

Fitness and the defence of mental illness in the Local and Children's Court

Legal Aid NSW Submission to
the Department of Justice

July 2016

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to provide advice regarding case involving fitness and the defence of mental illness in the Local Court and the Children's Court.

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Background

Legal Aid NSW understands that the Department of Justice is considering reforming the ways in which the Local Court and Children's Court deal with the question of fitness and the defence of mental illness.

The Department has asked Legal Aid NSW for any data or anecdotal evidence regarding how often the question of fitness and the defence of mental illness are raised in these courts, and the nature and circumstances of these cases. In particular, the Department is interested in cases where the circumstances are not appropriate for diversion.

These issues were considered by the NSW Law Reform Commission (NSW LRC) in Report 138: *Criminal responsibility and consequences*. Legal Aid NSW made submissions to the NSW LRC when it consulted on this reference. In 2013, Legal Aid NSW also provided a response to the Department of Justice indicating that it supported the LRC's recommendations around these issues.

In April 2016, Legal Aid NSW also made a submission in response to the NSW Department of Justice Paper, *Issues for Consultation*, arising out of the NSW LRC recommendations in Report 138. The issues canvassed include bail and remand pending a fitness review, consequences of breach when a non-custodial sentence is imposed, fitness raised at committals, and appeals against section 32 orders.

Local Court

How often fitness is raised in the Local Court

Legal Aid NSW cannot provide data on how frequently the question of fitness is raised in the Local Court. However based on our experience, it is relatively unusual for fitness to be raised in the Local Court.

Our Criminal Law Division has offered three related reasons as to the lack of reported instances of fitness being raised in the Local Court:

- Practitioners and Magistrates being unaware that issues of fitness can be ventilated in the Local Court.
- A tendency of practitioners to proceed with applications under section 32 of the *Mental Health (Forensic Provisions) Act 1900 (MHFP Act)* for clients who are unfit, particularly given that clients who are not fit to be tried generally have serious mental incapacity/mental illness and these applications are often granted by Magistrates on that basis.
- Reluctance of Local Court Magistrates to stay proceedings/discharge an accused on fitness grounds. There is no supervisory aspect to a stay, as there is for an order under section 32. Magistrates may fear the repercussions of discharging an accused for a serious offence in these circumstances.

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- Procedural barriers because there are no particular forms around stay applications in the Local Court.

Magistrate Heilpurn, in *R v KF* [2011] NSWLC 14 (7 April 2011), also provided reasons as to why applications for a stay on the grounds of unfitness are to be treated cautiously in the Local Court (at [19]):

Firstly, the result of a successful application is that the proceedings are stayed or the defendant is discharged. There is no supervisory regime, treatment plan, conviction, criminal record or detention as in the higher courts. Secondly, there are well known cases where people have successfully feigned physical and mental conditions, which later turn out to be fictional devices to avoid liability. Thirdly, there is no ability to return the matter to court should the defendant not comply with a treatment regime as there is with matters dealt with under s32. Finally, there is no "seriousness" test in an a stay application - the Local Court deals to finality with matters of increasing seriousness - as there is in a s32 application.

Nature and circumstances of cases where fitness is raised

As the Department may be aware, the key authority in this area is *Mantell v Molyneaux* (2006) 68 NSWLR 46. This case provides an outline of circumstances in which fitness was an issue in the Local Court and it was not necessarily appropriate to divert the defendant under section 32 of the MHFP Act.

Our Criminal Law Division has provided an example of another case, outlined below, where fitness was raised successfully in the Local Court.

Case study

Legal Aid NSW represented Ben at the Downing Centre Local Court. Ben is a young man with an intellectual disability. He was supported by numerous case workers from various disability support services. He had some family support and was living with his brother at the time of the hearing. He had committed a number of offences, including arson-related offences. These were indictable offences but the prosecution had chosen not to elect to have the matters dealt with in the District Court.

An application under s.32 was made and refused in the Local Court. We obtained another report and made another s.32 application which was also refused. The client could not provide any instructions. He agreed with everything his lawyer said by saying "yes", but did not fully comprehend anything that was discussed. The Magistrate wanted Ben's lawyer to enter pleas for Ben, but the lawyer indicated she could not obtain instructions and had concerns about his fitness. It was only when the lawyer indicated that she would seek leave to withdraw if Her Honour pressed a plea that the Magistrate adjourned the matter. It was then set down for hearing.

Pending the hearing, Ben was on bail but repeatedly breached his bail conditions as he did not understand them.

Legal Aid NSW instructed a Public Defender in the matter. We obtained a report from a neuropsychologist who found that Ben was unfit due to his intellectual disability. We sought that the matter be stayed based on the fitness report and tendered written submission to the court. The prosecution opposed the application. The Magistrate found that Ben was not fit to plead and therefore stayed proceedings. No written reasons were provided, as far as we are aware.

By contrast, the case of *R v KF* [2011] NSWLC 14 (7 April 2011) provides an example of circumstances where fitness was raised unsuccessfully in the Local Court. The defendant in that case had dementia but Magistrate Heilpern was not satisfied on balance that the *Presser* test had been met.

The defence of mental illness in the Local Court

Legal Aid NSW cannot provide data on how often the defence of mental illness is raised in the Local Court.

Our practitioners did not provide any examples of circumstances when the defence of mental illness has been raised in the Local Court. This is likely to be because the defence is “virtually never raised” in such proceedings, as noted by the Local Court in its submission to the LRC (see Report 138 at [12.78]). In most cases, defendants with mental health issues will be dealt with under sections 32 and 33, without consideration of their guilt or otherwise.

We suspect that many practitioners would be unaware that the common law defence remains applicable in the Local Court and, if successfully raised, requires that the defendant be discharged.

The Children’s Court

Fitness – frequency in the Children’s Court

Legal Aid NSW cannot provide data on how frequently fitness is raised in the Children’s Court.

Based on our experience, fitness is not often raised in criminal prosecutions in the Children’s Court, but it does occur. The Legal Aid NSW Children’s Law Service (**CLS**) lawyers were aware of at least four cases in which fitness has been raised, but all were disposed of via orders under section 32.

The CLS High Service Users Project is finding that the issue of fitness arises quite regularly in Apprehended Violence Order (**AVO**) proceedings in the Children’s Court, where section 32 orders are not available.

The CLS reports that its practitioners and some private practitioners are well aware that fitness can be raised in Children's Court proceedings. However, there may be various reasons behind the lack of reported instances of fitness being raised. Some of these differ from the Local Court:

- Where fitness issues become apparent at an early stage, practitioners sometimes intervene by way of writing representations to police to withdraw matters. This is sometimes successful and saves time and money. However, the CLS reports that some Police Prosecutors continue to press proceedings to an unnecessarily late stage after Legal Aid NSW has raised fitness concerns. This is not an efficient use of public resources and is stressful for the young person.
- In addition to diversion under sections 32 or 33 of the MHFP Act, the Children's Court has diversionary options available under the *Young Offenders Act 1997*, which may be dealt with by way of an admission (not even a plea of guilty). This is often a preferred course as the matter is finalised quickly.
- In the Children's Court, *doli incapax* may be easier to raise than unfitness. Unfitness requires the need for expert intervention, which is usually more than a Justice Health report. The associated delay can be a reason for raising other defences or pursuing diversion under the *Young Offenders Act 1997* or the MHFP Act.
- As in the Local Court, Magistrates in the Children's Court may be reluctant to stay proceedings on fitness grounds. As an aside, we also note that some Children's Magistrates are reluctant to deal with serious matters by way of sections 32 or 33. Some Children's Court Magistrates also take the view that a young person should only have the benefit of section 32 once, and not for repeat offending, which does not make sense if the diagnosis is a life-long disability.
- Our CLS lawyers are of the view that it is a very small cohort of young people who are legally unfit as per the *Presser* test.

Our CLS lawyer also note that it is important to distinguish between someone who is unfit to be tried versus unfit to plead. If a person is fit to plead, there may be forensic advantage to pleading (such as getting discounts and negotiating lesser charges that can remain in the Children's Court) and then obtaining a section 32 order.

The CLS has also raised some other points of distinction between the Local Court and the Children's Court:

- The recently updated Law Society of NSW Representation Principles for Children refer to representing unfit children and make reference to ss.32 and 33, as well as *Mantell v Molyneaux* and *Police v AR* (noted below).
- The Children's Court has a wider jurisdiction than the Local Court. Hence, it has a wider range of matters that can be dealt with via s.32 (the only matters which cannot be dealt with via s.32 are serious children's indictable offences).
- There are additional legislative requirements and principles for children to be able to understand what occurs in court (see for instance ss.6 and 12 of the *Children's (Criminal Proceedings) Act 1987* (NSW)).

Circumstances where fitness has been raised in the Children's Court

The decision of *Police v AR* (18 November 2009), reported in Children's Law News, provides an example of circumstances where the Children's Court found that it was not appropriate to deal with certain offences under s.32, and that the defendant was unfit to plead. Charges for those offences were dismissed and the defendant was discharged with respect to each of them. This is a decision of the former President of the Children's Court and helpfully canvasses the relevant authorities and the interaction of fitness to be tried, s.32, and committal proceedings.

Our CLS lawyers are also aware of another matter in the Broadmeadow Children's Court where eight or so serious sex offences were discharged on the grounds of unfitness by Magistrate Feather in line with *Police v AR*. The Magistrate found that the charges were too serious to be dealt with under s.32 and given the young person was unfit, there was no alternative to discharge.

In *Police v Beth* [2014] NSW ChC 8 (18 December 2014), by contrast, an application to the Children's Court for a permanent stay based on the grounds of fitness was refused. The young person, a girl aged 11, was diagnosed as having Post Traumatic Stress Disorder and Reactive Attachment Disorder. Children's Magistrate Blewitt AM considered the case an appropriate one for diversion under the MHFP Act, rather than a permanent stay.

As noted above, fitness is more commonly raised in AVO proceedings because AVO proceedings are not eligible for diversion under s32. Our CLS practitioners often have concerns about the ability of clients with cognitive and/or mental health impairments to understand these proceedings and any subsequent order, which is critical given that breach of an AVO is a criminal offence.

One example of such proceedings is the Children's Court case of *Police v DK* (10 December 2010). In that case, the Children's Court stayed AVO proceedings permanently on the basis that the young person (a young man with a severe intellectual disability) fell within the Presser test. Magistrate Mulroney noted that if the case were a criminal prosecution the court may have considered making an order pursuant to s.32 of the MHFP Act.

Defence of mental illness

Legal Aid NSW cannot provide data on how often the defence of mental illness is raised in the Children's Court. However, in the experience of the CLS, it is rare.

CLS lawyers provided two examples of where the defence was raised or considered.

The first involved a young person charged with the serious children's indictable offence of reckless wounding with intent to cause grievous bodily harm. The matter went through committal in the Children's Court and then to the District Court, but the trial did not proceed as the Crown's expert also formed the view that the young person was not guilty on the grounds of mental illness (**NGMI**). The matter took two years to resolve, and was extremely stressful on the young person, even though he spent the majority of his time on bail (rather than in hospital) and continued on bail even after the finding of NGMI. Our understanding is that the young person remained in the community under the care of the Mental Health Review Tribunal (**MHRT**) after finalisation of the matter. An offer to plead guilty to the lesser reckless wound charge was refused by the Office of the Director of Public Prosecutions (**ODPP**), as they were concerned about the matter being finalised by way of s.32, which the ODPP found unacceptable given the seriousness of the incident.

In another matter, the defence arose in relation to a child with possible psychosis who had been charged, inter alia, with animal torture. Ultimately, rather than exploring the common law defence (which would have required getting extra reports, more delay, foregoing negotiations, possible ex officio and the involvement of the MHRT), the CLS negotiated, pleaded and sought an order under s.32.

Ex officio

The other issue to note is that if an indictable matter is discharged/stayed in the summary jurisdiction either due to unfitness or the defence of mental illness, there is nothing precluding the ODPP from laying an ex officio indictment with respect to those charges in the District Court. This course was specifically noted by the former President in the decision of *Police v AR* (18 November 2009) at [62].