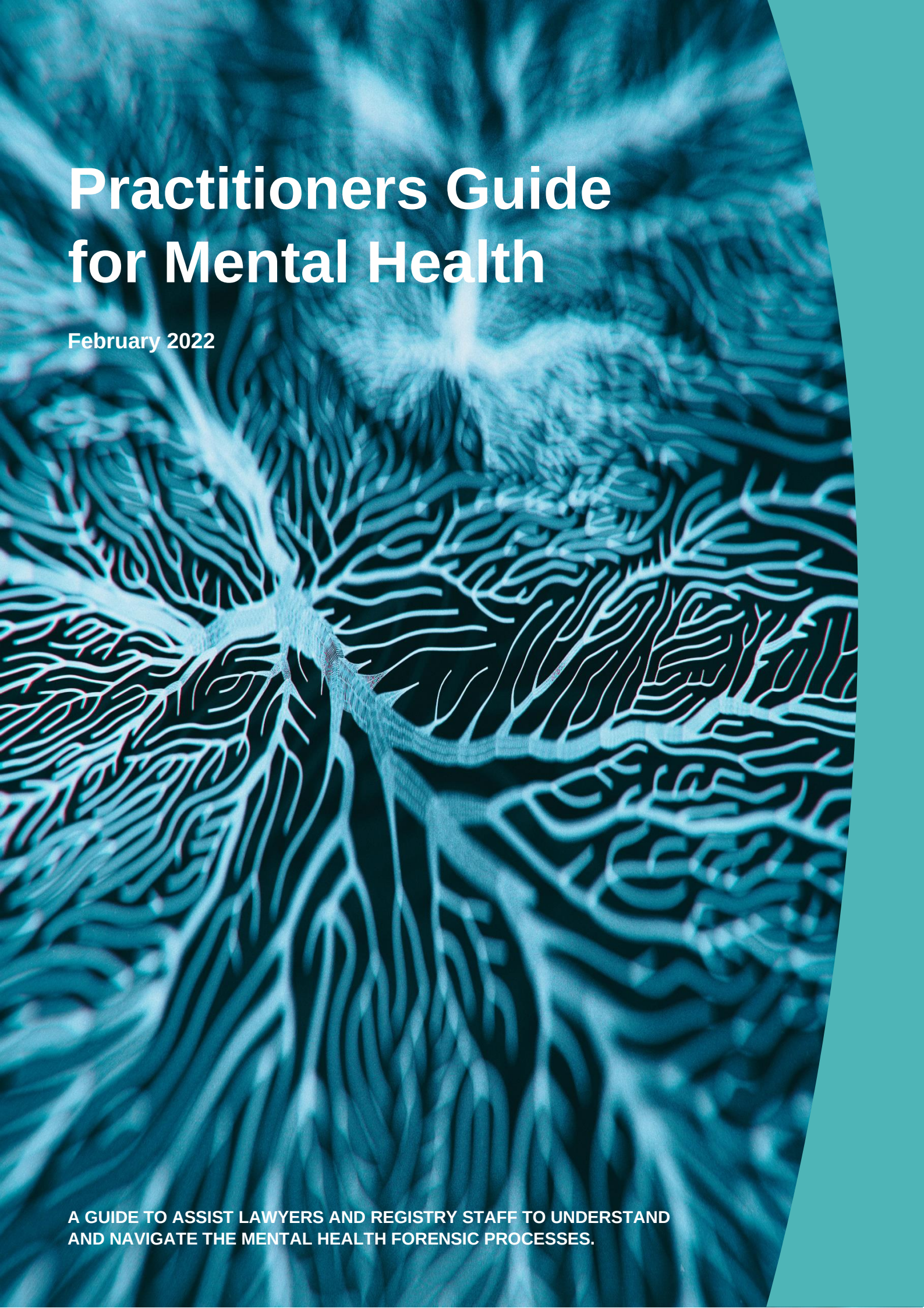

Practitioners Guide for Mental Health

February 2022

A GUIDE TO ASSIST LAWYERS AND REGISTRY STAFF TO UNDERSTAND AND NAVIGATE THE MENTAL HEALTH FORENSIC PROCESSES.

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1. Introduction

Acknowledgments

This guide has been prepared by an interagency Committee of lawyers and mental health professionals. The contributions of the following persons are gratefully acknowledged:

Todd Davies, Acting Solicitor in Charge of the Mental Health Advocacy Service of Legal Aid New South Wales

Brian Hancock, Public Defender

Anina Johnson, Deputy President, Mental Health Review Tribunal

Tobias MacKinnon, Justice Health Forensic Mental Health Network

Pierrette Mizzi, Director Research and Sentencing, Judicial Commission of New South Wales

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About this guide

The *Mental Health (Forensic Provisions) Act* 1990 (the former Act) and its successor, the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (the Act), provide a mechanism to divert people with mental illness and cognitive impairments from the criminal justice system into the health system. The Act commenced operation on 27 March 2021.

This guide has been prepared to assist lawyers and registry staff to understand and navigate the mental health forensic processes. This is a guide only and should not be used as a substitute for the provisions of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

All references to provisions in this Guide are to the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 unless otherwise stated.

Note that the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 applies to state offences. For federal offences see *9. Commonwealth provisions.*

Background to Mental Health Forensic Provisions reform

The NSW Law Reform Commission considered the mental health forensic legislative framework in 2012/3 in Reports 135 and 138

> **Report 135:** *People with cognitive and mental health impairments in the criminal justice system: Diversion*

Report 138: *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*

Following the Law Reform Commission Reports there was extensive stakeholder consultation before the Act was passed by the NSW Parliament in July 2020. The Act commenced on 27 March 2021.

The key changes in the Act are that it:

- Provides definitions for key concepts, such as mental health impairment and cognitive impairment, that have been revised in light of contemporary understanding of behavioral science and to provide consistency in terminology across the criminal justice system including bail, pre-court diversion, substantial impairment and within the Act itself.
- Codifies the common law in respect of fitness to be tried and the defence of mental illness.
- Replaces the verdict of not guilty by reason of mental illness with the verdict of act proven but not criminally responsible.
- Modifies procedures to streamline the steps following findings of unfitness, the defence of mental illness or cognitive impairment, and imposition of a limiting term.
- Section 32 of the former Act is recast to provide guidance for the Court in determining whether to divert mentally ill or cognitively impaired persons in the Local Court and to clarify the diversionary options available to the court.

2. Defining mental health and cognitive impairment

Background

Before the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 commenced, the question of whether a person was not guilty of a crime because of their mental health was determined under the common law. The common law test goes back two centuries and turned on the question of whether the accused person was labouring under a "disease of the mind" so that they did not know the nature and quality of the act, or if they did know the nature and quality of the act they did not know it was wrong.

In 2013, the NSW Law Reform Commission recommended that the common law should be incorporated into a statute and the language modernised.

The Act does that by including a definition of "mental health impairment". The Act also includes a definition of "cognitive impairment". These definitions are the foundation for deciding if a person is fit to stand trial, or if their act or omission might make them eligible for the defence of mental health impairment or cognitive impairment.

Mental health 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.

The definition takes a two pronged approach — a set of general criteria, followed by a non-exhaustive list of diagnoses that would usually meet the definition.

To meet the definition, a mental health impairment must be "significant for clinical diagnostic purposes": s 4(1)(b). This term is used in the DSM 5 and is commonly understood by psychiatrists and others clinical experts.

Consistent with the common law, a person cannot be said to have a mental health impairment simply because of the impact of substances that they have taken, or because of the impact of withdrawing from substances. However, if the use of substances exacerbates a clinical condition (that is not temporary) then that may constitute a mental health impairment: see *R v Tonga [2021] NSWSC 1064* per Wilson J at [89]-[90]; [106]; *R v Siemek (No.1) [2021] NSWSC 1292* per Johnson J at [103]. See also the consideration in *R v Miller [2022] NSWSC 802* at [1]-[52] by Cavanagh J of the relationship between s.4(1) and (2)(c) and s.4(3) where it is alleged the defendant acted under a drug induced psychosis but was not intoxicated at the time of the offending. For a discussion of the common law position on this issue, see*: R v Fang (No 3) [2017] NSWSC 28* per Johnson J (especially at [110]); *Fang v R [2018] NSWCCA 210*; *(2018) 97 NSWLR 876* at [95]-[105]. The onus of establishing s.4(3) lies on the party relying upon the exception on the balance of probabilities: *R v Miller [2022] NSWSC 802* at [53]-[62] per Cavanagh J.

Personality disorders are neither included nor excluded from the definition of mental health impairment. Clinical views about the diagnosis and treatment of personality disorders are evolving. The option of a personality disorder meeting the definition of mental health impairment remains open, but will require persuasive clinical evidence. Recent appeal cases in New South Wales and Victoria have determined that personality disorders may be taken into account on sentence under accepted principles applying to mental or psychiatric conditions and are not exclude by law: *Wornes v R [2022] NSWCCA 184* at [25]-[33]; *Brown v The Queen [2020] VSCA 212; (2020) 62 VR 491*. Severe personality disorder is included in the definition of 'mental impairment' in the Commonwealth provisions: *Criminal Code Act* 1995 (Cth) s 7.3(8): see further *9 Commonwealth provisions*.

In *DB [2022] NSWCCA 87* per Brereton JA, Ierace J agreeing, Wilson J dissenting, the Court found that sexsomnia (a form of somnambulism where sexual acts are committed while the person is asleep) did not constitute a mental health impairment because lack of volition while asleep was not a disturbance of volition within s 4(1)(a), and was of no clinical significance for the purposes of s 4(1)(b). The respondent was entitled to the outright acquittal that he received. Although not relevant to the outcome of the appeal Brereton JA did note at [56]-[58] that a complete absence of volition could constitute a 'disturbance' as required under s 4(1)(a) - the distinction in this case was that the absence of volition was an ordinary condition of sleep not a disturbance of an ordinary condition.

Cognitive impairment

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.

The definition of a cognitive impairment again provides for a set of general criteria, followed by a non-exhaustive list of diagnoses that would usually meet the definition.

A cognitive impairment can affect different aspects of a person's functioning including memory, capacity to understand information and decision making. A cognitive impairment may also impact a person's ability to understand right from wrong. Cognitive impairments generally do not change significantly over time, and some conditions, such as dementia, will deteriorate.

A person's cognitive impairment may affect their fitness to stand trial, if it means that the person has difficulty understanding or remembering the evidence against them or would struggle to follow what is discussed in court. A cognitive impairment may also impair a person's capacity to make a decision and instruct their lawyer. See further *6 The Fitness Inquiry: Fitness to stand trial - the test*.

For the first time in NSW, the Act now allows for a defence of not criminally responsible by reason of cognitive impairment. To raise this defence successfully requires evidence both that the person has a cognitive impairment and that the impairment had the effect set out in s 28 of the Act.[1] See further *8 Mental health and cognitive impairment defences in a criminal trial*

Clinical evidence will continue to be critical to deciding whether a defendant meets the definitions in these sections in the context either of fitness to stand trial or in considering whether a defence is available.

[1] See further K Eagle and A Johnson, "Clinical issues with the Mental Health and Cognitive impairment Forensic Provisions Act 2020" (2021) 33(7) *JOB* 67 and the Supplement to the Third Edition of *Crime and Mental Health Law in NSW* (2021) particularly pp 26 - 30

When seeking a clinical opinion, you should draw the clinician's attention to the definitions in the Act. See further *4 Expert witnesses*

3. Taking instructions and giving advice

Recognising unfitness - an advocate's ethical duties to court and to client

In order to properly administer justice in the exercise of their criminal jurisdiction, all courts have a duty to ensure that any trial is a fair trial.

An accused person cannot be tried for a criminal offence unless fit to stand trial: *R v Dashwood* [1943] KB 1; *R v Benyon [1957] 2 QB 111*; *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1.* The issue of a person's fitness to stand trial relates to the accused's condition at the time of the trial. This is in contrast to defences of "mental health or cognitive impairment", which relate to the accused's condition at the time of the offence*: R v Dennison (unrep, NSWCCA, 3 March 1988); Ngatayi v The Queen [1980] HCA 18*; *(1980) 147 CLR 1*.

A trial of a person who is unfit is a nullity: *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1* per Gaudron J at [62]. In *R v Dunn [2012] NSWSC 946*, Johnson J at [17] said,

> It is also appropriate to bear in mind that a legal practitioner for an accused person has an ethical obligation to raise the issue of fitness as part of the overriding duty to the Court, even without the client's instructions: *Eastman v The Queen [2000] HCA 29; 203 CLR 1 at 99 [297]; R v Zhang [2000] NSWCCA 344 at [29]*; Howard and Westmore, "Crime and Mental Health Law in New South Wales", 2nd edn, 2010, paragraphs 5.4-5.5.

A question of an accused person's unfitness may arise if it becomes apparent that, due to circumstances of that person that cannot be overcome, it would not be fair to try the person according to the usual procedures. Such a person is potentially "unfit to be tried". Legal training or experience does not necessarily qualify a legal representative to form an expert opinion on unfitness. However, an advocate should develop the basic skills to recognise when preliminary indications suggest that the question has arisen. See **Case Study 2** for an example.

The "fitness test" in s 36(1) of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 provides guidance on the kinds of difficulties that would lead to a person being unfit to be tried. The list is not exhaustive: s 36(2). See further *6 The Fitness Inquiry: Fitness to stand trial - the test*.

A client may not realise that they may be unfit to stand trial. A defence legal representative will often have some impression from interactions with the client or his or her family members or treating doctors' reports. The representative should then take instructions on those factual circumstances which may bear on the question and advise the client as to the likely procedures that are indicated.

In many cases, a client with indications of possible unfitness will have an accessible history of the particular personal circumstances bearing on the question of unfitness and will be able to provide instructions on those circumstances. In the case of mental illness, instructions on past psychiatric diagnoses, a history of mental health medications and hospital admissions and current treatments are all relevant. In the case of cognitive impairment, instructions on past expert assessments, any neuro-psychological or other psychological reports and the history and management of the impairment is important. See further *4. Expert witnesses*.

Where practicable, previous medical records, reports, assessments and diagnoses should be obtained with the signed authority of the client. If the client so instructs, family members may sometimes assist legal representatives to obtain relevant information.

Case Study - 1

A man was charged with a double murder. He had confessed to the killings. He maintained he was unemployed. He was remanded in custody. He confirmed his confession to his lawyer. After almost a year in custody he expressed grandiose ideas to his defence lawyer who then sought to have him assessed by a psychiatrist. The psychiatrist found he had a mental health impairment and recommended treatment in custody. After a period of more than a year of treatment in custody, his symptoms were reduced and his instructions changed. His instructions included that he was at work on the day of the killings. That was confirmed by his employer.

Case Study 2

Your client has been charged with aggravated robbery. He is alleged to have punched a person who had taken money out of an ATM and taken the person's wallet.

When you are interviewing your client, you notice that he sometimes giggles without any apparent reason. At other times, he looks to the side as if listening to something. When you ask him what he is laughing at, he tells you he's just remembered something funny that he saw on TV. You explain to him that you have seen CCTV footage of the victim being assaulted at the ATM. The person who is committing the assault is wearing the same clothes as your client was wearing when he was arrested by police an hour later. The victim's credit card was in his pocket. You ask if he has any explanation for this. He smiles and says, "I dunno". You ask him to explain to you what the evidence is against him. He says "I dunno". You explain to him he has the option of pleading guilty or not guilty, and the benefits and disadvantages of each course of action. At the end, he says again "I dunno" and giggles. You ask if he has ever spent time in a mental health facility and he says he has been to Cumberland Hospital a few times. You ask about his schooling and he says he left at 15, but didn't really go much after 12. He struggles to read and write.

Appropriate steps would include:

a) asking the client if there are family members you could speak to about his medical and social history; and

b) asking the client's permission to get medical records from any hospitals he has been admitted to, his GP or other practitioners.

Depending upon the material received, you may wish to obtain an expert report.

In summary, advocates should do the following:

a) recognise that a potential question of unfitness has arisen;

b) identify any further steps necessary to clarify the issue — for example obtaining a relevant report from an appropriately experienced and qualified forensic expert;

c) consider the implications for the client of raising the issue — including advising the client of the law and practical impacts;

d) form a professional judgement as to whether the time has come to raise the question in good faith with the court or prosecutor.

Why fitness matters

The decisions of *R v MB (No 2)* *[2014] NSWSC 1755*, *R v MB (No 3)* *[2014] NSWSC 1796* and *R v MB* *[2017] NSWSC 619* (see **Case Study 3**) show the importance of an accused being fit to stand trial. It also illustrates how criminal proceedings can recommence after a person is found fit during the period of a limiting term.

Case Study 3

MB was alleged to have drowned her baby in 2010. She was found to be unfit to stand trial and a special hearing was conducted. In 2014 she was found on the limited evidence to have committed the offence of murder. The defence of substantial impairment was raised but not made out. A limiting term of 20 years was nominated.

In 2016, she was found fit to stand trial, by which time she had spent 334 days in custody at Silverwater and the Forensic Hospital and a further 246 days in quasi-custody at the Cumberland Hospital before obtaining bail. MB pleaded not guilty to murder and guilty to the manslaughter of her baby on the basis of substantial impairment. She was able to agree to a set of facts that included that at the time of the baby's death she was suffering from a psychotic disorder, which later became more pronounced, but then went into remission with treatment. She was convicted of manslaughter and directed to enter into a good behaviour bond for 4 years.

In sentencing MB in 2017, Beech-Jones J said that "Notwithstanding the seriousness of MB's crime, the need and the time for her punishment has passed. Instead, at this point the necessity for the supervision and reintegration of MB into the community predominates."

Recognising possible defences of mental health or cognitive impairment

In the conduct of a criminal matter, an issue of an accused's mental health impairment or potential cognitive impairment may come to the attention of a legal representative in any one or more of six general areas:

- an accused's interactions with legal representatives
- aspects of the allegations
- statements of the accused about the alleged offending conduct

- contemporaneous observations by intimate contacts of the accused — including for example housemates, family members, close neighbours, friends etc
- the mental health or cognitive-functioning history of the accused
- formal diagnoses of the accused relevant to the alleged offending conduct.

Where such issues arise, it is nearly always necessary to consider two further questions:

1. in the specific circumstances of the alleged offence, does the evidence of the particular impairment rise to the level of a possible defence?
2. if the impairment does rise to the level of an available defence, should it be raised necessarily in any trial of the particular matter?

An accused's interactions with legal representatives

On occasion, a legal representative will first have a preliminary indication of mental health or cognitive impairment after first interactions with the accused, who may display obvious signs of mental disturbance or incapacity, thereby leading to further investigations as to possible unfitness and possible defences.

Aspects of allegations

Some allegations may exhibit bizarre aspects which immediately suggest the possibility of some mental health or cognitive impairment.

Statements of accused

During or after an event in which an allegation arose, an accused may have been alleged to have made statements by way of explanation or admission which could only be understood as demonstrating some mental health or cognitive impairment.

Observations by intimate contacts

Close associates of an accused who had knowledge of events surrounding the alleged offence or may have been witnesses to some aspects of it may have provided statements to police describing behaviour at the relevant time which raises the possibility of mental health or cognitive impairment at the time of the alleged offence. See, for example, *R v Warren Scott (No 2)* *[2021] NSWSC 1201* per N Adams J and *R v Tonga* *[2021] NSWSC 1064* per Wilson J.

Close associates of the accused who may have no direct knowledge of the allegations may none-the-less have some knowledge of the mental health or cognitive impairment history of the accused which may have continued up to the time of the allegations.

History of the accused

If an accused has a history of a mental health or cognitive impairment, details should be obtained of past and present medication; any hospitalisations; and any past or present diagnoses.

Relevant formal diagnoses

Once credible and substantial evidence of a mental health or cognitive impairment becomes available, it is nearly always advisable to obtain an updated forensic psychiatric or forensic psychological or neuropsychological assessment which includes an expert opinion as to the availability of the relevant defence. See *4 Expert witnesses*.

Case Study 4

A young man with a history of psychiatric treatment for psychoses broke through a window into the residence of an elderly and frail next-door neighbour and seriously assaulted his neighbour before returning to his own home.

Police and ambulance were called to the location. Ambulance officers and police spoke to the victim. The victim gave an account of the attack and stated that his assailant was 'mad'. Police spoke to the accused. He admitted the offending. However, he claimed he was 'helping the government' by attacking his neighbour who was a member of a terrorist organisation, possessed firearms and had displayed insignia of terrorism on his balcony. None of the accused's claims about the victim's conduct was supported by any evidence.

The accused was psychiatrically assessed to have been subject to delusions at the time of the attack due to the presence at that time of a formally-reported psychiatric diagnosis.

Case Study 5

A middle-aged woman with no criminal history who had been medically managed for a serious psychiatric condition and compliant in the community for decades without incident sought to improve her condition when she encountered a well-known and active quasi-religious organisation whose members convinced her to reduce her medication and to pay money to the organisation to purchase a purification program. The organisation provided her vitamins in substitution for her medication. Within weeks of reducing the medication, she purchased a knife with the intention of finding a person to attack believing this would make her powerful and free from her problems. With the knife, she attacked an acquaintance who was aware of her psychiatric history. The attack was without warning or apparent prelude.

Shortly afterwards, the accused provided police with a lengthy electronically-recorded interview in which she fully disclosed her actions and reasons for them. She told police she did not think that what she had done was wrong.

Formal psychiatric diagnosis supported a conclusion that the defence of mental illness was available at the time of the attack. A close friend had made a statement to police which supported the history of the recently-reduced medication and contact with the quasi-religious organisation.

4. Expert witnesses

Qualifying expert witnesses

In order to address evidentiary issues associated with “unfitness” or for the defences of “mental health or cognitive impairment”, it is ordinarily necessary to obtain the expert opinion of a suitably qualified and experienced expert. Unfitness may arise from diverse causes and a defence of mental health impairment may involve considerations distinct from a defence of cognitive impairment.

The qualifications of the expert to be used will depend on the accused’s condition. For example:

- an accused with a mental health impairment may require a psychiatrist’s report
- an accused with an intellectual disability or cognitive impairment may require a psychologist’s report
- an accused with dementia may require a report from a psychiatrist, geriatrician or physician
- an accused with a brain injury may require a report from a neuropsychologist
- a defence solicitor may write an affidavit explaining difficulties encountered while trying to take instructions from the accused.

In all cases, consideration should be given to:

a) the nature of the issues arising on which an expert opinion is sought

b) the evidentiary material, including material from the brief of evidence, the advocate has available to provide to the expert which may be relevant to the issue

c) what, if any, specific or general questions are to be asked of the expert in the preparation of the report

d) the qualifications and experience of the expert and whether the nature of the issues arising and questions to be asked of the expert are within the qualifications and experience of that particular expert.

An advocate should be familiar with s 79 *Evidence Act* 1995 (NSW) and the Expert Witness Code of Conduct in Sch 7, *Uniform Civil Procedure Rules* 2005 (NSW). The provisions of the Expert Witness Code of Conduct should be made known to the proposed expert witness and referred to in the report. The relevant expert witness’s CV should also accompany the report.

In cases where issues arise both of unfitness on the one hand and also issues of mental health or cognitive impairment defences on the other, it may be appropriate to obtain separate reports either from the same expert or two different experts in order that evidence relevant to the unfitness inquiry is discrete from that relevant to any special hearing or trial. Note that some experts will not comment on the available defences while a person is unfit so that if it becomes necessary to address the available defences at a later stage a separate report is required.

An expert may be later required to comment on whether the person could be safely conditionally released if they are given a verdict of act proven but not criminally responsible at either a special hearing or criminal trial: see *8 Mental health and cognitive defences in a criminal trial: Effect of special verdict*.

Any expert witness should be informed of current legislative provisions and any caselaw relevant to the opinion being sought. An expert witness almost certainly should not be called without having had the prior opportunity to review any evidence (relevant to the expert opinion sought to be adduced) on which cross-examination of the expert is likely or possible.

Content of reports - fitness

Experts who are providing fitness reports need to assess the criteria referred to in s 36 of the Act and comment on the following:

a) Is the defendant currently fit to stand trial?

b) If not, could the defendant become fit?

c) What would be needed to restore the defendant to fitness and what is the likely timeframe?

The expert report should also comment on whether the person may become fit to be tried within 12 months, namely is the condition one that is amenable to treatment (for example, a mental illness) or is it static (for example, a cognitive impairment) or is it likely to deteriorate (for example, dementia).

Prosecution expert reports

When the issue of an accused's unfitness to be tried is raised, a request is to be made to the Court to set a timetable whereby the accused obtains and serves a copy of their expert report on the DPP so that the DPP may consider its position. At this time, a further order of the Court should be sought requiring the accused to submit to examination by an expert nominated by the DPP. The timetable should allow sufficient time for both the accused and the DPP to obtain reports before the matter is next before the Court.

All reports obtained by the DPP relating to the state of mind of an accused person must only be obtained after permission to have the accused examined has been given by the accused's legal representative or, where the accused is not legally represented, after permission has been given by the accused.

The ODPP has an approved panel of psychiatrists who provide reports for the prosecution. The psychiatrist will be provided with any material from the Crown brief that is relevant to the issue of fitness.

The DPP report will be served on the accused’s lawyer. If the experts agree the reports may be tendered without calling any expert evidence.

Psychiatrists and psychologists – similarities and differences

Advocates should be mindful of the capacity of psychologists to diagnose mental illnesses or conditions. The Royal Australian and New Zealand College of Psychiatrists website provides a summary of the difference between psychiatrists and psychologists at:

https://www.yourhealthinmind.org/psychiatry-explained/psychiatrists-and-psychologists.

The Australian Psychological Society website provides some information about psychologists, their qualifications, different types of psychologists (e.g. clinical, forensic), and how they differ from psychiatrists at:

https://www.psychology.org.au/for-the-public/about-psychology.

As to diagnosis:

- Psychiatrists are qualified to diagnose mental illnesses and conditions.
- Psychologists with particular qualifications and experience (particularly clinical or forensic psychologists) are also qualified to diagnose mental illnesses and conditions.
- The use of psychometric tests to assess cognitive functioning is the exclusive realm of psychologists.

As to treatment:

- In general, psychologists and psychiatrists are both qualified to treat clients through psychotherapy and counselling.
- However only psychiatrists, as medical practitioners, are qualified to prescribe medication.

Jones v Booth [2019] NSWSC 1066 per Johnson J, contains a useful summary of the key cases on this issue, including a discussion of the circumstances in which a psychologist's report might be appropriate, the extent to which a psychologist's diagnosis is acceptable and the utility of a psychologist's report in dealing with applications in the Local Court under what is now Pt 2 of the Act. Although this case deals with the former Act it remains useful.

There is also a useful summary of the relationship between expert evidence and the sentencing principles that apply to offenders with mental health issues by R El-Choufani and D Pace, written in August 2018, at [98] ff:

https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/29323/Judicial-Fact-Finding-on-Sentence,-Riyad-El-Choufani-and-Daniel-Pace.pdf.

They suggest that given the different approaches taken in the superior courts to reports provided by psychologists purporting to diagnose serious mental illness, it is important in any given case to highlight the importance of:

- Briefing an appropriately qualified expert for the purpose of sentencing.
- Speaking to the expert if you anticipate a challenge to the diagnosis (or indeed, any other opinion expressed in the report). For example, carefully consider the expert's curriculum vitae - is the opinion expressed properly based upon the expert's specialised knowledge? Does the opinion address inconsistent evidence or competing inferences? Are the reasons proffered in support of the opinion sufficient?
- If necessary, ensuring that the expert is available to give evidence (including adjourning the sentence hearing to secure the expert's attendance).
- If necessary, adjourning the sentencing hearing to address weaknesses in the report or to obtain an opinion from a more suitably qualified expert.

5. Raising fitness

Introduction

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 is designed to bring the matter of fitness before the court as soon as possible. Generally the question of fitness is heard before a trial begins. However a person's mental health may fluctuate and fitness may become an issue at any stage of the proceedings. If the question of fitness is raised during a trial it must be dealt with in the absence of the jury. The court, the prosecutor, or the accused may raise a question of an accused's unfitness to be tried: s 39.

In forming a professional judgment as to whether the time has arrived to raise a question of unfitness, an advocate will be guided by several considerations, including:

- any evidence of unfitness known to the advocate
- the stage of proceedings the matter has reached
- the interests of the accused person in raising the question, and
- necessity and practicality of raising the question.

As to the role and responsibility of an advocate see further *3. Taking instructions and giving advice*

Note: if a person has been charged with federal offences, the mode of determining fitness and the test to be applied is regulated by State provisions but the consequences of a finding of unfitness is regulated by Commonwealth provisions. See further *9 Commonwealth provisions***.**

In good faith

The Court does not have to hold an inquiry unless it appears to the Court the matter has been raised "in good faith": s 42(3). If there is a real and substantial question to consider, or a genuine concern, the matter may be assumed to have been raised in good faith: *R v Tier [2001] NSWCCA 53; (2001) 121 A Crim R 509* at [69]–[72]; *R v Mailes [2001] NSWCCA 155; (2001) 53 NSWLR 251; (2001) 126 A Crim R 20* at [227]. A matter is not raised in good faith where the motivation is to disrupt the trial process: *R v Tier.*

Raised by the prosecutor

In *R v Zhang [2000] NSWCCA 344* at [25]–[27] Dunford J found the provisions in s 10 of the former Act (now s 42) were "explicit and mandatory" and did not allow a prosecutor to "withdraw" a question of unfitness after raising it.

Raised by the court

The Court has a duty to consider the issue even where it is not raised by either the accused or the prosecution: *Kesavarajah v The Queen [1994] HCA 41; (1994) 181 CLR 230* at [30] per Mason CJ, Toohey and Gaudron JJ; *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1* at [294]-[295] per Hayne J. In *R v Tier [2001] NSWCCA 53; (2001) 121 A Crim R 509* at [56]–[57] Kirby J stated the Court has a duty to consider the question if through information or observation it becomes aware an accused may not be fit.

In *R v Mailes [2001] NSWCCA 155; (2001) 53 NSWLR 251; (2001) 126 A Crim R 20* at [11], Spigelman CJ stated:

> Where, as sometimes occurs, apparent unfitness is accompanied by an insistence on the part of the accused that he or she is fit, legal representatives may reveal their doubts and the basis for those doubts to the trial judge. The question of unfitness can then be "raised … by the Court" within s 5.

Note: Section 5 of the former Act referred to by Spigelman CJ corresponds to s 39 of the Act.

Case Study 6

An appropriately qualified expert had reported a client is unfit to be tried on several grounds in the s 36 "fitness test". The client, although unfit to be tried on several other grounds, none-the-less was able to plead to the charge; instruct lawyers; and decide upon a defence. Furthermore, the client expressly instructed a wish to plead guilty; the client firmly instructed there was no challenge to any of the allegations; and the legal representative was of the opinion that the available evidence was capable of proving the prosecution case beyond reasonable doubt. The client expressed remorse, pleaded guilty and obtained a discount for the plea of guilty and raised subjective features in mitigation on sentence. The accused was sentenced to a term of imprisonment with a nominated non-parole period and earliest date for release being recorded.

Case Study 7

An appropriately qualified expert had reported on behalf of the defence a client was unfit to be tried due to a mental illness. Subsequently, another appropriately qualified and experienced forensic expert had reported on behalf of the prosecutor that the accused was fit to be tried because over a period of time and with appropriate treatment, their mental health had improved sufficiently. The matter was still in the committal stage before the Local Court. The client had a strong preference to be found fit and did not wish the question of unfitness to be raised with the court. In this case, a defence of mental health impairment may also have been available; however, the accused person specifically instructed he did not wish to raise that defence. Legal representatives for the accused formed the view that the evidence supported all elements of the charges and that no defence other than mental health impairment was available and accepted his instructions not to challenge any of the evidence or allegations and to enter pleas of guilty on the basis of the latest assessment of fitness. The accused raised his mental health issues only in mitigation on sentence and was sentenced to a term of imprisonment with a nominated release date.

Fitness raised at committal

A potential question of unfitness may arise at an early stage. An advocate may have taken instructions, obtained an expert report and informed the DPP. It may be appropriate to inform the Magistrate in the Local Court in order to obtain an adjournment to allow time for the DPP to also obtain an expert report prior to the committal.

Although the issue of unfitness is determined in the District or Supreme Court, the question may be raised at committal and the Magistrate may commit the accused for trial: ss 93, 94 *Criminal Procedure Act 1986 (NSW)*. The Magistrate may require a psychiatric or other report before committing the accused for trial: s 93(3). Where a person has been committed for trial under these sections, no case conference is required: s 69(c). If the person is subsequently found fit the matter can be remitted to the Local Court for a case conference: s 52.

Fitness raised before arraignment

Where fitness is raised before arraignment, the Court must determine whether an inquiry into fitness should be held and must conduct that inquiry if it does not subsequently determine there is no longer a need for the inquiry: ss 40, 42(1)(a).

An inquiry is to be held as soon as practicable after the Court has determined an inquiry should be conducted: s 42(2). An inquiry is not mandatory and the Court may decide not to hold an inquiry if it becomes apparent that it is no longer needed: s 40(2). See *Coles ats R [2008] NSWSC 672* per Grove J.

For example, in *R v Dunn [2012] NSWSC 946*, a medication regime utilised with respect to the accused led to an improvement in his mental health over a period of time, leading to a subsequent psychiatric assessment of fitness following initial assessments of unfitness. Johnson J said at [13]:

> It is apparent then in the statutory scheme, that an inquiry is not mandatory once directed. If the Court is in a position to determine, no doubt by reference to a body of reliable evidence, that there is no longer a question as to fitness to be tried raised, the Court may determine that an inquiry is no longer needed.

Fitness raised after arraignment

Where fitness is raised after arraignment, the Court must hold an inquiry into the question provided it appears to the Court the question has been raised "in good faith": s 42(1)(b),(3). See above: *In good faith*.

The Court must hear any submissions relating to holding an inquiry in the absence of any jury that has been constituted for the purpose of the proceedings: s 41. An inquiry is to be held as soon as practicable after the matter has been raised: s 42(2).

Fitness raised again

The question of fitness remains open throughout a trial and may be raised on more than one occasion in the same proceedings: s 37(2).

The test for a subsequent inquiry is not whether there is "fresh evidence" but whether the matter has been again raised in "good faith": *R v Mailes [2001] NSWCCA 155; (2001) 53 NSWLR 251; (2001) 126 A Crim R 20* at [6]–[17] per Spigelman CJ; at [219]–[229] per Wood CJ at CL.

Dismissal of charge before an inquiry

Under s 42(4), the Court may determine not to hold an inquiry, dismiss the charge and order that the accused be released if it is of the opinion that it is inappropriate to inflict any punishment, having regard to the following:

- the trivial nature of the charge or offence,
- the nature of the accused's mental health impairment or cognitive impairment,
- any other matter the Court thinks proper to consider.

In considering the virtually identical s 10(4) under the former Act, Spigelman CJ concluded this section addresses the appropriateness of punishment, seeking to avoid unnecessary delays, costs and complications of fitness hearings where no punishment would ultimately be inflicted. He further found "any punishment" includes conviction with no further penalty and orders of the Court after special hearing, and that the section is analogous to s 10 *Crimes (Sentencing Procedure) Act 1999 (NSW),* which empowers the Court to dismiss a charge without recording a conviction: *Newman v R [2007] NSWCCA 103; (2007) 173 A Crim R 1* at [34]–[46].

Actions pending a fitness inquiry

The Court may do one or more of the following before holding an inquiry:

- adjourn the proceedings
- grant the accused bail
- order the accused be remanded in custody for 28 days or less
- order the accused undergo a psychiatric, or other, examination
- order that a psychiatric report or other report relating to the accused be obtained
- discharge the jury
- make orders the Court thinks appropriate: s 43.

The Court will expect reports as to fitness. The qualifications of the expert to be used will depend on the accused's condition. For example:

- an accused with a mental health impairment may require a psychiatrist's report
- an accused with an intellectual disability or cognitive impairment may require a psychologist's report
- an accused with dementia may require a report from a psychiatrist, geriatrician or physician
- an accused with a brain injury may require a report from a neuropsychologist
- a defence solicitor may write an affidavit explaining difficulties encountered while trying to take instructions from the accused.

The expert will need to assess the criteria referred to in s 36 of the Act.

If an accused is found unfit to stand trial, s 47 requires the Court to also determine whether the accused is likely to become fit within 12 months. If the accused may become fit, the court process will be put on hold and the accused referred to the Mental Health Review Tribunal. For this reason expert reports should comment on whether there is likely to be any change in the accused's fitness and what kinds of treatment or fitness restoration would be needed.

See further *4. Expert Witnesses*.

6. The fitness inquiry

Introduction

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 applies to fitness proceedings before the District and Supreme Courts.

A person's fitness is determined at the time of the District or Supreme Court proceedings. It is a determination about the person's ability to participate in their trial, not only whether they are fit to plead to the charge.

Section 37 provides that the question of a person's unfitness to be tried for an offence should be raised before arraignment but enables the question to be raised at any time in proceedings, and more than once in the proceedings: see further *5 Raising fitness*

Note: if a person has been charged with federal offences, the mode of determining fitness and the test to be applied is regulated by State provisions but the consequences of a finding of unfitness is regulated by Commonwealth provisions. See further *9 Commonwealth provisions***.**

Fitness to stand trial – the test

Part 4 of the Act deals with fitness to stand trial and the processes that follow a finding of unfitness, including either referral to the Mental Health Review Tribunal or a special hearing.

The statutory test for ascertaining a person's fitness to stand trial adopts the common law "*Presser* test"[2] in s 36.

A person will be unfit to be tried if, because they have a mental health or cognitive impairment or for some other reason, they cannot do certain things including:

- understand the offence the subject of the proceedings,
- plead to the charge,
- exercise their right to challenge jurors,
- understand generally the nature of the proceedings as an inquiry into whether they committed the offence with which they are charged,
- follow the course of the proceedings so as to understand what is going on in a general sense,
- understand the substantial effect of any evidence given against them,
- make a defence or answer to the charge,
- instruct their legal representative so as to mount a defence and provide their version of the facts to that legal representative and the Court if necessary,
- decide the defence they will rely on and make that decision known to their legal representative and the Court: s 36(1).

[2] Smith J in *R v Presser* [1958] VR 45 at 48

The list is not exhaustive and does not limit the grounds on which a Court may consider a person to be unfit to be tried: s 36(2).

A person might be unfit for a reason other than a mental health or cognitive impairment if, for example, they are deaf, but use a sign language other than Auslan, so that no competent interpreter is available: *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1* at [22] and [59].

A Court determining the question of fitness will be assisted by psychiatric and psychological evidence or evidence from the accused's lawyer who has attempted to get sufficient instructions to run the case and failed. See Andrew Haesler SC *Applying the Amended Mental Health (Forensic Provisions) Act 1990*, July 2009, paper on the Public Defenders NSW's website.

The Fitness Inquiry

The question of an accused's fitness to stand trial for an offence is to be determined by the judge alone: s 44(1). The inquiry is not be conducted in an adversarial manner: s 44(3); the question of fitness is determined on the balance of probabilities: s 38 and the onus of proof of a person's fitness does not rest on any particular party: s 44(4).

In a fitness inquiry the accused must be legally represented unless the Court allows otherwise: s 44(2). The role of an advocate representing an accused during a fitness inquiry is substantially affected by the nature of the inquiry as provided by the section.

Evidence from defence counsel may be relevant to the question of unfitness. In *R v Bugmy [2009] NSWSC 1215* per Hidden J, the instructing solicitor provided an affidavit and gave oral evidence in the hearing which, in addition to other evidence, was relied on as "vital evidence" by the judge in determining the question of unfitness: at [13]-[15]. In *R v Dunn [2012] NSWSC 946*, defence counsel's instructing solicitor also provided evidence relevant to the issue of fitness.

See also [4-300] Procedures for fitness to be tried (including special hearings) in the NSW Judicial Commission's *Criminal Trial Courts Bench Book* which includes, at [4-320], a table setting out the procedure followed in a fitness hearing.

Fit if the Court makes allowances

Section 44 (5) reflects the observations by Mason CJ, Toohey and Gaudron JJ *in Kesavarajah v The Queen [1994] HCA 41; (1994) 181 CLR 230* at 245, 246 and *Ngatayi v The Queen [1980] HCA 18*; *(1980) 147 CLR 1* that a person may be able to participate fully in the trial if allowances are made. The section provides that matters to be considered in determining fitness include:

- could the trial process be modified to facilitate defendant's understanding and participation in trial,
- the likely complexity and length of the trial, and
- whether the defendant has legal representation.

Examples of modifications that could be made include:

- a person with chronic pain that limits their ability to concentrate, could be supported by providing them with comfortable seating and giving them permission to stand and move when they feel it is necessary

- a person with a mental health or cognitive impairment may be able to participate fully in their trial if they are given regular breaks and/or if the matter is listed for only a few hours per day, so that they can concentrate the whole way through
- a person may have a companion animal that they bring to the court
- a support person from the Intellectual Disability Rights Service could sit beside them to assist by simplifying the language used in court to assist the person to understand, supporting them to seek breaks and helping the accused to manage their emotions if they're getting upset.

The NSW Judicial Commission's *Equality before the Law Bench Book* at 5.4 gives other ideas of adjustments that courts can make to allow a person with a disability to participate in court proceedings.

If the person can be accommodated by the Court or is fit to stand trial and wishes to do so the matter may continue with the normal process and not proceed to a fitness hearing

Both defence and prosecution lawyers should contact the Court registry as soon as possible to discuss the alternative arrangements sought. The lawyers should know before the matter is raised in Court what is possible for that Court and therefore both should be in a position to assist the presiding judge.

Summary of the procedural paths following a fitness inquiry

In summary, the available procedural paths following a fitness inquiry are:

The Court

If the court finds the accused is:

- fit — the matter proceeds to a normal trial (s 46) or is returned for committal
- unfit and will not become fit within 12 months of the finding of unfitness — a special hearing is held under Pt 4, Div 3 (ss 47(1)(b), 48)
- unfit but may become fit within 12 months of the finding of unfitness — the court refers the matter to the Mental Health Review Tribunal ("the Tribunal") (ss 47(1)(a), 49(1)).

Where the accused is found unfit, the court can make a number of orders including discharging the jury, adjourning the proceedings, granting bail, or remanding the accused in custody (ss 47(2), 49(2)).

The Tribunal

If the matter is referred to the Tribunal under s 49, the Tribunal decides if the accused is:

- fit – the matter proceeds to a normal trial (s 50(1))
- unfit and will not become fit within 12 months of the court's finding of fitness – returned to the court for a special hearing (s 51(1))
- unfit but may become fit within 12 months of the court's finding of fitness – the Tribunal reviews the accused in accordance with Pt 5, Div 3 (s 80).

The Tribunal must review the accused and notify the court, the DPP and the accused's legal representative if it is of the opinion the accused:

- has become fit to be tried, or
- has not become fit to be tried and will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried: s 80(2).

Advice as to whether proceedings are to be taken

Where the court finds the accused unfit to be tried and

- the court or Tribunal find the accused will not become fit in the next 12 months, or
- the Tribunal finds the accused or forensic patient has become fit after the court found the accused is unfit or a special hearing has been held,

the court must obtain advice from the DPP as to whether further proceedings will be taken in respect of the offence: s 53(1)-(2). If the DPP advise further proceedings will not be taken, the court orders the release of the person: s 53(3).

If further proceedings will be taken, the matter is listed as a:

- trial – if the person becomes fit, or
- special hearing – if the person remains unfit.

See also B Hancock and J Wheeler, *Unfitness to be Tried in Mental Health and Cognitive Impairment Forensic Provisions Act 2020: the Scheme in Five Flow Charts* March 2021 on the Public Defenders Website.

Accused found fit to be tried

If an accused is found fit to be tried, the proceedings are to recommence or continue in accordance with the appropriate criminal procedures: s 46.

Committal proceedings following finding of fit to be tried

Where an accused has been committed for trial for an offence under Ch 3, Pt 2, Div 7 of the *Criminal Procedure Act* 1986 (NSW) (which allows committal for the purpose of determining a question of fitness) and has been found fit to be tried following an inquiry, the Court may, on the accused's application or on its own motion, make an order remitting the matter to a magistrate so a case conference can be held under Ch 3, Pt 2, Div 5 of the *Criminal Procedure Act*: s 52(1)-(2).

The Court must make such an order on the accused's application unless satisfied it is not in the interests of justice to do so or the offence is not an offence in relation to which a case conference is required to be held: s 52(3).

The Court may, on its own motion, make an order at any time remitting the matter to a magistrate so a case conference can be held, if it is satisfied the question of the accused's unfitness is not going to be raised in proceedings for the offence: s 52(4). If a matter is remitted to a magistrate, it is to be dealt with as if the accused had not been committed for trial and the proceedings are taken to be a continuation of the original committal proceedings: s 52(5). If no application is made or the matter is not remitted to a magistrate, the matter is to be dealt with in accordance with s 50 (proceedings to recommence or to continue in accordance with the appropriate criminal procedures): s.52(6).

Guilty plea following finding of fit to be tried – no committal proceedings

Where the matter is not remitted to a magistrate s 25D(5) and (6) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) determine the applicable sentencing discount for any subsequent guilty plea. The maximum discount is only available where the offender 'pleaded guilty as soon as practicable after the offender was found fit to be tried': see *Stubbings v R [2023] NSWCCA 69*. See also Richard Wilson SC, *The EAGP Scheme: Traps, Tactics and Ethics for Defence Lawyers*, 23 March 2024, pp. 20-23 (Public Defenders website) for a discussion as to the application of this subsection.

Accused found unfit to be tried

If the Court finds the accused unfit to be tried following an inquiry, it must also determine whether, on the balance of probabilities, during the period of 12 months after the finding of unfitness, the accused:

(a) may become fit to be tried for the offence, or

(b) will not become fit to be tried for the offence: s 47(1)

The Court will only find an accused will not become fit if there is a 'real certainty': *R v Risi [2021] NSWSC 769* at [55] per Beech-Jones J applied in *R v Lailna [2021] NSWSC 1205* at [25] per Hamill J.

Finding by Court that accused *will not* become fit to be tried within 12 months

If the Court finds the accused is unfit and will not become fit within 12 months of the finding of unfitness, it must hold a special hearing under Pt 5, Div 3 (unless advised by the DPP under s 53 that further proceedings will not be taken against the accused): ss 47(1)(b), 48. See *7 Special Hearing*.

Finding by Court that accused may become fit to be tried within 12 months

If the Court finds the accused is unfit but may become fit within 12 months of the finding of unfitness, the Court refers the matter to the Tribunal for review: ss 47(1)(a), 49(1).

The Court may grant the accused bail in accordance with the *Bail Act* 2013 for a period not exceeding 12 months on being notified of a determination by the Tribunal under s 80 that the person has become fit to be tried (see below): s 49(2). The Registrar of the Court must notify the Tribunal of the terms of the order or the grant of bail as soon as practicable after an order is made or bail granted: s 49(3).

Advice as to whether proceedings are to be taken

Where the Court finds the accused unfit to be tried and

- the Court or Tribunal find the accused will not become fit in the next 12 months, or
- the Tribunal finds the accused or forensic patient has become fit (including after a special hearing has been held),

the Court must obtain advice from the DPP as to whether further proceedings will be taken in respect of the offence: s 53(1)-(2). If the DPP advise further proceedings will not be taken, the Court orders the release of the accused: s 53(3).

Orders following finding accused unfit to be tried

Section 47(2) sets out the orders the Court may make if a person is found unfit following an inquiry. The Court may do one or more of the following:

(a) make an order discharging a jury constituted for the purpose of the proceedings,

(b) adjourn the proceedings,

(c) grant the accused bail in accordance with the *Bail Act* 2013,

(d) make an order remanding the accused in custody,

(e) make other orders that the Court thinks appropriate.

The indictment establishes the boundaries of a s 47 order. The finding that a person is unfit only applies to the charges on the indictment. Both prosecution and defence lawyers should clearly state to the Court what orders are sought.

The order should *not* include:

- matters the person was charged with by the police which are *not* on the indictment, any back-up or related charges under s 166 of the *Criminal Procedure Act* 1986 (NSW) or strictly summary matters (they are Local Court charges and the Local Court does not have a mechanism for finding a person unfit)

- any matters where the prosecution has not found a bill.

Disposition reports/conditions on bail

The Community Forensic Mental Health Service of Justice Health and the Forensic Mental Health Network (FMHN) will not provide a report on appropriate placement options. However, if bail is being considered for people with a mental health impairment, it is useful to consider imposing the following bail conditions:

a) The accused should submit to the Local Health District community mental health service for assessment and case management if that service considers it appropriate;

b) The accused should agree to an assessment by CFMHS if accepted as a client by the Local Health District.

For defendants with a cognitive impairment, the Court may be able to get advice about appropriate placement from the experts who have provided reports to the Court on fitness.

Role of MHRT in fitness hearings

Under the Act, the Tribunal has two roles in relation to fitness.

(1) Referral by the Court

If the Court decides that an accused is unfit to be tried, but may become fit within 12 months, the Court must refer the accused to the Tribunal: s 49(1). Under s 80, the Tribunal must determine if:

- the person has become fit to be tried, or
- has not become fit and will not become fit within 12 months.

The Tribunal starts with the presumption that an unfit person will remain unfit unless there is evidence to the contrary: s 45. A decision as to fitness is made on the balance of probabilities: s 80(3).

Practical considerations

A person who has been found unfit to stand trial will usually only become fit to stand trial if they receive appropriate treatment. This might include one or more of psychiatric treatment (including medication), psychological support, learning about the trial process, the involvement of a support service such as the Justice Advocacy Service of the IDRS or abstinence from substances.

The first review is often a chance for the Tribunal to consider what treatment the accused is receiving, and if any further steps are needed to give the accused the best chance of restoring their fitness.

A person may have become fit between the time of the Court hearing and the first Tribunal review. However, if they have not, it is likely that the Tribunal will adjourn the review, to allow more time for treatment to take effect. The length of the adjournment will depend on the clinical evidence about the time likely to be needed to see if a person will respond to treatment.

An accused who is found unfit but detained in custody will be provided with psychiatric treatment through Justice Health, but access to other fitness restoration options are limited.

The Tribunal also has the power to order that the person be detained in a particular Correctional Centre or a mental health facility if that assists in facilitating treatment. At present, psychological services and fitness restoration support can be difficult to access in custody.

After a period of treatment, the Tribunal will be in a better position to decide whether a person is fit to stand trial or will not become fit within 12 months. The Tribunal then reports its finding on fitness to the Court.

If the Tribunal notifies the Court that a defendant has become fit to stand trial, the proceedings against the accused recommence and there is no further fitness inquiry: s 50(2). If the accused has not, and will not, become fit within 12 months, the matter proceeds as a special hearing: s 48(1). In either case, the DPP must first advise the Court whether the proceedings will continue: s 53(2).

Case Study 8

In June, the accused assaulted an elderly lady in the city. At that time, he was living in Belmore Park. He had been diagnosed with schizophrenia 10 years earlier but had not taken any medication for six months. He was psychotic when he came into custody.

When he was interviewed by the defence expert in August, his active delusions and thought disorder meant he was not fit to stand trial. The defence expert said the accused was unlikely to become fit within 12 months.

He was interviewed by the prosecution expert in October, by which time he had had some psychiatric treatment. His thoughts were clearer, but his delusions still impacted on his assessment of his alleged offending. The Court found him unfit in December.

He continued receiving psychiatric treatment and some coaching about the criminal process. When reviewed by the Tribunal in March, he was fit to stand trial. He had seen CCTV footage of the assault and planned to plead guilty. He was likely to be sentenced to time served.

Case Study 9

The accused was found unfit by the court in March. During the fitness hearing, he was continually interrupting the judge and objecting to the court process. His lawyer agreed with the judge that the accused's microphone should be put on mute. The two experts diagnosed him with an intellectual disability, anxiety and depression, autism spectrum disorder and adult ADHD.

Whilst on remand in custody, Justice Health staff identified that he had a complex delusional system in which the mental health staff, correctional staff, courts, police and lawyers were part of a conspiracy to illegally detain him. He was transferred to Long Bay Hospital and involuntarily treated with anti-psychotic medication.

Within 6 months, the transformation was profound. The accused sat through a Tribunal hearing without difficulties. He responded appropriately to the Tribunal's questions and asked relevant questions himself. He now accepts the services of the Justice Advocacy Service of the IDRS, who can help him understand the court process and his lawyer's advice, help with emotional regulation and flag the need for a break. The resolution of his psychotic illness and the involvement of a support person mean that he is now fit to stand trial.

The Tribunal and a person granted bail

A person who is found unfit and granted bail is not a forensic patient: s 72(2) of the Act. Therefore, the Tribunal has no power to order that a person accept treatment if they are unfit but released on bail. The Tribunal only has the power to assess the person's fitness.

A legal practitioner whose unfit client has been granted bail should consider whether there is a treatment plan that may restore their client's fitness. This plan could be delivered by the private or public sector. Enforceable mental health care would need to be provided under the *Mental Health Act* 2007 (NSW). It is often helpful if the treatment plan forms a part of the bail conditions.

(2) Ongoing fitness assessments

Whenever the Tribunal reviews a person who has been found unfit to be tried for an offence, it must determine whether the person is now fit to be tried: s 80(1).

This includes a person for whom a limiting term has been nominated after a special hearing (including a person who is subsequently subject to an extension order or an interim extension order) and who is detained in a mental health facility, correctional centre, detention centre or other place or who is released from custody subject to conditions under an order made by the Tribunal: s.72(1)(b) definition of forensic patient. (See for example the case of MB in *3 Taking instructions and giving advice: Case Study 3*.)

The Tribunal does not assess fitness for those persons in respect of whom a special verdict of act proven but not criminally responsible was returned after their special hearing (or a verdict of not guilty by reason of mental illness under the *Mental Health (Forensic Provisions) Act 1990*). This is because a special verdict is taken for all purposes to be a verdict reached at an ordinary criminal trial: see s 61(1) and the discussion in *Ephram (No 2) [2014] NSWMHRT 2,* which dealt with the equivalent provisions in the former Act.

If the Tribunal determines at a review that the forensic patient has now become fit to be tried, it must notify the DPP, the person's legal representative and the Court: s 80(2)(b).

The DPP considers whether it intends to take further proceedings and must advise the Court of its decision: s 53(2).

If it is decided that no further criminal proceedings will be taken, the DPP must notify the Court, the Tribunal, the Minister for Police and Emergency Services and the Minister for Health and Medical Research: ss 53(4) and 160. The person stops being a forensic patient and must be released: ss 53(3) and 101(h).

If the DPP decides to take further criminal proceedings, the proceedings commence, without the need for the Court to hold a further fitness inquiry: s 50(2).

7. The special hearing

Introduction

Division 3, Pt 4, ss 54–68 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 provide for the nature, timing, procedure, verdicts, penalties, reports and court orders in a special hearing. It also provides for an accused to elect for the special hearing to be determined by a jury, amending the indictment and other matters.

Note: if a person has been charged with federal offences, the mode of determining fitness and the test to be applied is regulated by State provisions but the consequences of a finding of unfitness is regulated by Commonwealth provisions. See further *9 Commonwealth provisions***.**

Definition

A special hearing is similar to a trial, except that the accused cannot fully participate and so does not have the opportunity to present a full defence. The Act acknowledges this in s 54:

> … a *special hearing* is a hearing for the purpose of ensuring, despite the unfitness of the person to be tried in accordance with the normal procedures, that the [accused] is acquitted unless it can be proved to the required criminal standard of proof that, *on the limited evidence available*, the [accused] committed the offence charged or any other offence available as an alternative to the offence charged. [emphasis added]

When held

The Court must hold a special hearing as soon as practicable after the Court or the Tribunal determines an accused will not, within 12 months of a finding of unfitness, become fit to be tried for the offence: s 55(1). This does not prevent the Court holding a special hearing more than 12 months after the person was found unfit: *R v Peterson (No 2)* *[2014] NSWSC 966* per Campbell J.

Procedure

The special hearing must be conducted as nearly as possible as if it were a criminal trial: s 56(1). The Court may modify court processes to facilitate the effective participation by the accused in the special hearing: s 56(2). Where modification of the court processes is proposed, the parties must be in a position to assist the Court as to the available options. The accused is taken to have pleaded not guilty: s 56(5). The accused may raise any defence that could properly be raised if the special hearing was a trial and is entitled to give evidence: s 56(6), (7).

The requirement to conduct a special hearing "as nearly as possible as a trial" requires a formal arraignment in open court: *R v Zvonaric* *[2001] NSWCCA 505*; *(2001) 54 NSWLR 1; (2001) 127 A Crim R 9* at [3] per Spigelman CJ, Adams J at [35]–[36]. The Crown may rely

upon witness statements and other documents to present evidence but care must be taken not to treat the hearing as a paper committal: *R v Zvonaric* at [19] per Spigelman CJ, Sully J agreeing.

Section 56(8), which is a new provision in the Act, empowers a Court to allow the accused not to appear, or exclude the accused from appearing, at a special hearing if the Court thinks it appropriate in the circumstances and the accused or their legal practitioner agrees. In *R v McKellar (No 2)* *[2014] NSWSC 105* (a case under the old Act), Button J granted an accused's request not to appear in person taking into account that the accused found the symptoms of his mental illness were exacerbated by the court proceedings. The request was not opposed by the Crown, the accused was legally represented, it was a judge alone matter and the nature of a special hearing meant the accused's role was markedly reduced.

Judge alone or jury?

A special hearing is to be held before a judge alone unless an election for a jury has been made by the accused (the Court being satisfied the accused received and understood advice about the election from a legal practitioner), the accused's legal practitioner, or the prosecutor: s 56(9).

An election for a jury must be made on a day before the day fixed for the special hearing if the election is made by the accused, or at least seven days before the day fixed for the special hearing if made by the prosecutor: s 58(1). The accused, or their legal practitioner, may subsequently elect to have the special hearing determined by a judge instead of a jury: s 58(2).

In special hearings where the factual issues are of narrow compass or involve contests of specific expert opinion evidence only, a judge alone hearing may be preferable if it shortens the necessary court time required without compromising the accused's legal interests.

Where a jury is empanelled, the accused's legal representative may exercise the right to challenge the jurors or jury: s 56(10).

If a jury is empanelled, the Court must explain to that jury the following matters:

(a) the fact the accused is unfit to be tried in accordance with the normal procedures,

(b) the meaning of unfitness to be tried,

(c) the purpose of the special hearing,

(d) the available verdicts,

(e) the legal and practical consequences of the verdicts. s 56(11)

This explanation is mandatory: *Subramaniam v The Queen* *[2004] HCA 51* at [41] applied in *R v Knorr* *[2005] NSWCCA 70*.

The suggested direction given in *Subramaniam v The Queen* at [40] has been incorporated in the NSW Judicial Commission's *Criminal Trial Bench Book* at [4-331].

Role of legal representatives in a special hearing

An accused must be legally represented unless the Court allows otherwise: s 56(3). The fact the accused has been found unfit to be tried is not presumed to be an impediment to the person's representation: s 56(4).

The courts have acknowledged the difficulties that can arise in representing someone at a special hearing.

In *R v Smith* *[1999] NSWCCA 126* at [47]–[55], although James J accepted that legal representatives would have more power to make decisions than at an ordinary trial he rejected a submission that the representative has exclusive power and found no error in allowing the appellant to make a statement to the jury against the advice of counsel.

In *R v Zvonaric* *[2001] NSWCCA 505*; *(2001) 54 NSWLR 1; (2001) 127 A Crim R 9* at [12]–[15], Spigelman CJ observed that questions of instruction at a special hearing can be problematic, and that the scheme requires the Court to rely on the professionalism of the legal representative.

In *Dezfouli v R* *[2007] NSWCCA 86* at [43]–[46], Bell J noted the difficulty of representing a client who has a mental illness and that a legal representative is not always required to act on instructions.

Verdicts in a special hearing

There are four possible verdicts following a special hearing: s 59(1):

- not guilty of the offence charged: s 60
- special verdict of act proven but not criminally responsible because of mental health impairment and/or cognitive impairment: s 61
- on the limited evidence available, the defendant committed the offence charged;
- on the limited evidence available, the defendant committed an offence available as an alternative to the offence charged: s 62.

If a not guilty verdict is returned, the person ceases to be a forensic patient and there is no disposition decision.

If one of the other verdicts is returned, the Court may, of its own motion, request a report by a forensic psychiatrist (or a person of a class prescribed in the regulations) not currently treating the accused, as to the accused's condition and whether their release is likely to seriously endanger their own safety or that of any member of the public. The Court may consider the report in determining what orders to make about the accused: s 66. A person is prescribed for the purposes of ss 33(2) and 66(1) if they are a registered psychologist with, in the opinion of the Court, appropriate experience or training in forensic psychology or neuro-psychology: r 4, *Mental Health and Cognitive Impairment Forensic Provisions Regulation* 2021 (NSW).

Act proven but not criminally responsible

Where the judge or jury return a special verdict of act proven but not criminally responsible because of a mental health or cognitive impairment the accused is dealt with as if the verdict had been returned at an ordinary criminal trial: ss 59(1)(b), 61.

As to the procedure that follows where a special verdict has been returned see *8. Mental health and cognitive impairment defences in a criminal trial – Effect of special verdict*

Offence committed on limited evidence available

If, at a special hearing, the Court finds that, on the limited evidence before it, the accused committed the offence charged or an alternative offence (a qualified finding of guilt) the Court must decide upon the appropriate penalty.

If the Court *would not have* imposed imprisonment, the Court may impose any other penalty or make any other order it might have imposed had the accused been found guilty of the offence in an ordinary trial of criminal proceedings: s 63(3). The Court must inform the Tribunal that a limiting term is not to be nominated: s 63(6).

Note: such an offender will not be a forensic patient. Consequently, there is no State supervision unless a community based sentencing order is made requiring supervision.

If the Court *would have* imposed a sentence of imprisonment, it must:

(a) nominate a limiting term that is the best estimate of the sentence the Court would have imposed,

(b) refer the person to the Tribunal; and

(c) may make an interim order with respect to detention in a mental health facility, correctional centre, detention centre or other place pending review by the Tribunal: ss 63(1)-(2), 65.

In determining the penalty to be imposed, the Court:

a) must take into account that, because of the accused's mental health or cognitive impairment, or both, they may not be able to demonstrate mitigating factors for sentence or make a guilty plea for the purpose of obtaining a sentencing discount, and

b) may apply a discount of a kind representing part or all of the sentencing discounts that apply to a sentence because of those factors or a guilty plea, and

c) must take into account periods of the accused's custody or detention before, during and after the special hearing relating to the offence: s 63(5).

Limiting terms

A limiting term is the best estimate of the sentence of imprisonment the court would have imposed if the special hearing had been an ordinary trial: s 63 (2). It is an estimate of the head sentence and does not have a non-parole period: s 54 (c) *Crimes Sentencing Procedure Act 1999 (NSW)*; *R v Mitchell [1999] NSWCCA 120; (1999) 108 A Crim R 85* at [30]-[32]; *R v Mailes [2004] NSWCCA 394; (2004) 62 NSWLR 181; (2004) 150 A Crim R 365* at [18]-[32]; *RS v R [2013] NSWCCA 227* at [18]-[34].

In determining the penalty to be imposed, the Court:

a) must take into account that, because of the accused's mental health or cognitive impairment, or both, they may not be able to demonstrate mitigating factors for sentence or make a guilty plea for the purpose of obtaining a sentencing discount, and

b) may apply a discount of a kind representing part or all of the sentencing discounts that apply to a sentence because of those factors or a guilty plea, and

c) must take into account periods of the accused's custody or detention before, during and after the special hearing relating to the offence: s 63(5).

In setting the limiting term the court must have regard to ordinary sentencing principles: *R v AN [2005] NSWCCA 239* at [13] per Howie J.

A limiting term takes effect from when it is nominated unless the Court:

a) determines it is taken to have effect from an earlier time, having taken into account the accused's custody related to the offence during and after the special hearing, or

b) directs the term commence at a later time to be served consecutively (or partly consecutively) with some other limiting term or sentence of imprisonment imposed: s 64(1).

Before making a direction that the term commence at a later time, the Court must take into account:

a) a sentence of imprisonment in an ordinary criminal trial may be subject to a non-parole period but a limiting term is not,

b) in an ordinary criminal trial, consecutive sentences of imprisonment are to be imposed with regard to non-parole periods: s 64(2).

The Court must refer the accused to the Tribunal if it nominates a limiting term and must notify the Tribunal of orders it makes under the section: s 65. The Tribunal takes over the treatment and supervision of the person, including the disposition of the person: Pt 5 Div 3 of the Act and s 68 of the *Mental Health Act* 2007 (NSW).

Although s 65(2) states that the Court may order the accused be detained in a mental health facility, correctional centre, detention centre or other place after imposing a limiting term and pending review by the Tribunal the decision in *Director of Public Prosecutions v Khoury [2014] NSWCA 15* (dealing with the equivalent section under the old Act) suggests the Court must make an order for detention and that "may" in this context indicates a choice in the place of detention only. See further the NSW Judicial Commission's *Sentencing Bench Book* at [90-040].

8. Mental health and cognitive impairment defences in a criminal trial

Introduction

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 replaces the defence of mental illness with a defence of "mental health impairment or cognitive impairment": s 28.

The Act also replaces the verdict of "not guilty by reason of mental illness". Where the defence of "mental health impairment or cognitive impairment" is established, the Act now provides for a "special verdict of act proven but not criminally responsible": s 30.

The common law "defect of reason from disease of mind" has been replaced by the statutory definitions of "mental health impairment" found in s 4 and "cognitive impairment" found in s 5 of the Act. See *2 Defining mental health and cognitive impairment*.

Note: if a person has been charged with federal offences, the defence of mental illness is regulated by Commonwealth provisions. See further *9 Commonwealth provisions*.

Test for mental health and cognitive impairment defence

The test for the defence of mental health impairment and cognitive impairment is set out as follows in s 28(1).

> A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person—
>
> (a) did not know the nature and quality of the act, or
>
> (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

Whether the defence has been established is a question of fact to be determined by the jury on the balance of probabilities: s 28(2).

The test is similar to the common law test: *R v Siemek (No.1)* *[2021] NSWSC 1292* per Johnson J at [88]-[89]; *R v Jackson* *[2021] NSWSC 1404* per Johnson J at [14]; *R v MC (No.2)* *[2021] NSWSC 1542* per Dhanji J at [18].

As to the common law test see *The King v Porter (1933) 55 CLR 182* at 188-90 per Dixon J; *Sodeman v The King (1936) 55 CLR 192* at 215; *CJ v R* *[2012] NSWCCA 258* Hall J (Beazley JA and Campbell J agreeing) at [41].

Mental illness and alcohol/drugs

The Act explicitly excludes a mental health impairment caused solely by the temporary effect of ingesting a substance or a substance use disorder: s 4(3)

If however the use of substances exacerbates a clinical condition (that is not temporary) then that may constitute a mental health impairment: see *R v Tonga [2021] NSWSC 1064* per Wilson J at [89]-[90]; [106]; *R v Siemek (No.1) [2021] NSWSC 1292* per Johnson J at [103]. See also the consideration in *R v Miller [2022] NSWSC 802* at [1]-[52] by Cavanagh J of the relationship between s.4(1) and (2)(c) and s.4(3) where it is alleged the defendant acted under a drug induced psychosis but was not intoxicated at the time of the offending. For a discussion of the common law position on this issue, see*: R v Fang (No 3) [2017] NSWSC 28* per Johnson J (especially at [110]); *Fang v R [2018] NSWCCA 210; (2018) 97 NSWLR 876* at [95]-[105].

The onus of establishing s.4(3) lies on the party relying upon the exception on the balance of probabilities: *R v Miller [2022] NSWSC 802* at [53]-[62] per Cavanagh J.

Nature and quality of the act

"Nature and quality of the act" refers to the physical nature and consequences of an offence not the moral aspects: s 28(1)(a); *The King v Porter (1933) 55 CLR 182* at 188 per Dixon J; *Sodeman v The King (1936) 55 CLR 192* at 215 per Dixon J.

Knowledge of wrongfulness

The test refers to moral not legal wrongfulness and may include someone who has an awareness of the unlawfulness of their act but not the moral wrongness: s 28(1)(b). See *R v Tonga [2021] NSWSC 1064* per Wilson J at [52]-[55]:

> [55] … Section 28(1)(b) imports the expansion upon the latter of the two concepts that was first given by Dixon J in *The King v Porter* (1933) 55 CLR 182 at 189 - 190, that is, that the accused "could not reason about the matter with a moderate degree of sense and composure" as to the wrongness of his act, "having regard to the everyday standards of reasonable people".

As to common law cases see: *Stapleton v The Queen (1952) 86 CLR 358* at 375 per Dixon CJ, Webb and Kitto JJ; *Skelton v R [2015] NSWCCA 320* at [97]–[123]; *Carter v R [2019] NSWCCA 11* at [299]–[324].

Acts done unconsciously or involuntarily

Although not required for the determination of the appeal, Brereton JA expressed the opinion in *DB [2022] NSWCCA 87* at [69] that s.28 could include acts performed involuntarily and unconsciously if at the time of those acts the person was suffering from a mental health impairment (see further below *Relationship to the common law defence of sane automatism*)

Who can raise the "defence"?

The defence can be raised by the Crown or trial judge as well as the accused: *R v Ayoub (1984) 2 NSWLR 511* applied by Davies J in *R v Jawid [2022] NSWSC 788* at [72]-[92]. The duty of a trial judge to leave to the jury an available defence not raised or relied upon by the accused includes the defence of mental health or cognitive impairment: *R v Fantakis [2023] NSWCCA 3* at [265]-[268] per Ward ACJ.

The approach taken by defence counsel could be important for a future appeal as an accused can only appeal against a special verdict where the defence was not set up by that person; ss 5(2), 5AA(2) *Criminal Appeal Act*. In *R v Brewer (No 2) [2015] NSWSC 1547* at [86]–[93] Bellew J described an approach taken by defence counsel in a judge alone case where the defence was open on the evidence but contrary to instructions. Defence counsel did not run a defence of mental illness but stated he could not rationally argue against the defence if it was raised. For additional appeal cases considering whether the defence was "set up by the accused" at first instance see *12. Appeals*

Whether the defence should be left to the jury

This is a question of law and requires some evidence from which the defence was fairly or reasonably open: *Fang v R [2018] NSWCCA 210; (2018) 97 NSWLR 876* at [58]–[62]. See also *R v Fantakis [2023] NSWCCA 3* at [268]-[271] per Ward ACJ.

Explanation to jury

If the defence is raised, the judge must explain the following matters to the jury:

(a) the findings which may be made on the trial,

(b) the legal and practical consequences of those findings,

(c) the composition of the Tribunal and its relevant functions with respect to forensic patients,

(d) without limiting paragraph (b), that an accused who is found to have committed the act constituting the offence but not to be criminally responsible because of a mental health impairment or cognitive impairment, or both, may be ordered to be released by the Tribunal only if the Tribunal is satisfied, on the evidence available to it, that the accused's safety or that of any member of the public will not be seriously endangered by their release,

(e) that the jury should not be influenced by the consequences of a special verdict of act proven but not criminally responsible in deciding a verdict: s 29.

The purpose of the explanation is to ensure the jury understand the legal and practical consequences of the special verdict, the distinction between punishment and medical treatment and that the person will not be released until the Tribunal is satisfied there is no danger to the community: *R v Kembell [2020] NSWSC 1559* per Johnson J at [90]–[91]; *R v Hilder* (*unrep, NSWCCA, 10 October 1997)* per Hunt CJ at CL. See also *R v Jawid [2022] NSWSC 788* per Davies J at [114]-[119].

Must prove offence first

The trier of fact must first be satisfied beyond reasonable doubt that the offence was committed by the accused before turning to the question of mental health or cognitive impairment: *R v McDonald [2012] NSWSC 875* at [58] per Bellew J referring to *Styles (1990) 50 A Crim R 13* at 22; see also *The King v Porter (1933) 55 CLR 182* at 184 per Dixon J.

Offences of specific intent

For offences of specific intent, the tribunal of fact must consider the issues in the following order:

1. Whether the Crown has proved beyond reasonable doubt the physical acts of the offence (including voluntariness) excluding evidence of the mental state of accused;
2. Whether the accused has established the mental or cognitive impairment defence on the balance of probabilities;
3. If the defence of mental or cognitive impairment is not established whether the Crown has proved specific intent beyond reasonable doubt, taking into account all evidence of the mental state of accused.

See *R v Cunningham [2017] NSWSC 1176* at [13] per Beech-Jones J applying *Hawkins v The Queen (1994) 179 CLR 500* and *R v Minani [2005] NSWCCA 226; (2005) 63 NSWLR 490; (2005) 154 A Crim R 349* at [31]-[33].

This has been applied in cases under the Act: *R v Tonga [2021] NSWSC 1064* per Wilson J at [12]-[16]; *R v Siemek (No.1) [2021] NSWSC 1292* per Johnson J at [16]; *R v MC (No.2) [2021] NSWSC 1542* per Dhanji J at [51]-[54]

Relationship to the partial defence of substantial impairment

Where the accused also seeks to raise the partial defence of substantial impairment under s 23A *Crimes Act* 1900 (NSW), the tribunal of fact must first consider the mental or cognitive impairment defence then substantial impairment. Although much evidence will be relevant to both, the legal test is different: *R v Eyuboglu (No 2) [2019] NSWSC 285* per Button J at [10]–[21]; *R v Davidson (No 2) [2019] NSWSC 1011* per Davies J at [141]–[147]; *R v Jawid [2022] NSWSC 788* per Davies J at [93]-[108].

Relationship to the common law defence of sane automatism

After a lengthy consideration of cases in *DB [2022] NSWCCA 87* at [11]-[53] the Court concluded the Act did not replace or affect the common law defence of sane automatism which entitles an accused to an unqualified acquittal if the charged act or acts occurred independently of the will of the accused by reason of involuntary conduct not arising from a disease of the mind or natural mental infirmity (examples given included somnambulism, concussion, epileptic fit and hypoglycaemia). In this case Brereton JA, (Ierace J agreeing, Wilson J dissenting) found that sexsomnia (a form of somnambulism where sexual acts are committed while the person is asleep) did not constitute a mental health impairment under s.4 and the respondent, who had committed sexual acts against his daughter while he was sleeping, was entitled to the outright acquittal he received. See further See *2 Defining mental health and cognitive impairment.*

Use of expert evidence

Medical evidence is not essential but usually adduced. Although the trier of fact is not bound to accept and act upon expert evidence, they are not entitled to disregard it capriciously and ought not reject unanimous medical evidence unless there is evidence which can cast doubt upon that medical evidence. See *R v Moore [2020] NSWSC 1561* at [85] per Johnson J for a recent summary and the following cases under the Act: *R v Siemek (No.1) [2021] NSWSC*

1292 per Johnson J at [91]-[94]; *R v Jackson [2021] NSWSC 1404* per Johnson J at [15]; *R v MC (No.2) [2021] NSWSC 1542* per Dhanji J at [60]. See *4. Expert witnesses*

Where there is agreement as to impairment

Under s 31 (new to the Act) where a legally represented accused and the prosecutor agree that the proposed evidence establishes the defence of mental health impairment or cognitive impairment the Court may enter a special verdict if, after considering the evidence it is satisfied the defence is established: s 31.

Where no trial date has been set s.31 permits the judge to consider the agreed position of the parties without the usual elements of a criminal trial: *R v Jackson [2021] NSWSC 1404* per Johnson J at [7]-[10]

The Court is required to be satisfied the defence is made out, and must provide reasons for that decision: *R v Siemek (No.1)* per Johnson J at [20]-[21]; *R v Jackson [2021] NSWSC 1404* per Johnson J at [8], [11]; *R v Sands [2021] NSWSC 1325* per RA Hulme J at [4]. Where the matter has been set down for trial, and an election made for judge alone the judge is not required to comply with the s 132-3 *Criminal Procedure Act* 1986 (NSW) requirements to set out the relevant principles of law in a judge alone trial: *R v Tonga [2021] NSWSC 1064* per Wilson J at [98]-[100]; *R v Siemek (No.1) [2021] NSWSC 1292* per Johnson J at [17]-[18].

Effect of special verdict

On the return of a special verdict the Court must make one of the following orders under s 33(1):

(a) an order remanding the accused in custody until a further order is made under this section

(b) an order that the accused be detained in the place and manner the Court thinks fit until released by due process of law

(c) an order for the unconditional or conditional release of the accused from custody

(d) other orders the Court thinks appropriate.

In *R v Siemek (No.2) [2021] NSWSC 1293* Johnson J at [10] noted that an order made under s 33 is not for the purpose of punishment but directed at protection of community and welfare of person who has committed the act

Detained in custody

If the Court decides to detain a person in custody, the person will be taken into custody by Corrective Services NSW.

Detained in the place and manner the Court thinks fit

If the Court decides to detain a person in the place and manner it thinks fit, the person could be detained in a mental health facility. There are a number of specialist forensic mental health facilities in NSW. The Forensic Hospital is a high secure hospital situated in Malabar. There are also medium secure forensic mental health facilities at Bloomfield Hospital in Orange, Morisset Hospital in Morisset and Cumberland Hospital in Parramatta. There is a low secure

forensic unit at the Concord Hospital at Concord. There are some forensic beds available at the Macquarie Hospital in Ryde.

Legally, a forensic patient can also be detained at any gazetted mental health facility, although most mental health facilities do not have specialist forensic rehabilitation options, and are not always well suited to supporting and managing forensic patients.

There is a long waiting list for beds in each of these forensic mental health facilities. If the Court orders a person's detention in a particular facility, there may not be a bed available, which can cause practical difficulties.

Before a forensic patient is admitted to a particular forensic facility, staff from that facility would usually review the person and assess whether they are suitable for admission. For example, the forensic Bunya Unit at Cumberland Hospital is a mixed ward and male forensic patients with a history of sexual offending are not usually suitable for admission.

An accused may also be detained in a secure aged care facility if the facility is sufficiently secure that it meets the criteria for a place of detention. The criteria are discussed in *R v Wilson (No 6)* *[2019] NSWSC 529* at [66]–[81] by Schmidt J.

It is also legally possible for a person to be detained in accommodation for people living with cognitive impairments. However in practice, places with sufficient levels of security and control are hard to find, and it can be difficult to obtain sufficient NDIS funding for those arrangements. One exception is if a person is detained in an aged care facility: see *R v Wilson (No 6)*.

Unconditional or conditional release

The Court may only release an accused if it is satisfied on the balance of probabilities that the accused's safety or that of any member of the public will not be "seriously endangered" by the person's release ss 33(2)-(3), 61(2). The phrase "seriously endangered" was considered by the Court of Appeal *in Attorney General for the State of New South Wales v XY* *[2014] NSWCA 466*, Beazley P at [51], Basten JA at [168]. The Court held that making a decision about serious endangerment involved weighing both the probability of the risk occurring and the gravity of the risk if it were to occur.

Before making an order for the accused's release, the Court may request a report by a forensic psychiatrist or other person of a class prescribed in the regulations (see r 4 and the discussion above), who is not currently treating the accused, as to their condition and whether the accused is likely to seriously endanger their own safety or that of any member of the public.

The Community Forensic Mental Health Service of Justice Health and the Forensic Mental Health Network (FMHN) will provide a free expert report on appropriate placement options. The procedure to obtain this information is as follows:

1. Adjourn the proceedings (the FMHN requires at least 8 weeks to conduct an assessment and prepare a report).
2. The Court may direct that during the adjournment:
    (a) The accused be detained at the Long Bay Hospital (not Long Bay Forensic Hospital) unless an alternative appropriate interim placement is identified by the person's legal representative
    (b) The office of the Statewide Clinical Director Forensic Mental Health (FMHN phone: 02 9700 3027) arrange for FMHN to provide a disposition report to the Court before the next court date. The report will address:

(i) If the Court is considering releasing the person recommended conditions as to care and/or treatment in the community

(ii) If the Court is considering detaining the person recommended placement in a prison or mental health facility

The Court later considers the recommendations of the FMHN report.

Note: These free reports from the CFMHS are *only* available for people with a mental illness

There is also no government funded model for a forensic pathway for people with a cognitive impairment but not a mental illness. Many forensic patients with a cognitive impairment only are detained in custody. Securing a community placement usually means obtaining a high level of NDIS funding, and suitable accommodation with a provider willing to accommodate a person with a criminal history. This can be hard to achieve. The difficulties for this group are helpfully described in the article by Kerri Eagle, Todd Davis & Andrew Ellis “Unfit offenders in NSW: paying the price for gaps in service provision” (2020) *Psychiatry, Psychology and Law* 853

If the person has a cognitive impairment and no major mental illness, there is currently no publicly funded government agency that will provide disposition reports. The best option for people with a cognitive impairment is to ask the experts writing reports to the Court on other issues to also address this issue, if they consider they are qualified to do so.

If the experts who provide reports to the Court are forensic psychiatrists or forensic psychologists (or a prescribed person), those experts could also comment on the risks of release.

The Court must refer the person to the Tribunal where an order is not made for their unconditional release: s 67. The Tribunal is then responsible for making decisions about their treatment and supervision: Pt 5.

9. Commonwealth provisions

Unfitness to be Tried –Crimes Act 1914 (Cth)[3]

See further B Hancock and J Wheeler *Commonwealth Offences on Indictment Fitness to be Tried – The Scheme in Five Flow Charts* on the Public Defenders Website.

Relationship to State provisions

State law applies to federal offences where there is no inconsistency with Commonwealth law. In relation to unfitness, the mode of determining fitness and the test to be applied is regulated by State provisions and the consequences of a finding of unfitness is regulated by Commonwealth provisions: *Kesavarajah v The Queen [1994] HCA 41; (1994) 181 CLR 230* at [21]–[28] per Mason CJ, Toohey and Gaudron JJ; *R (Cth) v Sharrouf [No 2] [2008] NSWSC 1450* per Whealy J at [5]– [7].

Where unfitness raised at committal stage

The question of fitness may be raised by the prosecution, an accused person or their representative in committal proceedings before a magistrate: s 20B(1).

The magistrate must refer proceedings to the court to which the proceedings would have been referred if the person was committed for trial: s 20B(1) and may make an order detaining the person in prison or in hospital: s 20B(4).

If the court to which the person is referred subsequently finds them fit to be tried the proceedings must be remitted back to the magistrate: s 20B(2).

Consideration of unfitness

These provisions apply whether the matter was referred by a magistrate or raised in proceedings for trial on indictment: s 20B(3). The mode and test for determining unfitness is regulated by State law: *Kesavarajah v The Queen [1994] HCA 41; (1994) 181 CLR 230* at [21]-[28]; *R (Cth) v Sharrouf [No 2] [2008] NSWSC 1450* at [5] per Whealy J: see 6. The fitness inquiry

Provision for the determination of fitness by judge alone does not breach s 80 of the Constitution: *Baladjam & Ors [No 13] [2008] NSWSC 1437; (2008) 77 NSWLR 630* per Whealy J.

Where a court finds a person unfit to be tried the court must determine whether there is a prima facie case that the person committed the offence: s 20B(3).

[3] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

Where a court finds a person is unfit to be tried (other than a person referred by a magistrate) the court may make an order detaining the person in prison or in hospital: s 20B(5).

Determining whether there is a prima facie case

Procedures after a finding of unfitness, including consideration of a prima facie case, are regulated by Commonwealth provisions: *R (Cth) v Sharrouf [No 2]* *[2008] NSWSC 1450* at [6]–[7] per Whealy J. Where a court finds a person unfit to be tried, it must determine whether there is a prima facie case that the person committed the offence: s 20B(3).

A prima facie case is established if there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial for the offence: s 20B(6) and ; *R v Sharrouf [No 2]* at [51]–[54].

In proceedings to decide on a prima facie case, the person charged may give evidence or make an unsworn statement and may raise any defence that could have been properly raised at trial, and the court may seek such other evidence, whether oral or in writing, as it considers likely to assist: s 20B(7).

Consideration of a prima facie case is different to a special hearing under State law. It does not require the calling and cross-examination of witnesses and the court must consider the evidence at its highest without engaging in an assessment of the credibility or reliability of such evidence: *R v Sharrouf [No 2]* at [26]-[50].

Where court finds no prime facie case

Where the court determines no prima facie case has been established the court must dismiss the charge and order the release of any person in custody: s 20BA(1).

Where court finds a prime facie case — dismissal of charge

Where the court determines there is a prima facie case but concludes it is inappropriate to inflict any punishment, or inflict any punishment other than a nominal punishment, the court must dismiss the charge and order the release of any person in custody: s 20BA(2), (3). The court must have regard to the character, antecedents, age, health or mental condition of the person, the extent (if any) to which the offence is of a trivial nature or the extent (if any) to which the offence was committed under extenuating circumstances: s 20BA(2).

Where court finds prime facie case — no dismissal of charge

If the court does not dismiss the charge it must as soon as practicable determine whether, on the balance of probabilities, the person will become fit within 12 months of the determination of unfitness: s 20BA(4). The court must first obtain and consider oral or written evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner: s 20BA(5) and may consider evidence from any other person, body or organisation the court considers appropriate: s 20BA(6).

Finding person likely to be fit within 12 months

If the court determines a person is likely to become fit within 12 months, it must also determine whether the person is suffering from a mental illness or mental condition for which treatment is available in a hospital and whether the person objects to being detained in a hospital: s 20BB(1).

If the court makes a positive finding under s 20BB(1), it must order the person be detained (or continue to be detained) in a hospital until the person becomes fit or if the person does not become fit after 12 months, as soon as practicable after the court makes an order in relation to the person under s 20BC (see below): s 20BB(2)(a), (c), (d).

Where the court does not make a positive finding under s 20BB(1), it must either order the person detained in a place other than a hospital (including a prison) or grant conditional bail for a period ending when the person becomes fit or if the person does not become fit after 12 months, as soon as practicable after the court makes an order in relation to the person under s 20BC: s 20BB(2)(b), (c), (d).

Finding person likely to be fit within 12 months — person becomes fit

If the person becomes fit within 12 months the proceedings for committal or on indictment must continue as soon as practicable: s 20BB(3).

Finding person likely to be fit within 12 months — person does not become fit

If person does not become fit within 12 months they are dealt with under s.20BC as if they were originally found not likely to become fit: s 20BB(4).

Finding person will not become to be fit within 12 months

Where the court determines a person will not become fit within 12 months, it must also determine whether the person is suffering from a mental illness or mental condition for which treatment is available in a hospital and whether the person objects to being detained in a hospital: s 20BC(1).

Where the court makes a positive finding under s 20BC(1), it must order the person detained (or continue to be detained) in a hospital for a period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: s 20BC(2)(a).

Where the court does not make a positive finding under s 20BC(1), it must order the person detained in a place other than a hospital (including a prison) for a period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: s 20BC(2)(b).

As to the phrase “period not exceeding the maximum period of imprisonment that could have been imposed of the person had been convicted of the offence charged” in relation to an acquittal because of mental illness see the cases below under Defence of Mental Illness / Mental Impairment.

The court may order the release of the person from custody unconditionally or subject to conditions for not more than 3 years if of the opinion it is more appropriate to do so: s 20BC(5), (6).

These provisions also apply to a person who was found by the court likely to become fit but subsequently did not become fit within 12 months: s 20BB(4). A decision as to detention or conditional release under this section must take into account time spent in detention or on conditional bail during these 12 months: s 20BB(5)

Period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: s 20BJ(1)

This phrase has been considered in several cases.

The court applies a two-stage approach, identifying the legislative maximum penalty for the offence, then determining the hypothetical sentence that would have been imposed if the person had been found guilty of the offence: *R v G, H [2019] SASCFC 71*; *[2019] 134 SASR 461* per Doyle J at [13]; per Hughes J at [69], [74]-[75] applying *R v Goodfellow (1994) 33 NSWLR 308*.

In determining this hypothetical sentence the court must not take account of the mental illness of the person: *R v Goodfellow* per Hunt CJ at CL at p 311, Allen J at p 313; followed in *R v G, H* per Doyle J at [13], although in *R v Robinson [2004] VSC 505; (2004) VR 165* at [31]-[32], Kellam J took into account mental illness in determining the culpability of the person for the offence but not as a separate subjective factor.

In determining the hypothetical sentence the court must undertake a similar, although not identical, process as a sentencing hearing, applying general sentencing principles: *R v G, H* per Doyle J at [10], [23]-[24]; per Hughes J at [78]-[79].

The court is not required to quantify the hypothetical sentence but must make clear it has been considered: *R v G, H* at [25] per Doyle J.

Where there are multiple offences, the court must consider the principles of accumulation and fix a single period that reflects the multiple offences: *R v Goodfellow* per Hunt CJ at CL at p 312, Allen J at 314.

Review by Attorney General

Any person detained under s 20BC(2) must be reviewed by the Attorney General every six months to consider whether they should be released from detention: s 20BD(1). The Attorney General must obtain and consider a report from a psychiatrist or psychologist and another medical practitioner, may consider other reports and must take into account any representations made by or on behalf of the person being reviewed: s 20BD(2).

The Attorney General may order the person's conditional or unconditional release for the remainder of the period set under s.20BC or 5 years, whichever is less: s 20BE(1), (3), (4). The Attorney General must not order the release unless satisfied the person is not a threat or a danger to themselves or the community: s 20BE(2).

Significant differences to State provisions:

Upon an initial finding that a person is unfit

Under State provisions, the court must determine if the person is likely to become fit within 12 months. If the court determines a person is likely to become fit, they are reviewed by the MHRT for up to 12 months. Only at the end of the 12-month period is a special hearing held. Where the court determines a person is not likely to become fit a special hearing is held without delay.

Under Commonwealth provisions, the court determines if there is a prima facie case before deciding if the person is likely to become fit within 12 months.

Special hearing / prima facie case

There are differences in the procedures and test between the Commonwealth determination of a prima facie case and the State special hearing.

Limiting term / period not exceeding

Under State legislation, a limiting term is applied to a person after a special hearing. Under the Commonwealth provisions, a person who is found not likely to become fit or has not become fit after 12 months will be detained for a period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.

Future review

Under the State provisions a person is reviewed by the MHRT. Under the Commonwealth provisions they are reviewed by the Attorney General

Defence of mental impairment / mental illness

See further B Hancock and J Wheeler Defence of Mental Illness Procedural Flow Chart - Commonwealth on the Public Defenders Website.

Special verdict of not guilty because of mental impairment — *Criminal Code Act* 1995 (Cth)[4]

Section 7.3 provides for a special verdict of not guilty because of mental impairment for persons charged on indictment with federal offences.

Under s 7.3(1) a person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

(a) the person did not know the nature and quality of the conduct; or

(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

[4] Section numbers refer to the *Criminal Code Act* 1995 (Cth) unless otherwise stated.

(c) the person was unable to control the conduct.

This is similar to the common law and State tests except for the addition of (c): see *8 Mental health and cognitive impairment defences in a criminal trial - Test for mental health and cognitive impairment defence*.

"Mental impairment" includes senility, intellectual disability, mental illness, brain damage and severe personality disorder: s 7.3(8).

"Mental illness" is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli, although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur: s 7.3(9). The question of whether a person is suffering from a mental impairment is one of fact: s 7.3(2).

The question of mental impairment may be raised by the prosecution with leave of the court or by the defence: s 7.3(3), (4).

Whether a person is suffering from such a mental impairment must be established on balance of probabilities: s 7.3(3).

The tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment: s 7.3(5).

A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely upon this section to deny criminal responsibility: s 7.3(6).

If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence: s 7.3(7).

Where a person had been found not guilty because of a mental impairment which is a mental illness, they will be dealt with under s 20BJ of the *Crimes Act* (Cth). Note that this section refers only to persons acquitted because of mental illness. It is therefore unclear whether the provisions apply to a person whose mental impairment was because of senility, intellectual disability, brain damage or severe personality disorder.

Orders and review after special verdict — *Crimes Act* (Cth)[5]

Where a person is acquitted of a federal offence because of mental illness, the court must order the person be detained in safe custody in prison or in a hospital for a period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: s 20BJ(1).

The court may order the release of the person from custody unconditionally or subject to conditions for not more than three years if the court is of the opinion it is more appropriate to do so: s 20BJ(4), (5).

[5] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

Period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: s 20BJ(1)

This phrase has been considered in several cases.

The court applies a two-stage approach, identifying the legislative maximum penalty for the offence, then determining the hypothetical sentence that would have been imposed if the person had been found guilty of the offence: *R v G, H [2019] SASCFC 71*; *[2019] 134 SASR 461* per Doyle J at [13]; per Hughes J at [69], [74]-[75] applying *R v Goodfellow (1994) 33 NSWLR 308*.

In determining this hypothetical sentence the court must not take account of the mental illness of the person: *R v Goodfellow* per Hunt CJ at CL at p 311, Allen J at p 313; followed in *R v G, H* per Doyle J at [13], although in *R v Robinson [2004] VSC 505; (2004) VR 165* at [31]-[32], Kellam J took into account mental illness in determining the culpability of the person for the offence but not as a separate subjective factor.

In determining the hypothetical sentence the court must undertake a similar, although not identical, process as a sentencing hearing, applying general sentencing principles: *R v G, H* per Doyle J at [10], [23]-[24]; per Hughes J at [78]-[79].

The court is not required to quantify the hypothetical sentence but must make clear it has been considered: *R v G, H* at [25] per Doyle J.

Where there are multiple offences, the court must consider the principles of accumulation and fix a single period that reflects the multiple offences: *R v Goodfellow* per Hunt CJ at CL at p 312, Allen J at 314.

Review by Attorney General

Any person ordered to be detained in hospital or prison must be reviewed by the Attorney General as soon as practicable, and then every six months, to consider whether the person should be released from custody: s 20BK(1).

The Attorney General must obtain and consider a report from a psychiatrist or psychologist and another medical practitioner, may consider other reports and must take into account any representations made by or on behalf of the person being reviewed: s 20BK(2).

The Attorney General may order the person's conditional or unconditional release for the remainder of the period set under s 20BJ(1) or five years, whichever is less: s 20BL(1), (3), (4).

The Attorney General must not order the release unless satisfied the person is not a threat or a danger to themselves or the community: s 20BL(2).

Significant differences to State provisions:

Under Commonwealth provisions the defence is one of mental impairment:

- The definition of mental impairment is different to the State definition of mental impairment and cognitive impairment and includes "severe personality disorder"
- The defence is similar but and includes where a person was unable to control their conduct as a result of their mental impairment
- The verdict is "special verdict of not guilty because of mental impairment"
- It is unclear how a person is dealt with if their special verdict is based on a mental impairment that is not a mental illness.

Under Commonwealth provisions the court determines and imposes a specific period of detainment and the person becomes subject to review by the Attorney General.

Under State provisions a person is detained indefinitely and is subject to the review of the MHRT.

Summary disposition of persons suffering from mental illness or intellectual disability — *Crimes Act* (Cth) [6]

Section 20BQ provides for the summary disposition of persons suffering from a mental illness or an intellectual disability charged with federal offences. Where s 20BQ applies, the state provisions do not apply: *Kelly v Saadat-Talab [2008] NSWCA 213; (2008) 72 NSWLR 305*.

It must appear to the court that the person is suffering from a mental illness within the meaning of the civil law of NSW or is suffering from an intellectual disability: s 20BQ(1)(a). This is restricted to person suffering from a mental illness at the time of proceedings; State provisions extend to persons suffering a mental illness at the time of the offence: *Kelly v Saadat-Talab*; Commonwealth *Director of Public Prosecutions v Mahamat-Abdelgader [2017] NSWSC 1102* per McCallum J.

It must also appear to the court that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under these provisions than otherwise in accordance with law: s 20BQ(1)(b).

In *Morrison v Behrooz [2005] SASC 142* at [40]-[45], Gray J expressed the view that s 20BQ only applies where no plea has been entered. This was challenged but not decided in *Commonwealth Director of Public Prosecutions v Seymour [2009] NSWSC 555* per Simpson J. Note the State provisions apply whether or not a person has entered a plea: s 9(1) *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

The court may dismiss the charge and discharge the person:

(i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or

(ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for

[6] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or

(iii) unconditionally: s 20BQ(1)(c).

When considering whether to impose conditions, a magistrate must consider the seriousness of the offence, general deterrence and the need for supervision or treatment of the offender: *Boonstoppel v Hamidi [2005] SASC 248* per Gray J at [42]. The court may instead adjourn the proceedings, remand the person on bail and/or make any other order that the court considers appropriate: s 20BQ(1)(d).

An order under s 20BQ(1)(c) acts as a stay against any further proceedings against the person in respect of offence: s 20BQ(2).

The District Court hearing an appeal from Local Court in relation to federal offences may only exercise power under s 20BQ if the appeal is against conviction and the conviction is set aside. It is not available where it is a sentence appeal only: *Huynh v R [2021] NSWCCA 148*.

Sentencing alternatives for persons suffering mental illness or intellectual disability — *Crimes Act* (Cth) [7]

Hospital Order

The court may, without passing sentence, make a hospital order that a person be detained in a specified hospital for a specified period for the purpose of receiving specified treatment where the person is convicted on indictment of a federal offence, and the court convicting the person is satisfied of the following:

a) the person is suffering from a mental illness within the meaning of the civil law of that State or Territory; and

b) the illness contributed to the commission of the offence; and

c) the appropriate treatment for the person is available in a hospital; and

d) the proposed treatment cannot be provided to the person other than as an inmate of a hospital: s 20BS(1).

The court must not make an order unless, but for the mental illness, it would have sentenced the person to a period of imprisonment: s 20BS(2).

The specified period of detention in a hospital must not be longer than the period of imprisonment to which the person would have been sentenced had the hospital order not been made: s 20BS(3). The court may fix a lesser period of detention during which the person is not to be eligible to be released from the hospital: s 20BS(4).

The court must first consider the opinion of two duly qualified psychiatrists: s 20BS(5). It can impose hospital order even where the person is serving a federal sentence of imprisonment: s 20BS(6).

At the end of any lesser period of detention set under s 20BS(4), the Attorney General must consider reports of two duly qualified psychiatrists so as to determine whether to release the person: s 20BT(1).

The Attorney General must order the person to be released on such conditions for the balance of the period of the hospital order as the Attorney General considers appropriate having regard

[7] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

to the reports and other such matters the Attorney General considers relevant, unless at least one duly qualified psychiatrist recommends the person not be released because of a continuing need for hospital treatment or the person is serving an existing federal sentence: s 20BT(2).

Sections 20BM and 20BN apply in relation to the revocation of a release order: s 20BT(3).

The DPP may, at any time while the order is in force, apply to the court to discharge a hospital order and impose such other sentence as the court could have imposed: s 20BU(1).

The court must not discharge hospital order unless satisfied:

a) the person has sufficiently recovered from mental illness to no longer require involuntary hospitalisation; or

b) the mental illness will not respond or respond further to hospital treatment: s 20BU(2).

The new sentence of imprisonment must take into account the time served under the hospital order and must not exceed length of the hospital order: s 20BU(3).

Before reaching a decision the court:

a) must consider the reports of two duly qualified psychiatrists; and

b) must consider the report of any person into whose care the person was released under s 20BR; and

c) may obtain and consider such other information as it thinks relevant: s 20BU(4).

Psychiatric Probation Order

The court may, without passing sentence, make a psychiatric probation order that a person reside at, or attend at, a specified hospital or other place for the purpose of receiving that psychiatric treatment where the person is convicted of a federal offence, and the court is satisfied of the following:

a) the person is suffering from a mental illness within the meaning of the civil law of that State or Territory; and

b) the illness contributed to the commission of the offence; and

c) appropriate psychiatric treatment for the person is available in a hospital or other place; and

d) the person consents to the order being made; and

e) the person or the person's legal guardian consents to the proposed treatment: s 20BV(1), (2).

The order is subject to the following additional conditions:

a) the person will, during such period as the court specifies, not exceeding 2 years, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer;

b) the person will be of good behaviour for such period, not exceeding 5 years, as the court specifies: s 20BV(3).

The court may, on application of the probation officer or the person in charge of the hospital or other place where the treatment is being undertaken, vary treatment: s 20BV(4).

Where a court is satisfied a person has, without reasonable excuse, failed to comply with a condition of the order, the court may:

a) without prejudice to the continuance of the order, impose a pecuniary penalty: or

b) discharge the order and make an order under s 20 (conditional release); or

c) revoke the order and deal with the person for the offence in respect of which the order was made, in any way in which the person could have been dealt with for that offence if the order had not been made and the person was be-fore the court for sentence in respect of the offence; or

d) take no action: s 20BX(1).

Release on conditions

The court may, without passing sentence, order a person be released, on condition that they undertake a specified program or treatment for a specified period where a person is convicted of a federal offence, and the court is satisfied of the following:

a) the person is suffering from an intellectual disability; and

b) the disability contributed to the commission of the offence; and

c) an appropriate education program or treatment for the person is available; and

d) the person or the person's legal guardian consents to the proposed treatment: ss 20BY(1), (2); 20BV(2).

The order is subject to the following additional conditions:

a) the person will, during such period as the court specifies, not exceeding two years, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer;

b) the person will be of good behaviour for such period, not exceeding five years, as the court specifies: ss 20BY(2); 20BV(3).

The court may, on application of the probation officer or the person in charge of the place where the treatment is being undertaken, vary treatment: ss 20BY(2), 20BV(4).

Provisions dealing with the beach of psychiatric orders apply to a breach of these orders: ss 20BY(2), 20BW, 20BX.

10. The Role of the Mental Health Review Tribunal

Mental Health Review Tribunal and Forensic Patients

Under the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 a forensic patient is:

a) a person who has been found unfit to be tried and is detained pending the finalisation of the court proceedings

b) a person for whom a limiting term has been nominated after a special hearing

c) a person who is the subject of a special verdict of act proven but not criminally responsible (until unconditionally released

d) a person who is subject to an extension order or an interim extension order: s 72(2).

A person charged with an indictable offence can become a forensic patient in four ways:

- when the Court finds the person unfit to stand trial and remands them in custody: s 72
- where the person remains unfit, and at the end of a special hearing, the Court finds on the limited evidence that the person committed the act (or an alternative). The Court decides that if the person was being sentenced at trial, they would need to spend a period of time in detention, and so the Court sets a limiting term: Pt 2, Div 3 and s 72
- at the end of the person's limiting term if the Supreme Court decides to extend the person's forensic patient status under Pt 6
- following either a special hearing or a trial, the Court decides that the person committed the act charged but has made out the defence that they are not criminally responsible by reason of mental illness: ss 31, 33, 67.

Once a person becomes a forensic patient, the Tribunal will be the decision maker about the fundamental aspects of that person's life.

The Tribunal decides:

- Whether the forensic patient should be detained and if so, where they should be detained. Should it be custody, a mental health facility or some other place?
- When the forensic patient may have leave from that place and what kind of leave. The Tribunal's orders usually refer to:
  - escorted leave (with staff from the facility),
  - supervised leave (in the company of people who are not staff, but who are approved by staff to act as supervisors),
  - unsupervised leave (where the person is on their own, but subject to a leave plan imposed by the facility, which includes regular and random monitoring)

Leave can be granted for daytime only, or include periods of time overnight. The Tribunal can impose detailed conditions, or allow the treating team at the facility the discretion to impose their own conditions.

- When a forensic patient may be conditionally released. This means that a forensic patient lives in the community, under the supervision of a case manager. If the person has a major mental illness, the case manager will be part of the local Community Mental Health Team and the person will also see the psychiatrist who works with that CMHT. If the person has a cognitive impairment the case manager will be from the Community Safety Program, which is a part of the Department of Communities and Justice. A person who has been conditionally released to a nursing home may have the Director of Nursing as their case manager. The Tribunal can decide the type of conditions to impose but has a standard set of conditions that it uses as a starting point.
- When a forensic patient is ready for unconditional release. This means the person is no longer a forensic patient or under the control of the tribunal. The Tribunal may make a community treatment order at the time of unconditional release or the person may transition to voluntary mental health care.

The Tribunal relies on public sector facilities to follow the Ministry of Health Policy Directive which is *PD2012_50*. The Tribunal often uses the same terminology as is found in that Directive. The Directive has not yet been updated to refer to the new Act. However, the statutory criteria in relation to leave and release have not changed significantly, so that the Policy Directive is still relevant to the practical implementation of leave.

The Tribunal can only grant leave or conditional or unconditional release if satisfied that release will not seriously endanger the safety of the forensic patient, the public or a registered victim (but only for leave): ss 84(2) and 94(3). The phrase "seriously endanger" was considered by the Court of Appeal *in Attorney General for the State of New South Wales v XY [2014] NSWCA 466*, Beazley P at [51], Basten JA at [168], McColl JA agreeing. The Court of Appeal held that the decision involved weighing both the probability of the risk occurring and the gravity of the risk were it to occur.

A person who is subject to a limiting term cannot be conditionally released unless the Tribunal is also satisfied that the person has spent sufficient time in custody: s 84(1)(c). The meaning of the phrase "sufficient time" is discussed in *Adams [2013] NSWMHRT 1* and *Talbingo [2015] NSWMHRT 6*.

The Tribunal will conduct a review of forensic patients as soon as practicable after their court process has finished and will then usually review a forensic patient every six months. The Tribunal may extend this timeframe to 12 months if there are reasonable grounds to do so or an earlier review is not required: s 77.

Other functions of the Tribunal

The Tribunal also has a role in overseeing compulsory mental health care for people in custody. Involuntary treatment could include an order that a person detained in custody be involuntarily treated in a mental health facility (usually the Long Bay Hospital inside the Long Bay Correctional Complex or the Forensic Hospital for juveniles and most women) under s 90 of the Act. People in this situation are called correctional patients under s 73 of the Act. There is also an option for the Tribunal to order compulsory mental health care in a correctional centre under a community treatment order that is made under s 99 of the Act.

Practice Directions

The Tribunal has issued three Practice Directions that deal with its general forensic processes; processes unique to forensic patients who are subject to limiting terms or extension orders and correctional patients. These can be found on the Tribunal's Website and are titled:

- MHCIFP Act – Correctional Patients and Forensic CTOs
- MHCIFP Act – Forensic Patients Overview
- MHCIFP Act – Limiting Terms and Extension Orders.

These Practice Directions set out the requirements for notifying the Tribunal about the issues to be considered at an upcoming hearing, as well as the requirements for the filing and distribution of evidence and submissions.

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*

Appeal against refusal to make a s 14 order

An appeal to the District Court against a refusal by a magistrate to divert an offender under Part 2 Div 2 is to be conducted as an appeal against conviction and not as a severity appeal: *Application by Serge Zhura pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) [2024] NSWSC 198* per Hamill J; *Huynh v R [2021] NSWCCA 148*.

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*.

12. Appeals

Appeals against court orders

Note: References to sections in this part are to sections of the *Criminal Appeal Act* 1912 (NSW) unless otherwise stated.

The *Criminal Appeal Act* provides for a number of appeals against findings in the District and Supreme Court in relation to unfitness to be tried and special verdicts.

Appeal against a finding by a court that a person is unfit to be tried for an offence

A conviction is defined in s 2 to include a finding that a person is unfit to be tried: see ss 5(1)(a), 6A(a); see also *AG of New South Wales v X [2013] NSWSC 1392* at [67].

Appeal against a finding at a special hearing that the offence has been committed

A conviction is defined in s 2 to include a finding of a court following a special hearing: see also ss 5(1)(a), s 6A(b) and *AG of New South Wales v X [2013] NSWSC 1392* at [67].

Appeal against a special verdict of act proven but not criminally responsible

See s 5(1)(a), (2). The appeal is only available where the defence was not raised by the accused: s 5(2), applied in *Foy (1922) 39 WN (NSW) 20*, followed in *R v Grieg (1996) 89 A Crim R 254*, *Peterson v R [2007] NSWCCA 227*.

As to cases considering whether the defence was raised by the accused person see *R v Williams [2004] NSWCCA 224*; *Dezfouli v R [2007] NSWCCA 86* at [32]-[41]; *R v Minani [2005] NSWCCA 226; (2005) 63 NSWLR 490; (2005) 154 A Crim R 349* at [37]-[40].

Appeal against a limiting term of imprisonment or any other order or penalty after a special hearing:

A sentence is defined in s 2 to include a limiting term or any other order or penalty made or imposed after a special hearing: see also ss 5(1)(c), s 6A(c).

Appeal against any order made following a special verdict of act proven but not criminally responsible:

A sentence is defined in s 2 to include any order made in respect of a person following a special verdict of act proven but not criminally responsible: see also ss 5(1)(c), s 6A(d)

Raising fitness on appeal for the first time

If there is material on appeal that raises a real and substantial question about fitness at the time of the trial, the Court should quash the conviction unless satisfied that the trial court, acting reasonably, must have found that the appellant was fit to stand trial: *Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1* at [86]-[87] per Gaudron J and [319] – [320] per Hayne J; applied in *R v RTI [2003] NSWCCA 283; (2003) 58 NSWLR 438* at [31]; *R v Rivkin [2004] NSWCCA 7*; (2004) 59 NSWLR 284 at [294] – [295]; *JM v R [2017] NSWCCA 138* at [135] – [138]. This includes cases where the question of fitness was raised but not determined at trial: *RE v R [2022] NSWCCA 73* at [7].

This test continues to apply under the new Act: *Roberts v R [2023] NSWCCA 187* per Yehia J at [151]-[177]; Davies J agreeing at [145]-[148]; Kirk JA, dissenting at [13]-[65].

Finding of special verdict on appeal

Under s 7(4) the Court of Criminal Appeal may quash a conviction and sentence and make its own finding of a special verdict of act proven but not criminally responsible in relation to an appellant.

The appeal court does not need to first find error but must make its own evaluation of the evidence at trial in considering whether the person is mentally ill, giving due respect to the verdict at first instance: *Carter v R [2019] NSWCCA 11* at [2]–[14] per Payne JA; at [25]–[27] per Schmidt J and at [256]–[282] per Button J.

The Court may also consider cogent, additional evidence: *TA v R [2019] NSWCCA 145* at [13]–[14].

Appeals against refusal of Local Court to make a diversionary order

An appeal to the District Court against a refusal by a magistrate to make a diversionary order under Part 2 Div 2 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) or s 20BQ of the *Crimes Act* 1914 (Cth) is to be conducted as an appeal against conviction under s.11 *Crimes (Appeal and Review) Act* 2001 (NSW) and not as a severity appeal: *Application by Serge Zhura pursuant to s 78 of the Crimes (Appeal and Review) Act 2001 (NSW) [2024] NSWSC 198* at [101] per Hamill J; *Huynh v R [2021] NSWCCA 148*.

Appeals against Mental Health Review Tribunal orders

Note: References to sections in this part are to sections of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) unless otherwise stated.

Decisions of the Forensic Division of the Tribunal can be appealed to the Supreme Court or the Court of Appeal, depending on the nature of the Tribunal decision: Pt 7, Div 2.

The right of appeal is broad, allowing the person the subject of the Tribunal's order and the Minister for Health the opportunity to appeal on a question of law or any other question: s 150(1) and (2). Appeals by the person the subject of the order require leave: ss 150(1) and 151(1).

Registered victims who have made submissions regarding leave or release may similarly appeal on a question of law or any other question: ss 145 and 150(3).

Most appeals are heard in the Supreme Court. Appeals against release decisions are made directly to the Court of Appeal: s 151. The President of the Tribunal is usually a judge (as are some other presiding members). Appeals from a Tribunal decision presided over by a District or Supreme Court judge need to be taken directly to the Court of Appeal.

The nature of an appeal under the identical provisions of the former Act were considered by Johnson J in *A by his Tutor Brett Collins v MHRT* *[2010] NSWSC 1363*. Section 75A of the *Supreme Court Act* 1970 applies to appeals under the Act, so that an appeal to the Supreme Court is a rehearing: at [38]. If errors of law or wrong findings of fact have occurred below, the court will determine the appeal, and make such order as is appropriate: at [33].

Appeals by a forensic patient, a correctional patient or a person on bail who is a party to a proceeding before the Tribunal require leave: ss 150(1) and 151(1). This issue was also considered in *A by his Tutor Brett Collins v MHRT* by Johnson J. His Honour held that in considering whether leave should be granted the Court should bear in mind that the Tribunal holds specialist expertise in the subject matter: at [59]. For leave to appeal to be granted, the Court must be satisfied not merely that there is a reasonably arguable case of error, but also that there is a reasonable prospect of substantive relief being obtained: at [61].

There is 28 days from the Tribunal's determination to file an appeal: s 152. The Tribunal has an obligation to give written reasons for its decision and it is arguable that the 28 days run from the date of those reasons: *Minister for Mental Health v A* *[2017] NSWCA 288* per Beazley P at [56].

A forensic or correctional patient requires a tutor to be appointed (*Civil Procedure Act* 2005 (NSW) s 3 definition of 'person under legal incapacity' and *Uniform Civil Procedure Rules* 2005 (NSW) cl 7.14*)* unless the Court orders otherwise.

Judicial Review of Mental Health Review Tribunal determinations

Decisions of the Forensic Division of the Mental Health Review Tribunal can also be the subject of judicial review proceedings before the Supreme Court or the Court of Appeal: s 69 *Supreme Court Act* 1970 (NSW). This jurisdiction is based on the legality, rather than the merits, of the decision: *Attorney General (NSW) v Quin* *[1990] HCA 21; (1990) 170 CLR 1* at 35-37 per Brennan J.

Judicial review should only be used if statutory appeal mechanisms have been exhausted: see for example *Rodger v De Gelder* *[2011] NSWCA 97; (2011) 80 NSWLR 594* at [84] per Beazley JA.

13. Extension Orders

Introduction

Pt 6 (ss 123 –144) of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 empowers the Supreme Court to make orders extending a person's status as a *forensic patient*. Making such an order is a means of preventative control that aligns with similar mechanisms such as the *Crimes (High Risk Offenders) Act* (CHROA). Applications can only be made by a "Minister administering the Act"[8] during the last six months of a forensic patient's limiting term or existing extension order. The Supreme Court's role is confined to determining whether a person's forensic status is extended or not. The patient's liberty remains under the control of the Mental Health Review Tribunal (MHRT) throughout the process including after an extension order is made. The Crown Solicitor invariably appears on behalf of the applicant and eligibility for a grant of Legal Aid for forensic patients is likely. The rules and regulations relating to civil proceedings conducted before the Supreme Court apply: s 134.

The application

At the earliest opportunity contact the Mental Health Advocacy Service of Legal Aid NSW (MHAS) (ph: 9745 4277) informing them an extension order is being considered. As the MHAS represent over 98% of forensic patients it's likely the patient is a client. These patients invariably experience a disability that effects their ability to understand and difficulties in reading and communicating are common. The MHAS can explain the process to the patient and gain instructions regarding consent to being examined by experts and accepting service.

An application is made by way of summons and must be supported by an affidavit annexing a report prepared by a psychologist or psychiatrist or medical practitioner addressing risk and ongoing management (s 125) and other supporting documentary evidence such as health care records. Section 138 allows the applicant Minister to require the production of documents and information which is admissible despite any contrary rule. Usually the summons will seek:

- an *interim extension order* for up to three months
- orders appointing two experts to examine the patient and furnish the court with reports of those examinations: s 126(5)(a)
- orders directing the patient attend those examinations: s 126(5)(b)
- an order that the patient be subject to an extension order which can be no greater than five years: s 128
- an order restricting access to the court's file for non-parties without leave.

The application must be served within two business days of filing: s 126(1). A directions hearing is listed by the Supreme Court for the time tabling of the preliminary hearing.

[8] Minister for Health and Medical Research, Minister for Mental Health, Regional Youth and Women, Attorney General, and Minister for the Prevention of Domestic Violence. For full details of Ministerial responsibilities, see the Allocation of the Administration of Acts. Usually the Attorney General and/or the Minister for Mental Health make applications.

A forensic patient is deemed a 'person under legal incapacity': s 3 *Civil Procedure Act* 2005 (NSW). Accordingly, a tutor must be appointed for the proceedings to "carry on": cl 7.14 *Uniform Civil Procedure Rules* 2005 (NSW). A tutor will preferable be someone close to the patient such as a family member. Where such a person is not available a tutor may be gained through contacting the *Guardian Ad Litem* panel or on occasion Legal Aid arrange a tutor. A tutor certificate (cl 7.16 UCPR) and supporting affidavit indicating the tutor consents to act and has no interest in the matter must be filed so the tutor can act in that position.

Preliminary hearing — interim extension orders

Although not strictly required at a preliminary hearing, the court considers making an interim extension order that, if made, extends the patient's forensic status for no more than 3 months: s 131.

Usually, a preliminary hearing is conducted within half a day. The application is supported by a report and supporting documentation and the parties file and serve respective submissions. To be examined for the purpose of drafting that report the patient must provide consent.

The Supreme Court may make an order at a preliminary hearing where the "matters alleged in the supporting documentation would, if proved, justify the making of an extension order": s 130(b). Beech-Jones J (as his Honour then was) in *Attorney General for New South Wales v Kapeen [2017] NSWSC 226* at [15] per Beech-Jones J, described this as:

> To the extent that supporting documentation sets out factual matters and opinions on matters of fact the court does not, at this point, engage in any considered evaluation of whether those factual matters are well-founded but instead proceeds on the basis they are proven.

The Court's function at a preliminary hearing "is not to weigh the material or predict the ultimate result": *Attorney General of New South Wales v Beryalay by his tutor Jennifer Thompson (Preliminary) [2019] NSWSC 252* at [19] per Ierace J; *Attorney General for New South Wales v Tillman [2007] NSWCA 119* at [98]. Generally, this means witnesses are not called.

The test for making an order at a preliminary hearing is the same as the test for making an extension order: s 122. Where an interim extension order is made, the court does not issue a warrant or any orders regarding the patient's liberty. Rather, where an order is made the patient remains under the control of the MHRT. Within the period in which the interim extension order is made the substantive hearing is conducted unless the application is withdrawn or revoked.

Prior to substantive hearing

During the period between the preliminary and substantive hearing the parties must:

- unless the Court makes orders appointing particular experts ("court appointed experts") and examinations, negotiate and agree on which experts shall examine the patient and how, when and where that will take place
- negotiate the matters at issue doing their best to confine these matters
- negotiate what documents should be provided to the Court noting that the Court has requested the parties confine materials to those that are relevant to the application and issues

- determine whether a “working folder” of documents be provided to the Court and if so, what materials should be in that folder
- agree on a timetable for filing and serving evidence and submissions noting the patient may provide an expert report
- agree on what witnesses will be required to give evidence at the substantive hearing and how their evidence might be given such as separately or together
- agree on appropriate hearing dates for the substantive hearing with consideration for the availability of witnesses and counsel and allowing sufficient time for the matter to be determined
- agree on the estimated time for the hearing noting up to one day is common.

A directions hearing is conducted during this period. Short minutes of order should be agreed and drafted prior to the directions hearing or shortly thereafter. The Court will usually provide a date for the hearing.

The applicant customarily arranges for the relevant documents and folders to be filed with the Court in accordance with the Court orders regarding timetabling.

Substantive hearing

The Court *must* have regard to a number of prescribed matters when determining an application for an extension order (s 127) and *may* have regard to other matters. The prescribed matters include:

- the safety of the community
- expert reports including the report tendered at the preliminary hearing: s 125
- reports drafted by the two experts appointed by the court: s 126(5)
- any other reports made in support of the application
- the patient’s level of compliance with any obligations imposed whilst a forensic patient
- the views of the court that imposed the limiting term
- orders of the Mental Health Review Tribunal
- any other information as to the risk the patient will pose in the future.

Other matters that are commonly considered include expert reports undertaken on behalf of the forensic patient, guardianship and financial management orders, the possibility the patient may be subject to orders under the *Mental Health Act* such as detention as an involuntary patient or subject to a community treatment order, and available family and other community based supports and accommodation.

The test

The two-tiered test under s 122 for making an extension order arises where the Court …”is satisfied to a high degree of probability that”:

a) the patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient, and

b) the risk cannot be adequately managed by other less restrictive means.

Importantly, s 122 contains a note stating that "less restrictive means of managing a risk includes, but is not limited to, a patient being involuntarily detained or treated under the *Mental Health Act*".

The Court accepts that as the structure, language and key provisions for making an extension order have direct parallels with the *Crimes (High Risk) Offenders Act*, guidance is gained from the authorities and learning regarding that legislation: *Attorney General for New South Wales v Rohan (Preliminary)* *[2020] NSWSC 1610* at [18] per Hoeben CJ at CL.

High degree of probability

Satisfaction to a "high degree of probability" applies to both limbs of the two-tiered test, and has been held to import a standard of proof greater than the civil standard but less than the criminal: *Minister for Mental Health v Paciocco* *[2017] NSWSC 4* at [8] per Campbell J.

First limb: unacceptable risk

Whether the patient poses an unacceptable risk is assessed on the assumption they are not a forensic patient: *Attorney General for New South Wales v Rohan (Preliminary)* *[2020] NSWSC 1610* at [26] per Hoeben CJ at CL. That is, what, if any risk, would the patient pose if they did not carry the status of a forensic patient which provides the MHRT powers of control over the patient's liberty and autonomy. In predicting risk, the Court considered the period in which the forensic patient's status may be extended which is up to 5 years: at [27] citing *Tillman v Attorney General for the State of NSW* *[2007] NSWCA 327; (2007) 70 NSWLR 448; (2007) 178 A Crim R 133* at [8]. The patient's right to personal freedom is not a relevant consideration when determining the test of unacceptable risk: *Lynn v State of New South Wales* *[2016] NSWCA 57*.

Determining what is "unacceptable" is an evaluative task that takes into consideration the legislative objects especially the protection of the community. Consideration is given to the likelihood of the risk occurring and the gravity of consequential harm. Where the harm is great (such as killing) but the likelihood of that harm occurring is remote the test may be satisfied. That may be compared to the gravity of harm associated with aggravated break where the likelihood of that occurring similarly being remote, the test might not be satisfied: *Attorney General for NSW v MZ* *[2017] NSWSC 1773*.

First limb: serious harm

The type of harm posed is confined to harm to the community and does not include harm to the patient. Unlike the *CHROA*, the type of harm is not described. Harm is not confined to a particular type of offending such as violence or level of offending such as grievous bodily harm. As such, the Act has a far wider reach than the *CHROA*: *Attorney General of New South Wales v Kereopa* *[2017] NSWSC 411* at [11]-[12] per Davies J. "Harm" may concern physical or psychological harm and may arise in the absence of violence: *Attorney General of New South Wales v Kereopa (No 2)* *[2017] NSWSC 928* per RA Hulme JA and *Attorney General for New South Wales v Kereopa* *[2019] NSWSC 1339* per Harrison J. Extension orders may be made where both the offending leading to the imposition of the limiting term and the risk of harm did not involve personal violence.

Second limb: risk cannot be adequately managed by other less restrictive means

The first limb must be satisfied before moving to second limb. The applicant must then prove a negative test, that is, that the risk cannot be managed by less restrictive means. Remaining a forensic patient is the most restrictive means by which a forensic patient might be managed.

There are many less restrictive means available for managing risk, including mechanisms such as family support (including accommodation), NDIS support (including 24 hour supported living arrangements) and community based NGOs.

Formal mechanisms may involve elements of managing risk that are less restrictive than forensic status. Such powers under the *Mental Health Act* include the power to detain within a mental health facility or community treatment orders. Often concern is raised regarding these mechanisms as they do not require the Court or the MHRT's authority for involuntary treatment to cease. A person can only be detained in a mental health facility whilst they satisfy the statutory test for being a mentally ill person or mentally disordered person: ss 14 and 15 respectively. Those terms are based on legal rather than medical definitions. Detention of a mentally disordered person is confined to three working days whilst a mentally ill person may continue to be detained whilst they satisfy the definitional requirements. Where those tests are not satisfied, which may result from clinical improvement, the person cannot be detained. That may be undertaken by those detaining and treating such as the treating doctor. Similarly, where those implementing a community treatment order do not believe a further order is required, on expiration of an existing six or twelve month order, there is no power for the MHRT to order a further CTO without an application being made.

Other orders include Guardianship Orders, which may involve coercive powers including the power to keep a person at a particular place and return a person to that place if they abscond. Financial Management Orders usually made by the MHRT or Guardianship Division of NCAT are often a less restrictive consideration.

In *Attorney General of NSW v Doolan by his tutor Jennifer Thompson (No 2)* *[2016] NSWSC 107* at [96]ff per Adamson J explores the second limb of the test in detail comparing the various alternative less restrictive means for managing risk. Her Honour noted the powers of the MHRT to oversee and determine a patient's liberty, and considered the Minister and the Attorney General's right to be heard in regard to leave and release important especially in light of the underlying need to safeguard the community: at [122].

Making an extension order

The Court may decide to either make an extension order or dismiss the application: s 127. On making an extension order the Court does not make orders or issue a warrant for the patient to be taken to any place or detained in a prison as is often the case for those captured by the *CHROA*. The Court only decides whether the order is made or not. Where and how the patient is cared and detained remains a decision of the MHRT: s 129.

After an extension order is made

An interim extension order or an extension order may be varied or revoked following an application by the patient or Minister or on recommendation of the MHRT: s 133. The MHRT cannot order unconditional release for forensic patients subject to such orders: s 83(3). An existing extension order cannot be extended beyond the period of the order. That is, an extension order made for a period of three years cannot be extended beyond that period. Rather, a further application must be made for the forensic patient's status to increase beyond

the three-year period: *Minister for Mental Health v Paciocco [2018] NSWSC 277* per Fullerton J.

Costs may be awarded in favour but not against the forensic patient: s 136.

Appeals exist as a matter of right regarding extension orders and must be made within 28 days after the decision, may go to a question of law, fact or both and does not stay the operation of the extension order: s 135. Appeals in regard to interim extension orders fall within the domain of s 101 *Supreme Court Act*: *Attorney General of New South Wales v WB [2020] NSWCA 7*.

Appendices

Additional resources available on the Public Defender' Website

State - Mental Health and Cognitive Impairment Forensic Provisions Act 2020

- ***Summary of Significant Changes - March 2021***
- ***Unfitness to be Tried Procedural Flow Chart - State***
- ***Defence of Mental Health or Cognitive Impairment Procedural Flow Chart - State***

Commonwealth - Crimes Act 1914

- ***Unfitness to be Tried Procedural Flow Chart - Commonwealth***
- ***Defence of Mental Impairment Procedural Flow Chart - Commonwealth***

Services and programs for people with mental health and cognitive impairments

Justice Health Court Liaison Service

Most criminal lawyers would be aware of the Mental Health Court Liaison Service run by Justice Health. It operates in a number of Local and Children's Courts across NSW.

Those of you who have access to this service may know how helpful they can be in performing assessments (with additional input from psychiatrists if necessary), making referrals and assisting to formulate treatment/case plans for section 12 applications.

Unfortunately, the service is still not available at all Local and Children's Courts, and is generally not equipped to assess cognitive impairments.

See *https://www.justicehealth.nsw.gov.au/about-us/health-care-locations/courts* for Network court locations.

Justice Advocacy Service (JAS)

The Justice Advocacy Service (JAS) is run by the Intellectual Disability Rights Service (IDRS).

The service commenced on 1 July 2019, and is similar to the Criminal Justice Support Network (CJSN) which it replaced.

The JAS provides support for victims, witnesses, suspects and defendants in the NSW criminal justice system who may have a cognitive impairment.

Referrals may be made by calling 1300 665 908.

Further information is available at *https://idrs.org.au/jas/*, including eligibility and program factsheets.

Example of conditions used by Tribunal when granting conditional release/ sample bail conditions

Conditional Release Order

Case manager

1. PATIENT accept NAME, of the COMMUNITY MENTAL HEALTH SERVICE as his/her case manager. *He/she* shall be managed by the case manager in accordance with the NSW Ministry of Health *Guidelines for Forensic and Correctional Patient Ground Access, Leave, Handover, Transfer, and Release* (PD2012_50).
2. PATIENT shall meet with *his/her* case manager, either at *his/her* home or at the COMMUNITY MENTAL HEALTH SERVICE. The case manager will decide how often these meetings will take place, and where they are to take place.
3. PATIENT is to participate in any education, training, rehabilitation, recreational, therapeutic, or other programmes which *his/her* case manager asks *him/her* to attend.
4. *[OPTIONAL]* In particular, PATIENT is to attend *[insert specific programs and time frames for attendance]*.
5. PATIENT must attend a mental health facility if directed to do so by his/her case manager or psychiatrist.

NB A forensic patient may also be scheduled and taken to a mental health facility under the Mental Health Act 2007.

6. The case manager may nominate a delegate to act as case manager in his or her place from time to time.

Psychiatrist

7. PATIENT accept *NAME* (doctor), of the COMMUNITY MENTAL HEALTH SERVICE as his/her treating psychiatrist. *He/she* shall be managed by the treating psychiatrist in accordance with the NSW Ministry of Health *Guidelines for Forensic and Correctional Patient Ground Access, Leave, Handover, Transfer, and Release* (PD2012_50).
8. PATIENT shall meet the treating psychiatrist at the COMMUNITY MENTAL HEALTH SERVICE. The treating psychiatrist can nominate an alternative venue for the meetings to occur. The treating psychiatrist will decide how often the meetings will take place.
9. PATIENT is to accept the medication and other treatment prescribed by *his/her* treating psychiatrist. *He/she* shall take the medication in the way prescribed by the treating psychiatrist.

10. If the psychiatrist is concerned about PATIENT's mental state, the psychiatrist may direct *him/her* to attend a mental health facility and seek admission to that facility as a voluntary patient. PATIENT must immediately comply with that direction.

    NB A forensic patient may also be scheduled and taken to a mental health facility under the Mental Health Act 2007.

11. The treating psychiatrist may nominate a delegate to act as treating psychiatrist from time to time.

General Practitioner

12. PATIENT accept *NAME* (doctor), or his/her or her delegate (Name and address of the practice) as his/her general practitioner. The general practitioner is not to change medication without consultation with *PATIENT'S (name)* treating psychiatrist.

Drugs and Alcohol

13. The only mind or mood altering drugs that PATIENT is to consume are those prescribed by the treating psychiatrist or regular registered medical practitioner.

14. PATIENT must not take any illegal drugs or substances (or legal synthetic versions of illegal drugs).

15. PATIENT is only to consume alcohol in accordance with such directions and approval as may be given from time to time by his/her case manager. *OR* PATIENT must not consume any alcohol.

16. PATIENT must promptly submit to any test for the detection of the use of drugs and substances including alcohol as shall be requested from time to time by PATIENT's case manager. These tests may be administered randomly, at the discretion of the case manager. *[Specify particular tests and frequency if appropriate]*

Accommodation

17. PATIENT is to live at LOCATION. If *she/he* wishes to live at another address, *his/her* case manager must first agree that the alternative accommodation is appropriate *OR* PATIENT must first obtain approval from the Tribunal at a review hearing.

18. PATIENT must notify *his/her* case manager of *his/her* current residential address and telephone number.

19. If PATIENT changes accommodation or telephone number, the case manager will notify the Tribunal of the change to residential address.

20. PATIENT is entitled to be absent overnight *[OR for 2 or 3 nights as appropriate]* from *his/her* agreed accommodation, but must first obtain the approval of *his/her* case manager.

21. PATIENT must not travel interstate or overseas without the Tribunal's approval. This approval can be granted in writing by the President or a Deputy President of the Tribunal.

Conduct

22. PATIENT must not engage in unlawful conduct or conduct that could give rise to a reasonable apprehension that the safety of *himself or herself* or of any member of the public is, or could be, seriously endangered.

Other conditions

23. PATIENT to provide *his/her* case manager with a recent (head and shoulders) photograph of a quality acceptable to the case manager. Alternatively *she/he* must co-operate while

the case manager or delegate takes a photograph of *him/her*. The case manager is to provide a copy of the photograph to the Tribunal.

24. PATIENT must attend Mental Health Review Tribunal reviews according to arrangements as notified in advance to *him/her, his/her* case manager, and *his/her* solicitor, in writing by the Tribunal.
25. PATIENT shall attend any reviews which are requested by the Community Forensic Mental Health Service.
26. PATIENT shall allow the sharing of information about his/her treatment, progress and management between *associated teams*, his/her treating psychiatrist and any other person or persons providing health care, management and support services.

Optional Non-association with victims

27. That PATIENT shall not initiate any communication, or attempt to initiate any communication, in any way, or through any medium, with VICTIM.
28. That PATIENT is to remain away from the following places (at the following times): *list as appropriate to the patient's particular case and circumstances.*

Practitioners Guide for Mental Health
February 2022