a variation of a custodial supervision order before the first progress review at five years. It recommended ‘a neutral assessment, with no presumption that the level of supervision be reduced, at the first progress review (at five years)’ and a presumption in favour of a reduced level of supervision for all subsequent progress reviews’.<sup>850</sup> In relation to custodial supervision orders, at the second progress review (and reviews thereafter), there was a presumption that the court would vary the custodial supervision order to a non-custodial supervision order unless satisfied on the evidence that the person would pose an unacceptable risk of causing physical or psychological harm. In relation to non-custodial supervision orders, at the second progress review (and reviews thereafter), it was recommended that the court must revoke the supervision order unless satisfied of an unacceptable risk.<sup>851</sup> The VLRC also

<sup>844</sup> NSWLRC, above n 55, 222.

<sup>845</sup> Ibid 223.

<sup>846</sup> See VLRC, above n 24, Appendix F.

<sup>847</sup> See ibid 370–372.

<sup>848</sup> Ibid 371.

<sup>849</sup> Ibid.

<sup>850</sup> Ibid. It is noted that the VLRC recommended removing the current nominal term system with a system of progress reviews, with the first progress review to be held at five years: at 367–369.

<sup>851</sup> Ibid 372 Recommendation 85.

recommended that the requirement be retained that a custodial supervision order not be varied unless a 12-month period of extended leave had been completed.<sup>852</sup>

8.3.55 In Tasmania, there is currently no presumption in favour of release or detention contained in the *Criminal Justice (Mental Impairment) Act 1999* (Tas). Instead, the court takes into account the factors that are identified in the legislation in making its decision. If the current system of indefinite detention or supervision with reviews is retained, an option for reform may be to create a presumption in favour of a reduced level of supervision in circumstances where the MHT has issued a certificate. This may be appropriate to address concerns that there are unnecessary barriers for people progressing through the system and allows greater weight to be attached to the decision-making process undertaken by the MHT. If a system of limiting terms is adopted in Tasmania, consideration could also be given to introducing statutory presumptions such as a presumption against release or reduced supervision 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.

#### Questions

68. If the current system of indefinite detention or supervision with reviews is retained in Tasmania, should the *Criminal Justice (Mental Impairment) Act 1999* (Tas) be amended to create a presumption in favour of a reduced level of supervision in circumstances where the Mental Health Tribunal has issued a certificate?
69. 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?

8.3.56 **Making changes to the current decision making model.** In Tasmania, as indicated, the MHT reviews forensic orders within 12 months of the making of the order 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. However, it does not have the power itself to discharge or vary the forensic order. This can only be done by the Supreme Court.<sup>853</sup> 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.<sup>854</sup> 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 an 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 application to the Supreme Court for the revocation of their order. Alternatively, the two-step process may be viewed as providing an additional safeguard 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 a certificate at the MHT review (and who remain on the forensic order) and subsequently have a review hearing where no certificate is issued by the MHT. In addition, as noted by the TLRI,

<sup>852</sup> Ibid 372. See [8.3.67] for a discussion of extended leave.

<sup>853</sup> See [8.2.17].

<sup>854</sup> 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].

differing approaches to the issue of certificates by the MHT and the discharge of orders by the Supreme Court have been identified.<sup>855</sup>

8.3.57 A possible approach to address concerns in relation to the difficulties of varying or discharging forensic orders would be to adopt a different approach to the judicial model of decision-making and allow for the MHT to have the power to vary, discharge or revoke orders made under the *Criminal Justice (Mental Impairment) 1999* (Tas). 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.<sup>856</sup> Extending the power of the MHT would remove unnecessary duplication by having the MHT review a matter and issue a certificate and then have the forensic patient apply to the Supreme Court. This could be supported by an avenue of appeal in event that concerns arose in relation to a decision of the MHT. This would also accord with the approach in many other jurisdictions, as recognised by the NZLC.<sup>857</sup>

8.3.58 Other models of decision-making in relation to the review and release of people subject to forensic orders have been adopted in Australian jurisdictions.<sup>858</sup> In Queensland, the Mental Health Court makes the initial order and the Mental Health Review Tribunal can confirm or revoke a forensic order. The Tribunal is also able to make orders in relation to the category of forensic order, the conditions that are in place on the order, whether a person should have community treatment and any other orders including revoking the forensic order and making a Treatment Support Order or a Treatment Authority.<sup>859</sup> The Mental Health Review Tribunal consists of three members — a legal member, a medical member and a community member. In New South Wales, the court makes the initial order but a separate tribunal (the Forensic Division of the Mental Health Review Tribunal) has the power to review the forensic order and can release a forensic patient either unconditionally or conditionally before the end of the limiting term.<sup>860</sup> The Tribunal cannot order the release of a forensic patient unless the Tribunal is constituted by at least one member, including the President or Deputy President, who is the holder or the former holder of judicial office.<sup>861</sup> The New Zealand Law Commission also recommended that the decision-maker should be a specialised independent Tribunal and that it should be chaired by a current or former judge.<sup>862</sup> In the Australian Capital Territory, the hearing proceeds in court and the court orders detention and indicates a nominated term but an administrative tribunal (the Civil and Administrative Tribunal) reviews detention under the court order and has the power to order the release of a person from detention.<sup>863</sup>

8.3.59 This matter was considered by the VLRC, and the following advantages to using a mental health court or tribunal were identified:<sup>864</sup>

- Potentially ameliorating over-cautiousness in decision making;

<sup>855</sup> See [8.3.38].

<sup>856</sup> *Mental Health Act 2013* (Tas) s 168.

<sup>857</sup> NZLC, above n 440, 80. It was noted that this is also the position in Canada.

<sup>858</sup> See VLRC, above n 26, 199.

<sup>859</sup> Queensland Government, *Mental Health Review Tribunal Information Sheet* (2018) 2; *Mental Health Act 2016* (Qld) ch 12 pt 3.

<sup>860</sup> *Mental Health (Forensic Provisions Act) 1990* (NSW) ss 44(2), 47(1)(1b).

<sup>861</sup> *Ibid* s 77(3).

<sup>862</sup> NZLC, above n 440, 89.

<sup>863</sup> *Mental Health Act 2015* (ACT) ss 180–183.

<sup>864</sup> VLRC, above n 26, 200.

- Providing informality and an inquisitorial nature to the proceedings. The advantages of an inquisitorial model were set out by Freckelton:

Inquisitorial review bodies constituted by lawyers experienced in mental health, psychiatrists and community members with lengthy experience in mental health generally enjoy a significant advantage over the courts in exploring the dangerousness of persons with mental illness and assimilating the presentation of such patients. Adversarial courts are ill-suited to such a process and risk being insensitive to psychiatric illness realities and also to being counter-therapeutic in their outcome.<sup>865</sup>

- The membership of a Tribunal (including medical and legal expertise) ensures that it has specialist expertise.
- More resource effective.

Many of these advantages were also recognised by the New Zealand Law Commission.<sup>866</sup>

8.3.60 The VLRC also identified benefits of retaining the existing judicial model of decision-making including the ‘value of the jurisprudence and the expertise that has developed within the current judicial model’.<sup>867</sup> The judicial model was said to provide a continuity of approach and was ‘a forum that is more open to public scrutiny’.<sup>868</sup> Courts were said to ‘confer a certain “degree of authority”, which may be more effective at reassuring victims that their interests are important and being meaningfully represented’.<sup>869</sup>

8.3.61 In its final report, the VLRC considered that the benefits of the judicial model of decision-making currently outweighed the benefits of an alternative model. In particular, it was considered that this was appropriate given the public dimension of the order (the order was made by a court and should go back to the court for discharge).<sup>870</sup> It was also considered to confer legitimacy and authority on the decision and provide for public confidence.<sup>871</sup> In contrast, the NZLC recommended that a tribunal (rather than the court) was the preferred decision-making body for the review and discharge or orders.<sup>872</sup>

8.3.62 If the decision-making model to discharge, revoke or vary orders is altered in Tasmania, further issues will arise in relation to the composition of the MHT for the purposes of these decisions. There is a need for rigorous and consistent decision-making. In Tasmania, hearings of the MHT are constituted by a panel of three people: a chairperson (who is a lawyer), a psychiatrist and a person with experience in mental health.<sup>873</sup> This is similar to the composition of the Mental Health Review Panel in Queensland. In contrast, in New South Wales, decisions about whether to release a forensic patient must be made by a panel which includes the President or Deputy President, who is the holder or the former holder of judicial office.

<sup>865</sup> Ibid quoting Freckelton, above n 641, 399.

<sup>866</sup> NZLC, above n 440, 84.

<sup>867</sup> VLRC, above n 26, 200.

<sup>868</sup> Ibid.

<sup>869</sup> Ibid.

<sup>870</sup> VLRC, above n 24, 347.

<sup>871</sup> Ibid.

<sup>872</sup> NZLC, above n 440, 84 Recommendation R16.

<sup>873</sup> Mental Health Tribunal, above n 756.

## Questions

70. 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)?
71. 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)?

## Transition from forensic patient status

8.3.63 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 treatment under the *Mental Health Act 2013* (Tas). This difficulty stems from what has been described as a ‘catch-22’ situation as a forensic patient is not able to demonstrate how they may behave with a lower level of supervision and so are not granted a lower level of supervision.<sup>874</sup>

8.3.64 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 Health and Human Service v Horacek*,<sup>875</sup> the 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.<sup>876</sup> 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.<sup>877</sup>

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) was not lawful.<sup>878</sup> It held that it was 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’.<sup>879</sup>

<sup>874</sup> See [8.3.35].

<sup>875</sup> [2009] TASSC 65.

<sup>876</sup> 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](http://www.dhhs.tas.gov.au/career/home/careers_archive/education/rntp/practice_settings/rntp_mental_health_nurses)>.

<sup>877</sup> *Secretary of the Department of Health and Human Service v Horacek* [2009] TASSC 65, [51].

<sup>878</sup> *Ibid* [54].

<sup>879</sup> *Ibid* [60].

8.3.65 Features of forensic mental health systems in other jurisdictions may provide possible models to address concerns that exist in relation to the Tasmanian system. These include amendments to leave provisions, the use of technology to better supervise forensic patients on leave or conditional release and/or the creation of step-up and step-down facilities.

8.3.66 **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 test 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.<sup>880</sup>

Leave in Tasmania is also a central to rehabilitation of forensic patients and operates over the longer term with the aim of supporting and facilitating the discharge of a restriction order. However, this is not explicitly recognised in the *Mental Health Act 2013* (Tas). An option for reform in Tasmania may be 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 demonstrate their progress towards rehabilitation. This reflects a graduated approach to release from detention and is closely tied to rehabilitation and reintegration.<sup>881</sup> 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).

8.3.67 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'.<sup>882</sup> The VLRC summarised the types of leave as follows:<sup>883</sup>

- 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.
- 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.
- 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.

<sup>880</sup> Boyd-Caine and Chappell, above n 745, 24–25.

<sup>881</sup> VLRC, above n 24, 350.

<sup>882</sup> VLRC, above n 26, 168.

<sup>883</sup> VLRC, above n 24, 350; VLRC, above n 26, 169.

- Extended leave – this allows a forensic patient 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.

8.3.68 **Use of technology.** In New South Wales, there are changes being introduced with a view to ensuring that people with cognitive and mental health impairments are better managed to improve community safety.<sup>884</sup> One of the changes foreshadowed is the use of GPS technology by treating teams and the Mental Health Review Tribunal ‘to better supervise forensic patients on leave or conditional release’.<sup>885</sup> This reflects a review of the operation of the Mental Health Review Tribunal that proposed the amendment of the Forensic Mental 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’.<sup>886</sup> 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.<sup>887</sup>

However, it was not recommended that permanent ankle bracelets be used.<sup>888</sup>

8.3.69 **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.

8.3.70 In South Australia, the SASAC reported that there was a recognised need for an intermediate step between secure forensic mental health detention and being released — either conditionally or unconditionally — into the community.<sup>889</sup> 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.<sup>890</sup> 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.<sup>891</sup> 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.<sup>892</sup>

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<sup>884</sup> See NSW Government (Justice), above n 411.

<sup>885</sup> Ibid.

<sup>886</sup> NSW Government (Health), *Mental Health Review Tribunal: A Review in Respect of Forensic Patients* (2017) 13 (Recommendation 20).

<sup>887</sup> Ibid 13 (Recommendation 21).

<sup>888</sup> Ibid 47.

<sup>889</sup> SASAC, above n 388, 204.

<sup>890</sup> Ibid.

<sup>891</sup> Ibid 205.

<sup>892</sup> Ibid 208.

8.3.71 The VLRC also considered that incorporating more flexibility in terms of 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.<sup>893</sup> 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’.<sup>894</sup> It could also be used where people have breached conditions of a non-custodial supervision order.<sup>895</sup>

8.3.72 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.<sup>896</sup> 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 *UNCRC*’.<sup>897</sup> In Tasmania, there are resourcing difficulties that exist 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.

8.3.73 The TLRI seeks feedback in relation to whether the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and the leave provision in the *Mental Health Act 2013* (Tas) currently provides 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, 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.

### Questions

72. Are there any difficulties with the operation of the leave provisions under the *Mental Health 2013* (Tas) that limit its utility in providing an appropriate pathway for the gradual reintegration of a forensic patient into the community?
73. Does the *Criminal Justice (Mental Impairment) Act 1999* (Tas) provide an appropriate pathway for gradual reintegration of a forensic patient into the community?
74. 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?

<sup>893</sup> VLRC, above n 24, 425.

<sup>894</sup> Ibid xxxv, 430 Recommendation 100.

<sup>895</sup> Ibid 424.

<sup>896</sup> Office of the Anti-Discrimination Commissioner, above n 723, 45.

<sup>897</sup> Ibid.

- (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?

***The appropriateness of orders under the Criminal Justice (Mental Impairment) Act 1999 (Tas) for people with intellectual disabilities***

8.3.74 The Tasmanian forensic mental health system has been criticised for failing to provide a suitable framework for people with intellectual disability.<sup>898</sup> 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 community support to prevent offending behaviours’.<sup>899</sup> In addition, a failure to provide appropriate services in the community may result in a person on a supervision order behaving ‘in a manner that places both themselves and others at substantial risk’ and being apprehended and detained at the SMHU.<sup>900</sup> Further, there are issues in relation to patients with intellectual disability being able to discharge an order given that ‘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’.<sup>901</sup> 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’.<sup>902</sup>

**Case example<sup>903</sup>**

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

<sup>898</sup> Ibid.

<sup>899</sup> Ibid.

<sup>900</sup> Ibid 46 citing Tasmanian Forensic Mental Health Tribunal, *Annual Report 2011–2012* (2012) 6.

<sup>901</sup> Ibid citing Tasmanian Forensic Mental Health Tribunal, *Annual Report 2011–2012* (2012) 6.

<sup>902</sup> Ibid.

<sup>903</sup> Ibid 46–47.

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.

8.3.75 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 *Criminal Justice (Mental Impairment) Act 1999* (Tas) 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 case, 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.<sup>904</sup>

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.

8.3.76 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 raised in South Australia where the SASAC expressed the view that there needed 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'.<sup>905</sup> The SASAC also considered measures that could be put in place in the absence of a purpose-built facility and stated that it was 'essential that supported accommodation be tailored to the needs of individuals with cognitive impairments be developed'.<sup>906</sup> In Queensland, the Butler Report highlighted the inappropriateness of forensic orders and detention in mental health units for people with an intellectual disability and pointed to the lack of appropriate facilities for such people.<sup>907</sup>

8.3.77 Similarly, in Victoria, the VLRC highlighted concerns 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:

- rarely have their supervision order revoked
- lack a clear treatment pathway
- are not subject to clinical oversight by the Senior Practitioner

<sup>904</sup> Tasmania, *Parliamentary Debates*, House of Assembly, 24 May 2016 [3.20 pm], (M Ferguson).

<sup>905</sup> SASAC, above n 388, 168–169.

<sup>906</sup> Ibid 174.

<sup>907</sup> Butler Report, above n 49, 101.

- lack secure accommodation facilities and accommodation options in the community.<sup>908</sup>

In response, the VLRC made recommendations that would clarify supervision responsibility for people with a cognitive impairment and mandate the preparation of a treatment plan.<sup>909</sup>

8.3.78 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’.<sup>910</sup> In the context of dispositional orders, these inadequacies were said to relate to the very limited nature of services for people with cognitive impairment in the community, such as secure accommodation.<sup>911</sup> The NSWLRC expressed the view 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’.<sup>912</sup> 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*.<sup>913</sup>

### Questions

75. 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?
76. 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?
77. 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?

<sup>908</sup> VLRC, above n 24, 433.

<sup>909</sup> Ibid 439 Recommendations 103, 104.

<sup>910</sup> NSWLRC, above n 55, 8.

<sup>911</sup> Ibid 9.

<sup>912</sup> Ibid 9, 10 Recommendation 1.1.

<sup>913</sup> Ibid 12 Recommendation 1.2.

## 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.<sup>914</sup>

**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

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<sup>914</sup> 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.<sup>915</sup>

**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.<sup>916</sup>

**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.<sup>917</sup>

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<sup>915</sup> NSWLRC, above n 55, 31–32 Recommendation 2.1.

<sup>916</sup> VLRC, above n 24, 79 Recommendation 15.

<sup>917</sup> ALRC, above n 110, 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; 5
  - (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. <sup>918</sup>
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. <sup>919</sup> If would have imposed sentence of imprisonment, then must nominate a limiting term. <sup>920</sup> 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). <sup>921</sup>
<i>Not guilty by reason of insanity (NGMI)</i>	Four orders: detention, conditional release, unconditional release and any other order the court thinks appropriate. <sup>922</sup>
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. <sup>923</sup> 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. <sup>924</sup>
Victoria	The court must declare the person is liable to supervision under Part 5 or order the person to be released unconditionally. <sup>925</sup> A supervision order can be a custodial supervision order or a non-custodial supervision order. <sup>926</sup>
Western Australia	
<i>Unfit</i>	Release the accused or make a custody order. <sup>927</sup>
<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. <sup>928</sup>
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). <sup>929</sup> The Mental Health Review Tribunal may

<sup>918</sup> *Crimes Act 1914* (Cth) ss 20BC(2), (5), 20BJ(1), (4).

<sup>919</sup> *Mental Health (Forensic Procedure) Act 1990* (NSW) s 23(2).

<sup>920</sup> *Ibid* s 23(1)(b).

<sup>921</sup> *Ibid* s 27.

<sup>922</sup> *Ibid* s 39.

<sup>923</sup> *Criminal Law Consolidation Act 1935* (SA) s 269O.

<sup>924</sup> *Ibid* s 269NB.

<sup>925</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 18(4), 23.

<sup>926</sup> *Ibid* s 26(2).

<sup>927</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19(4).

<sup>928</sup> *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.

<sup>929</sup> *Criminal Code* (Qld) ss 613, 647.

	make a forensic order (mental health) or forensic order (disability). <sup>930</sup> 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. <sup>931</sup> 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. <sup>932</sup> In this case, the Mental Health Court may make a forensic order (mental health) or forensic order (disability) or make a treatment support order. <sup>933</sup>
Australian Capital Territory	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. <sup>934</sup>
Northern Territory	The court must declare the person is liable to supervision under Division 5 or order the person to be released unconditionally. <sup>935</sup> A supervision order can be a custodial supervision order or a non-custodial supervision order. <sup>936</sup>

**Table A3.2: Test for making orders**

Jurisdiction	Details
Commonwealth	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. <sup>937</sup> The court can order release if it is more appropriate to do so. <sup>938</sup>
New South Wales	
<i>UNA</i>	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.
<i>NGMI</i>	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.  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 and response to and compliance with treatment before and after the offending conduct, the extent to which the person understands the need for,

<sup>930</sup> *Mental Health Act 2016* (Qld) s 461.<sup>931</sup> *Criminal Code* (Qld) s 647(2).<sup>932</sup> *Mental Health Act 2016* (Qld) s 21(1).<sup>933</sup> *Ibid* ss 21(2), 130(1).<sup>934</sup> *Crimes Act 1900* (ACT) ss 318, 319, 323, 324.<sup>935</sup> *Criminal Code Act* (NT) ss 43I, 43X.<sup>936</sup> *Ibid* s 42ZA(1).<sup>937</sup> *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).<sup>938</sup> *Crimes Act 1914* (Cth) ss 20BC(5), 20BJ(4).

	and is willing to accept ongoing treatment, the recommendations of treating and other psychiatrists and accommodation arrangements. <sup>939</sup>
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).<sup>940</sup></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.<sup>941</sup></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.<sup>942</sup></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.<sup>943</sup></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.<sup>944</sup></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.<sup>945</sup></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.<sup>946</sup></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 its commission; the accused's character, antecedents, age, health and mental conditions; and the public interest. <sup>947</sup>

<sup>939</sup> NSWLRC, above n 55, 159 referring to *R v Line* [2004] NSWSC 1148 [19]; *R v Shan Shan Xu (no 2)* [2005] NSWSC 70 [71].

<sup>940</sup> *Criminal Law Consolidation Act 1935* (SA) s 269R.

<sup>941</sup> *Ibid* s 269NI.

<sup>942</sup> *Ibid* s 269T.

<sup>943</sup> *Ibid*.

<sup>944</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 39(1).

<sup>945</sup> *Ibid* s 40(1).

<sup>946</sup> *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.

<sup>947</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 19(5).

<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. <sup>948</sup>
Queensland	<p>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.<sup>949</sup></p> <p>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.<sup>950</sup></p> <p>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.<sup>951</sup></p>
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. <sup>952</sup>
Northern Territory	<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.<sup>953</sup></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 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.<sup>954</sup></p> <p>If going to release the defendant, require expert reports.<sup>955</sup></p>

<sup>948</sup> Ibid s 22(1), (2).

<sup>949</sup> *Mental Health Act 2016* (Qld) s 133(1).

<sup>950</sup> Ibid s 133(4).

<sup>951</sup> Ibid s 138(2).

<sup>952</sup> *Crimes Act 1900* (ACT) s 308.

<sup>953</sup> *Criminal Code Act* (NT) s 43ZM.

<sup>954</sup> Ibid s 43ZN(1).

<sup>955</sup> Ibid s 43ZN(2).

**Table A3.3: Term of order**

<b>Jurisdiction</b>	<b>Details</b>
Commonwealth	Maximum term is maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged. <sup>956</sup>
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. <sup>957</sup> The limiting term is governed by sentencing principles. <sup>958</sup> This is an upper limit and the person may be released sooner.
<i>NGMI</i>	Indefinite but subject to review
Victoria	Indefinite <sup>959</sup> 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. <sup>960</sup> ) The court undertakes a major review at least three months before the end of the nominal term. <sup>961</sup>
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. <sup>962</sup>
Western Australia	Indefinite <sup>963</sup> 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. <sup>964</sup> In deciding the non-revocation period, the court must have regard to the object of this Act in relation to protecting the community. <sup>965</sup>
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. <sup>966</sup>
Northern Territory	Indefinite <sup>967</sup> 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 term of imprisonment or supervision that would have been appropriate to impose if he or she had been found guilty of the offence. <sup>968</sup>

<sup>956</sup> *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.

<sup>957</sup> *Mental Health (Forensic Procedure) Act 1990* (NSW) s 23(1)(b).

<sup>958</sup> NSWLRC, above n 55, 166.

<sup>959</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27.

<sup>960</sup> *Ibid* s 28.

<sup>961</sup> *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.

<sup>962</sup> *Criminal Law Consolidation Act 1935* (SA) s 269O(2).

<sup>963</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 24(1), 38(1).

<sup>964</sup> *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.

<sup>965</sup> *Ibid* s 137(3).

<sup>966</sup> *Crimes Act 1900* (ACT) ss 301(2), 302(2), 303.

<sup>967</sup> *Criminal Code Act* (NT) s 43ZC.

<sup>968</sup> *Ibid* ss 43ZG(2), (3).

**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. <sup>969</sup>
New South Wales	<p>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.<sup>970</sup></p> <p>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.<sup>971</sup></p>
South Australia	As with making order but test is serious endangerment.
Victoria	As with making the order. <sup>972</sup> 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. <sup>973</sup>
Western Australia	The Governor on advice from the Minister following a recommendation from the Mental Impairment Accused Review Board. <sup>974</sup> 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 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. <sup>975</sup>
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

<sup>969</sup> *Crimes Act 1914* (Cth) ss 20BE(2), 20BL(2).

<sup>970</sup> *Mental Health (Forensic Procedure) Act 1990* (NSW) s 43.

<sup>971</sup> *Ibid* s 74.

<sup>972</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 32(2), 35(3), 40(1).

<sup>973</sup> *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.

<sup>974</sup> *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 33, 34.

<sup>975</sup> *Ibid* s 33(5).

	safety of the community, including from the risk of serious harm to other persons or property. <sup>976</sup> 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. <sup>977</sup> It must also be confirmed during any non-revocation period. <sup>978</sup>
Australian Capital Territory	<p>The Civil and Administrative Tribunal can consider the detention under a court order and must consider:</p> <ul style="list-style-type: none"> <li>(a) that detention in custody is to be regarded as a last resort and ordered only in exceptional circumstances;</li> <li>(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;</li> <li>(c) whether or not, if released— <ul style="list-style-type: none"> <li>(i) the person's health or safety would be, or would be likely to be, substantially at risk; or</li> <li>(ii) the person would be likely to do serious harm to others;</li> </ul> </li> <li>(d) if the court nominated a term under the Crimes Act, part 13—the nominated term.<sup>979</sup></li> </ul> <p>May also make and review mental health orders and forensic mental health orders.</p>
Northern Territory	<p>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.<sup>980</sup></p> <p>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.<sup>981</sup></p> <p>Other factors as with making the order.</p>

<sup>976</sup> *Mental Health Act 2016* (Qld) s 442(1).

<sup>977</sup> *Ibid* s 432.

<sup>978</sup> *Ibid* ss 442(2), 452.

<sup>979</sup> *Mental Health Act 2015* (ACT) s 180.

<sup>980</sup> *Criminal Code Act* (NT) s 43ZG(6).

<sup>981</sup> *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"> <li>• Make a defence.</li> </ul>
Presser criteria (NSW, Commonwealth, Queensland)	Y	Y	Y	Y	Y	Y	Y	
ALRC recommendations								<ul style="list-style-type: none"> <li>• Understand the information relevant to the decisions that they will have to make in the course of the proceedings.</li> <li>• Retain that information to the extent necessary to make decisions in the course of the proceedings.</li> <li>• Use or weigh that information as part of the process of making decisions.</li> <li>• Communicate decisions in some way.</li> </ul>
Victoria (current)	Y	Y	Y	Y	Y	Y	Y	
VLRC recommendations <sup>982</sup>	Y	Y and ability to understand the actual significant	N	Y	Y	Y	Communicate meaningful instructions	<ul style="list-style-type: none"> <li>• Decide whether to give evidence.</li> <li>• Able to give evidence.</li> </ul>

<sup>982</sup> 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.

	<b>Understand the nature of the charges</b>	<b>Enter a plea</b>	<b>Right to challenge juror</b>	<b>Understand the nature of the trial</b>	<b>Follow course of trial</b>	<b>Understand substantial effect of the evidence</b>	<b>Give instructions to legal practitioner</b>	<b>Other</b>
		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"> <li>• 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.</li> <li>• Provide a version of facts to the court.</li> </ul>
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"> <li>• Able to defend the charge.</li> </ul>
WA AG's review	Y	Y	Y	Y	Y	Y	Y	<ul style="list-style-type: none"> <li>• Decide whether to give evidence.</li> <li>• Ability to give evidence.</li> </ul>
Northern Territory	Y	Y	Y	Y	Y	Y	Y	
Australian Capital Territory	Y	Y	Y	Y	Y	Y	Y	

	<b>Understand the nature of the charges</b>	<b>Enter a plea</b>	<b>Right to challenge juror</b>	<b>Understand the nature of the trial</b>	<b>Follow course of trial</b>	<b>Understand substantial effect of the evidence</b>	<b>Give instructions to legal practitioner</b>	<b>Other</b>
Pritchard/John criteria (England and Wales, Northern Ireland)	Y	Y	Y		Y		Y	<ul style="list-style-type: none"> <li>• Give evidence in own defence.</li> </ul>
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"> <li>• Make a decision about whether to give evidence.</li> <li>• To give evidence.</li> <li>• Make other decisions that might need to be made by the D in connection with the trial.</li> <li>• Any other ability that appears relevant.</li> </ul>
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"> <li>• Give evidence in own defence.</li> <li>• Understand the information relevant to the decisions that they will have to make in the course of the proceedings.</li> <li>• Retain that information.</li> <li>• Use or weigh that information as part of the process of making decisions.</li> <li>• Communicate decisions.</li> </ul>
Scotland	Y	Y and effect of plea		Y and its purpose	Y	Y	Y	<ul style="list-style-type: none"> <li>• Any other factor that the court considers relevant.</li> </ul>

	<b>Understand the nature of the charges</b>	<b>Enter a plea</b>	<b>Right to challenge juror</b>	<b>Understand the nature of the trial</b>	<b>Follow course of trial</b>	<b>Understand substantial effect of the evidence</b>	<b>Give instructions to legal practitioner</b>	<b>Other</b>
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"> <li>• Make a defence.</li> </ul>
Canada				Y and possible consequences.			Y	<ul style="list-style-type: none"> <li>• Conduct a defence.</li> </ul>

## 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"> <li>• proof beyond a reasonable doubt</li> <li>• may raise defences</li> <li>• is entitled to give evidence</li> <li>• to have legal representation</li> </ul>	<ul style="list-style-type: none"> <li>• Not guilty of the offence</li> <li>• Not guilty on the grounds of mental illness</li> <li>• On the limited evidence available, the accused committed the offence charged or an alternative offence (finding of qualified guilt)</li> </ul>	<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"> <li>• Not guilty</li> <li>• Satisfied beyond reasonable doubt that the accused engaged in the conduct required for the offence</li> </ul>	<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"> <li>• Proof beyond reasonable doubt</li> <li>• Rules of evidence apply</li> <li>• May give evidence</li> <li>• Raise any defence that could raise at trial</li> </ul>	<ul style="list-style-type: none"> <li>• Not guilty</li> <li>• Not guilty because of mental impairment</li> <li>• Committed the offence (qualified finding of guilt)</li> </ul>	<i>Criminal Code (NT)</i> ss 43V, 43X, 43XA <sup>983</sup>
Victoria	Jury	Conducted as nearly as possible as if it were an ordinary criminal proceeding: <ul style="list-style-type: none"> <li>• Proof beyond reasonable doubt</li> <li>• Rules of evidence apply</li> <li>• May give evidence</li> </ul> Raise any defence that could raise at trial	<ul style="list-style-type: none"> <li>• Not guilty</li> <li>• Not guilty because of mental impairment</li> <li>• Committed the offence (qualified finding of guilt)</li> </ul>	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)</i> ss 15, 16, 17

<sup>983</sup> The 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"> <li>Not guilty</li> <li>Objective elements are established</li> </ul>	<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"> <li>Not guilty</li> <li>Finding that D did the act or made the omission</li> </ul>	<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"> <li>Dismiss charges</li> <li>Record finding that satisfied of D's involvement in the offence</li> </ul>	<i>Criminal Procedure (Mentally Impaired Persons) Act 2003 (NZ)</i> s 9

## **Appendix 6: *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.

## Appendix 7: Law reform recommendations

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
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)	Provide a definition of mental impairment to encompass mental illness, intellectual disability, acquired brain injuries and severe personality disorders (Recommendation 33)	No discussion	No discussion	No discussion	No discussion
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>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> <p>(i) anxiety disorders</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 within second limb as may also know that killing is wrong but <i>Porter</i> approach enable proof that the person did not</p>	Supported introduction of volitional component	No discussion

	<b>Definition of mental impairment</b>	<b>Nature and quality</b>	<b>Wrong</b>	<b>Unable to control conduct</b>	<b>Delusions</b>
	<p>(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.</p> <p>(2) Cognitive impairment: (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. (b) Such cognitive impairment may arise from, but is not limited to, the following: (i) intellectual disability</p>		<p>the act to be wrong by inference from an ability to reason with sense and composure about whether the conduct was wrong.</p>		

	<b>Definition of mental impairment</b>	<b>Nature and quality</b>	<b>Wrong</b>	<b>Unable to control conduct</b>	<b>Delusions</b>
	<ul style="list-style-type: none"> <li>(ii) borderline intellectual functioning</li> <li>(iii) dementias</li> <li>(iv) acquired brain injury</li> <li>(v) drug or alcohol related brain damage</li> <li>(vi) autism spectrum disorders.</li> </ul> <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 greater flexibility to deal with	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)) but amend the <i>Criminal</i>

	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>conditions resulting from a healthy mind's reaction to <i>internal</i> extraordinary stimuli (such as hyperglycaemia, arteriosclerosis and epilepsy). 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>				<i>Procedure Act 2004</i> (WA) to make it clear that gives rise to qualified acquittal (not guilty by reason of mental impairment).
<p>Sentencing Advisory Council (SA)</p> <p><i>Mental Impairment and the Law: A Report on the Operation of Part 8A of the Criminal Law Consolidation</i></p>	<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 soundness of mind test and</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>Q should be not simply whether D knew that the</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 inability to control conduct is not sufficient.</p>	

	<b>Definition of mental impairment</b>	<b>Nature and quality</b>	<b>Wrong</b>	<b>Unable to control conduct</b>	<b>Delusions</b>
<i>Act 1935 (SA)</i> (2014)	confusion in relation to personality disorders. Recommended no change to specifically include or exclude any medical conditions, including hypoglycemia or hyperglycemia and personality disorders. Recommended retention of the current law in relation to intoxication and insanity.	concerned about broad range of mental functions that may be covered. Little difficulty with current test. Unlikely make any substantive different in practice.	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. Adopt Model Criminal Code approach but delete words ‘with a moderate degree of sense and composure’.		
Scottish Law Commission <i>Report on Insanity and Diminished Responsibility</i> (2004)	Brief definition should be introduced — define mental disorder to mean: (a) mental illness, (b) personality disorder or (c) learning disability. Should exclude psychopathic personality disorders Should be renamed.	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. 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 doesn’t have a true or complete knowledge of her actions. A person who	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.	Opposed introduction of volitional component	No discussion

	Definition of mental impairment	Nature and quality	Wrong	Unable to control conduct	Delusions
		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 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>McNaghten</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	7 months (48.1% custodial) (single count)
	9 years 7 days and continuing	
	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