

GUIDE TO LEGISLATIVE CHANGES

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

The *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*

commences on 27 March 2021

This Act replaces the *Mental Health (Forensic Provisions) Act 1990*.

This guide summarises significant changes brought about by the introduction of the new legislation. It assumes the reader is familiar with this area of the law and accompanies flow charts created by Brian Hancock and Jennifer Wheeler that provide a procedural guide to fitness, mental health and cognitive impairment defences and special verdicts under state and federal provisions. Set out in Table 'A' at the end of this guide is a tabulation of provisions in the old Act and corresponding or equivalent (not identical) sections in the new Act.

Definitions

The new Act contains important definitions that change existing definition and codify others. These include:

Mental health impairment (s.4)

Cognitive Impairment (s.5)

Defence of mental health impairment or cognitive impairment (s.28) (old Mental Illness Defence)

Fitness test (s.36) (codified common law test)

Summary proceedings Part 2 (ss.7-26)

These sections provide alternative orders that can be made in summary proceedings to:

persons with a mental health or cognitive impairment

mentally ill or mentally disordered persons

They have been moved to the beginning of the Act before the Fitness provisions.

The content stays effectively the same but spread out over more sections. There are some clarifying additions such as s.15 which lists matters a Magistrate may consider in deciding whether to make an order in relation to persons with a mental health or cognitive impairment.

Under s.16(4) a Magistrate who has discharged a person with a mental health or cognitive impairment subject to conditions may bring the person back to be dealt with as if the charge had not been dismissed if the person fails to comply with the conditions any time within 12 months. This has been increased from 6 months and this increase in supervision period may make some Magistrates more comfortable to make an order under these provisions.

Defence of mental health impairment or cognitive impairment – Part 3 (ss.27-34)

This is the old Not Guilty by Reason of Mental Illness (NGMI). It is now expressed as:

Special verdict of act proven but not criminally responsible

The test has been codified and is expressed in s.28

(1) A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person—

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

(b) did not know that 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).

Procedural elements remain largely the same:

Test is to be decided by jury on the balance of probabilities: s.28(2)

Explanation to the jury is the same with the addition of a direction they are not to be influenced by the consequences of the verdict: s.29

The Court may enter a special verdict at anytime if the legally represented defendant, prosecutor and Court agree the evidence establishes the defence: s.31

The powers of the Court after the verdict remain the same with the addition of remanding the defendant and ordering reports: s.33(2)

If a defendant is not released unconditionally they are referred to the Mental Health Review Tribunal (Tribunal): s.34

Note: an appeal against a special verdict is available under s.5(1)(a), (2) only if the defence was not set up by the person. The court have allowed appeals where the defence (of NGMI) was raised for the person but against their wishes.

Fitness to stand trial: Part 4 Div 1-2 (ss.35-53)

The fitness test has been codified and is set out in s.36

(1) For the purposes of proceedings to which this Part applies, a person is taken to be unfit to be tried for an offence if the person, because the person has a mental health impairment or cognitive impairment, or both, or for another reason, cannot do one or more of the following—

- (a) understand the offence the subject of the proceedings,
- (b) plead to the charge,
- (c) exercise the right to challenge jurors,
- (d) understand generally the nature of the proceedings as an inquiry into whether the person committed the offence with which the person is charged,
- (e) follow the course of the proceedings so as to understand what is going on in a general sense,
- (f) understand the substantial effect of any evidence given against the person,
- (g) make a defence or answer to the charge,
- (h) instruct the person's legal representative so as to mount a defence and provide the person's version of the facts to that legal representative and to the court if necessary,
- (i) decide what defence the person will rely on and make that decision known to the person's legal representative and the court.

(2) This section does not limit the grounds on which a court may consider a person to be unfit to be tried for an offence.

Procedural elements for an inquiry into fitness remain largely the same. Changes include:

Prior to an inquiry into fitness the Court may now order (not just request) reports:
s.43(d)

In considering whether a defendant is unfit to be tried the court is to consider whether the trial process can be modified, or assistance provided, to facilitate the defendant's understanding and effective participation in the trial, the likely length and complexity of the trial and whether the defendant is legally represented: s.44(5)

Note that the *Criminal Procedure Act (CPA)* provides for the question of fitness to be raised at the committal stage and the Magistrate can commit the accused for trial: ss.93, 94 *CPA*. Where a person has been committed for trial under these sections no case conference is required: *CPA* s.69(c). If the person is subsequently found to be fit there is provision for the matter to be returned for a case conference: s.52 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.

Procedure after an inquiry has changed where the defendant is found unfit.

Instead of referring the defendant to the Tribunal the court decides if the defendant will become fit or not in the next 12 months: s.47. If the court finds defendant will not become fit the matter proceeds to special hearing (unless the DPP decides not to proceed): s.48. If the Court decides the defendant may become fit he or she is referred to the Tribunal: s.49

The referred person is reviewed by the Tribunal: s.78. Where the Tribunal finds a defendant has become fit the matter moves immediately to criminal proceedings (unless the DPP decide not to proceed) – there is no further inquiry into fitness by the Court: s.50

Where the Tribunal finds a defendant will not become fit within 12 months the matter moves immediately to special hearing (unless the DPP decide not to proceed) - there is no further fitness inquiry by the court: s.51

Special Hearing: Part 4 Div 3 (ss.54-68)

The purpose and procedure of the special hearing remains largely unchanged. The following tweaks have been made:

The court may modify court processes to facilitate the effective participation by the defendant in the special hearing: s.55(2)

The Court may permit the defendant not to appear: s.55(8)

The verdict of NGMI obviously replaced by new 'special verdict': s.59

Limiting Term provisions have added the following factors that the Court must take into account: s.63(5)

(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, and

(c) must take into account periods of the defendant's custody or detention before, during and after the special hearing that related to the offence.

Procedures after the imposition of a limiting term have changed. Under the old Act the Court referred the person to the Tribunal to determine if he or she was suffering from a mental illness or a mental condition treatable in a mental health facility. The Tribunal then returned them to the Court with that decision and the Court determined where the person would be detained. Under the new Act the Court imposes the limiting term and orders the defendant be detained in a mental health facility, correctional centre, detention centre or other place then refers them to the Tribunal who is required to review them as soon as practicable: ss.65, 78.

Extension Orders: Part 6 (ss.121-144)

This has been transferred unchanged from Schedule 1 in the Old Act

Remaining Provisions

The remaining provisions deal primarily with Forensic and Correctional Patients and the Tribunal. These are similar to equivalent provisions under the Old Act.

Commonwealth Matters – (Cth) Crimes Act 1914 ss.20B-20BY

Be aware that some procedures where there are Commonwealth offences are different. While the Commonwealth provisions are unchanged by the new Act it may be useful to review these differences.

Unfitness to be Tried

State law applies to Commonwealth offences where there is no inconsistency with Commonwealth law. In relation to unfitness the mode of determining fitness and the test to be applied is regulated by State provisions – the consequences of a finding of unfitness is regulated by Commonwealth provisions.

Significant differences to State provisions:

Upon an initial finding that a person is unfit:

Under State provisions the Court must determine if the person is likely to become fit within twelve months. If the Court determines a person is likely to become fit, they are reviewed by the Tribunal for up to twelve months. Only at the end of the twelve months is a special hearing held. Where the Court determines a person is not likely to become fit a special hearing is held without delay.

Under Commonwealth provisions the Court determines if there is a ‘prima facie case’ before deciding if the person is likely to become fit within 12 months

Special Hearing / Prima Facie Case

There are differences in the procedures and tests between the Commonwealth determination of a ‘prima facie case’ and the State ‘special hearing’.

Limiting Term / Period not exceeding

Under State legislation a limiting term is applied to a person after a special hearing. Under the Commonwealth provisions a person who is found not likely to become fit or has not become fit after 12 months will be detained for a period 'not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.'

Future Review

Under the State provisions a person is reviewed by the Tribunal. Under the Commonwealth provisions they are reviewed by the Attorney General

Special Verdict of Not Guilty Because of Mental Impairment

The Commonwealth provisions provide for a special verdict of not guilty because of mental impairment under the s.7.3 *Criminal Code*. Under the (Cth) *Crimes Act* 1914 where a person is 'acquitted of a federal offence because of mental illness' the Court must order the person detained in safe custody in prison or in a hospital for a period not exceeding the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged.

Significant differences to State provisions:

Under Commonwealth provisions the defence is one of mental impairment:

The definition of mental impairment is different to the State definition of mental impairment and cognitive impairment and includes 'severe personality disorder'

The defence is different and includes where a person was unable to control their conduct as a result of their mental impairment

The verdict is 'special verdict of not guilty because of mental impairment'

It is unclear how a person is dealt with if their special verdict is based on a mental impairment that is not a mental illness

Under the *Crimes Act* the Court determines and imposes a specific period of detainment and the person becomes subject to review by the Attorney General. Under State provisions a person is detained indefinitely and is subject to the review of the Tribunal.

Changes to the *Crimes Act 1900* No 40

The definition for 'mental health impairment' is inserted as s.4C

The offence of Infanticide has been replaced:

22A Infanticide

(1) A woman is guilty of infanticide and not of murder if—

(a) the woman by an act or omission causes the death of a child, in circumstances that would constitute murder, within 12 months of giving birth to the child, and

(b) 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.

(2) A jury may, at the trial of a woman for the murder of her child, find the woman guilty of infanticide and not of murder if the jury is of the opinion that—

(a) the woman by an act or omission caused the death of the child, in circumstances that would constitute murder, within 12 months of giving birth to the child, and

(b) 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.

(3) A woman found guilty of infanticide under this section may be dealt with and punished as if the woman had been guilty of the offence of manslaughter of the child.

(4) Nothing in this section affects the power of the jury on an indictment for the murder of a child to return—

(a) a verdict of manslaughter, or

(b) a special verdict of act proven but not criminally responsible (within the meaning of the Mental Health and Cognitive Impairment Forensic Provisions Act 2020), or

(c) concealment of birth.

s.23A Substantial Impairment has become ‘Substantial Impairment because of mental health impairment or cognitive impairment

Section 23A(1)(a) Reference to ‘substantially impaired by an abnormality of mind arising from an underlying condition’ replaced by:

“substantially impaired by a mental health impairment or a cognitive impairment”

Section 23A(7)(a) Replaced with

that the person is entitled to be acquitted on the ground that the person was not criminally responsible because of mental health impairment or cognitive impairment, or

Section 23A(8) Replaced with

(8) For the purposes of this section, 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 (9) or for other reasons.

(9) 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.

Note: definition of ‘mental health impairment’ has been added as s.4C

Table 'A'

Finding Provisions from the old Act (*Mental Health (FP) Act 1990*) in the new Act

These are equivalent, not identical provisions

Part 1 - Preliminary

Section Title	Old Act	New Act
Name of Act	1	1
Commencement	2	2
Definitions	3	3

Part 2 Criminal proceedings in the Supreme Court and District Court relating to persons affected by mental disorders

Section Title	Old Act	New Act
Application	4	35
Person by whom question of unfitness may be raised	5	39
Basis of determination of question of unfitness	6	38
Time at which question of unfitness may be raised	7	37
Procedure where question of unfitness raised before arraignment	8	40
Procedure where question of unfitness raised after arraignment	9	41
Procedure on raising question of unfitness	10(1), (2), (4) 10(3)	42 43
Determination of question of unfitness	11	44(1), (6)
Conduct of Inquiry	12	44(2)-(4)
Person found fit to be tried	13	46
Committal proceedings following finding of fit to be tried	13A	52
Person found unfit to be tried	14(a) 14(b)	47(2)
Presumptions as to findings concerning unfitness	15	45
Functions of tribunal on referral after inquiry	16	
Orders court may make following determination of tribunal that person will be fit to plead within 12 months	17	
Court to hold special hearing after advice received from DPP	19(1) 19(2) 19(3) 19(4)	55, 53(1), (2) 54 53(4)
Release of certain persons	20	53(3)
Nature and conduct of special hearing	21(1) 21(2) 21(3)(a) 21(3)(b) 21(3)(c) 21(3)(d) 21(4)	56(1) 56(3), (4) 56(5) 56(10) 56(6) 56(7) 56(11)
Judge to try special hearing unless jury election	21A(1) 21A(2)-(6)	56(9) 58
Verdict of judge	21B(1) 21B(2)	59(2)
Verdicts at special hearing	22(1) 22(2) 22(3)	59(1) 62
Amendment of indictment	22A	57

Procedure after special hearing	23(1)-(3) 23(4) 23(5)-(6) 23(7)	63(1)-(4) 63(5)(c) 64 63(6)
Consequences of nomination of limiting term	24(1) 24(2)	
Special verdict of not guilty by reason of mental illness	25	61
Verdict of not guilty	26	60
Reports about accused persons	26A	66
Orders Court may make following determination of Tribunal after limiting term is imposed	27	
Effect on other proceedings of finding on special hearing	28	68
Action to be taken on notification that person is fit to be tried	29	
Procedure after completion of further inquiry	30	

Part 3 - Summary proceedings before a Magistrate relating to persons affected by mental disorders

Section Title	Old Act	New Act
Application	31	8
Persons suffering from mental illness or condition or cognitive impairment	32(1) 32(2) 32(3), (4) 32(3A)-(3D) 32(4A), (4B) 32(5) 32(6)	9, 12 13 14 16 11 26 5
Reports from treatment providers	32A	17
Mentally ill persons	33(1) 33(1A)-(1B) 33(1C) 33(1D), (4B), (4C) 33(2)-(4) 33(4A), (4C) 33(5A)-(5AB), (6) 33(5B)-(6)	18, 19 20 21 23 11 22 24, 7
Transfer from correctional centre or detention centre	35	25
Means by which Magistrate may be informed	36	10

Part 4 – Defence of Mental Illness

Section Title	Old Act	New Act
Explanation to jury	37	29
Special verdict	38(1) 38(2)	30 33(1)(a)
Reports about accused person	38A	33(2)
Effect of finding and declaration of mental illness	39(1) 39(2) 39(3)	33(1)(b)-(d) 33(3) 34

Part 5 – Forensic and Correctional Patients

Preliminary

Section Title	Old Act	New Act
Objects	40	69
Definitions	41	73, 3
Forensic patients	42	72

Forensic Patients

Section Title	Old Act	New Act
Criteria for release and matters to be considered by Tribunal	43	84
Persons found not guilty by reason of mental illness—initial review	44(1) 44(2) 44(3)	78(c) 81
Person found unfit to be tried—initial reviews	45(1) 45(2), (3) 45(4)	78(b) 80
Further reviews by Tribunal of forensic patients	46(1) 46(1)-(3) 46(4), (5)	79, 78(d) 78(f), (e) 77
Orders and recommendations on further Tribunal reviews	47(1) 47(2)-(3) 47(4) 47(5)	81 83 80(1) 80(2)
Transfer of patients	48	82
Tribunal may grant leave of absence	49	94
Other leave of absence	50	96
Termination of classification as forensic patient on unconditional release	51	101(a), (b)
Additional circumstances for termination of classification as forensic patient	52	101(c)-(j)
Effect of unlawful absence on limiting term	52A	102
Classification as involuntary patient	53(1A)-(1C) 53(1)-(2)	106 105
Release on ceasing to be forensic patient	54	107(1), (3)
Extension of status as forensic patient	54A	103
Transfer from correctional centre by Secretary	55	86
Transfer back to correctional centre	56	87
Requests for transfer to correctional centre	57	88
Review by Tribunal of persons awaiting transfer to mental health facility	58	89
Review of persons transferred from correctional centres	59	90
Effect of detention in mental health facility on sentence and parole	60	116

Correctional Patients

Section Title	Old Act	New Act
Reviews by Tribunal of correctional patients	61(1) 61(2) 61(3) 61(4), (5) 61(6)	93, 91(b) 91(d) 100 77 92
Commissioner of Corrective Services to grant leave	62	95
Other leave of absence	63	96
Termination of classification as correctional patient	64	104
Classification as involuntary patient	65	105
Release from mental health facility on ceasing to be correctional patient	66	107(2), (3)

Community Treatment Orders / Enforcement / Tribunal Functions / General

Section Title	Old Act	New Act
Community treatment order	67	99
Breach of orders for release	68(1), (2), (5) 68(3), (4)	109 110
Apprehension of persons not permitted to be absent from mental health facility	68A	111
Apprehended person may seek reconsideration by Tribunal	69	112

Retaking of escapees	70	119
Aiding or permitting escape	71	113
Issue of warrants for apprehension of persons outside State	72	114
Forensic Division to exercise functions	73	148
Matters for consideration	74(a)-(c) 74(d)-(e)	75 84
Victims may make submissions to Tribunal on review of and release of, or grant of leave to, forensic patients	74A	145
Rights of victims	74B	145
Conditions that may be imposed by Tribunal on release or leave of absence	75	85
Tribunal may amend or impose conditions on release or leave orders on application of victims	76	146
Other matters relating to Tribunal functions	76A	147
Notification of expiry of limiting term or extension order	76AA	158
Treatment, detention and care of patients	76B(1) 76B(2) 76B(3) 76B(4)	70(1) 71(a) 71(c) 71(d)
Functions of Commissioner of Corrective Services and Secretary of Department of Justice	76C	162
Security conditions for patients	76D	117
Transfer and transport of patients	76E	115
Appeals against decisions of Secretary	76F	97
Planning for release and leave	76G	118
Person who ceases to be forensic patient or correctional patient may become voluntary patient	76H	108
Forensic patients and correctional patients in the community may be detained and treated under Mental Health Act 2007	76HA	120
Grants of leave do not affect sentences or limiting terms	76I	98
Exchange of information	76J	161
Duties of certain agencies	76K(1) 76K(2)	159 160

Part 5A Victims Register

Section Title	Old Act	New Act
Victims Register	76L	156
Notification to victims	76M	157

Part 6 Miscellaneous

Section Title	Old Act	New Act
Regulations	77	166
Appeals against Tribunal decisions	77A(1)-(3) 77A(4)-(6) 77A(7)-(8) 77A(9), (11)-(12) 77A(10), (13) 77A(14) 77 A(15)	150 151 152 153 154 149 155
Proceedings for offences	77B	163
Orders for transfer of patients	77C	165
Delegation	77D	164