A Practical Guide to Fitness and Special Hearings

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This paper is designed to be a "how-to" guide for practitioners when a fitness issue arises in relation to matters destined for the District or Supreme Courts. It lays out the relevant legislation, procedural steps that need to be taken and other matters that may need to be considered. There are excellent papers available on fitness in the Local Court and this paper does not address that topic.

Fitness Issue Arising Pre-Committal

If the fitness issue arises pre-committal in relation to a State offence, the process is set out in the *Criminal Procedure Act* 1986 (NSW) in Chapter 3, Pt 2, Division 7. Different provisions apply in relation to Commonwealth offences – detailed below under "Commonwealth Offences". The question of a person's unfitness to be tried may be raised at any time during the committal proceedings. The magistrate may commit the matter for trial where the question of the person's unfitness to be tried for the offence is raised by the accused person or prosecutor in good faith. The magistrate can also raise the question of fitness. The magistrate may require a psychiatric or other report be supplied by the accused or prosecutor before committing the matter for trial. The matter can be committed only if the charge certificate has been filed and either a case conference is not required to be held, or has not yet been held, or if the case conference certificate has been filed. [1]

In practice, it would be helpful to obtain a report as soon as possible so that you can have an answer as to whether the client is fit and then move the matter along accordingly. Delays in

[1] ss 93 and 94 of the *Criminal Procedure Act* 1986 (NSW)

getting appointments for clients, particularly those in custody are prevalent at present. There may be funding issues and other matters which make this difficult.

If the matter is committed to the District Court for trial under Division 7 and the person is subsequently found to be fit, there are two options. The matter may remain in the District Court. In those circumstances, the accused retains a 25 percent discount on sentence if they plead guilty "as soon as practicable" after they were found fit to be tried.[2] In determining whether the offender pleaded guilty "as soon as practicable" the court is to take into account whether the offender had a reasonable opportunity to obtain legal advice and give instructions to their legal representative.[3] Thereafter, the ordinary sentencing discounts apply in relation to the timing of any plea.[4]

The matter may be remitted to the Local Court on the application of the defendant, or on the court's own motion for the holding of a case conference.[5] If the application is made by the defendant, the court must make the order unless it is satisfied that it is not in the interests of justice to do so or that the offence is not an offence in relation to which a case conference is required to be held.[6] If the matter is remitted, it is to be dealt with as if the defendant had not been committed for trial.[7]

If, after committal, the question of fitness is not going to be raised in proceedings for the offence, the court may, on its own motion, make an order remitting the matter to the Local Court for a case conference to be held.[8]

[2] s 25D(5)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)
[3] s 25D(6) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)
[4] s 25D(5)(b) and (c) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW)
[5] s 52(2) of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) (sections following refer to this Act unless specified)
[6] s 53(3)
[7] s 52(5)
[8] s 52(4)

Applicable Legislation

The legislation governing the procedures for fitness and special hearings (amongst other things) changed on 27 March 2021. The relevant Act is now the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 ("the Act"). Previously the legislation was the *Mental Health (Forensic Provisions) Act* 1990 ("the former Act").

If the charges are recent then the question of which legislation applies is likely straightforward. However if the matter has been around for a while, it is important to consider, at least in these relatively early days of the new legislation, which of the acts apply.

The new legislation extends to proceedings commenced[9] but not completed before 27 March 2021, if the question of the defendant's unfitness was raised before that date. If a fitness inquiry or special hearing commenced under the former Act, but was not completed before 27 March 2021, it is to be continued under the new act.[10]

It becomes slightly more complicated when a mental illness defence is raised in the context of a special hearing in proceedings commenced before 27 March 2021.[11] The former act applies to proceedings where the question of a mental illness defence was raised before 27 March 2021 up until a determination is made as to whether a special verdict should be entered (or the defence is

[9] In *R v Tonga* [2021] NSWSC 1064 at [10], it was said per Wilson J:

> The "commencement of proceedings" could mean the date of charge, if the word "proceedings" is construed broadly to encompass the whole of the criminal proceedings against the accused. It could refer to the date upon which the accused first appeared in this jurisdiction, if "proceedings" is intended to refer to the whole of the proceedings in the trial jurisdiction. If "proceedings" is considered in a narrower context, it means the present trial proceedings before this Court, which commenced with the presentation of the indictment by the Crown on 23 August 2021. I favour the latter interpretation, since that would make sense of the transitional provisions, which allow for the continuation of proceedings under the 1990 Act only until such time as the special verdict should be entered or the defence is no longer raised. That appears to be directed to any trial in which the defence was raised that had commenced before, but was not finalised by, 27 March 2021.

[10] Sch 2, Pt 2, Cl 7

[11] See *R v Barolia (No. 2)* [2021] NSWDC 696 for discussion as to when the question "has been raised" of a defence of not guilty by reason of mental illness.

no longer being raised).[12] At that point, the terminology of the new act applies and, if successful, the verdict is "act proven but not criminally responsible."[13]

Raising Fitness in the District and Supreme Courts

The question of unfitness may be raised by the court, the defendant or the prosecutor.[14] It should be raised so far as practicable before arraignment, but may be raised at any time during the course of the hearing of the proceedings.[15] It may be raised on more than one occasion.[16]

Once it has been raised the court must determine whether an inquiry should be conducted.[17] It is not required to hold an inquiry unless it appears that the question of unfitness has been raised in good faith.[18]

Any fitness inquiry should be held as soon as practicable after the court determines that one should be held or the question is raised after arraignment.[19]

The court may determine not to hold an inquiry and instead dismiss the charge and order that the defendant be released if it is of the opinion that it is inappropriate to inflict any punishment. In determining this, regard may be had to the trivial nature of the charge or offence; the nature of the defendant's mental health or cognitive impairments or any other matter the court thinks proper to consider.[20]

After fitness has been raised, there are a number of things that the court may do before an inquiry is held:

[12] Sch 2, Pt 2, Cl 5(1) and (2)
[13] Sch 2, Pt 2, Cl 5(3)
[14] s 39
[15] s 37(1)
[16] s 37(2)
[17] ss 40 and 41
[18] s 42(3)
[19] s 42(2)
[20] s 42(4)

(a) adjourn the proceedings,
(b) grant the defendant bail in accordance with the *Bail Act 2013*,
(c) order the defendant to be remanded in custody for a period not exceeding 28 days,
(d) order the defendant to undergo a psychiatric examination or other examination,
(e) order that a psychiatric report or other report relating to the defendant be obtained,
(f) discharge a jury constituted for the purpose of the proceedings,
(g) make other orders the court thinks appropriate.[21]

Fitness Inquiry

The question of unfitness is to be determined by judge alone and is not to be conducted in an adversarial manner.[22] The defendant is to be represented by a lawyer unless the court otherwise allows.[23] The onus of proof in relation to unfitness does not rest on any particular party.[24] The standard of proof is on the balance of probabilities.[25]

The court is to consider (in addition to other matters):

(a) whether the trial process can be modified, or assistance provided, to facilitate the defendant's understanding and effective participation in the trial,
(b) the likely length and complexity of the trial,
(c) whether the defendant is represented by an Australian legal practitioner, or can obtain representation by an Australian legal practitioner.[26]

The judge's determination must include the principles of law applied and findings of fact upon which the judge relied.[27]

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[21] s 43
[22] s 44(1) and (3)
[23] s 44(2). Section 56(3) applies similarly to a defendant in a special hearing.
[24] s 44(4)
[25] s 38
[26] s 44(5)
[27] s 44(6). Section 59(2) contains the same requirement for special hearings.

The applicable test when determining fitness is now set out in section 36 of the Act, as follows:[28]

> (1) For the purposes of proceedings to which this Part applies, a person is taken to be unfit to be tried for an offence if the person, because the person has a mental health impairment or cognitive impairment, or both, or for another reason, cannot do one or more of the following—
>
> (a) understand the offence the subject of the proceedings,
>
> (b) plead to the charge,
>
> (c) exercise the right to challenge jurors,
>
> (d) understand generally the nature of the proceedings as an inquiry into whether the person committed the offence with which the person is charged,
>
> (e) follow the course of the proceedings so as to understand what is going on in a general sense,
>
> (f) understand the substantial effect of any evidence given against the person,
>
> (g) make a defence or answer to the charge,
>
> (h) instruct the person's legal representative so as to mount a defence and provide the person's version of the facts to that legal representative and to the court if necessary,
>
> (i) decide what defence the person will rely on and make that decision known to the person's legal representative and the court.
>
> (2) This section does not limit the grounds on which a court may consider a person to be unfit to be tried for an offence.

As can be seen above, the Act now sets out two categories of impairment – "mental health impairment" and "cognitive impairment," each defined for the purposes of the 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

[28] The test is based on the "Presser principles" (*R v Presser* [1958] VR 45 and applied in *Kesavarajah v The Queen* (1994) 181 CLR 230).

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.[29]

The Act sets out a non-exhaustive list of disorders from which a "mental health impairment" may arise. These include:

(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.[30]

A person does not have a "mental health impairment" if the person's impairment is caused solely by the temporary effect of ingesting a substance, or a substance use disorder.[31]

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.[32]

The Act also sets out a non-exhaustive list of conditions from which a "cognitive impairment" may arise. These include:

(a) intellectual disability,
(b) borderline intellectual functioning,

[29] s 4(1)
[30] s 4(2)
[31] s 4(3)
[32] s 5(1)

(c) dementia,

(d) an acquired brain injury,

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

(f) autism spectrum disorder.[33]

Outcome of Fitness Inquiry

If following an inquiry, the defendant is found to be fit, the matter thereafter proceeds in the ordinary way.[34] If the defendant is found to be unfit, the court must determine whether, during the 12 months following the finding of unfitness, the defendant may become fit or will not become fit.[35] This is to be determined on the balance of probabilities.[36]

Following a finding of unfitness the court may also 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 defendant bail in accordance with the *Bail Act 2013*,

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

(e) make other orders that the court thinks appropriate.[37]

If the court determines that a defendant will not become fit within 12 months, the matter will proceed to a special hearing.[38] An example of a circumstance where this might occur with the requisite degree of certainty[39] is where the defendant suffers from a cognitive impairment which will not change.

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[33] s 5(2)
[34] s 46
[35] s 47(1)
[36] s 47(1)
[37] s 47(2)
[38] s 48(1). In this situation or when the Tribunal finds that the defendant has not and will not become fit within 12 months, before proceeding the Court must obtain advice from the DPP as to whether or not further proceedings will be taken and order the release of the defendant if no further proceedings are to be taken (s 53).
[39] See *R v Risi* [2021] NSWSC 769 at [55] per Beech-Jones J

If the court determines that the defendant may become fit within 12 months, the defendant must be referred to the Mental Health Review Tribunal ("the Tribunal") for review.[40]

If the court is notified by the Tribunal that the defendant has become fit, proceedings recommence or continue in the ordinary way (without need for a further fitness inquiry).[41] The defendant may be granted bail for a period not exceeding 12 months on being notified of a determination by the Tribunal that the defendant has become fit.[42]

If the court is notified by the Tribunal that the defendant has not and will not during the period of 12 months become fit, the matter will proceed to a special hearing.[43]

Procedure for Special Hearings

If it has been determined by the court or the Tribunal that a defendant will not become fit during the 12 months after a finding of unfitness, the court must hold a special hearing. This must occur as soon as practicable.[44]

The special hearing is to proceed by way of judge alone unless an election[45] is made by the defendant (subject to receiving and understanding legal advice), their legal representative or the prosecutor.[46] If the special hearing proceeds before a jury, the accused's legal representative may challenge jurors or the jury in the ordinary way.[47] The jury is to have a number of matters explained to them which are set out in s 56(11).[48]

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[40] s 49(1)
[41] s 50(1) and (2)
[42] s 49(2)
[43] s 51(1)
[44] s 55(1)
[45] Where the election is made by the defendant it must be made before the day fixed for the special hearing. Where it is made by the prosecutor it must be made at least 7 days before the day fixed for the special hearing (s 58(1).)
[46] s 56(9)
[47] s 56(10)
[48] The Court must explain:
(a) the fact that the defendant is unfit to be tried in accordance with the normal procedures,

A special hearing is to be "conducted as nearly as possible as if it were a trial of criminal proceedings."[49] If appropriate, the court may modify the court processes so as to facilitate the effective participate of the defendant.[50] There is sometimes some pressure to have a matter dealt with quickly and on the papers. It may be obvious to say, but if there are legitimate issues with the Crown case, then these should be explored. Evidence that should be the subject of objection should be sought to be excluded.

The defendant is taken to have pleaded not guilty[51] and may raise any defence that could properly be raised in an ordinary trial.[52] The defendant is entitled to give evidence.[53] There is provision for the defendant to be excused or excluded from appearing in appropriate circumstances, with the agreement of the defendant or their legal representative.[54]

Outcome of Special Hearing

The available verdicts at a special hearing include the following:

(a) not guilty of the offence charged,
(b) a special verdict of act proven but not criminally responsible,[55]
(c) that on the limited evidence available, the defendant committed the offence charged,
(d) that on the limited evidence available, the defendant committed an offence available as an alternative to the offence charged.[56]

(b) the meaning of unfitness to be tried,
(c) the purpose of the special hearing,
(d) the verdicts that are available to the jury,
(e) the legal and practical consequences of the verdicts

[49] s 56(1)
[50] s 56(2)
[51] s 56(5)
[52] s 56(6)
[53] s 56(7)
[54] s 56(8)
[55] If the judge is satisfied that the requirements of ss 28(1) and (2) have been met: s 59(3)
[56] s 59(1)

A verdict of not guilty or a special verdict of act proven but not criminally responsible have the same effect as if it were an ordinary trial.[57] The same orders can be made in respect of the latter as would otherwise ordinarily be available after such a verdict.[58]

A verdict that on the limited evidence available, the defendant committed the offence charged (or an available alternative) is a qualified finding of guilt. It does not constitute a basis in law for a conviction for the offence.[59] The verdict and any subsequent limiting term, penalty or order are subject to appeal.[60]

After a verdict reached at a special hearing, the court may request a report by a forensic psychiatrist who is not currently involved in treating the defendant as to the condition of the defendant and whether release is likely to seriously endanger their safety or the safety of any member of the public.[61] The regulations also permit a report to be obtained from a registered psychologist with appropriate experience or training in forensic psychology or neuro-psychology.[62] The court may consider the report and any other expert reports tendered, before determining what orders to make.[63]

If the court would otherwise have imposed a sentence of imprisonment (if the defendant had been fit and there had been an ordinary trial), the court must nominate a "limiting term". A limiting term is the best estimate of the sentence that the court would have imposed.[64] If the court would not have imposed a sentence of imprisonment, it may impose any other penalty or make any order it might have otherwise ordinarily imposed.[65]

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[57] ss 60 and 61(1)
[58] s 61(2)
[59] s 62(a) (except in so far as it is taken to be a conviction for the purpose of enabling a victim of crime to make a claim for compensation: s62(c).)
[60] ss 62(b) and 63(4). Also see s 2 of the *Criminal Appeal Act* 1912 (NSW) in relation to the definitions of "conviction" and "sentence" for the purpose of that Act.
[61] s 66 (1)
[62] Regulation 4 of the *Mental Health and Cognitive Impairment Forensic Provisions Regulation* 2021 (NSW)
[63] s 66 (2)
[64] s 63(2)
[65] s 63(3)

The factors for consideration in determining penalty are set out as follows:

> (a) the court must take into account that, because of the defendant's mental health impairment or cognitive impairment, or both, the person may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for the purposes of obtaining a sentencing discount, and
> (b) the court may apply a discount of a kind that represents part or all of the sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea, and
> (c) the court must take into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence.[66]

A limiting term takes effect from when it is nominated unless it is backdated after taking into account periods of prior custody referable to the offence.[67] The court can direct that the limiting term commence at a later time so it is served consecutively (or partly concurrently and partly consecutively) with an existing limiting term or sentence of imprisonment.[68]

Before directing that the limiting term commence at a later time, the court is to take into account that an ordinary sentence of imprisonment may be subject to a non-parole period but a limiting term is not and that, ordinarily, consecutive sentences are to be imposed with regard to non-parole periods.[69]

Once a limiting term has been imposed, the Tribunal must be notified.[70] The court may order that the defendant be detained in a mental health facility, correctional centre, detention centre or other place pending review by the Tribunal.[71]

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[66] s 63(5)
[67] s 64(1)(a)
[68] s 64(1)(b)
[69] s 64(2)
[70] s 65(1)
[71] s 65(2)

Commonwealth Offences

For Commonwealth offences, fitness is addressed in the *Crimes Act* 1914 (Cth) at Part IB, Division 6. If the question of a person's fitness is raised prior to committal, the matter is to be referred to the court to which the proceedings would have been referred, had the person been committed for trial.[72] If the person is thereafter found to be fit, the matter must be remitted to the Local Court.[73]

The question of fitness is to be determined in accordance with State procedures. However once a finding of unfitness has been made, what happens thereafter is governed by the provisions in the *Crimes Act* 1914 (Cth). The process is different to that under the State legislation. The court must determine whether a prima facie case has been established.[74] A prima facie case is established if there is evidence that would provide sufficient grounds to put the person on trial in relation to the offence.[75] In determining whether a prima facie case has been established, the person may give evidence or provide an unsworn statement, raise any defence that could ordinarily be properly raised and the court may seek such other evidence as it considers likely to assist in determining the matter.[76]

If the court determines that no prima facie case has been established, then the charge must be dismissed (and the person be released if they are in custody.)[77] If the court determines that a prima facie case has been established, there are provisions for the charge to be nonetheless dismissed where inflicting any punishment (or punishment other than nominal punishment) would be inappropriate having regard to a number of factors set out in s 20BA(2).

Where a prima facie case has been established (and the matter was not dismissed) the court must, as soon as practicable, determine whether on the balance of probabilities the person will become

[72] s 20B(1) of the *Crimes Act 1914* (Cth)
[73] s 20B(2) of the *Crimes Act 1914* (Cth)
[74] s 20B(3) of the *Crimes Act 1914* (Cth)
[75] s 20B(6) of the *Crimes Act 1914* (Cth)
[76] s 20B(7) of the *Crimes Act 1914* (Cth)
[77] s 20BA(1) of the *Crimes Act 1914* (Cth)

fit to be tried within 12 months of the finding of unfitness. This must be informed by evidence from a duly qualified psychiatrist or other medical practitioner (or other appropriate source).[78] The procedures following that determination are set out at s 20BB (where the person is found to be likely to be fit within 12 months) and s 20BC (where the person found not likely to be fit within 12 months). Subsequent reviews in relation to persons detained are carried out by the Attorney General.

Where a matter involves both State and Commonwealth offences, care must be taken to ensure that the requirements of both legislative regimes are complied with.

[78] s 20BA(4) – (6) of the *Crimes Act 1914* (Cth)