COMMONWEALTH FITNESS ISSUES

Legal Aid 2018 Conference

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Fitness Provisions Division 6 of Part 1B of the *Crimes Act 1914 (Cth)*

This session and paper looks at the issue of fitness to be tried in Commonwealth matters and specifically:

- What is the relevant law?
- What are the procedural steps I need to consider for a client charged with a Commonwealth offence who is possibly unfit to be tried?
- What expert material do I need to get?
- What are the issues the Court is interested in knowing about?
- What are some proposed orders I can provide the District Court at a fitness hearing?
- What matters should I address in my submissions?
- What are the provisions and procedure under Commonwealth law as opposed to NSW State Law?

Overview of the paper

1. This paper deals with scenarios whereby a client has been charged on indictment. Summary matters are dealt with in Division 8 of Part 1B of the *Crimes Act 1914* (Cth) ('the Crimes Act').

What is the relevant law?

2. If a client is charged with an offence under the *Criminal Code Act 1995* (Cth) ('the Code') or other Commonwealth legislation, and the client may be unfit to plead to the offence, Section 20B of Part 1B Division 6 of the Crimes Act is the first point of reference, which provides:

> *(1) Where, in proceedings for the commitment of a person for trial of federal offence on indictment, being proceedings begun after this section commences, the question of the person's fitness to be tried in respect of the offence, is raised by the prosecution, the person or the person's legal representative, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial.*
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> *(2) If the court to which the proceedings have been referred finds the person charged to be fit to be tried, the court must remit the proceedings to the magistrate and proceedings for the commitment must be continued as soon as practicable.*

(3) Where a court:

(a) to which proceedings have been referred under subsection (1); or

(b) before which a person appears in proceedings for trial of a federal offence on indictment, being proceedings begun after this section commences;

finds the person charged unfit to be tried, the court must determine whether there has been established a prima facie case that the person committed the offence concerned.

(4) Where a magistrate refers proceedings to a court under subsection (1), the magistrate may order the person charged to be detained in prison or in hospital for so long only as is reasonably necessary to allow the court to which the person is referred to determine whether it will make an order under subsection (2) remitting the person to the magistrate, an order under section 20BA dismissing the charge or an order under section 20BB detaining the person in prison or hospital or granting the person bail.

(5) Where a court finds a person, other than a person in respect of whom proceedings have been referred to it by a magistrate under subsection (1), to be unfit to be tried, the court may order the person to be detained in prison or hospital for so long only as is reasonably necessary to allow the court to determine whether it will make an order under section 20BA dismissing the charge or an order under section 20BB detaining the person in prison or hospital or granting the person bail.

(6) For the purposes of subsection (3), a prima facie case is established if there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial in relation to the offence.

(7) In proceedings to determine whether, for the purposes of subsection (3), a prima facie case has been established:

(a) the person may give evidence or make an unsworn statement; and

(b) the person may raise any defence that could properly be raised if the proceedings were a trial for that offence; and

(c) the court may seek such other evidence, whether oral or in writing, as it considers likely to assist in determining the matter.

3. The court may make the determination as to whether a *prima facie* case has been established by reference to documentary material such as a statement of facts and / or brief of evidence: *R (Cth) v Sharrouf* [No. 2] [2008] NSWSC 1450 at [55]. Importantly, there is a mechanism by which there is a possible dismissal of the charge on the basis that it is inappropriate to inflict any punishment by virtue of (s20BA(2)).

4. Section 20BA(2) of the Crimes Act provides that:

> *(2) Where the court determines that there has been established a prima facie case that the person committed the offence, but the court is of the opinion, having regard to:*
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> *(a) the character, antecedents, age, health or mental condition of the person; or*
>
> *(b) the extent (if any) to which the offence is of a trivial nature; or*
>
> *(c) the extent (if any) to which the offence was committed under extenuating circumstances;*
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> *that it is inappropriate to inflict any punishment, or to inflict any punishment other than a nominal punishment, the court must, by order, dismiss the charge and, if the person is in custody, order the release of the person from custody.*

5. For example, in *R v Hay; Hay v R* [2009] NSWCCA 228 at [16] it was noted that a co-accused who had been charged with involvement in a scheme to defraud the Commonwealth of a significant amount of money, had been found unfit and a *prima facie* case had been established. The charges against Mr Agoston were dismissed pursuant to s 20BA in light of the accused's age, mental condition, character and antecedents.

6. By contrast, in *Sharrouf* [No. 2] at [249], Whealy J declined to dismiss charges concerning preparation for a terrorist act or acts pursuant to s 20BA, noting that the offence was not trivial, and no submission had been made as to s 20BA(2).

7. In light of factors such as an accused's age, lack of criminal antecedents, mental illness the Court may reach the conclusion that it is inappropriate to inflict any punishment on the accused, and dismiss the charge. If the Court concludes that the serious nature of the charge weighs against such a disposition, the Court must then determine whether the accused will become fit within 12 months.

8. In *Kesavarajah v R* (1994) 181 CLR 230 at 242-243 (per Mason CJ, Toohey and Gaudron JJ), the High Court determined that State law regulated the mode of determining whether a person was fit to stand trial and the Crimes Act regulated the consequences that flowed from that finding for persons charged with Commonwealth offences.

9. However, as is sometimes the case, the Commonwealth regime does not provide the complete solution to the particular issue and it is necessary to refer to the local jurisdictions laws, in this case the *Mental Health (Forensic Provisions) Act 1990* (NSW) 'the MH Act'. The question of fitness is to be determined by Judge alone (s 11(1) MH Act. An inquiry is to be conducted in a non-adversarial manner (s12(2) MH(FP)A), and the onus of proof does not rest on any particular party (s 12(3) MH(FP)A). Fitness is to be determined on the balance of probabilities.

10. The criteria for assessing fitness set out by Smith J in *R v Presser* (1958) ALR 248 and applied in *Kesavarajah v The Queen* (1994) 181 CLR 230 are applicable to matters involving Commonwealth charges. They are as follows:

    a. To understand the nature of the charge,

    b. To plead to the charge and to exercise the right of challenge,

c. To understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged,

d. To follow the course of the proceedings,

e. To understand the substantial effect of any evidence that may be given in support of the prosecution, and

f. To make a defence or answer the charge. Where the accused has counsel, he/she must be able to do this through counsel by giving any necessary instructions and letting them know what his version of facts is and, if necessary, telling the court what it is.

g. The anticipated length of the trial is a factor relevant to the determination: *Kesavarajah* at 245.

11. Two other divisions should be noted. Division 7 of Part 1B deals with circumstances where an accused has been acquitted by reason of mental illness and the orders that can be made in relation to their on-going care. Division 8 of Part 1B deals with sentencing alternatives for persons suffering from mental illness or intellectual disability.

Overview of the Procedural Steps

Preliminary: Fitness is raised by: Prosecution, Accused, Accused legal representative (s20B(1))

THEN

When the question of fitness is raised before committal, the proceedings are referred to the trial court. A Magistrate MUST refer proceedings to the same Court if the person were to be committed for trial (s20B(1)) (District Court)

Magistrate may order person be detained in prison/hospital until fitness determination made (s 20B(5))

THEN

STAGE 1

1. Trial Court to determine whether FIT OR UNFIT to be tried (Judge decides per s 11 Mental Health *(Forensic Provisions)* Act 1990 (NSW)

   a. If **FIT** – send back to Magistrate (s20B(2))

   b. If **UNFIT** – proceed to ***Stage 2***

STAGE 2

2. Trial Court to determine whether there is a *prima facie* case (s20B(3)) – Meaning of PFC (if there is evidence that would provide sufficient grounds to put the person on trial in relation to the case (s20B(6)) and factors in (7) apply. This sets out what may be raised in proof or defence Crown may tender brief/case statement to establish PFC – (*R v Sharrouf* [No 2] [2008] NSWSC 1450)

a. If there is **NO PFC**: Dismiss the charge and release the accused (if in custody/hospital) (s20BA(1))

b. If there is a **PFC**: determine whether it is inappropriate to inflict any punishment, or any other than nominal punishment

When considering this the Court will have to the character, age, antecedents, health or mental condition of the person, the extent to which the offence is of a trivial nature, the extent to which the offence was committed under extenuating circumstances - s20BA(2)

i. If punishment inappropriate: Dismiss the charge and release the accused (s20BA(2)) and s20BA(3))

ii. Otherwise: proceed to ***Stage 3***

STAGE 3

3. Trial court to determine whether the accused will become fit within 12 months (s20BA(4) – s20B(6)) The Court determines the application on the balance of probabilities (s20BA(4)). The Court must obtain and consider evidence from a psychiatrist and one other medical (s20BA(5)).

a. If the accused **will become fit**: The Court is to decide whether treatment can be obtained in hospital or the person should be detained in hospital *and* they not object to being detained in hospital. Then decide either to detain in hospital or in prison or to grant bail (s20BB(2)) and *THEN:*

i. **If they become fit within 12 months**: Remit the matter back to the Magistrate to continue committal proceedings (s20BB(3))

ii. **If they do not become fit within 12 months:** proceed as if the finding had been that they will not become fit within 12 months (s20BB(4))

b. If accused **will not become fit**: determine whether to order detention and obtain treatment in a hospital whilst detained or whether it is more appropriate to order conditional or unconditional release from custody (s20BC(1), (2), (5), (6)

What expert material do I need to get?

At a minimum you must obtain a psychiatrist's report – not a psychologist's report because a psychologist cannot give an actual diagnoses of mental illness – and a proposed treatment plan for the accused. The Crown may also obtain its own expert's report. If that happens, the Crown will serve it on you and it is advisable to have the expert retained on your client's behalf to review it and prepare a supplementary report – a further consultation may be necessary.

What are the issues the Court is interested in knowing about?

See the attached draft submissions

What are some proposed orders I can provide the District Court at a fitness hearing?

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What matters should I address in my submissions?

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What are the provisions and procedure under Commonwealth law as opposed to NSW State Law?

See the attached table