The New South Wales Bar Association

12/9

20 December 2012

Professor Hillary Astor
Commissioner
NSW Law Reform Commission
Department of Attorney General and Justice
GPO Box 5199
SYDNEY NSW 2001

By email:abi_paramaguru@agd.nsw.gov.au

Dear Professor

New South Wales Law Reform Commission Question Paper 2 : Fitness to Plead Guilty

I refer to your email of 30 November 2012 seeking submissions in response to the New South Wales Law Reform Commission Question Paper 2 on Fitness to Plead Guilty.

The Association has considered the questions raised by the Law Reform Commission concerning the question of whether there should be a separate test for fitness to plead guilty. The Association has also considered the comments by Senior Public Defender Mr Ierace SC in his letter of 30 November 2012.

The Association supports the view expressed by Mr Ierace that there should not be a different test for fitness in cases of a proposed plea of guilty. The essential nature of the test should remain the same, regardless of whether a plea of guilty or of not guilty is in contemplation.

However, it is the view of the Association that there is a need for legislative change in this area of law. It is apparent, from the issues raised by the Law Reform Commission, that the possibility of legislative change stems from a concern that some accused persons

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might be fit to plead guilty, but might not be fit to face a lengthy and complex defended trial. There is sense in that concern. However, this issue should be addressed, not by changing the test for fitness, but by setting out in clear terms that the question of whether a person is fit or unfit should be decided having regard to all relevant circumstances - including whether the person intends to plead guilty or not guilty.

This might be achieved by amending the *Mental Health (Forensic Provisions) Act 1990* NSW ("MHFP Act") in two respects:-

a) Firstly, by setting out in statutory form the test for fitness (based on the "Presser" criteria); and

b) Secondly, by requiring that, when determining whether a person is fit, the Court must take into account whether the accused wishes to plead guilty or not guilty (where that is known).

Fitness to be tried is an issue that frequently arises, in all kinds of criminal proceedings. It often arises without prior notice, and sometimes is confronted by legal practitioners with limited experience of the subject. It would be better therefore, if the "Presser" criteria (and perhaps any other circumstances relevant when applying the "Presser" criteria) were set out in statutory form. Setting out the criteria in this way would achieve greater clarity in this difficult area of law, and make the test more accessible. Setting out the circumstances that the Court is to take into account when applying the test for fitness would perhaps address the concerns that seem to be driving the Law Reform Commission's Question Paper.

A statutory formulation of the "Presser test" could be put into Part 2 of the MHFP Act. It would be useful to build into the statute a provision that the Court must, when determining fitness, take into account the nature of the proposed proceedings (e.g. a plea of guilty or a lengthy trial) – thus addressing the issue raised by the question paper.

As the MHFP Act speaks in terms of "<u>un</u>fitness", a definition of "unfitness" could be created in the MHFP Act, (or in any Act that replaces it) by inserting a new section. The Association suggests that consideration be given to a provision in the following terms (based on the assumption that an amendment is to be made to the MHFP Act):-

4A. (1) A person is unfit to be tried for an offence if any one or more of the following

applies to the person:-

(a) The person does not understand the nature of the charge;

(b) The person is not able to plead to the charge;

(c) The person is not able to exercise the right of challenge to potential jurors (where applicable);

(d) The person is not able to understand generally the nature of the proceedings;

(e) The person is not able to follow to a sufficient degree the course of the proceedings;

(f) The person is not able to understand the substantial effect of any evidence that may be given against the person;

(g) The person is not able to make any defence or answer to the charge – by giving instructions to lawyers, by letting lawyers know the person's version of the facts, and (if necessary) by telling the court the person's version in evidence.

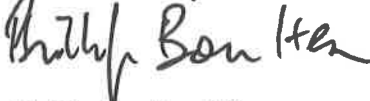
(2) A court, when determining whether any of paragraphs (a) to (g) of subsection (1) applies to a person, must take into account the nature, complexity and likely duration of the proceedings.

(*3*) A court is to state the reasons for making a decision as to whether or not a person is unfit to be tried for an offence.

It is submitted that a statutory provision in these (or similar) terms would satisfy two objects. Firstly, to set out the "test" for fitness in a clear and accessible form. Secondly, to require a court, when considering "fitness" to take into account the nature of the criminal proceedings (including whether a plea of guilty or of not guilty is contemplated).

The Association is grateful for the opportunity to comment on the Question Paper on Fitness to Plead Guilty.

Yours sincerely



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