Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Summary This Information Bulletin is to inform staff about changes made by new legislation.

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MENTAL HEALTH AND COGNITIVE IMPAIRMENT FORENSIC PROVISIONS ACT 2020 (NSW)

PURPOSE

The *Mental Health (Forensic Provisions) Act 1990* (NSW) is being repealed and replaced by the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW). The Bill was passed by the NSW Parliament on 16 June 2020 and it will come into effect on 27 March 2021.

KEY INFORMATION

Most of the changes in the new Act relate to the court proceedings. There are several changes that are important for NSW Health staff to note. Mental health clinicians particularly, should be aware of these change as they may impact their work.

Key changes include:

- The express recognition that the legislation applies to people with cognitive impairment
- The introduction of definitions of 'mental health impairment' and 'cognitive impairment'
- Minor changes to local court diversion schemes
- Rewording and codifying the defence of mental illness and special verdict
- Streamlining processes for fitness to stand trial.

These changes are discussed in more depth below.

The new Act also clarifies certain matters, including:

- That the NSW Health Secretary can order the transfer of both correctional *and* forensic patients from custody to mental health facilities
- That people found unfit for trial and bailed are not forensic patients.

Express reference to persons with cognitive impairment

The *Mental Health (Forensic Provisions) Act 1990* applied to persons who had a cognitive impairment. However, there was almost no reference to cognitive impairment in the Act. The new Act corrects this and clearly distinguishes between the two groups of impairments.

Definitions of 'mental health impairment' and 'cognitive impairment'

The new Act uses the terms 'mental health impairment' and 'cognitive impairment'. The definitions can be found in sections 4 and 5 of the new Act. The terms are used as the basis of eligibility to some diversion orders (which may include treatment orders), the tests for fitness to stand trial, and the determination of criminal responsibility. The definitions modernise the language used under the Act, are more detailed and now provide examples of included and excluded mental health and cognitive impairment

conditions. This will guide health and legal practitioners to better understand the requirements of establishing impairments.

Mental health clinicians should be aware of these definitions when assessing people and writing reports for diversion, fitness for trial, and the availability of the defence.

The terms “mentally ill” and “mentally disordered” (which come from the *Mental Health Act 2007*) are still used in the new Act for certain diversion orders (previous section 33 orders).

Local court mental health diversion

The local court mental health diversion scheme has undergone some small changes.

Diversion for people with a mental health impairment or cognitive impairment

Section 32 of the repealed Act was used to divert people with mental health or cognitive impairments from courts into treatment or support.

This diversion scheme is now found in Part 2 Division 2 of the new Act. The same orders as before can be made with the following changes:

- Magistrates now have a list of considerations to which they can refer when making orders (section 15).
- Where a person fails to comply with their order conditions, they may be called back to court by the Magistrate within 12 months, instead of the previous 6 months (section 16).

Clinicians should be aware of these matters as they may impact on treatment plans for diverted consumers.

Diversion for people who are ‘mentally ill’ or ‘mentally disordered’

Section 33 of the repealed Act provided for the diversion of people who were considered mentally ill or mentally disordered (as defined in sections 14 and 15 of the *Mental Health Act 2007*). This scheme is now found in Part 2 Division 3 of the new Act, and the provisions operate largely the same, allowing magistrates to order that an accused person be taken to a declared facility for assessment or to make a Community Treatment Order (CTO). One key difference is that magistrates no longer have to notify the Secretary of NSW Health of their intention to make a CTO.

Defence and special verdict

There are several changes that relate to the defences and verdicts for serious offences.

1. *The legal test for the defence has been modernised and inserted into the legislation* (section 28).

   This test for the defence of mental illness was previously only found in the common law, not in the Act, and contained outdated language.

   Now, to successfully prove the defence, the person must have a mental health impairment, or cognitive impairment, or both, which had the effect that the person:

   (a) did not know the nature and quality of the act, or

(b) did not know 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).

These changes are not expected to alter the substance of the defence itself but simply make its requirements clearer and more accessible.

2. *The verdict of 'not guilty by reason of mental illness' has been renamed 'act proven, but not criminally responsible'* (section 30).

   The new wording does not functionally alter the verdict or its consequences. However, it better recognises the harm experienced by victims. Additionally, it removes the focus from "mental illness" recognising that a cognitive impairment can also give rise to the verdict.

   Clinicians should note the new name for this verdict when writing court reports for defendants.

Fitness to stand trial

The elements of the question regarding fitness to stand trial are now incorporated into the legislation, as opposed to being found only in the common law.

A person is considered unfit to be tried if they cannot, for example, understand the offence, plead, understand the nature of the proceedings, make a defence, etc. (section 36).

Clinicians should note these elements when assessing and reporting on an accused person's fitness for trial.

There are also some procedural changes to the way the fitness question is dealt with to speed up proceedings. For example, where a person is found by the Tribunal to have become fit for trial, the Court is no longer required to hold a further enquiry as to the person's fitness (section 50(2)).