

Unfitness to be Tried
in
Mental Health and Cognitive Impairment Forensic Provisions Act 2020
The Scheme in Five Flow Charts

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CURRENCY

Act commences 27 March 2021

These provisions apply to criminal proceedings in the Supreme Court (including summary jurisdiction) and criminal proceedings in the District Court: s.35

Unfitness to be Tried: Chart One

Raising the Question

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

The Court, defendant or prosecutor may raise a question of unfitness to be tried: *s.39*

The question should be raised, as far as practicable, before arraignment, but may be raised at any time: *s.37(1)*

The question may be raised at the committal stage: *ss.93, 94 Criminal Procedure Act*

The question may be raised on more than one occasion: *s.37(2)*

Where the issue is raised before arraignment, the court must decide whether to have inquiry: *s.40(1)*

The court may determine at anytime before an inquiry commences that one is not needed: *s.40(2)*

Where the issue is raised after arraignment, the court must hear submissions relating to an inquiry in absence of jury:

s.41

Where the Court has determined an inquiry should be conducted, or the question of fitness is raised after the arraignment, the court must, as soon as practicable, conduct an inquiry to determine if defendant unfit to be tried: *s.42(1), (2)*

Before holding an inquiry, the court may: *s.43*

- adjourn the proceedings;
- grant bail;
- remand the defendant in custody for no longer than 28 days;
- order the defendant undergo psychiatric or other examination;
- order a psychiatric or other report be obtained;
- discharge the jury;
- make any other order the court considers appropriate

Instead of holding an inquiry the court may dismiss charge and order release if of the opinion that, having regard to trivial nature of offence or nature of defendant's mental health impairment or cognitive impairment or any other matter, it is inappropriate to inflict punishment: *s.42(4)*

The court is not required to conduct an inquiry unless it appears question has been raised in good faith: *s.42(3)*

Unfitness to be Tried: Chart Two

The 'Fitness' Inquiry

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Where the Court has determined an inquiry should be conducted, or the question of fitness is raised after the arraignment, the court must, as soon as practicable, conduct an inquiry to determine if defendant unfit to be tried: *s.42(1), (2)*

An inquiry is to be held in following manner:

- Before judge alone: *s.44(1)*
- The defendant is to be represented *s.44(2)*
- The hearing is not to be adversarial *s.44(3)*
- The onus of proof is not on any particular party *s.44(4)*
- The question of fitness is to be determined on balance of probabilities: *s.38*

The test for fitness is set out in *s.36*

In addition to any other matter the court may consider in determining fitness the court is to consider

- (a) whether trial process can be modified, or assistance provided, to facilitate defendant's understanding and effective participation in trial,
- (b) likely length and complexity of trial,
- (c) whether defendant is represented by, or can obtain, representation by a legal practitioner: *s.44(5)*

Where found fit to be tried trial proceedings recommence or continue in accordance with appropriate criminal procedure: *s.46*

Presumption that person found fit to be tried continues to be fit until contrary proved on the balance of probabilities: *s.45(b)*

Fitness issue may be raised again at any time *s.37(2)*

Where the defendant was committed for trial under Division 7 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* the following provisions apply: *s.52(1)*

If defendant has been found fit to be tried for an offence Court may remit matter to Magistrate for case conference: *s.52(2)*

Court must make the order on the application of the defendant 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: *s.52(3)*

Court may remit matter to Magistrate for case conference at any time if satisfied question of unfitness is not going to be raised in proceedings: *s.52(4)*

If no application is made or matter not remitted, matter is to be dealt with in accordance with section 50: *s.52(6)*

Where the defendant found unfit to be tried the Court must determine on balance of probabilities whether may become fit to be tried or will not become fit to be tried within next 12 months: *s.47(1)*

The Court may:

- discharge any jury
- adjourn proceedings
- grant bail
- remand into custody
- any other order the court considers appropriate: *s.47(2)*

Person becomes a FORENSIC PATIENT if detained: *s.72(1)(a), (2)*

Presumption person found unfit to be tried continues to be unfit until contrary proved on the balance of probabilities: *s.45(a)*

Where the Court determines the defendant will not become fit within twelve months

see: **Chart Three**

Where the Court determines defendant may become fit within twelve months

see: **Chart Four**

Unfitness to be Tried: Chart Three

Special Hearing and Outcomes

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Where the Court determines a defendant will not become fit within 12 months must obtain advice from DPP as to whether DPP will continue with proceedings: *s.53(1)(a), (2)*

If DPP do not advise no further proceedings defendant will be dealt with under Div 3 Special Hearings: *s.48*

The Court must hold a special hearing as soon as practicable after the Court determines defendant will not become fit: *s.55(1)*

Special hearing is for the purpose of ensuring defendant is acquitted unless it can be proved to the requisite criminal standard of proof that, on the limited evidence available, the defendant committed the offence charged or any other offence available as an alternative to the offence charged: *s.54*

If DPP advise Court there will be no further proceedings the Court must release the person: *s.53(3)*

DPP must also advise Minister for Police and Emergency Services and the Minister for Health and Medical Research: *s.53(4)*

If the person was a forensic patient they cease to be forensic patient upon release: *s.101(h)*

Special hearing to be held before judge alone unless election made for jury: *s.56(9)*

Election can be made by:

- defendant after receiving and understanding advice from legal representative, or
- legal representative of defendant, or prosecutor: *s.56(9)*

Election must be made:

- One day before hearing if defendant or legal representative
- Seven days before hearing if prosecutor: *s.58(1)*

Defendant or legal representative can change mind any time before hearing: *s.58(2)*

Nature and conduct of special hearing:

- As nearly as possible as if a criminal trial: *s.56(1)*
- Court may modify court processes to facilitate effective participation by defendant if appropriate: *s.56(2)*
- Defendant must be represented unless Court allows otherwise: *s.56(3), (4)*
- Defendant taken to have pleaded not guilty: *s.56(5)*
- May raise any defence that could properly be raised at criminal trial: *s.56(6)*
- Defendant entitled to give evidence: *s.56(7)*
- Court may permit defendant not to appear, or exclude defendant from appearing, if appropriate in circumstances and defendant or representative agrees: *s.56(8)*

If there is a jury the following also applies:

- Legal representative has right to challenge jury: *s.56(10)*
- Court must explain to jury person unfit to be tried, meaning of unfitness, purpose of special hearing; availability of verdicts and consequences of verdicts: *s.56(11)*

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Verdicts at special hearing include:

- Not guilty: *s.59(1)(a)*
- A special verdict of act proven but not criminally responsible where satisfied of requirements of defence of mental health impairment or cognitive impairment: *s.59(1)(b), (3)*
- Defendant committed offence, or an alternative offence, on limited evidence available: *s.59(1)(c), (d)*

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A special verdict of act proven but not criminally responsible treated as a special verdict at normal trial under Part 3: *s.61*.

Court must refer defendant to Tribunal if order not made for unconditional release of defendant: *s.67*

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A finding that the accused committed an offence constitutes a qualified finding of guilt and is subject to appeal in same way as any verdict in a criminal trial: *s.62(a), (b)*

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Verdict of not guilty same as acquittal at normal trial: *s.60*
Person ceases to be forensic patient:
s.101(1)(c)

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Ordering expert report

Following a verdict at a special hearing the Court may request a report by forensic psychiatrist or other person prescribed in the regulations, who is not currently involved in treating the defendant, as to the condition of the defendant, and whether their release is likely to seriously endanger the safety of the defendant or any member of the public: *s.66(1)*

Court may consider the report, and any other tendered report of an expert before determining what orders to make about the defendant: *s.66(2)*

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If Court would not have imposed imprisonment may impose any other penalty or order it might have imposed if defendant had been convicted of the offence at a normal trial: *s.63(3)*

When determining the penalty the Court:

- a) must take into account that, because of mental health impairment or cognitive impairment, or both, defendant may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for purposes of obtaining a sentencing discount, and
- b) may apply a discount of a kind that represents part or all of sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea, and
- c) must take into account periods of the defendant's custody or detention before, during and after special hearing that related to the offence: *s.63(5)*

Penalty or order subject to appeal in same manner as normal proceedings: *s.63(4)*

Must notify Tribunal if no limiting term: *s.63(6)*

Person ceases to be forensic patient: *s.101(d)*

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If the court would have imposed a sentence of imprisonment if normal trial Court must nominate a “limiting term” being the best estimate of that sentence: *s.63(2)*

When determining the limiting term the Court:

- a) must take into account that, because of mental health impairment or cognitive impairment, or both, defendant may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for purposes of obtaining a sentencing discount, and
- b) may apply a discount of a kind that represents part or all of sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea, and
- c) must take into account periods of defendant’s custody or detention before, during and after the special hearing that related to the offence: *s.63(5)*

Limiting term may commence earlier or later than the date imposed: *s.64(1)*

Court must take into account fact that limiting term not subject to NPP if imposing term partly concurrently or consecutively with existing limiting term: *s.64(2)*

Must refer person to Tribunal: *s.65(1)*

May order defendant be detained in a mental health facility, correctional centre, detention centre or other place pending review of defendant by Tribunal: *s.65(2)*

Person a FORENSIC PATIENT: *s.72(1)(b)*



As to review of forensic patients
See: **Chart Five**

A person ceases to be a forensic patient when limiting term expires and an extension order or interim extension order has not been made against the person: *s.101(e)*

Unfitness to be Tried: Chart Four

Tribunal Finds Person Will Become Fit in Twelve Months Or Has Become Fit

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Where Court determines defendant may become fit must refer defendant to Tribunal for review: *s.49(1)*

Tribunal must review defendant as soon as practicable to see if fit to be tried. Determination is to be made on the balance of probabilities: *ss.78(b), 80(1), (3)*

Tribunal must notify Court, DPP and person's legal representative if of the opinion the person has become fit to be tried for an offence: *s.80(2)(a)*

Tribunal must notify Court, DPP and person's legal representative if of the opinion the person has not become fit and will not in the next 12 months become fit to be tried:
s.80(2)(b)

If Tribunal notifies Court that a person has become fit to be tried, Court may grant bail for period not exceeding 12 months: *s.49(2)*

Court must seek advice from DPP as to whether or not proceedings will continue: *s.53(1)(c), (2)*

Court must obtain advice from DPP as to whether DPP will continue with proceedings: *s.53(1)(b), (2)*

Unless DPP advises no further proceedings defendant to be dealt with under Div 3 – Special Hearings: *s.51*

Must be dealt with as soon as practicable: *s.55*

Proceedings continue as described in **Chart Three**

Unless DPP advises no further proceedings, proceedings are to recommence or continue in accordance with the appropriate criminal procedures (no further inquiry into fitness) *s.50*

The person ceases to be a forensic patient: *s.101(g)*

DPP must advise the Court, the Police and Emergency Services and the Minister for Health and Medical Research if no further proceedings will be taken:
s.53(2), (4)

The Court must order release of the person: *s.53(3)*

A person ceases to be a forensic patient upon release:

s.101(h)

Unfitness to be Tried: Chart Five

Review of Forensic Patients

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

A person is a forensic patient if they are:

- a) a person found unfit to be tried and is detained in a mental health facility, correctional centre, detention centre or other place,
- b) a person who is subject to a limiting term (including 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,
- c) a person who is the subject of a special verdict of act proven but not criminally responsible 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 a court or the Tribunal: *s.72(1)*

Section 7(4) Criminal Appeal Act 1912 – order made after finding of mental illness on appeal

The Tribunal must review a forensic patient as soon as practicable after a court enters a special verdict of act proven but not criminally responsible *s.78(c)*

The Tribunal may make an order as to the person's care, detention or treatment or as to the person's release (either unconditionally or subject to conditions): *s.81*

(See **Mental Illness: Chart Three** – Orders of Mental Health Review Tribunal on Review of Forensic Patient Referred by Trial Court After Special Verdict of Act Proven but Not Criminally Responsible)

Tribunal must review a forensic patient as soon as practicable after Court finds a defendant unfit to be tried but may become fit in 12 months or after a limiting term is nominated: *s.78(a), (b)*

Must determine if person become fit to be tried on the balance of probabilities: *s.80(1), (3)*

Tribunal must notify Court, DPP and person's legal representative if of the opinion the person has become fit to be tried for an offence: *s.80(2)(a)*

Proceedings continue according to
Chart Four

Tribunal must notify Court, DPP and person's legal representative if of the opinion the person has not become fit and will not in the next 12 months become fit to be tried:
s.80(2)(b)

Proceedings commence for a special hearing according to
Chart Three

All Forensic patients must be reviewed by the Tribunal
at least every 6 months, and may be reviewed at any time: *s.78(d), 79*

Tribunal may make an order as to continued detention, care or treatment in a MHF, correctional place, detention centre or other place:
s.81(a)

Tribunal may release patient conditionally or unconditionally: *s.81(b)*
Cannot order release but may make a recommendation as to release if patient is in custody pending return to court: *s.83(2)*
Cannot order release if patient subject to extension order but may make a recommendation as to variation or revocation:
s.83(3)

Tribunal must determine whether a person who has been found unfit has become fit on balance of probabilities: *s.80(1), (3)*
This includes a person serving a limiting term after a special hearing:
ss.68(2), 72(b)

Where person will cease to be a forensic patient within 6 months of review
Tribunal may order the person to be an involuntary patient: *s.105(1)(a)*.
Person ceases to be forensic patient: *s.101(i)*

Where released conditionally ceases to be a forensic patient when conditions expire: *s.101(b)*

Where released unconditionally ceases to be a forensic patient: *s.101(a)*

Must notify Court, DPP and person's legal representative if Tribunal of the opinion patient is fit to be tried or will not become fit to be tried within 12 months of the original finding of unfit: *s.80(2)*

Where Tribunal determines patient will not become fit, proceedings will commence for a special hearing according to **Chart Three**

Where Tribunal determines patient fit to be tried proceedings continue according to **Chart Four**

The Supreme Court may extend a person's status as a forensic patient under Part 6: *s.103*