

The Shopfront

YOUTH LEGAL CENTRE

Working with clients with cognitive and mental health impairments

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Outline

- Defining mental illness and cognitive impairment
- Relevance in a criminal law context
- Assessing capacity and fitness
- Diversionary procedures (MHFPA ss32, 33)
- Resources and services
- Other options in criminal matters
- Sentencing

Mental illness

Mental Health Act 2007 s4: "**mental illness**" means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions,
- (b) hallucinations,
- (c) serious disorder of thought form,
- (d) a severe disturbance of mood,
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d).

Mental illness

- DSM – V (Diagnostic and Statistical Manual)
- Personality disorders?
- Substance abuse disorders?
- Drug-induced psychosis?
- “Dual diagnosis” or “co-morbidity” (mental health and substance abuse problems). Causal link not always clear.

Cognitive impairment

Mental Health (Forensic Provisions) Act 1990 s32(6):

"cognitive impairment" means ongoing impairment of a person's comprehension, reasoning, adaptive functioning, judgment, learning or memory that materially affects the person's ability to function in daily life and is the result of damage to, or dysfunction, developmental delay or deterioration of, the person's brain or mind, and includes (without limitation) any of the following:

[cont'd...]

Cognitive impairment

- (a) intellectual disability,
- (b) borderline intellectual functioning,
- (c) dementia,
- (d) acquired brain injury,
- (e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
- (f) autism spectrum disorder.

Intellectual disability

- Substantial limitations in both intellectual functioning (reasoning, memory) and adaptive behaviours (literacy, communication, living skills, social and recreational skills)
- Arising before age 18
- “Developmental disability” and “intellectual disability” are often used interchangeably, but developmental disability can also include autism, etc
- Does not change significantly over time, although a person’s adaptive functioning can improve with appropriate support
- *Intellectual disability is not a mental illness!*

Intellectual disability

- Borderline – IQ 70-79
- Mild – IQ 60-69
- Moderate – IQ 35-59
- Severe – IQ 20-34
- Profound – IQ under 20

Relevance in a criminal law context

- “Vulnerable person” if a suspect at police station (LEPRA Part 9 and Regulations)
- Admissibility of evidence including admissions made to police
- Capacity to instruct
- Fitness to be tried
- NGMI defence
- Diversionary procedures in Local and Children’s Courts (MHFPA s32/33, Cth Crimes Act s20BQ)
- Sentencing

Vulnerable persons in police custody

- Law Enforcement (Powers and Responsibilities) Act (LEPRA)
- Part 9 of Act; Part 3 Division 3 of Regulations
- “Vulnerable person” includes someone with “impaired physical functioning” or “impaired intellectual functioning”
- Custody manager has duty to assist vulnerable person to exercise rights
- Entitled to support person (if under 18 cannot waive)
- Criminal Justice Support Network: volunteer support people at police stations and courts

<http://www.idrs.org.au/support-criminal-justice/cjsn-court-support.php>

Capacity

“When a client’s mental capacity is in doubt: a practical guide for solicitors”

<https://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf>

- Presumption of capacity
- Capacity is decision-specific
- May fluctuate
- Assess the decision-making ability, not the decision itself (foolish decision does not equate to lack of capacity)
- Fitness to be tried: a separate but related issue

Local Court diversionary procedures

Mental Health (Forensic Provisions) Act

Section 33 – “mentally ill person”

Section 32 – mental illness or cognitive impairment

Commonwealth *Crimes Act* s20BQ - similar to s32

IDRS step-by-step guide to section 32 applications

http://www.idrs.org.au/s32/_home/index.php#.W8WXkdczaos

Local Court diversionary procedures

- Only for matters capable of being dealt with summarily
- May apply at any stage of proceedings
- No requirement to enter plea (but may ask for indication)
- Court cannot require defendant to incriminate him/herself
- Order under s32, 33, 20BQ does not amount to finding that offence has been proved (or otherwise)
- If application refused, may make further application with leave of court

Local Court diversionary procedures

Mental Health (Forensic Provisions) Act s33

- Applies to “mentally ill person” (see *Mental Health Act* s14)
- Court may send defendant to hospital for assessment or treatment
- Not necessarily a final order (see, eg *DPP v Wallman* [2017] NSWSC 40)
- May also make final diversionary order similar to s32, or Community Treatment Order
- Enforceable for 6 months

Local Court diversionary procedures

Mental Health (Forensic Provisions) Act s32

- Applies to person with
 - mental illness;
 - cognitive impairment; or
 - “mental condition for which treatment is available in a mental health facility”
- At time of alleged offence or at time of court appearance
- But not a “mentally ill person” at time of court appearance

Local Court diversionary procedures

Mental Health (Forensic Provisions) Act s32

- Magistrate's discretion: more appropriate to deal with defendant under s32 than according to law?
- Court may dismiss charge and discharge defendant
 - unconditionally;
 - on condition they attend upon specified place or person for assessment, treatment or support; or
 - into care of responsible person, unconditionally or subject to conditions
- Enforceable for 6 months

Local Court diversionary procedures

Commonwealth *Crimes Act* s20BQ

- Similar but not identical to s32
- Applies to person with
 - mental illness (within the meaning of the civil law of the relevant State or Territory); or
 - intellectual disability
- At time of court appearance
- “Mentally ill person” not excluded
- Diversionary orders similar to s32
- Enforceable for up to 3 yrs

Section 32 – common myths

“Some offences are just too serious”

- seriousness is relevant but not determinative

“The illness/condition/disability must have caused the offending”

- causal link is relevant but not determinative

“It’s all about treatment vs punishment”

- remember s32 is *diversionary*, not simply a sentencing option

DPP v El Mawas (2006) 66 NSWLR 93

Section 32 – common myths

“It’s all about fitness to be tried”

- no it’s not

Mackie v Hunt (1989) 19 NSWLR 130

“It’s got nothing to do with fitness to be tried”

- that’s not correct either

Mantell v Molyneux [2006] NSWSC 955

“The facts must be admitted, or findings of fact made, before the s32 application can be determined”

- no ... go back to the legislation, and remember it’s a diversionary procedure, not a sentencing exercise

Section 32 – common myths

“Section 32 is inappropriate for traffic or other strict liability offences”

- not necessarily

Police v Deng [2008] NSWLC 2

“The defendant must be present at court for an order to be made”

- not necessarily, but orders shouldn't be made in chambers without the parties being heard

DPP v Wallman [2017] NSWSC 40

“A 6-month time limit on enforceability is not long enough”

- matter may be adjourned to keep defendant under supervision for longer

Mantell v Molyneux [2006] NSWSC 955

Section 32 – common myths

“You must always have a treatment plan” (aka case/support plan)

- not necessarily, but for relatively serious offences you need one
Perry v Forbes & Anor (1993) NSWSC, unreported

“The responsible person must be a named individual”

- no, but person or agency must be clearly identified
Saunders v DPP [2017] NSWSC 760

Also be mindful that the responsible person:

- need not be a psychiatrist or mental health professional
- doesn't have to be at court or to sign anything
- can't be compelled to provide services
- can't be compelled to report a breach

Assessments and case plans

- Psychologist or psychiatrist?
 - cognitive impairment: psychologist
 - mental illness/condition: psychologist or psychiatrist
 - psychologists *can* diagnose mental illnesses, but check their qualifications
 - only psychiatrists can prescribe medication
- Where to find appropriate professional?
- Payment?

Assessments and case plans

Justice Health: Mental Health Court Liaison Service

- At over 20 Local and Children's Courts
- Mental health assessments for defendant in custody or in the community

Cognitive Impairment Diversion Program

- Pilot program at Penrith and Gosford Local Courts
- DoJ, Justice Health, IDRS
- Aim to develop case plan and link people with NDIS
- Eligibility criteria? May exclude people with borderline intellectual disability
- <http://www.localcourt.justice.nsw.gov.au/Documents/Facts%20Sheets/Cognitive%20Impairment%20Diversion%20Program/CIDP-factsheet-stakeholders.pdf>

Other options in Local Court

- If section 32 refused but unfit to be tried: discharge/stay:
Mantell v Molyneux [2006] NSWSC 955
- Defence: not guilty by reason of mental impairment (NGMI): arguably applies in Local Court but no statutory regime to deal with person who is found NGMI in Local Court

Superior Courts

- Fitness to be tried
- NGMI defence
- Special verdict, limiting term
- Forensic patients
- Role of Mental Health Review Tribunal

Sentencing

DPP v De La Rosa [2010] NSWCCA 194

- Reduced moral culpability
- Inappropriate vehicle for general deterrence
- Reduced role for specific deterrence
- Custody may weigh more heavily

BUT

- Protection of community

Sentencing

Muldrock v The Queen (2011) 244 CLR 120

- Intellectual disability
- Reduced culpability
- Inappropriate for general deterrence
- “Mild” intellectual disability is not insignificant
- See especially paras 50-55

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Questions?

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