11. Summary jurisdiction

Summary jurisdiction overview

Part 2 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 deals with the procedures for diverting people with mental health and cognitive impairments and people who are mentally ill or mentally disordered in the Local Court in summary proceedings. The objective of Pt 2 is to enable the Court to divert persons who suffer from a mental health or cognitive impairment from the summary court process if they are unfit to be tried or have a defence of mental health impairment or cognitive impairment.

Part 2 is substantially similar to ss 32 and 33 of the former Act. The old provisions have been expanded into a number of sections to provide an improved structure and greater guidance for magistrates to frame orders.

The changes made in the Act include:

- use of the new definitions of mental health impairment and cognitive impairment (see ss 4, 5)
- an increase in the enforcement period of s 14 orders from six months to 12 months (see s 16(4))
- a list of the factors a magistrate may consider when dealing with an application for a diversionary order in Div 2; and
- extending the opportunity for diversion to people who are “mentally ill” or "mentally disordered” (see Pt 2, Div 3).

Part 2 Div 2 deals with defendants with mental health impairments or cognitive impairments.

Part 2 Div 3 deals with mentally ill or mentally disordered persons.

Defendants with mental health impairments or cognitive impairments – Part 2 Div 2

Changes to definitions

The definition of a “mental illness” and “mental condition” found in the *Mental Health Act* 2007 has been replaced by the term “mental health impairment” which is defined in s 4 and ”cognitive impairment” which is defined in s 5. See further ***2 Defining mental health and cognitive impairment***.

Section 4 — Mental health impairment

(1) For the purposes of this Act, a "**person has a mental health impairment**" if —

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

(2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons—

(a) an anxiety disorder,

(b) an affective disorder, including clinical depression and bipolar disorder,

(c) a psychotic disorder,

(d) a substance induced mental disorder that is not temporary.

(3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by—

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

Section 5 — Cognitive impairment

(1) For the purposes of this Act, a "person has a cognitive impairment" if—

(a) the person has an ongoing impairment in adaptive functioning, and

(b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and

(c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (2) or for other reasons.

(2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons—

(a) intellectual disability,

(b) borderline intellectual functioning,

(c) dementia,

(d) an acquired brain injury,

(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,

(f) autism spectrum disorder.

Diversion in the Local Court

Section 12 sets out the criteria for eligibility for a diversionary order.

Section 12 is a *diversionary* procedure which allows the Court to dismiss charges (usually subject to conditions) instead of proceeding "according to law" in the normal way. Section 12

and the other provisions in Pt 2, Div 2 *do not apply* to "mentally disordered persons" and "mentally ill persons": s 12(3).

A s 12 application may be made at any stage of the proceedings without the need for a plea to be entered. However, if there has already been a guilty plea or a finding of guilt, this does not preclude a s 12 application. Section 9 of the Act makes it clear that a plea does not have to be entered.

A s 12 discharge does not amount to a finding that the offence is proved; nor does it amount to an acquittal. It will appear on the defendant's criminal history (on their bail report) but not on their conviction record.

Section 12 is not just an alternative sentencing option for people with cognitive or mental health impairments. Diversion also includes accommodating defendants with cognitive and mental health impairments who may have great difficulty with traditional criminal justice processes and especially with defended hearings.

Section 12 does not apply to federal offences: *Kelly v Saadat-Talab [2008] NSWCA 213; (2008) 72 NSWLR 305*. However, s 20BQ of the *Crimes Act* 1914 (Cth) is in broadly similar terms. See ***9 Commonwealth provisions*****.**

The test for a s 12 application

There are two limbs to the section.

Firstly, the defendant must have, either at the time of the alleged offence or the time of the court appearance, a mental health impairment or cognitive impairment, or both.

Second, the magistrate must decide it is more appropriate to deal with the matter under s 12 than according to law.

It was suggested by the Court of Appeal in *DPP v El Mawas [2006] NSWCA 154*; *(2006) 66 NSWLR 93*, and now seems widely accepted, that there was a third limb under the old s 32, that is, is there an appropriate case plan or treatment plan? This has not changed under the current Act.

Interim Orders — s 13

A Court may make interim orders under s 13 if considering making a diversionary order under s 12 including:

> (a) adjourning proceedings to enable
>
> > (i) the defendant's apparent mental health impairment or cognitive impairment to be assessed or diagnosed, or
> >
> > (ii) the development of a treatment or support plan for the defendant for the purposes of an order, or
> >
> > (iii) a responsible person to be identified for the purposes of an order, or
> >
> > (iv) for any other reason the Magistrate considers appropriate in the circumstances, or
>
> (b) any other interim orders that the Magistrate considers appropriate.

See the discussion below under *Final orders – s 14* on 'responsible person' and the requirement to specify the place or person.

Factors magistrate may take into account – s 15

Section 15 is a new provision setting out a list of the factors a magistrate may take into account when dealing with an application. These largely reflect the common law. Note the use of "may" (not "must") and the inclusion of a catch-all "other relevant factors".

As with the old s 32, a magistrate may make an order at any time during the proceedings. Section 9 of the Act adds "whether or not the defendant has entered a plea" and also makes clear that an order may be made on application or on the magistrate's own initiative.

Final orders – s 14

Section 14 sets out the final orders that a magistrate may make. These are identical to the final orders under s 32(3) of the former Act.

Section 14 provides that the magistrate may make the following final orders, dismissing and discharging the defendant:

a) into the care of a responsible person, unconditionally or subject to conditions, or

b) on condition that the defendant attend on a person or place specified for assessment treatment or the provision of support, or

c) unconditionally.

Unconditional dismissals are rare but may be appropriate for trivial matters, or for old matters where the client has undergone a long period of treatment and has stabilised.

There is no legislative requirement for a case plan or treatment plan, it arises from the common law, and was originally set out in *Perry v Forbes (unrep, NSWSC 21 May 1993)*, in the context of relatively serious and persistent offending. However, s 7 now defines a treatment or support plan as "a plan outlining programs, services or treatments or other support that may be required by a defendant to address the defendant's apparent mental health impairment or cognitive impairment". Note a "support plan" is the appropriate term for a cognitively impaired person as they are unlikely to respond to medical treatment.

The responsible person will often be the client's treating psychiatrist, psychologist or general practitioner. However, the responsible person does not have to be a medical or mental health practitioner. In practice, the discharge into the care of a responsible person will usually be accompanied by conditions requiring the defendant to adhere to a case plan.

Orders for assessment or treatment (or both) of the defendant's mental condition or cognitive impairment, or to enable the provision of support in relation to the defendant's cognitive impairment may be appropriate where there is no individual to nominate as a responsible person but where the client regularly attends a community mental health centre or other service.

DPP (NSW) v Saunders [2017] NSWSC 760 per R A Hulme J held that the specified place or person must be named. In this case, the magistrate was dealing with a defendant who was about to be released from custody and was still not certain where he would be living. The magistrate discharged him under s 32(3)(b) of the former Act on the condition that he attend his closest community mental health centre for treatment. The Supreme Court held that this was impermissible and that a specific person or place must be nominated.

RA Hulme J (at [45]) discussed the importance of there being a regime for enforcement of s 32 (now s 14) orders. He then said (at [47]:

> A failure to name a particular person or a particular place renders the enforcement provisions in relation to a conditional discharge under s 32 virtually nugatory. In the present case, there is no guarantee that "a psychiatrist" who may be consulted by the defendant "for a medication review" will know that he or she is seeing the defendant pursuant to a court order. In those circumstances, there is a most unlikely prospect of such psychiatrist knowing that he or she may report a failure to comply (s 32A).

Enforcement

Under s 32 of the former Act it was held that the order is binding on the defendant only and cannot compel any agency to provide services: see *Minister for Corrective Services v Harris (unrep, NSWSC 10 July 1987)*. This is well understood by most magistrates.

The above case has sometimes been interpreted as meaning that a person named as the "responsible person" does not have any obligations under the order. This is not what the case says. However, it is clear that the "responsible person" has no legal mandate to supervise the s 32 (now s 14) order (unlike, for example, a probation officer or JJO supervising a community-based sentence).

Nor is there any legislative framework for requiring the responsible person to sign an undertaking (cf. a surety or acceptable person under the *Bail Act*). The magistrate will often ask the responsible person to undertake to notify the Court in the event of a breach, but it is not clear how enforceable these undertakings are.

Section 16 provides that a defendant who is dealt with by way of an order under s14 may be brought back to Court at any time within the next 12 months to be further dealt with if the magistrate suspects they have failed to comply with a condition of the order.

Note that there is no *obligation* for a treatment provider or "responsible person" to notify the Court in the event of a breach. Under the former Act, magistrates dealing with a s 32 application had on occasion asked the proposed "responsible person" for an undertaking to notify the Court in the event of a breach but it is not clear whether these undertakings are enforceable.

Section 17 provides that a "treatment provider" *may* report a person's failure to comply. It retains the flaws of the old provision, in that it does not provide for the "responsible person" to report a breach, and provides for a report to be made to an officer of the Department of Communities & Justice (ie Community Corrections), who do not have a legal mandate to supervise s 14 orders. In practice, responsible persons or treatment providers generally report breaches directly to the Court.

Proceedings for breach of s 14 orders

If the Court calls the defendant up to deal with the breach, the aim is not to punish the defendant for non-compliance but to tweak the case/treatment plan so that it works better. However, persistent non-compliance may result in the defendant being required to enter a plea and have the matter dealt with "according to law".

Note that, unlike a CRO/CCO/bond, a fresh offence does not constitute a breach of a s 14 order (unless the magistrate has specifically made good behaviour a condition of the s 14 order, which is rare).

Myths and misconceptions about diversion in the Local Court

Some common myths about the old s 32 which are likely to remain unchanged under the new Act.

"Some offences are just too serious"

Seriousness is relevant but not determinative: *DPP v El Mawas [2006] NSWCA 154*; *(2006) 66 NSWLR 93*. In *El Mawas,* the Court of Appeal affirmed that there is a broad discretion available and did not expressly rule out s 32 of the former Act for serious offences.

"It's all about treatment vs punishment"

Although a s 32 application is often said to be a balancing exercise between treatment and punishment (e.g. in *DPP v El Mawas*) a s 12/32 is *diversionary*, not simply a sentencing option.

If a matter is dealt with according to law, it does not automatically follow that the defendant will be convicted and sentenced. For example, the defendant may be unfit to be tried, and therefore able to apply for a permanent stay or discharge on the basis that they will never receive a fair hearing (as was the case in *Mantell v Molyneux [2006] NSWSC 955; (2006) 165 A Crim R 83*); or the client may lack mens rea and would have a NGMI defence available.

While the case law does not expressly support this approach, it is appropriate to ask the magistrate to turn their mind to these issues, and take a pragmatic look at what might actually happen if a s 32/12 is refused, rather than focusing exclusively on the likely penalty in the event of conviction.

"The illness/condition/disability must have caused the offending"

Causal link is relevant but not determinative: *DPP v El Mawas [2006] NSWCA 154*; *(2006) 66 NSWLR 93*.

"The defendant knows the difference between right and wrong so s 12/32 is not appropriate"

A person who "knows the difference between right and wrong" and is capable of forming criminal intent can still be appropriately dealt with under s 12/32.

Remember that impaired judgment is a feature of many mental illnesses. Even if the defendant was not so unwell as to lack mens rea at the time of the alleged offence, the illness may have impaired their ability to make rational choices about their behaviour.

The *IDRS step-by-step guide to s 32 applications* remains very helpful in explaining links between intellectual disability and offending behaviour.

However, if a person was so impaired at the time of the offence that they could *not* form mens rea, this would be a powerful argument in favour of a s 12 disposition. If a s 12 application is refused in such circumstances, the defendant may need to consider a "not guilty by reason of mental impairment (NGMI)" defence, which is rare in the Local Court but is nevertheless available at common law.

It is worth noting that, in *Sullivan v DPP (NSW) [2020] NSWSC 253*, Hamill J said (at [48]), that "s 32 is not merely a diversionary scheme with a protective purpose, but also a provision that ensures that criminal liability is not attributed to somebody who was mentally ill at the time of the offence.''

"It's about whether the defendant is fit to be tried"

This is incorrect, see *Mackie v Hunt (1989) 19 NSWLR 130*.

"It's got nothing to do with fitness to be tried"

That's not correct either: *Mantell v Molyneux [2006] NSWSC 955; (2006) 165 A Crim R 83*. Unfitness is relevant but not determinative.

In *Mantell v Molyneux,* the s 32 application under the former Act was refused and the unfit defendant was subsequently discharged because there was no regime in place to accord her a fair trial in the Local Court. If a defendant has been assessed as unfit, this will be a strong argument in favour of a s 12 application, because of the difficulties involved in dealing with such a person "according to law". Taking a pragmatic view, most magistrates would prefer an unfit defendant to be subject to a s 16 order for 12 months than to be simply discharged.

"The facts must be admitted, or findings of fact made, before the s 12/32 application can be determined"

No. Section 9(1) provides that the order may be made any time whether or not a plea has been entered, this is because it is a diversionary procedure, not a sentencing exercise.

"Section 12/32 is inappropriate for traffic or other strict liability offences"

Not necessarily: *Police v Deng [2008] NSWLC 2*, where the defendant was discharged under s 32 of the former Act for an offence of negligent driving occasioning death. Some magistrates expressed the view that the former s 32 was not appropriate for strict liability offences which do not require proof of mens rea. This view has no basis in law and fortunately is not as widely-held as it used to be.

Another view is that the former s 32 was inappropriate for traffic offences because it did not allow the Court to impose any disqualification and therefore the protection of the community is compromised. With respect to those who hold it, this view rests on a simplistic and misguided assumption that disqualifying a mentally ill defendant will actually stop them from driving. In such a case you might argue that requiring the defendant to obtain treatment for 6-12 months would better promote road safety than simply fining and disqualifying the defendant without any follow-up.

The magistrate may refer the matter to the RMS after a successful s 12 application, so the RMS can consider whether the defendant is a fit and proper person to hold a licence. This is what occurred in *Deng*. This may result in the RMS requiring them to provide medical or psychiatric evidence that they are fit to drive. Experience shows that clients are usually able to retain their licences as long as they remain in treatment and do not continue to drive while acutely unwell.

"The defendant must be present at court for an order to be made"

No. A s 14 or s 18 order may be made in the absence of the defendant. It is not a bond and doesn't have to be entered into, however, orders should not be made in chambers without the parties being heard: *DPP v Wallman [2017] NSWSC 40*.

"You must always have a case/support/treatment plan"

Not necessarily, but for relatively serious offences you need one: *Perry v Forbes (unrep, NSWSC 21 May 1993)*; *DPP v Albon [2000] NSWSC 896*. The case law is summarised in *DPP (NSW) v Saunders [2017] NSWSC 760* at [34]–[37].

"The responsible person must be a named individual"

No, but the person or agency must be clearly identified: *DPP (NSW) v Saunders [2017] NSWSC 760*.

Also be mindful that the responsible person:

- need not be a psychiatrist or mental health professional
- does not have to be at Court or to sign anything
- cannot be compelled to provide services: *Minister for Corrective Services v Harris (unrep, NSWSC 10 July 1987)*.
- may report a breach (s 17) but can't be compelled to do so
- does not have to undertake to the Court to report non-compliance (although, in practice, some magistrates will refuse to make a s 14 order without such an undertaking)

"A psychologist can't diagnose a mental illness"

Yes they can, but check their qualifications. See ***4 Expert witnesses***

Mentally ill or mentally disordered persons – Part 2 Div 3

Section 18, in Div 3 applies to a person who is, at the time of their court appearance, a "mentally ill" or a "mentally disordered" person.

Neither term is defined in the Act. However s 3(2) states that "[w]ords and expressions used in this Act have the same meanings as in the *Mental Health Act* 2007". The definitions of "mentally ill person" and "mentally disordered person" are set out in ss 14 and 15 of the *Mental Health Act* 2007 (NSW).

Section 14 of that Act states:

> (1) A person is a mentally ill person if the person is suffering from a mental illness, and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary —
>
> (a) for the person's own protection from serious harm, or
>
> (b) for the protection of others from serious harm.
>
> (2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration of the person's condition and the likely effects of any such deterioration, are to be taken into account.

According to s 15 of the *Mental Health Act* 2007:

> A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary —
>
> (a) for the person's own protection from serious physical harm, or
>
> (b) for the protection of others from serious physical harm.

A client may be a “mentally ill person” even if they are not unwell enough to require immediate hospitalisation. A client who is on a Community Treatment Order (CTO), particularly where that CTO is likely to be continued, may fall within s 18, but for the treatment being administered under the CTO.

Like s 12, s 18 only applies to matters being dealt with summarily, and can be used at any stage of the proceedings without the need to enter a plea. Section 18 is more likely to be used at an early stage of the proceedings, to have an acutely unwell defendant sent to hospital.

An order under s 18 is only enforceable for six months, unlike orders under s 14 which are now enforceable for 12 months.

A person may have a “mental illness” but not be a “mentally ill person”. Essentially a “mentally ill person” is someone who meets the criteria for involuntary admission to hospital, or some other form of care, treatment or control

Types of orders — s 19

Section 19 can be used on either an interlocutory or final basis.

Under s 19(1), a magistrate may order that the defendant:

(a) be taken to, and detained in, a mental health facility for assessment

(b) is the same as (a), but with an additional order that if the defendant is assessed not to be a “mentally ill or mentally disordered person” (and therefore not admitted to hospital) he or she is to be brought back before the court as soon as practicable

(c) be discharged, unconditionally or subject to conditions, into the care of a responsible person.

Order (a) or (b) above may be made by an “authorised officer “(eg, a bail justice sitting in a weekend bail court): s 21.

A magistrate also has power to make a Community Treatment Order (s 20), but only with the agreement of the relevant community mental health service.

Unlike s 12, s 18 does not expressly require a magistrate to consider whether it is “more appropriate” to deal with the defendant in this way. However it is still a *discretionary* decision to apply s 18.

Interlocutory orders

If the Court sends a defendant to hospital under s 19(a) or (b), without any further order, this will have the effect of finalising the proceedings unless the defendant is brought back to court within six months.

Section 18(2) provides that an order may be made under Div 3 “without affecting any other order the magistrate may make in relation to the defendant, whether by way of adjournment, the granting of bail in accordance with the *Bail Act* 2013 or otherwise”.

If the Court wants to ensure the defendant is assessed and/or treated, but doesn’t want to finalise the proceedings, the Court may make an order under s 19 (a) or (b) and another order adjourning the substantive proceedings.

Unless the charge is relatively trivial, the Court will often send the defendant to hospital under s 19 and make a separate order adjourning the proceedings, with a view to finally disposing of the charges once the defendant's condition has stabilised. If the defendant ends up in hospital for a long period, the magistrate might end up making a final order under s 19. If the defendant is discharged from hospital and makes good progress in the community, the matter might be finalised under s 12. In other cases, the matter may end up being dealt with according to law.

Does the defendant have to be present?

In *DPP v Wallman [2017] NSWSC 40* the court said "Orders under s 33(1) must also be made with the defendant present and not in chambers in the absence of the parties". Section 19 of the Act is effectively in similar terms to s 33(1) of the former Act.

This simply means that a s 19(1) order must not be made in chambers without giving the parties the opportunity to be heard. For example, your client might not be at court because they are an involuntary patient in hospital. If you have sufficient material available to make a s 18 application, it may be appropriate for the magistrate to finalise the matter by making an order under s 19(c), discharging the client into the care of his or her treating psychiatrist.

Effect of an order under s 19 (c)

An order under s 19 (c) is similar to a final order under s 14. It has the effect of dismissing the charge unless the person is brought back to court within the next six months. Generally, the only way the defendant would be brought back to court after a s 19 (c) order would be if they breach the conditions.

Effect of an order under s 19 (a) or (b)

An order under s 19 (a) or (b) does not necessarily have the effect of finalising the proceedings, even where the defendant is admitted to hospital and remains there for some time.

A defendant who is admitted to hospital, but who remains in hospital for less than six months, may be discharged into police custody (see s 32 of the *Mental Health Act* 2007 (NSW)) and then returned to court (having been either granted or refused bail) for the proceedings to resume.

Even if the defendant is discharged from hospital into the community, it is open to the prosecutor to re-list the proceedings and bring the defendant back to court if the six months have not elapsed.

See the following cases:

- *DPP v Wallman [2017] NSWSC 40*
- *DPP (NSW) v Sheen and The Local Court of NSW [2017] NSWSC 591*
- *Police v DMO [2015] NSWChC 4*
- *Police v Thomas Stafford Roberts (unrep, Lismore LC 22 August 2014)*
- *Police v Pines [2013] NSWLC 3*

Procedural issues

Case plans, treatment plans, support plans

The Act uses the term “treatment or support plan”: s 7.

The Court usually won’t grant a s 12 application unless you can present them with a good case plan. This is a well-established principle arises from common law: *Perry v Forbes (unrep, NSWSC 21 May 1993)*, and *DPP v Albon [2000] NSWSC 896*. The case law is summarised in *DPP (NSW) v Saunders [2017] NSWSC 760* at [34]–[37].

It is important to note that the Supreme Court in *Perry v Forbes* emphasised the need for a case plan in the context of serious and/or repeat offences.

If you are dealing with a minor offence which would normally be dealt with by way of fine (or ss 10 or 10A of the *Crimes (Sentencing Procedure) Act* 1999), be mindful that one of the relevant considerations in a s 12 application is the likely penalty if the offence is proved and dealt with according to law. In this case an unconditional s 14 order may be appropriate and there is no need for a detailed case plan.

Responsible persons

This will often be the client’s treating psychiatrist, or psychologist or General Practitioner.

However, there is nothing in the legislation or case law to say that the responsible person must be a psychiatrist or other mental health professional. They could be a counsellor, caseworker, carer, or even a family member, who is responsible for co-ordinating the case plan by ensuring that the person attends relevant appointments, takes their medication, etc.

The defendant is discharged into their care but not their custody, so a responsible person does not have to be present at court. However, some magistrates do prefer the responsible person to be at court, and/or to undertake that they will notify the court if the client doesn’t comply with the case plan.

There is also some discussion in *DPP (NSW) v Saunders [2017] NSWSC 760* about a responsible person’s obligations and the enforceability of s 32 of the former Act.

In *Saunders* it was suggested that the “responsible person” should be a named individual (rather than being nominated by their role, eg. “treating psychiatrist”). RA Hulme J said at [40]:

> One of the options under s 32(3) [see now s 14(1)(a)] is to discharge the person "into the care of a responsible person". The provision does not explicitly require that the "responsible person" be named. But it is inescapable that in exercising the discretion to discharge a person in this way under s 32(3)(a) the "responsible person" would have been identified in the evidence and specifically nominated in the magistrate's order.

Although this is *obiter* only (the case was really about s 32(3)(b) of the former Act), since *Saunders*, magistrates have increasingly required that the case plan clearly identify a responsible person. It is common practice for a magistrate to discharge a defendant into the care of a named individual “or their delegate” (in the event that the nominated individual changes employment, the client moves to another area, etc).

Relevance of fitness in Local Court

Because of the diversionary procedure provided by ss 12 and 18, the issue of fitness to be tried does not often have to be addressed in the Local or Children's Court. However, if a s 12 application is refused, fitness may become an issue.

The procedures in Pt 4 of the Act have no application in the Local Court.

Application for discharge or permanent stay of proceedings

A defendant in a Local or Children's Court matter who is unfit to be tried may be entitled to a discharge (or at least a permanent stay of proceedings) on the basis that there is no way of ensuring a fair hearing: see *Mantell v Molyneux [2006] NSWSC 955; (2006) 165 A Crim R 83*. This effectively means the proceedings are finalised and there is no power to detain the defendant or impose conditions on their liberty.

As well as *Mantell v Molyneux*, there are other cases where this procedure has been adopted.

To make a discharge application you will generally need a psychiatric (or psychological in the case of intellectual disability) report assessing the client as unfit to plead, and your expert will need to be prepared to attend for cross-examination if requested by the prosecution. The prosecution may also request that your client make themselves available to be assessed by their expert.

Defence of mental illness under the common law in the Local Court

There was uncertainty as to whether the common law defence remained available in Local Court proceedings. Section 27 of the Act makes it clear that the statutory provisions of the *Mental Health and Cognitive Impairment Forensic Provisions Act* do not apply in the Local Court.

In 1996, the NSW Law Reform Commission in their Report Number 80 "People with an Intellectual Disability and the Criminal Justice System" (Recommendation 28), said:

> This does not necessarily preclude [the defence's] application. However, if the defence succeeded, the magistrate would not be able to make orders which can be made by Supreme and District Court judges under the *Mental Health Forensic Provisions Act*, nor would the detailed review system… involving the Tribunal be available. Accordingly the person would have to be released.

The onus of proving the mental illness is on the accused on the balance of probabilities: *Mizzi v R (1960) 105 CLR 659*, regardless of whether it is the Crown, accused, or the judge that raises the defence: *R v Ayoub (1984) 2 NSWLR 511*.