HENRY DAVIS YORK
LAWYERS

SUBMISSION TO THE NEW SOUTH WALES LAW REFORM COMMISSION ON BEHALF OF THE HOMICIDE VICTIMS' SUPPORT GROUP (AUST) INC.

PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM

29 July 2010

SUBMISSIONS TO THE NEW SOUTH WALES LAW REFORM COMMISSION (NSWLRC) ON BEHALF OF THE HOMICIDE VICTIMS' SUPPORT GROUP (AUST) INC.

1 BACKGROUND – HDY and The Homicide Victims' Support Group (Aust) Inc (HVSG)

Henry Davis York (**HDY**) is a commercial law firm situated in Sydney. HDY places great emphasis on their community and corporate social responsibility to provide legal services to groups and individuals who are disadvantaged and/or under-represented, as well as to address legal issues of broader community concern.

HDY has offered pro bono legal services in partnership with the Homicide Victims' Support Group (Aust) Inc (**HVSG**) since 2005. HVSG are a not-for-profit organisation dedicated to providing support, education and information to the families and loved ones of victims of homicide.

The Homicide Victims' Support Group (Aust) Inc. was founded in June 1993, at the Institute of Forensic Medicine at Glebe.

The group was established when the parents of Anita Cobby and the parents of Ebony Simpson were introduced to each other and they, with the staff at the Institute, recognised the very real need for an organisation which could offer counselling, support and information to families and friends of homicide victims throughout NSW.

The aims of HVSG are threefold

- offering support to families;
- educating the general public and professional bodies about the needs of homicide affected families; and
- reform of some laws that impact on family members.

HVSG has a working partnership agreement with the Attorney General's Department and the NSW Police Force that enables them to receive a notification form of every homicide in NSW within 48 hours of the homicide occurring. This then enables HVSG, the police and other services to put into place a comprehensive plan around supporting the surviving family members.

The majority of work conducted by HDY is for families and individuals to assist in their participation in coronial inquests and with matters such as wills, probate, civil matters and compensation. Since 2007 HDY has assisted with three to four inquest matters per year, frequently briefing counsel to appear on a pro bono basis in order to pose questions on behalf of the relevant family.

HDY and HVSG won the 2007 Pro Bono Partnership Award through the NSW Law and Justice Foundation. The partnership that we have fostered is unique and provides services to family members of homicide that no other organisation provides.

2 SCOPE OF THESE SUBMISSIONS

HDY was asked to prepare these submissions by HVSG on behalf of a number of their clients who are family members and loved ones of persons who have been killed by an individual with cognitive and/or mental health impairments.

The scope of these submissions is limited to matters in issue raised by HVSG and the families. **They relate only to mentally impaired defendants who have been charged with murder or manslaughter and are being tried accordingly in the Supreme Court.** These submission are less applicable to defendant's charged with minor offences and do not apply to Local Court proceedings.

At the end of these submissions is an Appendix which comprises several letters from families receiving support from HVSG who wanted to share their stories, experiences and frustrations with the NSW Law Reform Commission. **We advise that some of these letters contain details of how the family members were killed and so may be confronting for some readers.**

3 DEFINITIONS

3.1 **HDY** – Henry Davis York

3.2 **HVSG** – Homicide Victims' Support Group (Aust) Inc

3.3 **Defendant** – an accused person who has killed a family member / loved one and who suffers from a mental illness or cognitive impairment.

3.4 **MHA** – *Mental Health Act 2007* (NSW)

3.5 **MHFPA** – *Mental Health (Forensic Provisions) Act 1990* (NSW)

3.6 **MHRT** – Mental Health Review Tribunal

3.7 **NGMI** – a mentally impaired person who is found 'not guilty by reason of mental illness' under s22(b) of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

3.8 **UNA** – a mentally impaired person who is unfit to be tried and not acquitted under **s22(c)** and (d) of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

4 MAIN ISSUES OF CONCERN

4.1 FITNESS FOR TRIAL:

HVSG acknowledges and appreciates the importance of ensuring that the accused is deemed to be fit for trial. Where it is clear that a person lacks legal capacity and is not fit to be tried, any verdict reached at criminal law as to the guilt of the accused would be fundamentally unsafe.

HVSG is concerned, however, with ensuring that justice is pursued to the fullest extent, and that any finding of unfitness to stand trial is not reached lightly. It is extremely important, from the perspective of the victim's families, that the accused be tried before a court wherever possible, and that referring matters to the MHRT

only occurs in exceptional circumstances, where the accused is clearly unfit to stand trial.

When and how the question of fitness arises

(a) There is clear authority for the proposition that a defendant is presumed fit to be tried, unless or until a question as to fitness is raised by either the prosecution, the defendant or the court.[1] This position is codified within the provisions of the MHFPA. However, the question of fitness can be raised at any time during the course of the hearing, and on any number of occasions.[2]

(b) As to the issue of when the question of fitness should arise, HVSG submits that a mental health assessment should be conducted immediately after arrest on all persons charged with homicide or attempted homicide, with a view to immediately assessing whether the accused is fit for trial. This approach would avoid any external factors, for example, the stress of incarceration, from influencing a subsequent assessment of whether the defendant was mentally fit at the time of committing the offence.

(c) If the accused is found fit to be tried, this finding should not be disturbed unless new, objective evidence is brought before the court demonstrating that the mental condition of the accused has altered since their arrest to such an extent that, *prima facie*, they may no longer be considered fit for trial. Such material should be raised by the defendant, who should bear the onus of proof in establishing that they are not fit for trial. The burden of proof should be on the balance of probabilities, in accordance with the *Briginshaw* standards.[3]

(d) HVSG further submits that the defendant should be limited in the number of occasions that fitness can be raised during the proceedings. Otherwise the defendant may challenge their own fitness repeatedly, including in circumstances where there is little substance to the claims thereby extending the duration of the trial which causes greater distress to the families of the victims. If a defendant were assessed on arrest and found fit, and they were limited to challenging their own fitness once, this would allow for greater expediency. Any subsequent deterioration in mental state could be dealt with by consent between the prosecution and defence, or at the request of the court.

(e) In regards to the issue of how the question of fitness should arise, the current procedure of allowing the question to be raised by the prosecution, defence or the court is not deficient and does not warrant legislative amendment (**Issue 6.1**). The ambit of s5 of the MHFPA is sufficient to empower the court to raise the issue of fitness, should it become apparent to the trial judge.

(f) The courts are adequately equipped and judges are sufficiently able to utilise their discretion in appropriate circumstances, pursuant to s5, to raise any issues they perceive in regards to fitness, should they feel that the issue needs to be reconsidered. An express requirement would most likely be redundant.

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[1] Consultation Paper 6, p3. See *Eastman v The Queen* (2000) 203 CLR 1.
[2] MHFPA s7(1)-(2).
[3] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

(g) Any such requirement would also operate to increase the prospects of the accused successfully launching an appeal against any finding of guilt, on the basis that the judge erred at law in considering, or failing to consider, the issue of fitness for trial. Such an appeal would be extremely difficult for an appeal judge to consider, especially where the accused argues that the trial judge should have raised the issue of fitness, as an Appeal Court will not have been privy to the demeanour of the accused during the trial proceedings. This would result in further distress to the family as the proceedings would be elongated.

The definition of "Fitness to be Tried":

(h) It is unclear why there is no definition of the word "fitness" within the MHFPA, although this appears to reflect the position in other State jurisdictions. It appears that the legislature is content to utilise the minimum standards test espoused by Justice Smith in *R v Presser*.[4] However, it is also unclear why the NSW legislature has elected not to codify the Presser standards, or some variant of these standards, into legislation as has occurred in all other jurisdictions in Australia except Queensland.[5]

(i) HVSG submits that the Presser standards remain a relevant and sufficient criteria for determining a defendant's fitness for trial (**Issue 6.2**). The Commission may wish to consider following the mechanism adopted in many other Australian States and Territories and incorporate these standards into legislation.

(j) We note that the families of many victims do not understand the implementation of the Presser standards during the course of proceedings. The procedure of determining the fitness of the defendant to stand trial is rarely explained to the families of the victims, who often feel a sense of injustice when the defendant is consequently found unfit. This issue may be somewhat alleviated by the inclusion of clear standards in legislation, which can be explained to families prior to a determination of fitness taking place.

(k) HVSG submits that the inclusion of any reference to "rationality", and the defendant having the ability to make rational decisions, would be inappropriate (**Issue 6.3**). The only Australian jurisdiction to adopt any reference to the defendant demonstrating rationality is South Australia.[6] The adoption of any express reference to "rationality" in NSW would therefore be inconsistent with an otherwise almost uniform position adopted in all other States and Territories.

(l) For a criminal finding at law to be sound, the defendant need only to understand the nature of the proceedings and be able to plead to the charges. To impose a further requirement that the defendant be able to process this information and then formulate rational decisions goes too far beyond what is necessary to ensure a fair trial. An additional requirement

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[4] *R v Presser* [1958] VR 45.

[5] See *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic); *Crimes Act 1900* (ACT) s311; *Criminal Code Act 1983* (NT) s43J; *Criminal Law Consolidation Act 1935* (SA) s269H; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s9; *Criminal Justice (Mental Impairment) Act 1999* (Tas). There is no similar test in the Mental Health Act 2000 (Qld). This legislation is similar to the MHFPA in that it focuses on the procedure for determining unfitness.

[6] *Criminal Law Consolidation Act 1935* (SA) s269H.

for rationality goes too far in favour of the defendant being found unfit in circumstances where they could reasonably receive a fair trial.

(m) HVSG acknowledges the opinion expressed in paragraph [1.16] of Consultation Paper 6[7]; namely that the Presser standards are articulated in terms that implicitly allow a court to consider the ability of the defendant to make rational decisions. It is noted that the Commission feels that it may be unsatisfactory to have circumstances where a person understands an indictment, but insists upon making an irrational answer to it.

(n) In the case of *R v Cumming*, the Court of Appeal was satisfied that the defendant had received a fair trial, despite being diagnosed with a paranoid delusional personality disorder, attention deficit disorder, and an extremely low intellectual ability.[8] There was a question of whether he was fit for trial, given that he seemingly acted against his own best interests by terminating the services of his legal counsel before the proceedings commenced. The Court of Appeal acknowledged that, pursuant to the New Zealand Bill of Rights , the accused must be able to "rationally understand" the proceedings and defend themselves during the trial.[9]

(o) There is a substantial difference between the ability to "rationally understand" proceedings, which would seem to be a similar position to that stated under the Presser standards, and the amendment currently proposed, to introduce a standard whereby the defendant must demonstrate the ability to make rational decisions concerning the proceedings. In *R v Cumming*, the Court of Appeal acknowledged that the defendant, in admitting certain facts, asking numerous irrelevant questions, making delusional remarks during his evidence-in-chief, and terminating the services of his legal counsel, had acted in an inherently irrational way.[10] However, they were satisfied that, with the appropriate intervention of the trial judge, the defendant was able to ask questions of the complainant and provide his own evidence-in-chief which demonstrated a reasonable defence strategy.[11] The conviction and sentence was consequently upheld. HVSG submits that this was an appropriate approach and outcome.

(p) HVSG submits that there should be no reference to rationality in the *Presser standards*, and that the implication of a requirement for rationality, if any, should be a matter for discretion to be exercised by the trial judge on a case by case basis.

(q) It is submitted that an "effective participation test" would also go too far in favour of the defendant and inappropriately result in numerous persons who would be able to receive a fair trial being found unfit (**Issue 6.4**). As acknowledged by Consultation Paper 6,[12] the test would be extremely subjective. Using the concept of "effective participation" creates a real risk that an inherently fit defendant is found to not have capacity, as set out in

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[7] Consultation Paper 6, [1.16].
[8] *R v Cumming* [2006] 2 NZLR 597.
[9] *R v Cumming* [2006] 2 NZLR 597 at [38].
[10] *R v Cumming* [2006] 2 NZLR 597 at [50]-[51], [60]-[63].
[11] *R v Cumming* [2006] 2 NZLR 597 at [60]-[64].
[12] Consultation Paper 6, [1.18] - [1.20].

Consultation Paper 6.[13] HVSG submits that the disadvantages would set the bar for a finding of unfitness too low.

(r) Deterioration under the stress of trial is symptomatic of almost all litigation, both criminal and civil. Where a trial is lengthy and there is the potential for serious penalties to be imposed, this will invariably inflict stress upon the defendant, regardless of any pre-existing, diagnosed mental health issues. As such, HVSG submits that it is inappropriate to include any reference to deterioration under the stress of trial within the Presser standards (**Issue 6.5**). HVSG would also note that in lengthy criminal trials, the families of victims often suffer from deterioration from the stress of the proceedings without any consideration by the court as to the impact that the length of the trial has on them. It seems grossly unjust to make special allowance for the defendant when all persons immediately involved in the trial suffer similar stress and pressure.

(s) In the alternative, if the Commission was minded to recommend the inclusion of such a standard, it should be included with reference to a diagnosed pre-existing mental condition, whereby the stress of the trial could result in the deterioration of such a condition that would be detrimental to the health of the defendant.

Procedures Ancillary to the Determination of Fitness

(t) HVSG submits that the defence and prosecution should only be allowed to consent to a finding of unfitness in circumstances where the family of the victim has been appropriately informed on the issue, with the legal effect of such orders explained in advance (**Issue 6.9**). Entering of consent orders without this consultation has the real potential to leave the family confused about the legal process being undertaken in relation to the defendant and a perception of a lack of justice if the trial is terminated on the basis of a finding of unfitness by consent. Appropriate consultation would also ensure that the family understand the process that the defendant is found unfit by consent.

Appeals in Relation to Fitness at the Time of Trial

(u) HVSG supports the substitution of a qualified finding of guilt where a conviction is quashed due to the unfitness of the defendant at trial (**Issue 6.10**).

(v) This substitution of verdicts will improve expediency in circumstances where the court is satisfied that a special hearing would not make a substantially different finding. This eliminates the need to prolong the family's involvement in the proceedings any longer than is necessary, which reduces the stress and pressure on the family that is invariably associated with criminal proceedings.

(w) A qualified finding of guilt will also retain some symbolism for the families of victims, who might otherwise perceive the quashing of a conviction as an injustice for the victim.

(x) However, this substitution should only take place where it is clear that the defendant will never be fit for trial. In circumstances where the defendant

[13] Consultation Paper 6, at [1.19]

may be found fit at a later date, the proceedings should be held over until that time, and the matter properly remitted for retrial by a court.

4.2 PROCEDURE FOLLOWING A FINDING OF UNFITNESS

Postponing the Determination of Fitness

(a) HVSG strongly believes that an assessment of the mental health of the defendant should occur as soon as practicable after arrest.[14] HVSG does not support the recommendation that deferral of the determination of fitness should be available as an expeditious means for providing the defendant with an opportunity for acquittal (**Issue 6.15**).

(b) If the person is deemed to have capacity, they should be committed to trial, with the question of fitness only to be re-examined in circumstances where new material comes before the court, or the court raises the issue and the defendant discharges the onus of proof on the balance of probabilities, while having regard to the seriousness of the allegations and charges.

(c) A deferral of the determination allows the issue of fitness to remain dormant, creating increased anxiety on the part of victims and their families. Once the issue of fitness becomes apparent as a live issue, it should be determined before the trial is allowed to continue. This also avoids any wasting of the court's time, which may occur in circumstances where the prosecution presents its entire case, but the court ultimately determines that the defendant was unfit for trial throughout the duration of the proceedings.

Flexibility in the Special Hearing Procedure

(d) HVSG fully supports any amendments to the special hearing procedure that makes the process more flexible (**Issue 6.16**). An informal procedure, in addition to catering for the needs of the defendant, may also allow for families of victims, who may require support, to have greater participation in the proceedings. HVSG submits that an increase in participation could be achieved through a legislative amendment allowing for the reading of victim impact statements in the MHRT, which is currently not provided for under the MHFPA.

(e) Presently, the families of many victims are left feeling confused and let down by the criminal justice system when proceedings are constantly moved between the Supreme Court and the MHRT. Introducing greater flexibility into the special hearing procedure and supporting these families may assist in alleviating this confusion and restore public confidence in the role of the courts and MHRT.

(f) HVSG submits that this flexibility in the special hearing procedure should be similarly replicated in trial proceedings before a court to enable the defendant to be tried before a court wherever possible. Only in circumstances where the court cannot adapt its procedures to ensure the defendant receives a fair trial should the defendant be found unfit and a special hearing be conducted.

(g) HVSG relies upon the decision in *Re IMM*, where the Queensland Mental Health Court determined that an accused person was still fit to be tried because procedures could be adapted sufficiently to accommodate his

[14] See paragraph 4.1(b) above.

impairment.[15] HVSG accepts that the ambit of this decision appears to have been limited by the subsequent decisions in *Re WLW* and *Re M*, which suggest that the defendant must be able to be fairly subject to cross-examination, regardless of what flexible procedures could otherwise be adopted.[16]

(h) HVSG fully supports greater recognition of the public interest and victim's rights in ensuring that criminal trials are pursued to the fullest extent possible. There is judicial authority supporting the notion that criminal charges should be properly and thoroughly pursued to the fullest extent, with all avenues being explored to allow for the trial to take place, before an defendant is found unfit and the special hearing process is enlivened.[17] HVSG submits that any legislative amendments to this process should seek to achieve a greater balance between the need for a fair trial and the rights of the defendant on one hand, and the need for community protection and pursuing criminal charges for the benefit of obtaining justice for victims on the other.

Requirement for the defendant to be present

(i) HVSG does not support a recommendation that would allow for the defendant to be excused from a special hearing (**Issue 6.17**). From the perspective of the victim's family, the presence of the accused at the special hearing reinforces the fundamental legal principle that not only is justice being done, but justice is being seen to be done.

(j) If the court exempts the defendant from the special hearing, many victims and their families will feel that the defendant is not being forced to properly respond to the allegations with which they are charged, rendering the proceeding meaningless.

Findings at a Special Hearing

(k) It is HVSG's view that the current verdicts of a 'qualified finding of guilt' and 'not guilty by reason of mental illness' available to the court at a Special Hearing or trial fail to recognise the severity of the offence committed by the defendant and leave the family of the victim with a sense that there has been no legal acknowledgement of the death of their loved one. HVSG is concerned with the wording of the verdicts available to the MHRT and would like to make submissions on this point (**Issue 6.18** and **Issue 6.19**).

(l) It is open for the MHRT to reach several different verdicts at the conclusion of a Special Hearing. These verdicts include:

(i) Not guilty of the offence charged;

(ii) Not guilty on the ground of mental illness;

(iii) On the limited evidence available, the accused person committed the offence charged; and

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[15] *Re IMM* [2002] QHMC 12.
[16] *Re WLW* [2004] QHMC 6; *Re M* [2006] QHMC 19.
[17] *R v M* [2002] QCA 464 per de Jersey CJ at [14]-[15]; *R v Langley* (2008) 19 VR 90 per Lasry AJA at [26]; *R (on the application of TP) v West London Youth Court* [2005] EWHC (admin) 2583 per Lord Justice Scott Baker at [17]-[18].

(iv) On the limited evidence available, the accused person committed an offence as an alternative to the offence charged.[18]

(m) HVSG submits that the wording 'on the limited evidence available the accused person committed the offence charged (or an alternative offence)' is inappropriate. HVSG disagrees with the suggestion in paragraph [2.35] of Consultation Paper 6 that a qualified finding of guilt creates an erroneous perception that the person has been found guilty. Caution must be given to adopting comments made by counsel and the court in the cases referred to as a barometer of public perception.

(n) The fact that the word "qualified" is included in the phrase clearly suggests that the finding of guilt is contingent upon some other factor. It is difficult to see how the MHFPA as it is currently worded could create a perception of guilt where the reference to "qualified finding of guilt" is found only in legislation and is not adopted in the verdict recorded.

(o) A finding that the accused person committed the offence which makes no reference to the defendant's 'guilt', is cold comfort for families of the victims. There is arguably a connotation with such a verdict that, while the MHRT is satisfied that an offence has occurred, the criminal justice system is letting down the families of the victims by failing to find any degree of responsibility with regard to the accused.

(p) The absence of any reference to guilt creates a perception in the mind's of the families of victims that justice has not been served in circumstances where the defendant would otherwise have been found guilty, had he or she been fit to stand trial.

(q) The proposed change to the wording of the verdict to "the accused person was unfit to be tried and was not acquitted of the offence charged (or an offence available as an alternative)" does not resolve this fundamental concern.[19] Section 22(3)(a) of the MHFPA provides that a verdict pursuant to sections 22(1)(c) or 22(1)(d) constitutes a "qualified finding of guilt". HVSG submits that this acknowledgment of 'guilt' should be more accurately reflected in the verdicts available to the MHRT under sections 22(1)(c) and 22(1)(d). HVSG would propose the following wording:

> That on the limited evidence available, the accused person committed the offence charged (or an alternative to the offence charged), and a qualified finding of guilt has been entered.

(r) This wording accurately reflects the current position at law, does not constitute a conviction, but the reference to 'guilt' will provide the families of victims with some degree of comfort and a feeling that justice has been served.

(s) In relation to the verdicts available to the MHRT for defendants who are 'not guilty' pursuant to s22(1)(a) and s22(1)(b) of the MHFPA, HVSG notes that the current wording in both verdicts makes reference to 'guilt'. It would be inconsistent for a finding of not guilty to be available to the MHRT, suggesting that a person has not formed the requisite *mens rea* to commit the offence, but there be no finding of guilt available.

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[18] MHFPA s22(1).
[19] Consultation Paper 6, recommendation 6.18

(t) HVSG has similar concerns with the phrase 'not guilty by reason of mental illness' under s22(1)(b). This choice of words gives a strong connotation to the family that the defendant is 'getting away with it'. We acknowledge that criminal liability in Australia requires a defendant to have the necessary *mens rea* to commit murder, which a person of genuine unsound mind cannot have and therefore he/she cannot be guilty of the offence. HVSG do not wish to undermine this imperative legal principle. We simply put forward that families of the victim feel this phrase offers no recognition for their loss. Families similarly feel an injustice in the fact that the defendant does not receive a criminal record for having committed such a serious offence.

(u) HVSG propose that the wording in s22(1)(b) should acknowledge the *actus reus* component of the offence committed with words to the following effect:

> The accused committed an act which caused the death of another, but the accused was found not guilty by reason of mental illness.

Such a statement recognises the serious consequences of the defendant's actions while also making clear the fact that the defendant has been acquitted.

(v) If the LRC is not minded to accept this submission, the alternative submitted is that the verdict pursuant to s22(1)(b) be amended to make reference to a 'qualified finding of not guilty', which more accurately reflects the circumstances under which such a finding has been made.

4.3 SENTENCING CONSIDERATIONS FOR PATIENTS WITH A QUALIFIED FINDING OF GUILT OR NOT GUILTY BY REASON OF MENTAL ILLNESS:

People unfit to be tried and not acquitted at a special hearing – the limiting term:

(a) Once a defendant has been found UNA, the court must consider whether a limiting term needs to be imposed according to s23 of the MHFPA. HVSG support the current process of imposing a limiting term based on the best estimate sentence that the court would have imposed had it been a normal trial. In this way, a limiting term recognises the offence committed. Even though there are arguments against the terms used for this punitive-type purpose, HVSG believes that it is imperative to recognise the nature of the serious offence and that the defendant needs to be treated in a mental health facility (or other place) for a set period of time to avoid the risk of reoffending.

(b) Once a court orders a limiting term, the defendant becomes a forensic patient and is reviewed by the MHRT every six months.[20] These reviews are important to ensure that the care and treatment of the forensic patient remain appropriate.[21] However, periodical reviews are a period of great stress for the family members who are regularly faced with memories of the death and confronted by the person who committed the fatal act. It essentially means their grieving process is re-opened every six months, and is exacerbated by the anxiety that the patient may receive more liberties at each and every review.

(c) HVSG understand the importance of the need for regular reviews, but ask that the MHRT constantly keep the family's concerns in mind. Examples of how this can be achieved are explored in Section 4.6 of these submissions.

Sentencing considerations – UNA defendant:

(a) HVSG support the continued use of sentencing principals to determine the appropriate custodial or non-custodial sentence for a UNA defendant (**Issue 6.45**) and believe that the principle of public safety should be given paramount consideration. HVSG acknowledge the technical difficulty that a UNA defendant is subject to a sentence despite not having received a fair trial, however, it is HVSG's view that the defendant's unfitness to stand trial should not be a bar to protect members of the public from the violent nature of the crime. Additionally, the application of a custodial sentence provides the family of the victim with some sense that the death has been recognised and dealt with by law.

Sentencing considerations - NGMI defendant:

(b) HVSG acknowledge the difference in sentencing procedures between a UNA defendant and a NGMI defendant.

(c) Section 39 of the MHFPA provides that a defendant found NGMI must not be released unless it is satisfied on the balance of probabilities that the safety of any member of the public will not be seriously endangered.[22]

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[20] Consultation Paper 6, [6.18]
[21] Hon Greg James QC, *Review of the New South Wales Forensic Mental Health Legislation'*, August 2007, [7.14]
[22] MHFPA, s39(2)

HVSG argue the standard of a 'balance of probabilities' is not sufficient for a defendant who has committed a violent offence such as murder or manslaughter. The test should be escalated to satisfaction beyond reasonable doubt For HVSG, the safety of the community is the most important consideration the court can determine when deciding whether to detain or release a defendant found 'NGMI'. Thus, HVSG does not oppose an amendment to the MHFPA to provide additional guidance on such issues (**Issue 6.46**) provided that, public safety remains the consideration of utmost importance to the court.

Sentencing considerations – what principals and factors should the court consider:

(d) As mentioned above, HVSG supports the standard established in s39(2) of the MHFPA which requires the court to consider the risk of harm to the community before deciding to release an NGMI defendant. HVSG reiterates that this principle should always be given paramount consideration by the courts for defendants who have committed murder or manslaughter.

(e) HVSG is most concerned with the possibility of further physical harm or psychological harm which a defendant's release could post to family members of the victim. HVSG would support a definition of 'harm' to be included in the MHFPA similar to that suggested in the Consultation Paper,[23] provided it emphasised that physical harm would include psychological harm (**Issue 6.56**). Furthermore, the persons affected by harm should be extended to include people immediately related to the victim (including family and de facto partners). However, HVSG disagree with the qualification that the risk of harm must be related to the person's mental illness as, from our perspective, the harm may stem from other factors (for example, the violent nature of the offence or threats made by the patient).

(f) HVSG believe that the 'principle of least restriction', used in civil mental health, is not restrictive enough for a defendant who has committed a violent offence such as murder or manslaughter. HVSG supports the continued presumption in favour of detention offered by s39(2) and would encourage a similar presumption to be adopted for UNA defendants (**Issue 6.58**).

(g) If the 'principle of least restriction' is incorporated into the current legislative regime, HVSG would argue that in every circumstance it would be unsafe to release a UNA or NGMI patient who has committed murder or manslaughter at an early stage after the order was made.[24] HVSG acknowledges that a defendant cannot remain detained forever, however, it seeks that the MHRT ensure that sufficient consideration be given to the violent nature of the offence, and most importantly, to the views of the victims' family and to any attempts of the defendant to intimidate members of the victim's family while detained, before it reduces the term imposed on the patient.

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[23] Consultation Paper 6, [6.63]
[24] Consultation Paper 6, [6.72]

4.4 MANAGEMENT OF FORENSIC PATIENTS FOLLOWING COURT PROCEEDINGS:

(a) It is understood that the current forensic mental health system differs from the penal system which exists to punish convicted offenders.[25] The issue for HVSG concerns the involvement of the families after the forensic patient has been referred to the MHRT Forensic Division.

(b) Once the court has made a determination about the defendant's detention or conditional release, the MHRT must, as soon as practicable, review the defendant's situation and make an order about the appropriate treatment, care, detention or conditional or unconditional release.[26]

(c) The MHRT must also conduct a review of the defendant's care on a six-monthly basis.[27] HVSG have some concerns with the process of review. The victim's family have little involvement and are given little consideration at such reviews. Consequently, the families do not fully understand the process of the reviews and they see it as an opportunity for the defendant to obtain more rights and freedoms whilst in a treatment facility. Additionally, the lead-up to a review is often a time of great anxiety and confusion for the family. They fear having to come face-to-face with the defendant again and cannot comprehend how the person who caused the death of their loved one can be given so many opportunities by the tribunal, whilst their own voice is silenced.

(d) HVSG understand that it is important for the MHRT to maintain and constantly update the patient's care plan to ensure that he/she receive the best possible treatment. However, they believe that reviews on a six-monthly basis are frequent enough to achieve the MHRT's objectives and do not see a need to allow a defendant to apply for a further review (**Issue 6.74**).

Power in relation to leave and conditional release:

(e) HVSG strongly argue that the conditional or unconditional release of the forensic patient at an early stage is inappropriate given the violent nature of the offence committed.[28] The MHFPA states that the MHRT must not release a forensic patient or grant leave unless it is satisfied that the safety of any member of the public will not be seriously endangered.[29] It is in the best interests of the community that a violent forensic patient remain in a treatment facility for at least a minimum period of time as determined by the court (see Section 4.5 of these submission). And it is difficult to conceive of a situation where a defendant who has committed a violent crime but it UNA or NGMI may be eligible for early release.

(f) If the MHRT is going to release or give a forensic patient a leave of absence then HVSG suggest that the legislation be amended to require the MHRT consult with the victim (including the victim's family) prior to making an order for leave or conditional release (**Issue 6.78**). It is appropriate that the victim and/or victim's family can be notified of the conditions of release and given

[25] Consultation Paper 6, [7.5]
[26] Consultation Paper 6, [7.12]
[27] Consultation Paper 6, [7.12]
[28] Consultation Paper 6, [7.16]
[29] MHFPA, ss43 and 49(3)

an opportunity to attend the relevant review so that they can express any reasons for concern about the leave or release. The MHRT panel should ensure that due consideration is given to the family's concerns.

(g) HVSG are particularly concerned in circumstances where a defendant is released and then breaches one of his/her conditions, particularly a non-association order, or where a defendant suffers a deterioration of mental condition and is at risk of causing serious harm.[30] Section 68(1) of the MHFPA states that the President may make an apprehension order for such persons and the MHRT may then confirm or re-order the detention, care or treatment of the patient. HVSG would like to see more guidance on how such a breach can be brought to the President's attention (**Issue 6.79**). Does the MHRT require police intervention, or is it sufficient for a member of the public (including a victim or family member) to notify the MHRT of a perceived breach? How is the MHRT to be notified: in writing or at a tribunal?

(h) There should be a legislative requirement that any member of the public (including a victim and/or victim's family) can notify an appropriate person at the MHRT of a particular breach. It should also be mandatory that if a case manager, psychiatrist or other professional treating the defendant becomes aware of a breach or significant decline in his/her mental condition, they must notify an appropriate person at the MHRT who will bring the matter to the immediate attention of the President so that the applicability of s68 of the MHFPA can be considered without delay. Without providing for appropriate mechanisms to monitor the patient's progress after release, there is a risk that his/her condition could deteriorate unreported and therefore put the safety of the community at further risk.

[30] Consultation Paper 6, [7.22]

4.5 SHOULD THERE BE A TIME LIMIT?

(a) HVSG submits that a limit should apply to the length of time for which people who are UNA or NGMI remain subject to the forensic mental health system **(Issue 6.101)**.

(b) This approach accommodates a number of competing interests. Firstly, imposing a time limit addresses the discriminatory issue that a forensic patient could be subject to harsher penalties than those convicted of the same offence at an ordinary trial. Secondly, the fact that that court has ordered a time-limit sentence also provides an element of comfort to family members who look to the legal system for recognition of the serious crime that has been committed against their loved ones. Additionally, by providing a time limit to the duration for which a person remains a forensic patient, the legislation is ensuring that the individual's liberty is restricted to protect the safety of the community.

(c) HVSG supports the suggestion put forward in Consultation Paper 6, Chapter 7 for legislation to provide that if, at the end of the time limit, the forensic patient continues to pose a risk to the community or to themselves, or simply require further care, the patient should be transferred into the civil mental health system.[31] This approach would be seen as providing a further legislative precaution towards the paramount consideration of safety to the community.

(d) Should a time limit be incorporated into legislation, a sentencing based time limit approach should be taken, which uses a fixed formula based on the maximum penalty for the offence **(Issue 6.102)**.

(e) HVSG acknowledges that there are issues surrounding a judge's decision to impose a hypothetical sentence on a forensic patient that would have been imposed had the person been convicted in an ordinary way. One such issue is that the patient may not be able to bring to the Court's attention their mitigating factors due to their mental impairment.[32] Legislation should provide that the Court firstly consider the maximum sentence for the relevant offence and then have the discretion to consider mitigating factors. As suggested in the paper the Court should have the discretion to consider, among other things, that the person would have pleaded guilty at the first opportunity and would have expressed remorse.[33]

(f) HVSG, however, submits that the nature of the crime needs to be reflected in the sentence that is given. This means that where a crime is of a particularly violent nature the Court's discretion must be somewhat diminished.

(g) HVSG submits that the same approach should be used for both persons who are UNA and persons found NGMI **(Issue 6.103).** Even where a defendant is found NGMI, there needs to an acknowledgement from the legal system that a serious crime has been committed. The sentence should not be deemed to be punitive, but rather be seen as a time frame to ensure that the forensic patient receives adequate and necessary treatment to reduce the risk of reoffending. It would also assist to ensure the NGMI

[31] Consultation Paper 6, [7.102]
[32] Consultation Paper 6, [7.94]
[33] Consultation Paper 6, [7.109]

patient does not remain in a facility for an indefinite period of time without considerations and regular reviews. As argued above, mitigating factors need to be taken into consideration in the sentencing process and this is where the Court can differentiate between persons who are UNA and those found NGMI.

4.6 SUPPORT AND EXPECTATION OF FAMILY MEMBERS

Victim participation in proceedings:

(a) As stated in Consultation Paper 6, the entitlements available to victims (including families of victims) consequent upon a verdict of UNA or NGMI are unclear.[34] It is HVSG's view that the current legislative scheme relating to mentally impaired defendants does not give sufficient opportunity for victims to participate in the legal process and are inadequate (**Issue 6.60**).

(b) Presently in NSW, victims are able to submit victim impact statements at a Special Hearing where a conviction is recorded against the defendant, but not at other stages in the process or in cases where a conviction will not be recorded (for example, where a defendant is found NGMI).[35]

(c) A Victim Impact Statement is a crucial step in the grieving process for family members who have lost someone to homicide. Nearly always, the death is sudden and unexpected. Often, the Victim Impact Statement is the only opportunity the family have to express their emotions and frustrations to the defendant and to the court. It also assists the court to make a determination about the necessary orders for the patient. An example is illustrated in *R v Melehan* [2010] NSWSC 210. Justice Schmidt of the New South Wales Supreme Court reviewed the letter given to her on behalf of David Vaughan's family and her honour stated the following in the judgment:

> [42] Finally, I note that information concerning Mr Vaughan received from his family was put before the Court by the Crown, without objection. This material showed that Mr Vaughan had dealt bravely with the serious misfortune which life had brought him before his death. It also dealt with the impact which his death has had. This material has not gone without notice. I extend my deepest sympathy to Mr Vaughan's family for the undoubted consequences of his tragic death.

(d) HVSG submits that the opportunity to provide Victim Impact Statements should be extended and made accessible during all court and tribunal hearings in relation to the matter (**Issue 6.62**). The Victorian legislation provides that when there is going to be a variation in an order or an application for extended leave, a victim may make a report to the court of their views and that the report can be made before any order is made.[36] This is mirrored in Queensland legislation, and in South Australia (where there is an onus on the Crown to provide the views of victims to the court).[37]

(e) Notably, the reasons driving the Victorian provisions are to assist the counselling and treatment processes for victims *and* to assist the court in determining orders for the defendant, especially when extending leave applications.[38] HVSG believes that these facilitative provisions should be reflected in NSW legislation to guarantee the same rehabilitative opportunities and ensure that victim's views are heard in major matters affecting the forensic patient.

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[34] Consultation Paper 6, [6.73]
[35] *Crimes (Sentencing Procedure) Act 1999* (NSW), s3A(g) and pt 3 div 2
[36] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), ss42 and 43
[37] *Mental Health Act 2000* (Qld), s464; *Criminal Law Consolidation Act 1935* (SA), s269R
[38] *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s42(1)

(f) Importantly, Victim Impact Statements should be considered at the MHRT six-monthly reviews of the forensic patient, along with any other pertinent issues victims wish to raise on such occasions (**Issue 6.62**). It should be noted that in instances where there has been a relationship of some type (whether familial or otherwise) between victims and the defendant, communication between the defendant and victims does not necessarily cease after the offence occurs, but is often ongoing and can result in further concerns for victims.

(g) Excluding the perspective of victims from hearings marginalises, without reason, those voices which can accurately reflect the true impact of the crime on the community and misses a crucial opportunity to provide support to the victims as much as it provides understanding to the defendants.

Legal representation:

(h) Currently s12(1) of the MHFPA provides that the accused is to be represented by an Australian legal representative in proceedings in the Supreme and District court, unless the court allows otherwise. Section 21(1) gives the same right in special hearings. Section 154 of the MHA extends this right to the MHRT.

(i) The six-monthly MHRT reviews of the forensic patient act as a constant reminder to victims, as well as a source of continued concern. Currently families/victims are not eligible for legal representation at reviews and so are left to discern the process alone, while defendants are able to be represented. This is presents a difficulty to the families because, while there is no legislative provision to effect this, families/victims are informed that they can put forward submissions to the MHRT at reviews. This is a daunting task for grieving families with no legal expertise, especially when faced with a legally represented defendant. Having to represent their own interests creates an added and unnecessary burden upon victims which only increases levels of distress.

(j) Permitting families and victims to have legal representation at reviews would empower victims to have their concerns represented by knowledgeable parties, thereby ensuring their voices are not removed from the process. A systematic acknowledgment of the victim's right to speak would assist in alleviating some of the pressure and concern connected to these frequent reviews.

Carers:

(k) It is an unfortunate truth that victims of homicide are frequently also (before and after the event) carers of a defendant. In these situations the carer is often placed in a position of confidence with the defendant which should not be overlooked by the Court or Tribunal in favour only of professional opinion.

(l) HVSG submits that families, and especially carers, should be given the opportunity to be heard by the court and MHRT. Families are often in the best position to comment and inform the court of the real progress of the forensic patient, and issues of patient confidentiality should not prevent these voices being recognised as they are excluded from certain areas of care-giving.

(m) In relation to compulsory treatment orders,[39] the family/carer is also often in the best position to offer recommendations to the Tribunal on the form of orders proposed and should be permitted to submit information to the Tribunal on this matter. Again, the assistance of legal representation would provide support for the victims in this situation and provide clarity to the Tribunal.

A legal definition of 'victim':

(n) There is no encompassing and valid definition of victim in the MHFPA; the definition in s41 is applicable only to Part 5; and more specifically to the non-association orders referred to in s76.

(o) HVSG submits that a greater recognition and access to remedies should be available to victims. Defining the notion of 'victim' would better enable the courts and Tribunal to define the views of this group which are relevant to proceedings (**Issue 6.62**).

(p) A definition of victim similar to that in the *Victims Rights Act 1996 s5*, or *Division 5* of the *Victims Support and Rehabilitation Act 1996* which encompasses the entirety of the Act would be conducive to increasing the availability and weight of victims' views in courts and tribunals.

5 SUMMATION

This completes the submission on behalf of the HVSG and HDY.

On behalf of the families, we would like to thank you for the opportunity to contribute to this inquiry.

Should you have any further questions, please contact Mirella Fisicaro of HDY on the number below.

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[39] Consultation Paper 6, [7.56 - 7.59]