Consultation paper 6: People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences

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The Meaning of Fitness to be Tried: The Presser Standards

Issue 6.2: Do the Presser standards remain relevant and sufficient criteria for determining a defendant's fitness for trial?

On face value, the Presser criteria appear to remain extremely relevant to the rigours of trial. They are intended to clearly define the fundamental abilities an individual is expected and required to hold in order to be deemed fit to stand trial. However, from a professional expert's perspective, the meaning of the Presser criteria and how each of the criteria *should* be assessed and *degree* of competency necessary remains somewhat unclear.

Section 1.10 of the consult paper, talks about a determination of fitness being aided by expert psychiatric opinion, which is expected to addresses the Presser criteria and express an opinion regarding overall ability of the accused to stand trial.

Traditionally psychiatrists have been seen as the most relevant expert witness in regards to providing an opinion on fitness. This perspective has in the past been validated by the high number of fitness cases arising as a result of mental illness issues. However there is an increasing number of fitness assessments being conducted for individuals with cognitive impairments e.g. brain injury, stroke and dementia and intellectual disability.

Clinical neuropsychology is an applied science concerned with the behavioural expression of brain dysfunction[1,2]. Clinical neuropsychologists use psychological, neurological, and physiological principles, techniques, and tests to evaluate an individual's cognitive, behavioural, and emotional strengths and weaknesses and his or her relationship to normal and abnormal central nervous system functioning[1],[2]. The use of scientifically grounded theories and empirically-tested techniques to assess cognition means that neuropsychologists have the unique ability to contribute their understanding of neuroanatomy, neuropathology, and objective functional assessment to address the more specific questions of the court[3]. In the criminal context it is not enough simply to show that the defendant has a brain lesion, just as the diagnosis of a major mental illness alone does not render a defendant incompetent or unfit to stand trial. Rather, the behavioural consequences of the lesion are central to the concerns of the law. In this regard, neuropsychology has a distinct advantage over traditional medical testimony regarding evidence of brain damage [4]. This is increasingly being recognised and in fact, several forensic psychiatrists working in the field commonly now refer clients for a neuropsychological assessment of fitness in cases typically where there has been an acquired brain injury.

Therefore, it is important to consider the role different fields of experts, and in particular neuropsychologists, can and increasingly do play in informing fitness decisions and therefore may be relying on the Presser or amended criteria to inform their expert opinion.

Section 1.11 stated that the minimum standards do not require the accused be conversant with court procedure or to the understand law governing the case or have sufficient capacity

to make an able defence or to act wisely in his/her best interests. However the minimum standard of what they *do* require is not adequately explained.

To set some level may be inappropriate for a range of reasons. We agree that it is extremely difficult to set a standard level or requirement for fitness due to a range of confounding factors including the nature and severity of impairment, type of defence and type of charge and the type and quality of evidence produced to help inform the judge's decision regarding fitness. The unique issues and aspects of each and every individual case mean that a broad brush stroke approach is unlikely to be useful or successful in determining an individual's fitness. However, having a standard instruction as to what components are essential for fitness and therefore a standard assessment process eliminates the guess work for the judge when evaluating different expert evidence and its usefulness, relevance and meaning.

Skeem and Golding (1998)[5] discuss the importance of establishing a defendants psycholegal abilities regarding fitness to plead and more broadly competence to stand trial (CST). A fundamental task of the examiner is to determine whether any psychopathological or cognitive difficulties may possibly impair the defendant's psycholegal abilities. Skeem and Golding identify eleven psycholegal ability domains: capacity to comprehend and appreciate the charges or allegations; capacity to disclose to counsel pertinent facts, events, and states of mind; capacity to comprehend and appreciate the range and nature of potential penalties that may be imposed in the proceedings; basic knowledge of legal strategies and options; capacity to engage in reasoned choice of legal strategies and options; capacity to understand the adversary nature of the proceedings; capacity to manifest appropriate courtroom behaviour; capacity to participate in trial; capacity to testify relevantly; relationship with counsel and medication effects on CST. All of which need to be addressed in order to determine a defendants CST, which they assert should be tailored to examine issues most prevalent to the defendant's case. Although several of these aspects are canvassed in the current Presser criteria the lack of descriptive language surrounding the principles such as "make a defence or answer to the charge" is extremely open to interpretation. Is the expectation that the client is able to construct and logically assemble a defence or simply outline in their own words what happened. Underlying these two interpretations are distinct and varying cognitive abilities. The former would presumably involve higher level thought processes, working memory, expressive language skills, reasoning abilities, problem solving skills. The latter is arguably less cognitively demanding and may involve simply expressive language and autobiographical memory.

Further, having an understanding of what the general understanding of the Presser criteria is, or what they are perceived to mean by the lay person would help determine what is abnormal or reflects a lack of understanding relative to 'average' person. Further research in this area is required and is something that we are personally looking to undertake in regards to neuropsychological fitness assessments.

Are the Presser Standards Sufficient?

-The ability to make rational decisions;

-The ability to participate effectively in proceedings; and

- Deterioration under stress of trial

Are all issues several neuropsychologists currently seek to explain in reports and see as essential components of a fitness assessment even though not currently required according to the Presser criteria. These are discussed in turn below.

Issue 6.3: Should the test for fitness to stand trial be amended by legislation to incorporate an assessment of the ability of the accused to make rational decisions concerning the proceedings? If so should this be achieved by a new standard to the Presser formulation or amendment of relevant standards in the existing formulation?

The ability to make rational decisions is an important one, however it is difficult to define what is rational and to distinguish between an irrational decision and a bad decision. The difficulty arises in cases where an individual may be able to logically reason or explain what is perceived by the assessor and/or the courts to be an irrational decision. Whilst in cases of mental illness where irrationality and illogical processes are typically found, in individuals with an acquired brain injury or cognitive deficit, these processes are likely to be more varied and subtle. Individuals with frontal lobe dysfunction typically display poor reasoning, impulsivity, poor problem solving and mental flexibility. In addition they may have difficulty expressing their thoughts and processes. However, they may comprehend and understand their decision and the alternatives when explained however insist on following what is seen as a 'bad' decision.

The South Australian guidelines referenced in the consultation paper remain broad and non descriptive. Further, they provide little insight into *how* the aspect of rationality is to be assessed.

The language used in *Dusky v United States*[6] is more flexible and perhaps lenient, requiring a 'reasonable degree' of rational understanding. The discussion of fitness by Wilkinson and Roberts [7] in 'Defendant's Competency to Stand Trial' identified the relevant cognitive components for rational thinking and fitness including recall, decision-making, intelligence.

In the Presser criteria, 'have sufficient mental capacity to decide what defence he/she will rely on' is required. The American courts have a similar requirement and expressed this to mean a 'simple' decision between two alternatives. Making a choice between two respective defences is a lot less cognitively demanding and requires less attention, information processing and higher level abilities than making a choice between 3 or 4 options. While it is acknowledged that the complexity of decision making skills required may vary with the complexity of the possible defences, the use of the language in the American courts in expressing the minimum requirement is helpful.

Issue 6.4 As an alternative to the proposal in Issue 6.3, should legislation identify the ability of the accused to participate effectively in the trial as the general principle underlying fitness determinations, with the Presser standards being listed as the minimum standards that the accused must meet?

Whilst it is proposed that the general ability to partake effectively in the trial be considered as an alternative to making rational decisions, we argue that these two abilities are distinct and involve different cognitive processes.

The ability to participate effectively in the trial, we assume, encompasses a lot more of the legal processes than decision making. To participate effectively, an individual needs to have a degree of intellectual ability, basic expressive and receptive language skills, verbal memory, working memory (the ability to hold and manipulate information in mind), a reasonable

degree of speed at which they can understand and interpret information, various attention capacities including sustained and switching (mental flexibility, the ability to switch between two ideas quickly). We argue that the complexities of trial and fitness hearings require all of these abilities (or some accommodation of these abilities) and hence suggest that both issue 6.3 and 6.4 be integrated into any new guidelines.

Issue 6.5 Should the minimum standards identified in Presser be expanded to include deterioration under the stress of trial?

Increasingly, the demands of trial are being understood to affect individuals with a variety of conditions including organic deterioration e.g. a dementia, mood disorders e.g. suicidal depression and mental illness. The demand of trial vary on a case-by-case basis and therefore need to be taken into account in light of the individuals severity of deficits, prognosis and treatment options. At present, this is not viewed as an essential aspect of a expert opinion regarding fitness. For the reasons outlined in *Kesavarajah*[8], explicit mention of the stress of the trial in the criteria will ensure all experts address this issue.

Issue 6.6 Should the minimum standards identified in Presser be altered in some other way?

Some general considerations when considering changes to the Presser criteria:

While it is recognised that changes cannot simply be based on what we can reliably test and measure, it is important to consider how any such changes to standards would and should be assessed. Who should conduct such assessments, what tools used? This is important consideration as the information a judge uses to determine fitness is only as good as the information provided by the expert- psychologist or psychiatrist to the courts.

In Australia, whilst legal reform commissions have considered the issue of fitness to stand trial such inquiries have yet to address the current assessment methods used by mental health professionals[9]. Overseas, specific tools have been developed to assess fitness in an attempt to tie together legal concepts and psychological competencies. Fitness Interview Tests – the FIT and FIT-R developed in Canada[10]; the Evaluation of Competency to Stand Trial–Revised[11]; and the various versions of the MacArthur Structured Assessment of Competence-Criminal Defendants developed in the USA(MacSAC-CD[12]) are amongst the most popular with varying degrees of validity and reliability (e.g. [13,14,15]). Such tools have focused on deconstructing competence or fitness into relevant content-specific cognitive abilities that are quantifiable and measureable. These cognitive abilities have been broadly defined to include not only basic information processing capacities of encoding, retention and retrieval of factual, court-related knowledge, but also abilities related to reasoning and comprehension that are presumably linked to the rational aspects of competence [16].Whilst the reliability and validity of such tools is questionable and preliminary research suggests their use within an Australian context may not be necessary or advantageous, the idea of trying to identify and tests the underlying constructs of what constitutes fitness is an important one.

Neuropsychologists have a range of objective, scientifically grounded empirically testes tools which tap into these general areas of cognition thought to be necessary for fitness. The choice of any word changes to the Presser criteria should look to be specific in terms of what is the underlying cognitive construct we are trying to assess and how does it relate to fitness/trial proceedings will aid the assessors and also the judges in terms of linking what the assessor has done and how it relates to the criteria.

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