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"[1] 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).

[1] 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 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).