

Commonwealth Offences on Indictment Fitness To Be Tried

The Scheme in Five Flow Charts

(CTH) Crimes Act 1914

Brian Hancock, Public Defender
Jennifer Wheeler, Legal Research Officer
Anna Capsanis, Student Intern

Public Defenders Chambers

April 2021

C O N T E N T S

CHART ONE:	Commencement of Procedure
CHART TWO:	Court Decision on Prima Facie Case
CHART THREE:	Court Decides Unfit Person Will Become Fit
CHART FOUR:	Court Decides Unfit Person Will Not Become Fit
CHART FIVE:	Review by Attorney General

Fitness to be Tried (Commonwealth)

Chart One: Commencement of Procedure

(CTH) Crimes Act 1914

Question of a Person's Unfitness to be Tried arises

QUESTION ARISES IN COMMITTAL COURT

Question of fitness raised at committal proceedings for a federal offence by prosecution, the person or the person's legal representative - magistrate must refer proceedings to the court to which proceedings would have been referred if person had been committed for trial: *s.20B(1)*

Magistrate may order person to be detained in prison or hospital for so long as is reasonably necessary for court to make determination: *s.20B(4)*

QUESTION ARISES IN TRIAL COURT

Question of fitness raised at proceedings for a trial for a federal offence: *s.20B(3)(b)*

Issue of fitness determined by Trial Court in accordance with State provisions

Kesavarajah (1994) 181 CLR 230
Baladjam (No 13) (2008) 77 NSWLR 630
Sharrouf (No 2) [2008] NSWSC 1450

Court finds person **FIT**

Court finds person **UNFIT**

If matter was referred by a magistrate, the court must remit the matter back to the magistrate as soon as practicable for committal proceedings to continue: *s.20B(2)*

If question of unfitness arose in trial court, trial proceedings continue.

Court must determine whether there has been established a *prima facie case* that the person committed the offence concerned: *s.20B(3)*

See: Chart Two

Fitness to be Tried (Commonwealth)

Chart Two: Court Decision on Prima Facie Case

(CTH) Crimes Act 1914

Where a trial court has found a person unfit to be tried, the court must determine whether there has been established a **prima facie case** that the person committed the offence concerned: *s.20B(3)*

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: *s.20B(6)*

In proceedings to determine whether a prima facie case has been established:

- (a) the person may give evidence or make an unsworn statement;
- (b) the person may raise any defence that could properly be raised if proceedings were a trial for that offence;
- (c) the court may seek such other evidence as it considers likely to assist in determining the matter: *s.20B(7)*

Court may order person found unfit (except person referred by Magistrate) be detained in a prison or hospital only for so long as is reasonably necessary for the court to determine whether to make an order under *s 20BA* (no prima facie case) or *s20BB* (orders after determination person is unfit but will become fit): *s.20B(5)*

Where court finds **NO PRIMA FACIE CASE** it must dismiss the charge and order the release of the person from custody: *s.20BA(1)*

Where court finds a **PRIMA FACIE CASE** it must determine **whether it is of the opinion that it is inappropriate to inflict any punishment** having regard to:

- a) the character, antecedents, age, health or mental condition of the person;
- b) the extent to which the offence is of a trivial nature;
- c) the extent to which offence was committed under extenuating circumstances: *s.20AB(2)*

A finding of a prima facie case **acts as a stay against any proceedings**, or any further proceedings, against the person, in respect of the offence: *s.20BB(6); s.20BC(8)*

Where the court decides it is **INAPPROPRIATE** to inflict punishment the court must dismiss the charge and order release of the person from custody: *s.20BA(2), (3)*

If the court decides it is **NOT INAPPROPRIATE** to inflict any punishment, it must determine, as soon as practicable, whether on the balance of probabilities, the person will become fit to be tried within the period of 12 months after the day the person was found to be unfit to be tried: *s.20BA(4)*

The court must first obtain and consider evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner and may consider evidence from such other persons, bodies or organisations as it considers appropriate: *s.20BA(5)*

Fitness to be Tried (Commonwealth)

Chart Three: Court Decides Unfit Person Will Become Fit

(CTH) Crimes Act 1914

WHERE A COURT HAS DECIDED A PERSON FOUND UNFIT **WILL BECOME FIT** TO BE TRIED WITHIN TWELVE MONTHS ON THE BALANCE OF PROBABILITIES

The Court must determine:

- (a) whether the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital; and,
- (b) whether the person objects to being detained in a hospital: *s.20BB(1)*

YES - if the court determines the person is suffering from a mental illness or mental condition and does not object to being detained in a hospital the court must order that person be taken to and detained in a hospital, or continue to be detained in a hospital for a period ending:

- (i) when the person becomes fit; or
- (ii) when, as soon as practicable after the end of 12 months, the court makes an order under *s.20BC(2)* or (5)

whichever happens first: *s.20BB(2) (a), (c), (d)*

NO – if the court determines the person is not suffering from a mental illness or mental condition or objects to being detained in a hospital the court must:

- (i) order person be taken to and detained in a place other than a hospital (including a prison); or,
- (ii) grant bail on the condition the person live at an address or in a place specified by court;

for a period ending:

- (i) when the person becomes fit; or
- (ii) when, as soon as practicable after the end of 12 months, the court makes an order under *s.20BC(2)* or (5);

whichever happens first: *s.20BB(2)(b), (c), (d)*

If the person **becomes fit within 12 months**:

- (a) proceedings on indictment must be continued as soon as practicable; or,
- (b) if person was referred by a magistrate, proceedings continued as soon as practicable before the magistrate as if they were not referred: *s.20BB(3)*

If the person **does not become fit within 12 months** the court must proceed to make an order as to detain or release under *s.20BC(2)* and (5) as if the court had originally determined the person would not become fit to be tried. *s. 20BB(4)* The order is subject to the following:

- a) if the court orders a person detained it must take into account any period of detention already served: *s.20BB(5)(a)*
- b) where the court determines to release a person already on bail it must order continuance of the person's release on bail: *s.20BB(5)(b)(i)*
- c) in fixing a period of release for which conditions apply, must have regard to any period of detention already served under *s.20BB(2)*: *s.20BB(5)(b)(ii)*

Where a person is detained the Attorney General must consider whether the person should be released from detention at least once in each period of 6 months after the person is detained under the order: *s.20BD(1)* (**see below**)

Where a person is released from custody subject to conditions the person or the DPP may, at any time, apply to the court to vary those conditions: *s.20BC(7)*

Fitness to be Tried (Commonwealth)

Chart Four: Court Decides Unfit Person Will Not Become Fit

(CTH) Crimes Act 1914

WHERE A COURT HAS DECIDED A PERSON FOUND UNFIT **WILL NOT BECOME FIT** TO BE TRIED WITHIN TWELVE MONTHS ON THE BALANCE OF PROBABILITIES

The court must determine:

- (a) whether the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital; and,
- (b) whether the person objects to being detained in a hospital: *s.20BC(1)*

YES - if the court determines the person is suffering from a mental illness or mental condition and does not object to being detained in a hospital the court must order the person be taken to and detained in a hospital, or continue to be detained in a hospital, *for a period specified in the order, not exceeding the maximum period of imprisonment that could have been imposed if person had been convicted of the offence charged: s.20BC(2)(a)*

NO - if the court determines the person is not suffering from a mental illness or mental condition or objects to being detained in a hospital, the court must order the person be detained in a place other than a hospital, including a prison, *for a period specified in the order, 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)*

EXCEPTION: the court may order the person released from custody either absolutely or subject to conditions to apply for such period as the court specifies, not exceeding 3 years, if of the opinion it is more appropriate to do so: *s.20BC(5)*

Conditions may include:

- (a) the person remains in the care of a responsible person nominated in the order;
- (b) the person attends upon a nominated person, or at a place specified, in the order for assessment of the person's mental illness, mental condition, or intellectual disability and, where appropriate, for treatment; and
- (c) any other condition the court thinks fit: *s.20BC(6)*

Attorney-General must consider whether the person should be released from detention at least once in each period of 6 months after the person is detained under the order: *s.20BD(1)*

See: Chart Five

Where a person is released from custody subject to conditions the person or the DPP may, at any time, apply to the court to vary those conditions: *s.20BC(7)*

Fitness to be Tried (Commonwealth)

Chart Five: Review by Attorney-General

(CTH) Crimes Act 1914

Where a court makes an order for detention under *s.20BC(2)* the Attorney-General must consider whether the person should be released from detention at least once in each period of 6 months after the person is detained under the order: *s.20BD(1)*

In considering whether a person should be released, the Attorney-General:

- (a) must obtain and consider:
 - (i) a report from a duly qualified psychiatrist or psychologist; and
 - (ii) a report from another duly qualified medical practitioner; and
- (b) may obtain and consider such other reports as Attorney General considers necessary; and
- (c) must take into account any representations made to Attorney General by the person or on person's behalf: *s.20BD(2)*

The Attorney-General may order the person be released from detention: *s.20BE(1)*

The Attorney-General must not order release unless satisfied the person is not a threat or danger to either himself or herself or to community: *s.20BE(2)*

An order for release remains in force for the balance of the period set as detention under *s.20BC(2)*, or for a period of 5 years, whichever is lesser: *s.20BE(3)(b)*

The order for release may be subject to conditions: *s.20BE(3)(c); (4)*

A release order may be revoked by the Attorney-General:

- (i) if the person has failed to comply with conditions of the order without reasonable excuse; or,
- (ii) if there are reasonable grounds for suspecting the person has failed to comply with conditions without reasonable excuse: *s.20BF(1)*

The Attorney-General must, as soon as practicable after a person has been detained after the revocation of release order, consider whether the person should be released from detention, and continue to review such person at least every 6 months while they are detained: *s.20BG*