

# FOLEY'S | LIST

## A BRIEF BUT PRACTICAL GUIDE TO OBTAINING A REPORT ON THE DEFENCE OF MENTAL IMPAIRMENT

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## A BRIEF BUT PRACTICAL GUIDE TO OBTAINING A REPORT ON THE DEFENCE OF MENTAL IMPAIRMENT

### **Introduction:**

The defence of mental impairment is available for all offences whether indictable or summary. It applies to offences heard and determined in the superior courts as well as the Magistrates' Court and the Children's Court - see s.5(1) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

If an accused is found not guilty because of mental impairment in the County Court or the Supreme Court then there are three possible outcomes:

- **Unconditional release (rarely imposed)**
- **Non-custodial Supervision Order**
- **Custodial Supervision Order**

If an accused is found not guilty because of mental impairment in the Magistrates' or the Children's Court then the only possible outcome is for them to be discharged from the offence – ie. no further action taken.

The Victorian Law Reform Commission in 2014 conducted a review of the Act and made a recommendation that the powers be expanded in the Magistrates' Court so that to discharge the accused is not the only option (*Victorian Law Reform Commission, Review of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, report June 2014*).

### **Preliminary points**

#### **Phone call from client in custody and you are concerned about his/her mental state**

- Speak to police about organising a Forensic Mental Officer (FMO) to assess the client in custody before interview

**When do you get a mental health assessment done?**

- For mental impairment matters it is best to arrange an assessment with a suitable expert to be done as soon as practicable after the client is arrested and/or the commission of the alleged offence.
- It often takes some time before you have all the relevant information you need to send to the appointed expert – however, if it is at all possible you could have your expert see the client at an early stage for a preliminary assessment, which could include a request for a verbal opinion, not a formal written report. You will need to keep in mind funding concerns if legally aided.

**Who is best to do the assessment and report?**

- Forensic Psychiatrist – best for when the accused has a mental illness such as schizophrenia;
- Neuropsychologist – best for when the accused has an intellectual disability and/or an acquired brain injury

**Material to obtain and provide to the expert for their consideration****1. Record of Interview**

- Visual copy if available – if conducted within a reasonable time of the commission of the alleged offending then could potentially be very helpful.

**2. Documents/Material relating to the accused's attendance at the police station, including:**

- (a) Attendance register – this will include the welfare checks conducted by the police and other notes on the presentation of the client.

- (b) Consider whether seeking CCTV from police station/cells which may show client behaving erratically - likely that you will need to issue a subpoena to obtain the footage.

### **3. Police notes**

- (a) Seek police notes for all members who came into contact with the accused on the day of, or the days following, the incident – all police members, not just the ones who have made statements or who are listed in the witness list in the brief. Notes would include entries in official diaries, day books, running sheets, and patrol duty returns.

- (b) Seek the INTERPOSE database entries/notes for the investigation

- (c) Seek the notes of a FMO if one has been utilised by the police to assess the accused prior to interview

### **4. Any video recordings or audio recordings of the Accused *if within a reasonable time of the incident***

- Eg. highway patrol officers often have digital recorders in their pockets
- Eg. video-recorded searches will often have footage of the accused

### **5. Justice Health file – this will need to be the subject of a subpoena**

### **6. Hospital records**

- (a) Consider issuing a Freedom of Information request to hospitals where the accused has had previous admissions into the emergency department and/or psychiatric ward – whether it be voluntary or involuntary admissions

- (b) Recommend you read the material carefully before sending it to the expert – remember anything given to the expert can be called for by the prosecution.
- (c) If at the time of the incident the accused was on a Community Treatment Order then consider obtaining reports from their treating team
- (d) Sometimes an accused person will be taken by the police to a hospital because of concerns for the accused mental health – if that occurs then essential to obtain the relevant records, as this will involve an assessment of the client by a psychiatrist unit very close in time to the alleged offending.

## **7. Witness proofs from friends and families**

- (a) Get permission from the accused to speak with his/her family members and any friends who came into contact with them in the lead up to, or the days following the incident.
- (b) Seek permission from them to pass their details onto the expert so that they can be spoken to if considered appropriate

## **8. Run a committal hearing**

- (a) Often much can be gained from running a contested committal hearing in these cases
- (b) Consider seeking leave to cross-examine
  - FMO (if used by police)
  - Independent Third Person (if use by police)
  - Police members involved in the arrest of client if within reasonable time of the offence/incident
  - Eye witnesses to the incident

**Concluding Remarks**

The defence of Mental Impairment is not for everyone. There are often cases where, whilst the defence of mental impairment is open, it is not an attractive option from the client's point of view. This is because, in the higher courts a finding of not guilty because of mental impairment will often result in the imposition of lengthy supervision orders. Sometimes, a client may rather pleading guilty to the offence and relying upon the psychiatric material as mitigating and being sentenced in the ordinary way. The combination of *Verdins* and *Boulton* arguments may see the client receive a manageable Community Corrections Order of limited length as opposed to a longer supervision order. It is a case by case assessment.

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