

Persons with an Intellectual Disability

The *Mental Health Act 2016* applies to person with an intellectual disability in a limited number of ways. It applies in relation to magistrates' powers, reports on unsoundness of mind and fitness for trial, and in the forensic provisions of the Act.

What is an intellectual disability?

The Mental Health Act 2016 relies on the definition of 'intellectual disability' in the Forensic Disability Act 2011, namely:

a disability characterised by significant limitations in intellectual functioning and adaptive behaviour that originates in a person before the age of 18.

An intellectual disability includes a cognitive disability as defined in that Act.

What powers do magistrates have for persons with an intellectual disability?

The Act provides that a magistrate may discharge a person if the magistrate is satisfied, on the balance of probabilities, that the person:

- was, or appears to have been, of unsound mind when the offence was allegedly committed, or
- is unfit for trial.

This applies to persons with any mental condition, including an intellectual disability (see Fact Sheet: Magistrates Court).

Where the person does not have a mental illness, a magistrate may refer the person to an agency who may be able to provide treatment or care for the person. For persons with an intellectual disability, the magistrate may refer the person to the Department of Communities, Child Safety and Disability Services or the National Disability Insurance Agency, to see if suitable care is available for the person. A referral does not mandate the provision of any care for the person.

Is a person with an intellectual disability entitled to a report about unsoundness of mind and fitness for trial?

A person subject to a treatment authority, forensic order or treatment support who is charged with a 'serious offence' is entitled to a free psychiatrist report that expresses an opinion about whether a person was of unsound mind at the time of an alleged offence or fit for trial (see Fact Sheet: Psychiatrist Reports). This may include a person with an intellectual disability.

Where a person is subject to a forensic order (disability) for which the Forensic Disability Service is responsible, a person may request the Director of Forensic Disability (under the Forensic Disability Act 2011) for a senior practitioner (under that Act) to prepare a report.

Also, the Director of Forensic Disability may direct a report be prepared for a person with an intellectual disability if it is in the public interest.

How do the forensic provisions apply to persons with an intellectual disability?

A reference may be made to the Mental Health Court where a person with an intellectual disability is alleged to have committed a 'serious offence'. A reference may be made by the person, the person's lawyer, the Chief Psychiatrist or the Director of Forensic Disability.

Where the person has an intellectual disability:

- the Director of Forensic Disability may elect to be a party to the proceeding, and
- the Court may be assisted by a person with expertise in the care of persons with an intellectual disability.

There are two types of forensic orders that the Court may make if a person is found of unsound mind or unfit for trial, namely:

- a forensic order (mental health), or
- a forensic order (disability).

The Court must make a forensic order (mental health) if:

- the person's unsoundness of mind or unfitness for trial is due to a mental condition other than an intellectual disability, or
- the person has a dual disability (a mental illness and an intellectual disability) and needs involuntary treatment and care for the person's mental illness, as well as care for the person's intellectual disability.

The Court must make a forensic order (disability) if:

- the person's unsoundness of mind or unfitness for trial is due to an intellectual disability, and
- the person needs care for the person's intellectual disability but does not need treatment and care for any mental illness.

A person on a forensic order (disability) becomes the responsibility of the Forensic Disability Service (if the service has capacity to take on this responsibility) or an authorised mental health service.

How is a forensic order (disability) reviewed?

The Mental Health Review Tribunal reviews a forensic order (disability) every six months.

- The Director of Forensic Disability is a party to the Tribunal's proceedings if the person is subject to a forensic order (disability) for which the Forensic Disability Service is responsible.

For a person with a dual diagnosis on a forensic order (mental health), the Tribunal must amend the order to a forensic order (disability) if the person no longer requires involuntary treatment for the mental illness.

What role does the Director of Forensic Disability play in managing Information Notices for Victims?

The Director of Forensic Disability manages all information notices if they relate to a person subject to a forensic order (disability) for which the Forensic Disability Service is responsible

(see *Fact Sheet: Support for Victims*).