Forensic Provisions Act amendments

By Anina Johnson, Deputy President of the Mental Health Review Tribunal

Introduction

On 27 March 2021, it is expected that the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA) will commence, replacing the *Mental Health (Forensic Provisions) Act 1990* (MHFPA).

The MHCIFPA is the result of both the MHFPA and the common law having been given the full Marie Kondo treatment.

All of the legislative provisions and the common law tests have been tipped onto the bed. The items that do not spark joy have been discarded. There are some carefully curated new items. The remainder has been tidied up, arranged neatly into drawers and carefully labelled.

So what happened during this decluttering process?

Background

In 2012 and 2013, the NSW Law Reform Commission delivered two reports on *People with cognitive and mental health impairments in the criminal justice system: Diversion* in June 2012 and *Criminal responsibility and consequences* in May 2013. The Commission suggested streamlining aspects of the criminal processes, improving transparency by codifying the common law and reviewing the MHFPA for clarity and comprehensibility.

Generally speaking, those reforms have been implemented in the new MHCIFPA.

New definitions of mental health and cognitive impairment

Defining a mental health or cognitive impairment is a challenging brief, as the definition needs to be capable of adapting to changing clinical ideas. In the MHCIFPA, each definition has a set of general descriptors, followed by examples of conditions that meet the definition.

These definitions are then used in considering fitness, the defence of act committed but not criminally responsible, the diversion provisions and aspects of the *Crimes Act*.

The definitions are in ss 4 and 5 of the MHCIFPA as follows:

4 Mental health impairment

(1) For the purposes of this Act, a person has a mental health impairment if—
  (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
  (b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
  (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

(2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons—
  (a) an anxiety disorder,
  (b) an affective disorder, including clinical depression and bipolar disorder,
  (c) a psychotic disorder,
  (d) a substance induced mental disorder that is not temporary.

(3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by—
  (a) the temporary effect of ingesting a substance, or
  (b) a substance use disorder.

5 Cognitive impairment

(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.

(2) 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.

The definition of 'mental health impairment' refers to a disturbance as being 'significant for clinical diagnostic purposes'. This term is commonly used in clinical practice, and ensures that the impairment reaches a minimum level of seriousness.

The definition excludes the immediate impact of ingesting a substance and a substance use disorder, but allows for a substance induced mental disorder that is not temporary. This reflects the common law approach to criminal culpability and substance use.

The definition is deliberately silent on whether a personality disorder can be a mental health impairment. The Law Reform Commission recommended that a personality disorder should be excluded from the definition. However, since the Report was finalised, clinical understanding of personality disorders and their treatment has moved ahead. The definition leaves open the possibility that a personality disorder will be considered a mental health impairment if the expert evidence supports it. See for example: *Brown v The Queen* [2020] VSCA 212.

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Fitness

The fitness provisions are now neatly grouped in Part 4.

The test of whether a person is fit to stand trial has been codified. The *Presser* criteria are now found in s 36 of the MHCIFPA. The importance of being fit for the duration of the trial, the option of modifying the trial arrangements and the impact of being legally represented are found in s 44(5). Section 36(2) leaves open the possibility that a person may be unfit for other reasons not identified in *Presser*.

There are some significant changes to the fitness pathway under the MHCIFPA.

If, following an inquiry, the court decides that a defendant is unfit, the court must also decide if the person may become fit within 12 months: s 47. Practitioners will need to ask experts to advise on this issue when preparing fitness reports.

Only a defendant who may become fit will be referred to the Mental Health Review Tribunal: s 49. The Tribunal then has 12 months to decide if the defendant has become fit or will not become fit: s 80. If the Tribunal determines that a defendant is fit for trial, the criminal proceedings resume without a further inquiry: s 50(2).

If the court decides that a defendant will not become fit in this time frame, the matter proceeds straight to a special hearing. Where the fitness evidence is straightforward, such as an intellectual disability or dementia, a special hearing could be listed to begin immediately after the conclusion of a fitness inquiry, which will hopefully reducing the delay in finalising these matters.

Considerations when determining a penalty including length of limiting term

Under both the MHFPA and the MHCIFPA, if a defendant is found on the limited evidence available to have committed the offence charged, the court considers the appropriate penalty. If a custodial sentence would have been imposed at trial, then a limiting term is set: s 63(2). Under the MHCIFPA, when determining the appropriate penalty, including the length of that limiting term, the court must now take into account the fact that 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 then apply an appropriate discount to the term nominated: s 63(5). This is a far fairer approach than existed under the MHFPA.

Defence of act proven but not criminally responsible

Victims have consistently said they were offended by the idea that a person was found 'not guilty' of a crime because the defendant had a mental illness. That defence has now been renamed 'act proven but not criminally responsible'.

The M'Naghten rules are codified in s 28(1) of the MHCIFPA. There is an obligation to prove, on the balance of probabilities (see s 28(2)), that the defendant's mental health or cognitive impairment or both, meant that the person did not know the nature and quality of the act or that it was wrong.

The defence can now be entered by agreement if the defendant and prosecutor agree and the court is satisfied that the defence is established: s 31.

Section 28 replicates a well-trodden path for practitioners advising defendants with a mental health impairment. However, having that option for people with a cognitive impairment is new. The cognitive impairment still needs to impact so that the person did not know that the act or omission was wrong. How that might be used in practice will be a matter for expert evidence and judicial exploration.

The introduction of this defence has not led to any additional government funding to detain, accommodate or support people with cognitive impairments. At present, the majority of forensic patients with cognitive impairment (who are usually subject to limiting terms) are detained in custody. Conditional release orders are made, but depend on a high levels of NDIS funding and the identification of suitable accommodation. This is in limited supply.

Lawyers considering the ACNPR pathway for clients with a cognitive impairment should read the article by Kerri Eagle, Todd Davis & Andrew Ellis 'Unfit offenders in NSW: paying the price for gaps in service provision' (2020) *Psychiatry, Psychology and Law*, which sets out the difficulties for this group.

Substantial impairment & infanticide

The *Crimes Act 1900* has also been amended to mirror the changes introduced by the MHCIFPA.

The defence of substantial impairment in s 23A(1) no longer refers to an 'abnormality of mind arising from an underlying condition' and substitutes instead 'a mental health impairment or a cognitive impairment.'

The crime of infanticide, in s 22A of the *Crimes Act* has been updated and provides that a woman is guilty of infanticide 'if 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.'

The definitions of mental health impairment and cognitive impairment inserted into the *Crimes Act* are identical to sections 4 and 5 of the MHCIFPA.

Diversion updated

Despite broad changes being recommended by the NSWLRC, the provisions relating to diversion in the Local Court have changed very little. They are conveniently grouped together in Part 2 of the MHCIFPA.

The diversion procedures rely on a person meeting the new mental health and cognitive impairment definitions. A treatment or support plan may now be made for up to 12 months: ss 12, 14 and 16 MHCIFPA. The matters that a magistrate may consider when making an order are clearly set out in s 15.

A magistrate may now also refer a person for assessment if they appear to be either 'mentally ill' or 'mentally disordered'. The option of referring a mentally disordered person is new. Those terms are not defined in the MHCIFPA but are the foundation of an involuntary admission to a mental health facility under the *Mental Health Act 2007*.

The Tribunal and the forensic pathway

The role of the Mental Health Review Tribunal has changed very little. The powers of the Tribunal to order that a forensic patient be detained, transferred to a different facility, given leave or released into the community are the same. So too are the statutory criteria that the Tribunal must apply when making these decisions. The forensic pathway remains the same under the MHCIFPA as it was under the MHFPA.

The forensic pathway includes lengthy waits for beds within appropriate forensic mental health facilities, although the overall outcomes for forensic patients are very positive. The exception, as noted above, is that there is no clear forensic pathway or funding source for forensic patients with a cognitive impairment.

Conclusion

Marie Kondo would be proud of the work done on the MHCIFPA. It is far easier to follow than the MHFPA, which is particularly useful for practitioners who do not work regularly in this area. The court process has been streamlined, which will hopeful reduce delays in finalising these matters. As Marie advises, there have been thoughtful decisions made about which items to keep. The fundamental principles which apply to the intersection of law and impairment remain largely unchanged.

For practitioners, there are three key things to remember:

- Be sure that experts are aware of the new definitions and tailor their reports in summary and indictable matters accordingly.
- In fitness matters, brief your experts to advise on whether a defendant's fitness may improve so as to become fit to stand trial within 12 months.
- Be cautious before proceeding down ACNPR route for people with a cognitive impairment as funding for placement outside of custody is difficult to achieve. BN