The Public Defenders

30 November 2012

Ms. Hilary Astor,
Commissioner,
NSW Law Reform Commission,
DX 1227 SYDNEY

By email

Dear Hilary,

Re: People with Cognitive and Mental Health Impairments in the Criminal Justice System

Thank you for the opportunity to respond to these further fitness issues.

1. Should there be a separate test of fitness to plead guilty?
Not in my opinion; there should be the one test that covers all aspects of the committal, trial and sentencing process. Sentencing often requires a shorter and less complex court proceeding which may be within the capacities of the accused, whereas the particular trial may not; the concerns as to capacity are the same, and therefore the test of that capacity should remain the same.

To give an example, a mentally ill person who experiences hallucinations when subjected to stress over some days may be regarded by a forensic psychiatrist as unfit for a trial which has an estimate of ten days. The person satisfies all aspects of the Presser test in an immediate sense. He or she understands the charges and is able to give instructions. However, it is anticipated that after few days, when he or she is likely to lose touch with reality, he or she will be unable to follow the evidence or provide proper instructions; predictably the accused will then be unfit according to the Presser test, and so is unfit for the purposes of the trial. Therefore on a fitness hearing the accused is found to be unfit.

However, if the same mentally ill person gives informed instructions that he or she is guilty, and the legal representative advises that the sentence proceedings are likely to take a day, the forensic psychiatrist is likely to find that those significantly shorter proceedings are unlikely to produce an hallucinatory response and therefore the person is fit for that purpose.

I am aware that from time to time different terminology is used; fitness to be tried, fitness to plead and so on, and that there are slight differences between them. It would be an unnecessary complication to add a further label, hiving off a new test to be confined to anticipated guilty pleas. There may be an attraction in having an all-encompassing label such as fitness to plead, but then that suggests, inaccurately, that the question of fitness only applies at the time the defendant enters their plea. However, if there is to be a single label as an alternative to multiple labels, this is my preferred option. The test should remain uniform, not distinguishing between types of hearings.

Public Defenders Chambers, 23/1 Oxford Street, Darlinghurst NSW 2010
Telephone (02) 9268 3111 Fax (02) 9268 3168 DX 11545 Sydney Downtown

www.publicdefenders.nsw.gov.au

2. If so, what is the appropriate standard of fitness to plead guilty?
The proposed test is deficient; for example, it is silent on the need to follow the evidence and provide instructions. Often witnesses give evidence in sentence proceedings, and the offender is required to provide instructions as the matter proceeds. Some sentence hearings may take days of court time; to build on the earlier example, if the basis of the plea is to be contested, it may be that the sentence proceedings have an estimate of some days, in which case the accused would likely be unfit for those purposes as well. Again, it makes sense to have the one test for all purposes.

3. When should it be possible to raise the issue of fitness to plead guilty?
I note the feed-back from the Mental Health Review Tribunal ("the Tribunal") to the effect that, on occasion, they have a referral who has been found unfit to be tried, who wishes to plead guilty and who the Tribunal considers is sufficiently fit to plead guilty.

I receive occasional queries from practitioners wanting to confirm that the law on fitness allows for the possibility that an accused could be unfit to be tried but fit to plead guilty. I explain that the law is that, depending on the circumstances, an accused person could be as indicated in my response to Question 1, above. Therefore it may be that one or more of these instances involve defence practitioners that are unfamiliar with the law on fitness.

However, it may also be that, although the accused expressed a desire to plead guilty, the legal representative has concerns about how informed that plea would be. Alternatively, it may be that the accused has decided at a late stage to plead guilty, and the practitioner is unaware of that fact; there could be a number of explanations. The only sensible way to determine if some such concern is the issue is for a Tribunal representative to contact the legal representative, convey the Tribunal's impression and understanding of the accused's intentions and determine what the legal representative's concerns are.

In my opinion it is inappropriate for the Tribunal to effectively decide and unilaterally act on an accused's response that he or she would like to plead guilty and return the accused to the Court for that purpose; it is necessary for the legal representative to be contacted by the Tribunal and advised, so that the legal representative can act on their client's instructions.

Paragraph 1.8 of the Question Paper
I think the multiple questions asked in this paragraph demonstrate how unnecessarily complicated a system of two parallel tests of fitness would be; one for trials and one for guilty pleas. There is a core issue at the base of all aspects of fitness: the *capacity* of the accused to fairly partake in criminal proceedings. It should not be unnecessarily split or compartmentalised.

Yours sincerely,

Mark Ierace SC
Senior Public Defender