

# Crimes involving an accused with a mental health or cognitive impairment



**HOW AND WHY THE COURTS DEAL WITH THEM DIFFERENTLY**

23 June 2021

A guide for victims and witnesses of crime and their families

## About this guide

This guide is for victims and witnesses of crimes and their families where it is alleged that the crime was committed by a person with a mental health or cognitive impairment.

It explains:

- why the courts deal with criminal matters differently when the person charged has or had a mental health and/or cognitive impairment;
- how the courts deal with serious crimes, and less serious crimes; and
- what support is available to you.

It can add to the stress victims and witnesses of crime are already experiencing when the person charged isn't dealt with in the ordinary way under criminal law. The purpose of this guide is to help you feel less anxious about the legal process ahead by knowing what to expect and where you can find support.

## About the ODPP

The Office of the Director of Public Prosecutions (ODPP) prosecutes serious crimes in NSW on behalf of the community. We take over cases from police, who send us their evidence after they have finished their investigation and laid charges. Police prosecute less serious crimes themselves, in the Local Court.

Our solicitors and barristers work very closely with victims and witnesses but we don't represent clients in the same way other lawyers do. We have to make decisions in the interest of the community, not an individual or a group.

**The ODPP has a Witness Assistance Service (WAS)** that provides support and information to victims of serious crime, their families and vulnerable witnesses in matters we prosecute. Our WAS officers understand both the impact of trauma and how the legal process works.

WAS offices are based in our head office in Sydney and in all our offices in regional NSW.

**The contact details for the ODPP and for WAS** are on the back page of this guide.

### Disclaimer

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First published September 2019. Updated March 2021.

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**From time to time, the courts have to consider whether an accused person is capable of taking part in the legal process and/or can be held responsible for their actions due to a mental health impairment or a cognitive impairment.**

A mental health impairment includes a temporary or ongoing disturbance that affects the judgment or behaviour of a person but it must be significant enough to result in a mental health diagnosis by a psychiatrist. A person who behaves in a criminal manner because of sadness, grief or anger is not suffering from a mental health impairment. A mental health impairment does not include a disturbance that is solely caused by the temporary effect of taking drugs or having a substance abuse disorder.

The most common type of cognitive impairment is intellectual disability but cognitive impairment also includes conditions such as acquired brain injuries and dementia.

The courts deal with people who are suffering from a mental health or cognitive impairment when they commit a crime differently to other criminal matters. There is also a different process when the crime is a serious ('indictable') offence and is dealt with in the District or Supreme Court than when it is a less serious ('summary') offence which is dealt with in the Local Court.

It can add to the stress victims and other witnesses are already experiencing when the accused isn't dealt with in the ordinary way under criminal law. If mental health is an issue which is raised in a matter in which you are involved the different procedures that may occur are outlined below so you know what to expect.

## Why the courts treat these matters differently

A person cannot be found guilty of a crime if, as a result of a mental health or cognitive impairment, they didn't understand what they were doing or that what they were doing was 'wrong' by normal community standards.

Also, to be put on trial, a person has to be capable of understanding the charges against them and of taking part in court proceedings – that is, they have to be 'fit to be tried'. This is part of making sure that everyone who goes on trial gets a fair trial.

For these reasons, the courts take a different approach to criminal matters if there are questions about the accused's mental health or capacity when the offence was committed, or when they are facing court. In NSW, the system set up by the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* will usually apply.

## How this affects you

It's important for victims and witnesses to know that the legal steps, the verdict and the penalties can all be different in these matters than in other criminal matters.

The prosecution process can become very complex and take a long time, sometimes years, to finalise.

One of the differences that affects you directly is that you will not be called to give evidence in a trial if the accused is not fit to be tried. However, if the offence is serious and the judge holds what is called a 'special hearing' you may be required to give evidence.



# Determining whether a person is fit to be tried

**If a magistrate or judge accepts that there are genuine questions about whether a person charged with a serious offence is fit to be tried, a judge in the District or Supreme Court will hold what is called a 'fitness inquiry'.**

These inquiries rarely take more than a day. The judge will look at relevant evidence, including psychological, psychiatric and other medical reports. In some matters, the experts who assessed the accused will be called to give evidence. The inquiry will consider whether the accused can understand a trial, instruct lawyers and decide on a defence, among other things. The judge will also consider whether the trial process can be modified, or assistance provided, to facilitate the accused's understanding and effective participation in the trial.

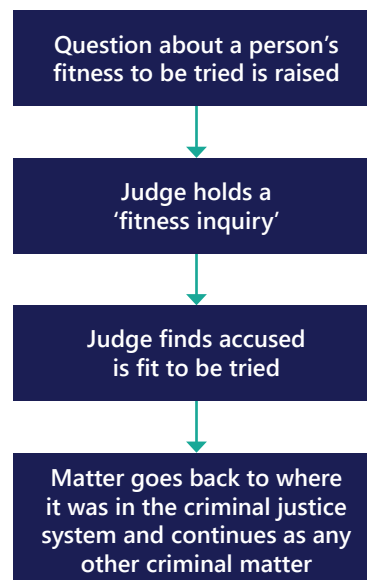
Questions about 'fitness' are usually raised when the accused is still before a magistrate in the Local Court but they can be raised at any time – by the prosecution, the accused's lawyer, or the magistrate or judge.

## Judge finds the accused is fit to be tried

If the judge holding the fitness inquiry finds the accused is fit to be tried, the matter will go back to where it was in the criminal justice system and continue like any other criminal matter. For example, if it was at the committal stage in the Local Court, it will return there. If the accused was on trial in the District or Supreme Courts, the trial process will continue.

A 'fit to be tried' finding does not mean the accused's mental health impairment or cognitive impairment won't be raised again. During a trial or a sentence hearing, or in a 'special hearing' the court may still hear evidence about the accused's mental state at the time the offence occurred (see Defence of mental health impairment or cognitive impairment).

## Accused is fit to be tried



### Judge finds the accused is unfit to be tried

If the accused is found unfit to be tried, the judge must also determine whether the accused might become fit to be tried within the next 12 months. If, following the fitness inquiry, the judge decides that the accused is unfit to be tried and will not become 'fit' within the next 12 months, the accused must be tried as soon as possible in a special hearing (subject to a decision of the ODPP whether to continue prosecuting the case).

### ODPP decision whether to continue with the prosecution

If the court finds the accused will not become fit for trial within 12 months, the ODPP has to decide whether it's appropriate to continue the case, given the accused's ongoing mental health or cognitive impairment.

If you are the victim, or a family member of a victim who died as the result of a crime, the ODPP prosecutor will talk to you about whether you want the matter to continue, and also consult with the police officer in charge, before making a decision. Other factors that will be taken into account include the public interest, the seriousness of the offence, the accused's circumstances and criminal history, the time the accused has already spent in detention, and the likely sentence a court will impose.

If, after weighing up all these factors, the ODPP decides not to continue with the case, the accused will be released. The ODPP will notify the victim and the police before this occurs, and will consult with the defence to ensure the accused receives the treatment and care required.

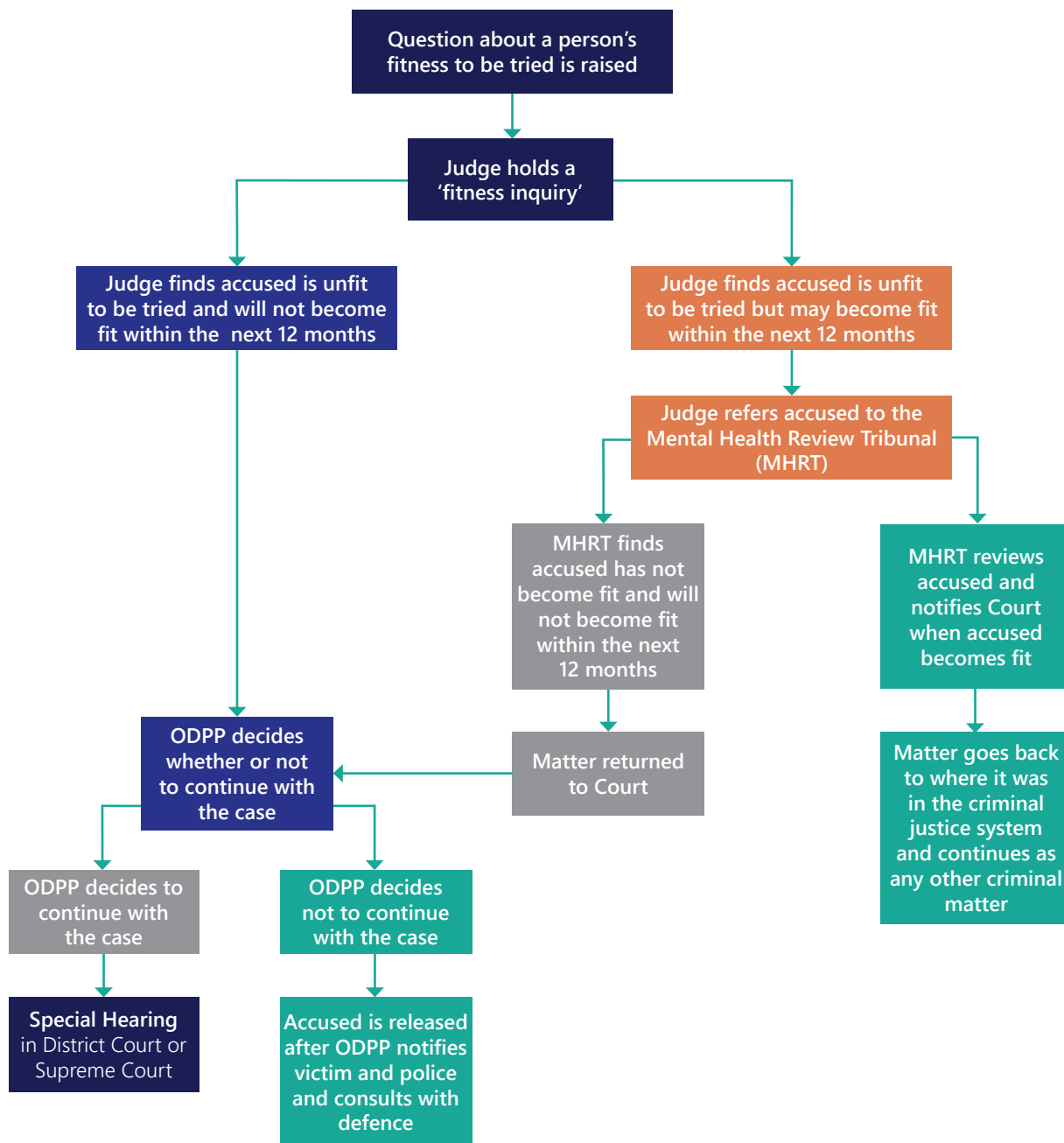


### Judge finds that the accused may become fit to be tried in the future

If the judge decides that the accused is currently unfit to be tried but may become fit to be tried within the next 12 months, the judge must refer the accused to the Mental Health Review Tribunal (MHRT) for review. The MHRT is a panel of mental health experts who will review the accused's fitness to be tried. A person could become 'fit', for example, if they had stopped taking medication for a condition such as schizophrenia and begin taking it again.

The MHRT will notify the court when an accused becomes fit to be tried for an offence and the matter will then go back to the criminal justice system and continue like any other criminal matter. The MHRT will also notify the court if an accused will not, during the period of 12 months after the finding of unfitness by the court, become fit to be tried for the offence. The matter will then return to the court and proceed to a special hearing (subject to a decision of the DPP whether to continue prosecuting the case as discussed above).

### Accused is unfit to be tried



## 'Special hearing' when the accused is unfit to be tried

If the ODPP decides to continue prosecuting a case after the accused has been found unfit to be tried, the matter will go to the District or Supreme Court for what is called a 'special hearing'.

A special hearing is usually before a judge only. It is conducted as closely as possible to a normal criminal trial but the judge can make adjustments to help the accused take part more fully – for example, by having extra breaks if the accused has dementia.

This is the stage at which victims and other witnesses are likely to be called to give evidence. To help you feel prepared, the ODPP prosecutor will arrange to speak with you before the hearing date about your police statement and what to expect on the day. If you have a WAS officer, they will also contact you and can arrange a support person to go to court with you when you give your evidence.

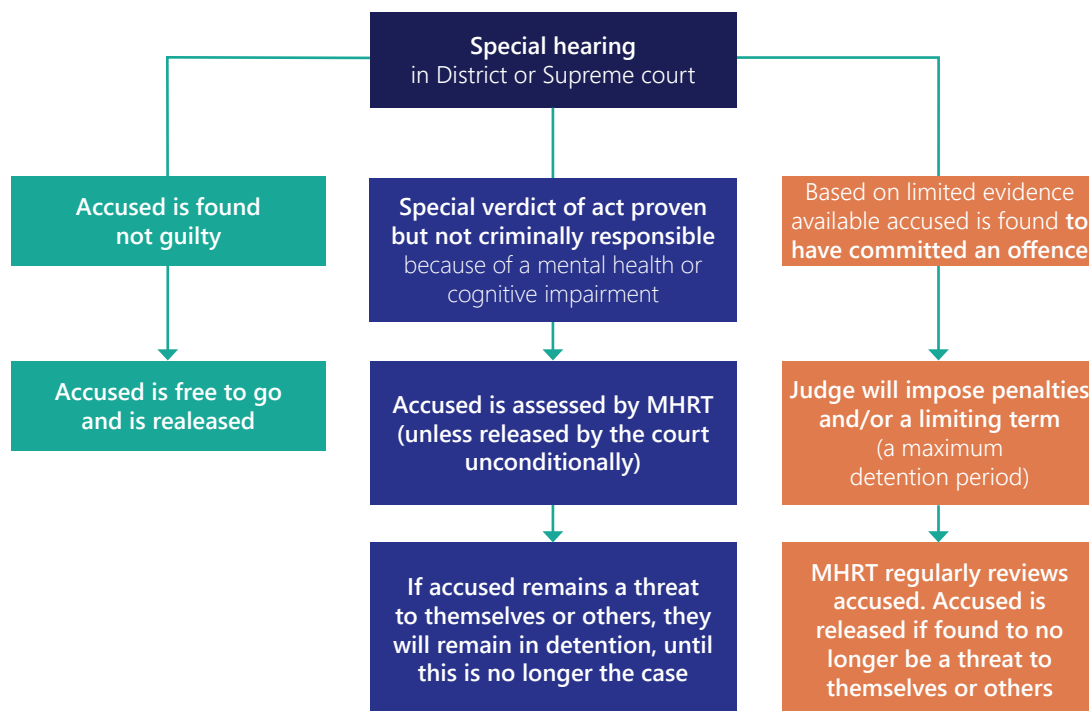
The verdicts available in a special hearing are different to those in a normal trial.

The accused can be found:

- not guilty (meaning they are free to go)
- to have committed an offence, based on the limited evidence available. (The wording of this verdict recognises that the accused may not have been fully capable of giving their version of events to the court)
- to have committed an offence available as an alternative to the offence charged, based on the limited evidence available

The court can also find that the act was proven but the accused was not criminally responsible because of a mental health impairment or cognitive impairment. This is a special verdict of "act proven but not criminally responsible" that is available when an accused raises the defence of mental health impairment or cognitive impairment.

## Possible outcome from a special hearing





### Court finds accused committed an offence

If the accused is found to have committed an offence (based on the limited evidence available) the judge will impose the same penalty the accused would have received if found guilty in a normal criminal trial. If that would have included prison, the maximum prison term the judge would have imposed becomes the maximum time the accused can be detained anywhere. It is called a 'limiting term'. The judge does not impose a non-parole period.

The MHRT will then assess the accused and recommend whether they should be detained in a mental health facility for treatment (which the accused has to agree to) or in prison. The court rarely grants bail while waiting for the MHRT's assessment if the offence was serious.

During the limiting term, the MHRT will continue to review the accused. If it finds the accused has become 'fit', the ODPP may decide to continue prosecuting the case as a normal criminal matter and the accused may face a normal criminal trial.

While the 'limiting term' is a maximum detention period, if the MHRT finds a person who is due for release remains a risk to themselves or others, it can make them an involuntary mental health patient, or the Minister responsible for the legislation can make an application to the Supreme Court to extend the limiting term.

### Court finds "act proven but not criminally responsible"

If, after a special hearing, the court finds that the act is proven but the accused is not criminally responsible the same process applies as when a court delivers this verdict in a normal criminal trial.





# Mental health impairment or cognitive impairment as a defence

A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person:

- (a) did not know the nature and quality of the act, or
- (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

A judge or jury must return a special verdict of “act proven but not criminally responsible” if satisfied that the defence of mental health impairment or cognitive impairment has been established.


In every serious criminal matter, the court will ask for reports on the accused from psychiatrists, psychologists or other medical experts, who will often also be called to give evidence.

It’s important to remember that a special verdict of “act proven but not criminally responsible” can have significant consequences. For example, after a special verdict, the court will usually detain the offender and order that they are assessed by the MHRT. The MHRT will not release the person unless and until it is satisfied that they are not a serious risk to others or themselves. The person will remain in detention until this is no longer the case – that is, they will have no minimum or maximum detention period (see Detention for serious crimes involving mental health impairment or cognitive impairment).

Some defence lawyers avoid using this defence because of the possibility of indefinite detention, and instead ask the court to take the accused’s mental health or cognitive impairment into account during sentencing.

If after a special hearing the MHRT assesses that the accused is no longer a threat, it will usually recommend that they are released with conditions attached, including ongoing treatment and support.





## Substantial impairment because of mental health impairment or cognitive impairment

In murder cases, an accused person can be found not guilty of murder but guilty of manslaughter if the court accepts they had a 'substantial impairment because of mental health impairment or cognitive impairment' when they committed the offence.

This will reduce the maximum penalty that a judge may impose from life to 25 years in prison.

The accused must show that at the time the offence occurred, their capacity to:

- understand events
- judge whether their actions were right or wrong, or
- control themselves

was 'substantially impaired by a mental health impairment or a cognitive impairment'. The impairment has to be from a condition they already had and substantial enough to reduce murder to manslaughter.

# Detention for serious crimes involving mental illness or impairment

**A person with a mental health impairment or a cognitive impairment who commits a serious crime will usually be detained in a secure mental health facility. In NSW, some of these units – such as the Long Bay Prison Hospital in Sydney – are within a jail. If these can't offer the right treatment, or if the accused doesn't agree to treatment, detention will usually be in prison.**

## What are forensic patients?

A person detained after a special verdict of “act proven but not criminally responsible” or after being found unfit to be tried, or after being given a ‘limiting term’ in a special hearing is referred to as a ‘forensic patient’ rather than a prisoner - whether they are in a mental health facility or a prison. This recognises that mental health impairment or cognitive impairment played a role in their detention and that they require ongoing treatment and care.

The MHRT reviews forensic patients every six months. It assesses their condition, their treatment, whether the detention facility is still appropriate (or if they should be moved, for example, from maximum to medium security), and if they are ready to be granted any leave.

Forensic patients will remain in detention until the MHRT finds they are no longer a serious threat to themselves or anyone else in the community.

When they are released from detention, it is almost always with conditions attached, including that they are linked to their local community mental health service for a regular review by a case manager and psychiatrist. The MHRT can also impose conditions relating to accommodation, enrolment in programs, drug and alcohol bans, and restrictions on travel and associating with particular people.

If you made a victim impact statement (VIS) after 27 May 2019, the MHRT has to take it into account when considering any application by a forensic patient for leave or to be released. If the MHRT agrees, you can update your statement while the forensic patient is in detention.

## Specialist Victims Register

There is a register of victims of crime committed by someone with a mental illness or incapacity who becomes a forensic patient. Family members of victims who died as the result of crime can also be on the register – which is called the Specialist Victims Register.

Registered members can:

- be notified about MHRT hearing dates and outcomes (and can attend MHRT hearings, as can members of the public)
- ask for restrictions on whom the forensic patient can contact and where they can visit if they are granted leave from detention or released
- ask to be told if the forensic patient is to be released, escapes, or is detained again after being released.

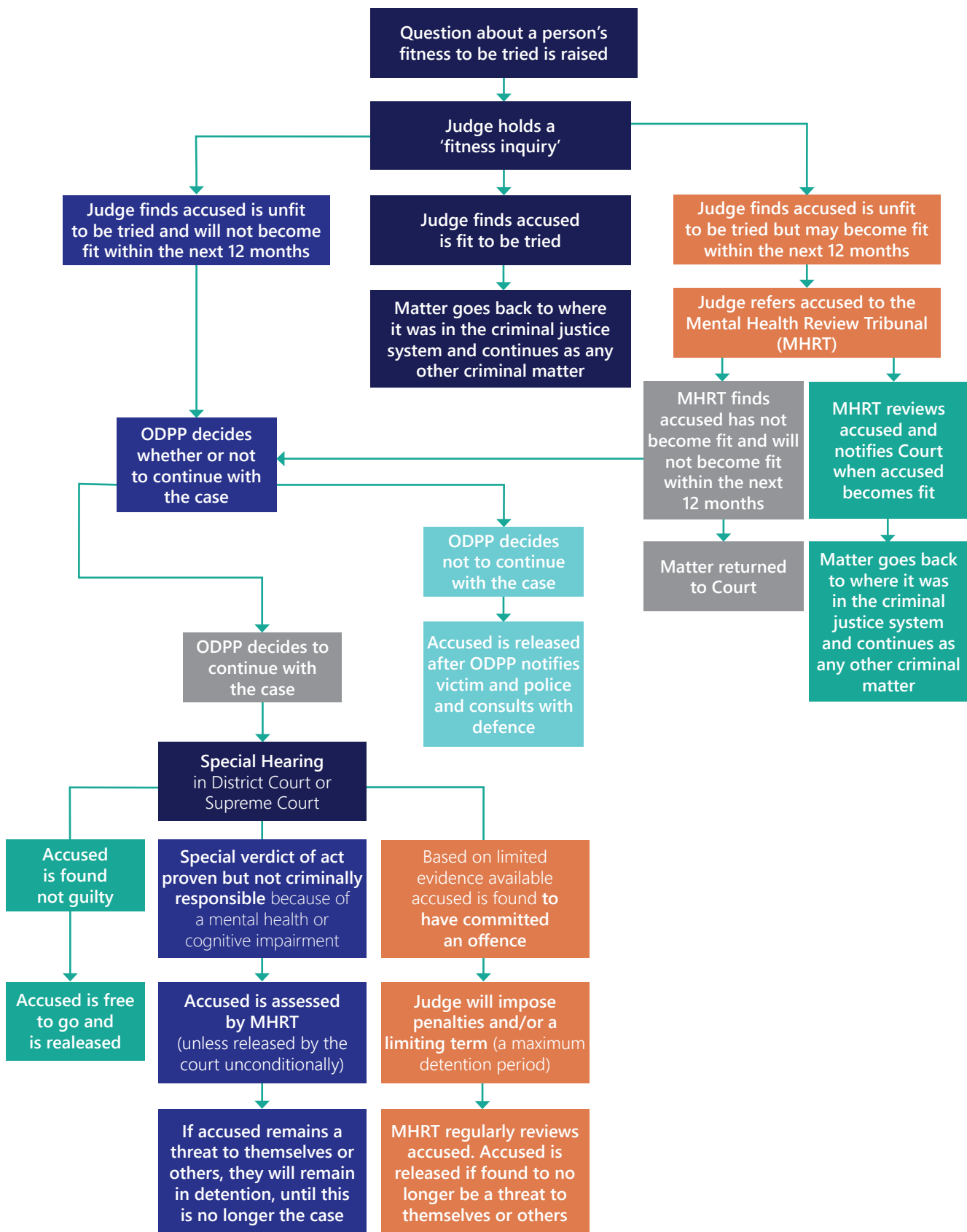
The Specialist Victims Support Service, which is part of Victims Services, maintains the register.

This specialist service also provides a range of support to victims or crime involving mental illness or impairment.

For more information on these services and the victims register, see the Victims Services website or ring 1800 633 063.



## Legal Process for serious crimes involving mental health impairment or cognitive impairment



# How the courts deal with less serious crimes involving mental health impairment or cognitive impairment

When there are questions about the mental health of a person charged with a less serious ('summary') offence, a magistrate in the Local Court can make orders for their treatment and care instead of dealing with them in the ordinary way under criminal law.

The magistrate will need persuasive evidence to do this, and will first consider very carefully the interests of both the accused and the public.

If the accused appears to have a mental health impairment or cognitive impairment – or to have had one when the offence was committed – the magistrate has the option of dismissing the charges and releasing the accused without a hearing, either:

- into the care of a responsible person, with or without conditions attached;
- on the condition that they are assessed for treatment and support;
- without any conditions attached.

The accused can be brought back before the court if they breach the conditions of their release within the next twelve months.

If the accused appears to be a mentally ill or a mentally disordered person (as defined in the *Mental Health Act 2007*), the orders the magistrate can make include:

- detention for assessment in a mental health facility. This can result in the accused becoming an involuntary patient, or in being brought back to court to face the charges if they are assessed as not mentally ill; or
- release into the care of a responsible person, with or without conditions attached.

If after six months the accused continues to need treatment, or has been released and is complying with all the conditions attached, the charge is taken to have been dismissed.

It can be upsetting for victims of crime when the accused is not convicted or penalised in the ordinary way. It's important to remember that a court's decision to place a person into the care of health professionals does not mean it doesn't recognise the harm their crime caused.





## Further information for victims of crime

### Victim impact statements

If you were harmed as the result of a serious crime, or you are a family member of a victim who died as the result of a crime, you will usually have the opportunity to make a victim impact statement (VIS) to the court.

If you want to, you can read your VIS aloud, or have someone read it for you.

VISs are made before an offender who has pleaded guilty or was found guilty is sentenced, or after a finding of not guilty on mental illness grounds.

Victims of crimes involving mental health or cognitive impairment can usually also make a VIS to the MHRT.

### Financial assistance and other support

In NSW, a Victims Support Scheme provides eligible victims of violent crime with access to support and assistance.

This includes:

- financial assistance for immediate needs
- financial assistance for economic loss
- recognition payments
- counselling by a professional trauma counsellor.

For more information, call the Victims Access Line on 1800 633 063 or go to [www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

### Your rights as a victim of crime

Victims of crime in NSW have rights under the NSW Charter of Victims Rights.

The ODPP is bound by this charter. This means we are required to treat you with respect and compassion, and provide you with information on the case you are involved in.

More information on the charter is available at [www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

### Information and support

Further information about the prosecution process and about going to court and being a witness is available on the ODPP's website at [odpp.nsw.gov.au](http://odpp.nsw.gov.au). See below for the ODPP's full contact details.

Information and support is also available at:

**Victim Access Line, Victims Services**  
1800 633 063  
[www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

**Aboriginal Contact Line, Victims Services**  
1800 019 123  
[www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

**Victims Register, Corrective Services NSW**  
02 8688 6833  
[www.correctiveservices.dcj.nsw.gov.au](http://www.correctiveservices.dcj.nsw.gov.au)

**Victims Register, Juvenile Justice NSW**  
02 8346 1406  
[www.juvenile.justice.nsw.gov.au](http://www.juvenile.justice.nsw.gov.au)

**Specialist Victims Register**  
1800 633 063  
[www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

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