MENTAL HEALTH IN THE LOCAL COURT

OVERVIEW

A consequence of the de-institutionalisation of mental health care is that individuals with mental health problems have come under increasing contact with the criminal justice system. That system is ill-equipped to cope with this development.

Both the Commonwealth and New South Wales parliaments have enacted provisions to establish diversionary schemes as an available alternative in dealing with individuals with mental problems who come before the courts.

The purpose of diversionary schemes is to redirect those people away from the justice system into treatment, to facilitate complete rehabilitation, where appropriate. This has the potential benefits both for offender and the wider community, in reducing offending behaviour and in improving mental health care for the offender (see the commentary: *Mad, Bad and Dangerous to Know*, The Hon Greg James AM QC, 2014).

This paper is divided into three parts, addressing the application of those schemes in the Local Court, moving offenders out of the criminal justice system:

- diversionary provisions within New South Wales legislation;
- diversionary provisions within Commonwealth legislation; and
- fitness to be tried in summary proceedings in New South Wales.

MOVING OFFENDERS OUT OF THE CRIMINAL JUSTICE SYSTEM

The NSW provisions

In New South Wales, the relevant Act governing criminal proceedings involving persons affected by mental illness and other mental conditions and the care, treatment and control of such persons is the *Mental Health (Forensic Provisions) Act 1990*.

Part 3 of that Act (sections 31-36) deals with summary proceedings before a Magistrate relating to persons affected by mental disorders. The Part sets up two diversionary schemes, under sections 32 (persons suffering from mental illnesses or conditions) and 33 (mentally ill persons).

Section 32 - persons suffering from mental illnesses or conditions

Section 32 provides that where it appears to the Magistrate - at the commencement or at any time during the course of the hearing of proceedings – that:

(a) the defendant is (or was at the time of the alleged commission of the offence):

(i) developmentally disabled, or

(ii) suffering from mental illness, or

(iii) suffering from a mental condition for which treatment is available in a mental health facility,

but is not a mentally ill person (to which s33 applies), and

(b) 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,

the Magistrate *may* take any of the actions set out in subsection (2) or (3). Those actions include:

(a) adjourn the proceedings: s32(2)(a),

(b) grant the defendant bail in accordance with the *Bail Act 2013*: s32(2)(b)

(c) make any other order that the Magistrate considers appropriate: s32(2)(c)

(d) make an order dismissing the charge and discharge the defendant:
  (i) into the care of a responsible person, unconditionally or subject to conditions, or
  (ii) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of the defendant's mental condition or treatment or both, or
  (iii) unconditionally: s32(3)(a)-(c).

Section 32 requires the Magistrate to consider 3 issues:

(1) **jurisdiction:** does the accused have a relevant mental condition within s32(1)(a);

(2) **value judgment:** would it be *"more appropriate"* to deal with the accused under Part 3 rather than at law ; and

(3) **the action to take:** which of the dispositions in s. 32 (2) or (3) would be appropriate.

See: *DPP v Lopez-Aguilar* [2013] NSWSC 1019, esp at para [8]

Issue 1: Developmental disability or mental illness

In accordance with section 32 (1)(a) this involves making a finding of fact that the accused person is (or was a time of the relevant conduct):

- developmentally disabled, or
- suffering from a mental illness, or
- suffering from a mental condition for which treatment is available in a mental health facility, and
- not a mentally ill person (which is defined in s14 of the *Mental Health Act 2007*)

A mental condition is defined under the Act as:

> "*A condition of disability of the mind not including either mental illness or developmental disability of the mind*" (s3 MHFP Act).

A mental health facility is also defined under the *Mental Health Act 2007* as a declared mental health facility or a private mental health facility (where the premises are subject to a licence under Div 2 Pt 2 Ch 5 of the *Mental Health Act*).

Issue 2: the value judgment

If the first issue is satisfied, then the Magistrate must have regard to the facts or such other evidence as the magistrate considers relevant to determine whether it is *"more appropriate"* to deal with the defendant under section 32, or otherwise in accordance with the law. The Magistrate is permitted a degree of latitude but he or she is confined to the subject matter and the object of the act: *DPP v Mawas* (2006) 66 NSWLR 93 at [71].

This discretion, to be exercised properly, requires the court to look at the seriousness of the offence, and whether a better outcome for both the individual and the community will follow if the offender is diverted under section 32.

In summary: in determining whether or not it is appropriate to deal with the matter under s. 32, the magistrate can take into account:

- the seriousness of the offences
  See: *Confos v DPP* [2004] NSWSC 1159,
  DPP v Mawas (2006) 66 NSWLR 93

- whether the offences were planned
  See: *DPP v Mawas* (2006) 66 NSWLR 93

- the fact that orders pursuant to the Act can effectively only have 6 months duration
  See: *Mantell v Molyneux* (2006) 165 A Crim R 83

Issue 3: the action to take

Upon a Magistrate determining that it is more appropriate to deal with the defendant pursuant to section 32, the Magistrate must determine which of the actions set out in subsections (2) and (3) should be taken.

Consequences of non-compliance with a s32 condition

If the defendant fails to comply with a condition imposed under s 32(3) within 6 months of the discharge, the Magistrate can deal with the charge as if the defendant had not been discharged: s32(3D).

If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate can take various steps within 6 months of the order being made, including calling on the defendant to appear before the Magistrate (s32(3A)) or issuing a warrant for their arrest (s32(3B) and (3C)).

This provision is not limited to unfitness to be tried: *Mackie v Hunt* (1989) 44 A Crim R 426, *Perry v Forbes* (unreported, SCNSW, Smart J, 21 May 1993).

Section 33 – mentally ill persons

Section 14 of the *Mental Health Act 2007* defines a "mentally ill person" as someone who is:

> *suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:*
>
> *(a) for the person's own protection from serious harm, or*
>
> *(b) for the protection of others from serious harm.*

If it appears to a Magistrate that a person is a mentally ill person under that definition, the Magistrate can:

- order that the defendant be taken to, and detained in, a mental health facility for assessment, or

- order that the defendant be taken to, and detained in, a mental health facility for assessment *and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the person be brought back before a Magistrate or an authorised officer*, or

- discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person: s33(1).

Again, this determination can be made at any stage during the hearing of the proceedings, or at the start of the proceedings.

If the person is not returned to court within 6 months the charges are deemed dismissed: s33(2).

If the person is brought back before a Magistrate in relation to the charge, the time the person spends in hospital must be taken into account in dealing with the charge: s. 33(3).

The defence of mental illness

The defence of mental illness can be raised in Local Court proceedings, although it is the considered opinion of senior counsel that it should only be raised as a defence in cases other than murder *in the most exceptional circumstances* - due to the risk that a resolution under the mental health legislation might lead to a longer period of incarceration than a plea of guilty with a strong case in mitigation.

See: *Criminal Law Survival Kit* – Defences - John Stratton SC
Regina v McMahon [2006] NSWDC 81

Onus of Proof

In state matters, there is no onus of proof, and the burden of proof is on the balance of probabilities: *s. 6 Mental Health (Forensic Provisions) Act 1990*

The Commonwealth provisions

Legislative framework

Section 20BQ of the *Crimes Act 1914* (Cth) provides that in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, if it appears to the court that:

- the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and

- on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under s20BQ than otherwise in accordance with law;

then the court may:

(a) dismiss the charge and discharge the person:

(i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or

(ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or

(iii) unconditionally; or

(b) adjourn the proceedings;

(c) remand the person on bail; or

(d) make any other order that the court considers appropriate.

Dismissal of the charge under s20BQ(1)(c) acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence: s20BQ(2).

There are a number of differences between s20BQ and s32, including:

- s20BQ operates only at the time of the hearing, not the commission of the offence;

- s20BQ does not extend to developmental disability or another mental condition that is not mental illness (cf s3 of the *Mental Health (Forensic Provisions) Act 1990*)

- treatment under s20BQ may take up to 3 years, not 6 months

Can the State diversionary provision co-exist with the Commonwealth provision?

As just noted, whereas section 32 of the NSW Act enables an order to be made if the defendant had been suffering from a mental illness *at the time of the offence*, even if he was no longer suffering from that illness at the time of the hearing, the Commonwealth legislation only permits such an order to be made if the defendant is suffering from a mental illness at the time of the hearing.

Section 68 of the *Judiciary Act* grants a Magistrate the jurisdiction and/or power to deal with the laws of a state in relation to arrest, detention,

conviction and procedure for summary conviction *"so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the … courts of that State … by this section"*.

On its face, Section 20BQ of the *Crimes Act* (Cth) does not expressly or impliedly affect the operation of the jurisdiction conferred by section 68 of the *Judiciary Act*, or suggest that it is intended to be supplemented or complemented by additional or differently worded provisions on the same subject. Section 20BQ is an additional source of power that is available in different circumstances. However the jurisdiction granted by s 20BQ of the *Crimes Act* (Cth) is not additional to that granted by s 68 of the *Judiciary Act* in its application of s 32 of the *Mental Health (Criminal Procedure) Act*.

This was the subject of *Kelly v Saadat - Talab* [2008] NSWCA 213 (6 November 2008):

- The Magistrate had dismissed an application by Saadat-Taleb for an order under section 32 of the *Mental Health (Criminal Procedure) Act 1990* (as the *Mental Health (Forensic Provisions) Act 1990* was then known) on the ground that s20BQ of the *Crimes Act 1914* (Cth) applied and s 32 of the NSW Act did not.

- The Supreme Court allowed Saadat-Taleb's appeal on the grounds that s32 was picked up as Federal law by s 68(1) of the *Judiciary Act*.

- The prosecution then applied for leave to appeal.

The Court of Appeal heard full argument on that application. Allowing the appeal, the Court of Appeal held that the question was whether the State section was "applicable" so that s 68(1) of the *Judiciary Act* made it "apply". Applying *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 per Gleeson CJ at 179-180, the Court of Appeal determined that Section 20BQ embodied "a Commonwealth legislative scheme which was complete on its

face" and "left no room" for the operation of s 32 of the State Act.

The Court of Appeal considered that the Commonwealth law is complete upon its face, leaving no room for the operation of a surrogate Federal law, because part of the content of the existing Commonwealth law is a negation of additional statutory content on the subject. The Court reasoned that if a State law picked up as surrogate Federal law would add statutory content to the subject, there would be an implied repeal of that negation of additional content present within the Commonwealth Act. Consequently, the Court of Appeal found that s20BQ was intended to be an exhaustive statement of the Commonwealth Parliament's response to the issue, and thus a scheme that left no room for the operation of the state provision to be picked up as Federal law.

Consequently, the application to be dealt with under section 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) failed.

The onus of proof in the Commonwealth legislative framework

S 20BR of the *Crimes Act 1914* (Cth) provides:

> **Means by which court may be informed**
>
> For the purposes of this Division, a court of summary jurisdiction may inform itself as the court thinks fit, but not so as to require the person charged to incriminate himself or herself.

The Act is silent as to the onus of proof as being vested in the applicant or the decision maker. It follows that the court is not bound by the rules of common law, and the court may itself be a source of evidence[1]. Subject to natural

[1] See *ALH Group Pty Ltd v Dicey's Toowong Pty Ltd* [2003] 2 Qd R 1 – in which it was held not to be an error of law for a member of the Liquor Appeals Tribunal to inspect the premises the subject of the complaint without the presence of the parties

justice, the court acts on its own knowledge[2] and make its own inquiries[3] whether of a factual matter or scientific where a member of the court has the requisite expertise[4].

As the court is not bound by the rules of evidence, and accordingly may properly make inquiries about all matters relevant to its function, the respondent and applicant do not bear a legal onus of proof. The party which is better placed to provide information on a matter relevant to the application, does have a practical or forensic onus[5].

FITNESS TO BE TRIED

Legislative framework

The *Mental Health (Forensic Provisions) Act 1990* provides the legislative framework which determines the procedure for criminal proceedings in which mental health is an issue.

Part 2 of that Act (sections 4-30) provides for the criminal procedure in the District and Supreme Courts for persons determined to be unfit to be tried.

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[2] See *Carr v Simnovic* (1980) 26 SASR 263 – a mining warden's knowledge of the industry and its "personalities"; *Maloney v New South Wales National Coursing Association Ltd* [1978] 1 NSWLR 161; *Hall v New South Wales Trotting Club Ltd* [1977] 1 NSWLR 378 - investigation of racing stewards forming tribunal; *Collector of Customs (Tas) v Flinders Island Community Association* (1985) 7 FCR 205 – misunderstanding of Aboriginal concepts of community ownership.

[3] See *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173 at 211

[4] See *Bowen-James v Delegate of Director-General of Department of Health* (1992) 27 NSWLR 457 at 481

[5] *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at [39] - [40]

However Part 3 that Act (sections 31-36), which provides a legislative framework for the disposition of summary proceedings before a Magistrate, makes no provision for persons determined to be unfit to be tried.

While it is open to the Local Court to divert a defendant pursuant to a provision within Part 3 of that Act (discussed above), it is an exercise of discretion. Accordingly, a person who is not fit to be tried but does not meet the criteria set out in Part 3 may be required to enter a plea to the charge circumstances where that person does not understand and is not properly able to plead in the proceedings.

In my view, this is a lacuna in the legislation.

What is fitness?

Fitness is concerned with the capacity of the defendant to defeat the indictment and comprehend the course of the proceedings at any trial. The principles setting up the minimum standards by which an accused person is assessed as being fit or not are set out in *R v Presser* [1958] VR 45 per Smith J in which the court distilled that the question is whether the accused fails to meet certain minimum standards which are necessary to ensure:

> " … He can be tried without unfairness or injustice".

His Honour went on to set out the following minimum standards:

> "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 to 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

> 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."

This criteria was approved in the High Court (*Ngatayi v R* (1980) 147 CLR 1 at [8]).

It is recognised that this test must be applied "in a reasonable and commonsense fashion" (*Ngatayi v R* at [8]). Defendants in the Local Court are not before a jury, and the complexity of the factual matters in dispute may be less than in indictable proceedings.

An important factor from these criteria is that lack of fitness is not confined to persons who suffer from a mental illness, mental condition or an intellectual disability: *Mailes* (2000-2001) 53 NSWLR 251. It may be available in circumstances where by reason of the absence of (for example) an interpreter (see *R v Willie* (1885) 7 QLJ 108 per Cooper J, where the 4 Aboriginal defendants were unfit to be tried due to the absence of an interpreter), or where the accused person has a disability which prevents the interviews anticipated in the proceedings (see *Pioch v Lauder* (1976) 13 ALR 266, where the accused was a deaf mute Aboriginal but did not suffer any mental condition or intellectual disability; R v Pritchard (1836) 7 C and P 303 - the accused was a deaf/mute and the jury was empanelled to determine if the accused was able to plead).

The fitness of a person may arise at any stage in the proceedings: (see *Kesavarajah v The Queen* (1994) 123 ALR 463 at 475 – 476).

Fitness to plead and fitness to be tried

The concept of fitness to plead and fitness to be tried are not the same.

In *R v Southey* (1865) 176 ER 825 the common law's approach to "insanity" at the time of arraignment or after pleading was considered. Determining a person's insanity considered whether the person is able to plead such as to understand the nature of the proceedings. It was only after the court determined whether the accused person was able to plead, that the jury would thereafter determine whether he was sufficiently sane to be tried (see also *R v Pritchard*, (1836) 7 C & P 303).

If it is accepted that the *Presser* criteria set out those matters relevant to considering whether a defendant is fit to plead, those minimum standards include the ability of an accused to understand what he or she is being charged with and an ability to plead to that charge. It follows that the concept of fitness to plead has been subsumed into the concept of fitness to be tried.

What is the remedy in summary proceedings?

In a stated case by a magistrate to the Supreme Court of the Northern Territory for a defendant aboriginal man who was totally deaf, unable to use speech to communicate, and brought up in an aboriginal community without having absorbed the cultural moral values of his aboriginal community, or the broader European society, that Court considered that despite there being no evidence of mental incapacity the defendant was not fit to plead in circumstances where there was no legislative framework under which an appropriate remedy existed: see *Pioch v Lauder* (1976) 13 ALR 266 at 267.

Having determined that the defendant was not fit to plead, Foster J considered that the proceedings *"should simply go no further"*, as to do so would be contrary to law (op cit, at 272). This would appear to be authority for the finalisation of the matter in the nature of a stay of proceedings.

This issue was subsequently considered again by the High Court, but in the context of indictable proceedings for murder. During the committal proceedings the High Court considered that it was a condition precedent to the committal hearings that an accused person is able to understand and comprehend the committal proceeding. Although the effect of this upon the magistrate was that the committal proceeding could not proceed further, owing to the nature of the proceedings being indictable, the Crown can proceed by an ex officio indictment: *Ebatarinja v Deland* [1998] HCA 62 at [6]-[8].

In New South Wales, the Supreme Court considered the issue of the appropriate remedy for any person in summary proceedings who was unfit to be tried. In *Mantell v Molyneux* [2006] NSWSC 955 at [16], Adams J considered a refusal by a Magistrate to stay proceedings in circumstances where an application pursuant to s 32 of the *Mental Health (Forensic Provisions) Act* had already been refused. His Honour concluded that the Local Court had erred in considering that a balancing process was involved in determining whether it would be fair to conduct a trial in the circumstances (at [33]). The following passages are worthy of extraction and consideration from the judgment:

> [33] …If a defendant is not fit to stand trial in the *Presser* sense, the trial is by virtue of that very fact necessarily unfair and the public interest in the trial of the person charged with the criminal offence must give way. …
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> [34] As the Crown Advocate pointed out during submissions in this Court, the learned Magistrate did not make any finding that the appellant was unfit for trial. His Honour approached the question facing him as being whether he could, by making some adjustments in the way in which proceedings were undertaken, ensure that the trial was fair.
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> [35] In my view, question of fitness for a trial is fundamental. In some cases, adjustments can be made to overcome the defendant's fitness, as by providing a deaf person with a signing interpreter. This is not to make the trial of a person who is unfit for trial a fair one: it is to remove the unfairness.

> [36] In my respectful opinion, there were no orders that the Court could have made that were capable of overcoming the appellant's unfitness. Where a defendant does not understand the nature of a plea, the elements of the charge in the essential nature of the proceedings, it does not make such a trial fair even though he or she is able to give a version of events. … Sympathetic allowance for the appellant's problems in this regard does not overcome the fundamental unfairness which her unfitness in respect of these matters demonstrates. This is not less so because it appears, as it happens, that the appellant has a good defence to the charge which might well result in an acquittal.
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> [37] It is not, of course, appropriate for me simply to substitute my view of the facts for that of the learned Magistrate. However, I am satisfied that his Honour erred in law in his consideration of the question of whether the appellant was unfit to stand trial."

In the absence of a statutory regime providing a remedy, the choice in the case law has traditionally been to discharge or to stay the proceedings. An analysis of the case law would suggest the latter to be the better course:

See:

- *Police v AR* (unreported, Children's Court of NSW, 18/11/09)
- *R v AAM: ex parte A-G* (Qld) [2010] QCA 305
- *R v KF* [2011] NSWLC 14
- *CL (a minor) v Lee* (2010) 29 VR 750

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