



Mental Impairment as a Criminal Defence in the Magistrates' Court

The Legislation

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (the Act) allows for the defence of mental impairment in the Magistrates' Court ¹. If a person is found not guilty because of mental impairment the Magistrates' Court **must discharge the person** ². Unlike the County Court and the Supreme Court, the Magistrates' Court cannot impose a supervision order, either custodial or non-custodial, nor apply any conditions.

The defence of mental impairment ³ is rarely used in the Magistrates' Court, despite the significant number of people with mental illness and cognitive impairment involved in the criminal justice system.

The Defence of Mental Impairment

Under s. 20 of the Act the defence of mental impairment is established for a person charged with an offence if at the time of engaging in conduct constituting the offence, the person was suffering from a mental impairment that has the effect that:

- (a) he or she did not know the nature and quality of the conduct; or
- (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong) ⁴.

Evidence is required to be produced from an expert witness (usually a psychiatrist) that at the time of engaging in the conduct for which the person has been charged he or she was experiencing a mental impairment which had either of the above effects.

Mental Impairments can be “mental illness”, intellectual disability or acquired brain injury. The *Mental Health Act 1986* defines mental illness as a medical

¹ S. 5 (1) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

² S. 5 (2) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

³ Mental impairment is broader than mental illness and also includes intellectual disability and some other forms of cognitive impairment/mental disorder.

⁴ S. 20 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

condition that leads to significant disturbance of thought, mood, perception or memory. Common mental illnesses include schizophrenia, bi polar disorder, clinical depression and psychosis. However, some conditions such as personality disorder are not usually defined as mental illness by the courts and a mental impairment defence may be unlikely.

A person is presumed not to have suffered from a mental impairment until the contrary is proved ⁵. The question whether a person was suffering from a mental impairment is a question of fact and is determined by the Magistrate on the balance of probabilities ⁶. If the defence of mental impairment is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption ⁷.

Implications of the Defence

Clients should be carefully advised of the implications of the defence vis a vis other options such as diversion. For example:

The Prosecution often applies to have these matters sent up to the County Court. As set out below, there are strong arguments against charges being sent up. If they are, however, proceedings may be more stressful. If the mental impairment defence is established in the County Court and the Court declines to exercise its discretion to unconditionally release the client it must impose an indefinite non-custodial or custodial supervision order and the client becomes a forensic patient (or forensic resident if the mental impairment is an intellectual disability rather than a mental illness) ⁸.

If the matter is sent up and a custodial disposition is likely, relevant considerations may be the fact a disability support pension can be paid to a forensic patient but not to someone convicted and in jail, and whether fines can be paid off by serving time in hospital like they can in prison.

If a person is found not guilty because of mental impairment it will state on the court record – “Not Guilty of the Grounds of Mental Impairment”. This finding may have implications for people in the workforce and those who apply for a working with children check, though as at March 2007 police guidelines state only findings of not guilty due to mental impairment in respect of serious offences should be disclosed.

⁵ S. 21 (1) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

⁶ S. 21 (2) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

⁷ S. 21 (3) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

⁸ S. 23 *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

Applications to Send Charges Up

The defence of mental impairment applies to summary offences and to indictable offences tried summarily in the Magistrates' Court ⁹. If the Magistrates' Court finds a person not guilty because of mental impairment of a summary offence or an indictable offence tried summarily, the Magistrates' Court **must discharge the person** ¹⁰.

Her Worship Jillian Crowe published a decision in relation to the defence of mental impairment in the Magistrates' Court jurisdiction in the case of Parrington 2003. The Prosecution sought to have the matter sent up to the County Court, and argued that section 5(2) should be interpreted as only applying to summary offences or less serious indictable offences. Her Worship noted that the second reading speech did nothing more than restate the content of section 5(2) and ruled that the charges should remain in the Magistrates' Court:

“If issues of public policy are to be determinative of which jurisdiction a matter is to be disposed in, the legislature has not said so, and it has given no indications as to how such considerations are to be resolved in this jurisdiction.....Having considered all these matters, in the vacuum of persuasive authority in which I find myself, I find that if a defendant is charged with an indictable offence that is triable summarily, the case ought to remain in this jurisdiction, which is charged with the power to dispose of it.” ¹¹

Parliament clearly intended that the defence of mental impairment be available to persons charged with summary offences and indictable offences that can be heard summarily, and, as Her Worship noted, it is always open to the Prosecution to lay its charges in the committal stream for hearing in the County Court from the outset.

⁹ S. 5 (1) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

¹⁰ S. 5 (2) *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

¹¹ 12 February 2003 **Parrington**, Her Worship Jillian Crowe, Heidelberg Magistrates' Court

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