



Supreme Court of Victoria

Practice Note SC CR 7

Sentencing Hearings: Expert Reports on Mental Functioning of Offenders

1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 This Practice Note has been developed by the Forensic Evidence Working Group, comprising judges, forensic psychiatrists, forensic psychologists and legal practitioners (including representatives of the Office of Public Prosecutions, Victoria Legal Aid and the Criminal Bar Association).
- 1.3 The Note has been approved by the judges of the Supreme Court and of the County Court, for introduction on a trial basis from 1 July 2017. It should be read together with s 189 of the *Criminal Procedure Act 2009*.
- 1.4 The purposes of this Practice Note are:
 - a. to enhance the quality and reliability of expert evidence relied on in sentencing hearings in connection with questions of the mental functioning of persons who are to be sentenced.
 - b. to improve the utility of such evidence by ensuring that opinions expressed are within the scope of the expert's specialised knowledge, and are supported by clearly-identified facts and reasoning.

2. COMMENCEMENT

- 2.1 This Practice Note was issued on 30 March 2017 and will apply to sentencing hearings in the Supreme Court and the County Court commenced on or after 1 July 2017, but only to expert evidence which addresses questions of the mental functioning of an offender.¹
- 2.2 Parties to a proceeding which on the commencement of this Practice Note is already listed in either Court should comply with this Practice Note so far as it is practicable to do so without interruption to the progress of those proceedings.

¹ Practice Note SC CR 5 governs expert evidence to be given at a trial or at a hearing conducted for the purposes of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*.

3. DEFINITIONS

3.1 In this Practice Note:

Assumed facts are matters that the expert has neither seen or been told but has either inferred from observed or reported facts or assumed to be so for the purpose of reaching a conclusion.

Commissioning party means the party who gives instructions to the expert.

Condition has the meaning set out in paragraph 7.1.

Expert means a person (other than a treating practitioner) who prepares expert evidence, for use at a sentencing hearing, regarding the mental functioning of the person who is to be sentenced.

Observed facts are matters that the expert has personally observed.

Primary expert report means a report that does not respond to a report served by the other party.

Recipient party means any other party to whom the expert's report is provided.

Reported facts are matters that have been reported to the expert by the subject or by any other person.

Responding expert report means a report that responds to an expert report served by the other party.

Subject means the person the subject of an expert report.

Treating practitioner means a clinician who is treating, or has in the past treated, the person who is to be sentenced.

4. GENERAL PRINCIPLES

4.1 The scope and purpose of an expert report is defined by the needs of the sentencing judge. Axiomatically, the function of an expert witness is to assist the Court, not to advocate for the interests of a party.

4.2 It is the responsibility of the party commissioning the report to ensure that the purpose of the report is clearly defined and that the opinions sought and expressed are relevant to that purpose.

4.3 It should not be assumed that an expert report is required for every plea. A report should only be relied on where counsel is satisfied that there is a proper basis for submitting that the opinions expressed bear relevantly on the exercise of the sentencing discretion.

4.4 The purpose of an expert report is to assist the sentencing judge to understand the mental functioning of the subject at relevant times before, during and/or after the offending for which sentence is to be imposed.

4.5 In order to evaluate what reliance to place on an expert report, the sentencing judge needs to know the purpose of the report, the relevant qualifications and

expertise of the expert, the expert's opinions and the factual foundation of each opinion.²

- 4.6 Opinion evidence is only admissible (under s 79 of the *Evidence Act 2008*)³ if – and to the extent that – it is based (wholly or substantially) on the ‘specialised knowledge’ of the person expressing the opinion. The judge therefore needs to be given sufficient information about the expert’s qualifications and experience to enable the judge:
- to ascertain the nature, and scope, of the expert’s “specialised knowledge”; and
 - to be satisfied that the opinions expressed are based ,wholly or substantially, on (and do not go beyond) the specialised knowledge.

5. EXPERT’S DUTY TO THE COURT

- 5.1 An expert has an overriding duty to assist the Court impartially, by giving an objective, unbiased opinion on matters within the expert’s specialised knowledge.
- 5.2 This duty overrides any obligation to the commissioning party or to the person by whom the expert is paid.
- 5.3 This duty includes an obligation to inform the commissioning party promptly if the expert’s opinion changes materially from that contained in a report served as evidence or given in a statement. The commissioning party must then inform the Court and other parties of the change.
- 5.4 An expert must never alter a report or an opinion at the request of the commissioning party. If factual clarification is requested, or additional information is provided, a supplementary report must be prepared which clearly identifies the nature of any change of fact or opinion.

6. CONTENT OF ALL EXPERT REPORTS

- 6.1 All expert reports to which this Practice Note applies shall state the opinions of the expert and (subject to 6.2) shall state, specify or provide:
- a. the expert’s name and place of employment;
 - b. an acknowledgement that the expert has read this Practice Note and agrees to be bound by it;
 - c. a statement of the expert’s qualifications and experience so far as relevant to the opinions expressed in the report (refer Schedules A and B);
 - d. whether any particular question, issue or matter falls outside the expert’s specialised knowledge;

² For information on relevant qualifications, see Schedules A and B.

³ Pursuant to s 4(2) of the *Evidence Act 2008*, that Act only applies to a sentencing proceeding if the court directs that it applies. Without fettering a court’s discretion in this regard, expert reports should be commissioned and prepared on the assumption that the court will so direct.

- e. in respect of each opinion expressed in the report:
 - i. the facts (whether observed, reported or assumed) on which the opinion is based; and
 - ii. the reasons for the opinion;
 - f. any qualification of an opinion expressed in the report without which the report would or might be incomplete or misleading;
 - g. any limitation or uncertainty affecting the reliability of the opinion(s) in the report;
 - h. any concern which the expert has about the reliability of facts reported by the subject, on which the expert has relied, together with the basis of that concern;
 - i. any examinations, tests or other investigations on which the expert has relied;
 - j. any limitation or uncertainty affecting the reliability of such examination, test or investigation;
 - k. a declaration that the expert has made all the inquiries and considered all the issues which the expert believes are desirable and appropriate, and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld.
- 6.2 Where the nature of the expert report makes it impracticable or inappropriate to comply with one or more of the requirements of 6.1, the report should identify the non-compliance and provide an explanation for it.
- 6.3 Where an expert is aware of any significant and recognised disagreement or controversy within the relevant field of specialised knowledge, which is directly relevant to the expert's ability, technique or opinion, the expert must disclose the existence and nature of that disagreement or controversy.
- 6.4 An expert report should not –
- simply rely on diagnostic labels;
 - simply record opinions or conclusions; or
 - uncritically repeat statements by the subject about prior psychiatric/psychological diagnoses or treatment.
- 6.5 When an expert conducts a psychometric assessment for the purposes of preparing a report, the expert should ensure that:
- a. he/she meets the user qualifications specified for the assessment measure(s) administered (i.e. is appropriately trained and experienced in the administration of the particular measure(s) administered);
 - b. the measure(s) administered are well-accepted for the purposes for which they are being used, and are appropriate for use in Australia;

- c. the most up-to-date version of the measure(s) is being used. (Where relevant professional considerations support the use of an older version of a measure, these should be clearly stated in the report);
- d. the measure(s) being administered are appropriate for use within the specific population to which the subject belongs (e.g. culture, gender, disability, language);

(Note: There are circumstances in which validated psychometric measures may not be available for a particular population. In some cases, it may still be appropriate to administer a measure to obtain information to assist with an assessment. In such cases the report writer must specify the non-standard use of the test and any possible limitations that it may have on the results obtained.)
- e. any non-standard administration of the measure is noted in the report, along with any potential limitations on the results obtained;
- f. due consideration has been given to the validity of the response of the subject (e.g. response style, dissimulation, malingering); and
- g. all measures administered are reported appropriately.

6.6 When a report includes matters reported by the subject, the expert should comment on –

- the clinical plausibility of the self-report; and
- any discrepancies between the self-report and other information available to the expert.

6.7 A report prepared by the subject's treating practitioner should be confined to information relevant to treatment provided to the subject (e.g. presenting signs and symptoms, diagnosis, clinical formulation, treatment, treatment response and treatment needs).

7. SCOPE AND LIMITS OF EXPERT'S OPINION

7.1 Under current Victorian law, impaired mental functioning, whether temporary or permanent ("the condition"), may be relevant to sentencing in a number of ways. Principally, the condition may:

- a. reduce the moral culpability of the offender, as distinct from the offender's legal responsibility;
- b. have a bearing on the kind of sentence that is imposed and the conditions in which it should be served;
- c. moderate or eliminate the importance of general deterrence as a sentencing consideration;
- d. moderate or eliminate the importance of specific deterrence as a sentencing consideration;
- e. mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health; and/or

- f. create a serious risk that imprisonment will have a significant adverse effect on the offender's mental health.
- 7.2 For this purpose, "impaired mental functioning" covers any mental disorder or abnormality, and is not limited to impairments which constitute, or reflect, a serious mental illness.
- 7.3 It is for the sentencing judge to decide whether any of the sentencing considerations listed in 7.1 above is applicable to the case before the court. It is beyond the scope of an expert report to express an opinion on whether any of those considerations is applicable to the exercise of the sentencing discretion.
- 7.4 The expert report should state the expert's opinion as to the following matters, so far as applicable:
- the nature, extent and effect of the condition experienced by the subject at the time of the offending and/or at the time of sentence;
 - how the condition affected, or is likely to have affected, the mental functioning of the subject at the time of the offending or in the lead up to it;
 - how the condition is likely to affect the subject in the future and whether this has implications for the type of sentence which the judge should consider;
 - whether the condition would be likely:
 - i. to affect adversely the ability of the subject to cope with imprisonment; and/or
 - ii. to deteriorate as a result of the subject being imprisoned.
- 7.5 In relation to sentencing consideration 7.1(a), the sentencing judge will ordinarily be investigating whether the evidence establishes a 'realistic connection' between the impairment and the offending. Any expert opinion to the effect that such a connection existed must state, as precisely as possible, how the particular condition was (or is likely to have been) operative at the time and how it was (or is likely to have been) connected with the offending.
- 7.6 Where the expert opinion concerns the likely impact of the condition on the experience of punishment and/or the likely impact of imprisonment on the condition, the report must state as precisely as possible the basis for each such opinion.
- 7.7 Any opinion expressed with respect to the subject's remorse, or lack of remorse, must state as comprehensively as possible the basis of the opinion. If the expert concludes that a lack of remorse is the result of the condition, this should be pointed out.
- 7.8 In relation to the subject's prospects of rehabilitation, the report should where appropriate identify:
- possible therapeutic and rehabilitative options for the subject;
 - the subject's particular rehabilitation needs;
 - any aspects of the subject's mental functioning which may impede

rehabilitation; and

- any implications of the condition for the risk of future offending.

8. SERVICE OF EXPERT EVIDENCE

8.1 A party wishing to introduce expert evidence must:

- where the report is a primary expert report, serve it on each other party as early as reasonably practicable and, in any event, no less than 14 days before the date fixed for the sentencing hearing; or
- where the report is a responding expert report, serve it on each other party as early as reasonably practicable and, in any event, no less than 48 hours before the hearing date.

8.2 A party may not introduce expert evidence if that party has not complied with 8.1, unless:

- every other party agrees; or
- the Court gives leave.

9. ACCESS TO MATERIALS

9.1 If a recipient party so requests, the commissioning party must, subject to 9.3, give that party a copy of, or ensure that the party has a reasonable opportunity to inspect:

- the instructions and material given to the expert by the commissioning party;
- any notes made by or on behalf of the expert in connection with the preparation of the expert report;
- a record of any examination, test or investigation on which the expert's findings and opinions are based or that were carried out in the course of reaching those findings and opinions.

9.2 A party may not introduce expert evidence if that party has not complied with 9.1, unless:

- every other party agrees; or
- the Court gives leave.

9.3 A commissioning party or the expert may withhold material referred to in 9.1 on any basis upon which objection could be taken if the material had been required to be produced under subpoena.⁴

9.4 Where material is withheld in reliance on 9.3, the commissioning party must ensure that the recipient party is aware of the withholding and the reason for it.

⁴ The Code of Ethics of the Australian Psychological Society prohibits a registered psychologist from disclosing to unauthorised persons the content of psychological tests and assessment methods.

9.5 The Court may resolve any dispute in relation to the withholding of material under 9.3.

10. AVAILABILITY OF EXPERT TO OTHER PARTIES

10.1 A party who serves an expert report on another party must:

- promptly inform the expert of that fact; and
- if so requested by a recipient party, arrange for the expert to be available for interview by that party and/or his/her representatives.

10.2 Unless the Court otherwise orders, the expert is not obliged to consent to be interviewed.

10.3 When an interview takes place pursuant to a request by a recipient party, the commissioning party is entitled to be present and/or be represented at the interview.

10.4 Subject to 10.3, the parties may settle the conditions upon which the interview is to be conducted, including as to whether the content of statements made during the course of the interview may be referred to in Court. The Court may resolve any dispute about this.

10.5 Unless otherwise agreed, the party requesting the interview bears the cost of the interview.

11. PRE-HEARING DISCUSSION OF EXPERT EVIDENCE

11.1 This rule applies where more than one party wants to introduce expert evidence on the same issue or on related issues.

11.2 The Court may direct the experts to:

- discuss the expert issues in the proceedings; and
- prepare a statement for the Court of the matters on which they agree and disagree, giving their reasons.

11.3 Except for that statement, the content of that discussion must not be referred to at the sentencing hearing of the accused without the Court's permission.

11.4 The Court may convene a hearing at which:

- the Court or any party may seek clarification of any aspect of the expert evidence; and
- the Court may direct the experts to identify and, if possible, narrow the areas of disagreement.

11.5 A party may not introduce expert evidence without the court's leave if the expert has not complied with a direction under 11.2 or 11.4.

12. CONSECUTIVE OR CONCURRENT EVIDENCE

12.1 Where:

- two or more parties have served expert evidence relating to the same issue or relating to two or more closely related issues;
- the commissioning parties agree; and
- the Court so orders,

evidence may be given by the experts consecutively (i.e. one after the other) or concurrently (i.e. with all of the experts present in court, sworn or affirmed at the same time).

12.2 The procedure to be followed for consecutive or concurrent evidence is to be determined by the Court, with the expectation that the parties will have conferred in advance and attempted to agree on the procedure.

13. COURT'S POWER TO VARY REQUIREMENTS UNDER THIS PRACTICE NOTE

13.1 The Court may:

- extend (even after it has expired) a time limit under this Practice Note;
- allow the introduction of expert evidence which does not comply with the requirements of this Practice Note.

13.2 A party who wants an extension of time must:

- apply when serving the expert evidence for which it is required; and
- explain the delay.

14. REVIEW OF OPERATION OF PRACTICE NOTE

14.1 The operation of this Practice Note will be monitored by the Forensic Evidence Working Group.

14.2 The Working Group will conduct a consultative review of the Practice Note at the conclusion of the first 12 months of operation (30 June 2018).

AMENDMENT HISTORY

30 March 2017: This Practice Note was issued on 30 March 2017.

Vivienne Macgillivray
Executive Associate to the Chief Justice
30 March 2017

15. SCHEDULE A

DETERMINING EXPERTISE FOR PSYCHOLOGISTS

Psychologist	<p>A practitioner registered with the Psychology Board of Australia (PsyBA) within Australian Health Practitioner Regulation Agency (AHPRA).</p> <p>Must have <i>at least</i> six years of training and experience comprising <i>at least</i> four years of academic study and <i>at least</i> one year of supervised experience.</p> <p>Endorsed psychologists normally have a minimum of a Masters degree in the relevant area of psychology plus two years supervision or a Doctorate plus one year of supervision.</p>
Australian Psychological Society (APS)	<p>The main professional body for psychologists. Not all psychologists are members and there are other (smaller) bodies that represent psychologists.</p> <p>Members may use the post-nominal MAPS.</p> <p>Fellowship of the APS (FAPS) is awarded based on exemplary contributions to the APS and to the discipline and/or the profession of psychology.</p>
College Member	<p>A psychologist who is a member of one of the nine APS Colleges. Colleges mirror the areas of endorsement and the eligibility requirements are currently identical.</p>
Clinical Psychologist	<p>A psychologist with additional qualification, advanced supervised practice, and experience in the assessment and treatment of mental disorders, who has been recognised by the Psychology Board of Australia as having an endorsement in clinical psychology.</p> <p>Has received advanced training in diagnosis and assessment, and has had experience treating patients who have been diagnosed with mental disorders.</p> <p>Only psychologists with an AHPRA endorsement in the area of clinical psychology may use this title.</p> <p>Most are members of the APS College of Clinical Psychologists. If so, may use MCCLP (Member, College of Clinical Psychologists).</p>

<p>Forensic Psychologist</p>	<p>A psychologist with additional qualification, advanced supervised practice, and experience in the application of psychology to legal contexts, who has been recognised by the Psychology Board of Australia as having an endorsement in forensic psychology.</p> <p>Has received advanced training in issues such as offender management, risk assessment, rules of evidence as they relate to psychology, and the issues associated with the presentation of expert evidence.</p> <p>Only psychologists with an AHPRA endorsement in the area of forensic psychology may use this title.</p> <p>Most are members of the APS College of Forensic Psychologists. If so, may use <i>MCFP</i> (Member, College of Forensic Psychologists).</p>
<p>Clinical Neuro-psychologist</p>	<p>A psychologist with advanced training and experience in the assessment of neurological and mental disorders and the ability to explain their relationship to cognitive function, including language, perception and action.</p> <p>Has received advanced training in reporting the relative impact on behaviour and thought of the following: (i) cognitive abilities such as attention, memory and executive capacity; (ii) substance use; (iii) acquired brain injury (including degenerative and stroke disorders); (iv) mental illness; (v) developmental disorders; (vi) behaviours of concern (e.g. impulsivity); and (vii) personality.</p> <p>Only psychologists with an AHPRA endorsement in the area of Clinical Neuropsychology may use this title. Most are members of the APS College of Clinical Neuropsychologists. If so, they may use <i>MCCN</i> (Member, College of Clinical Neuropsychologists).</p>

ASSESSMENT GUIDELINES

Advanced Standing. A psychologist should be recognised by their peers and/or by the regulating agency as holding relevant advanced standing in their area of practice. This is generally signified by endorsement and/or College membership in a relevant area of psychology.

Some psychologists without endorsement or College membership may, nevertheless, possess knowledge, skills and expertise that have not been 'officially' recognised (e.g. academics and *PhD* psychologists who completed their doctorate in a relevant field but who did not complete a relevant Master's degree and so are not eligible for either endorsement or College membership). Such expertise would typically be evident from an examination of the individual's CV.

Relevant Experience. In addition, it is necessary to establish that the psychologist's professional experience is relevant to the area upon which they are being asked to offer a professional opinion. For example, relatively few psychologists have expertise in understanding the relationship between mental illness and offending, which would limit their capacity to offer expert opinions in the areas of risk assessment and offender management of mentally ill offenders. Similar comments are germane for issues such as sexual offending and addiction.

Statement of qualifications and experience

A statement of qualifications and experience should state:

- a) whether the psychologist holds an endorsement from and/or membership of a relevant College (and specifically which ones);
- b) if not, the relevant qualification upon which the claim to expertise is based; and
- c) details of the specific experience in assessing and/or treating the relevant client group.

Probationary psychologist, Registrar, or Intern means that the person is not credentialled for independent practice and must practise under supervision of a registered and endorsed psychologist. Supervision does not require that the supervisor is present for the assessment but must have countersigned the report to indicate that the supervisor has discussed the assessment and report in supervision and accepts that they support the findings of the trainee.

SCHEDULE B
DETERMINING EXPERTISE FOR PSYCHIATRISTS

Consultant – means has completed specialist training and is accredited by the Royal Australian and New Zealand College of Psychiatrists (RANZCP).

Sometimes the person is *acting consultant* or has an overseas qualification, and is employed in Australia as a consultant while pursuing the Fellowship of the RANZCP.

So seek the post-nominals FRANZCP. If these are not present, explore the alternatives. MRCPsych means Member of the Royal College of Psychiatrists (UK). But this is not a consultant qualification without a Certificate of Completion of Specialist Training (CCST). There may be other pathways which are similar.

Registrar, Trainee, Medical Officer or Career Medical Officer means that the person is not credentialed for independent practice and must practice under supervision. Supervision does not require that the supervising FRANZCP (must be this) is present for the assessment but must have countersigned the report to indicate that they take responsibility – this usually means it has been discussed in supervision and the consultant in countersigning accepts that they support the findings of the trainee.

As an aside, for the purposes of court reports it is worthwhile that the court accepts trainees (so long as reports are prepared under supervision). This enables training of registrars to produce quality reports. The equivalent is of pupillage in barrister training.

Academic titles include Professor, Associate Professor, Senior Lecturer, Lecturer or Fellow. These indicate a sole or conjoint appointment with a university. They may denote that the person is involved in teaching or in research, but not necessarily. A CV will set out any teaching experience or academic publications. This is of particular relevance when the expert claims academic experience in the field, and is perhaps best investigated by review of CV to satisfy the Court that the research experience is relevant and sufficient.

To credential a psychiatrist in court, the court should be satisfied of the following elements.

The list is in order of specialisation. For treating and professional witnesses, the latter fields are of less relevance, but in expert reports (particularly those which raise any concerns, are germane to disposition and may be contested), areas of clinical experience and expertise become increasingly salient:

- The **basic medical qualification** (MBBS, MD etc).

- A **specialist psychiatric qualification** enabling individual practice. A search on AHPRA register will confirm specialist registration in psychiatry. FRANZCP (but not MRANZCP) indicates this, although there may be alternative pathways to specialist recognition.
- **Evidence of forensic specialisation:** Accredited Membership of the Forensic Faculty of the RANZCP or a certificate of Advanced Training in Forensic Psychiatry. Other certificates may be relevant, eg Child and Adolescent Psychiatry. While this is perhaps less important, it still demonstrates a degree of specialisation.
Note: Membership (without accreditation) of the Forensic Faculty of the RANZCP, does not imply any specialised forensic knowledge or expertise.
- **Any other relevant qualifications** (eg in law, criminology or areas of specialisation relevant to the topic in court). A higher degree such as PhD is of particular relevance.