



INFORMATION / FACT SHEET

MENTAL IMPAIRMENT & FITNESS TO STAND TRIAL MATTERS

The legal process relating to **Mental Competence** and **Fitness to Stand Trial** is both involved and complex.

Unfortunately there is no short or simple way to explain the many issues and steps a court must consider.

In developing this fact sheet, we have organised the information into a series of questions most commonly asked by victims and their families.

This fact sheet will give you an overview of the **Mental Impairment** and **Fitness to Stand Trial** legal process, including the steps involved and terminology used.

Please note that the information discussed in the fact sheet is by no means exhaustive and we always recommend that you speak with the relevant **DPP Prosecutor** or **Witness Assistance Officer (WAO)** for information specific to your matter.

Are There Particular Laws Relating to People with Mental Illness Who Commit Criminal Offences?

South Australian law relating to people who have a mental illness and who commit criminal offences is covered under **Part 8A (Sections 269A - 269ZB)** of the **Criminal Law Consolidation Act, 1935**.

The legislation specifically deals with:

- Criminal offenders who are **Mentally Incompetent** at the time of committing the alleged offence or offences, and
- Criminal Offenders who are currently **Unfit Fit to Stand Trial**.

Why Do We Need Laws Specific For People With Mental Illness Who Commit Criminal Offences?

Stated simply, the 'State' has an obligation to protect members of the South Australian community from all criminal offenders including those who are mentally ill or have a mental illness.

This involves ensuring that criminal offenders who have a mental illness (that plays a significant part in the relevant offence) are treated and supervised in an effort to prevent them from committing further criminal offences.

Why Are People With Mental Illness Who Commit Criminal Offences Dealt With Through Special Legislation?

Broadly speaking, when a person commits a criminal offence, two key elements must be established at law - firstly that the accused person actually committed the criminal act or acts they are charged with (known by the term **actus reus** - meaning '**guilty act**'), and secondly, that the accused person had a particular intention to commit the criminal act (known by the term **mens rea** - meaning '**guilty mind**').

Explained more simply, the court is interested in both **what the person did**, and **what the person's state of mind was at the time of the alleged offending**.

For people who are mentally ill, their mental illness can deprive them of the ability to adequately understand what they are doing or what they have done.

Where this occurs the law can determine that they lacked the necessary level of **Mental Competence** to commit the offence.

In such circumstances, the court will find the person **Not Guilty** of the offence or offences.

In addition, a person's mental state can deprive them of the ability to properly understand the court process.

As a consequence, the court can find the person **Unfit to Stand Trial**.

Again, in such circumstances the court will find the person **Not Guilty** because they are not well enough to have a trial.

What Is Meant By the Term 'Mental Impairment'?

According to **Part 8A of the Criminal Law Consolidation Act, 1935**, the term **Mental Impairment** is defined as:

- (a) a mental illness*; or
- (b) an intellectual disability; or
- (c) a disability or impairment of the mind resulting from senility, but does not include intoxication

***Mental Illness** is defined as "a pathological infirmity of the mind (including a temporary one of short duration)".

Is This Similar to the Term "Mental Competence"?

The term **Mental Competence** is different to the term **Mental Impairment**.

According to the legislation, a person is considered **Mentally Incompetent** to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment -

- (a) does not know the nature and quality of the conduct; or
- (b) does not know the conduct is wrong; or
- (c) is unable to control the conduct

What if Someone is Intoxicated at the Time of the Offending? Is This Also Covered Under the "Mental Impairment" Legislation?

The simple answer to this question is NO.

Part 8A of the Criminal Law Consolidation Act, 1935 does not deal with circumstances where a person is intoxicated by alcohol or affected by other drugs at the time of the alleged offending.

The legislation only applies to persons with a mental impairment.

As explained above, intoxication is not considered a mental impairment.

How is This Different to the Term "Fitness To Stand Trial"?

According to *part 8A of the Criminal Law Consolidation Act, 1935*, a person is considered *mentally unfit to stand trial* on a charge of an offence if the person's mental processes are so disordered or impaired that the person is -

- (a) unable to understand, or respond rationally to, the charge or the allegation on which the charge is based; or
- (b) unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or
- (c) unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.

Stated simply, a person's *Fitness to Stand Trial* relates to their mental state at the time of the trial.

What Other Terms or Phrases Is it Useful For Me to Know?

Where an accused person raises a **mental impairment** or **'unfit to stand trial'** defence, there are a number of key terms or phrases that are useful to know. These include:

- **"MENTAL IMPAIRMENT"**
- Refer to Page 2
- **"MENTAL COMPETENCE"**
- Refer to Page 2
- **"UNFIT TO STAND TRIAL"**
- Refer to Page 2
- **"TRIAL OF THE OBJECTIVE ELEMENTS"**
- Refer to Page 3
- **"DECLARED LIABLE TO SUPERVISION"**
- Refer to Page 4
- **"LIMITING TERM"**
- Refer to Page 4
- **"RELEASED ON LICENCE"**
- Refer to Page 5
- **"SUPERVISION ORDER"**
- Refer to Page 5

When can a Person Claim they Have a “Mental Impairment” or are “Unfit to Stand Trial”?

Stated simply, an accused person can raise a *Mental Impairment* or *Unfit to Stand Trial* defence at any time that their *mental competence* or *fitness to plead* becomes an issue during the criminal court process.

Having said this, an accused person will normally raise a *Mental Impairment* or *Unfit to Stand Trial* defence prior to entering a plea to the relevant charges for the first time in the relevant court (or jurisdiction).

What Does a Court Do When a “Mental Impairment” or “Fitness To Stand Trial” Defence is raised?

Where the issue of *Mental Impairment* or *Unfitness to Stand Trial* is raised, the Court can order expert psychiatric or psychological reports.

If in the views of the experts it is determined that the person is *mentally competent* or *fit to stand trial*, the legal proceedings will proceed in the ‘normal way’.

Where the experts indicate that a person has a *Mental Impairment* or is *Unfit to Stand Trial*, the court will deliver a finding of **Not Guilty** and proceed to a determination of the *Objective Elements* of the offence or offences (refer to Page 3)

Sometimes, the *Mental Impairment* or *Fitness to Stand Trial* reports are contested (disputed). This is commonly the case where there is a difference of professional opinion between the relevant experts. Where this is the case, a court hearing may be held so that the experts who have assessed the person can explain their report findings before the judge in an open court.

What Are the Steps Involved in Determining if Someone Has a “Mental Impairment” or is “Unfit To Stand Trial”?

The circumstance of every legal case is different. It is therefore only possible to explain the steps and stages involved in ***Mental Impairment*** or ***Unfit to Stand Trial*** process in a general way.

More specific information is best explained by legal staff involved in prosecuting the case involving you or your family.

The general Steps involved are explained in more detail throughout this document (*Refer to Mental Impairment / Fitness to Stand Trial Flow Chart*).

Will the Accused Person Still Have to go Through a Trial?

When a person is found *Mentally Incompetent* or *Unfit to Stand Trial* they will not be subject to a Trial in the ordinary way.

Where a person has been found **Not Guilty** of the mental element (*mens rea* or ‘*guilty mind*’) of the offences, it is still important for the court to determine if they committed the physical acts (*actus rea* or ‘*guilty act*’) that they were charged with. This is known as the **Objective Elements** of an offence.

Establishing the *Objective Elements* of an alleged offence will involve a Trial, unless the defence admits that the accused person committed the act or acts they have been charged with (therefore removing with the need for a trial).

Where the *Objective Elements* are ‘proven’ *beyond reasonable doubt* the accused person will then be **Declared Liable to Supervision**.

If the prosecution is unable to establish or ‘prove’ the *Objective Elements* of the offences, the matter will be dismissed by the court. In such circumstances the accused person will be cleared of all charges.

If an Accused Person is Found “Mentally Incompetent” or “Unfit to Stand Trial”, Then What?

If it is established that an accused person is *Mentally Incompetent* or *Unfit to Stand Trial* the court will deliver a **Not Guilty** finding (even if the *Objective Elements* are established (or proven) *beyond all reasonable doubt*).

This finding by the court can be very difficult for victims and families, particularly where a person is traumatised, physically injured or deceased as a result of the criminal offences.

However, in such circumstances, and providing that the *Objective Elements* of the offence are proven, a finding of *Not Guilty* does not ordinarily mean that the defendant does not have restrictions on his or her movements.

Ordinarily, there will be a period of (at least) supervision and treatment (refer to Page 4).

Where an accused person is found to be *Mentally Incompetent* or *Unfit to Stand Trial*, and the *Objective Elements* of the offence(s) are proven, they will then be **Declared Liable to Supervision** by the court (refer to Page 4).

Doesn't It Mean the Person Has 'Gotten Away' with the Offence?

When a person is found to be "Mentally Incompetent" or "Unfit to Stand Trial", the court will deliver a finding of 'Not Guilty'.

This language is commonly difficult for victims and families who may view the finding as the defendant 'getting away with the crime committed'.

The finding however does not mean that the person has not committed the acts that make up the crime.

Returning to an earlier point (see Question 3) it simply means that the person could not be found guilty of the 'mens rea' or 'guilty mind' element of the offence.

It is important to remember that the State has an obligation to both:

(i) protect members of the South Australian community by ensuring that mentally ill persons who have committed criminal offences are appropriately treated and supervised, and

(ii) not punish and imprison people who have a mental illness who are not "criminally responsible" for their actions.

This is the purpose of people being *Declared Liable to Supervision*.

When a Person Is "Declared Liable to Supervision", What Does This Mean?

Where a person is found to be *Mentally Incompetent* or *Unfit to Plead*, and the *Objective Elements* of the offence or offences are also established, they will then be **Declared Liable to Supervision**.

At this stage the court will order a number of specific reports. These will include a report from the *Minister of Health (or delegate)*, three reports from *Psychiatrists* or *Other Appropriate Experts*, and a *Victim Next of Kin Counselling Report*.

Based on the reports the court has an option to do one of the following:

- 1) *Release the Defendant Unconditionally*
- 2) *Commit the Defendant to Detention (in a Forensic Mental Health Facility, or other appropriate secure facility)*
- 3) *Release the Defendant on Licence*

The decision about appropriate supervision will be guided by a number of expert and other reports ordered by the court.

Decisions as to the appropriate supervision will be dependent on a number of factors including:

- *The nature of the defendant's mental illness or impairment*
- *Whether the defendant is, or would, likely endanger other persons*
- *Whether there are adequate resources available for the treatment and support of the defendant in the community;*
- *Whether the defendant is likely to comply with conditions of a licence; and*
- *Any other matter the court thinks is relevant*

How Long Is a Person Supervised For?

Once a person is declared **Liable to Supervision**, the Court will also impose a **'Limiting Term'**.

A *Limiting Term* is the period for which the person is to be supervised, treated and / or detained and will be similar in length to the sentence the person would have received had they not been declared *mentally incompetent* or *unfit to stand trial*.

For example, the maximum penalty for the offence of *Murder* is *Life Imprisonment*. Therefore a person who is found *Not Guilty* of the charge of *Murder* due to '*Mental Incompetence*'; and who is *Declared Liable to Supervision*', will have a *Limiting Term* set of Life.

This means that the person is liable to be supervised for the duration of their life, or until a time that the Supervision Order is *Revoked (Refer to Question 24)*.

Will I Get to Have A Say About What Happens?

Under the **Statutes Amendment (Victims of Crime) Act 2009**, a person who has suffered *injury, loss or damage resulting from the defendant's conduct* in a *Mental Impairment* or *Fitness to Stand Trial* matter¹ is entitled to present a **Victim Impact Statements (VIS)** to the court.

It is important to note however that the court may not require the defendant to sign the *VIS* and / or be present in the court if the *VIS* is read aloud if (a) the defendant is incapable of understanding the *VIS* or (b) it would be inappropriate having regard to the nature of their mental impairment.

In addition to *VIS*, where you are a victim to the offences, or family member of an injured or deceased victim, you will be invited to express a view about the *Supervision of the Defendant* via the **Victim Next of Kin Counselling Report (VNOKCR)**.

¹ In alleged Indictable Offences or prescribed Summary Offences only.

As part of the *VNOKCR* you may be asked to talk about:

- *Your current thoughts or feelings about what has happened;*
- *The impact of the offence on you (and members of your family);*
- *Any safety or security concerns you may have;*
- *Your view about treatment plans or arrangements proposed; and*
- *Any other information you think is relevant or important for the court to know*

It is important to note that the defendant's next of kin will also be provided with an opportunity to do the same.

When a *VNOKCR* is ordered by the court you will be contacted by a *Social Worker* from the *Forensic Mental Health Service* who will talk with you and report your views in writing to the relevant court.

Expressing your views in a *VNOKCR* is voluntary. Sometimes victims decide that they do not want to participate in the preparation of a *VNOKCR*.

It is your right to say that you no longer wish to have your views communicated to the court or to be advised of any applications made by the person.

Where a Person is Committed to Detention, Where Do They Go?

When a person is *Declared Liable to Supervision* and *Committed to Detention* they will be detained in a Forensic Mental Health Facility (*James Nash House*), or other appropriate secure facility.

If a person is detained to *James Nash House* they will be placed in a high, medium or low security ward as appropriate.

All wards are supervised and detained 'patients' cannot leave the unit unless approved by the court (or for emergency medical reasons).

As forensic patients stabilise or recover it is not uncommon for them to move from a high security ward to a medium or low security ward as their mental illness is treated and stabilised.

James Nash House also has a number of specific 'rehabilitation' wards for patients who are preparing for 'discharge' to the community at some stage in the future.

If a Person is "Released on Licence", What Does This Mean?

As described above, once a person is *Declared Liable to Supervision*, one option available to the Court is to '**Release the Person on Licence**'

Where a person is to be *Released on Licence*, they are not detained in a Forensic Mental Health facility, and the court will impose relevant conditions that the defendant must abide by.

The legal document spelling out the conditions the defendant is to abide by is known as a '**Supervision Order**'.

Common *Licence Conditions* included in a *Supervision Order* include the following:

- *Not to contact victims or their families;*
- *To follow all directions as to treatment or medication;*
- *To comply with agreed treatment plans;*
- *To see their treating psychiatrist on an agreed basis;*
- *To be under the supervision of a Community Corrections Officer;*
- *To not consume alcohol or other illicit substances;*
- *To not enter licensed premises;*
- *To submit to random urine drug testing;*
- *To not leave the State of South Australia without permission;*
- *To reside only at a approved facility or residence;*
- *To be of good behaviour (i.e. not commit further offences);*

Failing to abide by these strict conditions may result in the defendant '*Breaching*' their Licence Conditions.

Where this is the case, the matter will return to the Court.

What if a Person Does Not Comply With the Conditions Imposed?

In the event that the defendant **breaches** (does not comply with) their *Supervision Conditions*, the matter may come back before the relevant Court.

In such cases the DPP, Community Corrections Officer and Forensic Mental Health Service will discuss the matter in detail to determine if a *breach* is required.

Similarly, if the defendant does not report for agreed appointments or cannot be located (absconds), or their mental state starts to deteriorate, or they again become mentally unwell, an urgent application will be made to the Court by the DPP.

The matter can then come back before the court and appropriate action may be taken.

In appropriate cases, a *Supervision Order* may be revoked and the defendant detained. In other cases stricter conditions can be imposed to increase the level of supervision.

Who Will Keep Me Informed About What Is Happening?

The DPP Prosecutor and / or Witness Assistance Officer (WAO) will keep you informed and up to date about Mental Impairment and Fitness to Stand Trial proceedings.

Once a defendant is Declared Liable to Supervision and Limiting Term is set, staff from the Forensic Victim Register (FVR) will continue to update you about future matters or court proceedings (please note you must register with the FVR for this to occur)

Where you require information about the accommodation, supervision and treatment of a person who has been Declared Liable to Supervision, the Social Workers at James Nash House (Forensic Mental Health Service) or staff from the FVR should be able to assist you.

Once again you can choose not to have continued involvement and updates if this is your wish.

Once A "Supervision Order" Is Made, Is That the End of the Process

The simple answer to this question is 'it depends'.

Once a Supervision Order has been made, it may effectively be the end of the matter until the Limiting Term (period of supervision) expires. Where this is the case the DPP will receive ongoing Annual Reports.

However, a defendant may apply to **Vary Their Supervision Order** and can apply to do so on a six-monthly basis. Where this is the case, you have a right to continue to be informed of any developments or changes if, and where, they occur.

Similarly, many victims and families request that they not be contacted including when changes or developments occur.

What Happens When a Person Applies to Vary or Change Their Supervision Conditions?

Throughout the term of the supervision period (*Limiting Term*), the defendant may apply to vary their supervision conditions for a number of reasons.

A defendant may apply to be allowed to do certain things they currently cannot, for example:

- Attend relevant programs
- Attend local facilities or conveniences on a supervised or restricted basis
- Be allowed overnight stays at the place of an approved relative or friend
- Travel interstate for specified reasons

A person may also apply to vary their accommodation arrangements, for example

- From a closed detention ward to a open detention ward
- To be released into appropriate community accommodation
- To reside with appropriate family or friends.
- To some other appropriate and / or agreed arrangement

Where the supervision conditions are varied or altered for a specific reason (i.e. interstate travel) arrangements are put in place to ensure the person is adequately supervised and / or monitored.

Where a defendant applies to *Vary Their Supervision Order* the court will again order relevant reports including an updated *Victim Next of Kin Counselling Report*. Where this is the case, you will again have an opportunity to express your views about the changes to the supervision conditions proposed.

Is There Anything Else I Should be Mindful or Aware Of?

Delays & Adjournments

The process of the court determining whether a person is *mentally incompetent* or *unfit stand trial* is commonly lengthy and is likely to involve ongoing adjournments while reports are being written, conditions determined and appropriate supervision arrangements decided.

Please remember that it is important for the court to act cautiously and decisively in such matters.

It is not uncommon however for victims and family members to become frustrated with delays, adjournments and the length of time it can take to resolve such matters.

Media Involvement

Where a crime has been committed by a person with a mental illness that has resulted in the serious injury or death of a 'victim', it is not uncommon for the media to take an interest and report on particular developments or outcomes.

Victims and family members should be mindful of media involvement and make an early decision about responding (or not responding) to the media in the event you are approached.

If you decide to speak with the media, it is important to remember that courts have strict rules which prevent you from talking about most aspects of a case (i.e. evidence) whilst the proceedings are ongoing.

Ongoing Variations

As stated earlier, it is not uncommon for defendants to apply to vary their *Supervision Orders* at regular intervals.

This can be very distressing for victims and families when they are attempting to 'move on' from what has happened to them.

Victims and families commonly find it difficult when a defendant is applying for greater 'freedoms' or a 'relaxing' of their supervision conditions.

It is important that you inform the *DPP Prosecutor, Witness Assistance Officer* or staff at the FVR where you feel you need a temporary or permanent break from being contacted about outcomes and developments.

Expiry & Revocation of the Supervision Order

It is important to remember that a defendant's *Limiting Term* (supervision period) will expire at some point (unless a limiting term of Life was set) allowing the person to return to 'normal' life.

Victims and families should also be aware that a defendant may apply to have their *Supervision Order* 'revoked' in special circumstances; however this is very rare occurrence.

Emotional Impact

It is important not to underestimate the emotional impact of the legal process.

It is not uncommon for victims and families to find the *mental impairment* and *unfit to stand trial* legal processes frustrating, confusing, overwhelming and exhausting.

It is important that victims and families are well supported throughout the legal process.

Some families prefer to nominate a 'family spokesperson' who can advise on matters as they occur, make decisions for the family or provide their views on behalf of the family.

MENTAL IMPAIRMENT / FITNESS TO STAND TRIAL FLOW CHART

