THE NEW Section 32

Mental Health and Cognitive Impairment Forensic Provisions Act 2020 – Effective as of 27 March 2021

Introduction

1. The MHACIFP Act replaces the Mental Health (Forensic Provisions) Act 1990.

2. The concept of diversion to treatment of developmentally disabled or mentally disordered people has a 38 year history in the summary jurisdiction. The concept was first enacted by the Wran Labour Government in November 1983.

3. Prior to the enactment of the now replaced Mental Health (Forensic Provisions) Act 1990 there was provision to have a developmentally disabled or mentally disordered person diverted to care rather then being dealt with by law in the Crimes Act (NSW) 1900 in Parts 11A and 11B particularly at Section 428W. These parts are now repealed except for the sections dealing with intoxication.

4. The MHACIFP Act 2021 is the latest evolution of diversionary legislation.

5. So far as it modifies s32, the most significant changes are the length of time a treatment order can be made, up from 6 months – 12 months and there are some definitional changes.

6. While the length of time now authorised for treatment to take place is a positive thing, more could have been done to assist those people who are unwell. Indeed, the provisions in the new Act could be a double edged sword particularly Section 15 where the legislature has provided guidance with some points the Magistrate should consider.

Mental Health, the Criminal Law and Where Diversions Sit

7. Let's get to the basics! There are two things that a court needs to be satisfied of before a Magistrate, Judge and/or Jury must be satisfied of before they can make a finding of guilt

    i. That a criminal act occurred that offends a criminal legislative provision.

    ii. That the accused possess the requisite mental intent.

8. The Requisite intent is obviously where our focus is in regard to mental health and the Law.

9. On one end of the spectrum there is the accused who is completely sane and 100% of criminal responsibility will land on that accused if found guilty.

10. On the other end of the spectrum is an accused who is so unwell that they cannot comprehend the nature of their actions, cannot following proceedings and do not know that they have done something wrong according to law. They will be deemed not fit to plea per McNaughton and via the Presser test etc.

11. In the diversionary regime we are dealing with people who are placed somewhere between the extremes of this spectrum. They are people who are unwell or developmentally disabled have some understanding of their behaviour and know to some degree what is right or wrong.

Section 32 Mental Health (Forensic Provisions) Act 1990

12. Section 32 was introduced in 1990 when the Mental Health (Forensic Provisions) Act 1990 came into force.

13. The diversion for mentally disordered and developmentally disabled persons was moved from the Crimes Act 1900 into a tailor made mental health act. This was presumably done to shift the focus from that of criminality to one of illness or disability.

14. It was a 3 stage test.

    i. A mental condition or developmental disability had to be diagnosed.

    ii. The court must decide if it is more appropriate to deal with the matter under the section or by law.

    iii. Appropriate orders were to be made if an application was successful and they generally were along the lines of what was contained within a treatment plan attached to the report of a psychiatrist or psychologist.

15. In most case the battle ground was under limb 2 in deciding whether it was more appropriate to deal with the matter via the section or law. The Prosecution will tend to focus their submissions as to the seriousness of the alleged conduct of the accused.

16. Notwithstanding the 30 year lifespan of the this Section there has been little by way of case law in regard to it.

17. The following three cases in my view are the most significant cases in diversionary applications.

18. *Perry v Forbes and Storey* NSW Supreme Court Common Law Division (Unreported November 1993) found per Justice Smart that it was not relevant that a plea of guilty or not guilty be entered before a magistrate embark on hearing a Section 32 Application.

19. *Director of Public Prosecutions v Confos* [2004] NSWSC 1159 per Howie J. dealt with Section 32. This case was focused on the seriousness of the offence at hand but has often been misinterpreted as meaning the more serious the offending behaviour then the less appropriate it is to deal with the matter by diverting the accused for treatment.

20. *Direct of Public Prosecutions v El Mawas (2006)* 66 NSWLR 93 was the first time the section had been dealt with in the NSW Supreme Court of Appeal. The primary judgment in the

unanimous decision was by Justice McColl. The authority explored the history of the section and previous judicial interpretation. All though Mr El Mawas did not succeed in his appeal the judgment has provided significant guidance for the lower courts and practitioners in regard to how to deal with an application under the section. Such guidance is still very useful under the new act and I would recommend anyone who practices in the summary jurisdiction to read the case.

21. I took this matter to the common law division and Mr El Mawas succeeded in the first instance before Justice James, as he was then, but the DPP appealed this decision and Mr El Mawas applied for a grant from Legal Aid to fund it and took over carriage of the matter. After the Court of Appeal had disposed of the matter it was remitted back to the Local Court for finalisation. Legal Aid assigned the matter back to me and I then made a successful application for a Section 32 at Burwood Local Court.

THE NEW REGIME

22. Under *Mental Health and Cognitive Impairment Forensic Provisions Act* (NSW) 2020 an application can be made to have an accused discharged pursuant to the provisions in Division 2 of the Act covering Sections 7 to 17.

23. The operative section is Section 12.

24. Section 12(1) replicated the Limb 1 test in the old regime. It states a Magistrate "may" make an order under this division. Hence it preserves the wide discretion a Magistrate has in diversionary schemes to make a decision on what they think is best in the circumstances. If you are really interested in the nature of judicial discretionary decisions it is worth reading from paragraphs 64 to 70 of the *El Mawas* judgment for some analysis and further High Court authorities on the subject.

25. 12(1) only empowers a Magistrate to make orders under this section if the accused person is Mentally impaired or cognitively impaired. The definitions of these impairments are expressed in Sections 4 and 5 of the Act respectively.

26. Section 12(2) provides the test and is pretty much the equivalent of the 2nd Limb in Section 32.

    It states:

    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.

27. To break this down:

    i. The judicial discretion is again raised but limited by the test.

    ii. The test is whether it is more appropriate.

    iii. To guide the Magistrate on matters to consider when assessing the appropriateness of dealing with the matter via the Section or Law the Legislature has made provision for this in Section 15 eight areas for the Magistrate to consider. However the Magistrate is not restricted to only those eight areas but may also consider other relevant factors per Section 15(i).

28. There is no express provision in the Act that states the period an order can be made for. However, Section 16 provides that if a defendant has failed to comply with a condition of an order a Magistrate may order the person to appear before the Magistrate and the Magistrate may;

    i. Deal with the charge as if the defendant had not been discharged (16(4). This may still mean the accused could run a defended hearing.

29. The fact that the Courts may now make an enforceable order under this Act may well give Courts more confidence in making an order per the Division but it may also be a double edge sword that could be used to punish a mentally or cognitively impaired accused. This appears to go against the grain of jurisprudential trends where mental health issues are being greater consideration such as in *Muldrock v The Queen* [2011] HCA 39, *(Cth) DPP v De La Rosa* [2010] NSWCCA 194 and *Bugmy v R* [2013] HCA 37.

CHANGES IN DEFINITION OF CRITICAL TERMS

30. The new act changes the definitions of what the nature of the condition is that an accused person has that is applicable for an application under the act.

31. Under the old law an applicant would need to persuade the court they had a mental condition or cognitive impairment to satisfy limb 1. A “mental condition” is defined as a condition of disability of mind not including mental illness or developmental disability of mind. Cognitive impairment was not defined in the old Act.

32. Now Cognitive impairment is defined in Section 5 and the term “Mental Condition” is replaced by “Mental Impairment” which is defined in Section 4.

33. **Section 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.

34. **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.

TIPS IN RUNNING AN APPLICATION

35. It is helpful if you have a reasonable understanding of mental illnesses and cognitive impairments.

36. I found reading the older Diagnostic and Statistical Manual IV or the New Version V helpful in working out the different types of disorders.

37. Having such an understanding of the differences between Schizophrenia, bipolar I and II, and a personality disorder is extremely helpful to ascertain what type of clinician to obtain a report from that would assist the court to making orders to have your client diverted.

38. For example, if your client has had a number of recent psychotic episodes, but has not been diagnosed, they should be sent to be assessed by a psychiatrist and the psychiatrist should be the report writer. Courts will not accept a diagnosis of schizophrenia from a psychologist. But if there has been a previous diagnosis of schizophrenia by a psychiatrist then a psychologist can rely upon the previous diagnosis in a fresh report relating to a new incident.

39. Some psychologists are entitled to diagnose mental conditions or impairments. You will find that forensic psychologists are able to do this whereas many clinical psychologists do not. I would think it better to always use a forensic psychologist to prepare and make a report over a treating psychologist. The former is given greater weight by the Court.

40. As you are all aware the Local Court Bench is made up of Hawks and Doves. The Hawks will be the ones to pick the report writer apart if they perceive the report writer is not suitably qualified. They will be out to find anything to shoot down your application.

41. Find a clinician who can explain the presentation and nature of the condition and how it effects the client's conduct. For example, in some conditions where executive function of the brain is not functioning optimally there is often a chemical explanation for it. The client's serotonin levels might be diminished which in turn affects dopamine production. Dopamine levels are essential to proper executive function that occurs in the frontal lobe of the brain and helps control impulses, judgement, decision making and consequential thinking. This type of problem arises in clients with significant mood disorders such a bipolar suffers, chronic depressives and people suffering from ADHD. If there is a biochemical explanation for the client's condition you are in a stronger position to make a submission

that it is more appropriate to deal with the matter by the section as it is due to a chemical deficiency in the brain of the client.

42. Only make applications that have reasonable chances of success. You need to objectively assess the merits of the particular case after viewing the report. If there is little merit do not run it. Rather, use the report to support your submissions in a sentencing hearing. You will get a better result. One of the criticisms I have often heard from Magistrates when I have had the opportunity to speak to them off the bench is that too many practitioners are making applications without merit. You do not want to get a reputation among Magistrates or Judges that you are the lawyer of last resort and will try anything for your client. You will end up getting poor results as Magistrates will switch off because they do not trust your judgement. If you are not sure about the merits of your case ask a solicitor friend or call a barrister. When I was a solicitor I found many barristers were all to willing to help. One day you might reward a helpful barrister with a brief!

43. In the past few years many Magistrates have tried to force the accused to enter a plea. This push came right from the top. However, it never was law. At no time was an accused who wished to make an diversionary application compelled to enter a plea of guilty or not guilty. *Perry v Forbes* made this clear, as did *El Mawas*. If it was not clear to the Bench under the old Act it is now abundantly clear under the New Act under Section 9(1). A plea is irrelevant to the application of the section.

44. The New Mental Health and Cognitive Impairment Forensic Provisions Act 2021 does not extinguish the common law built up around previous diversionary legislation. So *El Mawas is still good law*.

45. The Strongest weapons you will have in your arsenal in a Section 12 Application comes from *El Mawas.*

46. In paragraph 73 the Court of Appeal has acknowledged that the diversionary does not mean that the Accused is not exposed to punishment. What the section does is impose conditions on the Accused when orders are made and such orders may restrict the Accused's freedom of movement and action. The compliance of such orders has now been bolstered with the extension of the enforcement period up from 6 months to 12 months.

47. The 12 months of court jurisdiction for compliance can be extended. An application can be made and a practitioner can submit that the clinician would like some further time to develop a care plan before providing a final care plan to the Court with their report. This can be achieved by a longer adjournment of a few months or more if necessary. This should be suggested to the bench if they make any comment about 12 months not being long enough due to the nature of the condition.

48. As I have stated earlier there are many Magistrates who cannot shift their focus from the seriousness of the offence when formulating how they will exercise their discretion. Paragraph 78 in *El Mawas* can assist in shifting that focus. The Court of Appeal says Howie J's observations in Confos do not exclude from consideration *"when considering the seriousness of the offending conduct, the degree to which the defendant is disabled from being able to control that conduct by limiting consideration to the seriousness of the*

offense". In other words, does not that mean that the more disabled the offender due to their mental impairment the less relevance the seriousness of the offence should have in the consideration for the exercise of their discretion?

49. The goal should be whether proceeding with a diversion would be in the best interests for both the offender and the community. Wouldn't it then mean if the Accused posses little risk of harm to the community but will greatly benefit from treatment then it is in both the Accused's and communities interest they be diverted?

50. It is also advisable to get your client started in treatment as soon as the decision is made to make an application for diversion. I have had client's refuse treatment until the order is made or leave it until the last minute to get assessed by a clinician. On such occasion the Bench will most often question you about why your client did not take it upon himself to start treatment and why they require an order to start. It is a good way not to succeed in your client's application.

LAST WORDS

51. There is nothing radically different in the new act and in a practical sense the prosecution of applications will change little. The biggest change is that there is an enforcement period up from 6 months to 12 months. Other changes are definitional and layout changes with some greater legislative guidance. There have been some exclusions and that is Substance Abuse Disorder and temporary effects of ingesting a substance, one would presume voluntarily.

52. Some of you may be aware of the recent decision in the District Court of Denise Jane Lee v R [2020] NSWDC 770 where her Honour Judge Wass was extremely critical of the Magistrates approach to the application for diversion and his and the media's attitude to someone suffering a mental illness. Ms Lee was a radiologist who had met the complainant online and dated on only a couple of occasions before the relationship was ended by the complainant. She embarked on a campaign against the complainant, he new partner and family. She was found to have a significant mental condition. I will read out the last paragraphs of her judgment as it gives hope that the attitudes toward how we view and deal with people suffering from mental illness and impairments are changing for the better:

> *54 There is just one additional matter, which I wish to remark upon. The inability of society in general and the legal system in particular, at times, to respond appropriately to people who are acutely mentally unwell and florid in their presentation, is a matter of considerable concern and regret.*
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> *55 This court is so often presented with complex and nuanced decisions, requiring sensitivity in respect of mentally ill offenders and victims. Indeed, the vast majority of them are either untreated or have received only minimal treatment. It does not serve the integrity of the justice system to deal with those people in a*

high handed and derisory fashion. It is demeaning to the people involved and has the potential to bring the system of justice into disrepute.

56 *Given the level of power that they have to impact upon, in a material way, the lives of others, it is the responsibility of all of those who work in and around the criminal justice system and those who report on it, to deal with all people and particularly mentally unwell people with respect, despite their actions, criminal or otherwise. Something that, in my view, regrettably has not happened so far in this case.*

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