

TITLE: Fitness to be tried in Commonwealth criminal prosecutions

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## INTRODUCTION

*If a person stands trial notwithstanding that there is an unresolved issue as to his or her fitness to plead or if that issue is not determined in the manner which the law requires ... there is a fundamental failure in the trial process.* Justice Gaudron in *Eastman v The Queen* [2000] 172 ALR 36 at paragraph 62:

No person can be tried for a crime unless that person is fit to be tried. Put simply, an accused needs to have the mental and physical ability to comprehend the proceedings, plead to the charge and defend him or herself. The modern jurisprudence concerning fitness to be tried characterises the requirement as a component of a fair trial; see: *Eastman*, as above, per Gaudron at para. 65, *Kesavarajah v R* (1981) 181 CLR 230, at 245.

All states and territories have statutory provisions to determine the issue of an accused person's fitness. The concept is well established in the common law and there is an established case law on the issue. The Commonwealth Crimes Act dictates a regime that applies in Commonwealth criminal prosecutions. The applicable rules and procedures are the subject of this paper.

## OVER REPRESENTATION

A disproportionate number of persons with mental health and developmental issues are subject to the criminal justice system. The New South Wales Law Reform Commission, in its recent report *People with an Intellectual Disability and the Criminal Justice System*, noted that 2-3 % of the general population of New South Wales has an intellectual disability, whereas for persons in prison the figure is 12-13%, the figure for defendants in the NSW Local Court was as high as 37% in a study cited (see: NSW LRC report No. 80, pp. 25-26).

While criminologists debate the causal relationship between mental illness, disability and crime, simply put many more defendants are psychiatrically and cognitively unwell as opposed to the general community. Frequently, the mental health of the accused goes a long way to explaining, and sometimes excusing, the conduct.

An additional justification for the requirement that an accused must be 'fit' before being subject to the rigors of the criminal justice system is that significant mental illness or retardation makes an individual an inappropriate subject of general and specific deterrence. This consideration is also relevant in relation to sentence proceedings.

In *R v Letteri* (unreported NSW CCA 18 March 1992), Mr Justice Badgery-Parker noted:

*There is ample authority for the proposition that in the case of an offender suffering from a mental disorder or abnormality, general deterrence is a factor which should be given relatively less weight than in other cases because such an offender is not an appropriate medium for making an example to others. (See also: R v Abdulrahman Fahda unreported, NSW CCA, 31 August 1999)*

Especially in relation to summary matters, the rules concerning fitness recognise that a disproportionate number of defendants are mentally unwell and or developmentally disabled and that it is desirable to divert a significant proportion of these matters from the criminal justice system to the health system. While the rules concerning fitness have their genesis in the common law, they now sit along side general mental health legislation and have a diversionary impact.

## **THE CRIMES ACT 1914**

The Commonwealth Crimes Act has a number of provisions that deal with fitness and the sentencing alternative for persons suffering from mental illness or intellectual disability. I list the relevant provisions below:

*Division 6 - Unfitness to be tried* - this division deals with fitness in relation to indictable matters.

*Division 7 - Acquittal because of mental illness* - this division deals with the situation when an accused is acquitted due to mental illness and provides for the making of hospital orders in relation to such a person.

*Division 8 - Summary disposition of persons suffering from mental illness or intellectual disability* - this division provides the standard for summary matters where the issue of the defendant's fitness is raised.

*Division 9 - Sentencing alternatives for persons suffering from mental illness or intellectual disability* - this division provides such dispositions as hospital orders or psychiatric probation orders for persons convicted on indictment of federal offences.

Division 6 and 8 concern what is generally known as the accused's fitness to be tried and are the subjects of this paper. Divisions 7 and 9 appear to be rarely used as, where they might apply, Division 6 is also applicable.

## **FITNESS**

The Commonwealth Crimes Act, in common with all State and Territory regimes, distinguishes between accused persons charged with an indictable offence and those charged with a summary offence. The determination of what rules apply relate to the court in which the person would be ultimately tried. In Commonwealth prosecutions, Division 6 - *Unfitness to be tried* applies to indictable offences and Division 8 - *Summary disposition of persons suffering from mental illness or intellectual disability* applies to summary matters.

The rules concerning indictable matters more closely resemble the common law and the general principles applied in relation to fitness to be tried. The procedures applied to summary matters are less onerous and the underlying policy is to divert mentally unwell persons from the criminal justice system.

Fitness concerns the person's physical and mental condition at the time he or she faces prosecution and has nothing to do with the person's mental state at the time of the offence.

I have used generally the term fitness to be tried or fitness. The concept is sometimes described in terms of fitness to plead. Fitness to be tried is a wider concept. Fitness to plead is one aspect of the notion of fitness albeit an important

one. It is the ability to sensibly answer the accusation against you and avail yourself of your legal options. The Commonwealth *Crimes Act 1914* uses the term *fitness to be tried* in Division 6 and this is the preferable term. In relation to summary matters, fitness is not really the appropriate term as the concept has only limited application.

## **PART 1 -SUMMARY PROCEEDINGS**

In a summary proceeding Division 8 applies. The operative section is s20BQ. s20BQ provides that:

(1) *Where, in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, it appears to the court:*

(a) *that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and*

(b) *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 this Division than otherwise in accordance with law .... .*

Further, s20BR states:

*For the purposes of this Division, a court of summary jurisdiction may inform itself as the court thinks fit, but not so as to require the person charged to incriminate himself or herself.*

s20BQ applies to summary proceedings for a federal offence where any party raises an issue as to the defendant's mental state or intellectual capacity. The application of the section to proceedings is discretionary as the court 'may' make an order under the section. The section has the effect of functioning as a dismissal of the charge and precludes the prosecution taking any further action concerning the offending conduct.

The section demands that a magistrate be satisfied of 2 matters before proceedings can be disposed of under the section. Further, whether a person should be dealt with under the section is a matter of discretion and not easily susceptible to review.

**First**, under s20BQ(1)(a), the court must be satisfied that a person charged is 'suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability'.

The paragraph contemplates a magistrate applying the standard of the State or Territory law in terms of determining what is a 'mental illness'.

'Mental illness' is defined in the Dictionary of Terms contained in Schedule 1 of the *Mental Health Act 1990 (NSW)* as:

*'a condition which seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:*

- (a) *delusions,*
- (b) *hallucinations,*
- (c) *serious disorder of thought form,*

- (d) a severe disturbance of mood,
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d)'

There is no elaboration of what constitutes an intellectual disability. Intellectual disability is a broad term and, as the Law Reform Commission research indicates, would potentially encompass more than a 3<sup>rd</sup> of defendants in the NSW Local Court.

**Second**, once it is established that a person charged with a federal offence suffers from a mental illness or is intellectually disabled, the magistrate must then determine under s20BQ(1)(b), '*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 this Division than otherwise in accordance with law*'.

s20BQ(1)(b) requires consideration to be given to 'an outline of the facts alleged in the proceedings'. Accordingly, a magistrate must consider the nature and seriousness of the prosecution case when determining whether a matter should be disposed of under the section. The seriousness of the offence and the likely outcome of the proceedings for the applicant must be considered when determining whether it is appropriate to deal with a matter under the section. For this reason, an applicant's prior criminal history or good character is relevant.

Some consideration needs to be made of the public interest in the proceedings being dealt with under the section rather than according to law. If the allegation against an applicant is very serious, it may be inexpedient to apply the section, as there is a greater public interest in having the applicant dealt with according to law for the offences charged. The alleged conduct may also illustrate the dimensions of the applicant's mental illness or intellectual disability and, as pointed out in *Letteri*, indicate the futility of subjecting the person to punishment.

s20BQ's coverage is broad and its application discretionary. The section is not concerned with fitness to be tried, as it is generally understood at common law. This point is illustrated in the case of *Mackie v Hunt and Anor*, unreported, Supreme Court of NSW, 8 December 1989. This case concerns the then equivalent NSW provision concerning summary offences. The legislation (the then s428W of the *Crimes Act 1900 NSW*) was almost identical to s20BQ. The prosecution in *Mackie* sought to advance the proposition that the relevant test required a consideration of the defendant's fitness to stand trial. The Court rejected this interpretation and noted the provision was a '*diversionary measure*' (p. 8) and that the magistrate could exercise powers under the section whether the intellectually disabled person is fit to be tried as a diversionary measure as well as where the defendant is unfit.

From the experience of the author, s20BQ tends to be applied fairly liberally and if the applicant satisfies the first limb, the matter is generally disposed of under the section.

## **PART 2 - INDICTABLE PROCEEDINGS**

An accused person's fitness to be tried in a Commonwealth prosecution in any state or territory court is governed by Division 6 of the *Crimes Act 1914*. The leading case is the High Court's decision in *Kesavarajah v R* (1994) 123 ALR 463.

The s20B concerns '*proceedings for the commitment of a person for trial of a federal offence on indictment*' (s20B). On its face, it appears to only cover committal proceedings although it is applied at all stages of the prosecution of an indictable offence. When an indictable offence is being dealt with summarily, the relevant provision is s20BQ.

### **TIMING**

The fitness of an accused is a fluid concept and in light of the episodic nature of many mental illnesses, fitness will arise at different times throughout the life of the proceedings. There is a well-documented link between stress and the severity of some mental illness such as schizophrenia and it can be expected that an accused's condition will deteriorate at critical junctures in the litigation i.e. at the commencement of the trial. Ideally, the issue should be raised prior to arraignment.

The issue of fitness can be determined at any stage in the proceedings. This includes after conviction and prior to sentence. The issue could theoretically be raised the moment before the judge pronounces sentence. Once the court is *functus officio* of the proceedings the question cannot be raised.

In *Eastman v R*, there was an attempt by the applicant, who had been convicted of murder in the Supreme Court of the Australian Capital Territory, to raise for the first time the issue of his fitness in the High Court. The question of the applicant's fitness had not been raised at trial or at his Full Federal Court appeal. The High Court by a majority held that an accused's fitness is a factual matter and cannot be raised as a fresh matter in an appeal court in accordance with the general rules concerning raising new matters on appeal. A failure to deal with the issue of fitness appropriately would give rise to appellable error.

According to s20B, '*[T]he prosecution, the person or the person's legal representative*', can raise the issue of the accused's fitness. There does not appear to be any provision for the judge or magistrate to raise the issue, and this places some responsibility on the prosecution in appropriate circumstances to raise the issue, although sufficiently bizarre behaviour on the part of an accused may in effect raise the issue so as to provide a judge with enough justification to conduct an enquiry. Generally speaking, the accused legal representative should raise the issue. The inability to get proper instruction is indicative of a possible lack of fitness.

For the accused's legal representative, raising fitness on one's client's behalf is an instance where instructions are not necessary and the legal representative can ethically act contrary to his or her instructions and raise the issue.

The issue needs to be raised in good faith and there is no requirement that there be expert evidence available at the time although such material is obviously useful. Once the issue is raised in good faith there is no discretion as to whether or not an enquiry should take place; an enquiry must take place.

Raising of the accused's fitness will necessarily place the prosecution in abeyance. In practical terms the result of such an enquiry may be that the prosecution is delayed til appropriate treatment is undertaken. The minimum delay would be something like 6 to 12 months.

In *R v Ju Sheng Zhang*, unreported NSW CCA, 31 August 2000, the prosecutor, on the 4<sup>th</sup> day of the accused's trial in which the accused was representing himself, expressed some concern about the accused's fitness due to his increasingly bizarre behaviour. The jury had been empanelled and the trial was underway. There had been an earlier psychiatric examination of the accused that due to the accused apparent lack of cooperation had provided very little information. The prosecutor sought to then withdraw his earlier 'application' and the trial continued. On appeal, it was noted that it was not an option to continue the trial once the issue had been raised in good faith: '*his honour [had] no option but to discharge the jury and order an inquiry*' (p. 7) into the accused fitness.

In NSW, if the issue of the accused fitness is raised prior to arraignment, the permission of the NSW Attorney-General is required prior to an inquiry taking place [s8, *Mental Health (Criminal Procedure) Act 1990*]. s8 reads:

*Procedure where question of unfitness raised before arraignment*

(1) If the question of a person's unfitness to be tried for an offence is raised at any time before the person is arraigned on a charge in respect of the offence, the Attorney General must determine whether an inquiry should be conducted before the hearing of the proceedings in respect of the offence.

(2) The Attorney General may, at any time before the inquiry is commenced, determine that there is no longer any need for such an inquiry to be conducted.

The section only applies to criminal proceedings in the Supreme and District Court relating. The permission of the State Attorney is not necessary for an indictable Commonwealth prosecution that is still proceeding through the Local Court as s20B of the *Crimes Act 1914* applies. After a person is arraigned, the permission of the New South Wales Attorney is not required.

Accordingly if a person subject to a Commonwealth prosecution raises the issue of his or her fitness prior to arraignment, the permission of the state Attorney-General needs to be sought (see: Judge Woods, *R v James William Shepherd*, 17 July 2003, unreported). This is an example of the 'pick-up' of state law in Commonwealth prosecutions discussed below.

## **APPLICABLE LAW**

s20B states that the court '*to which the proceedings would have been referred had the person been committed for trial*' determines the question of fitness. It is not clear from Division 6 what the mode of trial is or what procedures should be applied.

Chief Justice Mason and Justices Toohey and Gaudron in their joint judgment in *Kesavarajah* noted (at p. 471):

*The Commonwealth Act does not make provision for the manner in which the issue of fitness to be tried is to be determined. However, s68(1) of the Judiciary Act 1903 (Cth) makes applicable to persons who are charged with offences against the laws of the Commonwealth the laws of a State or Territory respecting the procedure for trial*

*of persons charged with offences and their conviction. And s79 of the Judiciary Act provides that the laws of each State, including laws relating to procedure, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable.*

The law and procedure relating to fitness is one of those areas in Commonwealth criminal law where there is a partial 'picking-up' of state and territory law remedying gaps in Commonwealth legislation. This aspect of the law relating to fitness was the subject of comment in *Application of Pearson* (1999) 46 NSWLR 148:

*In Kesavarajah, a question arose as to the fitness of an accused to be tried for a Commonwealth offence. The Crimes Act 1914 (Cth) contains provisions concerning the disposition of an accused who had been found unfit to be tried, but no provision as to the procedure by which the issue of fitness was to be tried. It was held that the State law regulating the method of determining that issue was picked up by s68, but the consequences remained to be determined by Commonwealth law. There was an inconsistency between the State and Commonwealth laws concerning that aspect, so that the latter prevailed. Otherwise the procedural provisions that were lacking under Commonwealth law were made applicable through s68 and s79 of the Judiciary Act 1903 (Cth).*

In NSW, there is specific legislation dealing with mental health, and a mental health tribunal. The application of the totality of the NSW procedures in relation to Commonwealth prosecutions is uncertain. As a matter of constitutional law, any NSW provisions that are inconsistent with Commonwealth law will be inoperative to the extent of the inconsistency in accordance with s109 of the Constitution.

In relation to Mr Kesavarajah, who was prosecuted for importing a prohibited narcotic under the Customs Act in Victoria, the High Court noted (at 123 ALR 463 at 473):

*The provisions of the State law must necessarily give way to the specific provisions of the Commonwealth Act to the extent of any inconsistency. The consequence would be that the State law would regulate the mode of determination of fitness to be tried, i.e. by jury in Victoria pursuant to s392 [Crimes Act 1958 (Vic)], but the consequences flowing from the determination would be regulated by Commonwealth law.*

The first place to look is Division 6 of the *Crimes Act* 1914. The explicit procedures set out there must be followed.

Division 6 gives a greater role to the courts whereas in NSW a non-judicial tribunal, the Mental Health Tribunal, plays a dominant role after a person is found to be unfit. One of the alternatives that arises once a person is found unfit is the deprivation of his or her liberty in a therapeutic environment or a prison. In Commonwealth prosecutions, Division 6 demands that a Court makes this decision initially although there is later scope for the federal Attorney-General to be involved and what the Division terms '*prescribed bodies*'.

An unresolved issue is the relevance of the constitutional guarantee of trial by jury for matters on indictment provided by s80 of the Constitution. Namely is a fitness trial by judge alone a permissible alternative in a Commonwealth prosecution in light of s80 of the Constitution.

## PROCEDURE AT HEARING

At common law, the determination of fitness was a jury question. The determination by a jury of what we would now call an accused's fitness was part of an arcane practice of determining the reason for an accused's failure to plead; an accused was either mute through '*malice*' or '*visitation of god*'. Note 1

Fitness hearings in New South Wales for indictable offences are governed by the provisions of the *Mental Health (Criminal Procedure) Act 1990* ('the Act'). s11 of the Act states that the question of a person's unfitness to be tried for an offence is to be determined by a jury constituted for that purpose, except as provided by s11A. s11A provides for a judge alone to determine the issue if there is consent of both the Crown and the accused.

Electing to dispense with the right to trial by jury is obviously an important issue in the progress of criminal litigation. For the consent of the accused to be obtained, the accused needs to digest appropriate advice and provide competent instructions (see: *R v Mifsud*, unreported, 8 November 1995, NSW CCA). As a practical point, an accused who is suspected of being unfit is also unlikely to be unable to give proper instructions as to whether to elect to have trial by judge alone. Accordingly most fitness hearings take place in front of a jury for the practical reason that the person whose fitness is to be tried is unable to give consent to a judge alone disposal irrespective of the view of the Crown.

s6 of the Act states that '*the question of a person's unfitness to be tried for an offence is to be determined on the balance of probabilities.*' This section applies to Commonwealth matters.

s12 of the Act deals with the conduct of the inquiry. The section reads:

*12 (1) At an inquiry, the accused person is, unless the Court otherwise allows, to be represented by counsel or a solicitor.*

*(2) An inquiry is not to be conducted in an adversary manner.*

*(3) The onus of proof of the question of a person's unfitness to be tried for an offence does not rest on any particular party to the proceedings in respect of the offence.*

*(4) At the commencement of an inquiry the Court is to explain to the jury the reason for the inquiry, the findings which may be made on the inquiry and the consequences, both at law and otherwise, of those findings.*

The accused person at a special hearing may be allowed to give evidence (or make a statement if it is permissible) even though his or her representative is opposed to that course being followed: *R v Smith* (CCA (NSW), 11 June 1999, unreported, BC9903092); (1999) 6 Crim LN 50 [1015]; [1999] NSWCCA 126.

The procedures for a special hearing were considered in *R v Zvonaric* BC200108141; [2001] NSWCCA 505; (2002) 9 Crim LN 4 [1379], where it was stressed that a special hearing should be conducted as nearly as possible as if it were a trial (see s21 of the Act), including a formal arraignment and the proper reception of evidence. Chief Justice Spigelman stated that special hearings should not be dealt with as if they were paper committals. The trial miscarried because the trial judge did not expose her reasons for the findings made in respect of the elements of the offence.

## THE TEST

The question of an accused's fitness to be tried relates to the mental condition of the accused at the time of the trial. In *R v Dennison* (CCA (NSW), 3 March 1988, unreported, BC8802160) it was held:

*The question of unfitness turns upon an evaluation of the capacity of the prisoner concerned at the trial to understand the proceedings, to be able to commence instructions, to be able to formulate his plea to the charge against him, and to follow to a sufficient extent what is actually taking place in the trial. Whatever may have been his mental state at the time of the offence, indeed even if he were totally insane at the time of the offence, that would not govern his fitness to be tried at the time of the trial. The critical question requires evidence of his state at the time of the trial.*

In NSW, there is no detailed legislative definition of what is required in order to be fit to be tried.

Generally, for a person to be unfit for trial a significant level of cognitive and or psychiatric impairment is required. The standard is higher than that applied in summary matters and the policy objective is fairness rather than a concern that the mentally unwell should be diverted from the criminal justice system. Having said this, an accused, to be fit, must on the face of it have an understanding of the nature of the proceedings against him or her that is quite sophisticated and in a practical sense likely beyond that of an unsophisticated accused. Despite this there is a long line of authority to the effect that an accused does not need to have the mental ability to make an able defence but requires an ability to understand the general nature of the proceedings against him or her. Being of low intelligence or having a mental disorder does not immediately render a person unfit to be tried.

For example, the Chief Justice in *Eastman v R* 172 ALR 39 at para. 26 approved a number of propositions as 'sound' made in an Ontario Court of Appeal decision in *R v Taylor* (1992) 77 CCC (3<sup>rd</sup>) 551 at 564-5 to the effect that:

(a) *The fact that an accused person suffers from a delusion does not of itself render him or her unfit to stand trial, even if that delusion relates to the subject matter of the trial.*

(b) *The fact that a person suffers from a mental disorder which may cause him or her to conduct a defence in a manner which the court considers to be contrary to his or her best interests does not, of itself, lead to the conclusion that the person is unfit to stand trial.*

(c) *The fact that an accused person's mental disorder may produce behaviour which will disrupt the orderly flow of a trial does not render that person unfit to stand trial.*

(d) *The fact that a person's mental disorder prevents him or her from having an amicable relationship with counsel does not mean that the person is unfit to stand trial.*

The case of *Presser* [1958] VR 25 is generally cited as expressing the relevant legal test. His Honour Justice Smith noted:

*He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He*

*needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any. (at p. 48)*

Fitness is not limited to mental illness and includes developmental or intellectual disability: *R v Mailes* [2001] NSWCCA 155. If a person is suffering from physical illness this could also impact on fitness. Obviously if a person is in a coma the ability of that person to understand the charge is fairly limited and his or her lack of fitness apparent.

*Pressor indicators* are the generally acknowledged term for the criteria used to determine fitness. The criteria can be summarised as follows. The accused needs to be able to:

- i. understand the nature of the charge;
- ii. plead to the charge;
- iii. exercise his right of challenge;
- iv. understand generally the nature of the proceedings;
- v. follow the course of the proceedings;
- vi. understand the substantial effect of any evidence against him or her; and
- vii. make his or her defence or answer to the charge through his or her counsel if he or she is represented.

Expert evidence is a requirement under Division 6 [s20BA(5)]. A general psychiatrist's report stating that the accused is suffered from a mental illness is not enough. An expert forensic psychiatrist or psychologist needs to be engaged and specifically address the *Pressor indicators*. Generally at least 2 expert opinions should be obtained, 1 of which will be a prosecution appointed independent expert.

Assessment of a person's fitness is not a therapeutic exercise. There are many qualified forensic psychiatrists who are familiar with the test and are able to produce reports specifically addressed to it. To this end, the prosecution expert (and the defence) should be provided with details of the charge, the statement of facts and a brief history of the litigation. As part of the assessment, the psychiatrists will engage the accused in some discussion of the alleged conduct. The psychiatrist will also ask the person more general questions about the process such as what is the role of the judge and what does the prosecutor do. Fitness being a transitory thing, the psychiatrists should also normally have access to the accused prior to the hearing to update their report. In the case of many mental illness, 'episodes' come and go and a person's presentation can vary dramatically over a few weeks or even days.

The evidence given at the hearing will generally be all expert opinion evidence. The person whose fitness is to be tried can give evidence and conceivably other persons such as his or her previous legal representative might give evidence. It is generally

desirable to have the experts give some evidence and be present at the hearing. In the event of a finding by the jury that the person is unfit, the judge needs to determine whether the person will become fit within 12 months and an appropriate treatment regime.

## **SUMMARY OF DIVISION 6**

There is no real substitute to closely reading the provision of s6. I have nevertheless summarised below the pathways created by Division 6 of the Crimes Act here.

s20B(1) deals with the raising of the issue of the fitness of a person for trial of a Commonwealth offence on indictment. Once raised the question of the person's fitness must be referred to the court that the trial of the person would have taken place.

That court must conduct a trial with a jury (or possibly judge alone if s11A applies) on the question of the person's fitness [s20B(2) & s20B(3)]. The jury's role is limited to determining the factual issue of whether the person is fit or unfit. Once the jury has delivered its verdict on this issue, it is dismissed, and the judge will then make all further orders.

According to s20B(3) and s20B(7), if the person is found to be unfit, the court must determine whether there is a prima facie case that the person '*committed the offence concerned*'. s20B(6) states:

*... 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 in relation to the offence.*

The person may give evidence or make an unsworn statement and the court has wide powers to inform itself in relation to any matter that it considers likely to assist in determining the matter: s20B(7).

According to s20BA(1), if the court determines that there is not a prima facie case, the court must dismiss the charge against the person and order the release of that person from custody. This is the end of the proceedings.

If the court determines that there is a prima facie case, the court may, having regard to the matters raised in s20BA(2), consider whether the matter should be dismissed. The test is similar to that in s20BQ and s19B. Once again, the proceedings can terminate at this juncture.

If the matter is not dismissed under s20BA(2), the court must determine whether the person will, on the balance of probabilities, become fit to stand trial within 12 months [s20BA (4)]. A finding that there is a prima facie case and that the person will likely not be fit within 12 months acts as a stay on the prosecution: s20BC(8).

If the person is likely to become fit within 12 months and treatment for the mental illness is available, the court may detain the person for treatment or grant the person bail so as to undertake treatment [s20BC(2)].

The person can be detained in either a hospital or gaol and ordered to undertake treatment. More commonly, the person will be granted bail and the local community psychiatric nurse will attend to the person and provide the court ordered treatment.

If the person is found not to be likely to be fit within 12 months, s20BC applies. This section allows the court to detain the person for treatment in a hospital or another place, 'including a prison' [s20BC(2)(B)]. It also provides a means to release the person from custody and ultimately a procedure to dismiss the proceedings. s20BC(5) provides the court with the power to release the person from custody with ongoing supervision.

If the person becomes fit within 12 months or any other period determined by the court, the prosecution proceedings recommence at the stage at which the fitness issue was raised [s20BB(3)].

In the event that the person is chronically unfit, Division 6 of the Crimes Act provides for the person to be detained in either a hospital or some other place including a prison. In line with the general practise concerning what was once termed the 'criminally insane', indeterminate executive control over the person's life is contemplated. These provisions of Division 6 are now anachronistic and hark back to a period when institutionalisation of the mentally unwell was commonplace. For the simple reason that the court does not have access to receptive institutions in which to house the chronically unfit, some sort of community-based order is the norm.

There is a capacity to access the relevant state or territory mental health arrangements. s20BF provides a means for state and territory bodies to be deemed 'prescribed authorities' and take over supervisory functions in relation to the chronically unfit. There are no prescribed bodies for NSW. This means that the services of the NSW Mental Health Tribunal cannot be accessed for chronically unfit Commonwealth accused.

## **CONCLUSION**

As the High Court pointed out in the *Eastman* case, an accused's fitness is an intrinsic component of the right to a fair trial. The issue needs to be taken seriously and the correct procedures followed. The Chief Justice in *Eastman* noted (at para 24), the usual consequence of a finding that a person is unfit to plead is indefinite incarceration without trial. This would likely be the norm in cases where the offence is one of violence and there is a nexus between the offence and the person's mental illness. For example, a high proportion of unlawful homicides in NSW are committed by persons afflicted by some form of psychotic illness with the killing occurring when the person is experiencing a psychotic episode. People in this situation are usually detained in some form of therapeutic environment as they are a risk to the community.

The ultimate possible consequence of being found unfit illustrates the importance of observing proper process. In many Commonwealth matters where the unfit person may not be considered violent and a threat to community, it appears indefinite incarceration without trial is not the norm.

## **Notes**

1. W J Brookbanks, *Judicial Determinations of Fitness to Plead – the Fitness Hearing*, *Otago Law Review*, (1992) vol. 7, No. 4, 520, see: p. 522.