Submission of the Office of the Director of Public Prosecutions

NSW Law Reform Commission Consultation concerning - Young people with cognitive and mental health impairments in the criminal justice system

Introduction

This submission is limited to some of the issues raised in Chapter 5 of Consultation Paper 11 and includes the views of the Crown Prosecutor who prosecuted the matter of *JH* [2010] NSWSC 531.

Question 11.23
Should legislative powers and procedures dealing with unfit defendants be extended to the Children's Court? If so, should they be framed in a different manner from those available in the higher courts?

1. Yes, we would support the legislative powers and procedures dealing with unfit defendants being extended to the Children's Court, but limited to indictable offences dealt with in the jurisdiction.

2. In relation to serious offences that must be dealt with eventually by committal to higher courts, consistently with the submissions we made to Consultation Paper 6, it would be beneficial to allow the issue of fitness to be addressed at an earlier stage in the process.

3. The formulation of criteria for matters dealt with in the Children's Court may be simpler as the process before the Children's Court is less complicated to understand than a criminal trial; for example, there is no requirement to challenge jurors and the whole scenario is less intimidating.

4. There may be an occasional case where the young person might be found fit in the lower court but unfit in the higher court, but such occasions would be rare. The important thing is that this finding will be made at a much earlier stage, which is desirable from the point of view of young persons and the community generally.

Question 11.24
(1) Are the Presser criteria suitably framed for application to young people?
(2) If not, should the criteria be expanded or modified?
(3) Should particular criteria relevant to young people be developed? If so what should they be?

1. The extract from the child psychiatrist in *JH* in the consultation paper seems to be included to support the proposition that because the mind of a young person is developing and perhaps some mental illness is emerging, then it is not appropriate to apply the nine Presser criteria.

2. It is wrong to use that extract in support of criticism that Presser is not appropriate to young people. The extract when closely analysed does not make a lot of sense. It is unclear what is meant by:

   "*any individual matter relating to JH's fitness has elements lacking precision when assessing them and which, taken alone, might not remove the presumption of fitness*. *Taking all these issues into account together…."*

3. One interpretation of this statement is that the psychiatrist is looking individually at the Presser criteria and saying, in relation to one or another viewed separately, you could not say that the young person is unfit. But viewing all of the *"matters"* or *"elements"* or *"issues"* all together he is unfit. The expert has not applied Presser at all. He has simply stated in some kind of global fashion that he is unfit.

4. *Presser* requires that all of the nine criteria be satisfied and if one is not then he is unfit. This extract does not look individually at each criterion at all.

5. It may be that the psychiatrist did engage in such an exercise in other parts of at least three extremely voluminous reports, but this particular extract does not support the argument that *Presser* is inappropriate for young people.

6. In our submissions in response to Consultation Paper 6 we said that the criteria could be cut down or reduced somewhat. In their existing form they really provide greater protection to a young person and this is something desirable.

7. The rationale of *Presser* is that there are certain basic requirements of understanding that an accused person needs before it would be fair to proceed against him/her in a criminal trial. They are standard clear principles of fairness to be applied across the board to any accused of whatever age. The fact that someone is younger will obviously be factored in, for instance on his or her capacity to understand the offence with which s/he is charged or the ability to properly instruct his or her legal representatives.

Capacity to instruct counsel

1. This is not an issue raised in the consultation paper but did assume importance in the *JH* fitness hearing. It can create difficulties, in that the evidence to establish this should logically come from the

representatives themselves. This creates the very awkward situation of their becoming witnesses and this did occur in *JH* , at least to the extent of the defence instructing solicitor giving evidence. He said, in effect, that his client could not give proper instructions. The difficulty for the Crown was then: how could this assertion be properly tested, or was it something that just had to be uncritically accepted? The difficulty was resolved, at least for the Crown, by having the psychiatrist engaged by the Crown pose a series of questions, in effect not unlike the defence, to see whether the accused was able to give instructions. This psychiatrist was of the view that he could understand and give instructions.

2. This is not ideal from the perspective of the defence because it can involve difficult lawyer/client privilege issues.

Question 11.25

Do any issues arise with respect to the operation of doli incapax and an assessment of fitness to stand trial where a young person suffers from cognitive or mental health impairments?

1. The rebuttal of doli incapax involves the prosecution proving that the young person knew that what he was doing was seriously wrong. It is an issue that comes into play when actually determining guilt for a crime. It does not directly assume any significance when dealing with the different question of whether he is fit to plead.

2. Those two determinations are for two different times, in that the time of fitness determination may be many months after the commission of the crime.

Question 11.26
Does the current test for the defence of mental illness adequately and appropriately encompass the circumstances in which a young person should not be held criminally responsible for his or her actions due to an impaired mental state? If not, should the circumstances be differently defined for young people than they are for adults?

1. The more important question is whether the M'Naughten rules should apply generally. If a person who has committed a criminal offence suffers a disease of the mind and is, in addition, a young person, then the chances of being found not guilty on the ground of mental illness are increased.

2. There is no logical reason why these rules (if they are now generally appropriate) should not be applied to young persons in the same way as to adults.
3. The power of the court to allow such a person not to be incarcerated, subject to strict conditions, is also very relevant to young persons.

Question 11.27
Should the defence of mental illness be available in the Children's Court? If so, should processes following a finding of not guilty by reason of mental illness be different to those available in the higher courts?

Yes, but limited to indictable offences. The court needs to have appropriate powers to deal with all circumstances that may arise in this context and there will be different issues and considerations for young persons.

Question 11.28
Does the interaction of doli incapax and the defence of mental illness present any particular issues? If so, how should these issues be addressed?

We have not had any experience of there being a problem with the interaction of doli incapax and the defence of mental illness.