SUPREME COURT OF QUEENSLAND

CITATION:	*Berg v Director of Public Prosecutions (Qld)* [2015] QCA 196
PARTIES:	**VINCENT VICTOR BERG** (appellant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (respondent)
FILE NO/S:	Appeal No 10371 of 2014 MHC No 79 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from the Mental Health Court
ORIGINATING COURT:	Mental Health Court at Brisbane – [2014] QMHC 5
DELIVERED ON:	16 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2015
JUDGES:	Fraser and Morrison JJA and Flanagan J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – FITNESS TO PLEAD OR BE TRIED – DETERMINATION OF ISSUES – where the appellant was charged with 37 offences – where the appellant referred himself to the Mental Health Court – where the appellant was found fit for trial both at first instance and on appeal – where the appellant's legal aid was subsequently withdrawn – where the appellant referred himself back to the Mental Health Court on the basis that the previous assessments as to fitness for trial were irrelevant to his current circumstances on the basis that he had become self-represented – where "fit for trial" is defined in the *Mental Health Act* 2000 (Qld) as constituting fitness to plead, fitness to instruct counsel and fitness to endure the person's trial with serious adverse consequences to the person's mental condition unlikely – where the appellant submits that this definition necessarily implies that a defendant must be represented in order to be fit to instruct counsel – whether a defendant must be represented in order to be "fit for trial" – whether "fit for trial" in the context of the *Mental Health Act* 2000 (Qld) incorporates and/or reflects the common law

MENTAL HEALTH – DECLARATION OR FINDING OF MENTAL ILLNESS OR INCAPACITY – where the appellant was charged with 37 offences – where the appellant referred himself to the Mental Health Court – where the appellant was found fit for trial both at first instance and on appeal – where the appellant's legal aid was subsequently withdrawn – where the appellant referred himself back to the Mental Health Court on the basis that the previous assessments as to fitness for trial were irrelevant to his current circumstances on the basis that he had become self-represented – where the learned primary judge relied on evidence provided by two court appointed psychiatrists from the first reference – where the appellant tendered a bundle of letters from his treating psychiatrist to the effect that he was not fit for trial – where the learned primary judge and the two assisting psychiatrists found that the appellant's treating psychiatrist was not an independent expert and lacked the necessary forensic rigour – where the learned primary judge took into account the bundle of documents from the treating psychiatrist, the earlier reference decision, the fact the appellant was now self-represented and the advice of assisting psychiatrists in determining the appellant was fit for trial – whether the learned primary judge erred in determining the appellant was fit for trial – whether the learned primary judge was in error in preferring the evidence of the court-appointed psychiatrists over the appellant's treating psychiatrists

MENTAL HEALTH – DEFINITIONS AND IN GENERAL – where the appellant was charged with 37 offences – where the appellant referred himself to the Mental Health Court – where the appellant was found fit for trial both at first instance and on appeal – where the appellant's legal aid was subsequently withdrawn – where the appellant referred himself back to the Mental Health Court on the basis that the previous assessments as to fitness for trial were irrelevant to his current circumstances on the basis that he had become self-represented – where "fit for trial" is defined in the *Mental Health Act* 2000 (Qld) as constituting fitness to plead, fitness to instruct counsel and fitness to endure the person's trial with serious adverse consequences to the person's mental condition unlikely – where the appellant submits that this definition necessarily implies that a defendant must be represented in order to be fit to instruct counsel – whether a defendant must be represented in order to be "fit for trial" – whether "fit for trial" in the context of the *Mental Health Act* 2000 (Qld) incorporates and/or reflects the common law

PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – IN GENERAL – ORDINARY RULE – where the appellant was charged with 37 offences – where the appellant referred himself to the Mental Health Court – where the appellant was found fit for trial both at first instance and on

appeal – where the appellant's legal aid was subsequently withdrawn – where the appellant referred himself back to the Mental Health Court on the basis that the previous assessments as to fitness for trial were irrelevant to his current circumstances on the basis that he had become self-represented – where the learned primary judge in the second reference had sat on the appeal from the first reference – where the appellant had not made an application for the learned primary judge to recuse herself – where the appellant alleges apparent bias as the learned primary judge in the previous appeal had preferred the evidence of two court-appointed psychiatrists over the appellant's treating psychiatrist – where the appellant alleges actual bias on the part of the learned primary judge by her alleged "biased, interrupting and influencing manner" – whether there is any apparent or actual bias on the part of the learned primary judge – whether the appellant's failure to take objection to the learned primary judge hearing the second reference constituted a waiver of the right to subsequently object

Acts Interpretation Act 1954 (Qld), s 14A(1), s 14B
Mental Health Act 2000 (Qld), s 4, s 5, Schedule

Berg v Director of Public Prosecutions (Qld) [2012] QCA 91, related
British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283; [2011] HCA 2, considered
Conway v The Queen (2000) 98 FCR 204; [2000] FCA 461, cited
Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57, cited
Douglas v Tickner (1994) 49 FCR 507; [1994] FCA 1066, cited
Eastman v The Queen (2000) 203 CLR 1; [2000] HCA 29, applied
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Johnson v Johnson (2000) 201 CLR 488; [2000] HCA 48, cited
Kesavarajah v The Queen (1994) 181 CLR 230; [1994] HCA 41, applied
Livesey v New South Wales Bar Association (1983) 151 CLR 288; [1983] HCA 17, cited
Mills v Meeking (1990) 169 CLR 214; [1990] HCA 6, cited
Ngatayi v The Queen (1980) 147 CLR 1; [1980] HCA 18, applied
R v Berry (1977) 66 Cr App R 156, applied
R v Cain [2010] QCA 373, cited
R v House [1986] 2 Qd R 415, applied
R v M [2002] QCA 464, applied
R v Mailes (2001) 53 NSWLR 251; [2001] NSWCCA 155, cited
R v Ogawa [2011] 2 Qd R 350; [2009] QCA 307, cited
R v Podola [1960] 1 QB 325, cited
R v Presser [1958] VR 45; [1958] VicRp 9, applied
R v Pritchard (1836) 7 C & P 303; (1836) 173 ER 135; [1836] EngR 540, cited
R v Rivkin (2004) 59 NSWLR 284; [2004] NSWCCA 7, applied

R v Sharp [1960] 1 QB 357; (1957) 41 Cr App R 197, cited
R v Southey (1865) 4 F & F 864; (1865) 176 ER 825; [1865] EngR 64, cited
R v Taylor (1992) 77 CCC (3d) 551, applied
Re Berg [2014] QMHC 5, related
Re T (2000) 109 A Crim R 559, applied
Saraswati v The Queen (1991) 172 CLR 1; [1991] HCA 21, cited
Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation [1977] VR 342; [1977] VicRp 42, cited
SM v The Queen (2011) 33 VR 393; [2011] VSCA 332, cited
Vakauta v Kelly (1989) 167 CLR 568; [1989] HCA 44, considered
Wills v The Queen (2007) 173 A Crim R 208; [2007] NSWCCA 160, cited

COUNSEL: The appellant appeared on his own behalf with A Berg assisting
D L Meredith for the respondent

SOLICITORS: The appellant appeared on his own behalf with A Berg assisting
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Flanagan J. I agree with those reasons and with the order proposed by his Honour.

[2] **MORRISON JA:** I have had the considerable advantage of reading the reasons prepared by Flanagan J. For the reasons given by his Honour, I agree that the appeal ought to be dismissed.

[3] I would add that I, too, reviewed the transcript of the entire proceedings below to deal with the contentions advanced as to actual and apprehended bias on the part of the learned primary judge. There is no substance to those contentions.

[4] **FLANAGAN J:** This is an appeal from a decision of the Mental Health Court made on 17 October 2014. The Mental Health Court determined that, in respect of a reference by the appellant dated 18 March 2013, the appellant is "fit for trial" as that term is defined in the *Mental Health Act* 2000 (Qld) ("**the Act**").

[5] The Mental Health Court was constituted by the learned primary judge assisted by two psychiatrists, Dr Sundin and Dr Harden.

[6] The reference was in relation to 37 charges. One of those charges was for the indecent treatment of a child under 16 which was alleged to have occurred between September and October 2000. Subsequent to the reference, the appellant was acquitted of this charge in the District Court. The indecent dealing charge therefore ceased to be part of the reference.

[7] The issue as to the appellant's fitness for trial was the subject of a previous reference to the Mental Health Court and an appeal to the Court of Appeal.[1] The constitution of the Court of Appeal included the learned primary judge.

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1 *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91.

[8] The charges include 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 and 28 counts relating to various offences of fraud, attempted fraud and uttering forged documents. The offences are alleged to have occurred between June 1999 and June 2004. Justice A Lyons, in delivering judgment in the Mental Health Court in respect of the previous reference, summarised the charges as follows:[2]

> "[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.
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> [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 psychiatric registrar. The allegations are that he treated patients with a mental illness and changed their medication causing them to suffer adverse events."

[9] Both Justice A Lyons and the Court of Appeal determined that the appellant was fit for trial. The primary change in circumstances relied on by the appellant since the previous reference is that the appellant's legal aid has been withdrawn.[3] There is no funding in place for the appellant's matters currently before the Southport Magistrates Court for committal proceedings.[4] If the appellant is, however, committed for trial in the District Court, he will be at liberty to re-apply for legal aid.[5] The learned primary judge summarised the change in circumstances as follows:[6]

> "[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."

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2 Quoted by the learned trial judge in *Re Berg* [2014] QMHC 5, [2].

3 Appellant's amended outline dated 2 March 2015, [3].

4 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-7, lines 45–47; 1-8, lines 1–5; appeal record book, 7–8.

5 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-28, lines 31–41; appeal record book, 28.

6 *Re Berg* [2014] QMHC 5, [10].

[10] From an analysis of the Notice of Appeal and the appellant's written and oral submissions, the present appeal raises three issues. The first is one of statutory construction concerning whether a person who is or may be self-represented can ever be "fit for trial" as that term is defined in the schedule to the Act. The second issue is whether the learned primary judge erred in relying on evidence from the previous Mental Health Court reference in determining the appellant's current fitness for trial. The third issue concerns whether the learned primary judge's determination that the appellant is fit for trial was infected with apparent and/or actual bias. The allegation of apparent bias arises from the fact that the learned primary judge was one of the judges who constituted the Court of Appeal in relation to the first reference. The allegation of actual bias concerns how the proceedings before the learned primary judge were conducted.

[11] For the reasons set out below in which each of these issues is considered the appeal must be dismissed.

The Statutory Construction Issue

(a) Fit for trial

[12] The term "fit for trial" is defined in the schedule to the Act:

> "***fit for trial***, for a person, means 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."

[13] In relation to the statutory construction of the definition of "fit for trial" in the Act, the learned primary judge stated:[7]

> "[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 [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.
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> [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

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7 *Re Berg* [2014] QMHC 5, [43]–[44].

> 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."

[14] The appellant submits that the learned trial judge erred in construing the definition of "fit for trial":[8]

> "MR BERG: And the second one is - again I would very much like to re-emphasise that what [the learned trial judge] has, in effect, done is she has put forward before the court her own abridged version of the Mental Health Act, namely, as you are no doubt aware, the Mental Health Act has three criteria of fitness. One of the criteria is to instruct counsel. And [the learned trial judge] suggested that it isn't really a criteria unto itself. She quite called it surplusage, and she then was somewhat critical of the parliamentary draftsperson for drafting the law in such an unclear manner."

[15] The appellant submits that the Act necessarily implies, by virtue of the phrase "fitness to instruct counsel", that a defendant is represented. According to the appellant what the Act mandates as the minimum criteria to participate in court proceedings, is representation by counsel and fitness to instruct such counsel.[9] Consequently, the appellant seeks orders that:[10]

1. he is "conditionally fit for trial, being unfit only in the absence of professional representation";
2. "[s]uch an unfitness is of permanent nature"; and
3. this Court should "put all of the [a]ppellant's charges on permanent stay, as the Court has no power to order a professional representation for the [a]ppellant and there is a substantial delay in reaching potential trial(s) from the date of charges."

[16] The appellant submits that the situation whereby a defendant is unrepresented is not addressed by the Act and therefore the Act foresees that trial participation must occur via a properly instructed counsel.[11]

[17] The appellant is also critical of the learned trial judge's incorporation of the common law into the definition of "fit for trial", specifically in the first criteria, "fit to plead".[12]

[18] Finally, the appellant submits that the learned primary judge ignored both the second and third criteria of the definition of "fit for trial" in the Act, namely fitness to instruct

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8 Transcript of proceedings, 20 July 2015, 1-3, lines 22–28.

9 Transcript of proceedings, 20 July 2015, 1-4, lines 32-46; 1-5, lines 5–14; 1-7, lines 8–12. See also: transcript of proceedings in the Mental Health Court, 30 April 2014, 1-20, lines 19–23; appeal record book, 20; appellant's amended outline dated 2 March 2015, [6].

10 Notice of appeal; appeal record book 115–116; appellant's amended outline dated 2 March 2015, [35].

11 Appellant's amended outline dated 2 March 2015, [26].

12 Appellant's amended outline dated 2 March 2015, [1](c).

counsel and the ability to "endure the person's trial, without serious adverse consequences to the person's mental condition."[13]

(b) The statutory framework

[19] It may be accepted that the definition of "fit for trial" identifies three individual criteria:

1. fit to plead;
2. fit to instruct counsel; and
3. fit to endure the person's trial.

The phrase "with serious adverse consequences to the person's mental condition unlikely" might only be referable to the third criteria of "fit to endure". Alternatively the phrase might be referable to all three criteria. The positioning of a comma after the term "endure the person's trial" would suggest that the phrase "with serious adverse consequences to the person's mental condition unlikely" is applicable to all three criteria both individually and collectively.

[20] The appellant submits that the Act clearly lists three equally indispensable criteria in the definition of "fit for trial" and that incapacity in any one of them is reflective of unfitness.[14] This submission may be accepted, contrary to the respondent's submission that fitness to instruct counsel is not relevant where a defendant is self-represented.[15] As stated by Connolly J in *R v House*:[16]

> "… a finding of unfitness for trial cannot be properly be [sic] made without the statutory criteria being addressed and a positive conclusion reached in relation to each of them."

[21] Parliament has mandated that each criteria must be met through its use of the word "means". The legislature's use of the word "means" is a well-established drafting principle used where the definition is intended to be exhaustive.[17] Further, the use of the word "and" requires that each criteria be considered conjunctively. An inability to meet one criteria equates to an inability to be "fit for trial". I do not understand her Honour's reference to the words "fit to … instruct counsel" as "surplusage", as suggesting that this legislative criteria is to be ignored. Rather, her Honour, at [43] and [44] of the Reasons, recognised that at common law the concept of "fit to plead" incorporates the concept of "fit to instruct counsel". It is only in this sense that her Honour considered the words as surplusage.

[22] On its face it may appear as though the definition of "fit for trial" seeks to exclude any other factors deemed relevant by the common law in determining a person's fitness for trial. Further analysis of the components of the definition is required. The individual components are not defined in the Act. The phrase "serious adverse consequences" and "mental condition" are also undefined terms. Whilst the phrases "fit to endure the trial" and "with serious adverse consequences to the person's mental condition unlikely" are capable of interpretation based on their ordinary meaning, the phrases "fit to plead" and "fit to instruct counsel" do not hold an ordinary meaning

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13 Appellant's amended outline dated 2 March 2015, [1](d), [18], [19], [23].
14 Appellant's amended outline dated 2 March 2015, [19].
15 Respondent's outline dated 5 December 2014, [1](c).
16 *R v House* [1986] 2 Qd R 415, 422.
17 *Sherritt Gordon Mines Ltd v Federal Commissioner of Taxa* [*tion*1977] VR 342, 353; *Douglas v Tickner* (1994) 49 FCR 507, 514.

but are terms which have their origin in the common law. In such circumstances it is permissible in construing these terms to have reference to the common law. As observed by Brennan J in *Boughey v The Queen* (a decision concerning the Tasmanian *Criminal Code*):[18]

> "It is erroneous to approach the Code with the presumption that it was intended to do no more than restate the existing law … but when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law …" (*citations omitted*)

[23] In light of the purpose of the Act (to which I refer below), it would be absurd if "fit to plead" meant no more than the ability to communicate, in some form, the words guilty or not guilty in response to an arraignment. It would necessarily require, at the very least, an inquiry into a defendant's understanding and comprehension of any charge. Further, given that it is a well-established common law phrase, it is necessary to determine whether parliament intended the common law definition to be incorporated within the statutory definition.

[24] The learned primary judge's observation that if "fit to instruct counsel" was read literally in the sense that a defendant must always have counsel present to be fit for trial then an absurdity would result must be accepted.[19] This absurdity is most obviously demonstrated where a defendant withdraws instruction from his or her legal representatives with the intention to be deemed unfit for trial, perhaps permanently, and to effect the proceedings being discontinued or permanently stayed. Such an absurdity would also arise if a defendant failed to comply, either intentionally or otherwise, with reasonably imposed conditions of legal aid. The definition of "fit for trial" which means in part "fit to instruct counsel" is a definition of general application which must be capable of applying to numerous and varying circumstances.

[25] To determine whether a person has the capacity to instruct counsel does not require counsel to be present. The relevant assessment is of the person's capacity or ability to instruct counsel. That is, the person's fitness to instruct counsel. The full definition of "fit for trial" by reference to a person's fitness to endure the person's trial, with serious adverse consequences to the person's mental condition unlikely, permits the Mental Health Court to determine fitness for trial even where a person is self-represented. This is how the learned primary judge construed the relevant definition:[20]

> "… 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."

[26] Her Honour's construction of the definition and its application to a person who is self-represented is also consistent with the purpose of the Act.[21] The purpose of the Act is stated in s 4 and how that purpose is to be achieved is stated in s 5:

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18 (1986) 161 CLR 10, 30.

19 *Re Berg* [2014] QMHC 5, [44].

20 *Re Berg* [2014] QMHC 5, [44].

21 *Acts Interpretation Act* 1954 (Qld) s 14A(1); *Mills v Meeking* (1990) 169 CLR 214; *Saraswati v The Queen* (1991) 172 CLR 1.

> **"4 Purpose of Act**
> The purpose of this Act is to provide for the involuntary assessment and treatment, and the protection, of persons (whether adults or minors) who have mental illnesses while at the same time—
> (a) safeguarding their rights and freedoms; and
> (b) balancing their rights and freedoms with the rights and freedoms of other persons.
>
> **5 How purpose of Act is to be achieved**
> The purpose of this Act is to be achieved in the following ways—
> (a) providing for the detention, examination, admission, assessment and treatment of persons having, or believed to have, a mental illness;
> (b) establishing the Mental Health Review Tribunal to, among other things—
> (i) carry out reviews relating to involuntary patients; and
> (ii) hear applications to administer or perform particular treatments;
> Note—
> For the tribunal's jurisdiction, see chapter 12 (Mental Health Review Tribunal), part 1 (Establishment, jurisdiction and powers).
> (c) establishing the Mental Health Court to, among other things, decide the state of mind of persons charged with criminal offences;
> Note—
> For the Mental Health Court's jurisdiction, see chapter 11 (Mental Health Court), part 1 (Establishment, constitution, jurisdiction and powers).
> (d) providing for the making of arrangements for—
> (i) the transfer to other States of involuntary patients; and
> (ii) the transfer to Queensland of persons who have mental illnesses;
> (e) when making a decision under this Act about a forensic patient, taking into account—
> (i) the protection of the community; and
> (ii) the needs of a victim of the alleged offence to which the applicable forensic order relates."

[27] An interpretation of the definition that gives effect to these purposes of safeguarding the rights and freedoms of mentally ill defendants whilst balancing the rights and freedoms of the rest of the community is to be preferred. In that sense, an interpretation which protects a defendant's right to a fair trial and permits a determination of a defendant's fitness to stand trial where they are self-represented strikes this balance.

[28] The correctness of her Honour's construction by reference to the common law, is also supported by a brief examination of the legislative history of the definition of "fit for trial".[22]

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22 *Acts Interpretation Act* 1954 (Qld) s 14B; *R v Mailes* (2001) 53 NSWLR 251, 272 [107] (Wood CJ at CL).

(c) History of the Act's definition of "fit for trial"

[29] The Act replaced the *Mental Health Act* 1974 (Qld) ("**the 1974 Act**") when it was enacted after an extensive process of consultation beginning in 1993 and the production of a Green Paper that was then widely consulted on in 1994. The definition of "fit for trial" was not a newly enacted definition in the Act. It is identical to the definition of "fit for trial" contained within the 1974 Act. The explanatory memorandum, in explaining the definition of fitness for trial for the present Act, makes clear reference to the common law:[23]

> "A person will be unfit for trial if the person is unable to understand what it means to plead guilty or not guilty, or understand what he or she is charged with. Also, the person will be unfit for trial if they are not able to understand the general nature of court proceedings, or if they are unable to tell their lawyer or the court their version of events or comment to their lawyer about the evidence. The person will also be unfit for trial if, in attending the trial, they are likely to experience a serious deterioration in their mental condition."

The use of the word "or" in which a defendant must have the ability to tell their version to their lawyer or the court also suggests that the requirement to instruct counsel cannot literally require a defendant to be represented in order to be fit for trial.

[30] During the second reading speech on 14 March 2000, the Honourable Wendy Marjorie Wood, the then Minister for Health, stated:[24]

> "Unsoundness of mind and fitness for trial should not be confused. As these two legal concepts are central to the determinations made, it is important to understand the difference between the two concepts …
>
> Fitness for trial … is considered when a person is not of unsound mind in relation to the offence but is unable to understand the nature of the proceedings, to understand the meaning of a plea of guilty or not guilty or to instruct counsel. It also means a person may be unable to endure his or her trial without serious deterioration of their mental state. For a person with a mental illness this is usually a transient condition, although at times an illness can be so severe that the person's unfitness for trial is prolonged."

[31] Both the explanatory memorandum and the second reading speech suggests that the terms "fit to plead" and "fit to instruct counsel" were intended to be far more expansive than their literal meanings.

[32] The definition of "fit for trial" was first introduced into the 1974 Act by the *Mental Health Act, Criminal Code* and *Health Amendment Act* 1984 (Qld). During the second reading speech, the then Minister for Health, stated:[25]

> "Fitness to be tried is not to be equated with fitness to plead. Fitness to be tried [in the 1984 Act] involves an assessment of all the mental and emotional capacities of the individual at the relevant time. If he lacks any of the required capacities, he should not be tried."

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23 Explanatory Memorandum, Mental Health Bill 2000 (Qld), 10.

24 Queensland, *Parliamentary Debates*, Legislative Assembly, 14 March 2000, 349 (Wendy Marjorie Wood, Minister for Health).

25 Queensland, *Parliamentary Debates*, Legislative Assembly, 22 March 1983, 3636 (Brian Douglas Austin, Minister for Health).

[33] When the Bill was reintroduced the following year, the then Minister for Health stated:[26]

> "The new concept of 'fit for trial' is not to be equated with the term 'fit to plead'. In commenting on this definition, Mr Justice Kirby, who made a significant submission on the Bill, has wondered why it has been decided to include this definition in mental health legislation and why it has not been thought preferable to leave it to the Criminal Code and the common law.
>
> The reason is quite simple. Although fitness to plead may well be a concept of the Criminal Code and common law, the concept of fitness for trial is not. It is very necessary that mental health legislation is specific in this matter."

[34] The then Minister for Health wrongly stated, in my view, that there was no common law concept of fitness for trial. As discussed below, the common law concepts of "fitness to plead" and "fitness for trial" have been used, and continue to be used, interchangeably (albeit incorrectly). From a consideration of the factors of fitness to plead and be tried at common law, it appears that the then Minister for Health was in error. The common law concept did, and still does, include an assessment of a defendant's mental and emotional capacities at the time his or her fitness to plead or be tried is called into question. It appears that the then Minister for Health construed fitness to plead in a technical and narrow sense, namely the ability to communicate a plea of guilty or not guilty to a charge with, perhaps, the required understanding of the charges being brought against him or her.

(d) Fit to plead

[35] Whilst the appellant is correct in his submission that an Act of Parliament prevails to the extent of any clear contradiction to the common law,[27] the definition of "fit for trial" in respect of the criteria of fitness to plead was intended to reflect and incorporate the common law. There is therefore no contradiction.

[36] Although the learned trial judge stated that "[a]t common law fitness to plead and fitness to stand trial were regarded as the same thing",[28] that was historically not the case. The terms are now used, although perhaps erroneously, interchangeably.[29] The terms relate to the timing of the question for fitness and the procedures that ensue dependent on that timing.[30] Fitness to plead was a preliminary threshold test that included the requirement to understand the nature of the charge(s) so as to be able to plead, to communicate his or her plea, and understand generally the nature of the proceeding that was about to be commenced. Fitness to be tried focused on a defendant's understanding and following of the trial so as to be able to make a proper defence. That is, in both cases, a defendant's comprehension of the proceeding was of importance for a fair trial.[31] As the law developed, the focus appeared to be whether a defendant

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26 Queensland, *Parliamentary Debates*, Legislative Assembly, 29 August 1984, 350 (Brian Douglas Austin, Minister for Health).

27 Appellant's outline in reply dated 2 March 2015, 3.

28 *In the Matter of Vincent Victor Berg* [2014] QMHC 5, [38], [43].

29 See footnote 15 in *Kesavarajah v The Queen* (1994) 181 CLR 230, 234. See also *Eastman v The Queen* (2000) 203 CLR 1, 13 [21] (Gleeson CJ); *SM v The Queen* (2011) 33 VR 393, 395 [11] (Redlich JA); *Conway v The Queen* (2000) 98 FCR 204, [296] (Miles, von Doussa and Weinberg JJ). See also Fraser JA in *R v Cain* [2010] QCA 373, where his Honour states that he uses the expression "fitness for trial" as comprehending fitness to plead as well as fitness to participate in the trial in all respects.

30 *R v Southey* (1865) 4 F & F 864; 176 ER 825 (in particular the notes to the case); *R v Pritchard* (1836) 7 C & P 303; *R v Sharp* [1960] 1 QB 357.

31 *R v Mailes* (2001) 52 NSWLR 251, 273 [114] (Wood CJ at CL). See also *Eastman v The Queen* (2000) 203 CLR 1, 13–14 [22] (Gleeson CJ); *R v Ogawa* [2011] 2 Qd R 350, 376 [95] (Keane JA).

was fit to plead *and* to stand his or her trial and, as a consequence, the two concepts merged.[32] Ultimately, it appears that fitness to plead, as it developed, incorporated all aspects of fitness for trial.[33]

[37] The seminal Australian case on fitness to plead and be tried is that of *Presser*.[34] The apt cited passage, based on the jury direction of Alderson B in *Pritchard*,[35] is as follows:[36]

> "[The test] needs, I think, to be applied in a reasonable and commonsense fashion. And the question, I consider, is whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal before he can be tried without unfairness or injustice to him.
>
> He 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*." (emphasis added)

[38] Before the learned trial judge, counsel for the Director of Mental Health submitted that the *Presser* criteria are posited on the assumption that there is representation.[37] The appellant relied on this in his outline of submissions.[38] That is incorrect as the emphasis in the passage cited above demonstrates. Smith J did not require a defendant to be represented so as to be fit for trial. Rather, as stated by the learned primary judge, his Honour contemplated that "questions of fitness might well arise with respect to self-represented people".[39]

[39] The High Court considered the concept of fitness to plead and be tried (although adopted the term "fitness to be tried") in the case of *Kesavarajah*.[40] Mason CJ, Toohey and Gaudron JJ stated:[41]

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32 See, for example, Hayne J in *Eastman v The Queen* (2000) 203 CLR 1, 98-99 [294]–[298].

33 A thorough and comprehensive history of the development of the concepts of fitness to plead and be tried can be found in *R v Mailes* (2001) 53 NSWLR 251, 273-288 [112]–[180] (Wood CJ at CL).

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

35 *R v Pritchard* (1836) 7 C & P 303.

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

37 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-14, lines 10–15.

38 Appellant's amended outline dated 2 March 2015, [22].

39 *Re Berg* [2014] QMHC 5, [42].

40 *Kesavarajah v The Queen* (1994) 181 CLR 230.

41 *Kesavarajah v The Queen* (1994) 181 CLR 230, 245.

> "In *Reg. v. Presser*, Smith J. elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson B to the jury in *R. v. Pritchard*, 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." (footnotes *omitted*)

[40] The plurality continued:[42]

> "In the context of a trial, fitness to be tried is to be determined by reference to the factors mentioned by Smith J. in *Presser* and by reference to the length of the trial. It makes no sense to determine the question of fitness to be tried by reference to the accused's condition immediately prior to the commencement of the trial without having regard to what the accused's condition will or is likely to be during the course of the trial."

[41] In *Eastman*,[43] the defendant had dismissed his legal representatives on a number of occasions and conducted his own defence for lengthy periods. The issue of fitness to plead and be tried (the term "fitness to plead" was used for convenience) was considered by the High Court in the context of the test contained within the *Mental Health (Treatment and Care) Act* 1994 (ACT) s 68(3). Whilst Gleeson CJ stated that the "ultimate test to be applied is the statutory test" (the test was termed "fit to plead" and had nine elements that wholly reflected the test in *Presser*), he cited with approval the following principles from *R v Berry*[44] and *R v Taylor*[45] and noted they were consistent with the statutory test.[46]

[42] In *R v Berry*, Geoffrey Lane LJ noted:[47]

> "It may very well be that the jury may come to the conclusion that the defendant is highly abnormal, but a high degree of abnormality does not mean that the man is incapable of following a trial or giving evidence or instructing counsel and so on."

[43] In *R v Taylor*, the Ontario Court of Appeal recorded the following propositions:[48]

> "(a) The fact that an accused person suffers from a delusion does not, of itself, render him or her unfit to stand trial, even if that delusion relates to the subject matter of the trial.
>
> (b) The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the

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42 *Kesavarajah v The Queen* (1994) 181 CLR 230, 246. Deane and Dawson JJ, at 249, disagreed with the ability to take into account the defendant's fitness in the future, as they suggested it would be a radical departure form accepted practice and the common law.

43 *Eastman v The Queen* (2000) 203 CLR 1.

44 *R v Berry* (1977) 66 Cr App R 156.

45 *R v Taylor* (1992) 77 CCC (3d) 551.

46 *Eastman v The Queen* (2000) 203 CLR 1, 14-15 [25]–[27] (Gleeson CJ).

47 *R v Berry* (1977) 66 Cr App R 156, 158 (Geoffrey Lane LJ).

48 *R v Taylor* (1992) 77 CCC (3d) 551, 564-565.

court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.

(c) The fact that an accused person's mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.

(d) The fact that a person's mental disorder prevents him or her from having an amicable, trusting relationship with counsel does not mean that the person is unfit to stand trial."

[44] These principles are consistent with the definition contained within the Act given that the Act reflects the common law.[49] I also agree with the remarks of Mason P, Wood CJ at CL and Sully J in *Rivkin*,[50] approved by Beazley JA in *Wills*,[51] whereby the *Presser* requirements were held to be the "minimum requirements for a fair trial" and that it is irrelevant if suitable medication or medical treatment might have enabled a defendant to understand and follow the proceedings *better*, or if the defendant possessed greater intelligence or acuity of the mind. That is, the *Presser* test does not contemplate or assume a defendant can perform at trial according to his or her maximum potential.

[45] Gaudron J in *Eastman* quoted *Presser* with approval as representing the concept of "fit to plead"[52] and did not make any reference to the ACT statutory test. Similarly, Hayne J quoted *Kesavarajah* (which in turn quoted *Presser*) as constituting the common law test of fitness to plead and stand trial.[53] Hayne J then noted that questions of "fitness to plead" were regulated by the *Mental Health (Treatment and Care) Act* 1994 (ACT) s 68(3) and that it was unnecessary to decide whether the scheme in s 68(3) applied to both questions of fitness to plead and questions of fitness to be tried (that is, whether the scheme could operate after a defendant had entered a plea and commenced his or her trial).[54]

[46] The appellant submits that the learned trial judge did not take the common law factors, in the sense of *Eastman*, *Kesavarajah* or *Presser*, into account.[55] That cannot be accepted. Her Honour at [47] expressly stated that she found the appellant met the *Presser* minimum requirements (as endorsed in *Eastman* and *Kasavarajah*).

(f) Fit to instruct counsel

[47] Chesterman J in *Re T*[56] had to consider the identical definition in the context of the 1974 Act. The defendant in *Re T* had been charged with two counts of indecently dealing with a child under the age of 12 and his solicitors referred the question of his fitness for trial to the Mental Health Tribunal. T was mistrustful of his legal representation and was paranoid. Chesterman J considered that an "exegesis of the concept 'fitness to instruct counsel' is provided by the judgment of Smith J in *Presser*."[57] His Honour then quoted *Presser* and continued:[58]

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49 Also cited with apparent approval in *Wills v The Queen* [2007] NSWCCA 160, [76]–[77] (Beazley JA); *R v Cain* [2010] QCA 373, [43]–[44] (Fraser JA).

50 *R v Rivkin* (2004) 59 NSWLR 284, [296], [301].

51 *Wills v The Queen* (2007) 173 A Crim R 209, [61], [64].

52 *Eastman v The Queen* (2000) 203 CLR 1, 20–21 [58] (Gaudron J).

53 *Eastman v The Queen* (2000) 203 CLR 1, 99 [298] (Hayne J).

54 *Eastman v The Queen* (2000) 203 CLR 1, 99–101 [299]–[300] (Hayne J).

55 Appellant's amended outline dated 2 March 2015, [21].

56 *Re T* (2000) 109 A Crim R 559.

57 *Re T* (2000) 109 A Crim R 559, 563 [14] (Chesterman J).

58 *Re T* (2000) 109 A Crim R 559, 563 [14] (Chesterman J).

> "The terms of this exposition [Smith J in *Presser*] reveal a concern that an accused person must be able to understand, at least in general terms, the nature of his plight and the case brought against him. That is, the accused must appreciate what is meant by being on trial, and as well he must be capable of understanding the substance of the charge he faces."

[48] His Honour also referred to *Pritchard*,[59] *Ngatayi*[60] and *Podola*[61] and concluded that to be fit for trial a defendant must be "able to answer the charge brought by the prosecution. To do so he must understand that he is on trial, and what that means, and he must understand the evidence led in support of the charge so that he can put forward whatever answer he has to it."[62] His Honour was not satisfied that the defendant's paranoia and distrust of counsel made him unfit to instruct counsel:[63]

> "[The psychiatrist's] concern was that the [defendant] would not give a balanced account of the facts to his lawyers. It is not, I think, necessary that an accused give such an account. It is enough, on the authorities, that he understands the evidence against him."

[49] What is critical is Chesterman J's inclusion of the common law in terms of *Presser* into the criteria to be "fit to instruct counsel" and then his Honour's determination that it was not necessary that the defendant give an account to his legal representatives. Rather, it is enough that the defendant *personally* understand the evidence so as to answer the charge.

[50] In *R v House*, Connolly J also considered the definition of "fit for trial" in the 1974 Act. There his Honour stated:[64]

> "Capacity to instruct counsel involves understanding the evidence which is led so as to be able to inform counsel whether it is true or not and whether there are other facts which qualify or explain the evidence adduced. It does not involve understanding the law especially if, as in this case, he had the benefit of counsel."

[51] To similar effect is the judgment of de Jersey CJ in *R v M*[65] where the Chief Justice was considering the meaning of "fit to … instruct counsel" in the same definition of "fit for trial" in the Act:

> "Fitness for trial, in relation to the capacity to instruct counsel, posits a reasonable grasp of the evidence given, capacity to indicate a response, ability to apprise counsel of the accused's own position in relation to the facts, and capacity to understand counsel's advice and make decisions in relation to the course of the proceedings. It does not extend to close comprehension of the forensic dynamics of the courtroom, whether as to the factual or legal contest. For a person represented by counsel, fitness for trial of course assumes that counsel will represent the client on the basis of the client's instructions. That the giving of such instructions may take longer because of intellectual deficit is a feature with which courts should and do bear."[66]

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59 *R v Pritchard* (1836) 7 C & P 303.
60 *Ngatayi v The Queen* (1980) 147 CLR 1.
61 *R v Podola* [1960] 1 QB 325.
62 *Re T* (2000) 109 A Crim R 559, 565 [21]–[22].
63 *Re T* (2000) 109 A Crim R 559, 567 [31].
64 *R v House* [1986] 2 Qd R 415, 422.
65 *R v M* [2002] QCA 464.
66 *R v M* [2002] QCA 464, [13].

[52] There are two relevant aspects to the Chief Justice's observation. First, his Honour has reference to the common law in construing the relevant definition.[67] Secondly, by use of the words "for a person represented by counsel" (and likewise Connolly J's words "if ... he had the benefit of counsel") the Chief Justice must be taken to accommodate a determination of capacity to instruct counsel where the defendant is self-represented.

[53] Of course, if a defendant is represented by counsel, it may be easier for a defendant to meet the minimum requirements of *Presser*.[68] As noted by Gibbs, Mason and Wilson JJ in *Ngatayi*, it is relevant that a defendant is defended by counsel. With the assistance of counsel, a defendant is usually able to make a proper defence so as to be fit to plead and be tried.[69] That does not mean that in all cases where a defendant is self-represented they are unable to make a proper defence. As stated by the learned trial judge:[70]

> "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."

(g) Disposition in respect of Issue One

[54] Her Honour was correct in stating that the term "fit for trial" was defined "apparently in ignorance of the position at common law" and her Honour did not err in determining that the phrase "fit to plead" incorporated the common law test of "fitness to plead". Having regard to the factors in *Presser*, as enounced in *Kesavarajah* and *Eastman*, it is clear that the ability to instruct counsel and endure the trial continue to be factors taken into account in determining one's fitness for trial, throughout the entire trial process. More importantly, at common law, a failure to meet one common law factor results in a holistic failure to be fit for trial. In that sense, the definition of "fit for trial" is representative of the common law and the term need not necessarily have been defined. I note that should the Mental Health Bill 2015 (Qld) be enacted, Queensland will revert to the common law concept of fitness for trial and the term will not be defined.[71]

[55] Nor did her Honour fail to apply the third criteria, the ability to endure proceedings without adverse effect, as submitted by the appellant.[72] In the context of the common law definition of fit to plead, her Honour gave consideration to not only the appellant's self-represented status but also his ability to instruct counsel by virtue of her finding that he was fit for trial. Her Honour noted, by reference to the judgment of Justice A Lyons in respect of the previous reference, that the appellant understands the charges and is able to put forward his defence. He was able to give his account of the offences to Dr Beech in 2010.[73] His primary defence, as explained to Dr Beech, is that he is

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67 *R v M* [2002] QCA 464, [4]–[6].

68 *Re Walton* [1992] 2 Qd R 551, 554.

69 *Ngatayi v The Queen* (1980) 147 CLR 1, 9.

70 *Re Berg* [2014] QMHC 5, [42].

71 The Mental Health Bill 2014 (Qld) was introduced to the Legislative Assembly on 27 November 2014 for consultation and has since lapsed. The Mental Health (Recovery Model) Bill 2015 (Qld) was introduced to the Legislative Assembly on 5 May 2015. The Mental Health Bill 2015 (Qld) was then introduced on 17 September 2015. None of the Bills contain a definition of "fit for trial". On page 29 of the Explanatory Memorandum, Mental Health Bill 2015 (Qld), the definition of "fit for trial" is stated to be removed so as to rely on the common law as is the case in the criminal jurisdiction in Queensland.

72 Appellant's amended outline dated 2 March 2015, [23]

73 *Re Berg* [2014] QMHC 5, [45].

a duly trained medical practitioner with qualifications in psychiatry. As to other allegations the appellant informed Dr Beech that he had acted in the interests of his patients and had always acted in a professional manner.[74] Her Honour therefore correctly concluded:[75]

> "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."

[56] The appellant also submitted, by reference to the *Dietrich*[76] principle, that as long as he remains legally unrepresented his charges should be permanently stayed. This submission must fail. First, as observed by her Honour, the *Dietrich* principle does not apply to committals.[77] Second, when properly construed, the definition of "fit for trial" permits a person's fitness to be assessed including that person's fitness to instruct counsel even where the person is self-represented.

Issue Two: Reliance on evidence from the previous reference

[57] The appellant submits the learned primary judge erred in relying on evidence from the previous reference to the Mental Health Court. Because of the change in circumstances since the previous reference, which includes the absence of legal representation and the opinions expressed by Dr Ziukelis in his letters, the appellant submits that the evidence of the previous reference was "entirely" based on the assumption that legal counsel was present.[78]

[58] The appellant has failed to establish this alleged error.

[59] The evidence from the previous reference remains relevant to the present reference. The change in circumstances does not detract from the relevance of this evidence. The reports of both Dr Kovacevic and Dr Beech conclude that the appellant had no psychotic illness and that he is fit for trial.[79] This is also the unanimous view of Dr Lawrence and Dr McVie who assisted the Mental Health Court in respect of the previous reference. The only psychiatrist who does not express that view is Dr Ziukelis.

[60] The relevant psychiatric findings are referred to in detail by the learned primary judge in her Reasons:[80]

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

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74 Report of Dr Michael Beech, psychiatrist, 8 September 2010, 8–10; appeal record book, 53–55.
75 *Re Berg* [2014] QMHC 5, [47].
76 *Dietrich v The Queen* (1992) 177 CLR 292.
77 *Re Berg* [2014] QMHC 5, [28].
78 Appellant's amended outline dated 2 March 2015, [3].
79 *Re Berg* [2014] QMHC 5, [8].
80 *Re Berg* [2014] QMHC 5, [4]–[6], [8].

'[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. In that time he had seen the appellant on nine occasions, the first for over an hour, and the subsequent consultations were in the order of half an hour each. 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 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: his main report a standard form document; his own view that he should confine himself to clinical matters; his admission that Andreas Berg does most of the talking at appointments; his admission that he had not exhaustively reviewed the question of whether Mr Vincent Berg was fit for trial; the tentative nature of his opinions, final part of extracted evidence; his reliance on statements of Mr Vincent Berg, 'I am led essentially by what the patient wishes to reveal to me rather than …'.

[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.'

> [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: Dr Kovacevic's view that, '… Mr Berg impressed me as deliberately and purposefully vague in his responses'; Dr Kovacevic's evidence as to the lack of any objective evidence of dementia and his evidence of malingering or misreporting functional impairment; 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; Dr Beech's evidence that he disbelieved Mr Berg's reports of hearing voices; Dr Kovacevic's further views about neuropsychology results suggesting, but not being diagnostic of, malingering, and being suggestive of gross exaggeration; Dr Lawrence's (assisting psychiatrist) conclusion that the evidence raised issues of deliberate misrepresentation at times; the evidence that the longitudinal pattern of illness was inconsistent with the natural course of any major illness; the evidence indicating no clear pattern of cognitive difficulties which would be consistent with any common memory disorder; further reference to neuropsychology tests showing gross exaggeration." (*citations omitted*)

[61] By reference to the above quoted paragraphs it is incorrect, as asserted by the appellant, that the reports of Drs Kovacevic and Beech are "entirely" based on the assumption that the appellant would be legally represented. The psychiatric reports went much further concluding that the appellant had no psychotic illness. Her Honour specifically recorded in her Reasons that the appellant brought the present reference to the Mental Health Court on the basis that he is now without legal representation and that previous assessments as to his fitness for trial were irrelevant to his current circumstances. The appellant's submission to her Honour was that he ought to be assessed as unfit for trial because the earlier 2011 reference in the Mental Health Court proceeded on the basis of an assumption that he would be represented by lawyers at any trial. Her Honour further noted that the only new medical evidence about fitness was constituted by Dr Ziukelis's letters.[81]

[62] Her Honour's Reasons reveal a detailed analysis of these letters.[82] When one has regard to the content of these letters her Honour was correct to prefer the evidence of Drs Kovacevic and Beech. As her Honour observed:[83]

> "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. He considers no collateral information and does not begin to deal with the reports and evidence

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81 *Re Berg* [2014] QMHC 5, [10].
82 *Re Berg* [2014] QMHC 5, [11]–[17].
83 *Re Berg* [2014] QMHC 5, [20].

> 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."

[63] Her Honour's decision not to rely on Dr Ziukelis's letters was also consistent with the advice her Honour received from the assisting psychiatrists.[84] Her Honour did, however, take these letters into account in determining that the appellant was fit for trial even in circumstances where he has no legal representation:[85]

> "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."

Issue 3

(a) Apparent bias

[64] The appellant's allegation of apparent bias arises from the fact that the learned primary judge sat on the appellant's appeal in respect of the previous reference.[86] The appellant submits that her Honour, having sat on the appeal, should have recused herself from hearing the present reference. The appellant further submits that by failing to recuse herself, her Honour viewed "the present reference from the standpoint of the previous one".[87]

[65] This submission should be rejected. For the purpose of considering the appellant's submissions both in relation to the allegations of apparent bias and actual bias I have read and considered the whole of the transcript of proceedings before the learned primary judge. Although it was a matter of public record that her Honour had sat as a member of the Court of Appeal in respect of the previous reference, her Honour, early in the proceedings, but after having granted Mr Andreas Berg leave to appear for the appellant, stated that she was familiar with the previous reference having sat on the appeal.[88] Having made this statement the appellant made no application for her Honour to recuse herself. Given that the appellant was not represented by counsel this failure to take objection may not necessarily amount to a waiver. As observed by Brennan, Deane and Gauldron JJ in *Vakauta v Kelly*:[89]

> "Where such comments which are likely to convey to a reasonable and intelligent lay observer an impression of bias have been made, a party who has legal representation is not entitled to stand by until the contents of the final judgment are known and then, if those contents prove unpalatable, attack the judgment on the ground that, by reason of those earlier comments, there has been a failure to observe the

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84 *Re Berg* [2014] QMHC 5, [21].
85 *Re Berg* [2014] QMHC 5, [22].
86 *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91.
87 Appellant's amended outline dated 2 March 2015, [8].
88 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-4, lines 6–7; appeal record book, 4.
89 (1989) 167 CLR 568, 572.

> requirement of the appearance of impartial judgment. By standing by, such a party has waived the right subsequently to object. The reason why that is so is obvious. In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing."

[66] This passage suggests that waiver will not necessarily arise where a party is not legally represented. It remains the case however, that the appellant, knowing that her Honour had sat on the appeal from the previous reference, did not request her Honour to recuse herself.

[67] The mere fact that her Honour sat as a member of the Court of Appeal in respect of the previous reference is not in itself sufficient to give rise to a reasonable apprehension that her Honour might not bring an impartial and unprejudiced mind to the present reference.[90] As observed by French CJ in *British American Tobacco v Laurie*:[91]

> "Particular applications of the general principle enunciated in *Ebner* will be required for the different classes of case in which an apprehension of bias is said to arise and different sets of circumstances within those classes. A gratuitous observation, adverse to a party, made in the course of proceedings or in extra-curial speech is one thing. A finding properly made by a judge in the course of an interlocutory ruling or in earlier proceedings is another. The latter is the area of concern in this appeal. It is an area in which courts should be astute not to defer to that kind of apprehension that is engendered by the anticipation of an adverse outcome, rather than a legitimate concern about partiality. By way of example, the fact that a judge who has made a finding of fact adverse to a party on particular evidence is likely to make the same finding on the same evidence, is not of itself indicative of bias. It could be indicative of consistency subject to the judge having an open mind when it came to argument about the effect of the evidence."

[68] It is important to note what was decided by the Court of Appeal in respect of the appeal from the previous reference. The appellant's appeal was allowed in respect of the Mental Health Court's finding that the appellant was not of unsound mind at the time of the alleged offences. The Court of Appeal found that there was sufficient material before the Mental Health Court to show that there was reasonable doubt as to whether the appellant committed the offences with which he was charged. In those circumstances s 268(1) of the Act operated to prevent the Mental Health Court making a finding of soundness of mind. The appellant was therefore partially successful before the Court of Appeal.

[69] The primary complaint of the appellant in respect of the previous reference concerning the issue of fitness for trial was that the Mental Health Court preferred the evidence of Drs Kovacevic and Beech to that of Dr Ziukelis or acted on the basis of the opinions of Drs Kovacevic and Beech.[92] Her Honour's analysis and acceptance

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90 See generally *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 344–345 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Johnson v Johnson* (2000) 201 CLR 488, 492 [11] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

91 (2011) 242 CLR 283, 303 [39] (French CJ).

92 *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91, [33].

of the correctness of the Mental Health Court's decision as to the issue of fitness for trial did not involve her Honour making any findings of credit in respect of Dr Ziukelis. As her Honour observed:[93]

> "As I have endeavoured to demonstrate by the above summary of psychiatric evidence, the Mental Health Court was well entitled to prefer Drs Kovacevic and Beech as the only independent experts who gave evidence at the hearing. There were aspects of Dr Ziukelis' evidence which were surprisingly vague, for example his lack of knowledge of the delusions suffered by his patient, and aspects of his treatment which seemed somewhat casual, and his knowledge of the history of his patient's drug treatment, for example. The Mental Health Court was entitled to take that into account in assessing Dr Ziukelis' opinion. The Mental Health Court was also entitled to take into account, as Dr Lawrence pointed out, that Dr Ziukelis' evidence actually fell short of unequivocally stating that the appellant was presently unfit for trial."

[70] Her Honour ultimately concluded that there was an abundance of evidence before the Mental Health Court upon which it could reach the conclusion that the appellant was fit for trial:[94]

> "The only dissenting voice amongst the psychiatrists was that of Dr Ziukelis. Not only did Dr Ziukelis himself qualify his ability to assist the Court, as outlined above, he did not unequivocally state that the appellant was unfit for trial."

[71] In my view no fair minded lay observer might reasonably apprehend that her Honour might not bring an impartial and unprejudiced mind to the resolution of the present reference on the basis that she sat on the appeal from the earlier reference. Her Honour was therefore correct in observing at [48] of the Reasons:

> "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."

(b) Actual bias

[72] The appellant submits that the learned primary judge conducted the proceedings in a "biased, interrupting and influencing manner".[95] It may be gleaned from the appellant's written and oral submissions on appeal that there are three aspects to the allegation of

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93 *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91, [33].

94 *Berg v Director of Public Prosecutions (Qld)* [2012] QCA 91, [34].

95 Appellant's amended outline dated 2 March 2015, [10].

actual bias. First, actual bias is demonstrated from how her Honour conducted the proceedings. Second, by announcing her opinion regarding the medical evidence before consulting with the two assisting psychiatrists, her Honour influenced their opinions.[96] Third, her Honour's actual bias is demonstrated by her treatment and criticism of the evidence of Dr Ziukelis.[97]

[73] As to the first of these matters an examination of the transcript of proceedings does not demonstrate any bias on her Honour's part in conducting the proceedings. The primary submission of the Director of Public Prosecutions was that because a committal was an administrative rather than a judicial proceeding it was inappropriate to apply the P*resser* criteria to determine whether or not the appellant was fit to participate in a committal. Her Honour rejected this submission observing:[98]

> "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 to 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 interest 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."

[74] The Director of Public Prosecutions has not sought to challenge this aspect of her Honour's judgment and the issue does not arise for determination on this appeal. The finding was, however, favourable to the appellant and is relevant in considering any allegation of actual bias in the conduct of the proceedings.

[75] As to the allegation that her Honour showed actual bias by "interrupting", an examination of the transcript of proceedings reveals that her Honour did intervene when Mr Andreas Berg sought to ask questions of Ms Louise Martin, the answers to which would have revealed privileged communications.[99] Her Honour was correct to intervene. Such intervention was for the purpose of protecting the appellant's privileged communications with Legal Aid.

[76] Her Honour also correctly interrupted Mr Andreas Berg when he persisted in a submission that the Mental Health Court should direct Legal Aid as to how the appellant should be represented.[100]

[77] As to the general conduct of the proceedings I further note that her Honour gave leave to Mr Andreas Berg to appear on behalf of the appellant[101] and granted the appellant's request to be provided with a transcript of proceedings.[102] Her Honour also ensured

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96 Appellant's amended outline dated 2 March 2015, [13].

97 Appellant's amended outline dated 2 March 2015, [11]–[16], [24]–[28].

98 *Re Berg* [2014] QMHC 5, [32].

99 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-29, lines 27–45; 1-30, lines 1–46; appeal record book, 29–30.

100 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-21, lines 17–47; 1-22, lines 1–14; appeal record book, 21–22.

101 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-3, lines 13–18; appeal record book, 3.

102 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-32, lines 34–37; appeal record book, 32.

that relevant evidence as to the status of any grant of legal aid to the appellant was presented. There is therefore no substance in the appellant's submission in this respect.

[78] As to the second matter, there is simply no evidence that either Dr Sundin or Dr Harden was in any way influenced by her Honour in providing their advice. Any suggestion to the contrary seeks to impugn the independence of the assisting psychiatrists without justification.

[79] In relation to the third matter, as already discussed above, her Honour's careful analysis of the letters from Dr Ziukelis supported the conclusion that there was no proper basis to act on the assertions in Dr Ziukelis's letters.[103] This conclusion was supported by Drs Sundin and Harden with Dr Sundin advising her Honour as follows:[104]

> "DR SUNDIN: … The clinical opinions presented to this court by Dr Ziukelis are simply that; his clinical opinions. There is no evidence that he has applied an appropriate level of forensic rigour in his consideration of the issues. While it is not uncommon for a clinician to advocate for his patient, in a case such as this where there is historical evidence of exaggeration, malingering and multiple allegations of deliberate fraud, one would expect a greater degree of caution from the clinician and the opinions that he expresses to a court. It appears to me that Dr Ziukelis has continued to act on a false presumption throughout in an individual where there is not a lot of evidence that he can be considered to be a reliable historian. I would advise your Honour that she accept the previous advice of the two independent forensic assessments that were undertaken by Doctors Beech and Kovacevic, and that this man is fit for trial, that any depression he has suffered was of a mild and transient nature and that the claims in relation to a persistent psychotic illness are not supported by objective evidence."

[80] The mere fact that her Honour preferred the previous opinions of Drs Kovacevic and Beech over the opinions contained in Dr Ziukelis's letters does not support an allegation of actual bias. The appellant's submissions in relation to actual bias should therefore be rejected.

Disposition

[81] The appeal should be dismissed.

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103 *Re Berg* [2014] QMHC 5, [20].

104 Transcript of proceedings in the Mental Health Court, 30 April 2014, 1-31, lines 43–47; 1-32, lines 1–9; appeal record book, 31–32.