Law Reform Commission
Attorney General & Justice

Discussion Paper

People with cognitive and mental health impairments in the criminal justice system

1. The test for fitness to stand trial

2. Not guilty by reason of mental illness

25 September 2012

TIME:
10am – 12.30pm

VENUE:
Level 14, 10 Spring St, Sydney

1. Fitness to stand trial

1. Background: the test for fitness to stand trial

At common law, a person is fit to plead if he or she is sufficiently able to comprehend the nature of the trial so as to make a proper defence to the charge.[1] In *R v Presser*, Justice Smith developed the common law test by identifying minimum standards that the accused must meet before he or she was considered to be mentally fit to stand trial within the meaning of the then *Crimes Act 1926* (Vic).[2] The Presser standards have been approved by the High Court in *Ngatayi v R*[3] and *Kesavarajah v R.*[4] The *Presser* standards have been substantially incorporated into statute in all Australian jurisdictions except NSW.[5]

The *Presser* standards require that the accused be able to:

1) understand the offence with which he or she is charged;
2) plead to the charge;
3) exercise the right to challenge jurors;

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1 *R v Pritchard* (1836) 7 C & P 303, 173 ER 135; *Ngatayi v R* (1980) 147 CLR 1, 6-7; *Kesavarajah v R* (1994) 181 CLR 230, 245.

2 *R v Presser* [1958] VR 545, 48.

3 (1980) 147 CLR 1, 8.

4 (1994) 181 CLR 230, 246.

5 *Crimes Act 1900* (ACT) s 311; *Criminal Code Act 1983* (NT) s 43J; *Criminal Law Consolidation Act 1935* (SA) s 269H; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 9; *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 8.

4) understand generally the nature of the proceeding as an inquiry into whether he or she committed the offences charged;
5) follow the course of proceedings so as to understand what is going on in a general sense;
6) understand the substantial effect of any evidence that may be given against him or her;
7) make a defence or answer to the charge;
8) where the accused is represented, give necessary instructions to counsel regarding the defence, and provide his or her version of the facts to counsel and, if necessary, the court; and
9) have sufficient mental capacity to decide what defence he or she will rely on and to make his defence and his version of the facts known to counsel and the court.[6]

The High Court has confirmed that the rules regarding the capacity of the defendant are based on the right to a fair trial - they are intended to ensure that a trial is not held when the defendant's abilities are so limited that the trial would be unfair or unjust.[7]

A person found unfit for trial becomes a forensic patient and is referred to the Mental Health Review Tribunal. Unless the person becomes fit, or the Director of Public Prosecutions decides that no further proceedings will be taken, a special hearing is conducted by the court. A special hearing resembles a normal trial but the available verdicts are not guilty, not guilty on the grounds of mental illness, and "on the limited evidence available, the accused person committed the offence charged" (or an alternative offence). A term of detention may be imposed, which may be served in a mental health facility or a prison.[8]

2. Submissions

Our Consultation Paper 6 asked if the *Presser* standards remain relevant and sufficient criteria for determining a defendant's fitness for trial. Responses included the following:

- The *Presser* standards appropriately identify the degree of understanding needed to participate in a trial, and embody a flexible approach.
- The *Presser* standards should be replaced with a shorter, simpler list, and it is too easy for an accused to be found unfit.
- The *Presser* standards are insufficiently robust and the standard for fitness should be raised to protect vulnerable defendants .
- The criteria are unclear and it is not clear what degree of competence is necessary.
- Two submissions thought that the ability to make rational decisions should be included in the standard, while others did not.

6 *R v Presser* [1958] VR 45, 48.

7 *R v Presser* [1958] VR 45, 48; *Eastman v R* [2000] HCA 29; (2003) CLR 1 [64].

8 *Mental Health (Forensic Provisions) Act* (NSW) ss 14-24.

- Several submissions agreed that the ability to participate in a trial should be identified as the principle underlying fitness, while others did not.

- Some thought that the likelihood of deterioration under the stress of trial should be explicitly stated in the criteria, while others thought this matter is satisfactorily addressed by the common law.

3. Other concerns regarding *Presser*

There is published literature suggesting that a test focussed on understanding, like the *Presser* test, can disadvantage defendants with delusions and other psychotic processes. They may have the intellectual capacity to understand the proceedings but their thought disorders may prevent them from making decisions in their best interests.[9] Their delusions may also prevent them from forming trusting relationships with legal representatives.

4. The Law Reform Commission's approach

There was no unanimity of approach in stakeholder's submissions, but we have sought to respond to concerns raised as far as possible. We consider that while the *Presser* approach is fundamentally sound, codifying the test in statute would create an opportunity to

- remove unnecessary elements: (2), (3), (7)
- clarify elements that are unclear: (8), (9)
- clarify what type of decision-making capacity is needed to participate in a fair trial, and
- incorporate matters that have been acknowledged by courts, post-*Presser*, as relevant to the decision on fitness.

We present two options for discussion.

5. Fitness test: Option 1

This test, like the *Presser* test, focusses on the specific capacities that are necessary to participate in a fair trial. It would function in the context of the common law tradition which has as its underlying theme effective participation[10] and the right to a fair trial. It is consistent, in this respect, with the approach taken in most other Australian jurisdictions.

This option includes a requirement that the accused be able to **understand the information relevant to the decisions** that he or she will have to make before and during the trial, and to **use that information** as part of a decision making process. This approach is intended to avoid the uncertainty that submissions identified in the

9 WJ Brookbanks & RD Mackay "Decisional competence and 'best interests' : Establishing the Threshold for Fitness to Stand Trial" (2010) 12 *Otago Law Review* 265, 282.

10 *Eastman v R* (2000) 203 CLR 1 [399]; *Kesavarajah v R* (1994) 181 CLR 230, 247, *R v Mailes* (2001) 53 NSWLR 251 [215].

"rational decision-making" approach. It is also intended to address the situation where a defendant is unaware of his or her own mental illness.

Our intention is not to raise (or lower) the standard required to be fit for trial. We consider it in the best interests of the defendant to have a normal trial if possible. We have therefore proposed that the court should consider whether modifications to the trial process can be made to enable the defendant to participate. These might include a shorter sitting day, the use of a support person, or a requirement for the use of simple language in examination and cross-examination of the person.

It is already the practice of the courts to take into account the likely complexity of the trial[11] and whether the defendant has legal representation.[12] We propose that these matters should be considerations in a statutory test.

The test

(1) A person is unfit to stand trial if it is established on the balance of probabilities that the person is unable to

(a) understand the offence with which the person is charged

(b) understand generally the nature of the proceeding as an inquiry into whether the defendant committed the offence charged

(c) follow the course of proceedings and to understand what is going on in a general sense

(d) to understand the substantial effect of any evidence that may be given against the defendant

(e) to understand the information relevant to the decisions that he or she will have to make before and during the trial, and to use that information as part of a decision making process

(f) to communicate effectively with legal representatives, or

(g) to provide his or her version of the facts to the court, if necessary.

2) In determining whether a person is unfit for trial, the court must consider

(a) whether modifications to the trial process can be made to facilitate the person's effective participation

(b) the likely length and complexity of the trial

(c) whether the person is legally represented

(d) any other relevant matter.

11 *R v Aliwijaya* [2012] NSWSC 503 [16].

12 *R v Walker* [2008] NSWSC 462 [16].

Questions

1) Do you agree with the approach that it is in the best interests of the defendant to have a normal trial if possible?
2) Should the requirement in para (2)(g), that the defendant be able to provide his or her version of events to the court, if necessary, be included in the test?

6. Fitness test: Option 2

At common law, the underlying issue concerning fitness is whether the defendant can be afforded a fair trial. Option 2 brings this issue to the centre of the test of unfitness. The *Presser* criteria have been simplified and are relevant considerations. Decisions as to the defendant's capacity necessarily involve questions of degree. Under this option, the question of whether the defendant has sufficient capacity is answered by considering the over-arching test of whether the defendant can be afforded a fair trial.

The common law does not specify what kind of mental states may render a person unfit. Option 2 specifies that the qualifying states are mental health or cognitive impairments. In Report 135, we proposed a definition of this term which includes a wide range of impairments.

The capacity to make rational decisions is included, in order to take into account the defendant who can understand and communicate effectively, but may not be able to make rational decisions (such as raising an available defence, or declining to give evidence when advised to do so).

The test:

1) A defendant is unfit for trial if the defendant cannot be afforded a fair trial by reason of mental health impairment or cognitive impairment or both.

2) In deciding whether a defendant cannot be afforded a fair trial, the court must have regard to all relevant considerations including the defendant's capacity to

    (a) understand the charge, the trial process and the evidence,

    (b) understand advice given by the defendant's legal representatives concerning the trial,

    (c) communicate effectively with defendant's legal representatives concerning the trial,

    (d) make rational decisions in relation to the trial, and

    (e) give evidence effectively, if necessary.

Questions

1) Should the test continue to focus on the specific capacities necessary to participate in a trial? Or should these matters become considerations, with the ultimate question being whether the defendant can be afforded a fair trial?
2) Should the test specify the type of mental states that can result in a finding of unfitness? Why / Why not?
3) Which test do you prefer? Why?

2. Not guilty by reason of mental illness

7. Background: the test for NGMI

The law relating to the defence of not guilty by reason of mental illness (NGMI) is contained in Part 4 of the *Mental Health (Forensic Provisions) Act 1990*. The preconditions for the special verdict of NGMI are contained in 38 MHFPA, which provides:

> If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.

The phrase 'so as not to be responsible, according to law' picks up the common law on NGMI, the basis of which is the so-called *M'Naghten* rules which define the defence of mental illness in the following way:

> The defendant was laboring under a defect of reason caused by disease of the mind and, because of the disease the defendant either
>
> did not know the nature and quality of the act, or
>
> did not know that the act was wrong

If a person is found to be 'mentally ill so as not to be responsible, according to law, for his or her action' a special verdict of not guilty by reason of mental illness (NGMI) must be returned.[13] The most frequent consequence of a finding of NGMI is that the defendant becomes a forensic patient.[14] The court is not to order the release of such a person from custody unless it is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be

13. *Mental Health (Forensic Provisions) Act* (NSW) s 38.
14. *Mental Health (Forensic Provisions) Act* (NSW) s 39, s 42.

seriously endangered by the person's release.[15] The Mental Health Review Tribunal monitors forensic patients.

8. Submissions

In CP 6 we asked stakeholders if they perceived any problems with the M'Naghten rules, and if the current test should be changed. We received seven submissions.

There was strong criticism of the terms 'defect of reason caused by disease of the mind' and it was submitted that these terms should be replaced with contemporary definitions of mental illness and cognitive impairment.

There was support for the other elements of the M'Naghten rules. It was submitted that the current rules work well and do not require change; that no basis for change has been established; that the rules should be retained and imported into legislation.

In CP 6 we set out a number of alternative models that provide for the situations in which a defendant may be exculpated on the basis of cognitive or mental health impairment. None of these models were supported by stakeholders as the basis for reform of the law in NSW.

9. Options for reform

Below we represent two options for reform

Option 1 : The M'Naghten model

In line with the approach recommended by stakeholders, one option for reform is to make legislative provision for the M'Naghten rules in a way that provides definitions of cognitive and mental health impairment that incorporate contemporary understanding of cognitive and mental health impairment. We have developed a proposal to this effect, which we will refer to below as the McNaghten Model.

Option 2 : The Allnutt O'Driscoll model

This model was devised by Dr Stephen Allnutt, forensic psychiatrist, Clinical Director of the NSW Community Forensic Mental Health Services (NSW), and by Mr Colman O'Driscoll, currently Chief of Staff, Minister for Mental Health (NSW) and previously Service Director, Statewide Forensic Mental Health, Justice Health (NSW), with a contribution to formulation by the Hon Harold Sperling, Part-time Commissioner, NSW Law Reform Commission.

15. *Mental Health (Forensic Provisions) Act* (NSW) s 39.

10. The M'Naghten Model

There are a number of factors that weigh in support of this model

- Submissions support retention of a reformed *M'Naghten* test.
- Consistency:
    - Most States and Territories and the Commonwealth have chosen this route, and have a version of the *M'Naghten* rules. Harmonisation of criminal laws in Australia has been promoted for some time.
    - For NSW practitioners (of both law and psychiatry) consistency between NSW and Cth legislation is important
    - Cognate jurisdictions (e.g. NZ, UK, Canada, US federal code) have a version of the *M'Naghten* rules.
    - The Statute of the International Criminal Court uses a version of the *M'Naghten* test.
    - The test in NSW for substantial impairment employs key elements of the M'Naghten test.
- Longevity: the rules have stood the test of time. Developed in 1843, there have been many opportunities for NSW to move to a different test since that time, and none have been taken. The New Zealand Law Reform Commission examined the defence in 2010 and recommended no change from a *M'Naghten* based definition.
- There is a great deal of case law, cited at length in submissions by stakeholders, which we would lose if we changed the formulation of the test radically.

In the proposed model, set out on the next page, we first define the test for NGMI, in line with the Commonwealth Criminal Code. We also define cognitive and mental health impairment in line with our recommendations in Report 135.

A person is not criminally responsible for an offence if, when carrying out the conduct required for the offence the person was suffering from a mental health impairment or a cognitive impairment that had the effect that the person

(a) Did not know the nature and quality of the conduct; or

(b) Did not know that the act 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; or

(c) The person was unable to control the conduct

In this section, mental health impairment and cognitive impairment have the following meaning

(2) (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) severe personality disorders

(v) substance induced mental disorders.

(c) "Substance induced mental disorders" should include ongoing mental health impairments such as drug-induced psychoses, but exclude substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances.

(3) (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

(ii) borderline intellectual functioning

(iii) dementias

(iv) acquired brain injury

(v) drug or alcohol related brain damage

(vi) autism spectrum disorders.

Note 1: to qualify, personality disorders must be severe and affect functioning in daily life to a material extent.

Note 2: substance abuse disorders are defined to exclude those who are temporarily affected by substances or are addicted to substances.

Note 3: as an alternative to para (3)(a) above, and in line with the definition of substantial impairment in s 23A *Crimes Act* 1900, this provision could read "did not have the capacity to understand events"

Note 4: re (3)(c), inability to control conduct: this provision has attracted criticism on the basis that it is too difficult to tell if the defendant could not, or did not control his or her conduct; that it can open the floodgates especially to personality disordered defendants. However, only Victoria and NSW do not presently include this provision.

Please turn to the next page for the Allnutt O'Driscoll model.

11. The Allnutt O'Driscoll model

(1) If it is found that –

(a) the defendant did the act or made the omission which is an element of the offence charged or of an alternative offence

(b) at the time of doing the act or making the omission the defendant had a qualifying mental state

(c) the qualifying mental state caused substantial impairment to the defendant's capacity to make rational decisions, and

(d) such impairment resulted in the defendant doing the act or making the omission

the court must not find the defendant guilty of the offence, and must find that the defendant did the act or made the omission but is not responsible in law

(i) by reason of cognitive impairment, or

(ii) by reason of mental health impairment

(iii) by reason of cognitive and mental health impairment

as best accords with the case.

(2) The burden of proving the matters in paragraphs (b), (c) and (d) above is on the defendant and the standard of proof is proof on a balance of probabilities.

(3) For the purposes of this section and subject to subsection (4), the following and only the following are qualifying mental states: delusions, hallucinations, abnormal perception, severely disordered thought, severe depression or other severe disturbance of mood, severe cognitive impairment, and inability to control conduct.

(4) A mental state is not a qualifying mental state for the purposes of this section unless it is either continuous or prone to recur. Intoxication and transitory emotions such as anger, jealousy and hatred are not, of themselves, qualifying mental states.

(5) Without limiting the generality of the expression, "impairment of the defendant's capacity to make rational decisions", the phrase includes a false perception of reality, an irrational justification for action and an inability to perceive available options.

Points in favour of the A-O'D model

- The function of the defence of mental illness is to identify cases where the defendant ought not be held criminally responsible for the act because of the person's mental state at the time and should, accordingly, be detained as humanely as possible if dangerous rather than being punished for the act according to law. It is suggested that this model identifies such cases in a way which validly reflects why people deserving such exculpation do what they do in circumstances where a normal person would not.

- Under any model for a defence of mental illness, courts are dependent on the expert evidence of psychiatrists. It is suggested that the defence in this model poses issues for expert evidence which are within a psychiatrist's expertise and with which psychiatrists are familiar in their professional practice.

- The model includes a causal nexus between a qualifying mental state and the act or omission (via substantial impairment of the capacity to make rational decisions). A causal nexus with the act has been seen as problematic in some quarters. A causal nexus is, however, an everyday issue in a large variety of cases dealt with by the courts daily, including as an element in some crimes such as murder. It rarely causes difficulty.

- Inability to control conduct has been opposed as a factor in a defence of mental illness on the ground that it is difficult to distinguish between not being able to control conduct and simply not doing so. But as Lord Denning observed, when supporting the introduction of such an element in the defence, "The Judge will tell [the jury] that there is all the difference in the world between an irresistible impulse and an impulse which is not resisted: and the jury will say which it is." (From evidence before the Royal Commission on Capital Punishment 1949-1953 (UK), cited in the Report of the Commission at p 95) The distinction has only to be stated for the issue to be clear. And there would be evidence by psychiatrists who answer to the distinction in other circumstances, such as when assessing the dangerousness of people who have been detained because of mental illness.

- It is suggested that a lack of empathy for the victim, arising from psychopathy or any other disorder, should not be exculpatory. Accordingly, it may be necessary to make special provision excluding cases where a lack of empathy has been a predominant cause of the conduct.

Question

1) Which of the two tests proposed above do you prefer? Why?