MENTAL HEALTH COURT

CITATION:	*In the Matter of Vincent Victor Berg* [2014] QMHC 12
PROCEEDING:	Reference
DELIVERED ON:	17 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2014
JUDGE:	Dalton J
ASSISTING PSYCHIATRISTS:	Dr JJ Sundin Dr S Harden
DETERMINATION:	**Mr Vincent Victor Berg is fit for trial**
APPEARANCES:	Mr Andreas Berg on behalf of Mr Vincent Berg Mr J Tate for the Director of Mental Health Mr S Vasta for the Director of Public Prosecutions
SOLICITORS:	Crown Law for the Director of Mental Health The Director of Public Prosecutions (Qld)

[1] This is a reference to the Court by Vincent Victor Berg dated 18 March 2013. The reference is in relation to 37 charges which include many charges of fraud, attempted fraud, uttering forged documents etc. The list of charges also contains offences such as grievous bodily harm, procure sexual acts by false pretences, assault occasioning bodily harm, and one charge of indecent treatment of a child under 16. It seems that latter charge should no longer be part of the reference as it has gone to trial and Mr Berg was acquitted by the jury. The dates of the alleged offending range from July 1999 until July 2004. Since 2006 there have been proceedings in this Court relating to some, or all, of these charges.

Extant Determination that Mr Berg is Fit for Trial

[2] These charges were the subject of a reference to the Mental Health Court dated 13 April 2010. Unusually for proceedings in the Mental Health Court, that reference was contested and there was a hearing and exploration of the matter before Justice Ann Lyons, involving her hearing the reporting psychiatrists and Mr Berg's treating psychiatrist. Justice Lyons delivered a judgment on 27 September 2011. Justice Lyons set out the (then) very long history relevant to this matter:

> "[1] Vincent Berg is charged with 37 offences. Those charges include one count of indecent treatment of a child under 16 which is alleged to have occurred between September and October 2000. He is also charged with one count of procuring a sexual act by false pretence, three counts of grievous bodily harm, two counts of assault occasioning bodily harm, one count of obtaining financial advantage by deception as well as 28 counts relating to various offences of fraud, attempted fraud and uttering forged documents. All of the

offences are alleged to have occurred between June 1999 and June 2004.

[2] The fraud and deception charges arise because it is alleged that Vincent Berg has falsely claimed to be a Russian trained psychiatrist. The charges arose as a result of the 2003 Queensland Public Hospitals Commission which recommended that there be an inquiry into Vincent Berg's claims that he was an overseas trained doctor. It would appear that investigations indicated that his degrees had not been awarded from the institutions he claimed to have attended. It is also alleged that he forged various documents and deceptively claimed payments. The allegedly forged documents include a certificate of good standing purportedly issued by the Medical Board of Queensland in 2001 stating that Dr Vincent Berg was registered with the Board with conditions that he practice only in psychiatry with a licence for private practice.

[3] The charges of causing bodily harm arose from incidents in Townsville when Vincent Berg was employed at the Townsville Hospital as a non training psychiatry registrar. The allegations are that he treated patients with a mental illness and changed their medication causing them to suffer adverse events. The sexual offences are also alleged to have occurred while he was purporting to treat patients at the hospital including a 15 year old boy.

History of the Charges

[4] This matter has a long history of delay. The original offence of indecent treatment of a child was alleged to have occurred in 2000 however the complaint to police was not made until 2005. A reference solely in respect of that offence was filed with the Mental Health Court in November 2006. The following is a brief summary of the matter's history:

- 7 November 2007: the matter was listed for hearing. Vincent Berg did not attend and the original reporting doctor, Dr Braganza was unable to attend. The matter was adjourned to the following year.

- 14 February 2008: the matter was listed for hearing. Vincent Berg did not attend. The matter was adjourned to a date to be fixed for defence to inform Vincent Berg of the proceedings and to allow Vincent Berg to represent himself.

- 12 June 2008: the application was heard by the Mental Health Court. Defence lawyers were given leave to withdraw and the matter was dealt with in the absence of Vincent Berg. The reference was struck out.

- 25 July 2008: A stay application under the UCPR was heard before the Mental Health Court. Vincent Berg was not present. The stay application was refused.

> - 10 October 2008: The Court of Appeal dismissed an appeal brought by Vincent Berg.
>
> - 10 November 2009: The High Court of Australia refused a special leave application by Vincent Berg as it was brought out of time and inevitable that the application would be dismissed.
>
> - 13 April 2010: a new reference was filed in the Mental Health Court including the initial charge of indecent treatment of a child under 16 as well as 36 new offences that Vincent Berg was charged with in 2009.
>
> - 12 July 2010: the new reference was mentioned before the Mental Health Court.
>
> - 11 November 2010: the matter was mentioned again in the Mental Health Court and the solicitors for Vincent Berg were given leave to withdraw.
>
> - 2 December 2010: The hearing of the matter was adjourned as Vincent Berg's new legal representatives had only just been briefed and had not received all material.
>
> - 7 February 2011: Vincent Berg's legal representatives were given leave to withdraw."

[3] The judgment of Justice Lyons went on appeal and that decision is reported as *Berg v Director of Public Prosecutions (Qld).*[1] In the Mental Health Court Justice Lyons had determined that Mr Berg was not of unsound mind at the time of the alleged offending; that he was fit for trial, and that proceedings against him were to continue according to law. Technically Justice Lyons ought not to have made the first finding as to soundness of mind because there was a reasonable doubt as to the facts of the offending in that Mr Berg denies the offending – see s 268 of the *Mental Health Act* 2000 (Qld). The Court of Appeal therefore set aside the order that Mr Berg was not of unsound mind at the time of the alleged offences. That matter will be determined, if it is raised, at his trials. Otherwise the Court of Appeal dismissed the appeal against Justice Lyons' finding that Mr Berg was fit for trial and the proceedings against him ought continue according to law.

[4] As to the question of Mr Berg's fitness for trial, the Court of Appeal judgment was as follows:

> "[12] Three psychiatrists gave evidence before the Mental Health Court. One was Dr Ziukelis, who had been treating the appellant for some 16 months at the time of the hearing (t 7, l 1). In that time he had seen the appellant on nine occasions (t 25, l 18), the first for over an hour, and the subsequent consultations were in the order of half an hour each (t 7, l 12). As well, the Mental Health Court heard evidence from independent psychiatrists, Dr Kovacevic and Dr Beech. Dr Kovacevic had seen the appellant on 5 February 2010

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1 [2012] QCA 91.

> for the purpose of examining him for the Court proceeding. The appointment lasted about 90 minutes and a written report was produced. Dr Beech saw the appellant on three occasions for the purpose of examining him for the Court proceeding. The consultations lasted about one hour each, and he produced a written report.
>
> [13] The Mental Health Court was assisted by Dr J M Lawrence and Dr E N McVie. Both Drs Kovacevic and Beech, as well as the two assisting psychiatrists, were of the view that the appellant was fit for trial. The only psychiatrist who did not express that view was Dr Ziukelis and, as will be seen, he did not distinctly express the view that the appellant was not fit for trial."

[5] Dr Jvozas (Joseph) Ziukelis apparently continues to treat Mr Berg. His lack of independence from Mr Berg meant his opinion was of little weight for Justice Lyons: [20] his main report a standard form document; [22] his own view that he should confine himself to clinical matters; [24] his admission that Andreas Berg does most of the talking at appointments; [27] his admission that he had not exhaustively reviewed the question of whether Mr Vincent Berg was fit for trial; [29] the tentative nature of his opinions, final part of extracted evidence; [72] his reliance on statements of Mr Vincent Berg, "I am led essentially by what the patient wishes to reveal to me rather than …".[2]

[6] The position was the same in the Court of Appeal which proceeded on a rehearing on the evidence in the Mental Health Court – see for example paragraphs 19, 20 and 21 of the Court of Appeal's judgment. The Court of Appeal judgment reads:

> "[39] Dr Ziukelis at no point, either in his letters or in his evidence, makes clear what collateral information he had read before giving evidence. This Court cannot act on assertions made about that by the appellant. However, the relevant point is that Dr Ziukelis made it perfectly clear that the opinions he gave were based, not on a consideration of all the material, including the collateral material, but on his observations as a treating psychiatrist, in which capacity he accepted the veracity of the appellant's reports of delusions. This is no doubt a valid basis to criticise his opinions in a forensic (as opposed to treatment) setting. Both assisting psychiatrists properly brought that to the attention of the Court below. It was quite proper for the Court to act on the basis of that advice."

[7] In any case, at the hearing before Justice Lyons, Dr Ziukelis did not distinctly say that Mr Berg was not fit for trial and, as noted, said he had not exhaustively reviewed that question.

[8] The other reporting psychiatrists before Justice Lyons, Dr Kovacevic and Dr Beech, were of the view that Mr Berg was fit for trial. They were of the view that he had no psychotic illness. The doctors went further than that: [29] Dr Kovacevic's view that, "… Mr Berg impressed me as deliberately and purposefully vague in his responses"; [30] Dr Kovacevic's evidence as to the lack of any objective evidence of dementia and his evidence of malingering or misreporting functional impairment;

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2 References in this paragraph are to Justice Lyons' 2011 judgment in the Mental Health Court.

[35] the reference to Dr Beech's opinion that, "clinically it is difficult to make sense of the symptoms Vincent Berg reports" and to Dr Beech's sceptical view that Mr Berg's delusional beliefs have evolved in such a way as to hinder Court proceedings and that he thought deliberate action to avoid trial was more likely than any mental illness; [40] Dr Beech's evidence that he disbelieved Mr Berg's reports of hearing voices; [63] Dr Kovacevic's further views about neuropsychology results suggesting, but not being diagnostic of, malingering, and [69] being suggestive of gross exaggeration; [71] Dr Lawrence's (assisting psychiatrist) conclusion that the evidence raised issues of deliberate misrepresentation at times; [75] the evidence that the longitudinal pattern of illness was inconsistent with the natural course of any major illness; [76] the evidence indicating no clear pattern of cognitive difficulties which would be consistent with any common memory disorder; [77] further reference to neuropsychology tests showing gross exaggeration.[3]

Course of Criminal Proceedings since Fitness was Determined

[9] After the Court of Appeal decision Mr Berg was represented by a solicitor in a committal heard in relation to the offence of indecent treatment of a child under 16. He was committed for trial. An indictment was presented in the District Court. There was a trial in which Mr Berg was represented by a solicitor and counsel. A verdict of acquittal was returned. Following this, Legal Aid Queensland who had funded Mr Berg both at committal and at trial in relation to the indecent treatment offence, withdrew funding for further committal proceedings. There is no reason to think that position will change. However, should Mr Berg apply for funding in relation to any further trials on indictment in the District Court, Legal Aid will assess that application as a new matter.

Mr Berg Without Legal Representation for Committal

[10] Mr Berg brings this reference to the Mental Health Court on the basis that he is now without legal representation and that previous assessments as to fitness for trial are therefore irrelevant to his current circumstances. It was submitted that he ought to be assessed as unfit for trial because the 2011 reference in the Mental Health Court proceeded on the basis of an assumption that he would be represented by lawyers at any trial. The only new medical evidence about unfitness before me on this reference was in letters from Dr Ziukelis.

Letters from Dr Ziukelis

[11] Mr Berg put before the Mental Health Court various letters from Dr Joseph Ziukelis. The first is not signed. It is dated 27 October 2010. It refers to Mr Berg being found fit for trial and says:

> "Today I find that his new legal representatives Mr Michael Eastwood and Mr Eric Muir are known with certainty by Mr Berg to be KGB Agents. The means of acquiring this knowledge is not revealed by Mr Berg.
>
> It is unlikely that he will now be candid with his counsel.

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[3] References in this paragraph are to Justice Lyons' 2011 judgment in the Mental Health Court.

> As the problem is due to symptoms of mental illness I consider he is no longer fit to attend Court on this basis as he cannot properly instruct counsel."

[12] The remainder of the letters from Dr Ziukelis are signed. There is one dated 27 October 2011 addressed to the Admitting Officer at the Gold Coast Hospital which says:

> "The background is complicated but essentially he has a diagnosis of chronic paranoid schizophrenia and Major Depression.
>
> Legal matters remain unresolved with the Mental Health Court.
>
> He is looked after by his son who is unable to manage him at the present time.
>
> Mr Berg is reported by his son to have stopped his medication as it is poisoned by the KGB.
>
> He rummages around in the house looking for 'bugs' and listening devices.
>
> He has not eaten for several days and has expressed the wish to end his battle with the KGB by ceasing to live.
>
> As his son cannot supervise him constantly because of work commitments I believe that admission for a period of time would be in the interest of his safety.
>
> Current medication is Seroquel 100mgm nocte, Abilify 30mgm daily and Aropax 40mgm mane."

[13] The next is dated 14 August 2012 and is addressed to Legal Aid. It reads:

> "Mr Berg reports a deterioration in his mental health following interviews with his lawyer appointed by Legal Aid (Howden Saggers).
>
> There is a worsening in insomnia, loss of appetite, hearing voices and paranoia in the form of the belief that his lawyer is a KBG agent.
>
> This follows lengthy interviews and particularly an instance of his lawyer 'yelling' at him.
>
> He requests that legal representation be carried out by someone with understanding and capacity to meet the needs of a mentally ill person."

[14] The next letter is a letter from Dr Ziukelis dated 17 September 2012 addressed to the Presiding Magistrate at the Southport Magistrates Court. It reads:

> "Following proceedings in the Mental Health Court Mr Berg is facing a number of charges scheduled for trial.
>
> In the interim Legal Aid funding has been withdrawn.

> He suffers symptoms of persecutory delusions and depressed mood. To represent himself adequately in any Court would be impossible.
>
> Justice Lyons noted that 'It is clear Vincent Berg is currently being treated by a psychiatrist. Dr Ziukelis will monitor the situation during his trial'.
>
> At the time of the above statement Mr Berg had legal representation and I assume it was expected to continue through trial.
>
> I am of the opinion that he is fit to plead and to instruct counsel as found by the Mental Health Court.
>
> This does not extend to representing himself.
>
> Effects of symptoms and medications used are also factors diminishing Mr Berg's capacity to act on his own defense."

[15] There is a further letter to the Presiding Judge dated 11 February 2013. It is not clear to whom this letter is addressed, perhaps the District Court Judge or perhaps a Magistrate in Southport. It reads:

> "Following proceedings in the Mental Health Court Mr Berg is facing a charge scheduled for trial and a number of other changes [sic] scheduled for committal proceedings.
>
> In the interim Legal Aid Queensland funding has been withdrawn. Before this happened, I had notified Legal Aid in my letters of the 27.10.2010 and 14.08.2012 that Mr Berg requires a solicitor who has an understanding of mental illness and experience of working with mentally ill clients. Mr Berg's capacity to work with his solicitor critically depends on the latters' [sic] professional ability to establish and sustain rapport with a mentally ill client.
>
> Mr Berg suffers symptoms of persecutory delusions and depressed mood. To represent himself adequately in any Court would be impossible.
>
> Justice Lyons noted that 'It is clear Vincent Berg is currently being treated by a psychiatrist. Dr Ziukelis will monitor the situation during his trial'.
>
> At the time of the above statement Mr Berg had legal representation and I assume it was expected to continue through trial.
>
> I am of the opinion that he was found fit for trial by the Mental Health Court under condition that he would have professional legal defence.
>
> According to Schedule 2 of the Mental Health Act 2000 (Qld): 'fit for trial means fit to plead at the person's trial and to instruct

> counsel, and endure the person's trial without serious adverse consequences to the person's mental condition.'
>
> It is of crucial importance that the Act presupposes the presence of counsel in its determination of fitness. A situation whereby counsel is absent is not broached by the Act at all. That is why the Act prescribes the determination of fitness on the basis of the person's capacity to instruct and not on the basis of the person's capacity to undertake a defence on his own. The Act foresees that the only action in the course of the proceedings which the mentally ill person undertakes entirely on his own is his utterance of a plea on the presumption that more complex participation must occur via a properly instructed counsel.
>
> Vincent Berg's fitness for trial does not extend to representing himself. Furthermore, effects of symptoms and medications used are also factors diminishing Mr Berg's capacity to act on his own defence.
>
> Considering Mr Berg's current fitness for trial against three criteria established in Schedule 2 of the Mental Health Act 2000 (Qld), I am in opinion that (1) he is able to plead, but (2) has no possibility to instruct counsel due to the absence of the latter and (3) cannot endure legal proceedings without serious adverse consequences as his attempts to act beyond his capacity and represent himself in the courts would seriously jeopardise his health."

[16] There is a letter dated 11 March 2013 addressed to the Registrar in this Court. It reads:

> "Mr Berg is due to undergo a committal hearing at Southport Magistrates Court commencing on 02.04.2013. I understand that 80 witnesses will be called.
>
> To date he has been refused Legal Aid and no-one is prepared to represent him 'pro-bono'.
>
> I do not consider that he has the capacity to represent himself. His condition remains under treatment and, although improved in comparison with his state in the past I fear that the improvement will be short-lived under the circumstances that prevail.
>
> Should the Mental Health Court have authority in this matter I would be grateful for its exercise."

[17] Lastly there is a letter dated 14 October 2013 addressed to the Presiding Judge in the Mental Health Court. It reads:

> "Mr Berg remains under treatment and continues to attend regularly. His condition has improved slightly in recent months in that he cares better for his appearance and is more forthcoming in speech. However it is clear he would not be able to adequately represent himself in Court.

> When last seen on 10.10.2013 he provided me with a letter from Gatenby Lawyers wherein the offer is made to represent him on the basis of Legal Aid funding.
>
> Michael Gatenby notes that 'on the last occasion your ability to provide instruction was impaired after an hour to an hour and a half'.
>
> He recommends multiple committal hearings by dividing the matters into manageable, like hearings. [sic]
>
> I have been requested by Mr Berg to provide an opinion from the view of the treating psychiatrist.
>
> I am inclined to concur with Mr Gatenby for the reason that when fatigued, pressured and feeling under duress Mr Berg is inclined to lapse into delusional preoccupations. In the past these have involved his representing lawyers.
>
> Under the present circumstances where his relationship with Mr Gatenby and his firm is favourable it would be prudent to foster this."

[18] Dr Ziukelis did not attend the hearing at the Mental Health Court before me.

[19] The letters demonstrate that Dr Joseph Ziukelis has abandoned the stance he took before Justice Lyons as to it being desirable to confine himself to treating Mr Berg. In my view he has gone beyond what is desirable even for a treating doctor. He has allowed himself to become a mouthpiece for his patient. He expresses legal views and has actively inserted himself into the legal process, corresponding with Courts and with Legal Aid, and apparently with Gatenby Lawyers. The letters are certainly nothing like the type of report which this Court expects from experts. There are no proper details of medical history, attendances, symptoms and the like. Much less any analysis of them. There are simply opinions stated without any factual basis. A Court will not act on material such as this – *Makita v Sprowles.*[4]

[20] In terms of what substance there is in the letters from Dr Ziukelis, he simply reiterates the view he expressed (more tentatively) before Lyons J. It is based upon his accepting what Mr Berg (or perhaps Andreas Berg) tells him. There is no indication that he tries to assess the veracity of this, as an independent expert must, much less any reason for his assessing and accepting it.[5] He considers no collateral information and does not begin to deal with the reports and evidence of Drs Beech and Kovacevic. His view continues to be that the reports from Mr Berg (perhaps through Andreas Berg) amount to psychosis with paranoia and persecutory delusions. His views as to that were rejected by Justice Lyons on advice from the psychiatrists assisting her. The psychiatrists assisting me also advise that there is no evidence of psychosis. There is simply no proper basis to act on the basis of the assertions in Dr Ziukelis's letters.

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4 [2001] NSWCA 305.

5 The invidious position this type of assessment brings about for a treating psychiatrist is the reason why treating psychiatrists usually refuse to be drawn into this exercise, it involves a duality of relationship with the patient, which is considered unacceptable, both in terms of treatment and the forensic process.

[21] The advice from my assisting psychiatrists was in blunt terms that no appropriate independent rigour had been brought to bear in the various letters written by Dr Ziukelis. Further, that this was particularly undesirable where there was "historical evidence of exaggeration, malingering and multiple allegations of deliberate fraud" – t 1.31. Their advice was that the letters from Dr Ziukelis were "quite unhelpful". They were, "lacking in detail, they do not provide a clinical basis of information for the conclusions he draws and they largely seem preoccupied with giving opinions about legal matters for which he does not provide a basis" – t 1.32. Both psychiatrists assisting me advise that I should accept the opinions of Drs Beech and Kovacevic which were before Justice Ann Lyons to the effect that Mr Berg had suffered from a depression and that there was no objective evidence of a psychotic illness. Their advice was that I should find Mr Berg was fit for trial.

[22] It has been the practice of this Court to allow repeated applications on the question of fitness for trial, for it is something which, as a matter of medical reality, may change from time to time. Particularly patients who are declared to be fit for trial may, after they are indicted, find themselves ill when the trial is listed for hearing. Pursuant to s 405 of the *Mental Health Act,* no party bears the onus of proof in relation to this matter, which I decide on the balance of probabilities. Here, looking at the extant decision of Justice Lyons; the letters from Dr Ziukelis which Mr Berg relies upon in this new reference; the fact that Mr Berg has no legal representation for the committal proceedings, and the advice of my assisting psychiatrists, I conclude that Mr Berg is fit for trial.

[23] Before leaving matters relating to Dr Ziukelis I will note that the written submissions of 27 April 2014 on behalf of Vincent Berg contain, at paragraph 55, this statement:

> "The applicant highlights that the MHC ([91] *Re Berg* [2011] QMHC) has tasked Dr Ziukelis to monitor the former's condition, and, therefore, professional opinion and recommendations of Dr Ziukelis should be not only of medical but of legal significance for the court."

This sophistry is based on Justice A Lyons making the following remark in the context of considering whether Mr Vincent Berg could endure a trial:

> "[91] It is clear that Vincent Berg is currently being treated by a psychiatrist and is receiving treatment and medication in particular. Dr Ziukelis considers that he is stable and has been so for some time. He is apparently depressed but Dr Ziukelis will monitor the situation during his trial."

This Court has not assigned any task to Dr Ziukelis. As explained, Justice Lyons found his opinions of limited assistance. I find them insufficiently reliable to act upon.

Committal

[24] I will go on to deal with matters of law raised by the Director of Public Prosecutions. The Director made submissions which were in response to the specific circumstances confronting Mr Berg: that he must conduct the committal without legal representation.

[25] It was submitted that because a committal is an administrative proceeding, not a judicial proceeding, it was inappropriate to apply the *Presser* criteria to determine whether or not Mr Vincent Berg was fit to participate in a committal. Some of the enquiries listed by Smith J in *R v Presser*[6] are inapt to a committal, for example, the defendant will not be obliged to plead (although he may be called upon) or challenge jurors. In effect it was argued on behalf of the Director of Public Prosecutions that a test which required less mental competence than the test from *Presser* was sufficient when considering fitness in the context of a committal.

[26] There are statements in some of the cases which give some support to the submission made on behalf of the DPP. In *Higgins v Comans*,[7] McPherson JA cited Victorian authority to the effect that the duty of a magistrate on a committal was a duty which was "exercised in favour of the defendants. It is an investigation on their behalf relating to the charge against them in order to satisfy a bench of magistrates that there is something for a higher court to decide."[8] However, as McPherson JA went on to say:

> "To say that the proceedings are purely for the benefit of the defendant would be to state the matter a little too highly. The prosecution, too, ... has the benefit from the proceedings of finding out weaknesses in its own case, and so of avoiding being encumbered with trials that are bound to fail. Nevertheless, the function of the magistrate, ... is essentially that of receiving evidence from the prosecution to justify a trial of the defendant for an indictable offence."

[27] After the evidence in a committal, a magistrate will either commit the defendant for trial or discharge the defendant on the basis that there is not a sufficiently strong case to warrant a trial. The magistrate does not determine whether or not an indictment is presented. That is a matter which rests with the DPP after the committal (usually). Thus, in terms of the outcome of a committal proceeding, the magistrate's examination of the evidence will advantage the accused if he is discharged, but not be such that any finding is made against him if he is not discharged. For these reasons the committal is sometimes spoken of as a proceeding protective to the accused person – *Barton v The Queen*.[9]

[28] There is some authority which shows a distinction between the administrative proceedings of a committal and the judicial proceedings of a trial in terms of concern with the fairness of proceedings. In *Higgins* (above) at [22] Keane JA referred to the High Court case of *New South Wales v Canellis*[10] to the effect that the *Dietrich* principle does not apply to committals. In *Canellis*, Mason CJ, Dawson, Toohey and McHugh JJ said of *Dietrich*, "There is no suggestion in the majority judgments that a court could exercise a similar jurisdiction in civil proceedings or in committal proceedings; nor do they suggest that such a jurisdiction could be exercised in favour of an indigent person charged with a criminal offence which is other than serious". – p 328.

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6 [1958] VR 45, 48.
7 [2005] QCA 234, [4].
8 *Re Mercantile Bank, ex p Millidge* (1893) 19 VLR 527, 529 per Hood J.
9 (1980) 147 CLR 75, 99.
10 (1994) 181 CLR 309.

[29] Further, there are indications in the cases that generally a superior Court does not interfere in committal proceedings but has a discretion to stay criminal proceedings after they reach that superior Court if it is clear an abuse has occurred during the committal – see *Higgins* (above) cited in *Mathews v Commissioner of Police.*[11]

[30] Notwithstanding the matters mentioned above, the committal is according to usual practice an important part of the criminal process and its advantage to the accused person is not limited to having some independent mind – the magistrate – assess the evidence against the accused. As a matter of practice and practicality the committal is of benefit to the accused because they will discover what the Crown witnesses say on oath; have the opportunity to cross-examine the Crown witnesses, and have the opportunity of calling evidence in rebuttal – cf *Barton* p 99. In *Barton* the High Court endorsed a stay of proceedings on an *ex officio* indictment because the accused person was deprived of the advantages of a committal process. Gibbs ACJ and Mason J said:

> "It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice ... For us to say, as has been suggested, that the courts are concerned only with the conduct of the trial itself, considered quite independently of the committal proceedings, would be to turn our backs on the development of the criminal process and to ignore the function of the preliminary examination and its relationship to the trial. To deny an accused the benefit of committal proceedings is to deprive him of a valuable protection uniformly available to other accused persons, which is of great advantage to him, whether in terminating the proceedings before trial or at the trial." – pp 100-101.

[31] The advantage to an accused person of attending and participating in a committal is recognised, for example, in the case of *R v Basha.*[12]

[32] It seems to me that the important principles which underlie the rule that an accused person must be fit for trial also mean that an accused person ought to be fit at the time of the committal. If the accused person is not able to understand the evidence at a committal and not of sufficient understanding to put relevant questions in cross-examination and make a decision as to whether or not a rebuttal case ought be led, it cannot be said that the accused person is able to take advantage of the committal. While the committal process may be more benign for the accused than a trial, someone who is not fit might prejudice their interests by making decisions, for example, to plead if called upon, or otherwise make admissions against interest during the course of proceedings which could be greatly to that person's disadvantage.

[33] Because the proceedings at a committal differ from those at a trial a psychiatrist and a court assessing fitness for a committal will accordingly address the activities relevant to a committal not a trial. There may be cases where this will make a difference to the outcome, they will not be many in my view. I do not see any facts in this case which would make the decision about fitness different were committal being considered, rather than trial.

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11 [2011] QCA 368 and *Fuller & Cummings v DPP (Cth)* (1994) 68 ALJR 611, 615, cited by White JA in *Berg v DPP* [2011] QCA 302.

12 (1989) 39 A Crim R 337.

Jurisdiction of Mental Health Court

[34] Having reached this point in my deliberations, I will record that I have to come to the view that the Mental Health Court does not have any jurisdiction to consider the matter of fitness for a committal independently of fitness for trial. Part 6 Division 2 of the *Mental Health Act* deals with references to the Mental Health Court concerning those who say that mental illness or natural mental infirmity affects their criminal responsibility. Section 267 requires the Mental Health Court to decide whether or not such a person was of sound mind at the time of committing an offence. There will be times when, because of disputed facts, the Mental Health Court is not able to make that decision – see ss 268 and 269. Section 270 provides that if the decision of the Mental Health Court is that the person referred to it is not of unsound mind at the time of the alleged offending, or pursuant to ss 268 or 269 that question cannot be determined, the Mental Health Court "must decide whether the person is fit for trial".

[35] Normally references in this Court are determined prior to both committal and trial with the determination of fitness applying in practical effect, although not in terms, to the committal as well as the trial. This may account for counsel not being able to refer me to any case which bore upon the question of whether this Court had jurisdiction to decide fitness for a committal. It appears to me that as a matter of plain words that is not one of this Court's functions. The use of the word "trial" in both s 270 and the definition of "fitness for trial" are strong indicators that this is so. While under s 104(2) of the *Justices Act* 1886 (Qld) an accused person may be asked if they wish to plead during the course of a committal, a person is not obliged to plead at a committal, and thus the substance of the definition of the phrase "fit for trial" implies that what is spoken of is the trial proper, not the committal. This is consistent with the use of the words "trial" and "committal for trial" in the *Criminal Code*, and the notion that a trial begins when an indictment is presented.

[36] In conclusion, as to the issues specific to a committal, I am not asked in terms of the reference to determine fitness for committal, and could not do so if I were asked. I do not apply any lesser standard in assessing fitness for trial because the next criminal proceeding Mr Berg must face is a committal, not a trial.

Fitness for trial and Legal Representation

[37] I go on now to address the relationship between fitness for trial and legal representation.

[38] At common law fitness to plead and fitness to stand trial were regarded as the same thing – see the judgment of Gleeson CJ in *Eastman v The Queen*.[13]

[39] Some of the early law as to this topic is discussed in *Eastman*. At pp 22-23 Gaudron J discusses the origin of the rule being the basis that "the common law guarantees an accused person a fair trial according to law and that one aspect of that guarantee is that a criminal trial cannot proceed unless the accused is fit to plead". Both Gleeson CJ (p 13) and Gaudron J (p 20) emphasise that the Court is concerned to know whether or not the defendant understands the nature of the trial so as to make a proper defence. Gleeson CJ says, "What is in question is a matter of comprehension, not skill" and Gaudron J cites authority for the proposition that the

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13 (2000) 203 CLR 1.

accused need not have the mental capacity to make an able defence, but must be able to comprehend various matters at a minimum.

[40] An oft cited formulation of these minimum matters is found in *R v Presser*.[14] The High Court in *Eastman* and in *Kesavarajah v The Queen*[15] approved *Presser*. But it is clear, including from those High Court authorities, that the formulation in that case is not to be applied rigidly as though it were a statute. The *Presser* criteria are based on a direction to the jury given by Alderson B to the jury in *R v Pritchard*.[16] Hayne J said this of them in *Eastman*:

> "... at common law those tests ... require the ability: (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge. Properly understood, these tests may not be very difficult to meet." – p 99.

[41] It will be seen that nowhere in the above passage is there any reference to the ability to instruct legal representatives. Mr Presser was represented in the criminal trial before Smith J. While the discussion in *R v Presser* makes reference to instructing lawyers, it does not depend upon an accused person having legal representation. In *Presser* Smith J said:

> "[the accused] needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any." (my underlining) – p 48.

[42] As can be seen from the underlined part above, Smith J contemplated that questions of fitness for trial might well arise with respect to self-represented people. Indeed I note that these concepts were so applied in *R v Ogawa*,[17] where Ms Ogawa was not represented by lawyers, and that Mr Eastman was unrepresented for various parts of

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14 (above) at p 48, an ex tempore decision.
15 (1994) 181 CLR 230, 245.
16 (1836) 7 Car & AP 303, 173 ER 135, see *Eastman* per Hayne J at [298].
17 [2011] 2 Qd R 350, 378ff.

his trial. Any person who conducts legal proceedings themselves is at a disadvantage because they do not have a lawyer. Questions as to fitness are not directed to that disadvantage. An assessment of fitness will no doubt take into account, if it is known, whether the accused person has legal representation, and it may be that in some cases that may make a difference to the assessment of whether the accused person has the minimum comprehension necessary, and separately, whether the accused person can endure the trial.

Fitness for trial under the *Mental Health Act* 2000

[43] It will be recalled that the term "fit for trial" is defined in the dictionary schedule to the Act as, "fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely". I think it is unfortunate that the parliamentary draftsperson sought to define this term in the *Mental Health Act* and further, that the definition was drafted, apparently in ignorance of the position at common law. If the words of the definition "fit to plead at the person's trial" refer only to the act of entering a plea when called upon, it can be seen that the statutory definition omits much of the common law test – challenging jurors, understanding the nature of proceedings, etc. The alternative is to interpret those words in accordance with the old common law understanding that fitness to plead and fitness to stand trial are the same thing. That produces the circular definition that the term fit for trial is defined as meaning fit for trial, but does have the advantage that regard can be had to all the elements to the common law test.

[44] Acutely though, on the facts here, there is still the difficulty that the definition of fit for trial specifically refers to the person being "fit to … instruct counsel". If that part of the definition were read literally then this Court could never take into account that an accused person the subject of a reference was legally unrepresented: fitness would have to be determined on the basis that they were represented, even though that was a false basis. The absurdity of that literal approach is so clear that I would not adopt it. I would prefer to interpret the words "fit to plead at the person's trial" as meaning fit for trial in the common law sense according to the authorities I have outlined and regard the words "fit to … instruct counsel" as surplusage. That is, I interpret the statutory test as one which allows the Mental Health Court to take into account, where it is the case, that an accused person the subject of a reference has no legal representation in determining whether or not that person is fit for trial.

[45] In this matter Justice A Lyons found:

> "[82] It would seem to me that Vincent Berg clearly understands the charges and is able to put forward his defence. He has consistently told his side of the story and there is no evidence before me that he will not continue to do so. He was able to give his account of the offences to Dr Beech in 2010 but was less forthcoming with Dr Kovacevic in February 2010 indicating that he had memory problems."

[46] Earlier Lyons J had recorded the view of Dr Lawrence (assisting psychiatrist):

> "[73] Dr Lawrence ultimately concluded that Vincent Berg is currently fit for trial. She advised that there is no evidence to support the fact that he is not other than fit for trial. She also opined that there is no evidence to suggest that Vincent Berg could not endure a

> trial without undue deterioration or undue consequences to his mental health. She noted that Dr Ziukelis himself said that he thought that Vincent Berg would be able to withstand the trial. Dr Lawrence indicated that steps could be taken to ensure that Vincent Berg received appropriate treatment and support if a trial were to be held."

[47] As earlier explained, the evidence before this Court is consistent with that position. Mr Berg continues to assert his position strenuously through Mr Andreas Berg. He signs and adopts written submissions by Mr Andreas Berg, and on his instructions Mr Andreas Berg presents arguments which have been consistently presented to this Court, and on appeal from it, over nearly eight years. I find he has the requisite comprehension necessary in terms of the *Presser* minimum requirements. I do not accept that there is any evidence that he suffers from any mental illness which interferes with this comprehension or which would prevent him enduring a trial. No doubt accommodation can be made for him in representing himself at any proceeding. As the matter of *Ogawa* shows, difficult behaviour by a self-represented accused is no reason why criminal proceedings should not continue.

[48] Since the hearing of this matter I have been made aware that Mr Berg has, through Andreas Berg, complained about me to the Chief Justice. I do not know whether I am fully apprised of the detail of that complaint, and it is not appropriate for me to address it here. However, I do know that part of the complaint is that I ought not have heard this matter because I sat on the appeal from Justice Lyons' 2011 decision. Mr Berg knew this at the hearing and did not object. Furthermore, I do not consider it is any valid basis to object, and would not have disqualified myself had he raised it at the hearing. There was nothing in my earlier involvement in the matter which prevented, or could reasonably be perceived to prevent, my bringing independent judgment to bear on the new circumstances which Mr Berg relied upon to ask for a determination different to the one which Justice Lyons made in 2011.