9. Commonwealth provisions

Unfitness to be Tried –Crimes Act 1914 (Cth)[1]

See further B Hancock and J Wheeler *Commonwealth Offences on Indictment Fitness to be Tried – The Scheme in Five Flow Charts* on the Public Defenders Website.

Relationship to State provisions

State law applies to federal offences where there is no inconsistency with Commonwealth law. In relation to unfitness, the mode of determining fitness and the test to be applied is regulated by State provisions and the consequences of a finding of unfitness is regulated by Commonwealth provisions: *Kesavarajah v The Queen [1994] HCA 41; (1994) 181 CLR 230* at [21]–[28] per Mason CJ, Toohey and Gaudron JJ; *R (Cth) v Sharrouf [No 2] [2008] NSWSC 1450* per Whealy J at [5]– [7].

Where unfitness raised at committal stage

The question of fitness may be raised by the prosecution, an accused person or their representative in committal proceedings before a magistrate: s 20B(1).

The magistrate must refer proceedings to the court to which the proceedings would have been referred if the person was committed for trial: s 20B(1) and may make an order detaining the person in prison or in hospital: s 20B(4).

If the court to which the person is referred subsequently finds them fit to be tried the proceedings must be remitted back to the magistrate: s 20B(2).

Consideration of unfitness

These provisions apply whether the matter was referred by a magistrate or raised in proceedings for trial on indictment: s 20B(3). The mode and test for determining unfitness is regulated by State law: *Kesavarajah v The Queen [1994] HCA 41; (1994) 181 CLR 230* at [21]-[28]; *R (Cth) v Sharrouf [No 2] [2008] NSWSC 1450* at [5] per Whealy J: see ***6. The fitness inquiry***

Provision for the determination of fitness by judge alone does not breach s 80 of the Constitution: *Baladjam & Ors [No 13] [2008] NSWSC 1437; (2008) 77 NSWLR 630* per Whealy J.

Where a court finds a person unfit to be tried the court must determine whether there is a prima facie case that the person committed the offence: s 20B(3).

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[1] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

Where a court finds a person is unfit to be tried (other than a person referred by a magistrate) the court may make an order detaining the person in prison or in hospital: s 20B(5).

Determining whether there is a prima facie case

Procedures after a finding of unfitness, including consideration of a prima facie case, are regulated by Commonwealth provisions: *R (Cth) v Sharrouf [No 2]* *[2008] NSWSC 1450* at [6]–[7] per Whealy J. Where a court finds a person unfit to be tried, it must determine whether there is a prima facie case that the person committed the offence: s 20B(3).

A prima facie case is established if there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial for the offence: s 20B(6) and ; *R v Sharrouf [No 2]* at [51]–[54].

In proceedings to decide on a prima facie case, the person charged may give evidence or make an unsworn statement and may raise any defence that could have been properly raised at trial, and the court may seek such other evidence, whether oral or in writing, as it considers likely to assist: s 20B(7).

Consideration of a prima facie case is different to a special hearing under State law. It does not require the calling and cross-examination of witnesses and the court must consider the evidence at its highest without engaging in an assessment of the credibility or reliability of such evidence: *R v Sharrouf [No 2]* at [26]-[50].

Where court finds no prime facie case

Where the court determines no prima facie case has been established the court must dismiss the charge and order the release of any person in custody: s 20BA(1).

Where court finds a prime facie case — dismissal of charge

Where the court determines there is a prima facie case but concludes it is inappropriate to inflict any punishment, or inflict any punishment other than a nominal punishment, the court must dismiss the charge and order the release of any person in custody: s 20BA(2), (3). The court must have regard to the character, antecedents, age, health or mental condition of the person, the extent (if any) to which the offence is of a trivial nature or the extent (if any) to which the offence was committed under extenuating circumstances: s 20BA(2).

Where court finds prime facie case — no dismissal of charge

If the court does not dismiss the charge it must as soon as practicable determine whether, on the balance of probabilities, the person will become fit within 12 months of the determination of unfitness: s 20BA(4). The court must first obtain and consider oral or written evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner: s 20BA(5) and may consider evidence from any other person, body or organisation the court considers appropriate: s 20BA(6).

Finding person likely to be fit within 12 months

If the court determines a person is likely to become fit within 12 months, it must also determine whether the person is suffering from a mental illness or mental condition for which treatment is available in a hospital and whether the person objects to being detained in a hospital: s 20BB(1).

If the court makes a positive finding under s 20BB(1), it must order the person be detained (or continue to be detained) in a hospital until the person becomes fit or if the person does not become fit after 12 months, as soon as practicable after the court makes an order in relation to the person under s 20BC (see below): s 20BB(2)(a), (c), (d).

Where the court does not make a positive finding under s 20BB(1), it must either order the person detained in a place other than a hospital (including a prison) or grant conditional bail for a period ending when the person becomes fit or if the person does not become fit after 12 months, as soon as practicable after the court makes an order in relation to the person under s 20BC: s 20BB(2)(b), (c), (d).

Finding person likely to be fit within 12 months — person becomes fit

If the person becomes fit within 12 months the proceedings for committal or on indictment must continue as soon as practicable: s 20BB(3).

Finding person likely to be fit within 12 months — person does not become fit

If person does not become fit within 12 months they are dealt with under s.20BC as if they were originally found not likely to become fit: s 20BB(4).

Finding person will not become to be fit within 12 months

Where the court determines a person will not become fit within 12 months, it must also determine whether the person is suffering from a mental illness or mental condition for which treatment is available in a hospital and whether the person objects to being detained in a hospital: s 20BC(1).

Where the court makes a positive finding under s 20BC(1), it must order the person detained (or continue to be detained) 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 20BC(2)(a).

Where the court does not make a positive finding under s 20BC(1), it must order the person detained in a place other than a hospital (including a prison) 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 20BC(2)(b).

In *R v Nguyen* *[2019] NSWDC 970* Neilson DCJ first found the phrase “period not exceeding the maximum period of imprisonment that could have been imposed of the person had been convicted of the offence charged” referred to the maximum penalty for the offence, then considered the circumstances of the offence and the subjective mitigating factors in determining the appropriate period. See also below under **Defence of Mental Illness / Mental Impairment** for cases dealing with the identical phrase under s.20BJ.

The court may order the release of the person from custody unconditionally or subject to conditions for not more than 3 years if of the opinion it is more appropriate to do so: s 20BC(5), (6).

These provisions also apply to a person who was found by the court likely to become fit but subsequently did not become fit within 12 months: s 20BB(4). A decision as to detention or conditional release under this section must take into account time spent in detention or on conditional bail during these 12 months: s 20BB(5)

Review by Attorney General

Any person detained under s 20BC(2) must be reviewed by the Attorney General every six months to consider whether they should be released from detention: s 20BD(1). The Attorney General must obtain and consider a report from a psychiatrist or psychologist and another medical practitioner, may consider other reports and must take into account any representations made by or on behalf of the person being reviewed: s 20BD(2).

The Attorney General may order the person's conditional or unconditional release for the remainder of the period set under s.20BC or 5 years, whichever is less: s 20BE(1), (3), (4). The Attorney General must not order the release unless satisfied the person is not a threat or a danger to themselves or the community: s 20BE(2).

Significant differences to State provisions:

Upon an initial finding that a person is unfit

Under State provisions, the court must determine if the person is likely to become fit within 12 months. If the court determines a person is likely to become fit, they are reviewed by the MHRT for up to 12 months. Only at the end of the 12-month period is a special hearing held. Where the court determines a person is not likely to become fit a special hearing is held without delay.

Under Commonwealth provisions, the court determines if there is a prima facie case before deciding if the person is likely to become fit within 12 months.

Special hearing / prima facie case

There are differences in the procedures and test between the Commonwealth determination of a prima facie case and the State special hearing.

Limiting term / period not exceeding

Under State legislation, a limiting term is applied to a person after a special hearing. Under the Commonwealth provisions, a person who is found not likely to become fit or has not become fit after 12 months will be detained 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.

Future review

Under the State provisions a person is reviewed by the MHRT. Under the Commonwealth provisions they are reviewed by the Attorney General

Defence of mental impairment / mental illness

See further B Hancock and J Wheeler Defence of Mental Illness Procedural Flow Chart - Commonwealth on the Public Defenders Website.

Special verdict of not guilty because of mental impairment — *Criminal Code Act* 1995 (Cth)[2]

Section 7.3 provides for a special verdict of not guilty because of mental impairment for persons charged on indictment with federal offences.

Under s 7.3(1) a person is not criminally responsible for an offence 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.

This is similar to the common law and State tests except for the addition of (c): see ***8 Mental health and cognitive impairment defences in a criminal trial*** - Test for mental health and cognitive impairment defence.

"Mental impairment" includes senility, intellectual disability, mental illness, brain damage and severe personality disorder: s 7.3(8).

"Mental illness" is a reference to an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli, although such a condition may be evidence of a mental illness if it involves some abnormality and is prone to recur: s 7.3(9). The question of whether a person is suffering from a mental impairment is one of fact: s 7.3(2).

The question of mental impairment may be raised by the prosecution with leave of the court or by the defence: s 7.3(3), (4).

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

The 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).

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).

Where a person had been found not guilty because of a mental impairment which is a mental illness, they will be dealt with under s 20BJ of the *Crimes Act* (Cth). Note that this section

[2] Section numbers refer to the *Criminal Code Act* 1995 (Cth) unless otherwise stated.

refers only to persons acquitted because of mental illness. It is therefore unclear whether the provisions apply to a person whose mental impairment was because of senility, intellectual disability, brain damage or severe personality disorder.

Orders and review after special verdict — *Crimes Act* (Cth)[3]

Where a person is acquitted of a federal offence because of mental illness, the court must order 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).

The court may order the release of the person from custody unconditionally or subject to conditions for not more than three years if the court is of the opinion it is more appropriate to do so: s 20BJ(4), (5).

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)

This phrase has been considered in several cases.

The court applies a two-stage approach, identifying the legislative maximum penalty for the offence, then determining the hypothetical sentence that would have been imposed if the person had been found guilty of the offence: *R v G, H [2019] SASCFC 71*; *[2019] 134 SASR 461* per Doyle J at [13]; per Hughes J at [69], [74]-[75] applying *R v Goodfellow (1994) 33 NSWLR 308*.

In determining this hypothetical sentence the court must not take account of the mental illness of the person: *R v Goodfellow* per Hunt CJ at CL at p 311, Allen J at p 313; followed in *R v G, H* per Doyle J at [13], although in *R v Robinson [2004] VSC 505; (2004) VR 165* at [31]-[32], Kellam J took into account mental illness in determining the culpability of the person for the offence but not as a separate subjective factor.

In determining the hypothetical sentence the court must undertake a similar, although not identical, process as a sentencing hearing, applying general sentencing principles: *R v G, H* per Doyle J at [10], [23]-[24]; per Hughes J at [78]-[79].

The court is not required to quantify the hypothetical sentence but must make clear it has been considered: *R v G, H* at [25] per Doyle J.

Where there are multiple offences, the court must consider the principles of accumulation and fix a single period that reflects the multiple offences: *R v Goodfellow* per Hunt CJ at CL at p 312, Allen J at 314.

Review by Attorney General

Any person ordered to be detained in hospital or prison must be reviewed by the Attorney General as soon as practicable, and then every six months, to consider whether the person should be released from custody: s 20BK(1).

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[3] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

The Attorney General must obtain and consider a report from a psychiatrist or psychologist and another medical practitioner, may consider other reports and must take into account any representations made by or on behalf of the person being reviewed: s 20BK(2).

The Attorney General may order the person's conditional or unconditional release for the remainder of the period set under s 20BJ(1) or five years, whichever is less: s 20BL(1), (3), (4).

The Attorney General must not order the release unless satisfied the person is not a threat or a danger to themselves or the community: s 20BL(2).

Significant differences to State provisions:

Under Commonwealth provisions the defence is one of mental impairment:

- The definition of mental impairment is different to the State definition of mental impairment and cognitive impairment and includes "severe personality disorder"
- The defence is similar but and includes where a person was unable to control their conduct as a result of their mental impairment
- The verdict is "special verdict of not guilty because of mental impairment"
- It is unclear how a person is dealt with if their special verdict is based on a mental impairment that is not a mental illness.

Under Commonwealth provisions the court determines and imposes a specific period of detainment and the person becomes subject to review by the Attorney General.

Under State provisions a person is detained indefinitely and is subject to the review of the MHRT.

Summary disposition of persons suffering from mental illness or intellectual disability - *Crimes* Act (Cth)[4]

Section 20BQ provides for the summary disposition of persons suffering from a mental illness or an intellectual disability charged with federal offences. Where s 20BQ applies, the state provisions do not apply: *Kelly v Saadat-Talab [2008] NSWCA 213; (2008) 72 NSWLR 305*.

It must appear to the court that the person is suffering from a mental illness within the meaning of the civil law of NSW or is suffering from an intellectual disability: s 20BQ(1)(a). In the stated case *Skapik [2025] NSWCCA 19* the Court rejected the Crown submission that 'mental illness within the meaning of the civil law' meant the definition of 'mental illness' in the civil law of a State or Territory providing for involuntary detention.

> *[78] In the context of Division 8 of Part 1B and of the Crimes Act 1914 more broadly, and whilst the words "the civil law of the State or Territory" are not generally found in legislation, the better view is that Parliament used the words "mental illness within the meaning of the State or Territory" in s 20BQ(1)(a) to direct attention to the meaning of "mental illness" in the State or Territory as a matter of civil, as opposed to criminal, law. In that way, Parliament was seeking to ensure that the very specific concepts of mental illness developed to determine whether a criminal defendant is fit to be tried, or*

[4] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

should be acquitted because of mental illness, did not guide the construction of "mental illness" in s 20BQ(1)(a).

These provisions are restricted to person suffering from a mental illness at the time of proceedings; State provisions extend to persons suffering a mental illness at the time of the offence*: Kelly v Saadat-Talab*; *Commonwealth Director of Public Prosecutions v Mahamat-Abdelgader [2017] NSWSC 1102* per McCallum J.

It must also appear to the court that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under these provisions than otherwise in accordance with law: s 20BQ(1)(b).

In *Morrison v Behrooz [2005] SASC 142* at [40]-[45], Gray J expressed the view that s 20BQ only applies where no plea has been entered. This was challenged but not decided in *Commonwealth Director of Public Prosecutions v Seymour [2009] NSWSC 555* per Simpson J. Note the State provisions apply whether or not a person has entered a plea: s 9(1) *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

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 that does not exceed 3 years; or

(ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or

(iii) unconditionally: s 20BQ(1)(c).

When considering whether to impose conditions, a magistrate must consider the seriousness of the offence, general deterrence and the need for supervision or treatment of the offender: *Boonstoppel v Hamidi [2005] SASC 248* per Gray J at [42]. The court may instead adjourn the proceedings, remand the person on bail and/or make any other order that the court considers appropriate: s 20BQ(1)(d).

An order under s 20BQ(1)(c) acts as a stay against any further proceedings against the person in respect of offence: s 20BQ(2).

The District Court hearing an appeal from Local Court in relation to federal offences may only exercise power under s 20BQ if the appeal is against conviction and the conviction is set aside. It is not available where it is a sentence appeal only: *Huynh v R [2021] NSWCCA 148*.

Sentencing alternatives for persons suffering mental illness or intellectual disability — *Crimes Act* (Cth) [5]

Hospital Order

The court may, without passing sentence, make a hospital order that a person be detained in a specified hospital for a specified period for the purpose of receiving specified treatment where the person is convicted on indictment of a federal offence, and the court convicting the person is satisfied of the following:

[5] Section numbers refer to the *Crimes Act* 1914 (Cth) unless otherwise stated.

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: s 20BS(1).

The court must not make an order unless, but for the mental illness, it 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). It 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).

The 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 the 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).

The 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).

The 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).

Psychiatric Probation Order

The court may, without passing sentence, make a psychiatric probation order that a person reside at, or attend at, a specified hospital or other place for the purpose of receiving that psychiatric treatment where the person is convicted 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; and

e) the person or the person's legal guardian consents to the proposed 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:

a) without prejudice to the continuance of the order, impose a pecuniary penalty: or

b) discharge the order and make an order under s 20 (conditional release); or

c) 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 be-fore the court for sentence in respect of the offence; or

d) take no action: s 20BX(1).

Release on conditions

The court may, without passing sentence, order a person be released, on condition that they undertake a specified program or treatment for a specified period where a person is convicted 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: 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 two 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 five 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 beach of psychiatric orders apply to a breach of these orders: ss 20BY(2), 20BW, 20BX.