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

Indictable matters

Justice Mark Ierace

Historical context

The *Mental Health & Cognitive Impairment Forensic Provisions Act 2020* (NSW) ("the Act") commenced on 27 March 2021. It replaced the *Mental Health Forensic Provisions Act 1990* (NSW) ("the previous Act"). The Act continues the evolution of the legislative scheme that was introduced by the *Crimes (Mental Disorder) Amendment Act 1983* (NSW) which took effect in 1986. One of its drafters was Dr Greg Woods QC, a Deputy Senior Public Defender at the time and later a Judge of the District Court of NSW.

Before 1986, there were no statutory diversionary provisions in Local Court proceedings for defendants who may have had a mental illness or cognitive impairment. In indictable proceedings, a person with such a condition who was found by a jury to be unfit according to the common law test, was simply detained in a closed ward of a mental hospital or in prison until they became fit. If they did not become fit, the length of time they were detained was exclusively an administrative matter for the Minister for Health; they were detained indefinitely, regardless of the strength or otherwise of the prosecution case. Similarly, a person who a jury found to be not guilty by reason of mental illness was held indefinitely in a mental hospital or prison.

This most recent iteration of the legislative scheme follows two reports by the NSW Law Reform Commission ("the LRC"). In 2007, the LRC received a reference from the Attorney General to undertake a general review of the criminal law and procedure applying to "*people with cognitive and mental health impairments*", with particular regard to, amongst other matters, Local Court proceedings, fitness, the mental illness defence and sentencing.

In their submissions to the LRC, legal practitioners generally preferred to retain the common law as to qualifying mental conditions, the fitness test and the mental illness defence. Community groups tended to express a preference for statutory definitions for these concepts and the use of current language, so that their meaning could be more readily understood in the broader community.

In 2012 the LRC published its report in respect of Local Court diversionary proceedings[1] and the following year its report in relation to the balance of the subjects covered in the reference.[2] The government then engaged in a consultation process for a further five years, before a Bill was tabled in parliament. It was another five years before a Bill was circulated. By the time it was assented to, on 23 June 2020, it had been 13 years since the reference to the LRC. That inordinate passage of time is a fair reflection on how difficult it was to find consensus for some of the provisions. In my view, however, the final form of the legislation in respect of the most controversial of the provisions, is a reasonable one. I will refer in passing to some of those controversies as I take you to some of the relevant provisions of the Act.

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1 LRC Report 135 People with cognitive and mental health impairments in the criminal justice system Diversion June 2012. Download at www.lawlink.nsw.gov.au/lrc

2 LRC Report 138 People with cognitive and mental health impairments in the criminal justice system Criminal responsibility and consequences May 2013. Download at www.lawlink.nsw.gov.au/lrc

At the heart of the changes from the previous Act are the non-exclusive statutory definitions of the terms "*mental health impairment*" and "*cognitive impairment*". Either mental condition is a necessary prerequisite for a partially codified test for fitness to be tried (previously exclusively a common law test), and a statutory "*defence of mental health impairment or cognitive impairment*", previously the common law defence of mental illness, which embodies the *M'Naghten* rules.[3] If the defence is made out, the verdict is termed a special verdict known as "*act proven but not criminally responsible*", which I shall refer to as "NCR", instead of the previous label, "*not guilty by reason of mental illness*" (NGMI).

Both statutory definitions are also imported into the *Crimes Act 1900* for the purposes of the partial defence to murder of substantial impairment [s 23A] which is re-named "*substantial impairment because of mental health impairment or cognitive impairment*" (substantial impairment). They replace the foundational mental condition previously described in that section as an "*abnormality of mind arising from an underlying condition*".

Definitions

These definitions are as follows:

(PPT slides 2 and 3)

The structure of the definition provisions is that, in relation to both definitions, subsection 1 sets out certain prerequisites in order for the particular impairment to apply, subsection 2 provides a non-exclusive list of conditions that may apply and, in the case of "mental health impairment", subsection 3 excludes certain conditions.

Mental health impairment

Broadly speaking, a mental health impairment is concerned with mental illness, such as schizophrenia and significant depression, and mental disorders, including personality disorders such as an antisocial personality disorder. As the Attorney General noted in the second reading speech:

> "The requirement that the disturbance be "significant for clinical diagnostic purposes" means that the temporary or ongoing disturbance must be serious enough to result in a mental health diagnosis. Sadness, grief or anger would not suffice for the purposes of meeting the definition. The temporary effect of taking drugs or having a substance-use disorder is expressly excluded from the definition. This means that a person who commits a crime while on drugs or intoxicated, with no other clinically significant mental health impairment or cognitive impairment, will not be a person with a mental health impairment or cognitive impairment for the purposes of the bill."

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[3] *M'Naghten's case* [1843] 10 Clark & Finnelly 200; (1843) 8 E.R. 718 at 210 (712).

Cognitive impairment

As to the definition of cognitive impairment, the Attorney General said:

> "A person has a cognitive impairment if they have an ongoing impairment in adaptive functioning and in comprehension, reasoning, judgement, learning or memory, which has resulted from damage or dysfunction to the brain or mind. Cognitive impairment may arise from intellectual disability, dementia, autism or foetal alcohol spectrum disorder."

Incidentally, while it may be appropriate to refer to someone as "suffering" from as mental illness, such as schizophrenia, it is never appropriate to refer to a person as "suffering" from an intellectual disability, any more than it is to refer to someone as "suffering" from having an IQ which is significantly higher than the average range.

Generally

These definitions introduce a degree of public clarity and transparency as to what mental conditions have been found at common law to be capable of basing a finding of unfitness to be tried or a verdict of NGMI, without excluding further developments in psychiatry and psychology which may identify other mental health disorders that satisfy s 4(1) and (3) of the Act, or conditions of cognitive impairment that satisfy s 5(1), that have the potential to negate fitness or significantly impact on, or eliminate, criminal culpability.

Mental health impairment: "disturbance of volition"

In *R v DB* [2021] NSWDC 213, Judge Weinstein SC, presiding as a Judge alone on a criminal trial, considered the meaning of the phrases "*disturbance of volition*" in s 4(1)(a) and "*clinical diagnostic purposes*" in 4(1)(b).

The accused, a male, was charged with two counts of sexual intercourse (digital penetration) of a child under ten, being his nine year old daughter, and a count of sexually touching of the same complainant (the touching of her breast). The accused pleaded not guilty to all three counts on the basis that his acts were involuntary, contending that carried out the acts unconsciously. He called evidence to the effect that he suffered from sexsomnia, which is a parasomnic disorder akin to sleepwalking in which an individual engages in sexual behaviour whilst asleep. The Crown accepted the forensic evidence that sexsomnia was a recognised disorder, that the accused was correctly diagnosed as having it and therefore that his acts were involuntary but contented that it was a mental health impairment pursuant to s 4 of the Act and that the accused was NCR.

Under the Act, as under the previous Act, such a verdict could result in a court constraining the accused's liberty by detention or conditional release pursuant to s 33 of the Act, in which case the accused would then be a forensic patient and come under the purview of the Mental Health Review Tribunal ("the Tribunal") (s 72). The accused contended that it was not a mental health impairment for the purposes of the Act, and therefore he was entitled to an acquittal.

As his Honour perceived the issues in his judgment, the result turned on whether sexsomnia was, in the relevant words of s 4(1), "*a temporary or ongoing disturbance of … volition*" and,

if so, whether the preconditions of s4(1)(b) and (c) were made out. His Honour concluded, at [279], that an act done by a person who has sexsomnia does not have a disturbance of volition but rather an absence of volition. Further, that the reference in s 4(1)(b) to "*clinical diagnostic purposes*" is to a mental health diagnosis, as was expressed by the Attorney General in the passage I extracted earlier from the second reading speech.

Defence of mental health impairment or cognitive impairment

The defence is set out in s 28 of the Act. Section 28(1) incorporates the two limbs of the M'Naghten rules: "*the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person did not know the nature and quality of the act, or did not know that the act was wrong"* as modified by Dixon J in his charge to the jury in *R v Porter*[4]: "*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."* Similarly, s 28(3) reflects the common law principle, dating back at least to the M'Naghten rules,[5] that, for the purposes of the defence, "*it is presumed that a defendant did not have a mental health impairment or cognitive impairment*".

The Act permits the court to enter a special verdict, as it continues to be known, if the prosecution and defendant agree that the "defence" is established, provided that the accuse is legally represented and the court is satisfied that the defence is established" s 31. It remains necessary for the trial judge to give reasons for the special verdict. In *R v Siemek (No 1)* [2021] NSWSC 1292, Johnson J explained the public policy rationale for this obligation:

> "20 It remains for the Court to find the facts (which are not in dispute in this case) and then apply the terms of ss.4 and 28 MHCIFP Act for the purpose of the Court determining whether it is satisfied that the defence of mental health impairment is established. As Wilson J observed in *R v Tonga*,[6] it is not necessary for the Court to recite in any detail directions which may have been required if the trial was proceeding other than in circumstances where s.31 MHCIFP Act has application.
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> 21 However, the Court's decision fulfills another important purpose. It provides reasons for the verdict of the Court announced in open court on a serious charge where there is a strong public interest in the community understanding the basis upon which the verdict has been returned. The provisions of reasons for a decision is an expression of the open justice principle. The importance of a public explanation for final decisions has long been recognised: *Wainohu v State of New South Wales* (2011) 243 CLR 181; [2011] HCA 24 at [54]-[58]."

Fitness to be tried

(PPT slide 4)

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4 (1933) 55 CLR 182 at 189-90
5 *op cit* fn 1
6 *R v Tonga* [2021] NSWSC 1064

The fitness test is stated in s 36 of the Act. It embodies each of the elements of the test for determining whether an accused is fit to be tried that were enunciated by Smith J in *R v Presser* [1958] VR 45 ("the *Presser* test)" and have been widely adopted since then.[7]

"or for another reason"

Pursuant to s 36(1), a finding of unfitness is not necessarily predicated upon the defendant having one or more of the two statutory impairments, thus leaving the door open to other causes, such as for example a communication impediment which is unrelated to a mental state, which is in accordance with common law.[8] However, the statutory consequences of unfitness, particularly of a qualified finding of guilt following a finding of unfitness and a special hearing, are geared towards such accused having a mental condition, as their nomenclature following such a finding suggests: a "*forensic patient*".[9]

Subsection 36(2)

Subsection 36(2) provides that an accused may be found unfit to be tried for reasons other than those that are identified at 36(1)(a) to (i). This allows the common law, if required, to identify elements of an accused's fitness that provide a minimum standard for a fair trial other than those identified in the *Presser* test.

The LRC recommended a straight codification of the *Presser* test, so the terms of s 36(1) and s 36(2) maintain the flexibility afforded by the common law.

(PTT slide 5)

Section 44(5)

(PPT slide 6)

Further codification is provided by s 44(5) of the Act which provides that, in determining fitness, the court is to have regard to whether the trial process could be modified, or assistance provided, to facilitate the defendant's understanding and effective participation in the trial, its likely length and complexity and whether the defendant is legally represented, which again reflects the common law; for example, *Kesavarajah v R* [1994] 181 CLR 230 at 246 as to whether the trial process can be appropriately modified and the likely length of the trial and *R*

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7 See for example *Kesavarajah v R* [1994] 181 CLR 230 at 245.

8 See for example *Eastman v R* (2000) 203 CLR 1 per Gaudron J at [59]:
"A number of matters should be noted with respect to what was said in *Presser*. The first is that the question whether a person is fit to plead may arise for reasons other than mental illness. It may arise, for example, because a person is deaf and dumb (See *Ebatarinja v Deland* (1998) 194 CLR 444) or, more generally, because language difficulties make it impossible for him or her to make a defence (See *R v Grant* [1975] WAR 163; *Ngatayi v The Queen* (1980) 147 CLR 1 at 9, per Gibbs, Mason and Wilson JJ; *R v Begum* (1985) 93 Cr App R 96). The second matter to be noted is that fitness to plead is a concept that derives from the common law. Usually, however, there are statutory provisions which bear on the determination of that issue. …".

9 s 72 of the Act.

v Ngatayi (1980) 147 CLR 1 as to the significance of legal representation. An example of the relevance of the complexity of the trial is *R v Aliwijaya* [2012] NSWSC 503 at [16].

If defendant is unfit to be tried

Under the previous Act, when an accused was found to be unfit to be tried, they were referred to the Tribunal which determined whether they were likely to become fit within 12 months. The Court now has that function, pursuant to s 47. Referring the accused to the tribunal was thought to be an unnecessary delay.

(PPT slide 7)

In my opinion, the nature of that decision calls for forensic evidence. It is clearly beyond the expertise that is assumed of a judge to make that determination without the benefit of evidence.

If the court determines that the accused may become fit within 12 months, it refers the accused to the Tribunal "*for review*" [s 49(1)]. The Tribunal reviews the accused and advises the court if and when they become fit or, if it determines that the accused will not become fit within 12 months of the finding of unfitness, of that determination [s 80].

Alternatively, if pursuant to s 47(1)(b) the court determines that the person will not become fit to be tried within 12 months, then it proceeds to hold a special hearing [s 48] "as soon as practicable" [s55(1)] unless the DPP indicates that further proceedings will not be taken [s 53(1)(a)].

(PPT slide 8)

In *R v Risi* [2021] NSWSC 769, Beech-Jones J, as his Honour then was, considered the appropriate approach of a court if there is uncertainty as to which of the alternative findings is appropriate. His Honour said, at [55]:

> "I set out the provisions of s 47(1) earlier. That provision posits a binary choice for the Court as to whether a person "may become fit to be tried for the offence" or "will not become fit to be tried for the offence." The subsection does not contemplate the possibility that the Court may be in a state of uncertainty about whether one or another is the correct position. The contrast between the wording of the two sections suggests that a finding in terms of s 47(1)(b), the effect of which will be to exclude [the Tribunal] from assessment of the accused, is one that should only be made if there is a real certainty as to the accused's lack of fitness during the relevant 12 month period."

His Honour's approach has been adopted in subsequent judgments, for example: *R v Lailna* [2021] NSWSC 1205 *per* Hamill J at [25].

<u>Special hearings</u>

The nature of a special hearing is explained at s 54:

> "**54 Nature of special hearings**

> In this Act, a ***special hearing*** is a hearing for the purpose of ensuring, despite the unfitness of the defendant to be tried in accordance with the normal procedures, that the defendant is acquitted unless it can be proved to the required criminal standard of proof that, on the limited evidence available, the defendant committed the offence charged, or another offence available as an alternative to the offence charged."

Procedural changes

The Act introduces elements of flexibility into the procedure for a special hearing; the Court may "*modify court processes to facilitate the effective participation by the defendant*" (s 56(2)), and the court may permit the defendant "*not to appear, or exclude the defendant from appearing, at a special hearing if the court thinks it appropriate in the circumstances and the defendant or the defendant's Australian legal practitioner agrees*" (s 56(8)).

Limiting Terms

Perhaps the most significant substantive change in the Act is to the matters the court may take into account when fixing a limiting term, which reduces (but does not eliminate) an inequality between unfit persons who are detained following a special hearing and fit to be tried offenders who are convicted at trial or following a plea.

A defendant who at a special hearing receives a "*qualified finding of guilt*" (now to be known as a verdict of "*act proven but not criminally responsible*"), will receive a limiting term if the court concludes that, had it been a normal trial, a sentence of imprisonment would have been imposed. The limiting term is the maximum period of time that the defendant can be detained against their will (almost inevitably in a prison) under the supervision of the Tribunal. Now, as before, it is the best estimate of the total sentence of imprisonment (with no reference to the non-parole period) that the court would have imposed on the defendant in those circumstances.

Under both the previous and current Act, the accused at a special hearing is taken as entering a plea of "*not guilty*" to the charge or charges, because of the finding of unfitness. Previously, the limiting term was fixed on the basis that the defendant was disentitled to mitigation in view of his presumed "*not guilty*" plea, no matter what evidence there may be of the accused having made admissions of guilt and expressing remorse.

(PPT slide 9)

Although there remains no legislative recognition of a non-parole period in fixing the limiting term, the Act does provide, pursuant to s 63(5), that, in determining a limiting term or other penalty, the court:

"(*a) must take into account that, because of the defendant's mental health impairment or cognitive impairment, or both, the person may not be able to demonstrate mitigating factors for sentencing or make a guilty plea for the purposes of obtaining a sentencing discount, and*

(b) may apply a discount of a kind that represents part or all of the sentencing discounts that are capable of applying to a sentence because of those factors or a guilty plea …".

Partial defences: substantial impairment and infanticide

Both statutory definitions are imported into the *Crimes Act 1900* for the purposes of the partial defence to murder of substantial impairment [s 23A] which is re-named "*substantial impairment because of mental health impairment or cognitive impairment*" ("substantial impairment)". They replace the foundational mental condition previously described in that section as an "*abnormality of mind arising from an underlying condition*".

The partial defence to murder of Infanticide [s 22A] is wholly replaced with a provision that depends upon the same definition of "*mental health impairment*". It applies if the accused "woman" commits the act or omission causing death within 12 months of giving birth to the child and, "*at the time of the act or omission, the woman had a mental health impairment that was consequent on or exacerbated by giving birth to the child*." [s 22(a)(1)(b)].

Extension of status as a forensic patient

In the previous Act, the provisions that enabled the Supreme Court to extend a person's status as a forensic patient were in Schedule 1 of that Act, pursuant to s 54A, which was within "*Part 5 Forensic patients and Correctional patients*." Section 40 was an "objects" clause that was expressed to apply to that part:

(PPT slide 10)

> "**40 Objects**
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> The objects of this Part are as follows:
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> (a) to protect the safety of members of the public,
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> (b) to provide for the care, treatment and control of persons subject to criminal proceedings who are suffering from a mental illness or mental condition,
>
> (c) to facilitate the care, treatment and control of any of those persons in correctional centres through community treatment orders,
>
> (d) to facilitate the provision of hospital care or care in the community through community treatment orders for any of those persons who require involuntary treatment,
>
> (e) to give an opportunity for those persons to have access to appropriate care,
>
> (f) to protect the safety of victims of forensic patients and to acknowledge the harm done to victims.
>
> **Note**. Section 68 of the *Mental Health Act 2007* sets out general principles with respect to the treatment of all people with a mental illness or mental disorder."

In the Act, the Objects clause remains within Part 5 (s 69), which retains the same name, "*Forensic patients and Correctional patients*." However, the provisions concerning the extension of status of a forensic patient now constitute a separate Part of the Act, being "*Part 6 Extension of status as a forensic patient*". It would be unsurprising if the loss of the objects clause for Part 6 is an oversight, It seems illogical that the objects that apply to the oversight

of forensic patients generally do not also apply to the question of whether their status as such should be extended. In any event, some justices have taken the view that it continues to apply by suggesting that Part 6 is effectively an extension of the "forensic patient' scheme in Part 5, for example *AG (NSW) v HRM bht Ramjan (Final)* [2021] NSWSC 1535 *per* Rothman J at [100]; *AG(NSW) v Mulipola (Final)* [2021] NSWSC 1041 *per* Walton J at [21], [22].

I note that s 127(2)(a) of the Act obliges the Court to have regard to the "safety of the community" in considering wither to make an extension order and s 122(1)(b) obliges the court to consider whether a risk can be adequately managed by less restrictive means than the person's status as a forensic patient being extended, but there is no statutory obligation in Part 6 to have regard to the matters identified in s 40(b) to (e) of the previous Act.

Conclusion

The Act does not significantly change the relevant principles to indictable matters involving an accused with a relevant mental condition, but it does modify the procedure in ways that build upon the experience over many years of practitioners with the basic legislative scheme. The statutory elaboration of the common law tests and standards, and the modification of the terminology, will enhance public confidence in an area of the law that is, of necessity, complex.