

Mental Health & the Criminal Law

January 2013

Particular Topics

- 1. Unfitness to be Tried**
- 2. Special Hearings - Formality**
- 3. Defence of Mental Illness – Ethical**
- 4. Section 32 (Local Court)**

Unfitness to be Tried: Raising the Question

Any party to proceedings in respect of an offence, or the court, may raise a question of unfitness to be tried: ss.5, 7(1)

The question should be raised, as far as practicable, before arraignment, but may be raised at any time: s 7(1).

The question may be raised on more than one occasion: s.7(2)

Where the issue is raised before arraignment, the court must decide whether to have inquiry: s.8(1)

The court may determine at anytime before an inquiry commences that one is not needed: s.8(2)

Where the issue is raised after arraignment, the court must hear submissions relating to an inquiry in absence of jury: s.9

Where the Court has determined an inquiry should be conducted, or the question of fitness is raised after the arraignment, the court must, as soon as practicable, conduct an inquiry to determine if person unfit to be tried:

s 10(1)

Unfitness to be Tried: The 'Fitness' Inquiry

Where the Court has determined an inquiry should be conducted, or the question of fitness is raised after the arraignment, the court must, as soon as practicable, conduct an inquiry to determine if person unfit to be tried: s 10(1)

An inquiry is to be held in following manner:

- Before judge alone: s 11(1)
- The accused is to be represented s 12(1)
- Not to be adversarial s 12(2)
- The onus of proof is not on any particular party s 12(3)
- The question of fitness is to be determined on balance of probabilities: s 6



Where found fit to be tried trial proceedings recommence or continue in accordance with appropriate criminal procedure: s.13

Presumption that person found fit to be tried continues to be fit until contrary proved on the balance of probabilities: s.15(b)

Fitness issue may be raised again at any time s.7(2)

Unfitness to be Tried: The 'Fitness' Inquiry... cont.



Where found unfit to be tried Court must refer person to Mental Health Review Tribunal (Tribunal): s 14(a)

The Court may:

- discharge any jury
- adjourn proceedings
- grant bail
- remand into custody
- any other order the court considers appropriate pending the determination of the Tribunal: s 14(b)

Person becomes a FORENSIC PATIENT if detained or released subject to provisions: s.42(a)(i)

Presumption that person found unfit to be tried continues to be unfit until contrary proved on the balance of probabilities: s.15(a)

Unfitness to be Tried: The 'Fitness' Inquiry ... cont.

Tribunal must, as soon as practicable after referral, determine on balance of probabilities whether person will become fit to be tried within 12 months: s.16(1)

Where Tribunal of opinion person will become fit within twelve months
Likely back for trial

Where Tribunal of opinion person will not become fit within twelve months
Likely special hearing

Unfitness to be Tried: Special Hearing / Limiting Term

Special hearing to be held before judge alone unless election made for jury: s.21A(1)

Election can be made by:

- accused person after receiving and understanding advice from legal representative, or
- legal representative of accused, or
- prosecutor: s.21A(1)

Election must be made:

- One day before hearing if accused or legal representative
- Seven days before hearing if prosecutor: s.21A(2)

Accused or legal representative can change mind anytime before hearing: s.21A(3)

If there is a jury the following also applies:

- Legal representative has right to challenge jury: s.21(3)(b)
- Court must explain to jury person unfit to be tried, meaning of unfitness, purpose of special hearing; availability of verdicts and consequences of verdicts: s.21(4)

Verdicts at special hearing include:

- Not guilty: s 22(1)(a)
- Not guilty on grounds of mental illness: s 22(1)(b)
- Accused committed offence, or an alternative offence, on limited evidence available: s 22(1)(c), (d)

Nature and conduct of special hearing:

- As nearly as possible as if a criminal trial: s.21(1)
- Accused must be represented: s.21(2)
- Accused taken to have pleaded not guilty: s.21(3)(a)
- May raise any defence that could properly raised at criminal trial: s.21(3)(c)
- Accused entitled to give evidence: s.21(3)(d)

Unfitness to be Tried: Special Hearing / Limiting Term

A finding that the accused committed the offence is subject to appeal in same way as any verdict in criminal trial: s 22(3)(c)

Court must indicate whether sentence of imprisonment would have been imposed if normal trial, and if so must nominate a "limiting term" being the best estimate of that sentence: s 23(1)

Court may take into account earlier periods of custody or detention: s.23(4)

Limiting term may commence earlier or later than the date imposed: s.24(5)

Court must take into account fact that limiting term not subject to NPP if imposing term partly concurrently or consecutively with existing limiting term: s 23(6)(a)

Must refer person to Tribunal: s.24(1)(a)

May make any order with respect to custody as court considers appropriate: s.24(1)(b)

Person a FORENSIC PATIENT: s 42(a)(i)

If Court would not have imposed imprisonment may impose any other penalty or order it might have imposed if person had been convicted of the offence at a normal trial: s 23(2)

Penalty or order subject to appeal in same manner as normal proceedings: s.23(3)

Must notify Tribunal no sentence of imprisonment: s 23(7)

Person ceases to be forensic patient: s.52(1)(b)

Special Hearings - Formality

Zvonaric (2001) 127 A Crim R 9 (NSWCCA)

Requirement to conduct special hearing as nearly as possible as if it were a trial requires indictment to be read out in open court - not sufficient to present indictment - usually insufficient to just tender statements.

Minani (2005) 154 A Crim R 349 at [27] (NSWCCA)

Section 21(1) requirement that a special hearing is to be conducted as nearly as possible as if it were the trial of criminal proceedings, require a degree of formality.

Special Hearings & Mental Illness Defence - Ethical

- ❑ The accused wishes to give evidence even though he/she is mentally ill

Smith [1999] NSWCCA 126 at [54]

[54] I do not consider that the Act provides that a respect in which a special hearing is not to be conducted as if it were an ordinary trial, is that all decisions about the conduct of the accused person's defence at the special hearing are to be made by the counsel or solicitor of a legally represented accused, to the exclusion of the accused. If an accused person at a special hearing is able to communicate and communicates that he wishes to give evidence (or make a statement), then I do not consider that the judge at the special hearing makes an error of law, if he permits the accused person to give evidence (or make a statement), even though counsel for the accused person is opposed to such a course.

- ❑ Counsel entitled to raise mental illness defence in a special hearing over objection of client:

Dezfouli [2007] NSWCCA 86 at [44]-[46]

[44] During the course of the special hearing Mr Toner informed the Court:

I'm in a somewhat unusual situation in this hearing, given that – albeit that I'm here to represent the best interests of Mr Dezfouli, I'm not bound by his instructions, but as I indicated to your Honour at the commencement of the proceedings, I would do my best to reflect Mr Dezfouli's wishes if I could accommodate both obligations under the Act, to the Court and to him. Now this morning, Mr Dezfouli indicated a number of things ... he is not at all that keen for me to communicate it to you at all because of his view, that you and I and the Crown are part of a broad conspiracy in relation to him ... (T 162).

Special Hearings & Mental Illness Defence Ethical... cont.

Dezfouli [2007] NSWCCA 86 at [44]-[46]

[45] In his closing address to the jury, Mr Toner said this:

What I will be saying to you are things Mr Dezfouli would not like me to say, but have to be said. He doesn't think he is insane and what I am saying to you is that there is no doubt that he is (T 427.11)

[46] The scheme of the Act is designed to ensure that an accused person's interests are protected in circumstances in which it is recognised that because of mental illness or incapacity he or she lacks the capacity to make reasoned forensic decisions. The special hearing was conducted by Mr Toner in an endeavour to advance the appellant's interests as he perceived them to be. Counsel was not required to follow the appellant's instructions.

Section 32 NSW (Local Court)

Jurisdictional Question

- ❑ In ***DPP v El Mawas [2006] NSWCA 154*** McColl JA (Spigelman CJ and Handley JA agreeing) said that there are at least 3 decisions to be made by the Court in dealing with a section 32 application:
 - Whether the defendant is eligible to be dealt with under the section, which involves a finding of fact and is properly described as the jurisdictional question (i.e. what the relevant mental condition is): at [75];
 - Whether, having regard to the facts alleged in the proceedings or such evidence as the Magistrate may consider relevant it would be more appropriate to deal with the defendant pursuant to section 32, rather than in accordance with the law: at [76]; and
 - If it is more appropriate to deal with the defendant pursuant to section 32 which of the actions set out in sub-sections (2) or (3) should be taken: at [80].

Section 32 NSW (Local Court)... cont.

Is it more appropriate to deal with them under section 32

- ❑ Must balance the “public interest in those charged with a criminal offence facing the full weight of the law against the public interest in treating, or regulating to the greatest extent practical, the conduct of individuals suffering from any of the mental conditions referred to in section 32(1) or mental illness (s.33) with the object of ensuring that the community is protected from the conduct of such persons.”

El Mawas (2006) 66 NSWLR 93 at [71]-[76]

Confos v DPP [2004] NSWSC 1159 per Howie J at [17]-[18]

Section 32 NSW (Local Court)... cont.

Future Proposals – Law Reform

The court must take into account the following factors, together with any other matter that the court considers relevant:

- (a) the nature of the defendant's cognitive or mental health impairment
- (b) the nature, seriousness and circumstances of the alleged offence
- (c) any relevant change in the circumstances of the defendant since the alleged offence
- (d) the defendant's history of offending, if any
- (e) the defendant's history of diversionary orders, if any, including the nature and quality of the support received during those orders, and the defendant's response to those orders

Section 32 NSW (Local Court)... cont.

- (f) the likelihood that proposed orders will reduce the likelihood, frequency and/or seriousness of offending
- (g) whether or not it is appropriate to deal with the defendant according to law in all the circumstances of the case including:
 - (i) the options that are available to the court if the defendant is dealt with according to law, and
 - (ii) any additional impact of the criminal justice system on the defendant as a result of their cognitive or mental health impairment
- (h) the defendant's views about any proposed course of action, taking into account the defendant's degree of understanding

Section 32 NSW (Local Court)... cont.

- (l) the availability of services appropriate to the defendant's needs
- (j) the family and community supports available to the defendant
- (k) the benefits of diversion to the defendant and/or the community
- (l) the desirability of making the order that has the least restrictive effect on the defendant that is appropriate in the circumstances of the case.

References

Applying the Amended Mental Health (Forensic Provisions) Act 1990

by Andrew Haesler SC, Deputy Senior Public Defender, July 2009

Fitness to be Tried Paper by Mark Ierace SC, Senior Public Defender

presented at the University of NSW Law Faculty CLE/CPD day, 5.11.10

People with Cognitive and Mental Health Impairments in the Criminal

Justice System by Mark Ierace SC, Senior Public Defender, 22 September 2010

Section 32: Step by Step guide to Making a Section 32 Application for a

Person with Intellectual Disability, Intellectual Disability Rights Service (IDRS)

2011

NSWLRC Report 135 People with Cognitive and Mental Health Impairments

in the Criminal Justice System - Diversion

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