COUNTY COURT OF VICTORIA

MENTAL ILLNESS & THE CRIMINAL LAW

This fact sheet focuses how mental illness is dealt with in the criminal law and the procedure in cases before the County Court. Mental illness is a psychological illness that anyone in our community can develop.

At least 45% of people will experience a **mental illness** at some point during their lives. Mental illness can include anxiety or mood disorders, substance addictions, depression, eating disorders, psychotic disorders like schizophrenia and personality disorders.[1] Mental illness can be a relevant factor in the application of the criminal law in a number of different ways; however, it is a myth that people who have mental illness are more likely to break the criminal law than people who do not. There is no evidence from research that people who have a mental illness are more likely to be violent than anyone else in the community. Research does show, however, that people who have a mental illness are more likely to be a victim of homicide and other violent crime and are also at higher risk of suicide and self-harm.[2]

If an accused person has a mental illness, this may be relevant in a number of areas of the criminal law and procedure. This fact sheet focuses on two areas dealt with by the County Court in the trial process and determination of an accused's person's criminal responsibility for an offence. The first area focuses on whether an accused is mentally well enough at the time of the trial to go through the process – **unfitness to stand trial**. The second area focuses on whether an accused who had a mental impairment at the time of the alleged offence should be held criminally responsible for his or her offending behaviour – the **defence of mental impairment**.

UNFITNESS TO STAND TRIAL

Fitness to stand trial refers to the law and procedure around whether an accused is mentally well enough, or **mentally fit** to go through the trial process. The law is based on the fairness principle and the basic right of an accused to have a fair hearing when charged with a criminal offence.

The current Victorian laws have developed over a long time in the common law in English and then Australian cases. The modern laws on unfitness to stand trial date back to medieval court procedure in the fourteenth century.

An accused may be unfit to stand trial if he or she has disordered or impaired mental functioning that makes them unable to participate fairly in the trial.

An accused's mental functioning may be impaired or disordered due to a mental illness or a cognitive impairment, like an intellectual disability or an acquired brain injury. Fitness to stand trial focuses on the accused person's mental state at the time of the trial in the County Court, not at the time of the alleged offending.

Victorian law on unfitness to stand trial is in the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic). A person may be unfit to stand trial if he or she can't do one of the following:

- understand the nature of the charge;
- enter a plea to the charge;
- participate in the jury selection and challenge jurors or the jury;
- understand what the trial is and follow the trial process;
- understand the evidence that is presented in the trial; and
- instruct their lawyer, that is tell them what he or she wants to do in the case.

All accused people are presumed to be fit to stand trial. If the question is raised, the County Court can investigate the matter. This is in the form of a hearing to determine whether the person is unfit to stand trial. This hearing must be held before a County Court judge and a jury, and it is a jury which decides whether an accused is unfit to stand trial.

If an accused is found fit to stand trial, the trial is commenced as usual to determine the accused's criminal responsibility.

If an accused is found unfit to stand trial, the accused will not go through a usual criminal trial to determine criminal responsibility. Instead the accused will have a different kind of hearing, called a **special hearing**. This is a criminal trial with a modified procedure to take into account that a person who is not fit to stand trial cannot fully participate in the trial process. This ensures a fair trial and maintains the integrity of the criminal trial process. A special hearing is held before a different jury which must determine whether accused committed the offence. If the accused is found to have committed the offence, this is a modified finding of guilt to reflect that the accused has not been able to go through the proper trial process.

The Victorian Law Reform Commission has examined these laws. One of the issues it considered was whether juries should decide whether an accused is unfit to stand trial, or whether this decision could be made by a judge alone. You can read more about this in a short article published by the Commission in 2013. The two cases below illustrate some examples of cases where an accused has been found unfit to stand trial: *DPP v Pappagiannis* [2016] VCC 845 (20 June 2016) and *DPP v Drake (a pseudonym)*[3] [2016] VCC 1858 (6 December 2016).

COUNTY COURT EXAMPLES
UNFITNESS TO STAND TRIAL

DPP v Pappagiannis: the accused was charged with four charges of assault. He had an intellectual disability and a question as to his fitness to stand trial was raised. A hearing was conducted in front of a jury to decide on the accused's fitness. The jury heard evidence from a psychiatrist who said that the accused was unable to descrive any of the court processes for entering a plea to the charges and it was her opinion that he was unfit to be tried. The jury found that the accused was unfit to be tried. A special hearing was held before another jury to determine whether the accused committed the four assaults, and the accused was found to have committed the four charges.

DPP v Drake: this case incolved the review of the supervision of an accused who had been found unfit to stand trial. The accused was charged with 4 driving offences that 'consisted of erratic driving at high speed, overtakin unsafely, forcing other vehicles off the road and eventually colliding with [the victim], causing him serious injury.' The accused suffered from a mild level of intellectual disability present since birth, as well as long-standing psychiatric problems which had been present since at least 1997. The accused had periods of wellness, but at the time of the offending in 2005 and the charges, he had relapsed into his long-stand psychotic disorder of a 'reactive psychosis in the context of depression arising from a number of life changes.' A jury found the accused unfit to stand trial and a special hearing was held before a different jury to consider his criminal responsibility for the offences. That jury found that he was not guilty of the offences because of the 'mental impairment.' This finding is discussed below in the next section.

THE DEFENCE OF MENTAL IMPAIRMENT

The defence of mental impairment is based on a legal principle that has been in existence for almost two thousand years. It has developed through common law by English and Australian cases. This principle is that a person should not be held criminally responsible and punished for an offence if they are not morally blameworthy for the behaviour because they had a **mental impairment** that seriously affected their mental capacity.

In Victoria, the defence was previously called the **insanity** defence under the common law. Now the defence is called the defence of mental impairment and is in the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic).

Criminal responsibility requires a person to have physically committed the act and also to have a guilty mind accompanying the act. The physical act is referred to in the law as the **actus reus** and the guilty mind is referred to as the **mens rea** (see Fact Sheet 3).

For example, for a person to be found guilty of the offence of murder, it must be proven that the person:

- engaged in conduct that caused the death of another person, such as stabbing (the physical element, or actus reus), and
- intended to kill that person or cause serious injury or knew that his or her conduct was likely to cause the death of that person (the mental element, or mens rea).

A key aspect of the mental element or mens rea of a crime is whether an accused person is responsible for their mental state. In this context, this means whether he or she had the mental capacity to understand the nature of his or her thoughts and actions and whether the accused knew whether his or her actions were morally wrong. If a person has a mental impairment that prevents them being responsible for these aspects of their mental state, they may be found not guilty because of mental impairment.

There are two stages to establishing the defence.

1. At the time of committing the physical act of the offence, the person was suffering from a mental impairment.
2. The mental impairment had affected the person, either that
   a. the person did not know the nature and quality of the conduct, or
   b. the person did not know that the conduct was wrong.

The phrase mental impairment is not defined in statute law but has a special meaning under the common law that has been developed over many years of English and Australian case law. It means a **disease of the mind**. This is a legal construct, not a medical term and there is a lot of legal debate over which mental conditions are included in a disease of the mind. The following, a legal definition, is that it is a defect in reasoning that is caused by:

> *an underlying pathological infirmity of the 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.*[4]

This means that the mental condition generally needs to be something that has developed naturally, rather than being a result of something that affected the accused's brain, for example taking a drug or suffering a head injury. The mental condition does not have to be permanent, and may be a temporary condition, from which the accused may recover.

This law exists because of the principle of fairness – that is, that a person should not be punished if they are not criminally responsible for their actions. This law also exists to recognise that a person who is suffering from such a mental impairment that they aren't responsible for their criminal behaviour, may pose an ongoing risk to the community and themselves.

If the defence of mental impairment is raised at the time of the trial, the accused bears the burden of proof and must present evidence in support of the defence. The standard of proof is on the **balance of probabilities**, meaning more probable than not, which is a lower standard than **beyond reasonable doubt** which applies to the prosecution case.

If both the prosecution and defence agree that the evidence to be presented at the trial establishes the defence of mental impairment, the County Court judge can decide that a jury is not needed. In these cases, the judge alone can hear the evidence and make a decision. This is called a consent mental impairment hearing.

If an accused is found not guilty because of mental impairment, he or she is not sentenced under the usual criminal procedure (see Fact Sheet 5). Instead, he or she can be placed under a different supervision regime. Under this regime, the judge can impose an indefinite order for supervision either in a special secure mental health facility or under the supervision of specialised community mental health services. Unlike most sentences, these orders do not have an end point; they are indefinite, meaning they can be in place for the rest of the person's life. If the judge is satisfied that the accused poses a low risk to the community or to himself or herself due to their mental condition and can receive adequate mental health treatment in the community, the judge can order that the person be released into the community without any order or conditions.

The Victorian Law Reform Commission has examined these laws. One of the issues it considered was whether mental impairment should be defined in Victorian statute law the (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic), or whether it should keep the current definition of a disease of the mind in common law. You can read more about this in a short **article** published by the Commission in 2013. The two cases below illustrate some examples of cases dealing with the defence of mental impairment: ***DPP v Pidgeon (a pseudonym)*** [2016] VCC 1180 (2 August 2016) and ***DPP v Warren*** [2013] VCC 2144 (19 December 2013).

COUNTY COURT EXAMPLES
MENTAL IMPAIRMENT DEFENCE

DPP v Pidgeon: the accused was charged with arson. There was evidence that the accused was suffering from schizophrenia at the time of the offence, and the prosecution and defence agreed that it satisfied the legal test for the defence of mental impairment. The case was heard in the County Court and the judge decided that because of the agreement between the parties, a jury was not needed to make the decision. Therefore, a consent mental impairment hearing was held and the judge heard the evidence and decided that the accused was not guilty because of mental impairment. The judge decided there was a low risk that he would endanger himself, or other people generally because of his mental illness. The judge was satisfied the treatment he was receiving in the community was adequate and appropriate to protect people. Therefore, the judge ordered he be unconditionally released.

DPP v Warren: the accused was charged with recklessly causing serious injury. The accused was suffering from paranoid schizophrenia, which is a serious mental illness. The circumstances of the offence were that the accused was observed in the street to be agitated and aggressive. He walked up behind a stranger in the street and stabbed her in the neck and shoulder with a 15cm steak knife. The victim was seriously injured. The accused was found to be unfit to stand trial by a jury. At a special hearing, a different jury found the accused to be not guilty because of mental impairment. The key evidence relevant to this was that the accused's mental illness - paranoid schizophrenia - meant that he had a belief in false events, including that he was 'being followed, spoken about on TV and radio, and being spied on or poisoned; by oral or auditory hallucinations; and by thought disorders, disorganised behaviour and mood symptoms.'
He also had delusions (false beliefs) that women and gay men were laughing at him, some of them outside of his caravan, and that the victim had spoken to him in his sleep. A psychiatrist who gave evidence in the special hearing expressed the opinion that he was so disturbed and out of touch with reality as a result of his mental impairment at the time of the offence that he did not know that what he was doing was wrong.

FOOTNOTES

1 SANE Australia, *Mental Health and Illness: Facts & Guides*, 'Fact vs Myth: Mental Illness Basics', <https://www.sane.org/mental-health-and-illness/facts-and-guides/fvm-mental-illness-basics>

2 SANE Australia, *Mental Health and Illness: Facts & Guides*, 'Fact vs Myth: Mental Illness and Violence <https://www.sane.org/mental-health-and-illness/facts-and-guides/fvm-mental-illness-and-violence>

3 A pseudonym is a fictitious name given to a party in a case in order to project the identity of a victim, for example in cases of sexual assault, or to protect the identity of the accused, in cases involving unfitness to stand trial or the defence of mental impairment.

4 *R v Radford* (1985) 42 SASR 266, 274.

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