

# THE DEFENCE OF MENTAL IMPAIRMENT: WHAT TO DO AND WHEN

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# STEP 1: PRELIMINARY ASSESSMENT

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*All jurisdictions*

# THE DEFENCE

*Crimes (Mental Impairment & Unfitness to be Tried) Act 1997 s 20*

[1] Person **engages in conduct constituting the offence charged**; and

[2] **At the time** of engaging in this conduct, person was **suffering from a mental impairment**; and

[3] The mental impairment had the effect that **the person either did not know**:

[i] The **nature and quality** of what they were doing; or

[ii] **Their conduct was wrong.**

Useful Resource: [Criminal Charge Book, Mental Impairment, Judicial College of Victoria](#)

# CONSEQUENCES OF SUCCESSFUL DEFENCE

## SUMMARY JURISDICTION

- Discharged (**CMIUT Act**, s 5(2))

## HIGHER JURISDICTION

- Unconditional release (**CMIUT Act**, s 23)
- Supervision order: Custodial or noncustodial (**CMIUT Act**, s 23)
  - Indefinite
  - Subject to review
  - Nominal terms

# IS THE DEFENCE OPEN?

## *Considerations to guide your analysis*

**[1]** Nature of the allegations – is the alleged behaviour indicative of mental impairment?

**[2]** Was the person arrested at time of or close to the time of alleged offence? How did they present in any BWCF of the arrest?

**[3]** Were they transported to hospital upon arrest?

**[4]** Was the person interviewed? How did they present in the record of interview?

**[5]** Were they deemed unfit for interview? Were they assessed by a Forensic Medical Officer?

**[6]** Is there other evidence on the brief that indicates that they were unwell? Statements of other witnesses?

**[7]** Speak to family members.

**[8]** What are your instructions? How do they present? Are they engaged with mental health services/on any treatment orders?

# STEP 2: GATHER MATERIALS

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*All jurisdictions*

# GATHERING MATERIALS

**[1]** Signed medical authority

**[2]** If deemed unfit for interview by a Forensic Medical Officer, the Forensic Medical Officer's report

**[3]** If deemed unfit for interview by police, any notes taken by police on why they were deemed unfit

**[4]** Forensicare Mental Health Patient Summary

**[5]** FOI any medical records/discharge summaries/GP records/Mental Health Service Records within the last 2-3 years of the alleged offending

**[6]** Previous psychiatric/psychological reports

**[7]** LEAP Records/police notes on any interactions with client

**[8]** BWCF of arrest

**[9]** Expert Report !

# STEP 3: CASE CONFERENCE

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*Summary Jurisdiction*



# SUMMARY CASE CONFERENCING

## *Public Interest Withdrawals*

**REMEMBER:** The defence of mental impairment only comes into question where the prosecution can prove that the person engaged in the conduct that constitutes the offence.

- Seek withdrawal of charges that cannot be established on the evidence.

Appealing to the prosecution's discretion to withdraw charges on a public interest basis is a potential way to resolve the case without having to run the defence in a contested hearing.

- Direct your language to the lack of public interest in prosecuting a person of your client's circumstances/characteristics/conditions.
- Draw specifically on the language of the DPP Policy & Police Manual s 4.2.

# STEP 4: PROCEED WITH DEFENCE

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*Summary Jurisdiction*

# CONTEST MENTION

- Inform the court that the defence of mental impairment is being considered.
- Advise the court that it is likely defence will seek an adjournment to a further CME to organise a forensic psychiatric report.
- Have an assessment booked, or at least funding confirmed for an assessment **prior to the contest mention.**
- Psychiatric report received and favourable – seek withdrawal again from the Prosecution.
- Psychiatric report received and unfavourable – use evidence of mental illness in resolution negotiations and sentencing hearing.
- Use CME for judicial guidance to assist in resolutions.

# Expert Evidence

## *Criminal Procedure Act 2009 s 50*

1. If the accused **intends to call a person as an expert witness at the hearing of the charge**, the **accused must serve** on the informant in accordance with section 392 and file in court a **copy of the statement** of the expert witness in accordance with subsection (2)—
  - a) **at least 7 days before the day on which the contest mention hearing is to be held;**
  - b) if there is no contest mention hearing, **at least 7 days before the summary hearing;** or
  - c) if the statement is not then in existence, **as soon as possible** after it comes into existence.

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# CONTESTED HEARING

## *Magistrates' Court*

- Available outcomes of hearing:
  - 1) *Guilty of the offence or an alternative – proceed to sentence*
  - 2) *Not guilty – acquitted*
  - 3) *Not guilty because of mental impairment – discharged*
- Consider briefing counsel

# FORENSIC EXPERT REPORT

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# RETAINING AN EXPERT

- Seeking expert opinion pursuant to s 79 of the **Evidence Act 2008**. Opinion based on specialised knowledge.
- Arguments only as strong as the evidence relied upon. Same applies to expert opinion, noting that the Prosecution will obtain their own expert.
- In most cases, this will be a forensic psychiatrist although this is not a requirement.
- If retaining a psychiatrist, must be a Fellow of the Royal Australian and New Zealand College of Psychiatry (FRANZCP).

# RETAINING AN EXPERT

- This will depend on the type of mental impairment (e.g. if the impairment is due to an acquired brain injury, then a neuropsychologist should also be retained).
- Should be retained early on in proceedings, may be more difficult to assess mental impairment at the time of offending with the passage of time.



# LETTERS OF INSTRUCTION

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# LETTERS OF INSTRUCTION

- Letters of instruction should be comprehensive and include all information required by the author.
- Should commence the letter of instruction stating clearly what the purpose of the report is for, a short summary of the allegations/charges, and brief background of the client's circumstances.

# LETTERS OF INSTRUCTION

Be specific about the questions that the expert should answer and express an opinion on. For example:

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 that mental illness/illnesses.*

# LETTERS OF INSTRUCTION

- Should include all material that would have a bearing on the conclusions reached by the expert:
  - Entire brief of evidence;
  - All exhibits, including CCTV, AV recording of the ROI and a transcript if its available ;
  - All medical records contemporaneous with the alleged offending;
  - Medical records confirming previous diagnoses;
  - Details of all current treating medical practitioners; and
  - Include the relevant practice note (SC CR 3 – Expert Evidence in Criminal Trials, **not** SC CR 7 relating to impaired mental functioning for sentencing).

# CCV & SCV

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*Time Limits & Practice Notes*

# County Court Criminal Practice Note

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If mental impairment has been raised as an issue prior to the Initial Directions Hearing the defence should state so in the Case Initiation Notice.

At the Initial Directions Hearing, court will set down a timetable for:

- a) The filing of the indictment;
- b) Filing and service of defence psychiatric expert report;
- c) Filing and service of the prosecution psychiatric expert report;
- d) A date for a further directions hearing.

# County Court Criminal Practice Note

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After the service of the reports:

1. If the parties **agree** that the expert evidence establishes the defence of mental impairment then the proceeding will be listed for hearing pursuant to s 21(4) of the **MIUT Act**. Judge considers evidence and either:
  - a) directs that a verdict of not guilty because of mental impairment be recorded; or
  - b) if the Judge is not satisfied that the defence is established, direct the accused to stand trial.
2. If the parties **disagree**, the matter is listed for trial in accordance with the practice note.

# Supreme Court

## *SC CR 1: Case management Procedure for Criminal Trials*

- At the post-committal directions hearing, counsel will be expected to address the court on mental impairment and issues with obtaining psychiatric reports, if they have not yet been obtained.
- The judge/judicial registrar has broad case management powers, and will make timetabling orders similar to that outlined in the County Court practice note for filing and service of reports, and for a further directions hearing if required.



# CASE STUDIES

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*R v Hammond*  
[2020] VSC 515

**CONSENT HEARINGS**  
***OPEN & SHUT MENTAL IMPAIRMENT***  
***CASES***

*R v Cohrs* [2024] VSC  
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*DPP v Gargasoulas*  
[2019] VSC 87

**MENTAL IMPAIRMENT EVIDENCE**  
***A CHANGING LANDSCAPE***

*R v Cohrs* [2024] VSC  
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**WHEN THE DEFENCE FAILS**  
***MENTAL IMPAIRMENT EVIDENCE AT***  
***PLEA***