Appendix 1: *Eastman Report*, Vol. 1, Recommendations

Section 11: Recommendations

278. As it has not been shown that Mr Eastman was unfit to plead during the whole of his trial or during any part of it, or that an unresolved question as to his fitness resulted in a miscarriage of justice, I do not recommend that the Executive take any action to set aside Mr Eastman's conviction.

279. At the risk of repetition it needs to be understood, however, that if the trial judge had been made aware on the morning of 22 May 1995 of the opinions of Mr Eastman's previous counsel, Mr Williams and Mr O'Donnell, and of the reports of Dr Hocking and Dr Milton, which were in the possession of the prosecution, it is highly likely that the trial judge would have determined that there was a question as to Mr Eastman's fitness to plead. That determination would have required an order which would have resulted in a determination of the Mental Health Tribunal whether Mr Eastman was or was not fit to plead. Furthermore, if in the appeal to the Federal Court, that Court had been made aware of what is now known to have been evidence available then as to Mr Eastman's unfitness, it is likely that that Court would have allowed the appeal, set aside the conviction and ordered a new trial. It is now put on Mr Eastman's behalf that he should not suffer that loss of the opportunity of a new trial. I reject that submission on the ground that on all the material now available there was no actual miscarriage of justice in what occurred. In my view, Mr Eastman was fit to plead throughout his trial. If there was a question as to his fitness to plead on the morning of 22 May, that question was resolved by his demonstrated fitness thereafter.

280. If the Executive was of the view, contrary to my own, that the fact that the issue of fitness to plead was not raised with the trial judge or in or by the Federal Court has resulted in a miscarriage of justice, then it should consider whether the conviction ought be set aside and a new trial take place. If that were the Executive's assessment, it would be necessary to

introduce legislation into the Legislative Assembly in order to bring about the desired effect. Alternatively, the Executive might introduce legislation to treat this report as a report under Part 20 of the Crimes Act as it now stands and to confer power on the Full Court of the Supreme Court to decide whether to confirm or quash the conviction and order a new trial accordingly under present s 430. I do not recommend either of those courses.

281. Kirby J in the High Court described the situation that led to the inquiry as unsatisfactory. It is possible to identify some of the unsatisfactory features of the case and to make suggestions how they may be avoided in the future.

282. At the heart of the matter is the role of counsel in relation to the issue of fitness to plead. Traditionally counsel in a criminal trial, whether for the prosecution or for the defence, have been reluctant to raise the issue of fitness to plead because of the perception that it may result in "throwing away the key", that is to say, detention in a mental asylum indefinitely and without rights for the person detained.

283. Whilst a decision to inform the court or opposing counsel of what one has learned about an accused person's mental capacity in the confidence of preparing a defence (or preparing the prosecution case against the accused) is not to be taken lightly, it needs to be taken in the full and accurate understanding of the consequences in the current medico-legal setting. The mental health legislation in the ACT provides a comprehensive regime for disposition, treatment and review of persons found unfit to plead, which is a far cry from the old days of "throwing away the key".

284. The recognition of the anomalous nature of fitness to plead as something for the court and for counsel to consider outside the adversary system, and of the obligation on counsel who raises an issue of incapacity to indicate the nature of the facts which go to support the view that the accused is unfit carries the clear implication that there is no impropriety in counsel (whether

for the defence or for the prosecution) raising the issue with the court. It suggests indeed that there is a duty to do so.

285. The ethical situation facing a lawyer who believes that his or her client is or may be unfit to plead should also be spelt out. This should be initially a matter for the professional associations themselves to formulate appropriate rules of conduct, and only in the failure of such formulation, need it be a matter for legislation. The possibility of legislation, however, should not be overlooked. I express the strong view that there is no impropriety in a lawyer appearing or acting in a criminal trial who has a well-founded belief that the accused person is unfit to plead informing the opposing lawyer and the court. The law as to how the issue is to be dealt with clearly implies that the continuing duty to the court over-rides any perceived duty to the client to keep the matter secret.

286. Once this is recognized, it follows that where the very question as to the client's capacity to give instructions is at issue, then the lawyer may not be bound by the express direction of the client that the matter of fitness is not to be raised.

287. A decision to raise unfitness by a lawyer acting for an accused person should be made in the light of an understanding of the possible ramifications for the retainer of the lawyer. Where the court determines that despite what counsel has raised, there is no question as to fitness, or where there is a finding of fitness (or even of unfitness) the lawyer may have to consider whether it is appropriate to continue to act or appear on behalf of the person. I refer in Appendix 6 to the salutary practice of ceasing to act for a client for whom the lawyer has acted unsuccessfully to resist a determination of unfitness to plead. Professional rules of conduct would be useful in this regard.

288. The duty to the Court should be regarded as surviving the termination of the lawyer/client relationship. The position of a lawyer as an officer of the court should usually be sufficient to secure a hearing in the courtroom. A lawyer who has been dismissed and who no longer has a

right of audience in a trial will need to be tactful and possibly persistent in seeking to be heard on a matter concerning a former client. A request to prosecuting counsel to make or join in the application may be appropriate and effective.

289. The position of prosecuting counsel needs particular consideration. The over-riding duty of the prosecution to assist in securing a fair trial has come to mean that the prosecution is under a duty to disclose to the defence all relevant material including any credible material that could conceivably go to assist the accused to make a defence. In my view, this duty of disclosure extends beyond matters concerned with issues relating to the ingredients of the alleged offence charged. The duty, in my view, clearly extends to disclosure of matters relevant to whether the accused was mentally ill at the time of the alleged offence and thus entitled to a verdict of not guilty on the ground of mental illness. In a trial for murder it extends to matters relevant to whether the accused acted in a state of diminished responsibility which would reduce the offence from murder to manslaughter. I see no reason why the duty of disclosure should not extend to matters which go to raise the issue of fitness to plead. I recommend that the ACT Director of Public Prosecutions be invited to revise the guidelines to prosecutors with these suggestions in mind.

290. Had these principles been recognised and applied at Mr Eastman's trial, the need for this inquiry might have been avoided. In the absence of conflicting opinions from the professional associations about whether it was proper to raise the issue of Mr Eastman's fitness to plead contrary to his directions, counsel for the defence, whose retainer had been withdrawn, might have been more persistent about raising the issue with the trial judge. Had the defence been furnished with the reports of Dr Milton and Dr Hocking, both Mr Williams and Mr O'Donnell might have been firmer in their assessments of Mr Eastman's unfitness. Had the prosecution paused to consider the Milton and Hocking reports and the opinions of

Dr McDonald in the light of a duty of disclosure, the concerns of defence counsel might not have been dismissed so easily.

291. It is a fact that legal practitioners generally are not well acquainted with mental health law and practice. The professional associations, the ACT Law Society and ACT Bar Association, should be encouraged by the Attorney-General to provide continuing education programs in this field.

292. More so than in any other jurisdiction in Australia, lawyers, mainly barristers, whose principal place of practice is outside the jurisdiction, commonly appear in ACT courts. Before Mr Eastman's trial these interstate counsel had to be admitted to practice in the ACT before they had the right of audience. This requirement provided a reminder that they should familiarise themselves with ACT laws and the practices of ACT courts. It was perhaps not as obvious that they were also bound by rules of professional conduct that might not be identical with those applying elsewhere and that if they needed advice on ethical matters it was to senior ACT practitioners or to the ACT Bar Association that they might have turned with benefit rather than to their fellows in their home cities. Unfortunately the tendency of interstate lawyers to overlook the differences between ACT laws and practices and those of their home jurisdictions was exacerbated by the Mutual Recognition Act 1992 which assumes that Australian lawyers are equally familiar with the situation on any one State or Territory as they are with that in any other. This tendency might be countered in the ACT by encouraging visiting interstate lawyers to join local professional associations or at least participate in their activities including continuing education programs.

293. There is something to be said for what appears to be the practice in the United States and Canada regarding a deliberately disruptive accused. In those jurisdictions leave of the court is required before the accused may appear unrepresented and the court has power to appoint "standby" counsel in the event of leave being granted. The practice is founded upon

constitutional considerations not applicable in Australia and any recommendation is outside the scope of the inquiry.

294. Likewise any recommendation as to clarifying the criteria for unfitness to plead, although touched on briefly in Appendix 3, lies outside the scope of the inquiry.

295. The recommendations made are not intended to be a precise formulation of appropriate rules that may be adopted but rather a basis for consideration by the Executive.