

ETHICS AND THE MENTALLY IMPAIRED

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Introduction

As criminal lawyers practising in New South Wales a substantial portion of our client base includes persons suffering from a mental impairment. This raises the issue of whether the client is fit for trial. Figures indicate that approximately 38 per cent of inmates sentenced in NSW have some form of mental illness, whilst 20 per cent have an intellectual disability.¹

This paper addresses some of the ethical and forensic dilemmas that may arise when appearing for the mentally impaired.

The term 'mentally impaired' includes clients with a mental, intellectual or physical impairment.

Background

The overriding concern when appearing for all clients in the criminal justice system is 'getting the best result', whether it be a not guilty verdict, a non-custodial sentence or the shortest custodial sentence possible. To be able to do that and appropriately advise clients on their best course of action, an ability to forecast possible outcomes is required. In relation to clients with mental impairments this has proved to be the most daunting of tasks.

Prior to the commencement of the *Crimes (Mental Disorder) Amendment Act* 1983, it was generally accepted that a finding of unfitness, or a verdict of not guilty by reason of mental illness was contrary to the best interests of the client, as both resulted in indefinite incarceration regardless of the trivial nature of the offence. If instructed to oppose such findings by the client, the legal representatives' duty was clear in relation to the mental illness defence but more problematic in relation to the issue of fitness for trial. Problems still remained after the 1983 amendments as to the client's best interests as the indeterminate nature of detention still remained in cases where a not guilty but mentally ill verdict was returned. Limiting terms were introduced which followed a finding of 'having committed the offence' after a special hearing. To some extent this ameliorated the indeterminate nature of detention as the client knew the longest

¹ NSW Law Reform Commission Consultation Paper 6 (2010) – 'People with cognitive and mental health impairments in the criminal Justice system: criminal responsibility and consequences' – para. 8.

period they could be detained. However, there are a number of drawbacks in relation to limiting terms. These include the fact that there is no provision for the setting of a non-parole period allowing for early release. A further shortcoming is that limiting terms are inevitably longer than most sentences imposed on offenders dealt with under the general sentencing regime as the utilitarian discount for a plea of guilty and remorse (where it cannot be adequately expressed because of the client's mental impairment) cannot be taken into account in mitigating the sentence.²

Importantly, the 2009 amendments to the *Mental Health (Forensic Provisions) Act 1990 (the MHFPA)* has taken the release powers for forensic patients, which includes those clients found unfit for trial and/or not guilty by reason of mental illness away from the executive government and placed it into the hands of the Mental Health Review Tribunal (the Tribunal). However, the executive still holds some sway - the Minister for Health and the Attorney General having a right of appearance before the Tribunal³ and a right of appeal⁴ in relation to the release of forensic patients. Also of some concern is the provision that the Tribunal, when considering the release of a forensic patient subject to a limiting term, must have regard as to 'whether or not the patient has spent sufficient time in custody'.⁵

The Tribunal's annual report for the year ending the 30 June 2010 suggests that the 2009 amendments are having some limited effect in moving those with mental impairments out of the gaol system and into more appropriate facilities, although some logistical problems are still hampering those transfers.

*"for the period from 1 July 2009 to 30 June 2010 the Tribunal made 78 orders for a patient's transfer to another facility, compared to 27 orders made in 2008/9 by either the Minister, the Governor, or the Tribunal. However...there have been some difficulties with the flow of patients through the system due to both the delay in the Forensic Hospital becoming fully operational, and the policy view adopted by Justice Health. As a result, 27 of the 78 orders for transfer made in 2009/10 had not been acted on by the end of the reporting period. 21 of these were for the Forensic Hospital with patients having waited an average of three and a half months for placements by the end of the reporting period, and six cases, the patients had been waiting over six months by the end of the reporting period."*⁶

It should also be pointed out that 14 forensic patients were released unconditionally in 2009/10 compared to 7 in 2008/9, and 10 conditionally compared to 13 for the same period.⁷

² *Regina v Mitchell* (1999) 108 A Crim R 73

³ MHFPA Sec 76A(2)

⁴ MHFPA Sec 77A

⁵ MHFPA Sec 74(e)

⁶ Annual Report of the Tribunal for the period 1 July 2009 to 30 June 2010 - page 7

⁷ Annual Report of the Tribunal for the period 1 July 2009 to 30 June 2010 - Table 17

NSW Bar and Law Society Rules

The NSW Bar Rules and the NSW Law Society Professional Conduct and Practice Rules do not provide specific guidance to legal practitioners when appearing for clients with mental impairments. The Bar Rules provide for contrasting duties to the duty to act in the best interest of clients; “a *paramount duty to the administration of justice*”;⁸ a duty “*to the courts, to other bodies and persons before whom they appear*”⁹ and even a duty to “*the greater public interest*”.¹⁰ Although, again only offering general guidance, the most appropriate may be Rule 5:

“Barristers should exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients.”

Fitness to Plead Guilty and Fitness for Trial

It is important at the outset, to make the distinction between a client being fit to plead guilty and competently take part in the sentencing proceedings and a client being fit for trial. The minimum standards in considering the question of whether a client is fit to plead guilty and take part in the sentencing proceedings that follow, as opposed to being fit to stand trial, are vastly less onerous. Also the degree of impairment may vary considerably from person to person. At one end of the spectrum there are those who because of the severity of their mental impairment are unable to effectively communicate in any meaningful way and thus not fit for trial or to plead guilty. On the other hand there are those with less severe forms of impairment who are quite capable of providing instructions to plead guilty and follow less arduous sentencing proceedings but not fit for trial. The *MHFPA* and the *Presser*¹¹ test are only directed to considerations of fitness to be tried, as opposed to fitness to plead guilty and competently take part in ensuing sentencing proceedings. Section 5 of the *MHFPA* provides:

*“The question of a person’s unfitness to be tried for an offence **may be raised by any party to the proceedings in respect of the offence** or by the Court.”*

Smith J (at para. 48) in *Presser*:

*“... whether the accused, because of mental defect, fails to come up to certain minimum standards which he needs to equal **before he can be tried** without unfairness or injustice to him. He needs ... 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*

⁸ NSW Bar Rule 1

⁹ NSW Bar Rule 4

¹⁰ NSW Bar Rule 7

¹¹ *Regina v Presser* (1958) 1 VR 45

the purpose of all the various court formalities. He needs to be able to understand ... 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."

A Duty to Raise Fitness

Whether to raise fitness in opposition to a client's instructions not to do so arose in the High Court case of **Eastman**.¹² Eastman was convicted in the ACT Supreme Court in 1995 for the murder of Colin Winchester, an Assistant Commissioner of Police. Shortly prior to the commencement of Eastman's trial, his then senior counsel approached the NSW Bar Association's Ethics Committee for a ruling as to whether he should raise fitness in opposition to Eastman's instructions not to do so, his senior counsel being of the view that Eastman may have been unfit for trial. He was advised not to raise the issue. Some way into the trial, Eastman's then counsel sought advice from senior members of the ACT bar on the very same issue. He was advised that the issue should be raised with the court but prior to being able to do so his instructions to appear were withdrawn. Eastman's trial continued to conviction without the issue being raised before the court.

The High Court decision of **Eastman** authoritatively states much of the law in relation to fitness. Gaudron J:

*"(62) If a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead, or, if that issue is not determined in the manner which the law requires, "no proper trial has taken place [and **the**] trial is a nullity" [84]. To put the matter another way, there is a fundamental failure in the trial process."*

Hayne J concluded:

*"(294) There can be no trial at all unless the accused is fit both to plead and to stand trial...In that respect it is a question which falls outside the adversarial system. Indeed, it must fall outside the adversarial system because the very question for consideration is whether there is a competent adversary...Ordinarily it would be expected that material suggesting doubts about the accused's fitness to plead or to stand trial would be drawn to the court's attention by counsel for the prosecution (if aware of it) or by counsel apparently retained by the accused (if counsel had doubts about the matter). **In particular, if counsel for the prosecution or counsel for the accused had expert medical opinion that raised a question about the accused's fitness, it would be expected that the existence of this material would be drawn to the attention of the trial judge."***

¹² **Eastman v Regina** (2000) 203 CLR 1

Thus a trial conducted in these circumstances, being 'a nullity' may well breach Bar Rule 5 as it is not in the 'proper administration of justice'.

Notwithstanding that Eastman's High Court appeal was dismissed, on grounds not relevant to the issue of fitness, some members of the court expressed concern that Eastman may have been convicted with the outstanding question as to his fitness being unresolved. Gleeson CJ, Kirby and Callinan JJ referred to the availability of a section 475 inquiry (identical to the then NSW section 475 inquiry provisions) as a possible way to resolve the unsatisfactory state of affairs. An inquiry duly followed with a report and recommendations being handed down by Miles AJ in October 2005¹³ (**Eastman's** 475 Inquiry). Some of the recommendations are apposite to this discussion:

"282. At the heart of the matter is the role of counsel in relation to the issue of fitness to plead. Traditionally counsel in a criminal trial, whether for the prosecution or for the defence, have been reluctant to raise the issue of fitness to plead because of the perception that it may result in "throwing away the key", that is to say, detention in a mental asylum indefinitely and without rights for the person detained.

.....

*284. The recognition of the anomalous nature of fitness to plead as something for the court and for counsel to consider outside the adversary system, **and of the obligation on counsel who raises an issue of incapacity to indicate the nature of the facts which go to support the view that the accused is unfit** carries the clear implication that there is no impropriety in counsel (whether for the defence or for the prosecution) raising the issue with the court. It suggests indeed that there is a duty to do so.*

285. The ethical situation facing a lawyer who believes that his or her client is or may be unfit to plead should also be spelt out. This should be initially a matter for the professional associations themselves to formulate appropriate rules of conduct, and only in the failure of such formulation, need it be a matter for legislation. The possibility of legislation, however, should not be overlooked. I express the strong view that there is no impropriety in a lawyer appearing or acting in a criminal trial who has a well-founded belief that the accused person is unfit to plead informing the opposing lawyer and the court. The law as to how the issue is to be dealt with clearly implies that the continuing duty to the court over-rides any perceived duty to the client to keep the matter secret.

286. Once this is recognized, it follows that where the very question as to the client's capacity to give instructions is at issue, then the lawyer may not be bound by the express direction of the client that the matter of fitness is not to be raised.

288. The duty to the Court should be regarded as surviving the termination of the lawyer/client relationship. The position of a lawyer as an officer of the court should usually be sufficient to secure a hearing in the courtroom. A

¹³ Inquiry under S475 of the *Crimes Act* 1900 into the matter of the fitness to plead of David Harold **Eastman**. - Report of the Honourable Acting Justice Miles AO dated 6 October 2005. Volume 1 released by Cabinet 10 October 2005. <http://www.courts.act.gov.au/supreme/content/judgments.asp?textonly=no>

lawyer who has been dismissed and who no longer has a right of audience in a trial will need to be tactful and possibly persistent in seeking to be heard on a matter concerning a former client. A request to prosecuting counsel to make or join in the application may be appropriate and effective.”

Although the NSW Bar Association has not addressed the issue of fitness, the Ethics Committee of the Victoria Bar has:

“Where counsel forms an opinion that there is a mental disorder or impairment with a consequent inability to give instructions, counsel, if he or she retains the brief, is obliged to disclose that inability to the trial judge in accord with the duty owed by counsel to the court. This arises because an inability to give instructions directly affects the proper administration (sic) of criminal justice. That a client may fear the consequences of a determination of unfitness does not negate or lessen this duty.”¹⁴

All the above overwhelmingly suggests that fitness must be raised. It may also well be time for the NSW Bar Association and the Law Society of New South Wales to offer guidance in formulating rules of conduct as regards fitness along the lines of the Ethics Committee of the Victorian Bar Association.

Clients Refusal to Run Mental Illness Defence When Available on the Evidence

It is not unusual to encounter the situation where the client has the mental illness defence available on the evidence but refuses to run it. Is this a basis for finding him not fit for trial? This issue was canvassed at some length in two recent decisions - Buddin J in *JH*¹⁵ and Berman J in *Holt*.¹⁶

In *JH* there were a number of bases advanced by the psychiatrists called by the defence as to why the accused was not fit for trial. These included the fact that he did not want to run the mental illness defence, he being of the view that he was not mentally ill at the time of the commission of the alleged offence - the evidence overwhelming suggesting otherwise. Buddin J found, as regards the *Presser* requirements:

“...the accused must be “able to plead to the charge”. The critical issue, as it emerged in the present case, is whether he has “sufficient capacity to be able to decide what defence he will rely upon and to make his defence”. That is to be understood in the context of the requirement that in making his defence to the charge “he needs to be able to do this through his counsel by giving any necessary instructions”.¹⁷

In finding the accused not fit for trial the judge said:

“In all the circumstances it appears to me that the accused lacks the necessary insight to understand that he was, and no doubt still is, suffering from a mental illness...In my view however, his condition deprives him of the capacity to give instructions concerning his mental state at the time of

¹⁴ Victorian Bar News No 142 Spring/Summer 2007, page 10

¹⁵ *R v JH* (2009) NSWSC 551

¹⁶ *R v Holt* 9 DCLR (NSW) 87

¹⁷ *R v JH* (2009) NSWSC 551 at (5)

the offence. Moreover, if he lacks the insight to appreciate that the “defence” of mental illness is available to him, then it is axiomatic that he does not have sufficient capacity “to be able to decide what defence he will rely upon and to make his defence” or perhaps even what plea he should enter.”¹⁸

This finding was made against evidence before the court of a conversation between the accused and his instructing solicitor that he “was told by a doctor at Baxter that if he was to be mentally ill he would be locked up in a mental institution and chained to a bed”.¹⁹ The Crown submitted this conversation was evidence that the accused had made a rational decision in not running the mental illness defence as he believed if he succeeded on the defence he would receive an indeterminate sentence. The submission was rejected the court being of the view that his decision not to run the mental illness defence was a result of his underlying mental illness.

Of interest are the observations offered by Dr Allnutt when giving evidence at the hearing:

*“I am of the view that as experts in this case, our areas of disagreement are a result of different thresholds applied to the **Presser** criteria. My understanding is that the test for fitness is relatively low test, that is that a relatively high degree of impairment needs to be present for a person to be found unfit.*

In NSW the necessary level of understanding of each criteria as articulated in Presser is limited in that, for example, it is not clear what is required of a person to be deemed having the capacity to instruct counsel; I have proceeded on the assumption that the legal test is relatively low and that this is what is meant by the term “minimal standard”. I also proceed to the understanding that fitness to stand trial is an issue of capacity...²⁰

The very same issue arose in **Holt** where the court’s finding went the other way. Berman J found that the accused was fit for trial and addressed a number of specific issues, including the following:

“In my view the undisputed fact that the accused comprehends all relevant aspects of the legal processes involved in a criminal trial means that he is fit to be tried. In particular, the accused understands the availability of a defence of not guilty on the grounds of mental illness, and understands the consequences of such a verdict, and it has not been shown that his present unwillingness to embrace that defence results from his mental illness.”²¹

There appears nothing in these two cases to suggest that the **Presser** criteria was found wanting in addressing this specific problem. As Dr Allnutt observed in **JH** it may be that ‘different thresholds’ are being applied by experts, and for that matter the courts. In the end both decisions were reached on the evidence before the respective courts, one being satisfied on balance that the decision

¹⁸ **R v JH** (2009) NSWSC 551 at (41)

¹⁹ **R v JH** (2009) NSWSC 551 at (40)

²⁰ **R v JH** (2009) NSWSC 551 at (13)

²¹ **R v Holt** 9 DCLR (NSW) 87 at (39)

making process of the accused was infected by the underlying mental impairment whilst the other found that not to be the case.

Fitness - How to Raise

The raising of fitness before the court against the client's wishes usually results in the lawyer/client relationship becoming somewhat strained and in some cases, ends in the client's instructions being withdrawn. In many cases it becomes patently obvious to all parties and even the court in some circumstances, that there is a fitness issue to be resolved. In these circumstances where the client instructs not to raise the issue, it can be left to the prosecutor or court to raise it as suggested by Spigelman CJ in **Mailes**:

*"Where, as sometimes occurs, apparent unfitness is accompanied by an insistence on the part of the accused that he or she is fit, legal representatives may reveal their doubts **and the basis for those doubts to the trial judge**. The question of unfitness can then be 'raised...by the Court' within s 5..."²²*

Also note that Miles AJ, in his recommendation following **Eastman's** 475 Inquiry (at 284), had no qualms in expressing the strong view *"that he saw no impropriety in counsel"* advising the prosecution of his belief as to his client's fitness.

The comments of Hayne J in **Eastman**, Miles AJ in **Eastman's** 475 Inquiry and Spigelman CJ in **Mailes** (all highlighted above) indicate that not only must the issue of fitness be raised but the basis or foundation for such belief must also be disclosed to the court. This would include advising the court of any experts reports that raise the issue or any opinions formed by the client's legal representatives (be it counsel or instructing solicitor) as to the client's fitness as a result of conferring with the client or observing their behaviour.

Expert's Reports

Experts reports, confidential communications within such reports between the expert and the client, and any instructions of the client provided to the expert by the client's legal representative for the purpose of preparing such report, are protected as client legal privilege pursuant to section 118 and 119 of the *Evidence Act 1995*.

Normally the reports are obtained to assist legal representatives in providing advice to clients once criminal proceedings have been commenced in the Local Court. In addition to providing opinions on the issue of fitness, they often include advice as regards the availability of the mental illness and/or substantial impairment defences.

²² **Regina v Mailes** (2001) 53 NSWLR 251 at (11)

James J in **Tantra**²³ (in a hearing before the Tribunal pursuant to section 16 of the *MHFPA* as to whether Tantra would become fit within the ensuing 12 months) queried whether client legal privilege was available in circumstances where experts reports were brought into existence for the sole purpose of a fitness hearing before the Tribunal, likewise for the sole purpose of a fitness hearing before a court. The argument proceeded on the basis that at common law the reports were not brought into existence for the purpose of litigation as the hearing before the Tribunal “*is not an adversarial proceeding, but is rather preliminary and ancillary to a trial... Proceedings to inquire into fitness by the Tribunal are neither curial nor adversarial (section 151)*”.²⁴ However the matter was not addressed at all by the parties to the Tribunal hearing, more particularly the applicability of the *Evidence Act*. There appears no issue that the *Evidence Act* does not apply to proceedings before the Tribunal. The matter is not so clear-cut as to the definition of proceedings, pursuant to section 4 of that Act, to include fitness proceedings before a court so as to invoke protection from disclosure as client legal privilege.

Difficult questions as regards waiving client legal privilege may arise with clients with mental impairments, more particularly those with more severe forms of impairment. Both section 118 and 119 state that, as regards client legal privilege, objection must be taken ‘by a client’. One would think if the client was unable to take the objection, because of his mental impairment, his legal representative would be under a duty to take the objection.

The issue as regards client legal privilege becomes even more problematic when a client, either by way of implication, having already instructed his legal representatives not to raise the issue of fitness, or by way of specific instructions, refuses to waive privilege. The importance of the protection cannot be overlooked. Dean J in **Baker v Campbell** commented:

*“The general and substantive principle underlying legal professional privilege is of fundamental importance to the protection and preservation of the rights, dignity and equality of the ordinary citizen under the law in that it is a pre-condition of full and unreserved communication with his lawyer”.*²⁵

The responsibility associated with having deliberately disobeyed a client’s instructions in raising fitness and then further compounding the apparent breach by waiving privilege, again in contradiction of a client’s instructions, is obviously a matter of considerable concern.

The other problem that often arises in these situations is that the opinion reached by the expert, or for that matter the client’s legal representatives, as regards a client possibly not being fit for trial is often partly (or totally) founded on communications with the client regarding the subject offence itself, the disclosure of which may cause irreparable damage to a client’s case.

²³ Unreported judgement of the Mental Health Tribunal in relation to Vita **Tantra** – Determination Pursuant to section 16 of the *Mental Health (Forensic Provisions) Act 1990*

²⁴ Unreported judgement of the Mental Health Tribunal in relation to Vita **Tantra** – Determination Pursuant to section 16 of the *Mental Health (Forensic Provisions) Act 1990* – at (23-24)

²⁵ **Baker v Campbell** (1983) 153 CLR 52 at (435)

Possible Alternatives to Breaching Client Legal Privilege

It must be borne in mind that legal representatives faced with this dilemma of whether to waive privilege against a client's instructions only fall foul of the various pronouncements of the High Court in **Eastman**, and Miles AJ in **Eastman's** 475 Inquiry, if the matter proceeds to trial, in that the trial of a person who is not fit for trial is a 'nullity'. There are a number of alternate avenues available to the prosecution and/or the court in determining the issue of fitness once raised by the defence.

It is very unusual for a client that presents with a fitness issue not to have had some psychiatric/psychological history. It may be by way of prior contact with a psychiatrist/psychologist or associated professional, admission to a psychiatric hospital or similar institution, or from some other sources such as a general practitioner, friends, relatives or associates who have observed the client over time. Some clients are often in custody or have previously been in custody and have corrections health records that may provide information on the issue. If this material is available to the prosecution they can then brief their own psychiatrist/psychologist or other appropriate expert on the issue. Similarly the court can request a similar report based on the available material.²⁶ The court also has power to request the client "*undergo a psychiatric or other examination*".²⁷ However, if the client refuses to undergo or co-operate with a psychiatrist or other expert in the preparation of the report, the court has no power to compel the client to do so.

A further alternative to waiving client legal privilege against a client's wishes was addressed by James J in the fitness hearing before the Tribunal in **Tantra**.²⁸ The Tribunal became aware that Tantra's legal representatives had reports from two named psychiatrists raising the issue of fitness. The Tribunal issued summonses for the production of the reports. The Tribunal accepted that submission that the reports were protected by client legal privilege on the basis that they were brought into existence to advise the client in his forthcoming Supreme Court trial not only the issue of fitness, but also on the availability of the mental illness and substantial impairment defences. However, the Tribunal went on to find that although the reports and the communications between the client and the psychiatrists contained within the reports, and a copy of the instructions of the client provided to the psychiatrist to assist in the preparation of the reports, were protected by client legal privilege, the opinions of the psychiatrists were not.

The Tribunal in reaching their decision relied on **R v P**²⁹ where Hodgson JA stated:

"...I am inclined to think that the actual opinions of Dr. Bell and Dr. Lewin, about the appellant's ability to give rational instructions would have been admissible, without disclosure of communications on which they were based, unless a case was made out that it would be unfair to admit them because the opinions could not be explored or tested without going into

²⁶ MHFPA sec 10 (3)(e)

²⁷ MHFPA sec 10(3)(d)

²⁸ Unreported judgement of the Mental Health Tribunal in relation to Vita **Tantra** – Determination Pursuant to section 16 of the *Mental Health (Forensic Provisions) Act 1990* at (41-54)

²⁹ **R v P** 53 NSWLR 664

*privileged communications. I think the same applies to the solicitor's opinion to the effect that the instructions he was receiving from the client would be extremely damaging to the client's case".*³⁰

Ipp AJA agreed, *"that the opinions of Dr. Bell and Dr. Lewin (divorced from the communication on which they were based) were not themselves confidential communications covered by section 19 of the Evidence Act"*.³¹ Mason JA expressed no opinion on the matter, maintaining that the issue need not be decided.

R v P was followed by Dunford J in **Sendy v Commonwealth**³² who in turn referred to the Supreme Court Rules and the Experts Code of Conduct *"to the effect that an expert witness is not an advocate for a party, that his or her paramount duty is to the court and not to the person retaining the expert, and that he or she has an overriding duty to assist the court impartially on matters relevant to the expert's area of expertise."*³³

The Tribunal also relied on the authority of **In the Matter of a Forensic Patient**,³⁴ where it was held that it was permissible for the Tribunal to question a social worker employed by the Legal Aid Service as to her opinion concerning a patient on the issues of fitness, provided the questioning did not trespass into the area of confidential communications between the patient and the social worker.

The Tribunal also went on to find that they could question the psychiatrists as to the client's demeanour and responsiveness to questioning during their interview.

The approach of the Tribunal if adopted in fitness hearings before courts may go some of the way in resolving one of the major ethical dilemmas facing legal representatives appearing for clients with mental impairments in avoiding waiving client legal privilege against instructions. It appears to have a sound legal basis in law and protects communications between clients and experts retained to provide advice to a client's legal representatives in criminal proceedings.

Conducting A Special Hearing

There has been some criticism by members of the Court of Criminal Appeal as to the degree of informality attending special hearings, particularly as regards the mere tendering of witness statements (as opposed to calling witnesses to give evidence) in support of the Crown case,³⁵ as it offends the principle of open justice. However, the court in **Zvonaric**³⁶ although finding that the practice was *"unusual it was not impermissible"*.

³⁰ **R v P** 53 NSWLR 664 at (56)

³¹ **R v P** 53 NSWLR 664 at (73)

³² **Sendy v Commonwealth** (2002) NSWSC 1109

³³ **Sendy v Commonwealth** (2002) NSWSC 1109 at [18]

³⁴ In the Matter of a **Forensic Patient v Mental Health Review Tribunal and The Attorney General NSW** Unrep SC 17th July 1987

³⁵ **R v Zvonaric** (2001) 54 NSWLR 1 and **R v Minani** (2005) 63 NSWLR 490

³⁶ **R v Zvonaric** (2001) 54 NSWLR 1 at (18)

Section 184 of the *Evidence Act* provides that an accused may admit matters of fact provided they “*have been advised to do so by his or her Australian legal practitioner or legal counsel*”. Accordingly, the Crown case could be put forward on an agreed statement of facts provided the client was advised to do so by his legal representatives. Similarly, section 190 of the *Evidence Act* provides for the waiver of the rules of evidence providing advice has been given, thus allowing for the tender of witness statements as opposed to calling them to give evidence. Spigelman CJ in **Zvonaric** addressed the use of these two provisions in special hearings and the reliance placed by the court on legal representatives appearing for clients in special hearings:

*“In the circumstances the Court must be, as the legislative scheme contemplates, particularly reliant on the legal practitioner representing the accused person. In the present case Counsel for the accused requested an opportunity to speak to the Appellant and explain the procedure to him. The matter was stood in the list for this to occur. There is, in my opinion, no basis for any inference that the procedures, issues and choices were not fully explained to the Appellant and, **insofar as that could reasonably occur, were understood by him**. To support the procedure adopted in this case of tendering witness statements, the Crown relied on each of s184 and s190 of the Evidence Act 1995. Section 184 permits an accused in a criminal proceeding to admit a matter of fact or to give a consent “if advised to do so by his or her lawyer”. Section 190 permits the rules of evidence to be waived with the following qualification in sub 2:*

“190(2) In a criminal proceeding, a defendant’s consent is not effective for the purpose of subsection (1) unless:

(a) the defendant has been advised to do so by his or her lawyer; or

(b) the court is satisfied that the defendant understands the consequences of giving the consent.”

It should be noted that par (b), with respect to an understanding of the consequences of consent, is an alternative to par (a), with respect to advice by a lawyer. Section 190 indicates the degree of reliance that the court places on the performance by legal practitioners of their professional obligations and of their duties to the court. This is even more the case with respect to the conduct of a “special hearing” under the Mental Health (Criminal Procedure) Act 1990.”³⁷

The highlighted section in paragraph 15 of the report suggests that the legal representative need not be satisfied that the client fully understands the procedure.

A question that often arises in the minds of legal practitioners appearing for clients in special hearings is whether they have a ‘free rein’ in the conduct of the proceedings without regard to the client’s instructions.

The matter was addressed at some length in **Smith**³⁸ where the issue was whether the trial judge had erred in allowing an accused in a special hearing to give evidence over objection by his counsel on the basis that “*the power to make*

³⁷ **R v Zvonaric** (2001) 54 NSWLR 1 at [15-17]

³⁸ **R v Smith** (1999) NSWCCA 126

decisions on behalf of the accused is exclusively vested the accused's legal representatives".³⁹ James J concluded:

*"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".*⁴⁰

The problem is further highlighted in such cases as **Williams**⁴¹ and **Dezfouli**.⁴²

Williams was charged with malicious wounding with intent to murder. The accused's legal representatives at a special hearing raised the mental illness defence against his client's wishes. His instructions were that he attacked the victim intending only 'to frighten him and not harm him in any way'. The court in dismissing the appeal passed comment that the accused's counsel and his solicitors "*acted responsibly in the manner in which they represented the appellant*"⁴³

Similar problems arose in **Dezfouli** where the mental illness defence was raised in contravention of the client's instructions. **Dezfouli** alleged there was a broad conspiracy between his legal representatives, the Crown and the trial Judge. Relations deteriorated to such an extent that his counsel advised the court that his client no longer desired his services. However, the court made no order permitting the appellant to appear unrepresented. The court concluded that counsel need not follow the client's instructions in such circumstances:

*"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."*⁴⁴

However, it might be worthwhile for a number of reasons to go part way in acceding to some of the client's instructions, within reason. It may avoid having your instructions withdrawn and throwing away the time and expense already involved in representing the client. To obtain new legal representation (and they almost inevitably having to address exactly the same problems with the client) may bring about further deterioration in the client's mental state. It may also be the case that if you can accede to putting some of the client's instructions during the proceedings, and in some cases even calling the client to give evidence, it may bring about some finality for the client with better outcomes for all involved.

³⁹ **R v Smith** (1999) NSWCCA 126 at (47)

⁴⁰ **R v Smith** (1999) NSWCCA 126 at (54)

⁴¹ **R v Williams** (2004) NSWCCA 224

⁴² **R v Dezfouli** (2007) NSWCCA 86

⁴³ **R v Williams** (2004) NSWCCA 224 at (20)

⁴⁴ **R v Dezfouli** (2007) NSWCCA 86 at (46)