The new mental health legislation

The Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW) – an outline of the changes

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(substantially revised from December 2020)

* *The views expressed in this paper are the author's, not necessarily those of Legal Aid NSW*

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2 INTRODUCTION

1. When it commenced (on 27 March 2021), the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) (the '**new Act**') became the new source of law for crime-related mental health issues. It remade and replaced the *Mental Health (Forensic Provisions) Act 1990* (NSW) (the '**1990 Act**')

2. The **new Act** follows reports in 2012 and 2013 by the NSW Law Reform Commission ('**NSWLRC**'), and a review of the Mental Health Review Tribunal ('**MHRT**' or '**the Tribunal**'), as well as an initial Bill (which was shelved) and then several more rounds of consultation (both public and private).

3. It has been a long time in the making, there has been a lot of consultation and it shows: this is the first piece of new legislation I have seen in a long time which does not make me want to throw a brick through the drafter's window. It's not perfect – but then what is?

4. A lot of the new Act will look familiar; a lot of the 1990 Act has just been moved around in order to make it flow a bit more logically. At the end of this paper I've provided a table which cross-references the provisions that I expect are going to be most-used by practitioners.

5. But there are some *big* changes that you should know about. They include:

    5.1. **Newly-defined categories** of mental illness and cognitive impairment.

    5.2. **Section 32 diversions** have had a make-over, including:

        5.2.1. A slight expansion of the categories of conditions which would fall under the legislation;

        5.2.2. There is now specific guidance in the Act about what factors a Magistrate may take into account when making what would've previously been a s 32 diversion; and

5.2.3. The time that a person can be on an old s 32 order is now 12 months, increased from six.

5.3. **Fitness to plead** has been codified, and had a whole extra procedure added on to the end (which would previously have been done at the Tribunal).

5.4. The **defence of mental illness** has had a shake-up:

5.4.1. The new special verdict is now called "***act proven but not criminally responsible***" (changed from the old "*not guilty by reason of mental illness*");

5.4.2. The old *M'Naghten* rules have been codified; and

5.4.3. Some other alterations that will change the procedures where there is agreement about the special verdict, or where there is a jury.

6. This paper is a legislative update, meaning it assumes at least a minimal level of understanding of the pre-existing regime; it's not a "mental health and cognitive impairment 101".

7. It's also not a tactical manual – if you want a paper on the tactics involved, then feel free to let me know.

8. Finally, this paper also doesn't address the Commonwealth scheme – again, if you want more information about that (or you have questions), let me know: **THOMAS.SPOHR@LEGALAID.NSW.GOV.AU**

> *… to define true madness, What is't but to be nothing else but mad?*
>
> - Polonious [1]

3 New definitions, and Interpreting the new Act

9. Before we dig into the definitions, there is a range of secondary material out there which might help if you need to interpret the new Act.

10. Among them are the two NSWLRC reports:

    10.1. **Report 135:** ***People with cognitive and mental health impairments in the criminal justice system: Diversion*** (August 2012); and

    10.2. **Report 138:** ***Criminal Responsibility and Consequences*** (June 2013).

11. At about 500 pages each, the reports are pretty long. But they are also pretty accessible, and if you ever need guidance on how this area of law works, you will almost certainly find something helpful in there – Ctrl-F is your friend.

12. You will also see that I have occasionally cited the Second Reading Speech in this paper; it is particularly important in interpreting one phrase which is not defined in the new Act.

[1] William Shakespeare, *Hamlet*, Act II, Scene II, lines 95-96.

13. It should be said, however, that the two core definitions in the new Act which we are about to examine – "***mental health impairment***" and "***cognitive impairment***" – have definitions which are pretty inscrutable for lawyers.

14. This is probably payback by forensic psychiatrists and psychologists, who have spent their entire careers trying to translate their clinical language into our forensic language. Now, we just have to get used to theirs.

15. In practice, it probably means that where there is a doubt about how to apply those definitions you're probably going to need advice from a psychiatrist or psychologist, rather than the case law.

What are the new definitions?

16. Under the new Act, two core definitions / categories are used consistently throughout as applying to each of the types of applications / orders (i.e. diversions, fitness, and defence of mental illness):

    16.1. A "***cognitive impairment***"; or

    16.2. A "***mental health impairment***".

17. **"Cognitive impairment"** as a category has been largely lifted from the old s 32 and so looks much the same as it did under the 1990 Act – the definition is now in **s 5** of the new Act.

18. There are two changes, although I confess that at the time of revising this paper (in May 2021), it's still unclear to me what will be their effect.

19. The first is that the words "… *materially affects the person's ability to function in daily life*…" have been deleted from the definition. In the absence of expert psychiatric interpretation it's not clear to me what practical difference that makes – but logically I think it can only really make it easier for a condition to fall within the definition, and seems to be a positive development.

20. The second change arises from the way that they've broken down the original definition into subsections. Let me illustrate:

20.1. The old definition, from the **1990 Act** s 32(6):

> *cognitive impairment means ongoing impairment of a person's comprehension, reasoning, adaptive functioning, judgment, learning or memory that materially affects the person's ability to function in daily life and is the result of damage to, or dysfunction, developmental delay or deterioration of, the person's brain or mind, and includes (without limitation) any of the following:*
>
> *[a list of examples follows]*

20.2. And the new definition from the **new Act** s 5(1):

> *(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.*
>
> *[Sub-section two then gives the same list of examples from the 1990 Act]*
>
> [**Emphasis** added]

21. Close comparison shows a subtle but potentially important raising of the bar: adaptive functioning has been separated out as its own inidependent requirement. Under the old definition, an ongoing impairment of adaptive functioning was just *one* of a list of things that might have been impaired. Now, the defendant *must* establish ongoing impairment in adaptive function, *in addition to* one of the other domains of impairment.

22. Again, in the absence of advice from a clinician – and, probably more importantly, without this being tested "in the wild" on a range of people who

actually have relevant conditions – it's very difficult for me to comment intelligently on what effect the change might have.

23. "**Mental health impairment**" is a new concept, and the definition is found in **s 4** of the new Act. It requires that

    23.1. the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and

    23.2. the disturbance would be regarded as significant for clinical diagnostic purposes, and

    23.3. the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

24. The definition then gives a non-exhaustive list of examples of mental health impairments, including anxiety disorders, affective disorders including bipolar, a psychotic disorder, or a substance induced mental disorder that is not temporary. It does, however, explicitly *exclude* temporary intoxication, and it excludes substance use disorders.

25. As to what kind of a disturbance would be regarded as "clinically significant", the legislation is silent. The Second Reading speech mentions that

> *… "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.*[2]

26. It will be essential for you to extract those words (indeed, the whole definitions) in letters of instruction to psychologists / psychiatrists, as part of helping them (as well as us) ease into the new definitions.

[2] New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2020, 32-3 (Mark Speakman, Attorney General, and Minister for the Prevention of Domestic Violence).

A madman is only punished by his madness.

- Sir Edward Coke [3]

4 Changes in the Local Court

27. Under the 1990 Act, we've all developed a shorthand where we call s 32 diversion "a section 32", and a s 33 dismissal "a section 33" and everybody just knows what you're talking about. The section numbers are different now, but there's no shorthand way of consistently referring to what they are in this paper, other than to use the original sections.

28. So here I'm still just calling them a "s 32" and a "s 33" and you're just going to have to cope with it. Sorry.

4.1 Section 32 diversions

29. Section 32 diversions have not been expanded into the District Court. Everybody asked for it and the NSWLRC recommended it, but it was all a bit much for the Government, who did not progress it as a proposal. That's why this section is still called '**Changes in the Local Court**'.

[3] *A commentary upon Littleton (The first part of the institutes of the laws of England)* (1628) 19th ed., 1832, 247b.

30. During the Second Reading speech it was touted that s 32 orders make up "*… fewer than 2 per cent of criminal cases dealt with by the Local Court, with even fewer under section 33*."[4] If you pause to think about it, that's actually quite a large number, because for example in the 2019 calendar year the Local Court finalised 351,852 criminal matters.[5] Two percent translates to something like **7,000** s 32 orders a year – and that's not counting the applications that were made but not allowed.

31. What *was* s 32 can now be found in **Part 2, Division 2 (sections 12-17)** of the new Act. Arguably, we should now be calling them "**a section 14**", because that is where the dismissal power is.

32. If you don't look too closely at the division, you'd be forgiven for thinking it looks very similar, but there are some *major* revisions.

When can an order be made?

33. As always, a diversionary order can be sought and made at *any time* during the proceedings. To emphasise that fact, helpfully, the new Act specifies that **it is not necessary to enter a plea** in relation to the proceedings in order to get either a s 32 or a s 33 order: see **s 9(1)** of the new Act.

What conditions fall under the section?

34. Under the 1990 Act there were three categories of illnesses that could be sufficient for a s 32:

    34.1. A cognitive impairment;

    34.2. A mental illness; or

[4] New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2020, 33 (Mark Speakman, Attorney General, and Minister for the Prevention of Domestic Violence).
[5] Local Court of New South Wales Annual Review 2019,

34.3. A "mental condition for which treatment is available in a mental health facility"

All of which assumed that the person was *not* a "*mentally-ill person*" (as defined in the *Mental Health Act* – more on which, below).

35. Under the new Act, an order is available to anybody with either a **cognitive impairment** or a **mental health impairment** – see above, at [16]*ff*.

36. For the reasons set out above, it seems to me that the definitions of those categories probably result in a modest expansion of the people who will fall under the new s 32 (particularly by the explicit inclusion of cognitive impairments) – although to be honest this is the sort of thing that will have to be tested in the wild before we will know for sure.

What does a Magistrate have to take into account in making the decision whether to make the order?

37. The next big change is that there is now a discretionary list of criteria that a Magistrate "***may***" take into account when deciding whether it is more appropriate to deal with the accused at law, or by way of diversion. **Section 15** of the new Act sets them out:

> *(a) the nature of the defendant's apparent mental health impairment or cognitive impairment,*
>
> *(b) the nature, seriousness and circumstances of the alleged offence,*
>
> *(c) the suitability of the sentencing options available if the defendant is found guilty of the offence,*
>
> *(d) relevant changes in the circumstances of the defendant since the alleged commission of the offence,*
>
> *(e) the defendant's criminal history,*
>
> *(f) whether the defendant has previously been the subject of an order under this Act or section 32 of the Mental Health (Forensic Provisions) Act 1990,*

> *(g) whether a treatment or support plan has been prepared in relation to the defendant and the content of that plan,*
>
> *(h) whether the defendant is likely to endanger the safety of the defendant, a victim of the defendant or any other member of the public,*
>
> *(i) other relevant factors.*

38. Many of those criteria simply reflect the pre-existing common law of what was to be taken into account as being "*appropriate*" circumstances for the making of an order. However, several of them (specifically **sub-ss (a), (d), (f) and (h)**) are new, and came from the NSWLRC or elsewhere – again, if you need assistance in interpreting those specific sections, you may be able to go back to the NSWLRC reports for guidance.

39. Of the criteria, there is only space to draw attention to a couple.

40. Criterion (g) draws attention to whether there is a treatment or support plan. "***Treatment or support plan***" is defined to mean

> *… a plan outlining programs, services or treatments or other support that may be required by a defendant to address the defendant's apparent mental health impairment or cognitive impairment.*[6]

41. This may not make much practical difference, because I think most reports already included a treatment plan. But many practitioners will be aware of Magistrates who considered it to be effectively a *precondition* to the granting of an order. So it is worth pointing out that there is now a statutory factor there; if it wasn't a de facto requirement to have a treatment plan before, then it is now.

42. There is still no strict requirement that the treatment plan be drafted *by a mental health professional*, though. So whilst it might be less persuasive, in a pinch it is certainly still possible under the new legislation to come up with a treatment plan yourself.

[6] New Act, s 7(1).

43. Of more concern is criterion (c): "*the suitability of the sentencing options available if the defendant is found guilty of the offence*". Despite my earlier positive comments about the drafting, in my view this wasn't a good use of language.

44. It seems to me that the preferable interpretation (from a defendant's point of view) is that this criterion is mainly engaged when the other sentencing options are ***un***suitable for some reason. For example, where the only option would be a fine (which many mentally-ill, indigent clients simply cannot pay).

45. The opposing view is that this criterion is engaged when a CRO, CCO or ICO could theoretically achieve the same practical goals as diversion. But it will *almost* always be possible to have the same conditions under a CRO, CCO or ICO as under a s 14 diversion – so what work would the sub-section have to do?

46. Putting it another way, my view is that criterion (c) is a factor designed to *facilitate* or *assist* defendants getting orders, not a factor designed to weigh *against* an order.

The threshold test

47. The threshold test for whether you can get a diversion has ultimately not changed. **Section 12(2)** reads:

> *The Magistrate may take action under this Division only if it appears to the Magistrate, on an outline of the facts alleged in the proceedings or other evidence the Magistrate considers relevant, it would be more appropriate to deal with the defendant in accordance with this Division than otherwise in accordance with law.*

48. That threshold – that they "*may*" divert if it is "*more appropriate*" – is the same, and is basically the definition of a discretionary decision. That it is discretionary might be important for appellate law wonks who lie in bed thinking about "*House v The King* error" in subsequent Supreme Court appeals – but it probably doesn't matter when you're making the initial application in the Local Court – but it *does* mean that you need to tailor your applications to

your audience, since the outcomes for discretionary decisions are as varied as the decision-makers making them.

The outcomes and length of the orders

49. Assuming the defendant falls within the legislation, the steps that can be taken are also the same as under the 1990 Act. **Section 14** provides that the available options are discharge:

    49.1. Unconditionally;

    49.2. Into the care of a responsible person (with or without conditions); or

    49.3. Upon condition that the defendant attend a place to have their mental health condition assessed.

50. As I say, this remains essentially the same as it was under the 1990 Act – including the fact that conditional discharge typically means release into the care of a "*responsible person*". Anybody who has ever tried to get a s 32 for a person in custody, or for a person who is iterant and unsupported when in the community, will know the difficulties that often arise in trying to find someone who can be the responsible person.

51. The legislation proceeds on the basis that there should be someone who (theoretically, at least), could bring the matter back before court if there is non-compliance with the order. It is unfortunate that there wasn't a little more flexibility built into this arrangement, but given that (presumed) justification, it is at least explicable.

52. Practitioners will just need to continue being creative (and / or judicial officers will need to continue to be pragmatic) about who can be a responsible person for the purposes of s 32 discharges.

53. One thing that *has* changed is that the conditions can now last for up to **12 months**, increased from the original six months (see **s 16**). This was widely sought and should be viewed as a really positive development.

54. **Section 14(2)** also still provides, as before, that a disposition under the section is still not a finding that the charge is proven or otherwise. This is worth emphasising, because old s 32 matters will often come up on a Bail Report when people are making bail (release) applications.

55. You should be prepared to remind judicial officers at all levels that the consequence of **s 14(2)** is that it is not safe or appropriate to take a determination into account in any context other than in a subsequent application for an order (because of s15(f) – see above at [37]-[38]).

4.2 SECTION 33

56. The old s 33 looks very much it used to. The equivalent is now to be found in **Part 2, Division 3 (ss 18 – 24)**. Specifically, the power to detain the person for assessment, and / or to discharge them, is now to be found in **s 18**.

57. However, there has been a *bit* of an expansion.

58. Previously a s 33 would only be available if the defendant was a "***mentally ill person***". That definition comes from *Mental Health Act 2007* (NSW) s 14:

> *(1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary—*
>
> *(a) for the person's own protection from serious harm, or*
>
> *(b) for the protection of others from serious harm.*
>
> *(2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.*

59. The new s 33 has been expanded to include "***mentally disordered***" people. That definition comes from *Mental Health Act 2007* (NSW) s 15:

> *A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary—*
>
> *(a) for the person's own protection from serious physical harm, or*
>
> *(b) for the protection of others from serious physical harm.*

60. As I understand it, the main effect of providing that "***mentally disordered***" people now fall under the section is that it allows for referral (and / or dismissal of charges) for people who are behaving irrationally but may not have a formal diagnosis of a mental illness; it slightly lowers the bar for the level of certainty before people can be referred. I also understand that there was a

bit of a disconnect under the 1990 Act because under s 33 the person could be referred for *assessment* if they were a mentally disordered person, but dismissal was not available. Again, this seems like a sensible (if perhaps not unambiguously) positive development.

61. One other change is that a person who has been sent to a mental health facility for assessment must be returned to court "***as soon as practicable***" rather than at the current discretion of police (unless they have been granted bail by the police).[7]

Length of the order – no change

62. One thing that has *not* changed is the length of time that a person can be subject to a s 33: it remains **six months**.[8]

63. I understand that keeping the time limit to six months would be welcomed by most Local Court practitioners because this way a defendant who has been involuntarily held in a mental health facility for (say) seven months won't be forced to return to court for the matter.

4.3 Transitional arrangements

Short version

64. The transitional arrangements for these matters will lead to an *incredibly* long tail of matters which are subject to the old Act. In summary:

    64.1. If proceedings had already been instituted when the New Act commenced, then the **1990 Act** applies – even if the prosecution

[7] New Act, s19(b).
[8] New Act, s 23(1).

subsequently adds a new charge (sequence) to those proceedings (i.e. a new sequence on an old H-number).

64.2. If the proceedings are completely new, then the **new Act** applies.

Slightly longer version – where proceedings commenced before commencement

65. After the new Act was passed, but before it had commenced, legislation was passed amending the commencement arrangements; you'll want to make sure you're reading the most recent version of the legislation.

66. Following the passing of the *COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021* (NSW)[9] the legislation now provides that the old Act applies to "***existing proceedings***", which is defined as

> *… criminal proceedings for which a court attendance notice was issued before the commencement of this Act, even if another court attendance notice is issued in relation to the proceedings after that commencement.*

67. For example, it means that the old Act applies in this scenario:

67.1. A charge is laid on 1 January 2021, and given reference H123456789;

67.2. The new Act commences on 27 March 2021;

67.3. An additional sequence is added to the proceedings with number H123456789 on 1 June 2021, on the day of hearing.

67.4. The **1990 Act** applies to that charge, even though it was commenced after the new Act started.

68. This could mean that the tail for matters under the old Act might be *several years*. For example, in the above example, if the person is convicted in their absence in January 2021, has their conviction annulled by the Local Court in

[9] Which must be in the running for "least concise title ever".

December 2022, goes to hearing, gets found guilty, and appeals to the District Court, they would still be subject to the old Act more than two years after the old Act has been repealed.

69. The result is that you'll probably want to keep a copy of the 1990 Act around for some time yet – and you should absolutely be careful to check commencement dates for proceedings, at least until about the end of 2021 (given the backlog of matters caused by COVID-19 delays).

> *… no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing.*
>
> - Lord Kenyon CJ [10]

5 Fitness to plead

Introduction

70. Fitness to plead can arise as an issue at any time in any criminal matter. Nevertheless, the legislation focuses exclusively on matters being dealt with *on indictment*, and says nothing about what to do if a client is unfit to plead in the Local Court in a summary matter.

71. So, for matters that are staying in the Local Court, the common law still applies: an unfit defendant in summary proceedings must either get a s 32 / s 33 or the proceedings must be stayed.[11]

72. It's unclear just how many people are found unfit to plead in the District and Supreme Courts each year, but about 30-40 people a year are referred to the MHRT following a finding of unfitness by a court.[12]

[10] *Proceedings in the case of John Frith, for High Treason, at Justice Hall in the Old Bailey, on Saturday April 17:30 George 3rd* (1790). Howells State Trials. Volume 22 (1783–1794) p308.
[11] *Mantell v Molyneux* [2006] NSWSC 955
[12] Mental Health Review Tribunal, *Annual Report* 2018-19, 49.

73. The changes that have been made to fitness are a mixture of codification and a genuine change in procedure.

74. Fitness was previously spread out through bits of the 1990 Act in uneven clumps, like someone had tried to spread refrigerated butter onto a bit of cold toast.

75. Now, fitness has its own part: **Part 4 (ss 35-53).** Within that Part, **Special Hearings** takes up **ss 54-68**.

The "new" test for unfitness

76. The test for fitness has long been held to have been correctly stated in *R v Presser* [1958] VR 45, at 48. In fact, we've used *Presser* for so long that we even became numb to the fact that the case was Victorian. Leaving aside the clear failings of its place of origin, the test has served us well for a long time and includes a robust collection of the factors relevant to a fitness determination.

77. Unsurprising, then, that when it was codified, we got basically the same test but broken down a bit more effectively. **Section 36(1)** of the new Act reads:

> *(1) … 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.*

78. The *other* part of the test is buried under "**Inquiry procedures**" in the new **s 44(5)**, which provides:

> *(5) In addition to any other matter the court may consider in determining whether the defendant is unfit to be tried for an offence, the court is to consider the following—*
>
> *(a) whether the trial process can be modified, or assistance provided, to facilitate the defendant's understanding and effective participation in the trial,*
>
> *(b) the likely length and complexity of the trial,*
>
> *(c) whether the defendant is represented by an Australian legal practitioner, or can obtain representation by an Australian legal practitioner.*

79. Personally I think there's a missing "and" in the drafting of **s 44(5)**, but it is tolerably clear that the court has to consider all of them.

Discussing the "new" test

80. At its core, it seems unlikely that the codification of this part of the fitness assessment process will have any major consequences, but there are still a couple of interesting things in this "new" test.

81. Firstly, unfitness can be because of a **mental health impairment**, or a **cognitive impairment**, both or (and this is the interesting bit) "***for another reason***".

82. That means that, say, a person who has seriously impaired communications skills could potentially fall within the section, notwithstanding that their communication deficits might not be related to a mental illness or a cognitive impairment.

83. Because the *Presser* criteria themselves are already well-worn, there's no need for me to do a thorough analysis here of the criteria themselves. However, I will say that my experience has been that many psychiatrists drafting fitness reports applying *Presser* have tended to ask defendants questions about who the various players in a court room are: "who is the judge and what is their role?", "what is a jury and what is their role?", "who is your lawyer and what is their role?".

84. Many clients (even clients who are ultimately fit to plead) struggled with those questions; I think maybe they were a bit existential so that some clients struggle to get beyond "they're just… people?".

85. My point is that if you were just applying the criteria from **s 36(1)** without the decades of pre-existing experience, you probably wouldn't ask those questions, so it is possible that they will become less of a feature of reports. And for my part I think that is fine.

86. However (and even though I said above that this isn't a paper about tactics), I should still point out that a finding of unfitness is, for most clients, not a desirable outcome. It can take longer to get the matter heard (even with the improvements set out below), and once the matter is heard the outcomes can be as punitive or even worse than if the matter were simply finalised at law – particularly when compared to using with the mitigating factor of serious mental health issues on sentence. Unfitness to plead is an unfortunate and necessary part of our criminal law – but it's not an outcome we should be straining for if there is a genuine alternative.

What happens *after* a fitness inquiry?

87. If a person is found **fit** at an inquiry, things just continue – that hasn't changed (see **s 46**)

88. What *has* changed is what happens if they are found **unfit**. Previously, the person would have been referred off to the MHRT for assessment of whether they were likely to become fit in the next 12 months. Depending on the outcome of that inquiry, their matter might be in a holding pattern for quite a long time indeed before the matter returned to court.

89. Under the new Act, after determining that a person is unfit, *the court* (not the MHRT) needs to decide whether the person is likely to become fit in the following 12 months: **s 47**.

90. Making that decision at court largely mirrors the Commonwealth legislation, and more importantly removes quite a large delay for many matters. It is a particular improvement in those cases were it is inevitable that the person will *never* become fit (say because of an organic brain disorder); for those people, waiting on the MHRT to formalise the inevitable finding that they would not become fit in 12 months was a waste of time which is now saved.

91. If the defendant *might* become fit within the next 12 months, then they are referred off to the MHRT for management in the interim: **s 49(1)**.

92. But, if a court decides that the person will *not* become fit in the next 12 months, the person goes straight into Division 3, which deals with **Special Hearings**.

93. However, upon reflection, it would appear that the drafting of the section could cause difficulty in some cases. Section 47(1) reads like this:

> *If a defendant is found unfit to be tried for an offence following an inquiry, the court must also determine whether,* ***on the balance of***

> ***probabilities**, during the period of 12 months after the finding of unfitness, the defendant—*
>
> *(a) **may** become fit to be tried for the offence, or*
>
> *(b) **will not** become fit to be tried for the offence.*
>
> *[**emphasis** added]*

94. The language of the section is difficult to reconcile, because it's a mixture of different statements of levels of satisfaction:

    94.1. The "***balance of probabilities***" in the chapeau is a statement about one level of certainty (more than 50%);

    94.2. "***May***" is a statement about a *possibility* (anything greater than about 0%); and

    94.3. "***Will not***" is a statement about a *clear expectation* (0% or thereabouts).

95. That is, it requires that a court make an assessment of the probability of the existence of a possibility.

96. If that makes you go cross-eyed, you are not alone.

97. An example might help. Imagine a defendant who has never been treated for chronic schizophrenia, who refuses to be treated, and whom the doctors think probably wouldn't become fit, even if they *were* treated. For that person, strictly speaking they "may" become fit (given they've never been treated), but it seems so unlikely that it makes it difficult to delay progressing the matter (probably for 12 months) against a possibility which the expert evidence suggests is unlikely.

98. Upon reflection (and I was one of the many people who didn't notice this problem until I actually had to apply it in a hearing), I think this was poor drafting. It was trying to get over a genuine problem – the unnecessary delays caused when people who could not become fit were sent to have that decision rubber-stamped – and it also reflects a policy position that if there is any

chance that a defendant may become fit, then that should be pursued. But I think the mixing of different statements about probabilities is unwieldy.

99. Having now attempted to apply the test with the current wording, my own view is that it would have been preferable if the section simply provided something like "The court must refer the defendant to the Tribunal unless there is no reasonable possibility that the defendant will become fit in the 12 months following the finding." It has only been a few months since commencement; it's probably too early to already be agitating for legislative change.

5.1 Special hearings

100. Special Hearings don't get their own special title page, mainly because I couldn't find a pithy quote to go at the top of the section. But also, you only get to a Special Hearing if you are found unfit to plead.

101. As set out above, if the court finds a defendant unlikely to become fit in the next 12 months, and the DPP indicate that they are still proceeding with the matter, the defendant is to face a so-called **Special Hearing**, being a hearing which is, "*as nearly as possible*", supposed to replicate a normal trial.[13]

102. The procedures for a Special Hearing are set out in **Part 4, Division 3 (ss 54-68)** of the new Act (that is, it's under the Part that deals with fitness generally).

103. Four changes are made under the new Act, all quite positive:

    103.1. If the court thinks it is appropriate, it can modify court processes to facilitate the effective participation of the defendant (**s 56(2)**);

    103.2. In appropriate circumstances the hearing can happen without the defendant being present – either because they do not want to at tend, or because they need to be excluded (presumably because of inappropriate behaviour) (**s 56(8)**);

    103.3. Importantly, if the defendant is found guilty, the court "must" take into account that the defendant may not be able to demonstrate mitigating factors for sentence, or make a guilty plea for the purpose of obtaining a sentencing discount. The court is also permitted to apply a discount representing part or all of the discounts for those things (**s 63**); and

    103.4. Where the court determines that it would otherwise have imposed a sentence of imprisonment, the court simply imposes a limiting

[13] The reference to as nearly as possible replicating a trial comes from s 56 of the new Act.

term and refers the defendant to the MHRT for treatment and supervision (**ss 63(2)** and **65**). This is a significant improvement over the current situation, where the person is bounced back and forth between the jurisdictions.

5.2 Transitional arrangements

104. For both fitness and Special Hearings, the legislation provides that those provisions started on commencement (i.e. on 27 March 2021) – including for proceedings commenced but not yet finalised.

105. In other words, for almost all people, the new Act will apply in relation to fitness and special hearings, even if the proceedings were underway when the new Act commenced.

106. One minor exception exists, having been added by amendment before the new Act commenced.[14] That amendment will impact a vanishingly small number of people. The 1990 Act will continue to apply for people who:

    106.1. Have previously been found unfit;

    106.2. Went to a Special Hearing;

    106.3. The offence was found to be established;

    106.4. They received a limiting term; and

    106.5. The Tribunal has not yet made its consequential orders under s 27 of the 1990 Act.

[14] *COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021* (NSW) – see above, n9, for snide remark about the title.

Insanity vitiates all acts.

- Sir John Nicholl [15]

6 The mental illness defence

Introduction

108. About 30 people were found to be "Not Guilty by Reason of Mental Illness" ("**NGMI**") in 2018-19.[16] That small number presumably reflects the fact that in all but a very limited set of circumstances, like unfitness, the indeterminate, compulsory, and (necessarily) invasive outcomes for forensic patients who have been found NGMI is not the best possible outcome.

109. In the new Act the mental illness defence is found in **Part 3 (ss 27-34)**.

A new name for the defence

110. The headline most people have probably already heard is that the name has been changed to "***act proven but not criminally responsible***" (**s 30**).

[15] *Countess of Portsmouth v Earl of Portsmouth* (1828) 1 Hag. Ecc. 355, at 359.

Look, I know it hasn't been "insanity" for a while. But it was insanity for a whole lot longer than it was "Not Guilty by reason of Mental Illness" – and now it's not even NGMI anymore. Also, where did the "R" go in the initialism / abbreviation? Shouldn't it always have been NG**R**MI?

[16] New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2020, 33 (Mark Speakman, Attorney General, and Minister for the Prevention of Domestic Violence).

111. According to the Attorney General in the Second Reading Speech, this name change was made in deference to victims and their families, because it was traumatic to hear that the defendant was 'not guilty'.[17]

112. Accepting that might well be true, in the very next paragraph of the Second Reading Speech, the AG immediately took to abbreviating the new defence to 'NCR': '***Not Criminally Responsible***'. Minds might differ about whether NCR is more or less traumatic than the original title.

The "new" test for mental illness

113. Everybody with a law degree is aware of the existence of the so-called "*M'Naghten* rules", named after the case of ***Queen v M'Naghten* (1843) 8 E.R. 718**.

114. We've become numb to the esoteric spelling, and we somehow came to peace with the fact that our rules for when a person is mentally ill were settled at a time when bloodletting and phrenology were in full swing; if it ain't broke, I suppose.

115. The *M'Naghten* rules remained important because previously there was no specific *legislative* rule for when a person might have the defence available – we just applied the common law.

116. So in the new Act they've codified the *M'Naghten* test: **s 28(1)**. That is, the special verdict will be available if:

    116.1. The person doesn't know the nature and quality of the act; or

    116.2. They did not know that the act was wrong (that is, they could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

[17] New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 June 2020, 34 (Mark Speakman, Attorney General, and Minister for the Prevention of Domestic Violence).

117. That said, there *has* been a bit of an expansion, and that's in what the *source* of that defect was. Previously we were just left with the Victorian-era language of "a disease of the mind".

118. As set out repeatedly above, the new Act allows that the defendant might have been suffering from either a **mental health impairment** or a **cognitive impairment** or both – for the definitions see above at [15]*ff*.

Verdict by consent

119. One reasonably positive change is that, in **s 31**, the new Act allows for the parties to agree on a verdict of NCR. In theory that seems intended to streamline things, although **s 31(c)** still requires the court to consider the evidence and satisfy itself that the defence is established.

120. Potentially the way to deal with that would be to have a single set of agreed facts which encapsulates all the relevant facts as well as the medical evidence, but it remains to be seen.

Explanation to the jury

121. The new Act codifies another aspect of the common law, which was to the effect that the effect of the special verdict should be explained to the jury, but the jury should be directed that they should not be influenced by the consequences of a special verdict in reaching their decision: **s 29(e)**.

"Clearing the indictment"

122. The new **s 32** provides that a special verdict in relation to a principal count does not result in a requirement of entering a verdict on alternative counts as well.

123. This is a pretty niche change, which I think is there to cope with the rule that an indictment must be "cleared" by way of verdicts.

Judge can seek an order in relation to dangerousness

124. Lastly, following the entry of a special verdict, if the judge is considering ordering the release of the defendant, they can now seek a report from a forensic psychiatrist (who is not the current treating psychiatrist) as to whether the release of the defendant is likely to endanger the defendant or a member of the public: **s 33(2)**.

6.1 Transitional arrangements

125. In relation to the mental illness defence, when the new Act commenced on 27 March 2021:

    125.1. For all new matters, those will (obviously) fall under the new Act.

    125.2. In all but one respect, the 1990 Act will continue to apply to proceedings commenced but not yet finalised at that time, provided that

    > *… a question has been raised before that commencement as to whether the defendant was, at the time of commission of the offence, mentally ill as referred to in section 38 of the [old Act].*[18]

    However, the verdict will be the *new* verdict ("NCR").

126. In fact, not only will the change of name be prospective, but all *previous* verdicts of NGMI will be renamed to NCR.

127. As for matters which were already in the pipeline as at the date of commencement, I confess to being unclear on what it means to have "*raised*" a "*question*" of mental illness defence. For example, will it have been "raised" if the

[18] New Act, Schedule 2, cl.5.

defendant was found unfit at a fitness hearing which happened after a committal for trial, but before arraignment?

128. That is, if the only thing that has happened is a fitness hearing? What about if they were arraigned, and indicated that they wanted a judge-alone trial because the only issue was the availability of NGMI, but then absconded?

129. Hopefully the class of people in this edge-case category of cases is very small – but for those people, the consequences could be quite significant. If you have one, I would be fascinated to hear about it.

7 Cross-referencing common sections between the old and new act

By topic

Old topic	Old Section(s)	New Section(s)
Section 32 dismissals	Section 32	Part 2, Division 2 (ss 12 – 17)
Section 33 dismissals	Section 33	Part 2, Division 3 (ss 18 – 24)
Fitness to plead	Sections 5-20, 29-30	Part 4 (ss 35 – 53)
Special Hearings	Sections 19-28	Part 4, Division 3 (ss 54 – 68)
Mental illness defence	Part 4	Part 3 (ss 27 – 34)

By old section

Old Section	New section	Topic
s 5	s 39	Who can raise fitness
s 6	s 38	Standard of proof for fitness
s 8	s 40	Procedure where fitness raised before arraignment
s 9	s 41	Procedure where fitness raised after arraignment
ss 10(2),(4)	s 42	When a fitness inquiry is required to be held
s 10(3)	s 43	Actions pending fitness inquiry
s 11(1)	s 44(1)	Fitness determined by judge alone
s 11(2)	s 44(6)	Fitness determination must include findings of law and fact
s 12(1)	s 44(2)	Defendant to be represented in fitness inquiry,
s 12(2)	s 44(3)	Fitness inquiry is not adversarial
s 12(3)	s 44(4)	No particular onus in fitness inquiries

Old Section	New section	Topic
s 13	s 46	Where defendant fit, proceedings recommence or continue
s 15	s 45	Presumptions about people already found fit / unfit
s 19(1)(b)	s 55(1)	When Special Hearing must be held
s 19(2)	s 54	Nature of a Special Hearing
s 32(1)	ss 9, 12	Section 32 diversion - test
s 32(2)	s 13	Adjournment under s 32
s 32(3)	s 14	
s 32(3a)	s 16	Time limit for s32
s 32a	s 17	Reports from treatment providers
s 33	s 18	Section 33 – eligible persons
s 33(1)	s 19	Orders under a s 33
s 33(2)	s 23(1)	Section 33 dismissal after six months
s 33(3)	s 23(2)	Magistrate must take account of time detained under s 33
s 33(4)	s 23(3)	Section 33 order is not a finding that charges are proven or otherwise
ss 33(1a), 33(1b)	s 20	Availability of Community Treatment Orders
s 33(1d)	s 21	Section 33 before authorise justice
ss 33(5b),(5c), (5d)	s 24	Bail orders in relation to s 33 matters
s 36	s 10	Means of informing Magistrate
s 38	ss 28, 30	Defence of mental illness
s 37	s 29	Explanation to jury of impacts of special verdict
s 39	s 33	Effect of NGMI