

Discharge Under Section 14

*s14 Mental Health & Cognitive Impairment
Forensic Provisions Act (NSW) 2020*

Magistrates in NSW have a discretion to divert persons with mental health impairments or cognitive impairments away from the legal system and into treatment. This means that the accused person avoids what would otherwise be highly punitive outcomes in the criminal justice system. Every defence lawyer needs to understand how to make a s14 application to represent their clients effectively.

Benefits of s14

Diversion under s14 is not a finding of guilt.¹ This means the client avoids a conviction and sentence and any mandatory punishment that may apply, such as disqualification from driving. So, diversion can be a better result for the client even than a discharge under s10 Crimes (Sentencing Procedure) Act which is a finding of guilt.

Why Do So Many Applications Fail?

My own experience is that magistrates are very reasonable and often eager to divert an accused person into treatment – especially if it is a first offence by a young person. Unfortunately, they are often let down by the practitioners appearing before them. This is usually because the practitioner has failed to obtain a proper medical report from a psychiatrist or failed to prepare submissions that address the relevant considerations. This paper aims to explain the process and the evidence and submissions required.

The Three Tests

Section 14 requires the Magistrate to make three decisions:

1. **Jurisdiction** – It appears to the Magistrate that the defendant has (or had at the time of the alleged commission of the offence to which the proceedings relate) a mental health impairment or a cognitive impairment, or both.²
2. **The Balancing Test** – It appears to the Magistrate, on an outline of the facts alleged in the proceedings or other evidence the Magistrate considers relevant, it would be more appropriate to deal with the defendant in accordance with this Division than otherwise in accordance with law.³
3. **Conditions** – If discharge is more appropriate, then what conditions should be placed on the discharge? ⁴

¹ s14(2) Mental Health & Cognitive Impairment Forensic Provisions Act (NSW) 2020

² s12(1) Mental Health & Cognitive Impairment Forensic Provisions Act (NSW) 2020

³ s12(2) Mental Health & Cognitive Impairment Forensic Provisions Act (NSW) 2020

⁴ s14(1) Mental Health & Cognitive Impairment Forensic Provisions Act (NSW) 2020

Medical Evidence

Your application will succeed or fail based on the medical report that you provide. The quality of the report depends on the letter of instruction that you provide to the psychiatrist. Remember the burden is on you to show why the court should exercise its discretion. If you don't bring the case, you fail.

A report from a psychiatrist carries more weight than one from a psychologist. In any event, the report must cover the following five matters:

1. **The Expert Witness Code of Conduct NSW** - A statement that the author has read and agrees to be bound by it,
2. A **Curriculum Vitae** stating the qualifications of the author,
3. A **Diagnosis** for the client including the basis for it (history, examination & investigations),
4. An **Opinion** as to whether the condition caused or contributed to the offending, and
5. A **Treatment Plan** – covering available treatments, how the treatment works and the prognosis for this particular client.

If your expert report covers all these points, then the jurisdictional test is usually conceded by the prosecutor. For a sample letter of instruction, [click here](#).

The Balancing Test

The key test is whether a discharge is more appropriate than proceeding according to law. This is a key term that you must use multiple times in your submissions. The court must balance two competing public interests. There is a public interest in sentencing offenders, but also a public interest in providing health care to impaired offenders.⁵

Section 15 provides that the magistrate may consider the following factors:

- (a) *the nature of the defendant's apparent impairment,*
- (b) *the nature, seriousness and circumstances of the alleged offence,*
- (c) *the suitability of the sentencing options available if the defendant is found guilty of the offence,*
- (d) *relevant changes in the circumstances of the defendant since the alleged commission of the offence,*
- (e) *the defendant's criminal history,*
- (f) *whether the defendant has previously been the subject of an order under this Act or section 32 of the [Mental Health \(Forensic Provisions\) Act 1990](#),*
- (g) *whether a treatment or support plan has been prepared in relation to the defendant and the content of that plan,*
- (h) *whether the defendant is likely to endanger the safety of the defendant, a victim of the defendant or any other member of the public,*
- (i) *other relevant factors.*

⁵ DPP v El Mawas (2006) 66 NSWLR 93 at [77]

Submissions

The reasoning process is explained very well in *Mo v DPP*⁶ at [36] – [69]. Submissions should cover each of the factors in s15. Ideally, the medical evidence will identify an impairment and a connection to the offending. Nothing can be done about the seriousness of the alleged offence or the client's criminal record. Counsel will submit that diversion is available to serious offenders provided the Magistrate regards it as more appropriate than the alternative.⁷

Counsel should cover the likely sentence if the application is refused and explain why treatment is a better outcome for all concerned, bearing in mind that a custodial sentence may be particularly onerous on a person with an impairment. Ideally, the client will already be engaged enthusiastically in treatment and the report will state this and include a prognosis about the client's recovery and likelihood of reoffending.

A previous s14 can cut both ways. It shows that the illness is longstanding and not a recent invention, but also that previous treatment hasn't worked. Counsel should be able to explain why treatment stopped or didn't work. All these matters should be covered by the psychiatrist's report. Defence counsel can then submit that a discharge will produce a better outcome both for the individual and the community.

Treatment Plan

Once the Magistrate has decided that the public interest in diverting the accused person into treatment outweighs the public interest in proceeding according to law, the court must consider the conditions on the 12-month bond. The court will usually discharge the accused onto the Treatment Plan prescribed by the psychiatrist which is why the expert report is so important. The order must name a particular person or place that the accused attend on for treatment.⁸

Conclusion

Written submissions should be prepared that cover all of the abovementioned matters. The final submission will be that it is more appropriate for the court to discharge the defendant into the care of their psychiatrist or psychologist or general practitioner rather than to proceed according to law.

I'm available everyday if you have any interesting issues.

Chris Nowlan
Barrister-at-Law
Ph: (02) 8251 0066
chris@chrisnowlan.com

⁶ *Mo v Director of Public Prosecutions* [2023] NSWDC 27 (16 February 2023)

⁷ *DPP v El Mawas* (2006) 66 NSWLR 93 at [79]

⁸ *Director of Public Prosecutions (NSW) v Saunders* [2017] NSWSC 760