# 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].

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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].