FITNESS TO BE TRIED

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The Nature of Unfitness in a client

1. Unfitness to be tried is a term that denotes that an accused is unable to fairly partake in the criminal hearing process. Fitness is concerned with the accused person's ability to partake in a trial, not the mental condition at the time of the offence. The latter would give rise to particular defences available to the accused in relation to their mental illness or intellectual disability in that regard, such as the insanity defence[1].

2. The common law test is set out in the Victorian decision of *R v Presser* [1958] VR 45 and has since been held by the High Court *Kesavarajah v The Queen per* Mason CJ, Toohey & Gaudron JJ, Dawson & Deane JJ agreeing, at pps. 245, 246. to state the essence of what is required in order for an accused to be fit at common law[2]:

> *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 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*

[1] See s. 39, Mental Health (Forensic Provisions) Act 1990 (NSW).

[2] at page 48

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.

3. Where the accused's lawyer or the Crown has expert medical opinion that the accused is unfit to be tried, there is an obligation to draw this material to the attention of the judge, it seems even if the accused does not wish the issue to be raised[3].

4. Various mental conditions are recognised as capable of causing unfitness, including mental illness and an intellectual disability: eg a person suffering paranoid schizophrenia who is hearing voices may be so distracted as to be unable to follow the evidence, or at least to distinguish between the evidence and what he or she believes the voices are saying. A person with an intellectual disability may be incapable of understanding abstract concepts; their comprehension may be limited to concrete notions, so that they are unable to understand much of what is being said by witnesses, even with the help of careful explanation.

5. It is not so easy with an intellectual disability. Many defendants or accused with an intellectual disability have not been previously identified as such, and there is nothing at all about their behaviour to suggest it. Indeed, persons with an intellectual disability may be adept at deliberately covering up their disability, having learned painfully that it is not in their interests to be identified by strangers as “dumb”.

6. These ranges are taken from the DSM-IV[4].

IQ range	Terminology
84-70	Borderline Intellectual Disability
70-50/55	Mild intellectual disability
50/55-35/40	Moderate intellectual disability
Les than 20/25	Severe or Profound intellectual disability

7. The terminology is quite misleading; a mild or moderate degree of intellectual disability is, in fact, quite severe.

8. A client with an intellectual disability is likely to mask the fact by giving simple “yes/no” responses to questioning. At some point during a

[3] Eastman v The Queen (2000) 203 CLR 1 esp at para [297] (per Hayne J.). See also Regina v Mailes (2001) 53 NSWLR 251 esp at para [11] and the report of Miles AJ into the conviction of David Eastman especially at para [284]

[4] The levels of intellectual disability in IQ terms the mean being an IQ of 100:

conference, ask the client an open question: eg to explain back to you in their own words an abstract piece of advice that you have given them. If they do not comprehend the essence of the advice, obtain a psychological assessment. An example where the absence of an interpreter contributed to an inaccurate assessment of an accused's intellectual capacity is *R v Tuigamala* [2006] NSWCCA 380.

9. Professor Eileen Baldry from the University of NSW recently carried out a study of some 680 prisoners in NSW prisons who have an IQ of less than 70 (being a person with an intellectual disability). Only 23% (156) were clients of the relevant NSW government agency (the NSW Dept of Ageing, Disability and Home Care: ìDADHCî), and of those, 79% (123) were first diagnosed in prison. Therefore only 33 of the 680 prisoners with an intellectual disability had disability services prior to their imprisonment.

10. The identification of a client's intellectual disability is important for other issues, beyond fitness:

- Admissibility of ERISP
- whether they are a competent witness under the Evidence Act,

- it may have ramifications for their sentence. An offender whose intellectual disability or mental illness contributed to their commission of the offence may warrant a lesser sentence, partly because general deterrence is not to be given the same weight[5]; where the disability is causally related to the commission of the offence, and subject to issues of the protection of society.

11. Unfitness is not confined to psychiatric or psychological issues. As our population becomes older, we are likely to encounter medical unfitness; that is, accused who cannot fairly partake in a trial process because of a physical disability, such as a poor heart condition.

Summary prosecutions

12. At common law the position regarding the onus and burden of proof is not entirely clear. In *R v Podola*[6] the English Court of Criminal Appeal ruled that if the question of fitness is raised by the accused, the onus of proof lies on the accused on the balance of probabilities[7]. Although not necessary for the determination, the Western Australian Court of Criminal Appeal held in *Re Donovan*[8] that where the Crown raises the

[5] See *R v Engert* (1995) 84 A Crim R 67 (NSW CCA) and *R v Way* [2004] NSWCCA 131 *per* the Court at [86]
[6] [1960] 1 QB 325
[7] see *R v P* (1991) 53 A Crim R 112
[8] (1989) 39 A Crim R 150 (at 154 – 155)

fitness issue the onus of proof lies on the Crown to prove unfitness beyond reasonable doubt.

13. There is no single common law test of unfitness. The most quoted formulation of the fitness test in the Australian jurisdictions is that of Smith J in R v Presser. His Honour set out the following checklist of minimum standards which the accused needs to demonstrate before that accused can be tried without unfairness or injustice:

- what he is charged with
- able to plea to the charge
- and exercise the right to challenge
- understand the nature of the proceedings
- able to follow what going on in court in a general sense
- understand the substantial effect of any evidence
- to make his defence or answer the charge
- be conversant with court procedure
- to have capacity to decide what defence he will rely upon

- to be able to make his defence[9]. Although, the implication from the majority in Ngatayi and the court in Dennison is that it is a checklist of issues, not all of which must be answered in the affirmative in order to find the accused fit to be tried[10].

14. The cause of the unfitness is not limited to mental illness, and at least also includes developmental disability[11]. The condition of the accused not only at the time of the application but also throughout the length of the trial must be taken into account: (*Kesavarajah*). An inability to remember the incident said to be the crime (such as blackouts or

[9] *Presser* [1958] VR 45, *Ngatanyi* (1980) 147 CLR 1 , *Kesavarajah* (1994) 181 CLR 230, 68 ALJR 670, (1994) 74 A Crim R 100)
[10] *Ngatayi v the Queen* (1980) 54 ALJR 401; *R v Dennison*, unreported, NSW Court of Criminal Appeal, 3 March 1988
[11] *Mailes* (2000-2001) 53 NSWLR 251

amnesia) does not constitute unfitness[12]. It is not sufficient that there is a reduced capacity to meet the Presser test[13].

Local Court Diversionary Measures in NSW

15. There are legislative provisions for diversionary options that are frequently applied to defendants with an intellectual disability or mental illness in the Local Court. These are sections 32 and 33 of the *Mental Health (Forensic Provisions) Act* 1990 (NSW) (the MHFPA).

Section 32

16. If, at any stage of proceedings, it appears to the magistrate that the defendant has an intellectual disability, mental illness or other mental condition for which treatment is available in a mental health facility, and on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law, then the magistrate may dismiss the charge and discharge the defendant unconditionally or subject to conditions set out at s.32(3). A failure by the defendant to comply with conditions within 6 months of discharge may result in the magistrate dealing with the charge as if the defendant had not been discharged.

Section 33

17. Section 33 applies to defendants who satisfy the definition of a "mentally ill person" in the *Mental Health Act 2007*, s. 3, MHFPA. which appears at section 14 of that Act. The essence of that definition is that there are reasonable grounds for believing that, as a consequence of mental illness, the person requires care, treatment or control in order to protect that person or others from serious harm.

18. In such circumstances, the magistrate may order that the defendant be detained in a mental health facility for assessment, or discharge the defendant into the care of a responsible person, either unconditionally or subject to conditions. The magistrate also has a power to order a community treatment order; s. 33(1A), which subjects the defendant to compulsory treatment in the community.

19. The charge which gave rise to the proceedings are automatically dismissed after 6 months of the matter is dealt with, pursuant to s. 33

[12] *Drummond* (1994) PD [266]
[13] Rivkin (2004) NSWLR 284

(s. 33(2)).

Section 32 (1): "It appears to the Magistrate"

20. The provisions may be applied whether or not a plea has been entered[14]. The magistrate is to have regard to the seriousness of the alleged offence in determining whether to apply s. 32[15]. The magistrate must make a positive finding of fact that the section be applied[16]. The magistrate cannot make orders that purport to bind the Crown to provide particular services to the defendant[17].

21. There are no legislative provisions for defendants in the Local Court in respect of whom there is a fitness issue, so the common law applies, although there is no impediment to the magistrate simply proceeding via sections 32 or 33 of the MHFPA if the defendant is suspected of being unfit[18]. However, sometimes the magistrate is entitled to not utilise these sections, for example where the defendant has previously had their benefit and not complied with conditions, or where the charges are regarded by the magistrate as being too serious. What then is to be done?

22. At common law, there must first be a determination of fitness. If the defendant is fit, the matter proceeds normally. If the magistrate concludes that the defendant is unfit, the defendant must be discharged.

23. In *Mantell v Molyneux* [2006] NSWSC 955, Adams J stated:

> *It is convenient first to deal with the problem arising from the appellant's unfitness for trial. Even though, in the case of a charge being heard in the Local Court, there is no statutory enactment either dealing with determination of the question of fitness to be tried or as to what should occur if a person is found unfit to be tried, it seems to me that, where a defendant is found not fit to be tried, he or she must be discharged. Adams J applied Ngatayi v The Queen (1980) 147 CLR 1 per Gibbs, Mason and Wilson JJ, at [6]-[8].*[19]

Criminal Indictable Prosecutions

Onus of Proof

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[14] *Perry v Forbes* NSW SC 21.5.93 (unreported)
[15] *DPP v Sami El Mawas* [2006] NSWCA 154
[16] *Confos v* DPP [2004] NSWSC 1159 at para 16
[17] *Minister for Corrective services v Harris* NSW SC, Brownie J, 10.7.87 (unreported)
[18] *Mackie v Hunt* (1989) 19 NSWLR 130
[19] At [28]

24. In state matters, there is no onus of proof, and the burden of proof is on the balance of probabilities[20].

25. In Commonwealth matters arguably the NSW onus applies[21]. At common law the onus of proof is on the accused if he alleges that he is unfit to be tried on the balance of probabilities, but on the Crown if it alleges it:[22].

26. The question of a person's fitness to be tried is normally to be determined by a judge alone[23]. However, the question must be determined by a jury if an election is made by the prosecution, the accused's lawyer, or by the accused[24]. It has been held that the judge must satisfy himself/herself that the barrister or solicitor appearing for the accused is satisfied that the accused properly understood the nature of the election he/she was making. Failure to make such an inquiry and to make such a finding has been held to be an appellable error[25].

27. If a further determination is made that the person is unlikely to be found unfit to be tried within 12 months, there can be a 'special hearing' on the basis of the limited evidence available.

28. The special hearing should be conducted as closely as possible to a criminal trial, and in particular there should be a formal arraignment[26]. A model explanation of the proceedings was given in[27]. It seems in a special hearing, counsel for the accused may raise mental illness as a defence even if expressly instructed not to raise it[28].

29. If the person is found guilty on the basis of the limited evidence available, a limiting term must be set, which is the longest period the person can be detained as a forensic patient, and which should represent the total sentence which the court would impose had the person been fit to be tried. A non-parole period and parole period should not be set[29]. The court should not give the offender the benefit of any discount for contrition in this situation.[30]

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[20] s. 6 Mental Health (Forensic Provisions) Act
[21] Kesavarajah v The Queen (1994) 181 CLR 230, 68 ALJR 670, (1994) 74 A Crim R 100
[22] Podola [1960] 1 QB 325
[23] s. 11 Mental Health (Forensic Provisions) Act
[24] if the court is satisfied that he has sought and received advice on this issue and has understood this advice): s. 21A Mental Health (Forensic Provisions) Act
[25] Regina v Minani (2005) 63 NSWLR 490 at paras [16] and [23]
[26] Zvonaric (2001) 54 NSWLR 1
[27] Subramanium v The Queen (2004) 211ALR 1 at para [39]
[28] Dezfouli v Regina [2007] NSWCCA 86 esp at para [46]
[29] Mitchell (1999) 108 A Crim R 85, Mailes (2004) 62NSWLR 181
[30] Mitchell (1999) 108 A Crim R 85

30. The limiting term imposed as a sentence can be backdated to take into account periods of pre-sentence custody[31]. However the limiting term cannot commence after the time when the limiting term is imposed[32].

[31] Parker (1990) 47 A Crim R 281, s. 23 (5) Mental Health (Forensic Provisions) Act (1990)
[32] s. 23 (5) Mental Health (Forensic Provisions) Act (1990)