The criminally insane: Dealing with mentally impaired clients

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An increased awareness of mental impairment matters would serve practitioners well. This is especially relevant because the law has traditionally identified the mentally impaired as not being criminally responsible for conduct that is beyond their capacity to understand or control. However, this vulnerable group remains saddled with various handicaps that require special consideration under the law that practitioners need to recognise and address.

History of mental impairment

The concept of criminal responsibility or 'guilt' only applies if the accused possesses the capacity for rationality. A criminal act made voluntarily and intentionally with an understanding of its significance will attract criminal responsibility, while a person who does not fulfil this criteria or found 'not guilty on grounds of insanity' may be excused from criminal culpability. This reflects the principle that the accused should not be unjustly convicted or punished for an act related to or caused by illness over which they had little or no control.

M'Naghten's Case (1843) established the defence of mental impairment. This defence acknowledges mental impairment by exculpating an accused from criminal responsibility when lack of capacity to understand the nature and quality of the conduct or that the conduct was wrong is proven.[1] This exclusion was further broadened by the High Court in *Falconer* (1990) which held that non-insane automatism, while not a 'disease of the mind', entitled the accused to outright acquittal if proved beyond reasonable doubt.[2]

Mental impairment in the NT

In the NT, 'mental impairment' under the Criminal Code s 43A reflects an inclusive and encompassing understanding of mental health matters. This is envisaged by the Code's broad spectrum of legislative mental impairment inclusions. These inclusions purposefully capture the widest range of health issues affecting criminal responsibility as possible and includes senility, intellectual disability, mental illness, brain damage and involuntary intoxication.

Such range is consistent with growing awareness of mental health issues and its effect on society. It is estimated that at least 690 000 Australians currently live with some form of mental illness, affecting up to four million family or relationship carers. Further, 45 per cent of Australians will experience a personality or eating disorder, psychotic illness or other mental illness in their lifetime with 20 per cent now affected by severe illnesses like anxiety disorder and depression.[3]

Therefore, a change in perspective with regard to the mentally impaired is necessary. Despite a common perception, dangerous psychopaths are only a minute representation of the spectrum. In reality, the poor, minorities and people with a history of offending and

contact with law-enforcement make up the vast majority of mentally impaired clients.[4] Such clients are more likely to be female and non-violent,[5] highly vulnerable and at risk of homicide, suicide and self-harm.[6]

Indigenous Australians are especially vulnerable to serious mental and behavioural disorders. The Centre for Rural and Remote Mental Health finds that the higher rates of serious mental disorders and problems experienced by remote communities are associated with social disadvantage, affecting children particularly hard,[7] with data indicating that morbidity and mortality rates, including suicide, are double that of non-Indigenous Australians.[8]

Practical issues

The legal profession is not immune to this growing epidemic and needs to develop skills and knowledge, although achieving proficiency in mental impairment matters can be challenging. Firstly, the concept of mental impairment is broad 'with no universally accepted definition.' Secondly, most practitioners would not possess the specialised training to readily identify manifestations; and thirdly, clients with mental illness are unlikely to disclose their illness or treatment due to self-denial of their illness, embarrassment or fear of discrimination.[9]

Stakeholders have recognised this shortfall and have called for practitioners to have a better understanding and awareness of mental impairment issues. While the Duty Lawyer Handbook calls for awareness in the interest of providing personalised instructions and case management,[10] the NT Law Reform Committee declares the need for additional resourcing, training and materials in the interest of effective communication with the wider community.[11]

Such an attitude is especially appropriate given that pro bono practices and community law centres are seeing and servicing a record number of mentally impaired clients.[12] Various unique circumstances lead a client into contact with the criminal justice system and invariably the already complex lawyer-client relationship is compounded when a client is mentally ill and especially so in combination with alcohol or substance abuse.

With mental illness, the clients often lack objective reasonableness and behaviour can range from aggressive and nasty to vulnerable, attractive and even seductive.[13] In many cases, client behaviour may be irrational, polarising, disorganised, delusional or even paranoid and their ability to understand and give instructions may be affected. For example, by frequently changing or providing conflicting instructions, or even instructing against self-interests. It may even be difficult to assess capacity to give instructions due to communicational and social-skill deficiencies such as rejection or misconstruction of advice.

Ultimately, wherever possible, the defendant should have the benefit of a full trial in the interests of transparency and fairness. In *Eastman* (2000), the High Court proclaimed a duty to raise such issues, where a 'well-founded belief' exists, overriding any other professional duty.[14] Although mental illness is a broad concept, practitioners should learn to recognise the potential legal and problem issues, and how to identify resources to deal effectively with these

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issues to address the specific needs of their clients through the judicial process.[15]

Conclusion

Practitioners need to revaluate their attitudes when dealing with mentally impaired clients. Mental impairment covers a spectrum of severity and affects clients who are vulnerable, of minority groups (particularly Indigenous, women and children) and at the lower end of the economic scale who are non-violent and more likely to be at risk of homicide, suicide and self-harm. Practitioners need to overcome potential issues in their clients' interest by learning to identify and deal effectively with these issues and to address their clients' specific needs.

1 *Daniel M'Naghten's Case (1843) 8 ER 718, 722.*
2 *R v Falconer (1990) 171 CLR 30.*
3 *Sane Australia, Mental Health Basics (retrieved 8 December 2017) Health Direct Australia.*
4 *Christine Montross, 'Hard Time of Hospital Treatment? Mental Illness and the Criminal Justice System' (2016) 375 New England Journal of Medicine 1407-1409.*
5 *Allen J Frances, Prison or Treatment for the Mentally Ill (10 March 2010) Psychology Today.*
6 *John Geddes, 'Suicide and Homicide by People with Mental Illness' (1999) 318 The British Medical Journal 1235-1240.*
7 *Ernest Hunter, 'Disadvantage and Discontent: A Review of Issues Relevant to the Mental Health of Rural and Remote Indigenous Australians' (2007) 15 Australian Journal of Rural Health 88.*
8 *Ibid, referring to 1998-1999 Australian Institute of Health and Welfare data.*
9 *Michael Barnett, Robert Hayes, Matthew Large and Olav Nielssen, 'Psychological and Ethical Issues in the Relationship between Lawyers and Mentally Ill Clients, (2007) 11 University of Western Sydney Law Review, 71.*
10 *Peter Bellach et al, Northern Territory Duty Lawyer Handbook (Law Society Public Purposes Trust, 2012) 230.*
11 *Northern Territory Law Reform Committee, Report on the Interaction between people with Mental Health Issues and the Criminal Justice System, Report No. 42 (2016), Recommendation 18, [4.0].*
12 *Barnett, above n 10, 63.*
13 *Ibid.*
14 *Eastman v R (2000) 203 CLR 1 per Miles AO at [284-285].*
15 *Ibid, 71.*

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