

Episode 30: Summary

Episode name: Criminal law and mental illness

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DISCLAIMER: At the time of recording the new *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)* was not yet in effect. The content of this episode may not be current having regard to the effect of that Act.

What area(s) of law does this episode consider?

Criminal law, in the context of criminal liability and fitness to stand trial.

Thomas Spohr, a trial advocate at Legal Aid NSW and former prosecutor for the Office of the Director of Public Prosecutions, draws on his years of experience working in criminal law to discuss the realities of dealing with mental illness in the criminal justice system.

Discussed in this episode are the procedures, requirements and expectations surrounding section 32 applications, changes to the legislation concerning the application (in the form of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* which has been passed and assented to but not yet commenced) and general tips and advice on identifying and dealing with a client who suffers from mental illness and/or may be unfit for trial.

Why is this topic relevant?

There are over ten thousand people serving a custodial sentence, in one form or another, in the Australian correctional system. Of these inmates, over 70% have or have experienced a mental health condition - so it's clear that mentally ill persons are overrepresented in the criminal justice system. Those with complex needs, such as multiple mental illnesses, compounded with social and economic disadvantages, have significantly higher rates of offending, convictions and imprisonment than those with single or no diagnosis.

The World Health Organisation once said, "Without urgent and comprehensive actions, prisons will move closer to becoming twenty-first century asylums for the mentally ill, full of those who most require treatment and care but who are being held in unsuitable places with limited help and treatment available".¹

It is important for lawyers to be vigilant to the possibility of a client's mental illness affecting their capacity to participate in the criminal justice system, their fitness for trial, and whether such illness might give rise to a defence to offences with which they are charged.

What legislation is considered in this episode?

Mental Health (Forensic Provisions) Act 1990 (NSW)

Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)

The *Mental Health (Forensic Provisions) Act 1990 (NSW)*, now superseded by the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)*, are both responses to the problem of overrepresentation of mentally ill or cognitively defendants

¹ World Health Organization. *Trenčín statement on prisons and mental health*. Copenhagen, Denmark: WHO Regional Office for Europe, 2008

in the criminal trials. The section 32 application under the 1990 Act, now made defunct and replaced by the section 14 application under the 2020 Act, are the primary tools lawyers have at their disposal to avoid their mentally ill or cognitively impaired clients having to be dealt with through the correctional system.

R v Presser [1958] VR 45 sets out a criteria for consideration on a question of fitness

Kesavarajah v The Queen - [1994] HCA 41 succinctly restates the Presser criteria, saying that the defendant must be able to:

1. *understand the nature of the charges;*
2. *the ability to understand the nature of the court proceedings;*
3. *to understand how to challenge jurors;*
4. *to understand the evidence;*
5. *to decide what defence to offer (if any); and*
6. *to explain his or her version of the facts to court.*

What cases are considered in this episode?

What are the main points?

- In the Local Court of New South Wales, people charged with criminal offences and who are affected by a mental illness may make an application under s 32 of the *Mental Health (Forensic Provisions) Act 1990 (the Act)* which provides that, along with other special provisions, a magistrate may make an order dismissing the charge and discharge the defendant.
- Reforms to the Act in the form of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (the New Act)*, which has yet to commence at this time of writing, change not only the terminology surrounding section 32 applications but increased the amount of time a person can be subject to an interlocutory order and formally codifies a test of psychological fitness.

What are the practical takeaways?

- Section 32 applications are primarily intended to be a means of diverting people away from the criminal justice system. It is important to keep that in mind when dealing with clients who are afflicted by a mental illness as the outcome of a section 32 application will decide whether they are dealt through the correctional system, the healthcare system or a combination of both.
- In order that all clients receive fair treatment by the justice system, be keenly aware of the possibility that a client's mental well-being may be an extenuating factor in the case, especially when they exhibit symptoms of mental illness and are undiagnosed for such. Your ability to detect the symptoms of a mental illness should sharpen over your career, however, it is crucial to be aware of your limits as a non-medical professional. A psychiatric or psychological report is central to any section 32 application.
- Section 32 applications should not be seen as a 'get out of jail free card', so to speak. A successful section 32 application resulting in the defendant being found not guilty by reason of mental illness, the defendant is likely to be subject to the mental healthcare system for the foreseeable future, and potentially far longer than any sentence they would serve if they had been found guilty.

Show notes

['What's new with section 32' factsheet – The Shopfront Youth Legal Centre](#)

[Review of the Mental Health Review Tribunal in respect of forensic patients](#)

['Our Network 2019' – Report by NSW Justice Health and Forensic Mental Health Network](#)

[Thomas Spohr, 'The New Mental Health Legislation' December 2020 \(available to download on Hearsay The Legal Podcast - Episode 30 'Criminal law and mental illness'\)](#)