

## 2. Defining mental health and cognitive impairment

### Background

Before the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 commenced, the question of whether a person was not guilty of a crime because of their mental health was determined under the common law. The common law test goes back two centuries and turned on the question of whether the accused person was labouring under a “disease of the mind” so that they did not know the nature and quality of the act, or if they did know the nature and quality of the act they did not know it was wrong.

In 2013, the NSW Law Reform Commission recommended that the common law should be incorporated into a statute and the language modernised.

The Act does that by including a definition of “mental health impairment”. The Act also includes a definition of “cognitive impairment”. These definitions are the foundation for deciding if a person is fit to stand trial, or if their act or omission might make them eligible for the defence of mental health impairment or cognitive impairment.

### Mental health impairment

#### *Section 4 — Mental health impairment*

- (1) For the purposes of this Act, a “person has a mental health impairment” if —
  - (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
  - (b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
  - (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.
- (2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons—
  - (a) an anxiety disorder,
  - (b) an affective disorder, including clinical depression and bipolar disorder,
  - (c) a psychotic disorder,
  - (d) a substance induced mental disorder that is not temporary.
- (3) A person does not have a mental health impairment for the purposes of this Act if the person’s impairment is caused solely by—
  - (a) the temporary effect of ingesting a substance, or
  - (b) a substance use disorder.

The definition takes a two pronged approach — a set of general criteria, followed by a non-exhaustive list of diagnoses that would usually meet the definition.

To meet the definition, a mental health impairment must be “significant for clinical diagnostic purposes”: s 4(1)(b). This term is used in the DSM 5 and is commonly understood by psychiatrists and other clinical experts.

Consistent with the common law, a person cannot be said to have a mental health impairment simply because of the impact of substances that they have taken, or because of the impact of withdrawing from substances. However, if the use of substances exacerbates a clinical condition (that is not temporary) then that may constitute a mental health impairment: see *R v Tonga* [2021] NSWSC 1064 per Wilson J at [89]-[90]; [106]; *R v Siemek (No. 1)* [2021] NSWSC 1292 per Johnson J at [103]. See also the consideration in *R v Miller* [2022] NSWSC 802 at [1]-[52] by Cavanagh J of the relationship between s.4(1) and (2)(c) and s.4(3) where it is alleged the defendant acted under a drug induced psychosis but was not intoxicated at the time of the offending. For a discussion of the common law position on this issue, see: *R v Fang (No 3)* [2017] NSWSC 28 per Johnson J (especially at [110]); *Fang v R* [2018] NSWCCA 210; (2018) 97 NSWLR 876 at [95]-[105]. The onus of establishing s.4(3) lies on the party relying upon the exception on the balance of probabilities: *R v Miller* [2022] NSWSC 802 at [53]-[62] per Cavanagh J.

Personality disorders are neither included nor excluded from the definition of mental health impairment. Clinical views about the diagnosis and treatment of personality disorders are evolving. The option of a personality disorder meeting the definition of mental health impairment remains open, but will require persuasive clinical evidence. Recent appeal cases in New South Wales and Victoria have determined that personality disorders may be taken into account on sentence under accepted principles applying to mental or psychiatric conditions and are not excluded by law: *Wornes v R* [2022] NSWCCA 184 at [25]-[33]; *Brown v The Queen* [2020] VSCA 212; (2020) 62 VR 491. Severe personality disorder is included in the definition of ‘mental impairment’ in the Commonwealth provisions: *Criminal Code Act 1995* (Cth) s 7.3(8): see further [9 Commonwealth provisions](#).

In *DB* [2022] NSWCCA 87 per Brereton JA, Ierace J agreeing, Wilson J dissenting, the Court found that sexsomnia (a form of somnambulism where sexual acts are committed while the person is asleep) did not constitute a mental health impairment because lack of volition while asleep was not a disturbance of volition within s 4(1)(a), and was of no clinical significance for the purposes of s 4(1)(b). The respondent was entitled to the outright acquittal that he received. Although not relevant to the outcome of the appeal Brereton JA did note at [56]-[58] that a complete absence of volition could constitute a ‘disturbance’ as required under s 4(1)(a) - the distinction in this case was that the absence of volition was an ordinary condition of sleep not a disturbance of an ordinary condition.

## Cognitive impairment

### *Section 5 — Cognitive impairment*

- (1) For the purposes of this Act, a “person has a cognitive impairment” if—
  - (a) the person has an ongoing impairment in adaptive functioning, and
  - (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
  - (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person’s brain or mind that may arise from a condition set out in subsection (2) or for other reasons.
- (2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons—
  - (a) intellectual disability,
  - (b) borderline intellectual functioning,
  - (c) dementia,
  - (d) an acquired brain injury,
  - (e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
  - (f) autism spectrum disorder.

The definition of a cognitive impairment again provides for a set of general criteria, followed by a non-exhaustive list of diagnoses that would usually meet the definition.

A cognitive impairment can affect different aspects of a person’s functioning including memory, capacity to understand information and decision making. A cognitive impairment may also impact a person’s ability to understand right from wrong. Cognitive impairments generally do not change significantly over time, and some conditions, such as dementia, will deteriorate.

A person’s cognitive impairment may affect their fitness to stand trial, if it means that the person has difficulty understanding or remembering the evidence against them or would struggle to follow what is discussed in court. A cognitive impairment may also impair a person’s capacity to make a decision and instruct their lawyer. See further [6 The Fitness Inquiry](#): Fitness to stand trial - the test.

For the first time in NSW, the Act now allows for a defence of not criminally responsible by reason of cognitive impairment. To raise this defence successfully requires evidence both that the person has a cognitive impairment and that the impairment had the effect set out in s 28 of the Act.<sup>1</sup> See further [8 Mental health and cognitive impairment defences in a criminal trial](#)

Clinical evidence will continue to be critical to deciding whether a defendant meets the definitions in these sections in the context either of fitness to stand trial or in considering whether a defence is available.

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<sup>1</sup> See further K Eagle and A Johnson, “Clinical issues with the Mental Health and Cognitive impairment Forensic Provisions Act 2020” (2021) 33(7) *JOB* 67 and the Supplement to the Third Edition of *Crime and Mental Health Law in NSW* (2021) particularly pp 26 - 30

When seeking a clinical opinion, you should draw the clinician's attention to the definitions in the Act. See further [4 Expert witnesses](#)