

Fitness to be tried in the Local Court and Children's Court

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Outline

1. Why have a scheme?
2. Other jurisdictions.
3. NSW Law Reform Commission proposals.
4. A proposal for fitness to be tried in the Local Court and Children's Court.

1. Why have a scheme?

- No current legislative framework.
- Very wide and expanding jurisdictions.
- Limitations of s 32/33 *MHFPA*: for example *Police v Goodworth* [2007] NSWLC 2.
- Possibility of discharge: *Mantell v Molyneux* (2006) 68 NSWLR 46. But this is extremely rare: see *Police v AR* (Marien P, Children's Court, 19.11.2009).
- Possible ex officio indictment if discharged: *Police v AR* at [61].

2. Other jurisdictions

- Western Australia.
- Tasmania.
- South Australia.
- ACT.
- New Zealand.

Western Australia

- *Criminal Law (Mentally Impaired Accused) Act 1996.*
- After enquiry Court can adjourn for 6 months to see if accused becomes fit.
- If not fit Court must make an order dismissing the charge without deciding guilt.
- Court can release the accused or make custody order.
- Either party can appeal against accused being found not mentally fit to stand trial.

Tasmania

- *Criminal Justice (Mental Impairment) Act 1999.*
- After investigation Court can adjourn for 12 months to see if accused becomes fit.
- Court can hold a special hearing.
- Findings and orders include: not guilty; restriction order; supervision; community care order; custody.

South Australia

- *Criminal Law Consolidation Act 1935.*
- Evidence is to be heard as to unfitness and whether objective elements of the offence are established, or vice versa.
- Orders include – supervision; conditional release; or setting of limiting term.
- If supervision, the Minister must submit an expert report to the Court within 30 days.

ACT

- *Crimes Act 1900.*
- Investigation as to fitness and whether accused engaged BRD in conduct.
- Orders: detention in custody or referral to ACAT for mental health order.
- Finding of unfitness is a bar to further prosecution.

New Zealand

- *Criminal Procedure (Mentally Impaired Persons) Act 2003.*
- Court to first determine on BOPs whether evidence establishes accused caused the act.
- 2 health assessors give evidence at fitness enquiry.
- If Court finds accused mentally impaired the Court hears evidence of 1 or more health assessors about what orders are necessary.
- Orders – detention as a special patient or care recipient; immediate release; imprisonment.

3. NSW LRC Proposals

- Discussion Paper 35 (1994) – *People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issue.*
- Report 80 (1996) – *People with an Intellectual Disability and the Criminal Justice System.*
- Consultation Paper (2010) – *People with Cognitive and Mental Health Impairments in the Criminal Justice System.*

Discussion Paper 35 (1994)

- Section 32 *MHCPA* is considered first.
- Magistrate conducts enquiry and can make orders including getting reports.
- Same principles as Supreme Court.
- If unfit the Court dismisses the charge and discharges the accused.
- Court can notify Minister of concerns about care, treatment and services.

Report 80 (1996)

- Magistrate first considers s 32/33 *MHCPA*.
- Magistrate holds fitness enquiry.
- If unfit, the matter should then proceed according to the usual fitness and special hearings procedures involving the MHRT as per the District and Supreme Courts.
- *De novo* right of appeal to District Court against Magistrate's finding of fitness.

Consultation Paper (2010)

- Proposes simplified fitness procedure.
- Magistrate can order reports, assessment.
- After determination Magistrate can acquit or deal with matter under s 32 *MHFPA*.
- Magistrate can order the accused to become a forensic patient under the supervision of MHRT.

4. Proposed Procedure

Goals

- Consistency as far as possible with the operation of *MHFPA* in higher courts.
- Criminal responsibility should be determined.
- Avoid unnecessary delays.
- Simplicity.

Raising fitness to be tried

- Can be raised by the Court, prosecution or defence.
- Preferably raised before commencement of hearing.
- Can be raised at any stage though, and more than once.
- If raised during hearing, the hearing is suspended until fitness determination.

Possible orders at this stage

A Court can:

- Make directions for preparation and service of expert reports.
- Make any other appropriate orders.

Reports

- If the expert assesses the accused as unfit to be tried, the expert must address the likelihood of the accused becoming fit in the next 12 months, as well as recommending a treatment plan.
- After service of expert reports by one party on the other, the other party can decide if they want a report prepared.

Section 32/33 *MHFPA*

- The first determination is always whether s 32/33 *MHFPA* is appropriate.
- Diversion will always be the first option.
- If s 32/33 *MHFPA* is not appropriate, then proceed with fitness enquiry.

The fitness enquiry

- Sections 12-13, 15 *MHFPA* apply.
- Hearings: contested; uncontested; or with consent of parties.
- If uncontested/with consent reports can be tendered without evidence required.
- Experts can be called to give evidence.
- Court informs itself as it considers appropriate.

Orders following fitness enquiry

If fit to be tried, the Court continues with proceedings but fitness can be raised at any future time.

If unfit, the Court decides whether the accused is likely to become fit during the next 12 months.

- If yes – adjourn and reconsider later.
- If no – make orders for special hearing.

The special hearing

- The procedure is to follow s 21 *MHFPA* as closely as possible.
- Verdicts are those contained in s 22 *MHFPA*.

Orders following special hearing

- Any order available: s 23(2) *MHFPA*.
- A new power to impose a Community Treatment Order [see s 33(1A) *MHFPA*].
- A limiting term: s 23(1)(b) *MHFPA*.

Limiting Terms

- Magistrate refers accused to the MHRT.
- Registrar advises the MHRT within 7 days.
- All reports are to be sent to the MHRT.
- The Magistrate directs that a report for the MHRT must be prepared within 30 days by Justice Health about the accused's diagnosis, prognosis, and suggested treatment plan.

Review by the Court

- The Court can monitor progress and deal with variation or breach of community-based orders: s 32A *MHFPA*.
- The Court or either party can re-list to seek variation or revocation.
- If revocation the Court can consider all post-special hearing options open to it previously.

Appeals

Appeals lie to the District Court:

- From the Magistrate's determination that the accused is fit to be tried.
- Against the possible verdicts at a special hearing (other than not guilty).
- Following orders imposed after a special hearing (s 23(3) *MHFPA*).

Additional matters

- Legal representation is legally aided, or alternatively paid by the Attorney General.
- A finding of unfitness is a bar to further prosecution in respect of the same circumstances (s 22(3) *MHFPA*).

Application of this procedure

- Issue raised.
- Report obtained by accused/considered by prosecution.
- Magistrate determines whether either s 32/33 *MHFPA* is suitable.
- If no – a fitness enquiry is held.
- If found unfit – a special hearing is held and verdict follows.
- Sentencing.
- Monitoring/breach/appeals.

5. Summary

- A legislative scheme is required.
- Sections 32/33 *MHFPA* remain important.
- There is a distinction between diversion and fitness to be tried.
- The procedure needs to be as simple as possible, and should be as consistent as possible with how the *MHFPA* operates in higher courts.