

Assisting your clients

While most legal practitioners do not have experience or training in psychiatry, it is important that if you suspect your client has a mental illness you try to provide your client with enough support and information to assist them to manage their illness.

Generally, this will consist of assisting your client through the legal system and the procedures relevant to persons with a mental illness as well as referring your client to a health professional, if necessary.

WHAT IS 'MENTAL ILLNESS'?

Under the MH Act, 'mental illness' is defined as a condition characterised by the presence of symptoms such as delusions, hallucinations, a severe disturbance of mood, or sustained or repeated irrational behaviour, which temporarily or permanently seriously impair the mental functioning of a person.

Clinical definitions of mental illness are broader and can include the following: delirium, dementia, amnesic and other cognitive disorders, mental disorders due to a general medical condition, substance related disorders, schizophrenia and other psychotic disorders.

Legal practitioners need to be aware that the definition of 'mental illness' in the MH Act is narrow in scope and not all mental illnesses fall within the definition used in the MH Act.

WHAT ISN'T MENTAL ILLNESS?

Mental illness is not:

- having particular political, religious or philosophical beliefs
- engaging in sexual promiscuity or expressing a particular sexual preference or orientation
- having a developmental disability or other cognitive impairment
- engaging in immoral, illegal or anti-social behaviour, or
- taking drugs or alcohol, unless it causes symptoms which meet the criteria for mental illness under the MH Act.

WHAT ARE SYMPTOMS OF MENTAL ILLNESS?

While it is not your role as a legal practitioner to assess the mental health of your client, it is important that you are aware of the symptoms of mental illness so if necessary you can assist your client in seeking appropriate treatment.

Factors which may indicate that your client has a mental illness include if your client:

- has a current history of ongoing psychiatric treatment
- exhibits unusual behaviours, such as hearing voices or having delusional or paranoid thoughts
- has attempted suicide on one or more occasions
- is or has been on anti-psychotic medication
- acts violently or aggressively
- is or has been on a community treatment order, or
- is on a disability pension.

If you think that your client has a mental illness talk to a health care professional as soon as possible to assist you to take the most appropriate step.

If your client is at risk of self-harm they may send out certain signals in an attempt to communicate their distress and intentions. Such signals may include:

- behavioural/physical changes (eg suddenly giving away all their belongings or showing no interest in anything)
- disclosure of thoughts and feeling (eg feeling helpless or isolated, lonely or desperate), or
- disclosure of previous suicidal attempts.

Where your client is at risk of self-harm to himself or herself, contact a crisis team. These teams are usually accessed through a local community centre or hospital. There are also after-hours psychiatric health care workers who assist a person only when they are in crisis.

WHAT IS AN APPROPRIATE WAY OF COMMUNICATING WITH A CLIENT WHO MAY HAVE A MENTAL ILLNESS?

If your client presents with the above symptoms, it may assist your client if you:

- try to avoid using legal jargon
- discuss one idea at a time
- check that your client understands what you are saying.

It is also important that you take into account your client's body language as this may also signal whether they are in distress.

WHAT IS THE IMPORTANCE OF HAVING MENTAL ILLNESS ASSESSED?

If you suspect your client has a mental illness it is important that you recommend your client seek an assessment.

An assessment is the first step in assisting your client to obtain appropriate treatment for the mental illness whether it be the provision of social support, counselling or psychiatric diagnosis. An assessment will also enable you to provide appropriate legal advice that is in the best interests of your client.

WHO CAN I REFER MY CLIENT TO?

Where your client is having difficulty coping with everyday life, but generally has control over their mental illness, then a referral to a social worker is most appropriate.

Where your client is not in immediate crisis but is showing signs of depression, a clinical psychologist, counsellor or social worker would be appropriate.

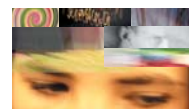
If you suspect that your client may harm himself or herself then it may be appropriate to refer your client to a psychiatrist who is able to diagnose a mental disorder and prescribe medication.

WHAT DO I DO IF I THINK MY CLIENT IS UNABLE TO GIVE INSTRUCTIONS?

Unless otherwise established, an adult is presumed to be mentally competent to give instructions. The mere presence of a mental illness does not negate this presumption.

Your client's capacity to give instructions needs to be assessed in terms of the particular circumstances and type of decisions that need to be made.

The NSW Law Society has developed the 'Client Capacity Guidelines' to assist legal practitioners who suspect that a client may not be competent to give proper instructions. It can be accessed via the NSW Law Society website (www.lawsociety.com.au).



Helpful contacts

MENTAL HEALTH SERVICES: LEGAL

The Mental Health Advocacy Service is a specialist branch of NSW Legal Aid that represents clients under the MH Act, Guardianship Act and Protected Estates Act (T: 02 9745 4277).

MENTAL HEALTH SERVICES: NON-LEGAL

Where you are seeking information to pass on to your client or their carer about mental health support services, the following generalist support service or information centres are a good starting point:

■ *Mental Health Information and Referral Service:* 02 9816 5688 or 1800 674 200

■ *Lifeline* (24 hours): 1300 13 11 14

Lifeline also has a comprehensive 'Just Look' service, which allows you to look online for free or community based health services all over Australia: <http://www.lifeline.com.au>

■ *Salvo Care Line* (for suicide prevention): 02 9331 2000

■ *Kids Help Line:* 1800 55 1800

■ *Department of Community Services Helpline:* 132 111

■ *Youthline:* 13 1114

There are also local mental health teams, which are available 24 hours and are contactable by phone. The contact details for the mental health teams are listed in your phonebook and on the NSW Department of Health website (www.health.nsw.gov.au).

Aims

This pamphlet is designed to assist legal practitioners in NSW whose client has or may have a mental illness and need a quick reference guide to direct them to the key issues facing legal practitioners practising in this area. It includes:

- what to do when you suspect your client (or potential client) has a mental illness
- how to assist clients with a mental illness with their care and treatment or through the criminal justice system, and
- where to locate resources relevant to mental illness.

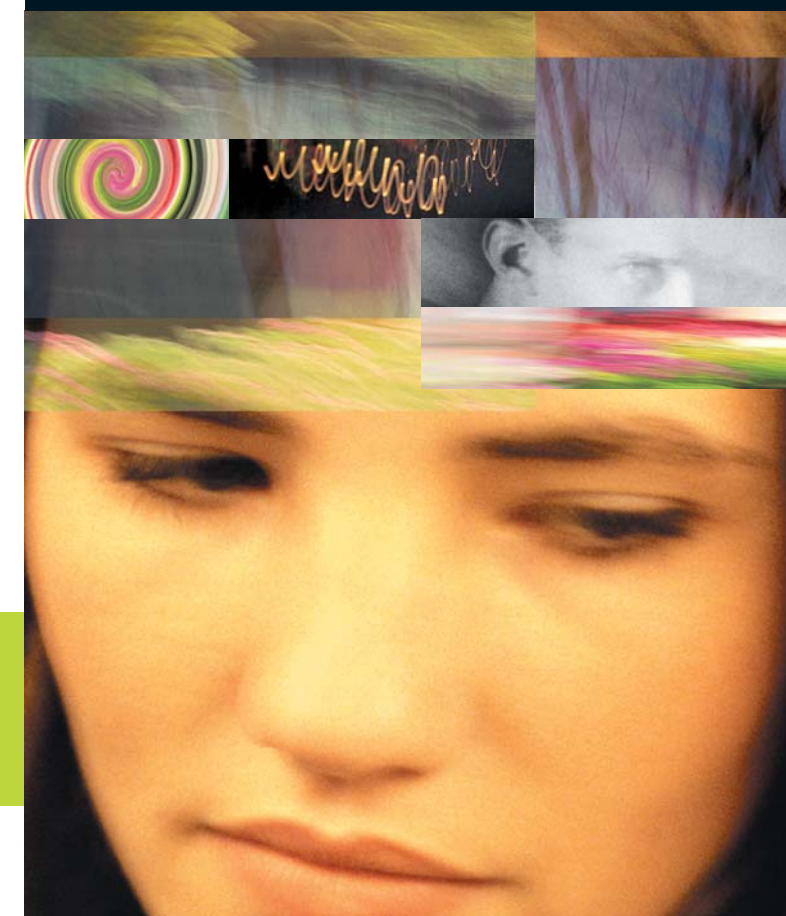
This is a general guide only and should not be used as legal advice.

NSW Young Lawyers Human Rights Committee would like to thank the various organisations that supported us in the preparation of this pamphlet, particularly the NSW Law Society Human Rights Committee.

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Understanding your clients and mental illness



Assisting your client with care and treatment

The MH Act deals with the treatment of people with mental illnesses in hospitals and in the community who:

- are admitted to hospital voluntarily, or
- are admitted to hospital involuntarily or subject to a community treatment order/counselling order.

IN WHAT CIRCUMSTANCES CAN MY CLIENT BE ADMITTED INVOLUNTARILY TO HOSPITAL?

Sections 9 and 10 of the MH Act set out the circumstances in which a person may be admitted to hospital as a ‘formal patient’ (also known as an ‘involuntary patient’). It includes where there are concerns that they may cause harm to themselves or others because of their mental illness.

WHAT ARE MY CLIENT’S RIGHTS REGARDING MEDICAL TREATMENT?

Your client is entitled to be informed about his or her medication and treatment and may refuse medical treatment. However, there are some exceptions if your client is an involuntary patient.

CAN MY CLIENT ACCESS HIS OR HER MEDICAL FILES?

Unless a court or tribunal determines otherwise, your client is entitled to have access to their medical files.

Generally, you will be able to obtain medical files with your client’s authority. However, where your client is an involuntary patient access to their medical files may be more difficult. If you are appointed as your client’s representative, ss45 and 276 of the MH Act provide that you are to have full and proper regard to any warning by the medical superintendent that disclosure of the medical files may be harmful to your client.

If applicable you may be able to access the medical files under the Freedom of Information Act 1989 (NSW) or Health Records and Information Privacy Act 2002 (NSW).

WHAT IS A CTO?

A community treatment order/counselling order (CTO) is a legal order made by the MHRT or a Magistrate that is an alternative to hospitalisation.

If your client is subject to a CTO he or she must receive treatment in the community under the supervision of a health care agency according to a treatment plan.

The order nominates a healthcare agency to administer and implement the CTO. The MH Act sets out provisions about enforcement of the CTO and provides that a breach of a CTO may result in apprehension and detention in hospital.

WHAT IF MY CLIENT HAS A PROBLEM CONCERNING THEIR CTO?

Your client may make an appeal to either the Supreme Court or the MHRT.

Assisting your client through criminal proceedings in the Local Courts

Part 3 of the MH(CP) Act applies to criminal proceedings regarding summary offences or indictable offences triable summarily, being proceedings before a Magistrate. It also deals with any related proceedings under the Bail Act 1978 (NSW).

WHAT IS A COURT LIAISON SERVICE?

In NSW a Statewide Community and Court Liaison Service operates at 19 Local Courts. This service involves the provision of a full-time clinical nurse at each of those courts to assist people identified as having a mental illness.

The service aims to divert people with a mental illness who have been charged with minor offences away from the criminal justice system and back into the community where they can receive appropriate treatment for their mental illness.

WHAT ARE THE RELEVANT PROVISIONS RELATING TO SUMMARY DISPOSITION?

Sections 32 and 33 of the MH(CP) Act deal with disposing of criminal proceedings in the Local Courts and Children’s Courts against defendants with mental illness.

If your client has a mental illness or was suffering from a mental illness at the time of the alleged offence, you can apply under 32 of the MH(CP) Act to have them discharged, conditionally or unconditionally, rather than dealt with according to the law. Usually a s32 application will not be granted unless an appropriate treatment plan is provided to the court.

If your client is currently a "mentally ill person" (needing care, treatment or control for their own or others’ protection), s33 of the MH(CP) Act allows the court to order that he or she be taken to hospital for assessment and/or treatment.

CAN MY CLIENT BE TRANSFERRED FROM A CORRECTIONAL CENTRE?

If, while your client is on remand in a correctional centre or a detention centre, he or she develops a mental illness, s35 of the MH(CP) Act enables the Magistrate to make an order that psychiatrists assess your client.

After this assessment, the Magistrate may make an order that your client be transferred to a hospital (although this rarely occurs).

Assisting your client through criminal proceedings in the Supreme or District Courts

Part 4 of the MH(CP) Act relates to criminal proceedings in the Supreme Court (including criminal proceedings within the summary jurisdiction of the Supreme Court) and District Court.

WILL THE COURT ASSESS MY CLIENT’S FITNESS TO STAND TRIAL?

The court will only consider whether your client is fit to stand trial once the issue has been raised. This means that if it is not raised, your client will be assumed to be fit to stand trial. The rules setting out how the issue of ‘fitness’ is assessed are found in the MH(CP) Act.

WHEN SHOULD I RAISE THE ISSUE OF FITNESS?

If you form the view that your client may be unfit to be tried you may feel it necessary to alert the court and raise the issue of fitness. You might have to do this even if your client tells you that they want you to proceed without raising it.

Although there is no specific rule that requires you to raise the question of fitness, if you are concerned about your client’s fitness it would be in keeping with your duty to the court to do so. A failure to raise the issue, where it is later found that your client is unfit, is a nullity and a fundamental failure of the trial process and may raise issues about your misconduct.

WHAT HAPPENS IF MY CLIENT IS FOUND TO BE ‘UNFIT’ TO BE TRIED?

If your client is found to be unfit, the MHRT conducts a hearing to decide whether your client will be fit to be tried for the offence in the 12 months after the court’s finding of unfitness.

If the MHRT decides that your client will not be able to be tried because he or she is mentally ill, it must notify the court, the Director of Public Prosecutions and the Attorney General. The Attorney General may after considering advice of the DPP decide not to proceed further, or direct that a ‘special hearing’ be held.

WHAT IS A ‘SPECIAL HEARING’?

The ‘special hearing’ is a quasi-trial of the client and is not recorded as a criminal trial. The hearing may find that your client:

- is not guilty of the offence
- is not guilty on the basis of mental illness, or
- on the limited evidence available committed the offence.

WHAT HAPPENS IF MY CLIENT IS FOUND NOT GUILTY?

If your client is found not guilty he or she will be discharged.

WHAT HAPPENS IF MY CLIENT IS FOUND GUILTY?

If found guilty the judge may impose a ‘limiting term’ which is the best estimate of the sentence of imprisonment that would have been appropriate had there been a regular criminal trial.

WHAT HAPPENS IF MY CLIENT IS FOUND NOT GUILTY BY REASON OF MENTAL ILLNESS?

Where the verdict is not guilty on the basis of mental illness the judge may order that:

- your client be detained in a prison, hospital or other place until released by due process of law, or
- your client be released from custody, either unconditionally or subject to conditions.

UNDER WHAT CIRCUMSTANCES MAY MY CLIENT BECOME A FORENSIC PATIENT?

Where the verdict is not guilty on the basis of mental illness or where a limiting term is imposed (and other orders are made) your client becomes a ‘forensic patient’ and is subject to 6 monthly reviews by the MHRT.

The MHRT is required to make recommendations to the Minister for Health about your client’s continued

detention, care and treatment (in prison, hospital or other place) or as to their release.

Your client will cease to be a forensic patient when released unconditionally by the Governor or when the limiting term expires.

IN WHAT SITUATIONS WILL MY CLIENT BE GRANTED BAIL?

If your client is charged with a criminal offence, then your client will be subject to the Bail Act 1978 (NSW). However, there are limited circumstances where bail may be granted to your client under the MH Act.

HOW CAN I ASSIST MY CLIENT AT SENTENCING?

At the sentencing hearing it is important to present a full and clear picture of the mental illness, which is relied on in reduction of the sentence, by obtaining a forensic psychiatrist or psychologist report that addresses specific issues relevant to sentencing.

It may also be useful to obtain additional reports from relevant agencies, such as Justice Health, as well as family members and other acquaintances of your client to put the offence and your client’s future in an appropriate context.

Relevant bodies

Whether assisting your client with their care and treatment or through the criminal justice system, there are a number of bodies, which may be relevant to your client’s particular circumstances. Set out below is a brief explanation of these bodies and their roles.

MENTAL HEALTH REVIEW TRIBUNAL

The Mental Health Review Tribunal (MHRT) is an independent body established by the MH Act.

The MHRT hears a range of matters in relation to mentally ill people, including extension of temporary patient orders, community treatment/counselling orders, forensic patient matters, electro-convulsive therapy applications, surgical or other special medical treatment, financial management applications and appeals against refusal to discharge a person from hospital.

THE GUARDIANSHIP TRIBUNAL

The Guardianship Tribunal is an independent body that operates under the Guardianship Act. Its primary function is to make guardianship and financial management orders

for people aged 16 years and over with decision-making disabilities. Anyone with a genuine concern for the welfare of the person can make an application to the Guardianship Tribunal.

Its powers include making guardianship orders for the appointment of a private guardian or the Public Guardian, financial management orders for the appointment of a private financial manager or the Protective Commissioner, providing consent to medical treatment, reviewing enduring powers of attorney or guardianship appointment and approving clinical trials.

THE OFFICE OF THE PUBLIC GUARDIAN

The Office of the Public Guardian is part of the Attorney General’s Department. It makes decisions about personal and lifestyle issues for its clients. The Public Guardian is only appointed when the Guardianship Tribunal considers that no private guardian can be appointed.

THE OFFICE OF THE PROTECTIVE COMMISSIONER

The Protective Commissioner, established under the Protected Estates Act, provides financial management services to people who have a disability that affects their capacity to make financial decisions.

A court or tribunal appoints the Protective Commissioner as a person’s financial manager when it is in the person’s best interests and there are no alternative formal or informal arrangements.

Relevant Legislation

Set out below is a list of relevant legislation when representing a client who has a mental illness:

- Mental Health Act 1990 (NSW) (MH Act)
- Mental Health (Criminal Procedure Act) 1990 (NSW) (MH(CP) Act)
- Crimes Act 1900 (NSW)
- Criminal Appeals Act 1912 (NSW)
- Criminal Procedure Act 1986 (NSW)
- Guardianship Act 1987 (NSW) (Guardianship Act)
- Protected Estates Act 1983 (NSW) (Protected Estates Act)

