



Mental Health
Review Tribunal

NSW MENTAL HEALTH REVIEW TRIBUNAL

RESPONSE TO:

LRC Question Paper 2:

Fitness to Plead Guilty

Should there be a separate test of fitness to plead guilty?

Question 1

1. In your experience would a test for fitness to plead have practical application? In what circumstances?
2. Would there be any practical difficulties, in your experience, if a test of fitness to plead guilty were promulgated?

The Tribunal sees a handful of cases each year where a person is unfit to stand trial, but has sufficient understanding to be fit to plead guilty and the capacity to participate in the sentencing procedures; sometimes these persons indicate that they want to plead guilty. The Mental Health Review Tribunal would support the introduction of a separate test of fitness to plead guilty to apply in these cases.

As the two tests for fitness to plead guilty and fitness to stand trial will necessarily share many common elements it may be that there is some difficulty for legal and medical practitioners in making the distinctions necessary to determine that someone is fit to plead guilty even though they are unfit to stand trial. However, this could be mostly avoided by appropriate guidance in the legislation.

Because a plea of guilty must emanate from the accused person, any proposed procedure whereby a court, or the MHRT, might make a finding of fitness to plead guilty, should only be enlivened upon application by the accused/forensic patient. This could be made to the MHRT at any time by a forensic patient who had previously been found unfit. Once a determination of fitness has been made, the person should be able to enter their plea at court and be dealt with accordingly.

It is likely that some forensic patients who were found 'unfit' for trial may seek to convert their status from forensic patient to that of a sentenced prisoner in the event that they become fit to plead guilty and decide to do so. There would need to be a provision for taking into account time served as a forensic patient in any subsequently imposed sentence.

What is the appropriate standard of fitness to plead guilty?

DRAFT test for fitness to plead guilty

The *Mental Health (Forensic Provisions) Act 1990* (NSW) should be amended to provide that:

A person is unfit to plead guilty if it is established on the balance of probabilities that the person is unable to:

- a) understand the offence with which the person is charged
- b) communicate effectively with, and understand advice given by, legal representatives relating to plea and sentence
- c) understand the consequences of a plea of guilty
- d) provide his or her version of the facts to the court, if necessary.

Question 2

1. Is this an appropriate test of fitness to plead guilty?
2. What changes, if any, would you make to the test?

The Tribunal supports the suggested test for fitness to plead as set out above. The only clarification that may be necessary is some further guidance on what 'understanding the offence' entails (e.g. is it the simple act, or an understanding of the elements that comprise the criminal offence, or some appreciation of the actual facts asserted).

When should it be possible to raise the issue of fitness to plead guilty?

Question 3

Would the proposed test work effectively in these two situations?

Yes it would work effectively.

As stated above, an application for a finding of 'fit to plead guilty' could be made to the MHRT at any time by a forensic patient, and by the court at any time in relation to an accused person who has not yet acquired forensic patient status. Once a determination of fitness has been made, the person should be able to enter their plea at court and be dealt with accordingly.

In keeping with the Tribunal's previous submission regarding simplifying the fitness process, the Tribunal would support the Court being able to proceed directly to a sentencing hearing when the evidence before the Court is sufficiently clear that while the person is not fit to stand trial, they are fit to plead guilty (and intend to do so).

Question 4

1. If a standard for fitness to plead guilty is introduced, should it be possible for the defendant, prosecution or court to raise the issue of the defendant's fitness to plead guilty at any time? For example, could fitness to plead guilty be raised:
 - a) By a defendant who has pleaded guilty but later wishes to argue that they were unfit to do so?
 - b) After a finding of unfitness, a special hearing and a finding that the defendant is unfit, not acquitted (for example at a review by the MHRT)?
2. If limits restrict when fitness to plead guilty can be raised, what should those limits be?

A person who has pleaded guilty and wishes to later argue that they were unfit to plead guilty at the time of the plea should be allowed to do this, subject to the same principles as would apply in relation to seeking to reverse a plea of guilty (if the matter has not been dealt with to finality), or, if the matter has been finalised, by way of an appeal in the usual way. If the evidence established that the person was unfit to plead guilty at the time they did so, then the plea should be regarded as a nullity. In such circumstances a court might also need to consider the larger question of fitness for trial for the ongoing management of the matter.

The Court or the Prosecution, or the accused's representative, should be able to raise the question of fitness to plead guilty in cases where a person indicates that they wish to enter a guilty plea. However, neither the Court nor the Prosecution should be able to raise this issue after a plea has been made. If the court determined that the person was unfit to enter a plea of guilty, the court could then, in most cases, proceed to determine the larger question of whether or not the accused is fit for trial.

As indicated above, a person who has been found unfit for trial and who has been dealt with at a special hearing and found to have committed the offence on the limited evidence available, ought be able at a future date to be found fit to plead guilty, on application by that person to the Tribunal. It would not be appropriate for the Tribunal to periodically review a person's fitness to plead guilty, as the desire to plead guilty must move from the person.