Criminal Law Continuing Professional Development Seminar

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The use of psychiatric and psychological evidence on sentence

Speaking notes

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1. When determining the sentence for an offender, the court may receive any information that it considers appropriate to enable it to impose the proper sentence: *Penalties and Sentences Act* 1992 (Qld), s 15(1).[1] Relevantly, this will often include expert evidence from a psychiatrist and/or psychologist regarding the offender, and usually in the form of a written report.

2. In an appropriate case, such evidence may be of critical importance to the proper exercise of the sentencing discretion and, because of that, a failure to adduce it may be productive of real injustice.

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[1] Although the scope of this paper does not extend to the Federal sentencing regime under the *Crimes Act* 1914 (Cth), the fourth edition of *Sentencing of Federal Offenders in Australia: a guide for practitioners* published by the Commonwealth Director of Public Prosecutions is a useful resource in that regard. Likewise, children are subject to an entirely separate sentencing regime under the *Youth Justice Act* 1992 (Qld) which provides that a pre-sentence report concerning the child is mandatory if the court has it in mind to make a detention order or an intensive supervision order: ss 207, 203.

3. One obvious example is where the offender was afflicted by an underlying mental disorder which, although falling short of a defence, was still causally relevant to the commission of the offence. In such a case, the offender's moral culpability will be lessened and so too will be the strength of claims that might otherwise have been made to denunciation and deterrence as sentencing factors: *R v Clark* [2009] QCA 361, [23]; *R v BCX* (2015) 255 A Crim R 456, [40]. Those factors will have only limited utility because an offender suffering from a causally relevant mental disorder or abnormality will not be an appropriate medium for public condemnation any more than he or she is a suitable vehicle for making an example to others: *R v Engert* (1995) 84 A Crim R 67, 70-71; *R v Grehan* (2010) 199 A Crim R 408, [24]-[25]; *Muldrock v The Queen* (2011) 244 CLR 120, [53]-[54].

4. Even where a causal relationship between an underlying condition and the offending cannot be satisfactorily established, the condition may still be relevant to the exercise of the sentencing discretion if it bears on any one or more of the non-exhaustive list of sentencing considerations set out in s 9 PSA. For example, it may figure in an assessment of the extent to which the offender is to blame for the offence (s 9(2)(d) PSA), the offender's character (ss 9(2)(f) and 11(c) PSA) or, more generally, as a mitigating feature (s 9(2)(g)): *R v BCX* (2015) 255 A Crim R 456, [42]. Indeed, in a given case, it may well be regarded as a standalone feature to be taken into account as another "relevant circumstance": s 9(2)(r) PSA.

5. Regardless of the position at the time of the offence, the presence of an underlying condition at the time of sentence may also have a tangible impact on the kind of sentence that should be imposed: *R v Verdins* (2007) 16 VR 269, [32]; *R v Goodger* [2009] QCA 377, [18]-[20]. In this regard, one of the purposes for which sentences may be imposed is to provide conditions in the court's order that the court considers will help the offender to be rehabilitated (s 9(1)(b) PSA), so recourse to the psychiatric and/or psychological evidence adduced on sentence regarding the offender's current mental state and

afflictions will be especially important to the framing of such conditions and the overall structure of the sentence.[2]

6. Less prescriptively, there are decisions of intermediate courts of appeal such as *Director of Public Prosecutions (Cth) v De La Rosa* (2007) 205 A Crim R 1 in New South Wales and *R v Verdins* (2007) 16 VR 269 in Victoria where attempts have been made to outline the possible significance of psychiatric and/or psychological evidence to the sentencing task while recognising that such a topic is incapable of being comprehensively captured. For instance, in *Verdins*, the court expressed the opinion that impaired mental functioning, whether temporary or permanent (defined in the judgment as "the condition"), is relevant to sentencing in at least the following six ways:

- The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances, and denunciation is less likely to be a relevant sentencing objective;

- The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served;

- Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both;

- Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition exhibited by the offender, and the effect of

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[2] Also, in the case of violent offenders, the court must have regard to "any medical, psychiatric, prison or other relevant report in relation to the offender": s 9(3)(j) PSA. For child sex offenders, ss 9(6) and (7) PSA oblige the court to have regard to the offender's "prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community": *R v BCX* (2015) 255 A Crim R 456, [43].

the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both;

- The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person enjoying normal health;

- Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.[3]

7. The sentencing court will direct its attention to how the mental disorder or abnormality[4] is likely to have affected the offender in the particular circumstances – i.e., at the time of the offending or in the lead-up to it – or is likely to affect him or her in the future. Undue focus on classification of the particular condition, that is, on whether or not it is a recognised psychiatric illness of one kind or another, is undesirable. Indeed, it may be that no specific condition can be identified.[5] But where a diagnostic label is applied to an offender this "should be treated as the beginning, not the end, of the enquiry": *R v Verdins* (2007) 16 VR 269, [13]. What matters is what the evidence shows about the nature and severity of the symptoms and their effect on the mental capacity of the offender at the time of the offence and/or at the time of sentence: *R v Yaldiz* [1998] 2 VR 376, 383; *R v Chambers* (2005) 152 A Crim R 164, [26].

8. The gathering and presentation of evidence from psychiatrists and psychologists regarding the offender will almost invariably be undertaken by the defence. In rare instances, the Crown may choose to test the opinions presented by the defence with its own expert evidence. The court also has power to direct that a pre-sentence report be prepared: *Corrective Services Act* 2006 (Qld), s 344.[6]

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3 *R v Verdins* (2007) 16 VR 269, [32].

4 An expression that is apt to cover a wide variety of conditions: *R v Channon* (1978) 33 FLR 433, 436; *R v Wright* (1997) 93 A Crim R 48, 50.

5 See A Frieberg, "*Out of Mind, Out of Sight*: *The Disposition of Mentally Disordered Persons Involved in Criminal Proceedings*" (1976-77) 3 Monash U L Rev 134, 135-6.

6 See, for example, *R v Hicks* [2017] QCA 14, [78].

9. With the vast bulk of sentences being legally aided, the freedom to choose whether to engage a psychiatrist as opposed to a psychologist is illusory; it being notoriously difficult to secure a grant of aid for a psychiatric assessment and report.[7] However, where the offender is afflicted with a serious mental illness (e.g., schizophrenia) of direct relevance to sentence, a psychiatric assessment should be pursued. Failing that, alternatives such as recourse to existing clinical records and reports relating to the offender's past treatment or enquiries of the Prison Mental Health Service in any case where the offender has been treated in custody will need to be considered.

10. A view has sometimes been expressed that psychologists are not qualified to express a diagnostic opinion about an offender's mental state because that requires the expression of a medical opinion: see, e.g., *R v MacKenney* (1981) 76 Cr App R 271, 274-275; *Klimoski v Water Authority of Western Australia* (1989) 5 SR (WA) 148; *R v Kucma* (2005) 11 VR 472, [26]. On the other hand, there are numerous case where diagnostic evidence from psychologists has been received: see, eg (e.g., *R v Nguyen* [2015] QCA 205; *R v SCZ* [2018] QCA 81). There is however no longer any room for debate because the Court of Appeal recently affirmed that the admissibility of such evidence will depend entirely on an application of the established principles for the determination of the admissibility of expert evidence: *R v Bassi* [2021] QCA 250, [61]. Those principles are well-known: *Clark v Ryan* (1960) 103 CLR 486, 491; *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, [85]. As such, the "question whether evidence of a psychologist's diagnosis is admissible as expert evidence has to be decided on a case-by-case basis and, in general, it will not be open for a judge to conclude that evidence of that kind is inadmissible just because it is to be given by a psychologist rather than by a psychiatrist": *R v Bassi* [2021] QCA 250, [61].

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[7] For aid to be granted for a pre-sentence *psychological* assessment and report, the following LAQ assessment criteria must be met:

- The report directly relates to the proposed plea and it is likely to result in a significant reduction in the sentence that might otherwise be expected, and
- The material cannot be presented to the court without obtaining the report, and
- the applicant has been provided aid for the substantive matter, and
- the applicant meets the merits test.

11. Of course, to be admissible, there must be an opinion expressed within the witness' specialised field of knowledge. A psychologist who churns out what in reality is not much more than a statement of the offender's antecedents expresses no admissible opinion at all.

12. In the same vein, where the relevant expert opinion is based on, or substantially on, the offender's own account without any supporting evidence, caution may be required: *R v Peisley* (1990) 54 A Crim R 42, 52; *R v Qutami* (2001) 127 A Crim R 369, [58]-[59]; *R v Palu* (2002) 134 A Crim R 174, [40]-[42]. As a general proposition, the weight given to such opinions could be significantly eroded unless supported by clinical testing or other evidence independent of the offender. As against that, a sentencing court will not automatically discount the weight to be attached to a professional opinion which is substantially based on a patient's history because "part of the professional skill of the psychiatrist [or psychologist] is the assessment of [that] history [and] how it accords with hypothesised and formed views of the professional": *Devaney v The Queen* [2012] NSWCCA 285, [88].