

MENTAL IMPAIRMENT QUICK REFERENCE GUIDE – CHILDREN’S/MAGISTRATES’ COURT



Magistrates’ Court
CMIUT Act Provisions
[Section 5](#) (Application)
[Section 20](#) (Defence)
[Section 21](#) (Presumptions)

Children’s Court
CMIUT Act Provisions
[Section 5A](#) (Application)
[Section 38ZA](#) (Defence)
[Section 38ZB](#) (Presumptions)

Magistrates’ Court

Magistrates’ Courts have the jurisdiction to determine the defence of mental impairment for summary and indictable offences heard summarily. The same procedure applies in the Magistrates’ and Children’s courts for these offences.

Successfully running a defence of mental impairment in the Magistrates’ Court will result in a discharge ([s 5\(2\) CMIUT Act 1997](#)).

Mental Impairment can be raised at any stage. However, it is **best that practitioners form a view as to its availability at an early stage** (prior to case conference).

Practitioners should always have the 2-limb test in mind ([s 20 CMIUT Act 1997](#)) when conducting a brief analysis and getting instructions from a new client:

1. **The client had a mental impairment at the time of engaging in the conduct; AND**
2. **Either:**
 - i. **That [the client] did not know the quality of the conduct; OR**
 - This relates to the physical, but not moral, quality of the conduct.
 - ii. **[The client] did not know that the conduct was wrong.**
 - They couldn’t reason with a moderate degree of sense and composure about whether their conduct, as perceived by a reasonable person, was wrong.

In the summary stage of proceedings, defence practitioners should consider the following the approach on the left-hand side of this handout, including obtaining relevant material and expert reports. **Please see page 3 of handout for more details on expert reports and letters of instruction.**

Be live to the accused’s obligations under [section 50](#) of the **Criminal Procedure Act 2009** with respect to service and filing requirements in relation to expert evidence.

Children’s Court

Unless an offence is a Category A Serious Youth Violence Offence or is being prosecuted through the committal stream of the Children’s Court, all offences are prosecuted summarily. The same process applies to the Children’s Court as in the Magistrates’ Court.

The **Children’s Court’s paramount objective is rehabilitation**. Regardless of the defence being open, it may be in the client’s interest to **promote youth diversion with conditions**, or a Therapeutic Treatment Order (which ultimately results in discharge).

SUMMARY CASE CONFERENCING EMAIL TEMPLATE – SEEKING A PUBLIC INTEREST WITHDRAWAL

Dear Informant,

My client has been charged with:

[charges]

I have attached the following material concerning my client's personal and mental health circumstances:

[list material]

I seek to have the charges withdrawn as the prosecution of these charges is not in the public interest.

As per section 4.2 of the Victoria Police Manual Procedures and Guidelines in Brief Preparation and Management, a determination of whether it is appropriate to prosecute an individual requires consideration be given to the public interest, that is, whether the circumstances of the case are of a nature that the public would reasonably expect the accused to be held accountable.

I also refer to the [Policy of the Director of Public Prosecutions for Victoria](#) which provides that a prosecution may only proceed if it is in the public interest. Factors to be taken into consideration when determining whether a prosecution is of public interest include:

- The seriousness of the offence;
- The offender's culpability;
- The offender's antecedents and background;
- The age, physical health, mental health or disability of the offender;
- The likely outcome of a prosecution; and
- Whether the prosecution would be perceived as counter-productive.

[Apply to particular circumstances making reference to support material to advance argument]

Accordingly, it is submitted that a member of the public would not reasonably expect a person in [client's] circumstances to be prosecuted and we seek that all charges be withdrawn on a public interest basis.

MENTAL IMPAIRMENT QUICK REFERENCE GUIDE – EXPERTS & LETTERS OF INSTRUCTION

Experts

The question of which expert to retain depends on the underlying cause of the mental impairment. In most cases, a forensic psychiatrist will be required (who is a Fellow of the Royal Australian and New Zealand College of Psychiatrists – FRAZNCP). However, mental impairment is a broad area and can arise outside psychiatric conditions alone. For example, a **neuropsychologist or neurologist expert report may also need to be commissioned where there is evidence of:**

1. Cognitive impairment.
2. Acquired brain injuries.
3. Dementia/Alzheimer's Disease.

The strength of the defence of mental impairment is dependent on the quality of the expert material in support. Therefore, choosing the right expert is key.

Letters of instruction

Letters of instructions should include the following structure:

1. State purpose of the report.
2. Summary of allegations.
3. Summary of client/medical history.
4. Questions to be answered for the report (**see below for an example**).
5. Itemisation of all enclosures, which should include:
 - a) Full brief of evidence;
 - b) All exhibits, both documentary and audio visual;
 - c) Recording and transcript of ROI if available;
 - d) Contemporaneous health records with alleged offending (eg hospital admissions, discharge reports);
 - e) Historical reports, health records confirming previous diagnoses;
 - f) Details of current treating medical practitioners;
 - g) A copy of the relevant practice note ([County Court](#); [Supreme Court](#)).
6. Confirm the due date of the report.
7. Confirm the fee arrangement with the expert.

Example questions for a client who has previously been diagnosed with schizophrenia:

1. Did the client suffer from schizophrenia at the time of the alleged assault on 29 December 2024?
2. If the answer to the first question is yes, did the schizophrenia:
 - a) Affect the ability of the client to know the nature and quality of the conduct and, if so, to what extent; or
 - b) Impede the client's ability to understand that the nature of their conduct was wrong and, if so, to what extent was their reasoning impeded.
3. In your opinion, did the client suffer from any other mental illness on 29 December 2024?
4. If so, what is your answer to questions (2)(a)-(c) above in relation to those mental illness/illnesses.