



## DEATH PENALTY AND MENTAL HEALTH

### Factsheet for Lawyers

#### 12<sup>th</sup> World Day Against the Death Penalty

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On 10 October 2014, the World Coalition Against the Death Penalty and other abolitionists worldwide will mark the 12<sup>th</sup> World Day Against the Death Penalty by drawing attention to the special concerns faced by accused and condemned prisoners with mental health problems. While opposing the death penalty absolutely, abolitionists are also concerned to see existing protections implemented. Among these is the requirement in human rights standards that persons with serious mental illness or intellectual disabilities should not face the death penalty.

#### Background

The death penalty, where it is provided for in law, is required to be reserved for the most serious offenders (the “worst of the worst”) and to offer the highest level of protection for those subject to it. International standards provide protection for specific populations who should never be subject to execution: children, pregnant women and “the insane”. However, “The real difficulty with the safeguard lies not in its formal recognition but in its implementation. (...) There is an enormous degree of subjectivity involved when assessing such concepts as insanity, limited mental competence and ‘any form of mental disorder’. The expression ‘any form of mental disorder’ probably applies to a large number of people sentenced to death.”<sup>1</sup>

While the death penalty remains, persons with mental disabilities are at risk of being sentenced to death and executed in breach of international standards. **This briefing paper provides concrete examples of what can be done to address this risk, including by ensuring that adequate mental health expertise is available for defendants in capital cases in which mental or intellectual disabilities are claimed as a factor.**

#### What Does a Mental Disability Mean for My Client?

Depending on the type of mental disability your client possesses and the jurisdiction in which you are practicing, your client’s mental disability may relieve him of criminal liability, disqualify him from death penalty eligibility, or serve as a mitigating factor in sentencing procedures. It is often extremely difficult for lawyers to assess whether their clients have a mental disability. It is impossible if you do not take the time to meet with your client on a regular basis. Spending time with your client is essential to develop trust, identify potential mitigating evidence and present an effective defense.

#### What Kinds of Mental Disabilities are Relevant?

The term “mental disability” refers to a broad range of possible conditions.<sup>2</sup> As a result, the mental health of your client can mean many different things for the outcome of his case. If you can

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<sup>1</sup> Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General. UN Doc. E/2010/10, December 2009.

<sup>2</sup> The Special Rapporteur on Health has observed that the term “persons with mental disabilities” encompasses an almost unmanageably broad spectrum of impairments and conditions, ranging from intellectual disabilities to severe psychiatric disorders. Report of the Special Rapporteur on the Right to Health, E/CN.4/2005/51 (Feb. 11, 2005), ¶ 19.

determine that your client was insane at the time the crime in question was committed, you may be able to prevent trial in the first place: in many, if not most legal systems, insanity is grounds to eliminate criminal responsibility altogether. If your client is mentally incompetent, you may be able to argue that he is ineligible for the application of the death penalty, as international law proscribes the execution of individuals with such conditions.<sup>3</sup> Even if your client's mental disability is not severe or is not significant enough to make him ineligible for the death penalty, it may serve as a critical piece of mitigating evidence during sentencing procedures.

### What are mental disabilities?

The language of disability is rapidly changing. Terms from the medical and legal fields such as mental illness and mental retardation are being supplemented by terms from the disability advocacy movement such as psychosocial disability (rather than mental illness) and intellectual disability (rather than mental retardation). However most death penalty laws retain earlier terminology and for that reason it is hard to avoid the existing legal terms.

- **“Insanity”**. This term which still appears within legal and legislative terminology refers to persons' capacity to understand “the nature and quality” of their acts or, if they did understand it, not to know of the wrongness of their action. “Insanity” is not found in psychiatric diagnostic manuals – it is a legal term.
- **Mental illness / Psychosocial disability**. These terms refer to: (i) a medical or psychological condition that disrupts a person's thinking, feeling, mood, ability to relate to others and daily functioning<sup>4</sup>; (ii) the interaction between psychological and social/cultural components of ... disability. The psychological component refers to ways of thinking and processing... experiences and...perceptions of the world...The social/ cultural component refers to societal and cultural limits for behaviour that interact with those psychological differences/madness as well as the stigma that society attaches to ...[the]...label ...of... disabled.<sup>5</sup>
- **Mental retardation / Intellectual disability / Intellectual Developmental Disorder** is a disorder with onset during the developmental period that includes both intellectual and adaptive deficits in in conceptual, social and practical domains.<sup>6</sup> With appropriate support, people with intellectual disability can function semi-independently, but will always have significant deficits and support needs.
- **Organic brain injury**. This refers to injury to the brain caused by a variety of traumatic events such as blows to the head, car accidents, or falls, or events such as asphyxiation, stroke, and substance abuse. The impact of these events is to decrease the capacity of the brain to function effectively leading to cognitive impairments which may (depending on the age at which the injury occurred, and the existence of sufficient adaptive deficits), to also cause the individual to be diagnosed with intellectual disability.
- **Degenerative brain disorders**. These include dementia and usually occur in later life, causing limits to intellectual functioning.

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<sup>3</sup> The HRC has also found that the reading of a warrant for execution to a mentally incompetent person violated ICCPR Article 7. In 1984, ECOSOC addressed itself to the issue for the first time and concluded that the death sentence is not to be carried out on persons who are insane. In its resolution on implementation of the Safeguards, ECOSOC proposes non-execution of persons suffering from mental retardation or extremely limited mental competence. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, p. 325.

<sup>4</sup> National Alliance on Mental Illness. What is mental illness? [http://www.nami.org/Template.cfm?Section=By\\_Illness](http://www.nami.org/Template.cfm?Section=By_Illness)

<sup>5</sup> World Network of Users and Survivors of Psychiatry, 2008, Implementation Manual for the UN Convention on the Rights of Persons with Disabilities.

<sup>6</sup> The principal US organization on intellectual disability—the American Association on Intellectual and Developmental Disabilities -- changed terminology from “mental retardation” to “intellectual disability” in 2005. The American Psychiatric Association has adopted the term “Intellectual Disability (Intellectual Developmental Disorder)” in its most recent diagnostic manual (DSM-5 Guidebook, p. 34). The WHO is expected to do likewise in the forthcoming edition of its diagnostic manual (ICD-11).

## The Importance of a Mental Health Assessment

The most important form of evidence you can use to support your client's claim of mental disability is an official assessment by a mental health expert. Many courts have held that individuals have a right to a mental health assessment prior to being sentenced to death,<sup>7</sup> and you should do your utmost to ensure that any assessment is conducted in accordance with the highest professional standards.

### **There are very few qualified psychiatrists in the region where I practice. How can I obtain a competent assessment of my client's mental health?**

- Even if there are no qualified psychiatrists in your region, most jurisdictions have devised a method by which to evaluate a defendant's mental health. Mental health assessments are sometimes carried out by qualified nurses or individuals with forensic training, even if they are not officially licensed. If you believe your client has a mental disability or illness, the court will often refer the defendant to a mental hospital or clinic where the assessment will be conducted.

- In regions where qualified mental health professionals are lacking, the standards for forensic assessments can be quite low. Because your client's mental health is highly relevant to his culpability and to his sentencing, you should do everything possible to consult with the individual who is carrying out the evaluation. This is important for several reasons. First, you may have critical background information relevant to your client's mental health. If your client is uncommunicative or resistant to disclosing information about his mental illness, the person conducting the assessment may erroneously conclude that he does not suffer from a mental disability. Second, if you later intend to challenge the conclusions of the forensic assessment (for example, if you are raising an insanity defense and the forensic evaluation concluded that your client was not insane), you should learn as much as possible about the amount of time the forensic expert spent with your client, the testing methods he utilized, and his qualifications and training. Third, by meeting with the forensic expert you can help educate him about the scope of the evaluation in a legal context. This is particularly important when you are trying to establish that your client has a mental disability relevant to the sentencing determination.

### **Who Should Conduct the Assessment?**

While it is best that you seek out the assistance of a psychiatrist in this assessment, if one is not available, medical experts with training in psychology or social workers can assist in determining whether your client possesses a mental disability.

### **What Standards Should the Assessment Follow?**

There are no universal standards guiding mental health assessments for legal purposes, but the Diagnostic and Statistical Manual of Mental Disorders (DSM IV-TR) is a widely respected resource. Published by the American Psychiatric Association, it catalogs mental health disorders for children and adults and is used in many countries outside the United States. That said, the DSM is largely a product of research conducted in the United States, and its diagnostic criteria may not translate reliably across all cultures. Your client's mental health assessment should not be limited to disorders contained within the DSM IV-TR or disorders that may disqualify the defendant from criminal liability or death penalty eligibility.

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<sup>7</sup> See, e.g., *Pipersburgh v. R*, 72 WIR 108, ¶ 33 (2008) ("It is the need to consider the personal and individual circumstances of the convicted person and, in particular, the possibility of his reform and social re-adaptation which makes the social inquiry and psychiatric reports necessary for all such sentence hearings."). See also *DPP Spencer v. Che Gregory*, E. Carib. Sup. Ct., High Ct. of Justice (2009), *Federation of St. Christopher & Nevis*, ¶ 3 ("It is also now standard practice for the state to provide a Social Enquiry Report and a Psychiatric Report.").

## **How Can the Mental Health Assessment Be Used?**

You may be able to use a mental health assessment at a number of different stages throughout the capital defense process: even if the client is not incompetent or insane, other psychiatric conditions may serve as valuable mitigating factors and contribute to a reduced sentence.

The case of *Uganda v. Bwenge Patrick* is an excellent example of the use of mental disabilities as mitigating factors in a sentencing procedure.<sup>8</sup> There, Uganda's High Court re-sentenced a former death row inmate who had been imprisoned for seventeen years. The Court gave special significance to evidence surrounding the defendant's impaired mental state at the time of the offence, his history of alcohol addiction, the fact that he had maintained strong ties with his family throughout his long incarceration, his good relations with other prisoners, his remorse, and the lengthy period of time he had already served in prison. Based on these mitigating factors, the High Court found that the offender did not merit a death sentence, and it re-sentenced him to the seventeen years already served, along with an additional year in prison followed by a year of probation.

### **What can I do if I don't have funds to hire an expert?**

- First, consider asking for funds from the court. In many jurisdictions, lawyers file written motions asking for funding from the courts for necessary expert assistance. Remember, if you require expert assistance to effectively defend your client, it is critical that you make a written record regarding your inability to hire the expert. Your client has a right to a competent defense, and if you are deprived of necessary funding because your client is indigent, his rights to due process, a fair trial, and equal protection are at stake.
- If no funds are available, consider reaching out to universities that teach psychology and forensic assessment. You may also be able to find qualified individuals to conduct the assessment on a pro bono basis.
- In the alternative, you can look for qualified individuals who may not be licensed, but may be able to provide you with valuable information about your client. If they encountered your client before his arrest and can testify regarding his mental state, their testimony will still be relevant to the court's assessment of his culpability as well as its sentencing determination.
- As a last resort, some websites have information that will not necessarily help you in court, but could give you some direction.

## **What Other Duties Do I Have to a Client with Mental Disabilities?**

Your client's mental disability may cause him to be more vulnerable to the complications of the legal system and the dangers of incarceration. As a result, you have special responsibilities to ensure he understands his rights at all times and ensure he is treated properly while incarcerated.

### **Ensuring Your Client Understands His Legal Rights**

Individuals with disabilities may not completely understand their rights as they maneuver through the criminal justice system.<sup>9</sup> You must ensure that your client understands his rights and the procedures he is facing, taking care to explain the process at every step. You might also consider taking special steps to meet with the client on a regular basis, as your client may not be able to express a desire to meet with you when needed or may not understand how to request a meeting.

### **Ensuring Your Client Receives Treatment**

You should also take steps to ensure that your client receives adequate treatment while he is incarcerated. Nearly all of the central international human rights mechanisms provide for a right to an adequate standard of living and health care, and the U.N. Standard Minimum Rules for the

<sup>8</sup> *Uganda v. Bwenge*, HCT-03-CR-SC-190/1996 (2009).

<sup>9</sup> U.N. Office of Drugs and Crime, Handbook on Prisoners with Special Needs, p. 12 (2009), available at [www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf).

Treatment of Prisoners mandate that the standards set by these mechanisms should be applied unwaveringly in prisons.

You should ensure that your client is assessed by a mental health professional as soon as he is admitted to prison.<sup>10</sup> This allows medical staff to identify any pre-existing medical conditions to ensure that appropriate treatment is provided, identify disabilities or injuries that may be developing or may have been sustained during initial detention, and it will allow staff to analyze the mental state of the prisoner and provide appropriate support to those who may be at risk for self-injury.<sup>11</sup> You should also ensure your client receives periodic examinations, including daily checkups if he complains of illness.

#### **What should I do if I think my client won't consent to a psychological evaluation?**

- First, be sure. Address your client directly and let him know why you think an evaluation would be helpful to their case. There are taboos surrounding mental disabilities in many cultures, so be respectful and avoid making him feel like you think there is something "wrong" with him. Again, being honest and forthcoming, while remaining considerate and respectful will make it easier for both you and your client to have this conversation and address the issue.

- If your client still refuses, you have a difficult decision to make. If you strongly believe that it is in his best interest to have an evaluation, you may be able to get a court to order the evaluation. However, this could damage your relationship with your client and his trust in you. You must carefully weigh a number of competing factors: the extent of your client's disability, the likelihood that he will be sentenced to death if evidence of his disability is not presented, and the availability of other defenses to the crime. In many cases, you will find that the need for an evaluation outweighs the potential harm to your lawyer-client relationship.

#### **Mental Health Developments During Incarceration**

If your client develops a disability over the course of his incarceration, you should raise this issue in all appeals and clemency proceedings, since international law prohibits the execution of individuals with severe mental disabilities. You should also take care to inform family members of any significant change in mental health.<sup>12</sup> If a client has been determined to be incompetent, you should also ensure that the client is removed from the prison entirely and given access to appropriate treatment.

#### **Legal Commentary on Mental Illness and Intellectual Disability**

For legal commentary on intellectual disability, please visit:

<http://www.deathpenaltyworldwide.org/mental-retardation.cfm>

#### **Acknowledgements:**

This sheet is an abstract from the guide "Representing Individuals Facing the Death Penalty: A Best Practices Manual" and from a memorandum prepared by Mr James Welsh, a former researcher and adviser on 'Health and Detention' at Amnesty International.

Full Manual available here: <http://www.worldcoalition.org/defense-manual-lawyers-capital-cases-death-penalty-mitigating-babcock-training.html>

Full Factsheet available here: [www.worldcoalition.org/worldday](http://www.worldcoalition.org/worldday)

<sup>10</sup> Standard Minimum Rules, ¶ 24, (1977) U.N. Doc. A/CONF/611, annex I.

<sup>11</sup> International Centre for Prison Studies, *A Human Rights Approach to Prison Management*, p. 50, available at [www.prisonstudies.org](http://www.prisonstudies.org).

<sup>12</sup> Standard Minimum Rules, ¶ 44, 82 (1977) U.N. Doc. A/CONF/611, annex I.