

1. Introduction

Acknowledgments

This guide has been prepared by an interagency Committee of lawyers and mental health professionals. The contributions of the following persons are gratefully acknowledged:

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About this guide

The *Mental Health (Forensic Provisions) Act 1990* (the former Act) and its successor, the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (the Act), provide a mechanism to divert people with mental illness and cognitive impairments from the criminal justice system into the health system. The Act commenced operation on 27 March 2021.

This guide has been prepared to assist lawyers and registry staff to understand and navigate the mental health forensic processes. This is a guide only and should not be used as a substitute for the provisions of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.

All references to provisions in this Guide are to the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* unless otherwise stated.

Note that the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* applies to state offences. For federal offences see [9. Commonwealth provisions](#).

Background to Mental Health Forensic Provisions reform

The NSW Law Reform Commission considered the mental health forensic legislative framework in 2012/3 in Reports 135 and 138

Report 135: People with cognitive and mental health impairments in the criminal justice system: Diversion

Report 138: *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*

Following the Law Reform Commission Reports there was extensive stakeholder consultation before the Act was passed by the NSW Parliament in July 2020. The Act commenced on 27 March 2021.

The key changes in the Act are that it:

- Provides definitions for key concepts, such as mental health impairment and cognitive impairment, that have been revised in light of contemporary understanding of behavioral science and to provide consistency in terminology across the criminal justice system including bail, pre-court diversion, substantial impairment and within the Act itself.
- Codifies the common law in respect of fitness to be tried and the defence of mental illness.
- Replaces the verdict of not guilty by reason of mental illness with the verdict of act proven but not criminally responsible.
- Modifies procedures to streamline the steps following findings of unfitness, the defence of mental illness or cognitive impairment, and imposition of a limiting term.
- Section 32 of the former Act is recast to provide guidance for the Court in determining whether to divert mentally ill or cognitively impaired persons in the Local Court and to clarify the diversionary options available to the court.