

4. Expert witnesses

Qualifying expert witnesses

In order to address evidentiary issues associated with “unfitness” or for the defences of “mental health or cognitive impairment”, it is ordinarily necessary to obtain the expert opinion of a suitably qualified and experienced expert. Unfitness may arise from diverse causes and a defence of mental health impairment may involve considerations distinct from a defence of cognitive impairment.

The qualifications of the expert to be used will depend on the accused’s condition. For example:

- an accused with a mental health impairment may require a psychiatrist’s report
- an accused with an intellectual disability or cognitive impairment may require a psychologist’s report
- an accused with dementia may require a report from a psychiatrist, geriatrician or physician
- an accused with a brain injury may require a report from a neuropsychologist
- a defence solicitor may write an affidavit explaining difficulties encountered while trying to take instructions from the accused.

In all cases, consideration should be given to:

- a) the nature of the issues arising on which an expert opinion is sought
- b) the evidentiary material, including material from the brief of evidence, the advocate has available to provide to the expert which may be relevant to the issue
- c) what, if any, specific or general questions are to be asked of the expert in the preparation of the report
- d) the qualifications and experience of the expert and whether the nature of the issues arising and questions to be asked of the expert are within the qualifications and experience of that particular expert.

An advocate should be familiar with s 79 *Evidence Act* 1995 (NSW) and the Expert Witness Code of Conduct in Sch 7, *Uniform Civil Procedure Rules* 2005 (NSW). The provisions of the Expert Witness Code of Conduct should be made known to the proposed expert witness and referred to in the report. The relevant expert witness’s CV should also accompany the report.

In cases where issues arise both of unfitness on the one hand and also issues of mental health or cognitive impairment defences on the other, it may be appropriate to obtain separate reports either from the same expert or two different experts in order that evidence relevant to the unfitness inquiry is discrete from that relevant to any special hearing or trial. Note that some experts will not comment on the available defences while a person is unfit so that if it becomes necessary to address the available defences at a later stage a separate report is required.

An expert may be later required to comment on whether the person could be safely conditionally released if they are given a verdict of act proven but not criminally responsible at either a special hearing or criminal trial: see [8 Mental health and cognitive defences in a criminal trial](#): Effect of special verdict.

Any expert witness should be informed of current legislative provisions and any caselaw relevant to the opinion being sought. An expert witness almost certainly should not be called without having had the prior opportunity to review any evidence (relevant to the expert opinion sought to be adduced) on which cross-examination of the expert is likely or possible.

Content of reports - fitness

Experts who are providing fitness reports need to assess the criteria referred to in s 36 of the Act and comment on the following:

- a) Is the defendant currently fit to stand trial?
- b) If not, could the defendant become fit?
- c) What would be needed to restore the defendant to fitness and what is the likely timeframe?

The expert report should also comment on whether the person may become fit to be tried within 12 months, namely is the condition one that is amenable to treatment (for example, a mental illness) or is it static (for example, a cognitive impairment) or is it likely to deteriorate (for example, dementia).

Prosecution expert reports

When the issue of an accused's unfitness to be tried is raised, a request is to be made to the Court to set a timetable whereby the accused obtains and serves a copy of their expert report on the DPP so that the DPP may consider its position. At this time, a further order of the Court should be sought requiring the accused to submit to examination by an expert nominated by the DPP. The timetable should allow sufficient time for both the accused and the DPP to obtain reports before the matter is next before the Court.

All reports obtained by the DPP relating to the state of mind of an accused person must only be obtained after permission to have the accused examined has been given by the accused's legal representative or, where the accused is not legally represented, after permission has been given by the accused.

The ODPP has an approved panel of psychiatrists who provide reports for the prosecution. The psychiatrist will be provided with any material from the Crown brief that is relevant to the issue of fitness.

The DPP report will be served on the accused's lawyer. If the experts agree the reports may be tendered without calling any expert evidence.

Psychiatrists and psychologists – similarities and differences

Advocates should be mindful of the capacity of psychologists to diagnose mental illnesses or conditions. The Royal Australian and New Zealand College of Psychiatrists website provides a summary of the difference between psychiatrists and psychologists at:

<https://www.yourhealthinmind.org/psychiatry-explained/psychiatrists-and-psychologists>.

The Australian Psychological Society website provides some information about psychologists, their qualifications, different types of psychologists (e.g. clinical, forensic), and how they differ from psychiatrists at:

<https://www.psychology.org.au/for-the-public/about-psychology>.

As to diagnosis:

- Psychiatrists are qualified to diagnose mental illnesses and conditions.
- Psychologists with particular qualifications and experience (particularly clinical or forensic psychologists) are also qualified to diagnose mental illnesses and conditions.
- The use of psychometric tests to assess cognitive functioning is the exclusive realm of psychologists.

As to treatment:

- In general, psychologists and psychiatrists are both qualified to treat clients through psychotherapy and counselling.
- However only psychiatrists, as medical practitioners, are qualified to prescribe medication.

Jones v Booth [2019] NSWSC 1066 per Johnson J, contains a useful summary of the key cases on this issue, including a discussion of the circumstances in which a psychologist's report might be appropriate, the extent to which a psychologist's diagnosis is acceptable and the utility of a psychologist's report in dealing with applications in the Local Court under what is now Pt 2 of the Act. Although this case deals with the former Act it remains useful.

There is also a useful summary of the relationship between expert evidence and the sentencing principles that apply to offenders with mental health issues by R El-Choufani and D Pace, written in August 2018, at [98] ff:

https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0019/29323/Judicial-Fact-Finding-on-Sentence,-Riyad-El-Choufani-and-Daniel-Pace.pdf.

They suggest that given the different approaches taken in the superior courts to reports provided by psychologists purporting to diagnose serious mental illness, it is important in any given case to highlight the importance of:

- Briefing an appropriately qualified expert for the purpose of sentencing.
- Speaking to the expert if you anticipate a challenge to the diagnosis (or indeed, any other opinion expressed in the report). For example, carefully consider the expert's curriculum vitae - is the opinion expressed properly based upon the expert's specialised knowledge? Does the opinion address inconsistent evidence or competing inferences? Are the reasons proffered in support of the opinion sufficient?
- If necessary, ensuring that the expert is available to give evidence (including adjourning the sentence hearing to secure the expert's attendance).
- If necessary, adjourning the sentencing hearing to address weaknesses in the report or to obtain an opinion from a more suitably qualified expert.