Chapter 14
Mental health and capacity

Chapter 14—Mental health and capacity

A. Introduction

14-1 Situations facing lawyers

As a duty lawyer, you will probably have to deal with a defendant who:

- appears to be mentally ill or intellectually disabled
- may have been mentally ill at the time of an alleged offence
- may be both.

This chapter addresses what you should do in such situations. You may be alerted to the possibility of these situations by the:

- defendant's behaviour at interview
- defendant's apparent inability to give coherent or rational instructions
- defendant giving a history of psychiatric treatment
- defendant giving a history of institutional care for intellectual disability
- facts of the alleged offence itself.

14-2 What is a mental illness?

The *Mental Health Act 2000* (Qld) (MHA) defines mental illness as a condition characterised by a clinically significant disturbance of thought, mood, perception or memory.

14-3 What is an intellectual disability?

A person with an intellectual disability has significantly below average intellectual functioning with onset before age 18 years and concurrent deficits or impairments in adaptive functioning (DSM-IV-TR Diagnostic and Statistical Manual of Mental Disorders (2000)). Adaptive behaviour refers to the effectiveness with which a person meets the demands of daily living (such as eating and dressing, communication, locomotion, socialisation and responsibility).

14-4 What is a cognitive impairment?

Cognitive impairment is a broad term to describe a wide variety of impaired brain function relating to the ability of a person to think, concentrate, reaction to emotions, formulate ideas, problem solve, reason and remember. It is distinct from a learning disability insofar as it may have been acquired later in life as a result of an accident or illness.

B. Obtaining instructions

14-5 Advice on obtaining instructions

The main issue for you, as the duty lawyer, is to obtain the defendant's instructions. If you can obtain coherent and rational instructions, you should act on them. However, you need to be cautious and alert before accepting instructions. If you have any doubt about the defendant's fitness to plead, do not enter any plea; instead, seek an adjournment to enable the defendant to seek more extensive legal advice. Although you may have doubts about the defendant's fitness to plead, you may still act to obtain a remand or apply for bail.

If you cannot obtain coherent or rational instructions, this means no solicitor–client relationship has been established. You then have a duty to inform the court that you cannot obtain instructions due to concerns about the defendant's fitness for trial or to plead. This will alert the court and enable it to take appropriate steps to determine the defendant's fitness. In this situation, the court could consider a court-ordered assessment (as discussed in 14-15).

Your duty lawyer obligations are the same whether you believe the defendant has a mental illness, intellectual disability or cognitive impairment.

14-6 Considerations when assessing defendants' capacity to provide instructions

Common symptoms and characteristics of mental illness or intellectual disability or cognitive impairment, which may alert you to the possibility that your client may have a mental illness or intellectual disability or cognitive impairment, include:

- avoidance of eye contact
- difficulty understanding the motivation, perspectives or feelings of others
- difficulty coping with changes
- decreased ability to learn new skills
- coordination problems.

When assessing the defendant's fitness to plead, you should consider whether or not the defendant can:

- read
- write
- manage money
- tell the time
- cook
- communicate clearly with other people, and
- look after their personal care.

Can the defendant recall significant things about:

- themselves (e.g. birthday)
- where they live, and
- what you have said to them?

Has the defendant:

- attended a special school or a class within a mainstream school

- attended court with a carer
- lived in an institution or mental health unit/intellectual disability service?

Has an Adult Guardian been appointed under the *Guardianship and Administration Act 2000* (Qld)?

If the client is subject to an order under the Guardian and Administration Act making the Office of the Adult Guardian decision maker for his/her legal affairs you should take steps to ensure the Office of the Adult Guardian is informed about the defendant's attendance before the court. It is unethical to proceed to deal with a person the subject of such and order without making every reasonable effort to gain the involvement of the guardian. The guardian may provide instructions about how the case is to proceed, which you are bound to follow, even if they conflict with the client's instructions and your own view.

Has the defendant been subject to an Involuntary Treatment Order?

If the client is subject to an involuntary treatment order or forensic order under Chapter Seven, Part Two of the MHA, the case cannot proceed until certain measures have been formally undertaken pursuant to the MHA (refer to Chapter Seven, Part Two MHA). However, you can apply for bail for the client.

14-7 Applying the *Presser* test

If you suspect your client is mentally impaired and you have ascertained that he/she is not subject to a guardianship order or an Involuntary Treatment Order, you must determine if the client's impairment restricts your capacity to take instructions.

Ask the client simple, non-leading questions to determine if he/she appreciates the circumstances which led to the charge. The guide to determining a person's level of capacity is the test established in *R v Presser* [1958] VR 45. You will need to take the client through each of the criteria outlined in that case and satisfy yourself that the client satisfies each criterion before moving on to the next. You will need to do this by asking the defendant simple, non-leading questions and giving him/her time to explain their position.

The *Presser* criteria are:

1. Ability to understand the charge — this involves a basic understanding of the essential facts of the charge and the elements of the offence.
2. Ability to plead to the charge and to exercise the right of challenge — the client must understand that a plea of guilty is an acceptance that the essential facts and elements of the offence are established.
3. An understanding of the nature of the proceedings, namely, that it is an inquiry as to whether he/she committed the offence charged — the client must understand that he/she is involved in a formal process inquiring into his/her responsibility for the matter alleged and be aware of the potential consequences of that process.
4. Ability to follow the course of proceedings so as to understand what is happening in court in a general sense, though not necessarily understand the purpose of all the various court formalities — this involves following the proceedings and understanding the roles of the various participants.
5. Ability to understand the substantial effect of the evidence that may be given — the client must have an awareness of the implications of the prosecution evidence.
6. Ability to make a defence or answer to the charge — the client must be able to give the court a basic version of the facts as he/she claims them to be, if necessary through his/her lawyer, by entering the witnesses box and responding to questions in evidence-in-chief and cross-examination.[1]

Fitness for trial is further defined by the MHA to include the ability to endure a trial without serious adverse consequences to the defendant's mental condition becoming likely. If the defendant is likely to become unfit at some point in the trial due to his/her impairment, then he/she is considered to be unfit.

1 See Briggs,J. *Ethical considerations for duty lawyers representing mentally impaired persons*, presentation to Legal Aid Queensland Duty Lawyer Training, March 2011, for a more detailed discussion of the way to take defendants through the *Presser* criteria.

Each of the above criteria needs to be met for the client to be fit for trial. However, a client may be fit to plead guilty and take part in sentence proceedings but be unfit to plead not guilty and stand trial on the charge, i.e. failure to meet *Presser* criteria number 6 does not make the client unfit to plead guilty.

If you have any doubt as to whether or not the defendant has a mental illness, intellectual disability or cognitive impairment, do not enter any plea; instead seek an adjournment to obtain a psychiatrist or psychologist report (depending on the more extensive legal advice).

A client may appear to be unfit to plead based on an assessment of the above criteria but insist on pleading guilty for one or more of a number of reasons, for example, he or she may wish to have the matter disposed of immediately or may not wish to have the issue of his or her mental condition or disability the subject of court proceedings. However, where a lawyer has a real and substantial doubt about a client's fitness to plead, the lawyer cannot conduct a plea of guilty on the client's behalf. (Barristers' conduct rules 2011, number 5; Miles AJ. Inquiry under s 475 of the Crimes Act 1900 into the matter of fitness to plead of David Harold Eastman (6 October 2005).) If such a client insists on pleading guilty, contrary to the lawyer's advice, the lawyer should withdraw from the case, explaining the reason why the lawyer must withdraw to the client and inform the prosecutor and the court of the lawyer's views and concerns.

Not all impaired people are necessarily unfit to plead or have a defence of insanity. A client may have an intellectual disability or cognitive impairment (IDCI) that appears significant or severe, but still have legal capacity and be fit to plead to a charge or to be tried. It is the lawyer's responsibility to form a view based on the client's response to the questions posed above.

It is also important to respect the right of people with mental illness or IDCI to take responsibility for themselves. An impaired person's disability should not limit his or her fundamental human rights. An impaired person has the same fundamental right as non-impaired people to be treated as 'a person' in court, and not merely a patient or an individual under care. Unless there has been a formal decision that an impaired person lacks capacity to deal with his or her legal affairs, he/she has the same rights as others to make fundamental decisions, especially in relation to legal matters.[2] To bring a person into the mental health system or have their rights limited under a guardianship order can have significant impacts on their rights as an individual and to make personal decisions.

It is essential that your written instructions deal thoroughly with the issue of your client's capacity. Some of the important issues in relation to capacity that your instructions should address are:

- why you believed the client may be impaired
- how you inquired about whether the client had a statutory decision maker or was subject to an involuntary treatment order or forensic order
- each of your *Presser* assessments
- that the client understands that you were mindful that his or her fitness may be an issue, and that you investigated that matter with him.

If it appears from the prosecution brief and the client's instructions that the client may have a defence of unsoundness of mind, the lawyer should advise the client accordingly. However, again the client may wish to plead guilty. If the client is fit for sentence, you may enter a plea of guilty on his/her behalf. However, you should advise the client of the advantages and disadvantages of both courses and note this in your written instructions to enter a plea of guilty.

14-8 Defence of unsoundness of mind, partial defence of diminished responsibility and fitness for trial

Every duty lawyer should be aware of provisions in the MHA and *Criminal Code Act 1889* (Qld) relating to the defence of unsoundness of mind, the partial defence of diminished responsibility (only applicable if the charge is murder) and

2 See United Nations *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* (1991); United Nations *Convention on the Rights of Persons with Disabilities* (2006).

fitness for trial. Be aware that the role of the Mental Health Court (MHC) is to determine these issues if you are able to refer the defendant to that court.

Having a general understanding of these issues and the role of the MHC will give you more skills to deal with mentally ill or intellectually disabled defendants.

A person is deemed not to be responsible in law for an alleged offence if they were of unsound mind at the time of the alleged offence, and a defendant cannot be tried for an offence if they are unfit for trial.

C. Representing clients with capacity issues in the magistrates court

14-9 Representing clients with capacity issues in the magistrates court

Where a client is charged with an indictable offence, and there is a question about the defendant's

- fitness to plead
- fitness to be tried, or
- whether he or she was of unsound mind at the time of committing the offence,

either the defence or the prosecution may refer the matter to the MHC for determination under the provisions of the MHA.

There is no comparable procedure available where the client is charged only with a simple offence.

In *R v AAM; ex parte Attorney-General of Queensland* [2010] QCA 305, the Court of Appeal observed:

> It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness, intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system.

Further, under s 613 of the Criminal Code, if, when a person is called upon to plead to an indictment, it appears the person is incapable of understanding the proceedings or making a proper defence, a jury may be empanelled to decide the issue of capability. If the jury finds the person is capable, the trial must proceed. However, if the jury finds that the person is not capable, the accused must either be discharged or kept in custody until they can be dealt with according to law.

Again, there is no comparable procedure available when a person is charged with a simple offence. In the absence of a statutory procedure, the common law applies. If a defendant charged with a simple offence is found not fit to plead, the magistrate must discharge the defendant but does not have any power to order that the defendant be kept in custody or undergo treatment or participate in a program.

The experience of LAQ duty lawyers is that some magistrates are unaware of the applicability of the common law in these cases or are reluctant to apply it and discharge defendants. In some cases, magistrates insist the matter is to proceed and the defendant is to enter a plea, despite submissions from the duty lawyer that they are unable to obtain instructions.

Duty lawyers should remain firm that they do not hold instructions in the matter, and cannot appear on any plea. A duty lawyer can assist as friend of the court to advise the court about things such as mental health diagnosis, agency support in the community and accommodation which may assist the client to get bail. However, it should be clear to the court that the duty lawyer does not hold written instructions to act due to a lack of capacity. If the magistrate continues to hear the plea with a self represented person, then the duty lawyer should withdraw and accept the magistrates decision to continue without them.

D. The Mental Health Court

14-10 Mental Health Court

The MHA established the MHC to determine criminal responsibility and fitness for trial where a person has been charged with at least one indictable offence and has had, or currently has, a mental illness or a natural mental infirmity. The MHC comprises a Supreme Court justice assisted by two psychiatrists. Those psychiatrists do not decide the ultimate issues; rather, they offer clinical advice to the judge, who then decides the issues.

The MHC has jurisdiction over state indictable offences and simple offences if they are accompanied by an indictable offence. The defendant must have at least one indictable offence to have their case referred to the MHC. The MHC does not have jurisdiction over Commonwealth offences.

14-11 Unsoundness of mind

Schedule 2 of the MHA states that 'unsoundness of mind' is 'the state of mental disease or natural mental infirmity as described in the Criminal Code, section 27, but does not include a state of mind resulting, to any extent, from intentional intoxication or stupefaction alone or in combination with some other agent at or about the time of the alleged offence'.

Section 27 of the Criminal Code states that '[a] person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission'.

The effect of those provisions is that, if a defendant is deprived of a relevant capacity by a mental illness or natural mental infirmity alone (i.e. intoxication at or about the time of the offence did not contribute to the state of deprivation of capacity), the defendant is not criminally responsible and is entitled to the qualified acquittal of unsoundness of mind. The acquittal is qualified by the state's right to detain the defendant under a forensic order, with or without granting limited community treatment.

14-12 Fitness for trial

Schedule 2 of the MHA defines 'fitness for trial' as 'fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely'. The MHC has, essentially, adopted the *R v Presser* [1958] VR 45 test for fitness for trial (known as the Presser test), which is expressed as follows:

'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.'

Note that the Presser test covers the first two limbs in the statutory definition of fitness but not the third. The third limb does not commonly apply but is invoked when a defendant's mental condition is likely to deteriorate over the course of the trial or sentence proceeding to the extent that their mental condition will suffer serious adverse consequences. The first two limbs may be apparent at the first interview but the third may not be.

In *R v AAM; ex parte Attorney-General of Queensland* [2010] QCA 305, the Attorney General referred this petition for pardon to the Court of Appeal under the Criminal Code s 672A. The Court of Appeal were asked to revisit numerous previous convictions for simple offences in the magistrates court following a finding in the MHC that the appellant was permanently unfit due to her intellectual impairment. The Court of Appeal found that the appellant was unfit to plead at the times she had been convicted in the magistrates court and thus it would be a miscarriage to allow those convictions to stand.

14-13 Diminished responsibility

This is a partial defence to a charge of murder. If invoked, it reduces the charge to manslaughter.

Section 267 of the MHA requires the MHC to determine whether a person was of diminished responsibility at the time of an alleged murder. Section 304A of the Criminal Code states that:

'[w]hen a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only'.

Unsoundness of mind and diminished responsibility concern the person's state of mental health at the time of an alleged offence. Fitness for trial concerns the person's current state of mental health. It is not uncommon for a person to be charged with offences that occurred some time well in the past. Sometimes, although there is no clear evidence that the defendant was suffering any mental illness or natural mental infirmity at the time of the alleged offences, there is evidence that the defendant has since become mentally ill or suffered a brain injury, or perhaps developed a dementia, and so is now unfit for trial.

E. Defendants charged with an offence who are on an involuntary treatment order or a forensic order

14-14 If a defendant is on an involuntary treatment order or forensic order

If a person is subject to an involuntary treatment order (ITO) or forensic order under the MHA and charged with a simple or an indictable offence, Chapter 7, Part 2 of the MHA applies. The Director of Mental Health (DMH) must commission a report by a psychiatrist under s 238 that addresses the issues of unsoundness of mind, diminished responsibility (if the charge is one of murder) and fitness for trial. The court proceedings relating to the charges are automatically suspended at this stage, but the court may still grant bail, remand a person in custody, adjourn the proceedings to a later date, or, discontinue proceedings (MHA, ss 243 and 244). Once the report is received, the DMH can refer the matter to the Director of Public Prosecutions (DPP) if the charge is for a simple offence only or an indictable offence that is not of a serious nature, depending on any damage, injury or loss. The DMH may also refer

serious indictable offences to the DPP to continue the proceedings if the psychiatric assessment indicates that the defendant was not of unsound mind and is fit for trial (MHA, s 240).

The DPP can order that the proceedings continue according to law, order that the proceedings be discontinued or refer the matter to the MHC if the charge relates to an indictable offence. If one or more of the charges is serious and the defendant appears to have been of unsound mind or is unfit for trial, the DMH then refers the matter to the MHC.

F. Defendants charged with an offence who are not subject to an involuntary treatment order or a forensic order

14-15 If a defendant is not on an involuntary treatment order or forensic order

If a defendant is not subject to an ITO or a forensic order, the defendant has no status under the MHA. In this case, under ss 256 and 257, if there is reasonable cause to believe that the defendant was mentally ill or of natural mental infirmity either at the time of an alleged offence or at present, to a degree that the MHC should consider issues of unsoundness of mind, diminished responsibility and fitness for trial, then the defendant, defendant's legal representative, Attorney-General, DPP or, if the defendant is a voluntary patient receiving treatment for a mental illness, the DMH with the defendant's consent can refer the matter to the MHC.

If the defendant wishes to rely on a defence of unsoundness of mind or argue that they are unfit for trial, they must provide evidence of this to the MHC. The evidence will usually be an expert's report provided to the MHC (s 258). The MHC may either determine the matter on the evidence provided or, as it often does, seek a second opinion by way of a court-ordered assessment. Sections 61–63 provide a mechanism for a Supreme Court or district court judge to refer a person's matter to the MHC. The magistrates court has no power to refer matters to the MHC. Once a matter is referred to the MHC, proceedings on the charges are suspended, but the court may still grant bail, remand a person in custody, adjourn the proceedings to a later date, or discontinue proceedings (ss 259 and 260). If the magistrates court does not discontinue proceedings, the proceedings remain suspended until the MHC determines the reference.

G. Outcomes in the Mental Health Court

14-16 Unsound mind or not of unsound mind but permanently unfit for trial

If the MHC finds that the defendant was of unsound mind, or was not of unsound mind but is not fit for trial and the unfitness is permanent, the proceedings are discontinued and notices of the decision are sent to the defendant and the defendantís legal representative, the Director of Mental Health, the Director of Public Prosecutions and the Attorney-General.

The MHC may make a forensic order, which detains the defendant to either an authorised mental health service (AMHS) for treatment as an inpatient or in the community, or to the Forensic Disability Service for care (s 288). In those cases, a notice of the decision is also sent to those authorities. For the purpose of this handbook, an AMHS is a public psychiatric hospital or psychiatric ward of a public hospital. However, about six private hospitals have wards that have been gazetted as AMHSs.

14-17 Unsound mind or not of unsound mind but permanently unfit for trial

If the MHC finds that the defendant was of unsound mind, or was not of unsound mind but is not fit for trial and the unfitness is permanent, the proceedings are discontinued and notices to that effect are sent to the trial court and prosecutor.

The MHC may make a forensic order, which detains the defendant to either an authorised mental health service (AMHS) for treatment as an inpatient or in the community, or to the Forensic Disability Service for care (s 288). For the purpose of this handbook, an AMHS is a public psychiatric hospital or psychiatric ward of a public hospital. However, about six private hospitals have wards that have been gazetted as AMHSs.

14-18 Not of unsound mind and temporarily unfit for trial

If the MHC finds that the defendant was not of unsound mind but is not fit for trial, and the unfitness is not permanent, the proceedings remain suspended. The MHC makes a forensic order and the Mental Health Review Tribunal (MHRT) reviews the defendant's fitness for trial at regular intervals to determine whether the defendant has become fit for trial. Again, notices to that effect are sent to the trial court.

14-19 Diminished responsibility

If the MHC finds that the defendant was of diminished responsibility, proceedings for the offence of murder are discontinued, but may be continued for another offence constituted by the act or omission that gave rise to the charge of murder (s 282). No forensic order is made.

14-20 Dispute of fact

The MHC may also find that there is a dispute of fact. Sections 268 and 269 of the MHA refer to different kinds of dispute of fact. Section 268 concerns a dispute of fact that would create reasonable doubt that any offence was committed. Section 269 concerns facts that are substantially relevant to an expert's opinion and so in dispute that it would be unsafe for the MHC to make a decision on unsoundness of mind or diminished responsibility.

If the MHC finds that there is a dispute under ss 268 or 269, the court must not make a finding of unsoundness of mind or diminished responsibility, but must still consider whether the defendant is fit for trial.

If, on a review, the Mental Health Review Tribunal (MHRT) finds that the defendant has become fit for trial, the proceedings are ordered to continue according to law. If the defendant does not become fit for trial within the applicable time period, the proceedings are discontinued. Again, appropriate notices are sent to the court.

14-21 Right to argue defence and right to trial

While trials do not directly concern you as the duty lawyer, you should note that the MHA does not affect the defendant's right to raise the defence of unsoundness of mind or partial defence of diminished responsibility at their trial, even after the MHC finds that the defendant was not of unsound mind or diminished responsibility. The MHC's decision is not admissible at the trial (s 317).

Conversely, note that, if a defendant is found of unsound mind with respect to an offence, they may still elect to be brought to trial for that offence. A notice of election in an approved form must be given to the attorney-general within 28 days of the defendant receiving written notice of the MHC's decision (s 311).

Be aware that considerable time may elapse before the MHC determines a matter because matters referred to the MHC are more complex than most other matters.

H. After a finding of unsound mind or unfit for trial

14-22 Neither of unsound mind nor permanently unfit for trial

If the defendant is found not to have been of unsound mind, or there is a dispute of fact and the person is not fit for trial and the unfitness is not permanent, the MHC must make a forensic order (s 288). This order requires

the defendant to accept treatment or care and enables further assessment of their unfitness so the MHRT can periodically review it. The defendant may be detained in a mental health service for treatment or receive treatment in the community.

14-23 Of unsound mind or permanently unfit for trial

If the defendant is found to have been of unsound mind or permanently unfit for trial, or there is a dispute of fact and the defendant is permanently unfit for trial, the MHC may make a forensic order. When considering whether to make such order, the court must consider the seriousness of the offence, defendant's treatment needs and community's protection (s 288). If the defendant is found to be of unsound mind or permanently unfit for trial, the proceedings are ordered to be discontinued by the MHC and must be discontinued at the next mention of the charges in the criminal court.

I. The Mental Health Review Tribunal

14-24 Consequences of findings of the MHRT

The Mental Health Review Tribunal (MHRT) performs various review functions. Of relevance to duty lawyers, if the defendant has been found unfit for trial but not permanently unfit, the MHRT must review the defendant's fitness for trial at least every three months for the first year after the finding and every six months thereafter.

If the MHRT finds that the defendant has become fit for trial, it sends a notice of decision to the court to continue proceedings. If the MHRT finds that the person is still unfit, the proceedings remain suspended. The attorney-general, DPP or complainant can discontinue the proceedings at any time (s 217).

If the offence for which the defendant is not fit for trial carries a life sentence, the defendant's fitness must be reviewed for seven years from the date of the MHC's determination. For any other offence, the reviews continue for three years. Proceedings are discontinued after the seven or three year period if the defendant has not become fit for trial and proceedings on the charges have not been otherwise discontinued.

J. General matters, classified patients and Commonwealth offences

14-25 Issues of mental illness or natural mental infirmity

The previous paragraphs provided a brief overview of unsoundness of mind, fitness for trial, diminished responsibility and the MHC's operation. In practice, these issues and the way the MHC conducts cases are often intricate and complex. In most cases, if you are facing issues of mental illness or natural mental infirmity, you should seek an adjournment so the defendant can get more extensive legal advice. Legal Aid Queensland has a mental health section specialising in this area of law. If the defendant is remanded in custody, they can obtain advice from the prison duty lawyer service.

In some magistrates courts, Queensland Health (of which the office of the Director of Mental Health forms a part) provides mental health liaison officers who help the court and duty lawyers provide information on whether a person is subject to any current orders under the MHA (involuntary treatment orders or forensic orders) or the defendant has a history of contact with mental health services.

Sometimes the liaison officer helps prepare and provide reports to the court and the duty lawyer. If a liaison officer is not available, you can contact the Mental Health Unit at Legal Aid Queensland to find out whether a person is subject to any current orders under the MHA.

As the issues relating to unsoundness of mind and fitness for trial can be complex, you should not take any steps, apart from seeking bail or applying for an adjournment of proceedings, without first obtaining a psychiatric assessment of the defendant.

14-26 Classified patients

As a duty lawyer, you should be aware of the provisions relating to classified patients in Chapter 3 of the MHA. A classified patient is a person admitted to an AMHS from court or custody for a mental health assessment to ascertain whether the defendant requires treatment at the AMHS because their treatment requirements cannot be met in custody. The AMHS also ascertains whether the defendant needs involuntary treatment.

Your role is to act on the defendant's instructions. Unless the defendant seeks your assistance in arranging admission for assessment as a classified patient, avoid taking any steps that may result in the defendant's detention to an AMHS.

Arranging the detention of a defendant in an AMHS as a classified patient is not your role; it is the role of health practitioners authorised to take the appropriate steps under the MHA. If a defendant asks for assistance with this, inform the court so that it and health professionals can take the appropriate steps (outlined below).

If available, a court mental health liaison officer will initiate the necessary steps for a court assessment order. If this service is not available, a court may ask a government medical officer for assistance, though s 50 notes that any doctor or authorised mental health practitioner can make a recommendation for assessment. Court mental health liaison officers must be authorised mental health practitioners so that they can complete the recommendation for assessment.

14-27 Becoming a classified patient

The classified patient provisions exist to meet the treatment needs of people in custody while maintaining secure management. They apply when a person's treatment needs cannot be met in the custodial facility but can only be met at an AMHS. These provisions do not address how charges are determined.

They apply to defendants detained in a watch-house, correctional facility (on remand or serving a sentence, or both) or youth detention centre. They apply to defendants before a court on any charge, whether for simple, indictable or Commonwealth offences. They also apply to people who are being held in lawful custody, or lawfully detained without charge under a state or Commonwealth Act, prescribed by regulation (s 64).

The following three documents are necessary to detain a defendant at an AMHS:

- the recommendation for assessment. A doctor or an authorised mental health practitioner who has examined the person within the preceding three days may complete this document (s 50)
- the agreement for assessment, which is provided by the AMHS administrator (s 53)
- the court assessment order (s 58) if the defendant is before the court or a custodian's assessment authority if the defendant is actually in custody, whether in a watch-house, correctional centre or detention centre (ss 64–66).

After making a court assessment order, the court must adjourn proceedings and remand the defendant in custody (s 58(3)). However, if the court does not make an assessment order, but believes that the defendant can be assessed other than as an AMHS inpatient, it can either remand the defendant in custody or grant bail and arrange for an assessment (s 59).

Once the documents are completed, the defendant is taken to an inpatient facility of an AMHS (s 68). After the staff at the AMHS have received the documents, the defendant becomes a classified patient (s 69). Note: The AMHS administrator produced a copy of the agreement for assessment to the court, and still holds the original, so they need to receive only the recommendation for assessment and either the court assessment order or custodian's assessment authority.

A police officer, corrective services officer or detention centre officer—depending whether the defendant is in the watch-house, correctional centre or detention centre—then takes the defendant to the AMHS. Those authorities may call on others to assist and use reasonable force.

A young person, defined in Schedule 2 as 'an individual who is under 17 years', or a person charged only with a simple offence may be detained as a classified patient to a high security unit only with DMH approval.

An authorised doctor must assess the defendant within three days of admission to decide whether the defendant has a mental illness that requires treatment as an inpatient of the AMHS, regardless of whether the defendant consents to treatment (s 71). The authorised doctor must regularly assess the defendant to decide whether they need to remain a classified patient. On the initial or regular assessments, the authorised doctor can make an ITO if the treatment criteria apply (ss 108 and 14). If they do so, the ITO must be inpatient category.

Although a defendant can become a classified patient if charged with any offence before a court, including a Commonwealth offence, proceedings are suspended only on state offences (s 75).

Once the court has made a court assessment order that detains the defendant to the AMHS, a classified patient is remanded in custody (s 58). Notwithstanding this, the authorised doctor may authorise limited community treatment with the DMH's written approval (s 129(2)). This leave can range from short escorted outings to indefinite leave to reside in the community, though the latter is rare.

In giving written approval, the DMH must be satisfied there is no unacceptable risk that the patient would:
- not return to the AMHS when required
- commit an offence while away from the AMHS
- endanger the safety or welfare of the patient or others (s 129(3)).

Additionally, in approving limited community treatment, the DMH must consider the patient's mental state and psychiatric history, the offence leading to the classified patient status, the patient's social circumstances, and their response to treatment and willingness to continue treatment (s 129(4)).

14-28 Ceasing to be a classified patient

When proceedings are suspended, a court may still grant bail, remand a defendant in custody or adjourn the proceedings to a later date. Additionally, the complainant or DPP may discontinue proceedings. If the defendant is remanded in custody, the place of custody will be the AMHS.

A patient ceases to be a classified patient if any of the following occur:
- on an initial or regular assessment, the authorised doctor decides that the person does not need to be detained as a classified patient
- the DPP or MHC make a decision on the charges
- for any offence (state or Commonwealth), bail is granted or proceedings are discontinued
- for Commonwealth offences, proceedings are decided according to law (see below for how Commonwealth offences may be dealt with)
- after the initial assessment, an involuntary treatment order is not made and the person asks that they no longer be detained at the AMHS
- the person's sentence of imprisonment expires or they are granted parole.

However the person will remain a classified patient if still in lawful custody or lawfully detained without charge under a state or Commonwealth Act prescribed by regulation, or still serving a sentence of imprisonment or detention (ss 78 and 253).

If a person is not charged with any offence or serving a sentence but is held in lawful custody or lawfully detained without charge under a state or Commonwealth Act, prescribed by regulation, the person ceases to be a classified patient when their lawful custody or detention ends (s 100C).

If a person who is the subject of a reference to the MHC is a classified patient, they cease to be classified once the MHC makes a decision on the reference, unless they are still:

- in lawful custody or lawfully detained without charge under a state or Commonwealth Act prescribed by regulation
- serving a sentence of imprisonment or detention
- have charges for Commonwealth offences to be dealt with (s 287).

14-29 When classified patient status ceases

The question of what happens when a classified patient status ceases depends on why it ceased.

If the defendant is granted bail and was not put on an ITO while classified, either the defendant must be released from the AMHS or arrangements may be made for their admission to an AMHS (s 81).

If granted bail and subject to an ITO, the defendant may either, depending on treatment requirements, be detained under the ITO as an inpatient or treated in the community.

If the DPP orders that the proceedings on the charges be discontinued, the defendant must be released to the community if they are not on an ITO. However, if they are subject to an ITO, they may be detained as an inpatient or treated in the community, depending on treatment requirements.

If the MHC finds a defendant of unsound mind or unfit for trial, their classified patient status ceases. The forensic provisions subsequent to one of those findings determines what then happens to the defendant.

If any of the following occur, the defendant is returned to court or custody, depending whether the defendant became classified under a court-ordered assessment or a custodian's assessment authority:

- the defendant faces charges before a court
- the DPP or the MHC orders proceedings to continue according to law
- no ITO is made and the defendant asks that they no longer be detained at the AMHS
- the authorised doctor decides that the defendant does not need to be detained as a classified patient.

However, the DMH may return to court a defendant who became a classified patient as a result of a custodian's assessment authority if the DMH decides it is in the defendant's best treatment interest, and it is proper and expedient to do so (s 89).

When a classified patient's term of imprisonment or detention ends, or they are granted parole, their classified patient status ends if they have no outstanding charges, and are not in lawful custody or being lawfully detained without charge under a state or Commonwealth Act prescribed by regulation.

If a classified patient is also on an ITO, the ceased classified patient status has no effect on the ITO. Involuntary treatment orders come in two categories: inpatient and community. An ITO made while a defendant is a classified patient is an inpatient category order. When the classified patient status ends, it can be changed to community category by the authorised doctor if treatment in the community is appropriate.

If an ITO is made while a defendant is a classified patient, Chapter 7, Part 2 of the MHA takes effect—the patient is assessed in relation to any outstanding charges on issues of unsoundness of mind, fitness for trial and future management, to refer the charges to the DPP or the MHC. Proceedings on the charges are suspended under that chapter as well.

Note: An assessment of a classified patient is only for treatment purposes; it does not relate to assessment of the issues of unsoundness of mind or fitness for trial. Assessment of these issues for a classified patient occurs only if the authorised doctor makes an ITO, bringing the patient under Chapter 7, Part 2 of the MHA, or the patient's lawyer arranges that assessment.

14-30 Applying for bail for a classified patient

If you are instructed to apply for bail for a classified patient, you should obtain a letter of support from the patient's treating doctor. The letter should outline the patient's current mental health state, suitability to reside in the community, and the follow-up arrangements for continuing management and care in the community.

Occasionally, the AMHS may request a bail application be made for a classified patient on an ITO. The reason given is that, while the patient is not ready for limited community treatment, the patient would remain on an ITO if they had bail. In these circumstances, the treating doctor does not need to obtain the DMH's written approval for limited community treatment. Additionally, the treating doctor has the authority to change the ITO from inpatient to community category without DMH approval.

In these situations, you should ask for bail on the patient's own undertaking. If the magistrate requires a residential condition, the following is suitable: 'That the defendant comply with every reasonable direction of the treating team and/or treating staff at the [insert name of AMHS] with respect to matters of accommodation'.

An alternative might be '…with respect to matters of medication and accommodation' but, under the ITO, the patient is obliged to accept medication if it is given. However, some magistrates may be comforted by the latter wording.

14-31 Commonwealth offences

The references in this chapter to the MHA and the Criminal Code of Queensland are not relevant to charges of offences against Commonwealth law. With such charges, the relevant law is the common law of the Commonwealth (under which a defence of insanity can be raised) and certain provisions of the *Crimes Act 1914* (Cth).

Sections 20B—20BH of the Crimes Act deal with 'unfitness to be tried'.

Sections 20BJ—20BP deal with 'acquittal because of mental illness', where a person has been charged with a Commonwealth offence on indictment and is acquitted because of mental illness at the time of the offence. In such a case, s 20BJ of the Crimes Act states that 'the court must order that the person be detained in safe custody in prison or in a hospital' unless the court believes that it should order the person's release from custody either absolutely or subject to conditions. Note that the charge must be on indictment.

The Crimes Act also provides procedures for when a person suffering from a mental illness is charged with a Commonwealth offence before a court of summary jurisdiction. In this situation, the court may, for example, dismiss the charge and discharge the person if it considers that action more appropriate than dealing with the person otherwise by law (Crimes Act, s 20BQ).

Further, the Crimes Act provides sentencing alternatives for people suffering from mental illness or intellectual disability (ss 20BS–20BY). For further details, see Chapter 6 in this handbook, which deals with Commonwealth offences.

As with state offences, if you face issues of mental illness for a defendant charged with Commonwealth offences, you should seek a remand so they can obtain further legal advice.