CRIME AND JUSTICE
Bulletin

NSW Bureau of Crime
Statistics and Research

Contemporary Issues in Crime and Justice Number 38

October 1998

# Mental Health and the Criminal Justice System

*Karen Freeman*

## INTRODUCTION

It has long been recognised that there is widespread community fear and misunderstanding of people who suffer from mental illness. Community attitudes concerning mentally ill offenders and their treatment by the criminal justice system are no exception. Much of the misunderstanding comes from sensational depictions of mentally ill persons and the insanity defence in film and television, combined with a general ignorance of the true legal implications and procedures. The defence of mental illness is often viewed as an easy option and a loophole used by criminals to escape punishment for their crime.[1] This view frequently surfaces after a shocking crime which sparks debate over the offender's state of mind: whether such an offender must be 'mad' to commit such a crime or simply 'bad'. There is also a common fear that the perpetrator of such a crime will feign madness to escape punishment.

This bulletin provides a summary of the ways in which mentally ill offenders are dealt with by the New South Wales (NSW) Criminal Courts and attempts to answer many of the common questions people have about mentally ill offenders and mental illness as a defence. The first section examines why we have a defence of mental illness and the second section discusses what it means to be a 'mentally ill' person. The third section explores what happens to mentally ill offenders who commit less serious offences and appear before the NSW Local Courts, and the type of offences most commonly dismissed under the *Mental Health (Criminal Procedure) Act 1990* (NSW). The fourth section deals with mentally ill persons who commit a more serious criminal offence and appear in either the District or Supreme Court (i.e. the Higher Courts). It explores what happens to people who are mentally unfit to stand trial, whether mentally ill offenders are better off using the defence of mental illness, what other defence exists for persons suffering from a mental disorder, and what happens to prisoners who become mentally ill while in custody.

## WHY CONSIDER MENTAL ILLNESS AS A DEFENCE?

Under Australian criminal law, in most cases, for a person to be considered to have committed a criminal offence, there are several criteria which must be met. Besides showing that the person committed the unlawful act, a mental component must be satisfied. The mental component is referred to as the *mens rea*, meaning 'intention to do wrong'. This intention must be established for most findings of criminal responsibility. The importance of *mens rea* is obvious. For example, if a person accidentally mistakes a bag for their own and walks away with it, it would not be reasonable to convict the person of a criminal offence.

If an accused person is suffering from a mental disorder which deprives them of reason and understanding, the *mens rea* necessary for criminal responsibility may be lacking. If an individual lacks the capacity for choice or voluntary action, it follows that, under the law, he or she should not be held responsible for performing a criminal act.

In NSW the defence of mental illness is available in the District and Supreme Courts (Higher Courts). These courts hear serious offences such as serious sexual offences, robbery and murder. In NSW the defence of mental illness can be raised for all types of crimes heard in the Higher Courts. However in practice this defence only tends to be used for serious offences, such as murder.

The defence of mental illness is not commonly used in the NSW Local Courts, which hear less serious criminal offences. Rather, a matter may be dismissed by a Local Court if the magistrate finds the defendant to be a mentally ill person.[2]

A 1996 NSW Law Reform Commission report recommended that the defence of 'mental illness' be change to 'mental impairment' to ensure intellectual disability is also considered.[3]

## WHO IS CONSIDERED A MENTALLY ILL PERSON?

Definitions of mental illness and mentally ill persons have varied over time and still vary across professions and legal jurisdictions. Currently, the criteria for being considered a mentally ill person under NSW law differ from the criteria used to assess mental illness by mental health professionals.

### The medical perspective

The medical definition of mental illness is far broader than the legal definition. A psychiatric diagnosis of a mental illness involves rigorously identifying a cluster of

symptoms according to a standardised diagnostic classification system. Such systems are designed to provide consistency in psychiatric diagnosis. The most widely accepted psychiatric classification system is outlined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorder, IV (DSM-IV). The DSM-IV manual provides a description of the essential and associated features of over 300 mental disorders. A mental disorder is considered to be a group of clinically significant behaviours, or patterns that cannot be 'an expectable' response to a particular event or situation, and must be considered a 'manifestation of a behavioural, psychological or biological dysfunction in the person'.[4] DSM-IV contains details on a wide range of mental disorders, including psychoses, neuroses, personality disorders, substance abuse disorders, eating disorders and anxiety disorders.

## The legal perspective

As noted earlier, a clinical diagnosis of a mental disorder is generally not sufficient to establish the existence of a mental disorder for legal purposes. Furthermore, the definition of mental illness used in the Local Courts (which deal with less serious matters) is different from that used in the District and Supreme Courts (which deal with more serious matters).

The definitions of mental illness and mentally ill persons used in relation to criminal matters in the Local Courts are set out in the *Mental Health Act 1990* (NSW). The statutory definition of mental illness stipulates that it is a condition which severely impairs (temporarily or permanently) the mental functioning of the person and is characterised by the presence of one or more of the following symptoms: delusions, hallucinations, serious disorder of thought, a severe disorder of mood, and sustained or repeated irrational behaviour indicating the presence of one of the symptoms already listed.[5] From a medical perspective, these symptoms would most often be associated with a diagnosis of psychosis. A mentally ill person, according to the Act, is considered to be someone suffering from a 'mental illness' where there are reasonable grounds to believe that treatment or control of that person may be necessary. Thus, although disorders such as personality disorders, phobias, and substance abuse disorders are commonly diagnosed by mental health professionals, they would not necessarily be considered 'mental illnesses' under the statutory definition.

The Act also outlines certain conditions under which a person *cannot* be considered mentally ill or mentally disordered. These conditions include a failure to express or engage in a particular political belief, religious opinion, philosophy or sexual preference. Furthermore, a person cannot be considered a mentally ill or disordered person merely because that person engages in sexual promiscuity, immoral conduct, anti-social behaviour, or has taken alcohol or any other drug, or if the person has a developmental disability.[6]

The definition of mental illness when used in the NSW Higher Courts is different again. In the NSW Higher Courts (but not in the Local Courts) the 'mental illness defence' can be used by mentally ill persons. However, the term 'mental illness' is not defined in legislation for this defence, and is determined instead according to what are called the *M'Naghten Rules*. The *M'Naghten Rules* are as follows:

> to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[7]

This definition of insanity is a culmination of laws concerning the common law definition of insanity over the past century in Britain, with the essential elements being a lack of reason and understanding such that the accused did not know what he or she was doing, and/or could not distinguish between good and evil.[8]

# CRIMINAL PROCEEDINGS BEFORE THE NSW LOCAL COURTS FOR MENTALLY ILL OFFENDERS

Just as the Mental Health Act sets out definitions of mental illness and mentally disordered persons in relation to criminal matters in the Local Courts, the Mental Health (Criminal Procedure) Act 1990 sets out procedures for dealing with mentally ill offenders in the Local Courts.

The vast majority of criminal matters are heard in the NSW Local Courts, where there is no statutory defence of mental illness and although, in theory, the common law *M'Naghten* defence may still be raised, the magistrate is more likely to rely on the diversionary powers under the Mental Health (Criminal Procedure) Act.[9] This Act has two sections that specify the conditions under which a magistrate can dismiss criminal matters due to the mental condition of the defendant. Section 33 of the Act applies to mentally ill persons, and s 32 refers to defendants with a developmental disability and defendants with a mental illness or condition who do not fall under the definition of a mentally ill person. Under s 33, a magistrate can order the defendant to be taken to hospital for an assessment and then, if the defendant is found not to be mentally ill, the matter is taken back to court to be heard. If the defendant appears to be a mentally ill person (within the meaning of the Mental Health Act) the magistrate has the power to discharge the defendant, with or without conditions, into the care of a responsible person. If, after six months, the person is not brought back before the magistrate to deal with the charge, the charge is taken to have been dismissed.[10]

Section 32 states that Local Court magistrates have powers for dealing with defendants who have a developmental disability. Under this section a magistrate can dismiss the charges against such a defendant and discharge the person (with or without conditions).

For persons dismissed under s 32 or s 33, the fact that the charges have been dismissed does not constitute a finding that the charges against the defendant are proven or otherwise.

## How many people are dismissed under the Mental Health (Criminal Procedure) Act?

Out of a total of 111,045 persons for whom criminal charges were finalised in NSW Local Courts in 1996, only 321 persons (less than 1%) had their charges dismissed under s 32 or s 33 of the Mental Health (Criminal Procedure) Act. These 321 persons had a total of 555 charges dismissed in this manner; the 555 charges accounted for only 0.3 per cent of the total 171,349 criminal charges finalised in NSW Local Courts in 1996.

Given that females accounted for only 15 per cent of all charges finalised in Local Courts in 1996, but 21 per cent of charges dismissed under s 32 or s 33, it is clear that females were somewhat over-represented in persons dismissed under s 32 or s 33.

## What type of charges are most commonly dismissed under the Mental Health (Criminal Procedure) Act?

Figure 1 shows all charges finalised in the NSW Local Courts by offence type (Figure 1a), and all charges dismissed under s 32 or s 33 by offence type (Figure 1b), for 1996. Although the overall number of charges dismissed under s 32 and s 33 is very low, these sections are used more frequently for some offence types than for others. Dismissals under s 32 or s 33 were most common for offences 'against the person' (181 charges), followed by 'theft' offences (110 charges), which together accounted for over 50 per cent of charges dismissed under s 32 or s 33 in 1996 (see Figure 1b).

Furthermore, for some offence categories, a considerable disparity exists between the proportion of all charges finalised and the proportion of charges dismissed under s 32 or s 33. For example, Figure 1 shows that offences 'against the person' accounted for 33 per cent (181) of charges dismissed under s 32 or s 33, but a much smaller proportion, 14 per cent (24,490) of all finalised charges. Figure 1 also shows that while 35 per cent (59,219) of Local Courts charges finalised in 1996 were for 'driving' offences, only 5 per cent (30) of charges dismissed under s 32 or s 33 were for 'driving' offences.

For other offence types the proportion of charges finalised and the proportion of charges dismissed under s 32 or s 33 were more similar. 'Theft' offences accounted for 20 per cent (110) of charges dismissed under s 32 or s 33, and 19 per cent (32,340) of charges finalised in the Local Courts in 1996, while offences 'against justice procedures', such as breaches of court orders, accounted for 14 per cent (78) of charges dismissed under s 32 or s 33, and 9 per cent (15,880) of charges finalised in the Local Courts. Offences 'against good order' accounted for 15 per cent (81) of charges dismissed under
s 32 or s 33, and 8 per cent (14,274) of all finalised charges.

**Figure 1: Offence type of charges finalised in 1996, NSW Local Courts**

**Figure 1a: All charges (n = 171,349)**

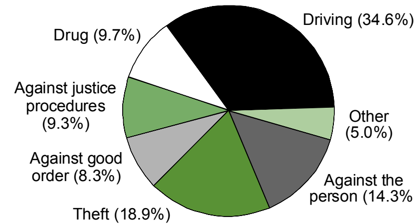



**Figure 1b: Charges dismissed under s 32, s 33, Mental Health Act (n = 555)**

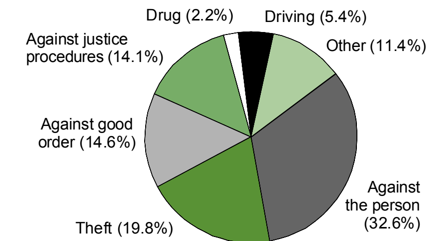



**Figure 2: 'Against the person' charges finalised in 1996, NSW Local Courts**

**Figure 2a: All charges (*n* = 24,490)**

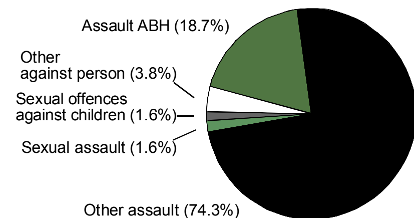
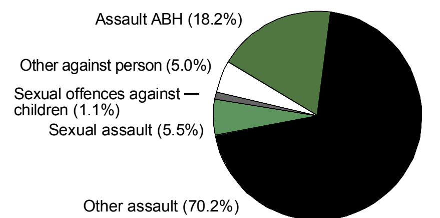



**Figure 2b: Charges dismissed under s 32, s 33, Mental Health Act (*n* = 181)**




Given that the offence categories of 'against the person' and 'theft' accounted for the majority of dismissals under s 32 and s 33, it is of interest to see whether some offences within these categories accounted for a disproportionately high percentage of dismissals.

Figure 2 shows a detailed offence breakdown for persons charged with offences 'against the person' for all charges finalised and for charges dismissed under s 32 or s 33, in the Local Courts in 1996.

It is evident that no particular type of 'against the person' offence is more likely to attract a s 32 or s 33 dismissal than any other type: the breakdown of offences 'against the person' was similar for all charges finalised (Figure 2a) and charges dismissed under s 32 or s 33 (Figure 2b). The most common 'against the person' charges finalised, and dismissed under s 32 or s 33, were 'other assaults'. The subcategory of 'other assaults', which includes common assault, assault officer and malicious wounding, accounted for 70 per cent (127) of 'against the person' charges dismissed under s 32 or s 33 and 74 per cent (18,206) of all 'against the person' charges finalised. 'Assault occasioning actual bodily harm' ('assault ABH') was the next most common subcategory of 'against the person' offences both for charges finalised and charges dismissed under s 32 or s 33. 'Assault ABH' accounted for 18 per cent (33) of 'against the person' charges dismissed under s 32 or s 33 and 19 per cent (4,583) of all 'against the person' charges finalised.

Females, nevertheless, were over-represented for persons dismissed under s 32 or s 33 for offences 'against the person', accounting for 19 per cent of charges dismissed under those sections but only 12 per cent of all finalised charges for offences 'against the person'.

**Figure 3: 'Theft' charges finalised in 1996, NSW Local Courts**

**Figure 3a: All charges (*n* = 32,340)**

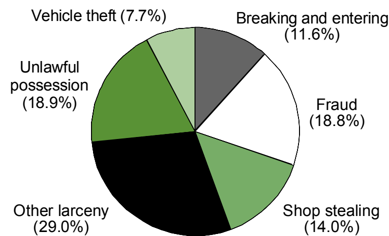



**Figure 3b: Charges dismissed under s 32, s 33, Mental Health Act (*n* = 110)**

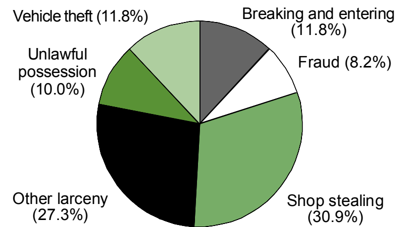



Figure 3 shows an offence breakdown for 'theft' charges finalised in the Local Courts and for 'theft' charges dismissed under s 32 or s 33, in 1996. The breakdown of 'theft' offences for all charges finalised (Figure 3a) was not entirely consistent with the breakdown for 'theft' offences dismissed under s 32 or s 33 (Figure 3b).

Figure 3 shows 'shop stealing' accounted for the largest proportion (31%, 34 charges) of charges dismissed under s 32 or s 33 for 'theft' offences, but accounted for only 14 per cent (4,533) of all 'theft' charges finalised. The subcategory 'fraud' accounted for a somewhat smaller percentage (8%) of 'theft' offences dismissed under s 32 or s 33 than it did for all 'theft' charges finalised (19%).

Females accounted for 25 per cent of all finalised charges relating to 'theft' offences and 26 per cent of 'theft' offence charges dismissed under s 32 or s 33.

## CRIMINAL PROCEEDINGS BEFORE THE NSW DISTRICT AND SUPREME COURTS FOR MENTALLY ILL OFFENDERS

Generally, persons who are charged with serious (i.e. indictable) offences stand trial in either the District or the Supreme Court. There are five questions which need to be addressed in relation to mentally ill persons who appear before the District or Supreme Courts. Firstly, what happens when the accused is not mentally fit to stand trial? Secondly, what happens if a person is mentally fit to stand trial, but was mentally ill at the time of committing the offence? Thirdly, is a mentally ill offender better off using the mental illness defence? Fourthly, what defence exists for persons who suffer from a mental disorder that impaired their mental responsibility at the time of committing the offence but does not meet the conditions for using the mental illness defence? And finally, what happens to offenders who become mentally ill after being sentenced to prison?

### What happens to persons who are mentally unfit to stand trial?

A fair criminal trial requires the defendant's understanding of the trial proceedings, ability to participate in the proceedings and ability to defend himself or herself. It is the person's fitness at the time of the trial that is relevant to the question of fitness to stand trial, not the person's fitness at the time of the offence. Figure 4 provides a simplified outline of the paths that can be followed for accused persons when the question of fitness to be tried is raised.[11] Each step in the figure is numbered, and references to these steps in the text below are accompanied by the relevant number in brackets.

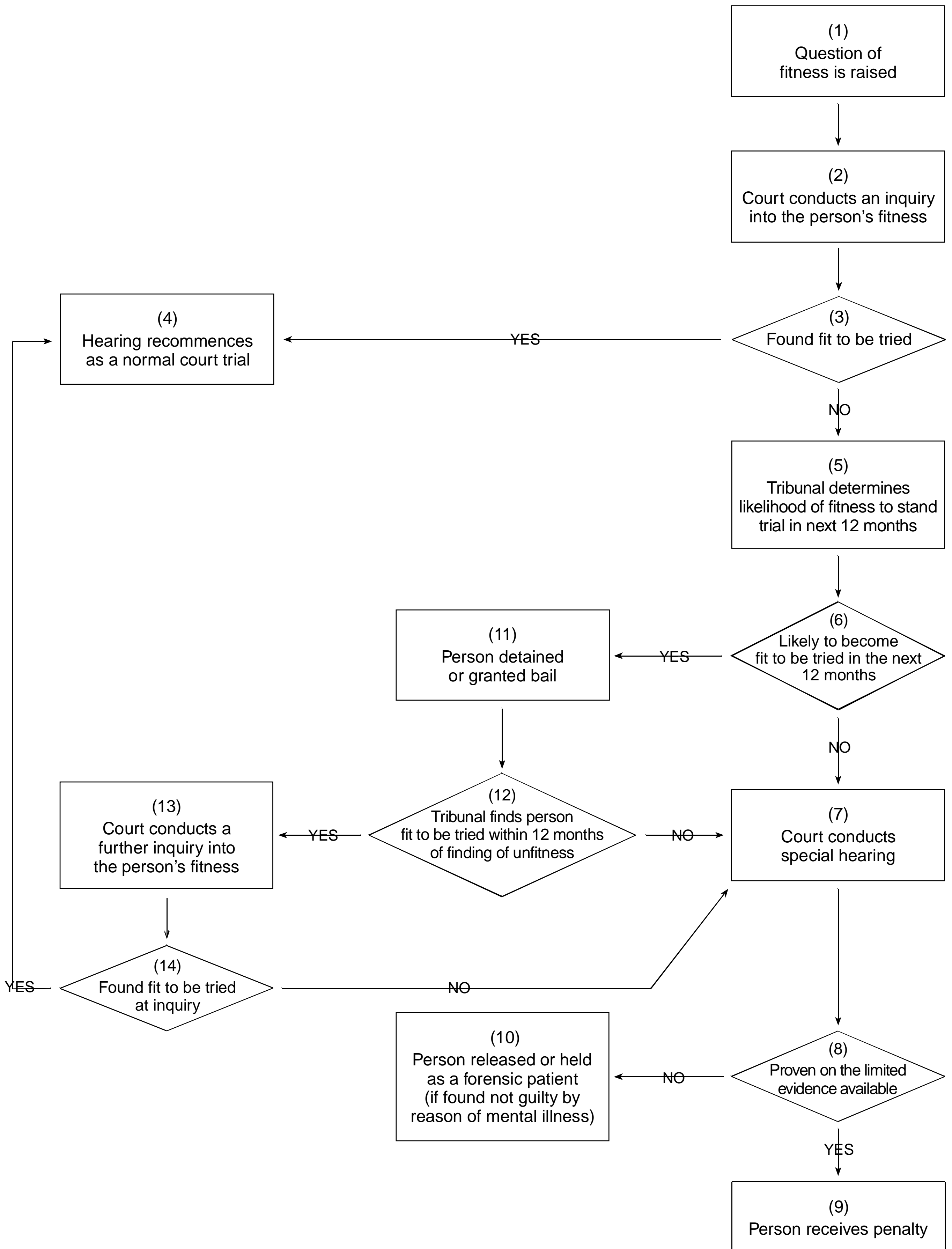
The question of the accused's fitness to stand trial can be raised at any time during the proceedings, but it is usually raised before arraignment (1).[12] Once the question of fitness to stand trial has been raised in good faith, the Court usually conducts an inquiry to determine the accused's fitness (2). The person's fitness is determined by a judge or a jury assembled for the inquiry, with the determination of fitness being based on the balance of probabilities. The Court may call for a medical examination to be conducted and reports to be presented to assist in making their decision. If the question of fitness is raised and the accused is found fit to be tried (3), the criminal proceedings recommence in the usual manner, that is, the accused then goes through the usual trial process (4). If the accused is found unfit to be tried (3), he or she is referred to the Mental Health Review Tribunal (hereafter 'the Tribunal') to determine if he or she is likely to become fit to be tried over the next 12-month period (5).

When and if the Tribunal forms the view that it is unlikely that the person will become fit to be tried within the year (6), a 'special hearing' is held by the Court (7). This special hearing is conducted, in a way which is as close to a normal criminal trial as possible, and the defendant can raise any defence that could be used at an ordinary hearing, including the mental illness defence. At a special hearing, the accused is taken to have pleaded not guilty, and must be acquitted unless it is 'proved on the limited evidence available' that the accused committed the offence. If the offence is proven on the limited evidence available (8), the penalty handed down must not be greater than that which would have been imposed after conviction at a normal criminal trial (9). If the Court indicates that it would have imposed a sentence of imprisonment, the Court must nominate a term, called the 'limiting term'. Upon receiving a limiting term the person concerned becomes a 'forensic patient' and must be referred to the Tribunal for assessment. Forensic patients can be detained in hospital until a recommendation for release is made by the Tribunal and approved by the Minister for Health.

If, on the other hand, the outcome of the special hearing is a successful mental illness defence, the accused person receives a 'special verdict' whereby he or she is found not guilty on the grounds of mental illness and is held in custody for an indefinite period as a forensic patient (10).

Where the Tribunal finds that, on the balance of probabilities, it is likely that the accused will become fit to be tried within 12 months (6), the Court can arrange for treatment and either bail or detention, for a period up to 12 months (11). The Tribunal reviews the person's case on a regular basis and advises the Attorney General when they consider the

**Figure 4: Fitness to stand trial**



person has become fit to be tried (12). Once the Tribunal considers that the accused has become fit to be tried, the Attorney General can then request that the Court hold a further inquiry regarding the accused's fitness (13). If the person is found fit to be tried at the inquiry (14) the proceedings recommence as a normal trial (4). If, after 12 months, the person is still considered unfit to be tried, the Attorney General can order a special hearing to be conducted (7).

The frequency with which persons are found unfit to be tried is low. In 1996, of the 3,792 persons whose cases were finalised in the NSW Higher Courts, the Tribunal conducted only 11 reviews of persons in relation to a determination of fitness to be tried. The Tribunal determined that 10 persons probably would not, during the 12 months after the finding of unfitness, become fit to be tried, and that one person was fit to be tried.[13]

## What happens if a person is mentally fit to stand trial, but was mentally ill at the time of committing the offence?

A defence of mental illness can be raised at either a special hearing or a normal criminal trial. If the defendant is considered fit to be tried, yet was mentally ill at the time the offence was committed, the matter will be heard as a normal criminal trial but the defence of mental illness may be used. Once a criminal trial has commenced in the Higher Courts, questions of mental illness can be raised by either the defence or the prosecution. The burden of proof of mental illness (on the balance of probabilities) rests with the party that raises the issue. When a special verdict of not guilty by reason of mental illness is returned as a result of a criminal trial, the accused is found to have committed an offence but, due to their state of 'mental illness' at the time of committing the offence, is found not to know the nature of what he or she was doing, and thus, not to have the necessary *mens rea* (wrongful intent) required for a guilty verdict.[14]

The frequency of people obtaining a special verdict of not guilty by reason of mental illness either from a special hearing or during a normal trial each year in the NSW Higher Criminal Courts is low. Only 10 persons were found not guilty by reason of mental illness in 1996.[15]

## Is a mentally ill offender better off using the mental illness defence?

There is a great deal of public misunderstanding regarding the consequences of a successful mental illness defence. Contrary to popular belief, a successful defence of mental illness can produce an outcome that is potentially more severe than a guilty verdict. Unlike all other findings of not guilty, a person found not guilty due to mental illness is not immediately released at the completion of the trial. Regardless of the mental health and custodial status of the accused throughout the duration of their trial, upon their plea of 'not guilty by reason of mental illness' being accepted by the Court, the person is subsequently detained in strict custody in gaol or the locked ward of a psychiatric hospital for an undetermined period of time. Such a person then becomes a 'forensic patient' and the Mental Health Review Tribunal is required to review the patient's case as soon as practical and make recommendations for their care, treatment and release. Release can only be granted by the Governor, after a recommendation for release, to which the Attorney General does not object, has been made by the Tribunal.

Of the 10 patients found not guilty by reason of mental illness in 1996, only four were recommended for immediate release with conditions, and no recommendations for immediate unconditional release were made.[16]

As of 31 December 1996 there were a total of 89 forensic patients under review by the Tribunal as a result of being found not guilty by reason of mental illness, either at trial or at a special hearing. The majority of these patients received their special verdict prior to 1996. Seventy-seven of these 89 forensic patients were diagnosed as suffering from a psychotic illness, such as schizophrenia, at the time of the offence. Thirty-three of these 77 patients were also considered to be dependent on either illegal drugs or alcohol or both.[17]

A further five of the 89 forensic patients had their initial diagnosis changed. These five had originally been diagnosed with acute psychosis and schizophrenia, but were later found to have been under the influence of mind-affecting illegal drugs at the time of the offence. Despite the fact that the Mental Health Act 1990 stipulates that a person under the influence of drugs is not automatically considered mentally ill, in practice the relationship between drug use and mental illness is a complex one. It is not always possible to distinguish some drug-induced states from psychotic disorders. For example, sometimes it is not clear whether drug taking or mental illness came first. A person who has a mental illness may be taking drugs in an attempt to 'self-medicate' in order to quieten the voices they hear or the strange feelings they experience. On the other hand, mental illness may result from drug taking. When mental health professionals disagree about a patient's diagnosis, the difference in expert evidence relating to the defendant's mental illness is a matter for the jury to take into account.

## What defence exists for persons who suffered from a mental disorder that impaired their mental responsibility, but does not meet the conditions for using the mental illness defence?

The defence of diminished responsibility is also available in NSW. Unlike the defence of mental illness, the defence of diminished responsibility can only be used as a defence to murder. Furthermore, if the defence of diminished responsibility is successful, it does not result in an acquittal but a conviction of manslaughter with the imposition of a determinate sentence of up to 25 years in gaol. However, the defence of diminished responsibility can be used with a broader range of mental conditions than the mental illness defence, including cognitive disorders falling outside the defence of mental illness, extreme emotional states and uncontrollable urges.[18] The most commonly diagnosed disorders of people using this defence include severe depression, schizophrenia, brain damage, personality disorders and post traumatic stress disorder.[19]

Diminished responsibility as a defence to murder was introduced in 1974 to avoid handing down a murder conviction (and, at the time, a mandatory life sentence) to offenders whose mental state was impaired at the time of the killing, but did not meet the strict criteria for using the

defence of mental illness outlined in the M'Naghten Rules. The diminished responsibility defence reflects the principle that a person's responsibility for committing murder should be considered diminished if the person experienced a mental disorder that substantially impaired their mental responsibility at the time the offence was committed.[20] The provisions for the use of the defence of diminished responsibility are contained in the *Crimes Act 1900* (NSW) in s 23A. It states that it is a precondition of the defence that the prosecution proves that the accused is otherwise liable for murder. Furthermore, the accused must satisfy three requirements before a defence of diminished responsibility can be accepted. Firstly, the person must have been suffering from an abnormality of mind at the time of the killing. Secondly, the abnormality of mind must be a condition of arrested or retarded development of mind, or from any inherent cause, or induced by disease or injury. The defence of diminished responsibility does not permit reliance on evidence of self-induced intoxication as a part of the defence. Thirdly, the abnormality must have substantially impaired the accused's mental responsibility for the killing.

Given that the defence of diminished responsibility can only be used as a defence to an unlawful killing, and that successful use of the defence results in a manslaughter conviction, it is used very infrequently. Although recent statistics on the use of the diminished responsibility defence are not available, between 1990 and 1993 only 14 per cent of persons accused of murder raised the diminished responsibility defence, and a verdict of manslaughter was returned in approximately 61 per cent of those cases where it was raised.[21]

In 1998, the defence of diminished responsibility was amended and re-named 'substantial impairment' (*Crimes Legislation (Diminished Responsibility) Act 1997*).[22]

## What happens to offenders who become mentally ill after being sentenced to prison?

If a person has been convicted of an offence, sentenced to prison, and subsequently becomes mentally ill, he or she may be transferred from the main prison to a prison hospital or a psychiatric hospital. A transferred prisoner (transferee) is classified as a forensic patient and the Mental Health Review Tribunal becomes involved in the patient's assessment, treatment and care. For transferees, any detention period in hospital is treated as if it were a period of imprisonment for the purpose of the person's sentence.

Only a small proportion of prisoners become forensic transfer prisoners. In 1996 in NSW the Tribunal conducted 26 initial reviews for forensic transfer patients.[23] On prison census day in 1996, there were over 6,200 prisoners serving a full-time custodial sentence in NSW.[24]

When the transferee is serving a short term of imprisonment, regardless of whether he or she is acutely or chronically mentally ill, the Tribunal generally recommends that the patient remain in the prison hospital until the expiry of their term of imprisonment. The Tribunal may transfer the patient to a general psychiatric hospital toward the end of their imprisonment term for continued treatment or make Community Treatment Orders in relation to the patient upon expiry of their term of imprisonment if the patient is still mentally ill. Transferee patients suffering acute or chronic mental illness serving a long or life imprisonment term with little chance of returning permanently to prison can apply for a transfer to a general psychiatric hospital. The application must be approved by the Tribunal and must comply with specific criteria regarding the hospital to which the patient is to be transferred, the patient's history and the likely course of the illness.

The status of a transferee patient is terminated upon the expiry of the imprisonment term, on being transferred back to prison, on being classified as a continued treatment patient,[25] or on release following a recommendation by the Tribunal that has been approved by the prescribed authority. The Tribunal must address the issue of the patient's potential dangerousness when considering the patient's release or transferring a forensic patient to a general psychiatric hospital. The Mental Health Act stipulates that the Tribunal must be satisfied that the safety of the forensic patient and of members of the public will not be seriously endangered before a recommendation for release of the forensic patient can be made.[26]

The Tribunal reports that an increasing number of prisoners are being transferred to hospital and classified as forensic patients because of chronic mental illness which is often believed to have existed prior to, and at the time of, their offence. It appears that the health of such persons rapidly deteriorates once they have been sent to prison, because the Tribunal is finding an increasing proportion of forensic transfer patients need long term treatment and rehabilitation and are unable to be returned to prison.[27]

## SUMMARY

- Mental illness can be considered as part of a person's defence in the Local and the Higher Courts. A mental illness defence reflects the principle that it is reasonable that a person must have an intention to do wrong before they can be held criminally responsible for an action.
- A criminal matter heard in the Local Courts may be dismissed under s 32 or s 33 of the NSW Mental Health (Criminal Procedure) Act if the magistrate finds the defendant is suffering from a mental condition, mental illness or is a mentally ill person.
- Dismissal of a matter under s 32 or s 33 of the Mental Health (Criminal Procedure) Act does not mean that the charge has been proven or otherwise; rather it is a reflection of the accused's mental status.
- While the proportion of charges dismissed in the Local Courts under s 32 or s 33 in 1996 was low, females were somewhat over-represented. The most common type of offences to be dismissed under s 32 or s 33 were offences 'against the person', particularly assaults less serious than assaults occasioning actual bodily harm.
- In the NSW Higher Courts a person's mental state at the time of committing the offence and at the time of the trial can be taken into account during a criminal trial.
- Persons who are mentally unfit to stand trial can have the matter heard at a special hearing, where the matter is either proved on the limited evidence available or the person is acquitted. If proven on the limited evidence available the penalty

received cannot be more severe than the penalty which would have been received at a normal criminal trial. If acquitted, the person may be released or held as a forensic patient.

- In the Higher Courts, a person who was mentally ill at the time of committing the offence, to the extent that they did not know what they were doing or did not know that what they were doing was wrong, can use the defence of mental illness. Although this defence can be used in relation to all offences it is usually only used as a defence to murder.
- The proportion of offenders who are found not guilty due to mental illness in the Higher Courts is very small, which belies the perception that the defence of mental illness is commonly exploited.
- The consequence of a successful mental illness defence is not necessarily an easier option than receiving a conviction.
- Diminished responsibility as a defence to murder can be used as a defence for persons who suffered from a mental disorder that impaired their mental responsibly at the time of the offence but whose disorder does not meet the criteria necessary for using the defence of mental illness. Where the prosecution proves that the accused is otherwise guilty of murder, the defence of diminished responsibility reduces the liability from murder to manslaughter.
- Offenders who become mentally ill while serving an imprisonment term can be classified as forensic transfer patients and transferred to a prison hospital or, in some circumstances, to a general psychiatric hospital.

## NOTES

1. Hans, V. & Slater, S. 1985, 'Plain crazy: Lay definitions of legal insanity', *International Journal of Law and Psychiatry*, vol. 7, pp. 105-114.
2. Mentally ill person as defined in the *Mental Health Act 1990* (NSW).
3. NSW Law Reform Commission 1996, *People with an Intellectual Disability and the Criminal Justice System,* Report 80, NSW Law Reform Commission, Sydney.
4. American Psychiatric Association 1994, *Diagnostic and Statistical Manual of Mental Disorders*, 4th edn, American Psychiatric Association, Washington DC, p.xxi
5. *Mental Health Act 1990* (NSW), Schedule 1.
6. *Mental Health Act 1990* (NSW), s 11.
7. *M'Naghten's Case* 1843,10 Cl & Fin 200 at 210; 8 ER 718 at 722.
8. Campbell, I.G. 1988, *Mental Disorder and Criminal Law in Australia and New Zealand*, Butterworths, Sydney.
9. The 1996 Law Reform Commission report recommended that the Local Courts be given the power, after having considered diversionary options, to consider a defence of not guilty by reason of 'mental impairment', and to conduct a summary 'special hearing'. (NSW Law Reform Commission 1996, op. cit.)
10. The legislation does not specify under what conditions the defendant could be brought back before the magistrate to deal with the matter further.
11. Figure 4 displays only the most common paths followed by persons whose fitness to stand trial is questioned. The charges against the person may be dismissed at various points along these paths, for example, if the nature of the matter is considered too trivial to conduct a special hearing.
12. Arraignment is the formal procedure used in the District and Supreme Courts to commence a criminal proceeding.
13. Mental Health Review Tribunal 1997, *Annual Report 1996*, Mental Health Review Tribunal, Sydney.
14. *Mental Health (Criminal Procedure) Act 1990* (NSW), ss 37-39.
15. Mental Health Review Tribunal 1997, op. cit.
16. Mental Health Review Tribunal 1997, op. cit
17. Mental Health Review Tribunal 1997, op. cit.
18. NSW Law Reform Commission 1997, *Partial Defence to Murders: Diminished Responsibility*, Report 82, NSW Law Reform Commission, Sydney.
19. Donnelly, H., Cumines, S., & Wilczynski, A. 1995, *Sentenced Homicide Offenders in New South Wales 1990-1993*, Judicial Commission of New South Wales, Sydney.
20. For more information on the defence of diminished responsibility see NSW Law Reform Commission 1997, op. cit.
21. Donnelly, H., Cumines, S. & Wilczynski, A. 1995, op. cit.
22. The 1997 amending Act commenced on 3 April 1998, with prospective application.
23. Mental Health Review Tribunal 1997, op. cit.
24. NSW Department of Corrective Services 1997, *NSW Inmate Census 1996 Summary of Characteristics*, NSW Department of Corrective Services, Sydney.
25. The Tribunal can classify a patient who would cease to be a forensic patient within six months as a continued treatment patient if the Tribunal considers that the patient is a mentally ill person who should continue to be detained for further observation and treatment.
26. These conditions also apply to recommendations for release of forensic patients who obtained their status of forensic patient through a finding of not guilty on the grounds of mental illness or after a special hearing, upon being found unfit to be tried.
27. Hayes, R., Sterry, M., Greer, W., & Langley, A. 1995, *Forensic Patients: Background 1995*, Occasional Paper 14, Mental Health Review Tribunal, Sydney.

**NSW Bureau of Crime Statistics and Research**
**Level 8, St James Centre, 111 Elizabeth Street, Sydney 2000 Tel: 9231-9190**
**Website: www.lawlink.nsw.gov.au/bocsar/**
**ISSN 1030 - 1046 ISBN 0 7313 2603 2**