

Commonwealth Offences

Persons Found Not Guilty Because of Mental Impairment Persons Suffering From Mental Illness or Intellectual Disability

The Scheme in Four Flow Charts

(CTH) Criminal Code

(CTH) Crimes Act 1914

Public Defenders Chambers

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Chart One: Commonwealth Offences on Indictment

Defence of Mental Impairment and Special Verdict of Not Guilty Because of Mental Impairment

(CTH) Criminal Code

CRIMINAL TRIAL

Commonwealth Offences on Indictment

DEFENCE

No criminal responsibility if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that:

- (a) the person did not know the nature and quality of the conduct; or
- (b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or
- (c) the person was unable to control the conduct: *s.7.3(1)*

Statutory definition of ‘mental impairment’ includes senility, intellectual disability, mental illness, brain damage and severe personality disorder *s.7.3(8), (9)*

Question of whether a person is suffering from a mental impairment one of fact: *s.7.3(2)*

Issue may be raised by prosecution with leave of the court or by the defence: *s.7.3(3), (4)*

Whether person suffering from such a mental impairment must be established on balance of probabilities: *s.7.3(3)*

A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely upon this section to deny criminal responsibility: *s.7.3(6)*

If the tribunal of fact is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence: *s.7.3(7)*

VERDICT

Tribunal of fact must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment: *s.7.3(5)*

Found not guilty because of mental impairment

see CHART TWO

Note: the definition of mental impairment under the *Criminal Code* includes senility, intellectual disability, mental illness, brain damage and severe personality disorder. The provisions under the *Crimes Act* in Chart Two refer only to mental illness—it is unclear whether these provisions also apply where a person has been found not guilty on the basis of senility, intellectual disability, brain damage or severe personality disorder.

Chart Two: Commonwealth Offences on Indictment Orders and Review After Special Verdict of Not Guilty Because of Mental Impairment

(CTH) Crimes Act 1914

Where a person 'charged with a federal offence on indictment ... is acquitted because of mental illness at the time of the offence': *s.20BJ(1)*

Note: the definition of mental impairment under the *Criminal Code* also includes senility, intellectual disability, brain damage and severe personality disorder. It is unclear whether the following provisions under the *Crimes Act* apply where a person has been found not guilty on the basis of a mental impairment other than mental illness.

The court must order that the person be detained in safe custody in prison or in a hospital for a period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: *s.20BJ(1)*

Court may order the person's release from custody either absolutely or subject to conditions for a period not exceeding 3 years if of the opinion it is more appropriate to do so: *s.20BJ(4)*

Conditions may include:

- (a) person remains in the care of a responsible person nominated in the order; and
- (b) person attends upon a person nominated, 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: *s.20BJ(5)*

Where a person is released from custody subject to conditions the person or DPP may, at any time, apply to the court to vary those conditions: *s.20BJ(6)*

Attorney-General must, as soon as practicable after the person is detained, consider whether or not the person should be released from detention and must, while the person is in detention, reconsider the matter at least once in each period of 6 months after the initial consideration: *s.20BK(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 the person's behalf: *s.20BK(2)*



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

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

An order for release remains in force for balance of the period set as detention under *s.20BJ(1)* or for a period of 5 years, whichever is the lesser: *s.20BL(3)(b)*

An order for release may be subject to conditions: *s.20BL(3)(c), (4)*



Release order may be revoked by the Attorney-General:

- (i) if the person fails 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.20BM*



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

Chart Three: Commonwealth Summary Offences

Persons Suffering From a Mental Illness or Intellectual Disability

(CTH) Crimes Act 1914

CRIMINAL SUMMARY HEARING

Commonwealth Offences

Where in proceedings in a State or Territory court of summary jurisdiction in respect of a federal offence it appears to the court:

- a) the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or an intellectual disability, and
- b) it is more appropriate to deal with the person under this Division than otherwise in accordance with law based on an outline of facts or other evidence the court considers relevant: *s.20BQ(1)*

The court may dismiss the charge and discharge the person:

- (i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period not exceeding 3 years: or
- (ii) on other conditions for a specified period not exceeding 3 years: or
- (iii) unconditionally: *s.20BQ(1)(c)*

Instead of dismissing charge, the court may:

- (i) adjourn proceedings;
- (ii) remand the person on bail;
- (iii) make any other order the court considers appropriate: *s.20BQ(1)(d)*

Order acts as a stay against any further proceedings, against the person in respect of offence: *s.20BQ(2)*

Chart Four: Commonwealth Sentencing Alternatives

Persons Suffering Mental Illness or Intellectual Disability

(CTH) Crimes Act 1914

Where a person is convicted in a State or Territory on indictment of a federal offence, and the court convicting the person is satisfied of the following:

- a) the person is suffering from a mental illness within the meaning of the civil law of that State or Territory; and
- b) the illness contributed to the commission of the offence; and
- c) the appropriate treatment for the person is available in a hospital; and
- d) the proposed treatment cannot be provided to the person other than as an inmate of a hospital

the court may, without passing sentence, make a **hospital order** that the person be detained in a specified hospital for a specified period for the purpose of receiving specified treatment: *s.20BS(1)*

The court must not make an order unless, but for the mental illness, the court would have sentenced the person to a period of imprisonment: *s.20BS(2)*

The specified period of detention in a hospital must not be longer than the period of imprisonment to which the person would have been sentenced had the hospital order not been made: *s.20BS(3)*

The court may fix a lesser period of detention during which the person is not to be eligible to be released from the hospital: *s.20BS(4)*

The court must first consider the opinion of two duly qualified psychiatrists: *s.20BS(5)*

The court can impose hospital order even where the person is serving a federal sentence of imprisonment: *s.20BS(6)*

At the end of any lesser period of detention set under *s.20BS(4)* the Attorney-General must consider reports of two duly qualified psychiatrists so as to determine whether to release the person: *s.20BT(1)*

Attorney-General must order the person to be released on such conditions for the balance of the period of the hospital order as the Attorney-General considers appropriate having regard to the reports and other such matters Attorney-General considers relevant unless at least one duly qualified psychiatrist recommends the person not be released because of a continuing need for hospital treatment or the person is serving an existing federal sentence: *s.20BT(2)*

Sections 20BM and 20BN apply in relation to the revocation of a release order: *s.20BT(3)*

DPP may, at any time while the order is in force, apply to the court to discharge a hospital order and impose such other sentence as the court could have imposed: *s.20BU(1)*

Court must not discharge hospital order unless satisfied:

- a) the person has sufficiently recovered from mental illness to no longer require involuntary hospitalisation; or
- b) the mental illness will not respond or respond further to hospital treatment: *s.20BU(2)*

The new sentence of imprisonment must take into account the time served under the hospital order and must not exceed length of the hospital order: *s.20BU(3)*

Before reaching a decision the court:

- a) must consider the reports of two duly qualified psychiatrists; and
- b) must consider the report of any person into whose care the person was released under *s.20BR*; and
- c) may obtain and consider such other information as it thinks relevant: *s.20BU(4)*

Where a person is convicted in a State or Territory of a federal offence, and the court is satisfied of the following:

- a) the person is suffering from a mental illness within the meaning of the civil law of that State or Territory; and
- b) the illness contributed to the commission of the offence; and
- c) appropriate psychiatric treatment for the person is available in a hospital or other place; and
- d) the person consents to the order being made
- e) and the person or the person's legal guardian consents to the proposed treatment:

the court may, without passing sentence, make a **psychiatric probation order** that the person reside at, or attend at, a specified hospital or other place for the purpose of receiving that psychiatric treatment: *s.20BV(1), (2)*

The order is subject to the following additional conditions:

- a) the person will, during such period as the court specifies, not exceeding 2 years, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer;
- b) the person will be of good behaviour for such period, not exceeding 5 years, as the court specifies: *s.20BV(3)*

The court may, on application of the probation officer or the person in charge of the hospital or other place where the treatment is being undertaken, vary treatment: *s.20BV(4)*



Where a court is satisfied a person has without reasonable excuse, failed to comply with a condition of the order, the court may:

- without prejudice to the continuance of the order, impose a pecuniary penalty: or
- discharge the order and make an order under section 20 (conditional release); or
- revoke the order and deal with the person for the offence in respect of which the order was made, in any way in which the person could have been dealt with for that offence if the order had not been made and the person was before the court for sentence in respect of the offence; or
- take no action: *s.20BX(1)*

Where a person is convicted in a State or Territory of a federal offence, and the court is satisfied of the following:

- a) the person is suffering from an intellectual disability; and
- b) the disability contributed to the commission of the offence; and
- c) an appropriate education program or treatment for the person is available; and
- d) the person or the person's legal guardian consents to the proposed treatment

the court may, without passing sentence, order the person be released, on condition that they undertake a specified program or treatment for a specified period: *ss.20BY(1), (2); 20BV(2)*

The order is subject to the following additional conditions:

- a) the person will, during such period as the court specifies, not exceeding 2 years, be subject to the supervision of a probation officer appointed in accordance with the order and obey all reasonable directions of a probation officer;
- b) the person will be of good behaviour for such period, not exceeding 5 years, as the court specifies: *ss.20BY(2); 20BV(3)*

The court may, on application of the probation officer or the person in charge of the place where the treatment is being undertaken, vary treatment: *ss.20BY(2), 20BV(4)*

Provisions dealing with the breach of psychiatric orders apply to a breach of these orders: *ss.20BY(2), 20BW, 20BX*