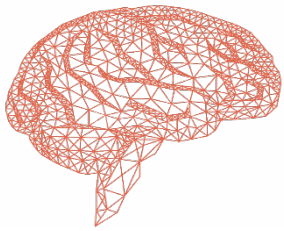

CMHLAWYERS

Criminal & Mental Health Lawyers

THE ETHICS OF ACTING FOR CLIENTS WITH COGNITIVE OR MENTAL HEALTH IMPAIRMENTS

LEGALWISE SEMINARS
CRIMINAL LAW SYMPOSIUM
SATURDAY 12 MARCH 2016

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The only real valuable thing is intuition.

Albert Einstein

1. INTRODUCTION

Statistically, people coming into contact with the criminal justice system are highly likely to have a cognitive or mental health impairment that may be relevant to an alleged offence. Taking instructions from, advising and acting for such clients can be extremely challenging. Ethical issues and dilemmas frequently arise requiring a criminal law practitioner to make difficult decisions.

Whether the practitioner is a newly admitted solicitor or a senior member of the profession, a thorough understanding of the law governing professional responsibility and ethics is essential if the practitioner is to discharge their duties to the court, the client and other members of the profession. While significant legislative change occurred in 2015 with the enactment of the Uniform Law, the principles governing ethics remain largely unchanged.

This paper provides a "refresher" on the ethical duties of a criminal law practitioner with reference to the new Uniform Law. Suggestions are made to ensure practitioners can identify problematic areas in advance to ensure they discharge their duties to a client. Case studies are provided of ethical dilemmas that have arisen in the author's practice in recent years. The paper is not exhaustive. Despite twenty years of practise, the unexpected arrival of a "curve ball" from time to time highlights the fact that legal "practise" is exactly that, the ongoing development of skills.

2. TERMINOLOGY

What is a cognitive or mental health impairment? Is it a mental illness? A mental disorder? A mental condition ? Mental ill-health ? An intellectual disability ? A developmental disability ?

While criminal law practitioners are likely to be familiar with the term "ethics", there is likely to be some uncertainty as to what a cognitive or mental health impairment is.

Terms such as "mentally ill" and "mental illness" are often used loosely and/or their meaning derives from the context in which they are used. This can cause a great deal of confusion, as recently confirmed by the New South Wales Law Reform Commission ("NSWLRC"). It recommended the terms "cognitive and mental health impairment" be used:

> " … concepts such as "mental illness" and "cognitive impairment" are multi-faceted and encompass medical, scientific and social criteria. In practical terms, a mental illness or disorder is a dysfunction affecting the way in which a person feels, thinks, behaves and interacts with

> others. The term covers a vast group of conditions, ranging in degree from mild to very severe, episodic to chronic. Common forms of mental disorder include depression, anxiety, personality disorders, schizophrenia and bipolar mood disorder.
>
> Generally, a cognitive impairment or disorder means a loss of brain function affecting judgment, resulting in a decreased ability to process, learn and remember information. A cognitive impairment may manifest itself in conditions such as Alzheimer's, dementia, autism and autistic spectrum disorders, multiple sclerosis, and acquired brain injury. The term also encompasses intellectual disability, interpreted to mean a permanent condition of significantly lower than average intellectual ability, or a slowness to learn or process information.
>
> The concepts of cognitive impairment and mental illness are often confused and conflated. An important difference is that "intellectual disability is not an illness, is not episodic and is not usually treated by medication.
>
> … [We] use the terms "cognitive and mental health impairments" to refer to a broad spectrum of conditions that can result in reduced capacity for mental functioning or reasoning. These conditions may be congenital or acquired and encompass both chronic and episodic conditions, as well as those that may improve over time with treatment"

3. PEOPLE WITH COGNITIVE & MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM

Most people with mental ill-health are not dangerous[1]. However, the rate of mental health problems, both substance and non-substance related, are much higher amongst offenders in custodial settings[2]. In a 2011 study of young people in custody, 87% were found to have at least one psychological disorder and 73% had two or more. Similar findings have been made in relation to adult inmates. According to one study the overall incidence of any psychiatric illness was 80% among for prisoners compared to 31% within the community.[3] The over-representation of people with mental health impairments in the criminal justice system has been acknowledged by the current State government[4]. While substantial legislative change was recommended by the NSWLRC in 2012 to ensure mental health issues are identified early to reduce the risk of re-offending, the government has failed to implement the recommendations.

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[1] Purcell R. *The Relationship between Violence and Mental Illness*, 2011, Orygen Youth Health Research Centre Policy Briefing, www.oyh.org.au.

[2] Smith N and Trimboli L. *Comorbid substance and non-substance mental health disorders and re-offending among NSW prisoners* (2010) Crime and Justice Bulletin (No 140),retrieved from http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_cjb140.

[3] Richardson E. & McSherry B, *Diversion down under - Programs for offenders with mental illnesses in Australia* (2010) International Journal of Law and Psychiatry 33:249-257 at p.249 citing Butler et. al. (2006) *Mental disorders in Australian prisoners: A comparison with a community sample*, The Australian and New Zealand Journal of Psychiatry, 40:272-276

[4] In responding to the NSWLRC Report 135 the Attorney General, The Hon Greg Smith SC said "*people with mental impairments are overrepresented in our courts and jails and the report's recommendations aim to reduce their reoffending by ensuring their impairments are identified early and they have access to appropriate treatment and support*". Media Release 23 August 2012. retrieved via http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/LL_Homepage_news2012#cjs

Given their over-representation in the criminal justice system, it is highly likely a criminal law practitioner will receive instructions from a client who has cognitive or mental health impairments. If a practitioner who accepts instructions in a criminal matters fails to identify such clients, the advice provided by the practitioner might be insufficient, incomplete or inaccurate and the practitioner will be at risk of failing to discharge his/her ethical duties. If the practitioner is not equipped to act for such clients, referring the client to another practitioner must be considered.

So what are the duties of the criminal law practitioner to his/her client, other members of the profession and the court?

The law in relation to ethics and professional responsibility is governed by statute and the common law. Significant legislative change occurred in 2015 when the movement towards a national profession became a reality It is essential criminal law practitioners are aware of the provisions of the Uniform Law.

4. ETHICS & PROFESSIONAL RESPONSIBILITY – THE LEGISLATIVE FRAMEWORK

4.1. THE UNIFORM LAW 2015

On 1 July 2015 the Uniform Law commenced operation. The Uniform Law creates a common regulatory platform across NSW and Victoria, encompassing almost three quarters of Australia's lawyers[5]. The practise of law and the legal profession in both jurisdictions is governed by it.

The former regulatory framework ended on 30 June 2015 *"marking the cessation of the NSW Legal Profession Act, the NSW Legal Profession Regulations and the NSW Professional Conduct and Practice Rules 2013".*[6]

For solicitors in NSW, the Uniform Law consists of:

Acts: Legal Profession Uniform Law
Legal Profession Uniform Law Application Act 2014

[5] Milliken C, *The New Legal Profession Uniform Law: What It Will Mean For NSW Practitioners* Law Society Journal, March 2015, p. 70.
[6] Monaghan, P. *New Ethical Trends and issues in an uniform legal market,* Law Society Journal, July 2015 at p.76.

Regs: Legal Profession Uniform Regulations 2015

Legal Profession Uniform Law Application Regulation 2015

Rules: Legal Profession Uniform General Rules 2015

Legal Profession Uniform Admission Rules 2015

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015[7]

Legal Profession Uniform Legal Practice (Solicitors) Rules 2015

Legal Profession Uniform Continuing Professional Development (Solicitors Rules 2015)[8]

Note, the reason we are talking about ethics on a Saturday afternoon is because of Rule 6 Uniform CPD Rules[9].

Despite the extent of legislative reform, the ethical principles which govern our profession essentially remain unchanged[10] and the common law remains. Preliminary Conduct Rule 3.1 provides:

> The objective of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules.

Likewise, Rule 2 provides:

> 2.1 The purpose of these Rules is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and these Rules.
>
> 2.2 In considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the Rules apply in addition to the common law.
>
> 2.3 A breach of these Rules is capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority, but cannot be enforced by a third party.

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[7] Hereafter the "Rules".

[8] Hereafter the "CPD Rules".

[9] Solicitors are required to complete ten continuing professional development ("CDP") units in each CPD year. Unless exempted, at least one CPD unit must be completed in the fields of ethic and professional responsibility; practice management and business skills, professional skills and substantive law.

[10] Law Society of NSW, Ethics Committee and Ethics Department, *Ethical Dilemmas and Issues*, Law Society Journal, July 2015 at p.75. See also Monaghan, P. *New Ethical Trends and Issues in a Uniform Legal Market*, Law Society Journal, July 2015 at p.76.

4.2 FUNDAMENTAL DUTIES OF SOLICITORS

Our duty to the court is paramount and overrides every other duty. The duty is now found in the Rules relating to "fundamental duties" of solicitors. Rule 3 provides:

> 3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

Other fundamental ethical duties are set out in Rule 4:

> 4.1 A solicitor must also:
> 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,
> 4.1.2 be honest and courteous in all dealings in the course of legal practice,
> 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,
> 4.1.4 avoid any compromise to their integrity and professional independence, and
> 4.1.5 comply with these Rules and the law.

The obligation not to engage in dishonest and disreputable conduct is also classed as a fundamental duty. Rule 5 provides:

> 5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:
> 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice, or
> 5.1.2 bring the profession into disrepute.

The final fundamental duty relates to undertakings given by solicitors in the course of practice[11].

4.3 DUTIES TO THE CLIENT

The duty of a solicitor to fully advise a client in relation to his/her options is set out in Rule 7 which provides:

> 7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
>
> 7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.

[11] Rule 6.

The duty of a solicitor to act in accordance with a client's lawful, proper and competent instructions can be found in Rule 8. Rule 9 deals with the duty of confidence and the limited circumstances where disclosure of confidential information is permitted. Conflicts concerning former clients, conflict of duties concerning current clients and conflict concerning a solicitor's own interests are the subject of Rules 10, 11 and 12, respectively.

Criminal law practitioners must be familiar with the provisions relating to the termination of a retainer which are contained in Rule 13. The termination of a retainer where costs remain unpaid by a client charged with a serious criminal offence will not necessarily be justified.

13.1 A solicitor with designated responsibility for a client's matter must ensure completion of the legal services for that matter UNLESS:
13.1.1 the client has otherwise agreed,
13.1.2 the law practice is discharged from the engagement by the client,
13.1.3 the law practice terminates the engagement for just cause and on reasonable notice, or
13.1.4 the engagement comes to an end by operation of law.

13.2 Where a client is required to stand trial for a serious criminal offence, the client's failure to make satisfactory arrangements for the payment of costs will not normally justify termination of the engagement UNLESS the solicitor or law practice has:
13.2.1 served written notice on the client of the solicitor's intention, a reasonable time before the date appointed for commencement of the trial or the commencement of the sittings of the court in which the trial is listed, providing the client at least 7 days to make satisfactory arrangements for payment of the solicitor's costs, and
13.2.2 given appropriate notice to the registrar of the court in which the trial is listed to commence.

13.3 Where a client is legally assisted and the grant of aid is withdrawn or otherwise terminated, a solicitor or law practice may terminate the engagement by giving reasonable notice in writing to the client, such that the client has a reasonable opportunity to make other satisfactory arrangements for payment of costs which would be incurred if the engagement continued.

4.4 OBLIGATIONS OF THE ADVOCATE AND LITIGATOR

The additional obligations of solicitors representing clients in courts are set out in Rules 17 - 29. A solicitor must not:

- be the mere mouthpiece of the client and must exercise independent forensic judgment[12];
- express their personal opinion on the merits of any material evidence or issue in the case[13];
- act informally in a way that might suggest the solicitor has special favour with the court;[14]
- deceive or knowingly or recklessly mislead the court;[15]

A solicitor:

- seeking interlocutory relief in an ex parte application has obligations of disclosure;[16]
- must advise a court of any binding authority, appellate authority and legislation which the solicitor has reasonable grounds to believe to be directly in point against the client's case[17];
- who learns a client or their witness has lied, falsified a document tendered into evidence or suppressed evidence, must advise the client that the court should be informed and refuse to take any further part in the case, or if the client authorises the solicitor to do so, must promptly inform the court[18];
- is obliged to advise a client against disobeying a court order where the client informs the solicitor of an intention to do so;[19]

Rule 20.2 deals with the client who confesses guilt but maintains a plea of not guilty.

Rule 21 deal with the responsible use of court process and privilege.

Rules 22 and 23 govern communication with opponents and witnesses.

Rule 24 prohibits solicitors from influencing witnesses or their evidence.

Rule 25 prohibits a solicitor from conferring with more than one lay witness at a time, including the client, unless there are special circumstances.

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[12] Rule 17.1
[13] Rule 17.3
[14] Rule 18.1
[15] Rule 19.1
[16] Rule 19.4 – 19.5.
[17] Rule 19.6 – 19.9. For other obligations see Rules 19.10 – 19.12.
[18] Rule 20.1
[19] Rule 20.3

Rule 27 precludes a solicitor from acting where the solicitor becomes a witness in the proceedings.

There is a prohibition on the publication of any material by a solicitor of material concerning current proceedings that may prejudice a fair trial or the administration of justice in Rule 28.

4.5 RELATIONS WITH OTHERS

Rules 30 – 35 govern a solicitor's relationship with others. Rule 32 prohibits a solicitor from making an allegation of unsatisfactory professional conduct or professional misconduct against another Australian legal practitioner unless it is made bona fide and there is a proper basis for the allegation. Rule 33 prohibits a solicitor from dealing with another practitioner's client except in limited circumstances. Practitioners must be mindful of this rule where a person already has a solicitor but consults the practitioner for a "second opinion".

5. ACTING FOR CLIENTS WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS

When taking instructions from a client in a criminal matter a practitioner must be mindful of the possibility the client has cognitive or mental health impairments that may be relevant to the alleged offence(s).

Given a practitioner is duty bound to provide "*advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter*"[20] a practitioner's failure to address the issue could result in the practitioner breaching his/her duty to the client.

[20] Rule 7.1

5.1. THE FIRST CONFERENCE – TAKING INITIAL INSTRUCTIONS

Some clients with cognitive and mental health impairments will lack an awareness of or insight into their impairment(s) and may be unable to alert the practitioner of matters that may be relevant to the proceedings.

For others, contact with the criminal justice system is often the catalyst for assessment, diagnosis and treatment or further assessment and diagnosis if there has been misdiagnosis and/or suboptimal treatment previously.

In addition, clients with cognitive and mental health impairments who present with comorbid (co-occurring) substance misuse or abuse can be overlooked when drugs or alcohol are presumed to be the cause of the client's difficulties.[21] Practitioners are discouraged from making such assumptions, in the absence of a proper foundation, given the high rate of comorbidity among people with cognitive and mental health impairments in the criminal justice system[22].

As there can be a genetic component to many mental disorders, a detailed history of the mental ill-health of the client's extended family will often be helpful. Family histories of disorders that include Anxiety, Depression, Schizophrenia, Bipolar Disorder, ADD/ADHD and substance or alcohol misuse should sound warning bells. For a list of matters upon which a practitioner should seek instructions, see the author's 2010 and 2011 papers.[23]

A practitioner may also need to obtain information from third parties. Given the duty of confidence owed to the client[24] practitioners should first obtain the client's authority and it would be prudent to do so in writing. Parents and carers are often useful sources of information, especially where the client is young, has a disability, suffers memory impairments or is acutely unwell.

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[21] See the first case study (R v Mr Y) at the end of this paper.
[22] For extensive discussion on Comorbidity see the author's 2014 paper "Section 32 Applications – An Update". It can be downloaded via http://www.cmhlaw.com.au/papers_17.html
[23] Weeks K (2010) *To Section 32 or Not: Applications pursuant to Section 32 Mental Health (Forensic Provisions) Act 1990*, Law Society Journal 48(4) at p. 49 and
Weeks K, (2011) *Dealing with Clients with Cognitive and Mental Health Impairments in the Local Court*, Legalwise Seminars, 25 March 2011. Papers can be downloaded via www.cmhlaw.com.au (Section 32 Guides page).
[24] Rule 9

5.2 CAPACITY

A practitioner taking instructions from a client with cognitive or mental health impairments must consider whether the client has the capacity to provide instructions in the matter. A practitioner has a professional obligation to ensure their client has capacity. "*It can be a tricky issue and cause difficulties for even the most experienced legal practitioners"*[25]. Capacity is governed by the common law. When a practitioner is in doubt, a suitably qualified medical practitioner should be consulted. Where a client lacks capacity, the NSW Trustee and Gaurdian may need to be consulted.[26]

When taking instructions from a client with cognitive or mental health impairments, practitioners must also be mindful of whether a client is fit to stand trial.

5.3 FITNESS / UNFITNESS

The issue of whether a client is fit to stand trial is fundamental to an accused's right to a fair trial[27]. When a client is unfit a practitioner will be required to advise the Court in accordance with the practitioner's duty to the court. This may be contrary to the client's instructions and the practitioner's duty to the client.

Unfitness to stand trial is often referred to fitness to stand trial or fitness to plead. The terms are used interchangeably and a client who is unfit to stand trial / unfit to plead may also be unfit to provide instructions. Fitness is an issue that can be raised by the prosecution, the defence or by the court and it must be resolved once it is raised. If an accused is found unfit the trial cannot proceed. The question of fitness / unfitness involves considerations broader than the mental health of the accused. Clients with an intellectual disability, physical disability or an acquired brain injury may also be unfit to stand trial.

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[25] Blyth T. & Couston G, *Proceed with caution over client capacity*, Law Society Journal March 2012 at p.52.
[26] The NSW Trustee and Guardian provides financial management services to people who have a disability that affects their capacity to make decisions. This may be due to mental illness, brain injury, intellectual disability, dementia or other disabilities - http://www.tag.nsw.gov.au/summary-intro-page.html
[27] See the extensive discussion on fitness issues in Howard D. & Westmore B *Crime and Mental Health Law in New South Wales*, 2010, Butterworths at pp. 172 – 267.

Where a client is unfit, a practitioner's duties to the court and client can come into conflict and difficult decisions may need to be made. In *Ngatayi v R*[28] the High Court acknowledged that it may not be in the client's interest to raise fitness and a client may want to avoid a finding that s/he is unfit.[29] Practitioners must be very mindful of the risk of a client losing his/her liberty if found to be unfit. What happens after a determination of unfitness is made depends on whether Local Court or the District or Supreme Court has jurisdiction over the proceedings.

Legislation and the common law governs fitness / unfitness in the District and Supreme Courts[30] and an unfit client can be remanded in custody.[31]

However, the machinery provisions in the MHFPA do not apply to the Local Court where the position is governed by the common law[32].

A Local Court Magistrate can make an order pursuant to s.33 MHFPA if an unfit accused fits the criteria of a "mentally ill" person. However, this can result in the detention of the client for assessment at a hospital[33] which could, in turn, result in involuntary detention for assessment and/or treatment pursuant to the *Mental Health* Act 2007.

An unfit accused in the Local Court can also be diverted pursuant to s.32 MHFPA[34], assuming the eligibility criteria in s.32(1)(a) MHFPA are satisfied and a determination is made that diversion is more appropriate (s. 32 (1)(b) MHFPA). However, if the matters are dealt with in accordance with law, an accused who is unfit must be discharged.[35]

If a practitioner has concerns about a client's fitness, the practitioner would ordinarily obtain a report from a forensic psychiatrist addressing the *Presser* requirements, the common law test for unfitness. In accordance with *R v Presser [1958]* VR 45 the accused must:

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[28] (1980) 147 CLR 1
[29] As noted by Howard D. & Westmore B op cit at p. 178.
[30] See Part 2, ss 4-30 MHFPA.
[31] s. 14 MHFPA
[32] See the extensive discussion by the NSWLRC in Report 138 (2013) *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, at pp.341 - 356
[33] s.33(1)(a)&(b).
[34] *Mantell v Molyneux* [2006] NSWSC 955 ; Mackie v Hunt (1989) NSWLR 130
[35],*Mantel v Molyneux* , Adams J at [28] citing *Ngatai v The Queen*, Gibbs, Mason & Wilson JJ at pp.7-8.

- be able to understand what it is s/he is charged with;
- be able to plead to the charge;
- be able to exercise his/her right of challenger of jurors;
- understand generally the nature of the proceedings, namely, that it is an inquiry as to whether s/he did what s/he is charged with;
- be able to follow the course of the proceedings so as to understand what is going on in court in a general sense;
- be able to understand the substantial effect of any evidence that may be given against him;
- be able to make his defence or answer to the charge.

In *R v Mailes* (2001) 53 NSWLR 251 Wood CJ and CL reviewed the development of the common law:

> 112 The origin of the rule concerning the fitness of an accused to stand trial appears to lie in the procedural formalities of the medieval courts of law. Without an opening plea and the accused's consent to trial by jury, a trial could not take place. Accordingly, it became the practice for the Courts to determine whether a failure of a defendant to enter a plea was due to malice, or whether he or she was mute by the visitation of God. A critical distinction was drawn between these two classes of accused persons. Until 1772, a defendant who stood mute of malice was subjected to peine forte et dure, while in the case of an accused who was mute by visitation of God, a plea of not guilty was entered and the trial was respited.
> 113 Between 1772 (12 Geo 111 C 2) and 1827 (Criminal Law Act 1827 (UK)), a plea of guilty was recorded in relation to an accused found by jury to have stood mute of malice. After 1827 the Court was permitted to order the entry of a plea of not guilty in such a case.
> 114 The importance of comprehension (or lack of it) for a fair trial was early recognised. Sir Mathew Hale recorded:
> "If a man in his found memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his [f]renzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment …. And if such person after his plea, and before his trial, become of non sane memory, he shall not be tried; or, if after his trial he become of non sane memory, he shall not receive judgment; or, if after judgment he become of non sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution.
> But because there may be great fraud in this matter, yet if the crime be notorious, as treason or murder, the judge before such a trial or judgment may do well to impanel a jury to inquire ex officio touching such insanity, and whether it be real or counterfeit.
> If a person of non sane memory commit homicide during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the king's grace to pardon him". (Hale, The History of the Pleas of the Crown 1736 Vol 1 at pp 34-5).

A practitioner is duty bound to advise the Court his/her client is unfit. In *Eastman v R* (2008) 166 FCR 579 the Full Federal Court made the following *obiter* observations:

> "For these reasons, a question of fitness to plead by reason of the client's mental state might be one of the rare occasions in which the duty of counsel to the court, and indeed to the client, might override the express instructions of the client, so as to require that the issue be raised, despite the client's express wish to the contrary".[36]

In *R v Mailes,* Spigelman CJ said:

> "Where, as sometimes occurs, apparent unfitness is accompanied by an insistent 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'"[37]

Howard and Westmore conclude:

> "As a matter of sensible, competent and non-negligent practice, raising the issue may, in most cases where there is real doubt as to fitness, be the obvious course to take.
> It is at the junction where the question of fitness to stand trial meets with the question of fitness to give instructions that practitioners will need to exercise most care in ensuring that they take the correct steps …
> If the defendant is fit to give instructions that he or she wants the matter to proceed without raising the issue of fitness, the practitioner may feel bound by those instructions. However there will be occasions when the practitioner may feel it is necessary to alert the court to his or her concerns about the fitness of the accused…
> Great care is obviously required and, if there is any doubt, it would be both sensible and advisable to have the client examined by a psychiatrist to confirm the client's capacity to give instructions, and to consider seeking an ethical ruling from one's professional association".

Practitioners are urged to have the contact details of the Law Society's Ethics Unit stored in their smart phone[38]. On the few occasions the author has required assistance, the ethics solicitors have provided prompt and helpful guidance.

5.4 ADVISING THE CLIENT

As noted above, the Conduct Rules require a practitioner to act in the best interests of the client[39], deliver legal services competently and diligently[40], to provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be

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[36] Spencer, Gray and Logan JJ at [18] as cited by Howard & Westmore op cit at p.179.
[37] As cited by Howard & Westmore op cit at p.179. The authors suggest the passage may "provide a useful roadmap for practitioners confronted with such situations".
[38] Ph: 9926 0114, Fax: 9221 5804, e: ethics@lawsociety.com.au
[39] Rule 4.1.1
[40] Rule 4.1.3

taken[41] . The client is also to be informed about the alternatives to fully contested adjudication of the case.[42]

When advising clients with cognitive or mental health impairments practitioners are therefore duty bound to advise a client of all available options. Sufficient information on the law and the evidence to be relied upon must be provided to enable the client to make an informed decision. An estimate of costs must clearly be provided.

Therefore, to discharge their duty to the client a practitioner will be required to do much more than simply advise a client they can plead guilty or not guilty.

When acting for clients with a cognitive or mental health impairments a practitioner must also consider whether they are required to provide advice in relation to:

- the ss.32 & 33 diversionary regimes in the MHFPA for summary matters;
- whether the prosecution can prove each element of the offence beyond a reasonable doubt;
- whether the client was capable of forming the necessary mens rea;
- whether the defence of insanity/mental illness (M'Naghten Rules) is available;

5.5 PLEADING GUILTY

Given the very limited circumstances where a person will be permitted to withdraw a plea of guilty, practitioners should take particular care when advising a client to plead guilty. Such advice should not be provided until all other options have been considered and discussed with the client. The client should also be advised of the maximum discount on sentence available for an early plea of guilty and the maximum penalties that can be imposed. Never suggest a particular result or outcome can be obtained for a client.

Ethical issues can arise when a client who is not guilty wants to plead guilty. The practitioner is duty bound to advise the client that a plea of guilty is an acceptance that all of the elements of an offence are made out. The plea of guilty must be unequivocal. It would be prudent for the

[41] Rule 7.1
[42] Rule 7.2

practitioner to obtain written instructions from the client confirming they were advised about the nature of the charge and the decision was made in the exercise of free choice, i.e. without ignorance, duress, fear, intimidation, inducement, and/or mistake.

5.6 PLEADING NOT GUILTY

If a client is to make an informed choice about the action to be taken, a client must be advised they are entitled to plead not guilty. Advising the client on the strength of the prosecution's case can be difficult in summary matters in the Local Court where there is no entitlement to a Brief of Evidence unless a plea of not guilty is entered.

A practitioner must ensure the client is aware of the nature of the charge, the elements of the alleged offence and that the prosecution is required to prove each element of the offence beyond a reasonable doubt. Apart from strict liability offences, a client should be advised it is necessary for the prosecution to prove an accused had a guilty mind (see 5.6.3 below). Any defences need to be canvassed.

A practitioner acting for a client with Bipolar Disorder, Schizophrenia, Schizoaffective Disorder, a Depressive Disorder with Psychotic features or who has experienced any psychotic symptoms must tread very carefully and be alert to the possibility the client could meet the narrow criteria for the M'Naghten's defence.

5.6.1 The defence of insanity / mental illness (M'Naghten Rules)

It has long been held that an accused is not liable for their actions when they are insane. The test as to whether an accused is insane has been settled since 1843 with the decision of the House of Lords in *Re M'Naghten's Case* (1843) 4 ST Tr (NS) 847. With the greatest respect, any criminal law practitioner unaware of this decision ought to immediately consider practising in another area of law !

When a criminal law practitioner is advising a client who has a cognitive or mental health impairment and it appears the client was psychotic or acutely unwell at the time of the alleged

offence the practitioner is, in the author's view, duty bound to consider whether the client has available the common law defence of insanity (M'Naghten Rules).[43] A failure to do so, when required, will result in the practitioner failing in his/her duties to the client and could result in a miscarriage of justice. Obtaining a forensic psychiatric report would ordinarily be required before a client decides what action to take.

An area of the author's practise currently increasing in size relates to appeals against convictions entered by the Local Court after a section 32 application is refused and a plea of guilty is entered.

In a number of appeals in which the author has appeared recently, the solicitors appearing in the Local Court failed to advise the clients they had the option of pleading not guilty on the basis they were unable to form the necessary intent and/or they might have the common law defence of insanity (M'Naghten's Rules) available to them[44]. All of the solicitors involved were experienced practitioners[45].

It is the author's experience that such appeals can be very difficult to run, especially given the Court's leave to appeal is first after a plea of guilty is entered in the Local Court[46].

It is truly remarkable that some solicitors, barrister and judicial officers remain unaware the M'Naghten's defence remains available in the Local Court. Unfortunately, it appears some have incorrectly assumed the common law was displaced with the enactment in 1983 of the precursor to s.32 MHFPA, s. 428 W *Crimes* Act 1900[47]. This is incorrect.

It is beyond argument the M'Naghten's defence remains available in the Local Court, albeit it is rarely run, no doubt because Magistrates exercise have available their ss. 32 & 33 MHFPA discretionary powers in respect of an accused person who was M'Naghten's insane at the time of the alleged offence.

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[43] In the context of discussion in relation to summary offences, the defence is hereafter referred to as the "M'Naghten's defence.
[44] See the case studies at the end of the paper.
[45] In making these remarks the author is mindful of the prohibition in Rule 32 on solicitors making unfounded allegations against another legal practitioner.
[46] s.12 *Crimes (Appeal and Review)* Act 2001. For an excellent discussion on the limited circumstances where an accused will be permitted to withdraw his/her plea of guilty see the paper available on the Public Defenders website Watts J. (2015) *Ethics – Recent Developments*, presented at the Public Defenders Criminal Law Conference 2015.
[47] For a history of s.32 MHFPA and it precursor see Weeks K. (2010) op cit at p.50.

The defence has the onus of establishing the defence on the balance of probabilities. If successful the defence results in a complete acquittal and, in the Local Court, the accused must be discharged[48]. Howard and Westmore note:

> "Until such time as there is statutory change, then the common law M'Naghten Rules apply if the defence of mental illness is raised in the Local Court. The difficulty is, there is no regime, statutory or otherwise, for the disposition of a person who successfully raises the M'Naghten defence in the Local Court (assuming the person is fit at the time of hearing), so that the only order that could be made would be for the dismissal of the matter and the discharge of the defendant"

Raising the M'Naghten's defence in the Local Court was also considered by the NSWLRC recently:

> "It would appear the common law M'Naghten rules apply in the Local Court. However the provisions governing the operation of NGMI in Part 4 of the MHFPA do not …. The consequence of Part 4 of the MHFPA not applying in Local Court proceedings is that the procedures governing the detention and release of people found NGMI under s.38(1) do not apply in the Local Court. Accordingly, it appears that the only course available to a magistrate if the defence is made out is to discharge the defendant".[49]

The only authority on point appears to be a decision of Berman SC DJ in *R v McMahon* [2006] NSWDC 81 where a conviction entered in the Local Court was quashed and a verdict of not guilty by reason of mental illness was entered.

Where the defence is relied upon in the District and Supreme Courts, it is referred to as the defence of mental illness but the common law rules remain. Provisions in the MHFPA determine what happens to a person after they are found not guilty by reason of mental illness.[50] The person comes under the jurisdiction of the Mental Health Review Tribunal. While detention at the "governor's pleasure" was the result of establishing the defence for over a hundred years, the District and Supreme Courts now have the power to order conditional release after the verdict is returned. Likewise, the MHRT has the powers to order conditional release and supervise the person in the community.

Note, the defence is a separate issue to the issues of intent, voluntariness and fitness/unfitness. If the issue of insanity or fitness to plead arises, it must be decided ahead of the question of intent[51].

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[48]

[49] NSWLRC (2013) op cit at pp.357 – 358.

[50] See Part 4, ss 37 – 39.

[51] Tilmouth S. & Glissan J, *Australian Criminal Trial Directions*, Butterworths at [1-1500-23].

In *Hawkins v R* (1994) 179 CLR 500 the High Court held:

> "In principle, the question of insanity falls for determination before the issue of intent. The basic questions in a criminal trial must be: what did the accused do and is he criminally responsible for doing it ? Those questions must be resolved … before there is any issue of the specific intent with which the act is done, It is only when those basic questions are answered adversely to an accused that the issue of intent is to be addressed"[52]

5.6.2 Mens Rea

There will be occasions where a client with cognitive or mental health impairments will not have possessed the necessary mens rea, or guilty mind, to be guilty of an offence. In such cases a client must be advised that defending the charge(s) is an option. However, it is unlikely a practitioner will be able to provide a client with such advice without first obtaining a report from an appropriately qualified expert such as a forensic psychiatrist. Again, given the delay that can be encountered in obtaining reports, a practitioner should request a report at the outset of the engagement.

5.6.3 Diversion pursuant to ss. 32 & 33 MHFPA[53]

Clients with cognitive and mental health impairments may be eligible for diversion from the criminal justice system pursuant to ss.32 & 33 MHFPA in certain Local Court matters[54]. A criminal law practitioner is duty bound to advise clients of these options where it appears a client is eligible for diversion.

Practitioners ought to be aware of the differences in the eligibility criteria of ss. 32 and 33. It is entirely possible a client will fulfil criteria for s.32 diversion at the start of a matter but may become a "mentally ill" person by the time any application is heard and so becomes ineligible for section 32 diversion but eligible for s.33 diversion.

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[52] Mason CJ, Brennan, Deane, Dawson and Gaudron JJ at 517

[53] For extensive discussion on the provisions and common law see the author's 2010 and 2014 papers which can be downloaded via www.cmhlaw.com.au

[54] In accordance with s.31 MHFPA, ss. 32 & 33 apply to criminal proceedings in respect of summary offences or indictable offences triable summarily, being proceedings before a Magistrate, and includes any related proceedings under the *Bail Act 2013*, but does not apply to committal proceedings.

As noted in the discussion above on fitness / unfitness above[55], there is a risk of detention and the client losing his or her liberty if the Local Court makes a s.33 order.

If practitioners feel equipped to run section 32 and section 33 applications it is ordinarily prudent for the practitioner to request reports from appropriately qualified health professionals and other supporting documentation. Leaving the client to collect material to support a section 32 or section 33 application is fraught with danger.

When requesting reports from psychologists or psychiatrists the onus is on the practitioner to ensure the eligibility criteria are correctly addressed. There have been a number of relatively recent decisions where section 32 applications have been refused in the Local Court and the Supreme Court has dismissed an Appeal after the report writer failed to address the criteria in s.32(1)(a)(i), (ii) or (iii) with precision.

In *Khalil v His Honour Magistrate Johnson Anor*[56] the report writer was Dr Chris Lennings, an experienced and eminent clinical psychologist. Dr Lennings did not *inter alia* specify whether the offender's mood disorder satisfied s.32(1)(a)(i), (ii) or (iii). The section 32 application was refused by the Magistrate and Khalil appealed to the Supreme Court. Hall J found there was insufficient evidence to satisfy the criteria in s.32(1)(a) "*the primary issue of eligibility*".[57] The Supreme Court refused to grant Khalil leave to appeal, even though it found the Magistrate had denied the applicant procedural fairness in the hearing of the section 32 application.

In *Edwards v DPP*[58] a report from Dr Bruce Westmore, a very experienced and eminent forensic psychiatrist, was tendered in the Local Court in support of a section 32 application. Dr Westmore opined the offenders did not have a "*mental illness*" but did suffer from a "*mental condition*" (alcohol related organic brain damage)". Unfortunately Dr Westmore omitted the words "*for which treatment is available in a health facility"*. On appeal, the Supreme Court found s.32(1)(a)(iii) *"mental condition for which treatment is available in a health facility*" was an essential ingredient in enlivening the court's jurisdiction as any of the other tests in s.32(1)(a)[59].

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[55] At 5.3.
[56] [2008] NSWSC 1092
[57] [108] and [112]. His Honour also found the report writer had not "articulated the substrata for his opinion that there was a causal nexus" between the mood disorder and the offence [108].
[58] [2012] NSWSC 105.
[59] at [15] and [17].

Hislop J found it was open to the Magistrate to find there was a lack of evidence of an essential pre-condition to dismiss the section 32 application[60].

It is arguable the practitioners in these cases failed to discharge their duty to the client. Ideally, the legal practitioner should be given an opportunity to peruse a draft report before the final draft is settled.

5.6.4 The guilty client pleading not guilty

In certain circumstances a solicitor can cease to act where a client confesses guilt but maintains a plea of not guilty[61]. However, if there is not enough time for another solicitor to take over the case properly before the hearing, the solicitor who continues to act for the client:

(i) must not falsely suggest that some other person committed the offence charged,
(ii) must not set up an affirmative case inconsistent with the confession,
(iii) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged,
(iv) may argue that for some reason of law the client is not guilty of the offence charged, and
(v) may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged[62]

Where the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence the solicitor must not continue to act[63].

[60] at [20]
[61] Rule 20.2.1
[62] Rule 20.2.2
[63] Rule 20.2.3

6. CASE STUDIES

See the attachments.

7. CONCLUSION

Acting for clients with cognitive and mental health impairments can be very difficult. The law is complex and at times confusing. A practitioner must take great care in advising such clients if they are to fully discharge his/her duties to the client and avoid a miscarriage of justice . There may be times when, in discharging their duty to the Court, the practitioner will be required to make decisions contrary to the client's instructions. Having a solid understanding of the provisions of the Uniform Law, in addition to substantive and procedural law, is absolutely essential for the criminal law practitioner acting in such matters.

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