



NSW LAW REFORM COMMISSION

Consultation Paper 7

People with cognitive and mental health impairments in the criminal justice system: diversion

January 2010

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Terms of Reference

Pursuant to s 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to undertake a general review of the criminal law and procedure applying to people with cognitive and mental health impairments, with particular regard to:

1. s 32 and s 33 of the *Mental Health (Criminal Procedure) Act 1990*;
2. fitness to be tried;
3. the defence of "mental illness";
4. the consequences of being dealt with via the above mechanisms on the operation of Part 10 of the *Crimes (Forensic Procedures) Act 2000*; and
5. sentencing.

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The closing date for submissions is 28 May 2010

Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Consultation Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other people or organisations. Any request for a copy of a submission marked “confidential” will be determined in accordance with *the Freedom of Information Act 1989* (NSW).

ABBREVIATIONS

- COAG:** Council of Australian Governments.
- CP 6:** Consultation Paper 6.
- CP 7:** Consultation Paper 7.
- CP 9:** Consultation Paper 9.
- CROC:** Convention on the Rights of the Child.
- CTO:** Community Treatment Order.
- DSM-IV:** American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th edition, 2000).
- HREOC:** Human Rights and Equal Opportunity Commission.
- ICCPR:** International Covenant on Civil and Political Rights.
- MHA:** *Mental Health Act 2007* (NSW).
- MHCPA:** *Mental Health (Criminal Procedure) Act 1990* (NSW).
- MHFPA:** *Mental Health (Forensic Provisions) Act 1990* (NSW).
- MHRT:** Mental Health Review Tribunal.
- MOU:** Memorandum of Understanding.
- NSWLRC:** New South Wales Law Reform Commission.

ISSUES

Issue 7.1 - see page 11

- (1) Should a legislative scheme be established for police to deal with offenders with a cognitive impairment or mental illness by way of a caution or a warning, in certain circumstances?
- (2) If so, what circumstances should attract the application of a scheme like this? For example, should the scheme only apply to certain types of offences or only to offenders with certain defined forms of mental illness or cognitive impairment?

Issue 7.2 - see page 11

Could a formalised scheme for cautions and warnings to deal with offenders with a cognitive impairment or mental illness operate effectively in practice? For example, how would the police identify whether an offender was eligible for the scheme?

Issue 7.3 - see page 12

Does s 22 of the MHA work well in practice?

Issue 7.4 - see page 12

Should the police have an express, legislative power to take a person to a hospital and/or an appropriate social service if that person appears to have a cognitive impairment, just as they can refer a mentally ill or mentally disturbed person to a mental health facility according to s 22 of the MHA?

Issue 7.5 - see page 12

Do the existing practices and policies of the Police and the DPP give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender?

Issue 7.6 - see page 14

Do provisions in the *Bail Act 1978* (NSW) setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders?

Issue 7.7 - see page 14

Should the *Bail Act 1978* (NSW) include an express provision requiring the police or the court to take account of a person's mental illness or cognitive impairment when deciding whether or not to grant bail?

Issue 7.8 - see page 15

What education and training would assist the police in using their powers to divert offenders with a mental illness or cognitive impairment away from the criminal justice system?

Issue 7.9 - see page 23

- (1) Should the term, "developmentally disabled", in s 32(1)(a)(i) of the MHFPA be defined?
- (2) Should "developmentally disabled" include people with an intellectual disability, as well as people with a cognitive impairment acquired in adulthood and people with disabilities affecting behaviour, such as autism and ADHD? Should the legislation use distinct terms to refer to these groups separately?

Issue 7.10 - see page 24

Is it preferable for s 32 of the MHFPA to refer to a defendant "with a developmental disability" rather than to a defendant who is "developmentally disabled"?

Issue 7.11 - see page 25

Should the term, "mental illness" in s 32(1)(a)(ii) of the MHFPA be defined in the legislation?

Issue 7.12 - see page 26

Should the term, "mental condition" in s 32(1)(a)(iii) of the MHFPA be defined in the legislation?

Issue 7.13 - see page 27

- (1) Should the requirement in s 32(1)(a)(iii) of the MHFPA for a mental condition "for which treatment is available in a mental health facility" be changed to "for which treatment is available in the community" or alternatively, "for which treatment is available"?
- (2) Should the legislation make it clear that treatment is not limited to services aimed at curing a condition, but can include social services programs aimed at providing various life skills and support?

Issue 7.14 - *see page 29*

Should the existing categories of developmental disability, mental condition, and mental illness in s 32(1)(a) of the MHFPA be removed and replaced by a general term used to determine a defendant's eligibility for a s 32 order?

Issue 7.15 - *see page 29*

What would be a suitable general term to determine eligibility for a s 32 order under the MHFPA? For example, should s 32 apply to a person who suffers from a "mental impairment"? How would a term such as "mental impairment" be defined? For example, should it be defined according to an inclusive or exhaustive list of conditions?

Issue 7.16 - *see page 29*

Are there specific conditions that should be expressly excluded from the definition of "mental impairment", or any other term that is preferred as a general term to determine eligibility under s 32 of the MHFPA? For example, should conditions related to drug or alcohol use or abuse be excluded? Should personality disorders be excluded?

Issue 7.17 - *see page 33*

Should a magistrate take account of the seriousness of the offence when deciding whether or not to divert a defendant according to s 32 of the MHFPA? Why or why not?

Issue 7.18 - *see page 34*

Should the decision to divert a defendant according to s 32 of the MHFPA depend upon a direct causal connection between the offence and the defendant's developmental disability, mental illness, or mental condition?

Issue 7.19 - *see page 35*

Should the decision whether or not to divert a defendant according to s 32 of the MHFPA take into account the sentence that is likely to be imposed on the defendant if he or she is convicted?

Issue 7.20 - *see page 37*

- (1) Should s 32(1)(b) of the MHFPA include a list of factors that the court must or can take into account when deciding whether it is appropriate to make a diversionary order?
- (2) If s 32(1)(b) were to include a list of factors to guide the exercise of the court's discretion, are there any factors other than those discussed in paragraphs 3.28-3.41 that should be included in the list? Are there any factors that should be expressly identified as irrelevant to the exercise of the discretion?

Issue 7.21 - *see page 38*

- (1) Do the interlocutory orders available under s 32(2) of the MHFPA give the Local Court any additional powers beyond its existing general powers to make interlocutory orders?
- (2) Is it necessary or desirable to retain a separate provision spelling out the Court's interlocutory powers in respect of s 32 even if the Court already has a general power to make such interlocutory orders?

Issue 7.22 - *see page 39*

Are the interlocutory powers in s 32(2) of the MHFPA adequate or should they be widened to include additional powers?

Issue 7.23 - *see page 42*

Is the existing range of final orders available under s 32(3) of the MHFPA adequate in meeting the aims of the section? Should they be expanded?

Issue 7.24 - *see page 42*

Are the orders currently available under s 32(3) of the MHFPA appropriate in meeting the needs and circumstances of defendants with a cognitive impairment, as distinct from those with mental health problems?

Issue 7.25 - *see page 42*

Should s 32(3) of the MHFPA include a requirement for the court to consider the person or agency that is to implement the proposed order and whether that person or agency is capable of implementing it? Should the legislation provide for any means of compelling a person or agency to implement an order that it has committed to implementing?

Issue 7.26 - *see page 45*

Should s 32 of the MHFPA specify a maximum time limit for the duration of a final order made under s 32(3) and/or an interlocutory order made under s 32(2)? If so, what should these maximum time limits be?

Issue 7.27 - *see page 47*

Should the Mental Health Review Tribunal have power to consider breaches of orders made under s 32(3) of the MHFPA, either instead of or in addition to the Local Court?

Issue 7.28 - *see page 47*

Should there be provision in s 32 of the MHFPA for the Local Court or the Mental Health Review Tribunal to adjust conditions attached to a s 32(3) order if a defendant has failed to comply with the order?

Issue 7.29 - *see page 48*

Should s 32 of the MHFPA authorise action to be taken against a defendant to enforce compliance with a s 32(3) order, without requiring the defendant to be brought before the Local Court?

Issue 7.30 - *see page 48*

Should the MHFPA clarify the role and obligations of the Probation and Parole Service with respect to supervising compliance with and reporting on breaches of orders made under s 32(3)? What should these obligations be?

Issue 7.31 - *see page 48*

Are there any other changes that should be made to s 32(3A) of the MHFPA to ensure the efficient operation of s 32?

Issue 7.32 - *see page 50*

Is there a need for centralised systems within the Local Court and the NSW Police for assessing defendants for cognitive impairment or mental illness at the outset of criminal proceedings against them?

Issue 7.33 - *see page 52*

- (1) Should the MHFPA expressly require the submission of certain reports, such as a psychological or psychiatric report and a case plan, to support an application for an order under s 32?
- (2) Should the Act spell out the information that should be included within these reports? If so, what are the key types of information that they should contain?

Issue 7.34 - see page 53

Should the MHFPA allow a defendant to apply for a magistrate to disqualify himself or herself from hearing a charge against the defendant if the same magistrate has previously refused an application for an order under s 32 in respect of the same charge?

Issue 7.35 - see page 55

- (1) Should there be alternative ways of hearing s 32 applications under the MHFPA rather than through the traditional, adversarial court procedures? For example, should there be opportunity to use a conferencing-based system either to replace or to enhance the current court procedures?
- (2) If so, should these alternative models be provided for in the legislation or should they be left to administrative arrangement?

Issue 7.36 - see page 60

Should s 33 of the MHFPA require a causal connection between the defendant's mental illness and the alleged commission of the offence?

Issue 7.37 - see page 62

Are the existing orders available to the court under s 33 of the MHFPA adequate and are they working effectively?

Issue 7.38 - see page 63

Should legislation provide for any additional powers to enforce compliance with an order made under s 33 of the MHFPA?

Issue 7.39 - see page 64

Is it preferable to abolish s 33 of the MHFPA and broaden the scope of s 32 of the MHFPA to include defendants who are mentally ill persons?

Issue 7.40 - see page 68

Does 10(4) of the MHFPA provide the superior courts with an adequate power to divert defendants with a mental illness or cognitive impairment?

Issue 7.41 - see page 68

Should s 32 and 33 of the MHFPA apply to proceedings for indictable offences in the Supreme and District Courts as well as proceedings in the Local Court?

Issue 7.42 - see page 68

- (1) Should there be a statement of principles included in legislation to assist in the interpretation and application of diversionary powers concerning offenders with a mental illness or cognitive impairment?
- (2) If so, what should this statement of principles include?

PREFACE

0.1 This Paper is the third consultation paper in the Commission’s reference on people with a mental illness or cognitive impairment in the criminal justice system. The focus of the Paper is diversion. The terms of reference require the Commission to assess s 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (the “MHFPA”). These sections empower the Local Court to divert defendants with a mental illness or a developmental disability away from criminal proceedings and, potentially, into treatment or support services.¹ While there appears to be general support for these provisions, criticisms have arisen about their scope and practical application. This Paper considers these criticisms and invites feedback on a range of possible reforms. As an ancillary matter, the Paper also considers briefly the powers to divert offenders with a mental illness or cognitive impairment at the preliminary stages of the criminal process, where the role of the police is critical to an offender’s entry into that process. The potential to divert offenders away from the traditional forms of sentencing, in particular imprisonment, into other kinds of sentencing options is considered in our Consultation Paper on Criminal Responsibility and Sentencing (“CP 6”).

0.2 This Paper is one of five consultation papers on this reference. The first four papers are released concurrently, and relate to:

- an overview of the laws affecting people with a mental illness or a cognitive impairment when they become involved as defendants in the criminal justice system (“CP 5”);
- the laws governing fitness to be tried and the defences relating to mental impairment (that is, the defence of mental illness, the defence of substantial impairment, and infanticide), which apply primarily to criminal proceedings in the Supreme and the District Courts, and the sentencing of offenders with a mental illness or cognitive impairment (“CP 6”);
- the laws relating to the diversion of offenders with a mental illness or cognitive impairment, focusing on the diversionary mechanisms available to the Local Court (“CP 7”); and
- the use of forensic samples taken from a defendant who is unfit to be tried or not guilty by reason of mental illness (“CP 8”).

1. Sections 32 and 33 are reproduced in the Appendix .

0.3 The remaining consultation paper (“CP 9”) will be released subsequently. It relates to issues particular to young offenders with a mental illness or cognitive impairment.

0.4 Although we have separated out the issues for consultation into discrete papers, we are conscious of the need to consider the interrelationship of the various laws affecting defendants with a mental illness or cognitive impairment as they travel through the criminal justice system. In the case of diversion, for example, an important question raised in this Paper is whether the diversionary mechanisms available to the Local Court should be extended to the Supreme and the District Courts and whether this would impact on other laws operating in criminal proceedings in those courts. Following the release of the consultation papers, we will carry out extensive community consultation in order to prepare a report with our recommendations for reform. This report will draw together the wide range of matters raised in the consultation papers and assess whether there are advantages in forming an overarching, coherent legislative framework to deal with defendants with a mental illness or cognitive impairment in the criminal justice system.

1.

The concept of diversion

- The broad meaning of diversion
- The focus of this discussion
- Reasons for diverting offenders with a mental illness or cognitive impairment
- Aims and benefits of diversion

THE BROAD MEANING OF DIVERSION

1.1 When a person commits a crime attracting the attention of the police, that person will come into contact with the criminal justice system. Progress through that system is marked by various stages. The preliminary stage involves interaction with the police, which can include arrest,¹ questioning,² and charging,³ and possibly decisions by the police or the courts about whether to release that person on bail.⁴ The next stage involves prosecution in the Local, District, or Supreme Court, depending on the seriousness of the offence, and generally ends in a decision about the person's guilt by a magistrate, a judge, or a jury. The final stage arises only on a finding of guilt, and involves the sentencing of the offender.

1.2 Diversion is a term that can be used to refer to any measure that removes an offender from the criminal justice system at any one of these stages.⁵ Diversion may simply divert offenders away from the system

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1. See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99, which sets out the powers of police officers to arrest a person without a warrant in relation to the commission of an offence, and s 101 of that Act, which empowers police officers to arrest a person in accordance with a warrant: see NSW Law Reform Commission, *Criminal Procedure: Police Powers of Detention and Investigation After Arrest*, Report 66 (1990). A police officer is also empowered to detain an intoxicated person (who has not committed an offence) in certain circumstances: see *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 16.
 2. See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) pt 9, as modified (pursuant to s 112) for "vulnerable persons" under the *Law Enforcement (Powers and Responsibilities) Regulation 2005* pt 3 div 3. A vulnerable person includes a person with impaired intellectual functioning: see *Law Enforcement (Powers and Responsibilities) Regulation 2005* cl 24(1)(b).
 3. At common law, any private individual has the power to file a charge. That power can be limited by legislation. For summary offences, a police officer conducts the prosecution in his or her personal capacity. Prosecutions for indictable offences in the Supreme and District Courts are brought on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions: see *Criminal Procedure Act 1986* (NSW) s 8.
 4. There is no specific legislative provision empowering the police to charge a person with an offence, but s 18(1) of the *Bail Act 1978* (NSW) implies such a power (police power to grant bail to a person whom they have charged).
 5. See C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (2002) 247; E Pritchard, J Mugavin and A Swan, *Compulsory Treatment in Australia: a Discussion Paper on the Compulsory Treatment of Individuals Dependent on Alcohol and/or Other Drugs* (Australian National Council on Drugs, Research Paper 14,

without directing them into any alternative process (for example, where the police issue an informal caution without imposing any further obligation on the offender). A more complex form of diversion directs offenders away from the formal system into an alternative means of dealing with them, one that focuses on treatment rather than punishment. This form of diversion identifies the underlying causes of the offender's criminal behaviour and seeks to redress them. Schemes based on this more complex form of diversion have attracted increasing support in Australia, with diversionary schemes now set up in NSW, for example, for offenders with drug and/or alcohol addiction and young offenders.⁶ The trend towards greater reliance on diversionary measures as a response to criminal conduct acknowledges the limitations of traditional forms of punishment in reducing crime and rehabilitating offenders.

THE FOCUS OF THIS DISCUSSION

1.3 While the term diversion can be used more broadly to refer to any measure aiming to remove an offender from the criminal process, the focus of this Paper is the legislative provisions that allow defendants with a mental illness or developmental disability to be diverted out of criminal proceedings in the Local Court. As we noted in the Preface, the terms of reference specifically require us to consider these provisions. While our discussion takes account of the broader meaning of diversion, it remains centred on these very specific legislative powers. In this context, we consider:

- why offenders with a mental illness or cognitive impairment should be diverted;
- the existing legislative powers to divert;
- the potential to improve on these powers; and

2007) ch 3; T Calma, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, Australian Human Rights Commission, Report 3 (2008) 30-32; Rt Hon Lord Bradley, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (April 2009) 15-16.

6. For example, the Magistrates Early Referral Into Treatment ("MERIT") scheme targets adult offenders with problems with illicit drug use, the Youth Justice Conferencing scheme allows police and Children's Court magistrates to refer young people to conferencing, and the Youth Drug and Alcohol Court aims to help young offenders overcome their drug and alcohol problems.

- the situations where it is appropriate to empower the courts to divert these offenders.

1.4 A useful starting point for our discussion is to identify a rationale for diversion, or why it may at times be desirable to divert offenders with a mental illness or cognitive impairment away from the criminal justice system.

REASONS FOR DIVERTING OFFENDERS WITH A MENTAL ILLNESS OR COGNITIVE IMPAIRMENT

1.5 The Commission can identify three reasons why diversionary powers should exist in respect of offenders with a cognitive impairment or mental illness:

- Where the individual offender's culpability is reduced because of his or her mental illness or impairment, it is not fair to require him or her to face the full force of the criminal law and its sanctions.
- The culpability of these groups of offenders should be measured against the wider social problems that they typically face and which may offer at least a partial explanation for their criminal behaviour. Estimates consistently indicate a disproportionately large number of offenders with a cognitive impairment or mental illness, or both, when compared with the number of people with these conditions in the general population.⁷ While there are various

7. Precise figures are difficult to pinpoint. There are estimates of up to 50% of sample offender groups reporting some form of mental disorder, and close to a quarter reporting an intellectual disability. See CP 5, [1.34]-[1.38]. See too T Butler and S Allnutt, NSW Corrections Health Service [now Justice Health], *Mental illness among NSW prisoners* (2003) 17; C Jones and S Crawford, "The psychosocial needs of NSW Court defendants" (March 2007) *Crime and Justice Bulletin No. 108: Contemporary Issues in Crime and Justice* (NSW Bureau of Crime Statistics and Research); Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System: with particular reference to the practice operation of s 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW)* (2008) ("the *Enabling Justice* report") 13; T Gotsis and H Donnelly, *Diverting Mentally Disordered Offenders in the NSW Local Court* (Judicial Commission of NSW, Monograph 31, 2008) ("the *Judicial Commission* report") 2-3. See too NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996) ("NSWLRC Report 80") [2.4]-[2.21].

theories to suggest why people with a cognitive impairment or mental illness might become enmeshed in the criminal justice system,⁸ it is commonly agreed that it is not the impairment or mental illness itself that makes a person more prone to criminal activity.⁹ Rather, it is the cumulative effect of numerous social disadvantages arising from their impairment or illness that may make these groups more susceptible to become involved in crime, disadvantages such as limited educational and employment opportunities, social isolation, greater visibility to the police, lack of support services and difficulties in getting access to these services.¹⁰ Diversion is one way by which the law can try to break this cycle of involvement in the criminal justice system and ensure that that system is not used as a substitute for proper social services to deal with people whom society finds inconvenient.¹¹

- Because of the individual offender's condition and/or because of the social disadvantages which he or she faces, it is less than likely that the conventional criminal process will provide a means of rehabilitation and deterrence from future re-offending. An alternative process, one that tries to address the underlying causes of the criminal conduct, may have a greater chance at reducing recidivism.

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8. See the discussion in NSWLRC Report 80, [2.10]-[2.19]; the *Enabling Justice* report, 10-14; Law Reform Commission of Western Australia, *Court Intervention Programs* (Consultation Paper, Project 96, 2008) 94-96.
 9. See J Simpson, M Martin, J Green, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending* (Intellectual Disability Rights Service, NSW Council for Intellectual Disability, 2001) 13-14; the *Enabling Justice* report, 13-14.
 10. There have been many calls for consistent government commitment to early intervention programs and co-ordinated social support services in an attempt to overcome this cycle of disadvantage. See, for example, J Simpson, M Martin, J Green, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of Offending* (Intellectual Disability Rights Service and the NSW Council for Intellectual Disability, 2001) vii, 10-14, rec 13, 17, 39.
 11. See *R v Clarke* (1975) 61 Cr App R 320, 323.

AIMS AND BENEFITS OF DIVERSION

1.6 In light of the reasons just outlined, diversionary schemes for offenders with a cognitive impairment or mental illness should aim to identify the underlying causes of the criminal conduct, provide a means of overcoming these underlying causes, stop people from becoming entrenched in the criminal justice system, and ultimately redress their over-representation in that system.

1.7 Schemes that are successful in achieving these aims offer benefits not just for the individual offender but also for the community as a whole. For instance, the community benefits from a reduction in crime and increase in public safety, particularly where the criminal behaviour involved violent or otherwise dangerous conduct. There may be cost benefits in avoiding the expense of criminal prosecution and possible incarceration, as well as avoiding a future drain on police resources. And at a more fundamental level, it could be argued that it benefits society as a whole if its collective conscience weighs more lightly in treating some of its most vulnerable members with compassion and humanity, rather than condemnation.

2. **Pre-court diversion**

- Existing police powers
- Enhancing the existing powers?

2.1 While the focus of this Paper is on the powers of the courts to divert defendants, our discussion would be incomplete without at least brief reference to the powers to divert offenders during the preliminary stages of the criminal process. Diversion at this stage has been described as crucial in successfully keeping offenders out of the criminal justice system, on the basis that once a person has been to court, he or she becomes more deeply entrenched in the system.¹

2.2 The police play a central part in these preliminary stages. They have been described as the gatekeepers to the criminal process, and to a large extent a person's entry into and journey through that process is determined by the exercise of the police's discretion.²

EXISTING POLICE POWERS

2.3 In NSW, the police can use the following general powers as a way of diverting people out of the criminal justice system:

- They can issue a warning or a caution instead of arresting a person.³
- They can exercise their discretion not to initiate proceedings against a person (whether that be by way of laying charges or issuing a court attendance notice). Similarly, the Director of Public Prosecutions has a discretion whether or not to file an indictment (for indictable offences).⁴
- They can grant bail after a person is charged.⁵ The courts also have the power to grant bail.⁶

1. See Law Society of England and Wales, *Submission to the independent review of the diversion of individuals with mental health problems from the criminal justice system and prison* (5 March 2008) 3; Rt Hon Lord Bradley, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (April 2009) 34.

2. See T Calma, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, Australian Human Rights Commission, Report 3 (2008) 52. See too NSW LRC Report 80 [4.1]-[4.2].

3. See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 107(2).

4. See *Criminal Procedure Act 1986* (NSW) s 8.

5. See *Bail Act 1978* (NSW) s 18.

6. See *Bail Act 1978* (NSW) pt 4.

2.4 In addition to these more general powers, legislation provides the police with specific powers to enable them to deal with people with some forms of mental illness or cognitive impairment. Section 22 of the *Mental Health Act 2007* (NSW) (the “MHA”) authorises a police officer to take a person to a mental health facility if the person appears to be “mentally ill” or “mentally disturbed” and the officer believes, on reasonable grounds, that:

- the person is committing or has recently committed an offence;
- the person has recently attempted suicide; or
- it is probable that the person will attempt to kill himself or herself or another person, or attempt to cause serious physical harm to himself or herself or another person,

and it would be beneficial to the person’s welfare to deal with the person under the MHA rather than otherwise in accordance with law.⁷ The MHA sets out certain procedures which must follow the detention of a person in this situation, and which allow for a person to receive treatment in accordance with the Act.⁸

ENHANCING THE EXISTING POWERS?

2.5 There are a number of ways in which these powers might be enhanced to make them a more effective means of diversion for people with a cognitive impairment or mental illness. We raise the following issues to invite comment on the effectiveness of the powers as they currently operate and on the desirability for change.

The police power to issue warnings and cautions

2.6 It has been suggested that legislation should set up a formalised scheme of warnings and cautions to enhance an arresting officer’s discretion in respect of people with a cognitive impairment or mental

7. See MHA s 22.

8. These procedures include at least one medical examination and may end in the person’s discharge from the facility into the custody of the police officer who brought that person to the facility (if the person was apprehended because of a police officer’s belief that the person committed an offence (MHA s 32), or may result in a mental health inquiry which, depending on its findings, may result in the person’s involuntary detention in a mental health facility for a specified period (see MHA s 27(e), 31) or some other less restrictive treatment (MHA s 35).

illness.⁹ The scheme could be modelled on the legislative scheme that exists for young offenders under the *Young Offenders Act 1997* (NSW). Part 3 of the *Young Offenders Act 1997* establishes a formalised system for the police to issue a warning to a child who has committed a summary offence. The legislation expressly provides for a child in that situation to be dealt with by a warning rather than by any other way.¹⁰ Similarly, Part 4 of the *Young Offenders Act 1997* establishes a formalised system of police cautions and, again, expressly provides for a child to be entitled to receive a caution in certain circumstances.¹¹

2.7 In a similar way, legislation could provide for a formal system of warnings and cautions in respect of offenders with a cognitive impairment or mental illness. As with young offenders, the legislation could spell out the types of offences for which there could be an entitlement to a warning or a caution. It has also been suggested that this system could be linked to a referral to support services to assist in preventing offenders from re-offending.¹² Of course, a referral system, particularly one that imposes some sort of obligation on an offender (rather than simply encourages him or her to seek help), may have resource implications. Additional resources may also be required to support the police to ensure that a scheme like this works effectively: in order for police officers to make a quick and accurate identification and assessment of an offender's eligibility for the scheme, they would need to be able to carry out adequate screening procedures (probably with some form of expert assistance) as well as receive further education and training on issues relevant to identifying offenders with a mental illness and/or cognitive impairment.

2.8 The Police Code of Practice for CRIME does currently direct police officers to consider alternatives to arrest generally and emphasises that arrest is to be used as a last resort.¹³ It is open to question whether a

9. See the *Enabling Justice* report, 74-75. The suggestion in the *Enabling Justice* report related to offenders with an intellectual disability, obviously because it was this group that was the basis of the report's discussion.

10. *Young Offenders Act 1997* (NSW) s 14. There are exceptions to this entitlement: see s 14(2).

11. *Young Offenders Act 1997* (NSW) s 20.

12. See the *Enabling Justice* report, 74.

13. See NSW Police, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (version as at February 2008) 9-10.

legislative scheme of warnings and cautions would provide a more effective means of diverting offenders with a mental illness or cognitive impairment at this preliminary stage of the criminal process.

Issue 7.1

- (1) Should a legislative scheme be established for police to deal with offenders with a cognitive impairment or mental illness by way of a caution or a warning, in certain circumstances?
- (2) If so, what circumstances should attract the application of a scheme like this? For example, should the scheme only apply to certain types of offences or only to offenders with certain defined forms of mental illness or cognitive impairment?

Issue 7.2

Could a formalised scheme for cautions and warnings to deal with offenders with a cognitive impairment or mental illness operate effectively in practice? For example, how would the police identify whether an offender was eligible for the scheme?

Section 22 of the MHA

2.9 The definitions of “mentally ill” and “mentally disturbed” in the MHA may not be broad enough to include some forms of cognitive impairment in order to allow the police to refer offenders with a cognitive impairment for treatment. The power under s 22 is aimed at people with mental health problems for the purpose of redirecting them into the civil system set up under the MHA for treatment for mental illness. It does not specifically take account of treatment options for people with a cognitive impairment. Of course, unlike mental illness, the various forms of cognitive impairment are not usually amenable to treatment and cure through medication and hospitalisation, although they can be supported through appropriate social services and education. A power similar to the power under s 22 could be introduced to allow the police to refer people with a cognitive impairment to appropriate social services. This could be done either by changing the terms used in s 22 to include people with a cognitive impairment, or by formulating a separate provision directed specifically at people with a cognitive impairment.

Issue 7.3

Does s 22 of the MHA work well in practice?

Issue 7.4

Should the police have an express, legislative power to take a person to a hospital and/or an appropriate social service if that person appears to have a cognitive impairment, just as they can refer a mentally ill or mentally disturbed person to a mental health facility according to s 22 of the MHA?

The decision to charge or prosecute

2.10 Both the police and the Director of Public Prosecutions exercise a discretion in deciding whether or not to charge or prosecute. Various factors are taken into account in making this decision. The Office of the DPP has issued Prosecution Guidelines setting out these factors.¹⁴ They make brief reference to various personal circumstances of an alleged offender, which may weigh against a decision to prosecute. Among other things, these circumstances require consideration of an alleged offender's mental health, special disability or infirmity.¹⁵ It is worth considering whether it would be beneficial to put stronger emphasis on taking account of the importance of diverting people with a cognitive impairment or mental illness away from the criminal process in the decision not to prosecute, and guiding the police's decision to charge in a similar way (for example, by way of express reference in the Police's Code of Practice on CRIME).

Issue 7.5

Do the existing practices and policies of the Police and the DPP give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender?

14. See Office of the Director of Public Prosecutions for NSW, *Prosecution Guidelines* (2007).

15. See *Prosecution Guidelines* (2007) guideline 4, [3.18].

Granting bail

2.11 The power to grant bail provides a means of diverting people out of the criminal justice system into programs for treatment and support services. Successful completion of such programs can later weigh in a person's favour, either by way of a decision to discontinue the prosecution process or in considering sentencing options upon conviction. At present, the *Bail Act 1978* (NSW) sets out the circumstances in which bail may be granted. The Act provides for a right to be granted bail for minor offences,¹⁶ but that right can be refused on a number of grounds including, for example, if the alleged offender has failed to comply with a condition of bail previously granted in respect of the offence in question.¹⁷ The *Bail Act* also provides for a presumption against the grant of bail for certain offences¹⁸ and a presumption in favour of the grant of bail for other offences.¹⁹

2.12 One issue for consideration in the context of a discussion on diversion is whether the bail provisions work well to provide a means to divert people with a mental illness or cognitive impairment into treatment and support services. Obviously, there are significant questions about resources involved, because a successful use of the bail provisions as a means of diversion will depend to a great extent on the existence of well-resourced treatment programs. While we cannot focus on questions of resources within this reference, we can ensure that the legislative provisions governing the grant of bail assist, in so far as possible, in allowing people with a mental illness or cognitive impairment to be granted bail as one means of diverting them away from the criminal justice system. For example, we can consult on whether certain provisions in the *Bail Act* make it harder for people with a mental illness or cognitive impairment to be granted bail than other people, such as the provision that allows bail to be refused in respect of a minor offence if the alleged offender has previously breached a bail condition for that offence. It is easy to imagine situations where a person with a mental illness or cognitive impairment may find it difficult to comply with a bail

16. "Minor offences" are defined in the *Bail Act 1978* (NSW) s 8(1).

17. See *Bail Act 1978* (NSW) s 8(2)(a).

18. See *Bail Act 1978* (NSW) pt 2 div 2A. See also pt 2 div 3A (offences for which bail is to be granted only in exceptional circumstances).

19. See *Bail Act 1978* (NSW) pt 2 div 3.

undertaking without adequate support to explain the conditions of bail and help ensure that they are followed.

Issue 7.6

Do provisions in the *Bail Act 1978* (NSW) setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders?

Issue 7.7

Should the *Bail Act 1978* (NSW) include an express provision requiring the police or the court to take account of a person's mental illness or cognitive impairment when deciding whether or not to grant bail?

Further police training and education

2.13 The NSW Police have taken a number of initiatives aimed at assisting them in their interactions with people with a mental illness or cognitive impairment. For instance, in 2007, the Mental Health Intervention Team was established as a pilot program to help the police in their interactions with members of the public with mental health issues. The program has recently been made a permanent component of the NSW Police Force Policy and Programs Command.²⁰ It provides an intensive training program for police officers, with an emphasis on developing communication skills to manage and de-escalate a mental health emergency event. The overall aim of the program is to reduce risks to the police and those with mental health problems by minimising police intervention in non-criminal incidents involving mental health consumers.²¹ Other initiatives include developing a project designed for repeat offenders with an intellectual disability, which has produced a screening tool for detecting the presence of an intellectual disability, as well as work with interagency groups on issues relating to intellectual disability.²²

2.14 It is outside our terms of reference to consider the various programs that exist to help the police in their dealings with people with a mental illness or cognitive impairment. Examples of these programs are

20. See NSW Police Force, *Annual Report 2008-2009* 35.

21. See NSW Police, Mental Health Intervention Team, *Newsletter* (July 2008) 1.

22. See NSW Police Force, *Annual Report 2007-2008* 33.

noted here in so far as they may be relevant to the efficacy with which the police can rely on their existing powers, or any additional powers we may propose, to divert these groups of offenders away from the criminal justice system. We invite comment on whether, broadly speaking, further education and training of police officers, particularly in the identification of mental illness and cognitive impairment in suspected offenders, would help them to use their powers to divert these groups out of the criminal process.

Issue 7.8

What education and training would assist the police in using their powers to divert offenders with a mental illness or cognitive impairment away from the criminal justice system?

3. **Diversion under section 32**

- Overview of the Local Court's diversionary powers
- Determining eligibility for a section 32 order
- Exercising the court's discretion about what is appropriate
- Orders that the court can make
- Hearing applications under section 32

OVERVIEW OF THE LOCAL COURT'S DIVERSIONARY POWERS

3.1 Once a decision is made to prosecute a person for a criminal offence, that person will proceed to a hearing or a trial in the Local, District, or Supreme Court. The bulk of criminal matters are heard in the Local Court, which has traditionally been responsible for hearing less serious offences, although its jurisdiction has been expanded in recent years to include offences of a more serious nature.¹

3.2 Sections 32 and 33 of the MHFPA provide the Local Court with diversionary powers aimed specifically at defendants with a cognitive impairment or mental illness.² The sections operate in the Local Court and the Children's Court,³ and apply to criminal proceedings for summary offences and for indictable offences triable summarily. They can also cover bail applications before a magistrate but they do not apply to committal proceedings.⁴

3.3 Sections 32 and 33 allow magistrates to dismiss charges against defendants, either unconditionally or upon certain conditions, for example, that they undergo treatment. Section 33 is designed to deal with a very specific set of circumstances and allows diversionary orders to be made only for those defendants suffering from an acute form of mental illness. In contrast, s 32 is much broader in scope and potentially allows for a diversionary order to be made in respect of defendants suffering from a much wider range of conditions and disabilities, provided these can be shown to be a "developmental disability", a "mental illness", or a "mental condition". Even though s 32 is quite wide-ranging, figures

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1. See *Criminal Procedure Act 1986* (NSW) ch 5.
 2. These powers can be distinguished from other diversionary schemes operating in the Local Court that are not based on any specific legislative provisions, such as the Magistrates' Early Referral Into Treatment program, which provides for defendants who use illicit drugs to enter a detoxification program.
 3. A magistrate under the MHFPA is defined to include a Children's Magistrate: see s 3(1). Young offenders will be discussed in a separate consultation paper, which will be published after the release of this consultation paper. Our discussion of s 32 in the present Paper is limited to its application to adult defendants in the Local Court.
 4. See MHFPA s 31(1).

suggest that the number of defendants in fact diverted from the court system under s 32 is very small.⁵

3.4 The predecessors to s 32 and 33 were introduced in 1983⁶ as part of a package of legislative reforms relating to the treatment of people with mental illness.⁷ At the time of their introduction, these reforms were heralded as marking significant social advances on the basis that they embraced a humane and sympathetic approach to mental illness that moved away from the harsh and often punitive treatment underlying government policies of the past.⁸ The legislation was introduced in the wake of the release of the Richmond report, which had advocated for treatment and support of those with mental illness and developmental disability in the community rather than in institutions.⁹ There is little specific discussion of the diversionary provisions in the parliamentary debates leading up to the passage of the legislation, beyond the fact that they provided defendants in the Local Court with the opportunity to be dealt with in an appropriate rehabilitative context.¹⁰

3.5 The practical purpose of these diversionary powers is that they allow the Local Court to deal more humanely with defendants with a mental illness or cognitive impairment than its general powers otherwise allow. The Local Court is more limited than the superior courts in its

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5. In the period 2004-2006, there was a total of close to 480,000 criminal matters finalised in the Local Court (which does not necessarily mean that there were close to 480,000 defendants dealt with, as one defendant may be subject to more than one matter). For the same period, there was a total of 2,7111 orders made under s 32(3): see the Judicial Commission report, 4. These figures do not give any indication of the number of applications for a diversionary order under s 32 that have failed.
 6. The predecessors to s 32 and 33 were s 428W and 428X of the *Crimes Act 1900* (NSW), which were introduced by the *Crimes (Mental Disorder) Amendment Act 1983* (NSW) sch 1[3].
 7. See *Mental Health Act 1983* (NSW); *Protected Estates Act 1983* (NSW); *Crimes (Mental Disorder) Act 1983* (NSW).
 8. See NSW, *Parliamentary Debates*, Legislative Assembly, 22 November 1983, 3087 (The Hon Laurie Brereton, Minister for Health).
 9. See CP 5, [1.58]-[1.59].
 10. See NSW, *Parliamentary Debates*, Legislative Council, 29 November 2005, 20087 (The Hon Tony Kelly, Minister for Justice) (explaining the purpose of s 32 in its original form before commenting on proposed amendments to allow consideration of the defendant's mental state at the time of committing the crime).

ability to respond to a defendant's impairment by determining him or her unfit to be tried or not guilty by reason of mental illness.¹¹ For that reason, the diversionary powers provided by s 32 and 33 are particularly important as a means of ensuring that defendants with reduced mental capacity are treated fairly.

3.6 This chapter comments on the current operation of s 32, and the next chapter deals with the current operation of s 33. When deciding whether to make a diversionary order under s 32, a magistrate must consider three questions:

- First, is the defendant eligible for consideration under s 32, that is, does the defendant have one of the conditions listed in s 32(1)(a)?
- Secondly, is it more appropriate to deal with the defendant under the diversionary provisions than otherwise in accordance with law?
- Thirdly, if the answer to the second question is yes, what order should the magistrate make?

3.7 The following discussion deals with each of these questions in turn, noting criticisms and uncertainties that have arisen in respect of each and putting forward issues for possible reform. The discussion ends by considering the way in which s 32 applications are heard and various suggestions for improving this process.

DETERMINING ELIGIBILITY FOR A SECTION 32 ORDER

3.8 At present, in order to be eligible to come within the scope of s 32, a defendant must not be a "mentally ill person" but may be:

- developmentally disabled;
- suffering from a mental illness; or
- suffering from a mental condition for which treatment is available in a mental health facility.

The defendant must not be a "mentally ill person"

3.9 An order to divert under s 32 cannot be made in respect of a defendant who is a "mentally ill person" (irrespective of whether that person also happens to be developmentally disabled, suffering from a

11. See CP 6, ch 1 (fitness to be tried) and CP 6, ch 3 (not guilty by reason of mental illness).

mental illness, or suffering from a mental condition). A “mentally ill person”¹² means a person who suffers from mental illness and, because of that illness, there are reasonable grounds for believing that care, treatment, or control of the person is necessary for the person’s own protection from serious harm, or for the protection of others from serious harm.¹³ Section 32 is obviously not intended to apply to defendants with acute mental illness that may make them violent, either against themselves or others. Section 33 is intended to apply instead in those situations.

Meaning of “developmentally disabled”

3.10 A defendant in the Local Court may be eligible for a s 32 order if he or she is “developmentally disabled”. “Developmentally disabled” is not defined in the MHFPA. The term derives from the Richmond inquiry in the 1980s into health services for the psychiatrically ill and “developmentally disabled”.¹⁴ That report¹⁵ defined a “developmental disability” as a severe chronic disability which (among other things) is attributable to an intellectual and/or physical impairment, is manifested before a person attains the age of 18, and results in substantial functional limitations in three or more specific areas of major life activity, namely self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and economic self-sufficiency. It was noted in the Richmond report that the term potentially covered a broader range of people than the terms which it sought to replace, “intellectual handicap” and “mental retardation”, but it was also emphasised that the largest group within this range would be those whose primary disability is intellectual.

3.11 The adoption of the term, “developmentally disabled”, in s 32 of the MHFPA may cause some confusion about its legal meaning in the

12. See MHFPA s 3(1); MHA s 14. See s 4(1) of the MHA for the definition of a mental illness and CP 5, ch 4.

13. The likely deterioration of the person and the likely effects of any such deterioration can be taken into account when determining whether he or she is a mentally ill person: see MHA s 14(2).

14. See [3.4] and CP 5, [1.58]-[1.59]. The Richmond report culminated in the passing of cognate legislation, of which the predecessor to s 32 was a part.

15. See NSW, *Inquiry into Health Services for the Psychiatrically Ill and Developmentally Disabled* (1983) Part 2, 9-12.

context of that section, as distinct from the way it is interpreted in clinical practice.¹⁶ There may be instances where a defendant with a clear cognitive impairment has been considered ineligible for the application of s 32 because a magistrate takes a narrow view of what it means to be “developmentally disabled”. For example, a narrow approach may limit the term to those with an intellectual disability,¹⁷ excluding those with disorders such as attention deficit hyperactivity disorder, autism, or Asperger’s syndrome,¹⁸ as well as those with an impairment acquired in adulthood,¹⁹ such as dementia or a brain injury arising from an accident or disease.²⁰

3.12 There is no detailed discussion in the case law about the meaning of “developmentally disabled”. There is evidence of it being used interchangeably with “intellectually disabled”,²¹ while in other instances being extended to include those who suffer cognitive deficits as a result of brain injury.²²

3.13 From a policy viewpoint, there seems no good reason for excluding from the scope of s 32 those people whose criminal responsibility is significantly compromised by an impairment that happens not to fall within the confines of the notion of a developmental disability, as that term may be understood by the courts. At the least, it has been proposed that “developmentally disabled” should be defined in the legislation, if

16. See the discussion in the Judicial Commission report, 26-27.

17. It was submitted that this was the medical definition of developmental disability, that is, an intellectual impairment that has manifested itself prior to the age of 16: see NSW Crown Advocate, *Preliminary Submission*, 3. See too Intellectual Disability Rights Service, *Enabling Justice* (2008) 28.

18. This was a concern of the Intellectual Disability Rights Service, *Preliminary Submission*, 3. See too NSW Crown Advocate, *Preliminary Submission*, [8]-[9]

19. Since the reference to “developmental” in “developmental disability” refers to the developmental phase of a person’s life, which occurs during childhood. This interpretation of the phrase is certainly supported by the meaning given to the term in the Richmond report, although the term was being used in a different context there: see para 3.10 above.

20. See Intellectual Disability Rights Service, *Preliminary Submission*, 3. See, too the *Enabling Justice* report, 28.

21. See *R v Mailes* (2001) 53 NSWLR 251.

22. See *DPP v Albon* [2000] NSWSC 896, which considered the application of s 32 to a defendant who had sustained a traumatic brain injury, although it is not clear if this was the sole source of his impairment, and at what age he sustained the injury.

only for the sake of clarity and greater certainty. It was submitted²³ that it should be defined broadly to encompass a wide range of conditions, such as:

- autism and Asperger’s disorder;
- attention deficit hyperactivity disorder (“ADHD”);
- cerebral palsy;
- intellectual disability; and
- learning and communication disorders.

3.14 On the other hand, one submission suggested that s 32 should expressly apply to both people with a “developmental disability” and “intellectual disability”, and that those terms should be separately defined in the legislation. “Developmental disability” would encompass conditions such as autism and ADHD that do not necessarily have an intellectual disability element.²⁴ In addition, it was submitted²⁵ that s 32 should refer to a defendant “with a developmental disability” rather than to those who are “developmentally disabled”, as it currently does. The shift in language would represent a change in thinking about people with disabilities by focusing on them as people first, with their disability being one aspect of their makeup, rather than defining them entirely.

Issue 7.9

- (1) Should the term, “developmentally disabled”, in s 32(1)(a)(i) of the MHFPA be defined?
- (2) Should “developmentally disabled” include people with an intellectual disability, as well as people with a cognitive impairment acquired in adulthood and people with disabilities affecting behaviour, such as autism and ADHD? Should the legislation use distinct terms to refer to these groups separately?

23. See Intellectual Disability Rights Service, *Preliminary Submission*, 2-3; Legal Aid NSW, *Preliminary Submission*, 2.

24. See Law Society of NSW, *Preliminary Submission*, 1. See too *Enabling Justice* report, 29, which advocated for the inclusion in s 32 of the term “cognitive disability” as a notion separate from and in addition to “developmental disability”.

25. See Law Society of NSW, *Preliminary Submission*, 1. See too *Enabling Justice* report, 29.

Issue 7.10

Is it preferable for s 32 of the MHFPA to refer to a defendant “with a developmental disability” rather than to a defendant who is “developmentally disabled”?

“Suffering from a mental illness”

3.15 A defendant in the Local Court may be eligible for an order under s 32 if he or she is “suffering from a mental illness”. “Mental illness” is not defined for the purposes of s 32.

3.16 In one case, it was suggested that “mental illness” as a general concept is narrower than mental or psychiatric injury, in so far as the notion of mental illness necessarily involves a serious impairment to mental functioning.²⁶ There may also be uncertainty among the judiciary about the extent to which conditions arising from drug use and abuse can and should come within the meaning of a mental illness or mental condition in s 32.²⁷

3.17 The Intellectual Disability Rights Service commented²⁸ that there is confusion about the distinction between mental illness and intellectual disability, or developmental disability, in the application of s 32. It was said that some lawyers and magistrates may be under the misapprehension that intellectual disability is a form of mental illness. As a result, unrealistic expectations may be placed on defendants to undergo treatment and be cured of their disability. It was asserted that s 32 applications are more often made for people with a mental illness or dual diagnosis than for people with only an intellectual disability, and that applications on the basis of mental illness tend to be more successful than

26. See *Saadat-Talab v Australian Federal Police* [2007] NSWSC 1353, [38] (in relation to possible inconsistency between s 32 and federal legislation).

27. The Chief Magistrate’s submission drew attention to the difficulties that arise in cases involving drug-induced psychosis: see Chief Magistrate of the Local Court of NSW, *Preliminary Submission*, 7-8. Magistrates surveyed by the Judicial Commission were divided in their views about whether conditions arising from drug use could or should be dealt with under s 32: see T Gotsis, Senior Research Officer, Judicial Commission of NSW, Correspondence to the Law Reform Commission, 2 April 2008.

28. See *Enabling Justice* report, 30-32.

applications on the basis of a disability.²⁹ Among the reasons suggested for this were the perceived higher recidivism rates for people with an intellectual disability as opposed to people with a mental illness, and the relative ease of obtaining case plans from mental health service providers as opposed to disability service providers. To try to overcome this confusion, it was proposed that the name of the MHFPA be changed to reflect its application to people with an intellectual disability as well as mental health disorders, and that there be more education about the differences between mental illness and intellectual disability for those dealing with s 32.

Issue 7.11

Should the term, “mental illness” in s 32(1)(a)(ii) of the MHFPA be defined in the legislation?

“Suffering from a mental condition for which treatment is available in a mental health facility”

3.18 The last ground of eligibility for a s 32 order is if the defendant is suffering from a mental condition for which treatment is available in a mental health facility. “Mental condition” is defined in the MHFPA to mean a “condition of disability of mind not including either mental illness or developmental disability of mind”.³⁰ This definition says more about what a mental condition is not rather than what it is. It has been described as a catch-all phrase, with no general recognition as a legal or clinical concept, but one which can cover a wide range of conditions that do not fall within the meaning of a developmental disability or mental illness.³¹

29. The Judicial Commission’s study into the operation of s 32 did not contain a breakdown of the types of conditions which formed the basis of applications under the section, nor their success rates.

30. See MHFPA s 3(1).

31. See Judicial Commission report, 28. See too *Saadat-Talab v Australian Federal Police* [2007] NSWSC 1353, [19] (a mental condition is something broader in scope than a mental illness).

3.19 The main area of contention relating to this third ground is its requirement that treatment be available in a mental health facility.³² This requirement has been criticised for being archaic, echoing earlier, now discredited approaches of dealing with people with mental disorders by institutionalising them, and overlooking the fact that many conditions are now treated in the community. It was also asserted that there could be a tendency to perceive this third category of eligibility as restricted to treatment aimed at “curing” a mental condition. Treatment perceived in this way would exclude, for example, people with an intellectual disability whose condition is permanent and incurable. There is no reason why treatment in this context should not also encompass programs such as literacy and life-skills programs that aim at supporting people with disabilities and reducing the risk of recidivism.

3.20 To overcome these perceived shortcomings, a number of submissions suggested that this third category be expanded to allow for a mental condition “for which treatment is available in the community”.³³ Alternatively, it was proposed that the subsection simply require a mental condition “for which treatment is available”.³⁴

Issue 7.12

Should the term, “mental condition” in s 32(1)(a)(iii) of the MHFPA be defined in the legislation?

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32. Of the submissions which addressed this issue, all were critical of this limitation on the third ground for eligibility: see NSW Crown Advocate, *Preliminary Submission*, 4-5; Dr J Ellard, *Preliminary Submission*, 2; Intellectual Disability Rights Service, *Preliminary Submission*, 3; Law Society of NSW, *Preliminary Submission*, 1-2; Legal Aid NSW, *Preliminary Submission*, 1-2; Office of the DPP, *Preliminary Submission*, 2; Public Defenders, *Preliminary Submission*, 1; Shopfront Youth Legal Centre, *Preliminary Submission*, 2; Dr A Walker, *Preliminary Submission*, 1-2. See too, Judicial Commission report, 28.
33. Law Society of NSW, *Preliminary Submission*, 1-2; Office of the DPP, *Preliminary Submission*, 2; Public Defenders, *Preliminary Submission*, 1; Shopfront Youth Legal Centre, *Preliminary Submission*, 2; Dr A Walker, *Preliminary Submission*, 1-2.
34. See Dr A Walker, *Preliminary Submission*, 1-2. See also Judicial Commission report, 28.

Issue 7.13

- (1) Should the requirement in s 32(1)(a)(iii) of the MHFPA for a mental condition “for which treatment is available in a mental health facility” be changed to “for which treatment is available in the community” or alternatively, “for which treatment is available”?
- (2) Should the legislation make it clear that treatment is not limited to services aimed at curing a condition, but can include social services programs aimed at providing various life skills and support?

Adopting a general, overarching term to replace existing categories of eligibility?

3.21 One way of addressing any perceived shortcomings in the current criteria for eligibility under s 32 is to make changes to the formulation of the existing categories of eligibility. The questions raised in Issues 7.9-7.13 are designed to consult on what sorts of changes could be made, following this approach.

3.22 An alternate approach is to do away altogether with these existing categories, and replace them with one overarching term to define a person’s eligibility for a diversionary order under s 32. The reasoning behind doing away with separate categories of eligibility is that it should not matter what the source of a person’s impairment is when determining his or her eligibility for diversion. For example, if a person’s criminal responsibility is seriously impaired because of a reduced cognitive functioning, it should not make him or her any more or less deserving of a diversionary order depending on whether he or she was born with a cognitive impairment, or it developed before adulthood, or it resulted from injury or illness in his or her adult years. Discarding the existing categories of eligibility would take the focus away from trying to identify a specific source of impaired functioning and make it fit into one of a list of categories, when these categories are not necessarily relevant to the real issue of whether or not a person should be diverted away from the criminal justice system.

3.23 This Commission has previously considered a proposal to use an umbrella term as a standard definition in all legislation relating to people with reduced cognitive capacity.³⁵ It was proposed that the term, “impaired intellectual functioning” be used and defined as “includes impaired intellectual functioning because of intellectual disability, brain

35. See NSWLRC Report 80, [3.23]-[3.26].

injury or dementia”. The Commission ultimately decided against recommending an umbrella term, mainly because the particular terms of its reference were not broad enough to allow it to consider people with impairments other than intellectual disability.

3.24 Several other Australian jurisdictions have legislative provisions similar to s 32 that allow defendants charged with less serious offences to be diverted out of the criminal process. These provisions vary in the terminology they use to determine eligibility for their diversionary schemes, although they predominantly favour the use of a general term rather than distinct and separate criteria. For example, in the ACT, the power of the Magistrates Court to divert applies to a defendant who is “mentally impaired”.³⁶ “Mental impairment” is defined as including “senility, intellectual disability, mental illness, brain damage and severe personality disorder”.³⁷ In South Australia, the Magistrates Court or the Youth Court has the power to divert a person charged with a summary offence or a minor indictable offence, where that person suffers from a “mental impairment”.³⁸ “Mental impairment” is defined to mean “an impaired intellectual or mental function resulting from a mental illness, an intellectual disability, a personality disorder, or a brain injury or a neurological disorder (including dementia)”.³⁹ Under s 20BQ of the Commonwealth *Crimes Act 1914*, courts exercising summary jurisdiction over a federal offence have the power to divert defendants who are suffering from a mental illness or are intellectually disabled. “Mental illness” is defined according to the meaning of the civil law of the particular State or Territory. “Intellectually disabled” is not defined.

36. See *Crimes Act 1900* (ACT) s 334(1)(a).

37. See *Criminal Code 2002* (ACT) s 27 (the definition of “mental impairment” provided in the *Criminal Code* applies to s 334(1)(a) of the *Crimes Act 1900* (ACT) by virtue of s 6 and 7 of the *Criminal Code*, which provide that the general principles of criminal responsibility set out in chapter 2 of the Code are of general application, that is, they apply to all offences against the Code as well as against all other laws of the ACT).

38. See *Criminal Law (Sentencing) Act 1988* (SA) s 19C.

39. See *Criminal Law (Sentencing) Act 1998* (SA) s 19C(5).

Issue 7.14

Should the existing categories of developmental disability, mental condition, and mental illness in s 32(1)(a) of the MHFPA be removed and replaced by a general term used to determine a defendant's eligibility for a s 32 order?

Issue 7.15

What would be a suitable general term to determine eligibility for a s 32 order under the MHFPA? For example, should s 32 apply to a person who suffers from a "mental impairment"? How would a term such as "mental impairment" be defined? For example, should it be defined according to an inclusive or exhaustive list of conditions?

Issue 7.16

Are there specific conditions that should be expressly excluded from the definition of "mental impairment", or any other term that is preferred as a general term to determine eligibility under s 32 of the MHFPA? For example, should conditions related to drug or alcohol use or abuse be excluded? Should personality disorders be excluded?

EXERCISING THE COURT'S DISCRETION ABOUT WHAT IS APPROPRIATE

3.25 Once a defendant has passed the threshold test for eligibility,⁴⁰ it must be decided whether or not it would be "appropriate" to divert him or her away from criminal proceedings.⁴¹ This second stage requires the magistrate to exercise a discretionary judgment⁴² about whether it is more appropriate to deal with this particular defendant under a diversionary regime or require him or her to face the full force of the criminal law.

3.26 Section 32 does not spell out the factors to consider in deciding what is "appropriate". In this regard, the legislation provides for a very wide discretion and it is possible that individual magistrates, though acting reasonably, might reach different conclusions based on the same

40. See MHFPA s 32(1)(a).

41. See MHFPA s 32(1)(b).

42. See *Confos v Director of Public Prosecutions (NSW)* [2004] NSWSC 1159, [16]-[18]; *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154, [4] (Spigelman CJ) [76] (McColl JA). But see the comments of Greg James J in *El Mawas v Director of Public Prosecutions* [2005] NSWSC 243, [54]: "I do not see that a discretionary judgment, in the strict sense, is made by the Magistrate. To my mind it is rather a value judgment concerning the appropriateness of dealing with the matter under one regime or another."

facts.⁴³ Ultimately, determining what is “appropriate” involves weighing up two public interests: the public interest in ensuring that those charged with a criminal offence face the full weight of the law versus the public interest in treating people suffering from any of the listed mental conditions with the aim of ensuring that the community is protected from their conduct.⁴⁴

3.27 While the legislation is silent on the factors to be considered in deciding what is appropriate, there is limited discussion in the case law about several matters held to be relevant to the exercise of this discretion. These are referred to below.

The seriousness of the offence

3.28 It has been consistently held that the determination of what is appropriate requires a magistrate to take account of the seriousness of the offence involved.⁴⁵ The courts have stressed that this does not mean that a more serious offender will be automatically excluded from the diversionary scheme under s 32, if doing so will produce a better outcome for the individual and the community.⁴⁶ It is not clear, however, in what circumstances it might be considered appropriate to divert a defendant charged with a relatively serious offence. On the one hand, it has been held that the more serious the offence, the more important will be the public interest in ensuring that punishment is imposed and the less likely will it be found appropriate to divert the defendant away from criminal proceedings.⁴⁷ On the other hand, it has been pointed out that a defendant who is diverted under s 32 will still be punished in so far as the orders imposed under s 32(2) and (3) will usually curtail his or her freedom in some way.⁴⁸

43. See *Confos v Director of Public Prosecutions (NSW)* [2004] NSWSC 1159, [17]; *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154, [4].

44. See *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154, [17].

45. See, for example, *Confos v Director of Public Prosecutions (NSW)* [2004] NSWSC 1159; *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154; *Perry v Forbes* (NSW Supreme Court, unreported, 21 May 1993); *Mantell v Molyneux* (2006) 165 A Crim R 83; *Khalil v His Honour Magistrate Johnson* [2008] NSWSC 1092.

46. See *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154, [79].

47. See *Confos v Director of Public Prosecutions (NSW)* [2004] NSWSC 1159, [16]-[18].

48. See *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154, [73].

3.29 The diversionary scheme under s 32 is only available to defendants charged with committing summary offences or indictable offences triable summarily. In its recent study on the use and operation of this section, the Judicial Commission considered the nature of offences that formed the basis of orders granted under s 32 in the period between 2004 and 2006. The Judicial Commission found that the types of offences were varied, with the five largest categories being:

- acts intending to cause injury, such as assault (23%);
- offences against justice procedures and government security and operations (16%);
- theft and related offences (14%);
- public order offences (12%); and
- property damage and environmental pollution (10%).⁴⁹

3.30 The types of offences for which the fewest orders were granted under s 32 are recorded as sexual assault and related offences (a total of only 43 for the two year period) and robbery, extortion, and related offences (a total of just 10 for the two year period). As well, magistrates responding to the Judicial Commission's survey were reported to be reluctant to grant s 32 orders for traffic offences because they were unable to disqualify a driver's licence unless a conviction was recorded.

3.31 It is difficult to glean too much from these figures in so far as they may demonstrate any particular tendency towards certain types of offences for s 32 orders in the absence of any comparative figures for the types of offences for which applications under s 32 were made but declined, as well as figures demonstrating the types of offences generally committed by people who would normally fall within the categories of offenders eligible for consideration under s 32. Previous studies of offenders with intellectual disability have indicated that this group tends to commit either relatively minor but repeated offences or one major, violent crime, and that these offences generally involve impulsive, unplanned behaviour. Property offences and offences against people, including sexual offences, were identified as the more common offences committed by this group.⁵⁰

49. See Judicial Commission report, 5-7.

50. See J Simpson, M Martin, J Green, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and Those at Risk of*

3.32 It was submitted⁵¹ that, in practice, magistrates tend not to grant s 32 orders for more serious offences and it was argued that this approach is wrong in principle. It was said that a defendant who is found to lack capacity and understanding of his or her actions should be entitled to consideration under s 32 regardless of the seriousness of his or her offence. At the same time, the same submission was not in favour of including a statutory list of factors to guide the exercise of the discretion in deciding what is appropriate, because it was thought that this would remove the flexibility that is currently provided by the wording of the section. Another submission argued⁵² that magistrates should not take account of the seriousness of the offence when deciding whether it is appropriate to divert a defendant. Instead, the legislation should allow magistrates to consider the seriousness of the offence after they have decided to divert the defendant, when deciding what conditions to impose on a defendant who has been diverted.⁵³

3.33 The question whether a s 32 order should be available in respect of more serious offences is essentially a question of principle. The question really amounts to whether certain offences are of such a serious nature that they require the imposition of a criminal penalty regardless of the individual circumstances of the particular defendant, or whether a defendant whose mental capacity is impaired to the extent that it reduces his or her criminal responsibility should be considered suitable for diversion regardless of the objective seriousness of the offence he or she is charged with committing. At present, because s 32 orders are limited to Local Court proceedings, the offences to which they can apply will be relatively less serious (although this is less true now that the Local Court has jurisdiction to hear proceedings for some indictable offences). Later in this paper, we discuss a proposal to extend the application of s 32 to the superior courts.⁵⁴ If that proposal were adopted, the question of whether it should apply to more serious offences takes on greater significance. As well, if legislation were to extend the fitness to plead provisions and the special verdict of not guilty by reason of mental illness to Local Court

Offending (Intellectual Disability Rights Service, NSW Council for Intellectual Disability, 2001) 13-14.

51. See Intellectual Disability Rights Service, *Preliminary Submission*, 4.

52. See Law Society of NSW, *Preliminary Submission*, 1-2.

53. See *Mental Health (Forensic Provisions) Act 1990* s 32(3).

54. See Chapter 5.

proceedings,⁵⁵ it may be necessary to consider whether some distinction should then be made between the types of offences to which these provisions are to apply and the types of offences to which s 32 applies.

Issue 7.17

Should a magistrate take account of the seriousness of the offence when deciding whether or not to divert a defendant according to s 32 of the MHFPA? Why or why not?

A causal connection between the condition and the offence?

3.34 It is not clear from the case law whether the exercise of the magistrate's discretion in deciding what is appropriate should take into account the extent of the causal connection between the defendant's offending conduct and his or her disability, condition, or illness. Can it be thought appropriate to grant an order to divert if the defendant's criminal conduct cannot be directly attributed to his or her illness, disability, or condition?

3.35 In one case, it was found that the magistrate was not wrong in refusing to grant a s 32 order where the reason for that refusal was, among other things, that the mental illness, which was characterised by a lack of self-control and impulsiveness, was not seen to play a part in the commission of the offence, which involved an element of planning and premeditation.⁵⁶ But in another case,⁵⁷ it was left open for question whether an application under s 32 must fail because there was no causal link between the mental condition and the offence. On the particular facts of the case, the magistrate made no final finding about whether and to what extent the defendant's mental condition contributed to her negligent driving, but nevertheless exercised his discretion by granting an order under s 32.

55. See CP 6, ch 3.

56. See *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154. But see the decision of the primary judge which found that the magistrate had erred in the exercise of her discretion by considering, among things, that there must be a causal link between the defendant's mental condition and the offence: see *El Mawas v Director of Public Prosecutions* [2005] NSWSC 243.

57. See *Police v Deng* [2008] NSWLC 2.

3.36 In consultation, the Deputy Chief Magistrate of the Local Court said that the issue of a causal relationship between the offence and the impairment is a key factor that a magistrate ordinarily considers in determining whether to make an order under s 32.⁵⁸ NSW Police noted with concern that s 32 does not expressly require a causal relationship between the defendant's mental condition, mental illness, or developmental disability, and the offending conduct. They said that some defendants do not take arrest or charges seriously because they know that they will be "let off" under s 32.⁵⁹ Professor Susan Hayes, who specialises in intellectual disability and has conducted psychological assessments for the purposes of s 32 applications, also said she had encountered defendants with this attitude.⁶⁰ The relevance of a causal connection to the exercise of the discretion about what is appropriate is even more uncertain in cases where the defendant has co-occurring problems of substance use and abuse.

3.37 It makes sense to require a causal connection between the defendant's criminal conduct and his or her illness or disability if the underlying justification for diversion is a reduction in criminal responsibility because of diminished mental capacity. On the other hand, it may be overly simplistic to try to identify a direct cause for criminal conduct in the case of a defendant with a mental illness or impairment, in so far as this denies the broader context that may have given rise to the defendant's conduct and which may be years of disadvantage and marginalisation.

Issue 7.18

Should the decision to divert a defendant according to s 32 of the MHFPA depend upon a direct causal connection between the offence and the defendant's developmental disability, mental illness, or mental condition?

58. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

59. See NSW Police, *Consultation*.

60. See Prof Susan Hayes, *Consultation*.

The sentencing outcomes if the defendant is convicted

3.38 In a few cases, it has been found relevant to consider the sentencing outcomes available if the defendant were convicted of the offence when considering the appropriateness of dealing with that defendant under diversionary provisions. For instance, in one case, the magistrate found that if the defendant were convicted of the charge of negligent driving occasioning death, any penalty imposed on her would be at the lower end of the scale, and that factor was taken into account in granting her application under s 32.⁶¹ In another case,⁶² it was noted that if the likely penalty upon conviction were a non-custodial sentence, then that would necessarily be taken into account in the balancing exercise between the two public interests in deciding what is appropriate.

3.39 It is not clear from these judicial statements whether the reverse would apply to weigh against granting an order under s 32. That is, if a defendant were likely to face a sentence at the higher end of the scale of possible penalties, would that necessarily weigh against the public interest in granting an order to divert him or her under s 32? And should consideration of sentencing outcomes be relevant at all to a decision about the extent of a defendant's criminal responsibility and his or her potential for rehabilitation through diversion?

Issue 7.19

Should the decision whether or not to divert a defendant according to s 32 of the MHFPA take into account the sentence that is likely to be imposed on the defendant if he or she is convicted?

Availability of a case plan or other proposed course of action

3.40 It has been held that a magistrate can take into account a proposed course of action or case plan, or treatment plan, for the defendant when determining what is the appropriate course of action to take. At the same time, a magistrate is entitled not to place significant weight on the existence of such a plan in the circumstances of a particular case in

61. See *Police v Deng* [2008] NSWLC 2.

62. See *Mantell v Molyneux* (2006) 165 A Crim R 83.

exercising his or her discretion.⁶³ The legislation does not require a case plan to be tendered in support of a s 32 application, but at the same time it was submitted that an application under s 32 will not succeed in the absence of such a plan.⁶⁴ We discuss case plans in greater detail below at paragraphs 3.78-3.82.

The defendant's criminal history, including previous diversionary measures

3.41 In a few cases, the defendant's criminal history has been taken into account in the exercise of the discretion about whether it is appropriate to divert. In some instances, a lengthy criminal history, and in particular the failure of earlier diversionary measures under s 32 to prevent re-offending, may be considered to weigh against granting an application under s 32.⁶⁵ In other instances, a long criminal history may weigh in favour of diversion where it is found to be caused by the defendant's impairment.⁶⁶

A legislative list of factors to guide the discretion?

3.42 At present, s 32(1)(b) does not provide a magistrate with any guidance in the exercise of his or her discretion to divert beyond a requirement to consider what is appropriate. It has been left to the case law to develop a list of factors that may be relevant to this decision. The questions raised in the discussion above are directed at finding out whether there is general agreement with the approach taken in the case law so far. That leads on to the question whether there would be any advantage in providing in the legislation itself a list of factors that the court can or must take into account in the exercise of its discretion. For example, the legislation could require the court to take into account any or all of the matters just discussed or, alternatively, require it *not* to take a specific matter into account, depending on the policy position that is ultimately taken about its relevance.

63. See *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154, [10]; *Khalil v His Honour, Magistrate Johnson* [2008] NSWSC 1092, [85].

64. See Intellectual Disability Rights Service, *Preliminary Submission*, 3; Law Society of NSW, *Preliminary Submission*, 3.

65. See *Mantell v Molyneux* (2006) 165 A Crim R 83.

66. See *Minister for Corrective Services v Harris* (unreported, Supreme Court of NSW, Brownie J, 10 July 1987).

3.43 There are examples from other Australian jurisdictions where similar legislative provisions direct the court's attention to specific matters when deciding whether to divert a defendant. For instance, in the ACT, s 334(3) of the *Crimes Act 1900* is quite detailed in the matters that the court must pay regard to when deciding whether to make a diversionary order in respect of a defendant with a mental impairment. These matters include the nature and seriousness of the impairment, the period for which it is likely to continue, the seriousness of the alleged offence, the defendant's antecedents, and the effectiveness of any previous diversionary order. In South Australia, s 19C of the *Criminal Law (Sentencing) Act 1988* frames the court's discretion in different terms, but still directs its attention to certain matters when deciding whether to make a diversionary order. These matters include, for instance, whether the defendant's mental impairment explains and extenuates, at least to a certain extent, the criminal conduct in question, the risk that is posed to the public in releasing the defendant, and whether the defendant has made a conscientious effort to overcome behavioural problems.

Issue 7.20

- (1) Should s 32(1)(b) of the MHFPA include a list of factors that the court must or can take into account when deciding whether it is appropriate to make a diversionary order?
- (2) If s 32(1)(b) were to include a list of factors to guide the exercise of the court's discretion, are there any factors other than those discussed in paragraphs 3.28-3.41 that should be included in the list? Are there any factors that should be expressly identified as irrelevant to the exercise of the discretion?

ORDERS THAT THE COURT CAN MAKE

3.44 Once a magistrate has decided that it is appropriate to grant an application under s 32, there are two different types of orders that he or she can make. There are interlocutory orders, as provided by s 32(2), and there are final orders, as provided by s 32(3).

Interlocutory orders

3.45 The interlocutory orders available under s 32(2) consist of the power to:

- adjourn proceedings;
- grant bail in accordance with the *Bail Act 1978* (NSW); and
- make any other order that the magistrate considers appropriate.

3.46 This last power is ancillary to the other interlocutory powers provided in s 32(2) and could include, for example, an order imposing conditions on the defendant about supervision or residence during an adjournment. It does not expand the Court's powers to make a final order under s 32(3).⁶⁷

3.47 The interlocutory orders available under s 32(2) can only be made after the magistrate has exercised his or her discretion in favour of granting a s 32 application. They cannot be used before the exercise of that discretion. However, the Court retains its general powers to make interlocutory orders in the course of proceedings, such as the power to grant an adjournment.⁶⁸ The additional interlocutory powers available under s 32(2) have been said to widen these more general powers by allowing the magistrate to reach an "interim position" before deciding whether to make a final order under s 32(3).⁶⁹

Issue 7.21

- (1) Do the interlocutory orders available under s 32(2) of the MHFPA give the Local Court any additional powers beyond its existing general powers to make interlocutory orders?
- (2) Is it necessary or desirable to retain a separate provision spelling out the Court's interlocutory powers in respect of s 32 even if the Court already has a general power to make such interlocutory orders?

67. See *Mantell v Molyneux* (2006) 165 A Crim R 83.

68. See *Mantell v Molyneux* (2006) 165 A Crim R 83.

69. See *Mantell v Molyneux* (2006) 165 A Crim R 83.

Issue 7.22

Are the interlocutory powers in s 32(2) of the MHFPA adequate or should they be widened to include additional powers?

Final orders

3.48 There are a number of final orders that the Local Court can make when it decides to grant an order under s 32. Section 32(3) empowers a magistrate to dismiss the charges against the defendant and:

- discharge the defendant into the care of a responsible person, unconditionally or subject to conditions;
- discharge the defendant on the condition that the defendant attend on a person or at a place specified by the magistrate for assessment of the defendant’s mental condition or treatment or both; or
- discharge the defendant unconditionally.

3.49 According to the Judicial Commission’s research into s 32,⁷⁰ the most common form of order imposed under s 32(3) in the period between 2004 and 2006 was an order discharging the defendant into the care of a responsible person subject to conditions (55% of total orders imposed). Next most common was an order discharging the defendant on the condition that they attend on a person or place for assessment or treatment (24%), then an order discharging the defendant unconditionally (18%). Least commonly imposed was an order discharging the defendant into the care of a responsible person unconditionally (2%).

3.50 A number of issues were raised in preliminary submissions in relation to the orders available under s 32(3). These are discussed below, following which Issues 7.23-7.31 raise questions aimed at determining the adequacy of the orders currently available.

Responsible person

3.51 “Responsible person” is not defined in the legislation. Parents, partners, or other family members may be nominated as a responsible person for the purpose of a s 32(3)(a) order.⁷¹ If a guardianship order is in

70. See Judicial Commission report, v and Table 1. The figures provided are out of a total of 2711 defendants discharged under s 32(3).

71. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

place, the Public Guardian may act as the responsible person.⁷² Professor Susan Hayes expressed the view that it may be inappropriate to nominate a family member as the responsible person. There will often be a history of complex family dynamics between family members and the defendant, and families may have exhausted their own resources or be incapable of arranging the necessary interventions. In some instances, the defendant might be suffering abuse within the family.⁷³

3.52 It was also pointed out that the legal obligations of the responsible person are uncertain, since the Court does not have the power to compel third parties to comply with s 32 orders.⁷⁴ The question was raised whether the legislation requires the responsible person to agree in writing to their responsibilities, including their responsibility to advise of a breach of the order.⁷⁵

3.53 It was also submitted that the notion of a single responsible person is fictitious because it is rare that only one person will be responsible for the care of a person with a cognitive or mental health impairment.⁷⁶ There are usually a variety of professionals or agencies responsible for implementing a treatment plan. It was submitted that it would be more appropriate, and would better reflect reality, to frame an order in terms of discharging the defendant on conditions, which could include accepting treatment or case work from a nominated agency or following a case plan.

Discharge on condition of treatment

3.54 “Treatment” is not defined in the legislation. In the case of *Albon*, the Court noted that it would not be appropriate to impose an order for treatment on a defendant with a developmental disability.⁷⁷ The Court appears to have interpreted the word, “treatment”, narrowly to denote

72. For example, see *Director of Public Prosecutions v Albon* [2000] NSWSC 896; *Mantell v Molyneux* (2006) 165 A Crim R 83.

73. See Prof Susan Hayes, *Consultation*.

74. See Shopfront Youth Legal Centre, *Preliminary Submission*, 2. See para 3.56-3.58 below.

75. See the response of one magistrate to a survey conducted by the Judicial Commission as noted in Judicial Commission report, 24.

76. See Shopfront Youth Legal Centre, *Preliminary Submission*, 2. See too comments from two magistrates in relation to the term, “responsible person” as recorded in the Judicial Commission report, 24.

77. See *Director of Public Prosecutions v Albon* [2000] NSWSC 896, [21].

something that is amenable to a cure. Obviously, a person with a development disability cannot be “cured”. But it was submitted that a broader notion of treatment should be applied to orders made under this category, which would be appropriate for defendants with a developmental disability.⁷⁸ For example, supported accommodation, behavioural therapy, and living skills education, could be regarded as “treatment” in so far as they provide people with a developmental disability with a variety of life skills aimed at reducing their risk of recidivism.

Unconditional discharge

3.55 The policy underlying s 32 is to provide an alternative, more humane way of dealing with offenders in the particular circumstances of their case and promote their rehabilitation in order to reduce their risk of recidivism. It could be argued that an unconditional discharge would only be appropriate in a limited range of circumstances, probably involving relatively minor offending.

Orders binding third parties

3.56 At present, the Local Court does not have the power to compel third parties to comply with any final order that it makes under s 32(3).⁷⁹ For example, if a magistrate orders that a defendant attend a specific treatment facility, the magistrate has no power to compel that facility to provide a service to the defendant if, for example, it does not have sufficient resources to do so. At the most, it is possible that the Court has an obligation not to make a final order under s 32(3) until it is satisfied that there is a plan or service available to allow for compliance with the order.⁸⁰ It has been argued that a lack of adequate funding for mental health resources can undermine the utility of s 32 and significantly reduce its effectiveness in diverting offenders out of the criminal justice system.⁸¹

3.57 An analogous situation arises in respect of the imposition of community treatment orders for the involuntary treatment in the

78. See Law Society of NSW, *Preliminary Submission*, 2; Shopfront Youth Legal Centre, *Preliminary Submission*, 2.

79. See *Minister for Corrective Services v Harris* (Supreme Court of NSW, unreported, 10 July 1987).

80. See *Director of Public Prosecutions v Albon* [2000] NSWSC 896, [26].

81. See Judicial Commission report, 31. Magistrates responding to the Judicial Commission’s survey expressed concerns about the lack of adequate resources to support the s 32 scheme.

community of people with mental health problems. The MHA makes provision for the Mental Health Review Tribunal or a magistrate to impose a community treatment order in certain circumstances.⁸² The legislation expressly requires that, before making an order, the Tribunal or magistrate must consider a treatment plan provided by the mental health facility that is to implement the proposed order,⁸³ and must be satisfied that the treatment plan is appropriate and that the facility is capable of implementing it.⁸⁴

3.58 While the legislation governing community treatment orders does not go so far as to compel third parties to provide a service, it does require some form of positive commitment from a mental health facility before an order can be made. It is worth considering whether a similar provision should be included in s 32(3), and whether, at the very least, it would focus attention on the practicalities of implementing a proposed diversionary measure.

Issue 7.23

Is the existing range of final orders available under s 32(3) of the MHFPA adequate in meeting the aims of the section? Should they be expanded?

Issue 7.24

Are the orders currently available under s 32(3) of the MHFPA appropriate in meeting the needs and circumstances of defendants with a cognitive impairment, as distinct from those with mental health problems?

Issue 7.25

Should s 32(3) of the MHFPA include a requirement for the court to consider the person or agency that is to implement the proposed order and whether that person or agency is capable of implementing it? Should the legislation provide for any means of compelling a person or agency to implement an order that it has committed to implementing?

82. See MHA pt 3.

83. See MHA s 53(2)(a).

84. See MHA s 53(3)(b).

Duration of orders

3.59 Section 32 does not set out time limits for the duration of any conditions that can be attached to a final order under s 32(3). The only reference to time limits in the section is to the six month limit on the magistrate's power to supervise the defendant's compliance with the order: s 32(3A) empowers a magistrate to call a defendant to appear if it is suspected that the defendant has breached a condition of an order imposed under s 32(3). The power to recall the defendant lasts for six months from the time that the order is made.

3.60 It was assumed in one case that an order imposing a condition on a defendant could not last more than the six month period for which it could be enforced.⁸⁵ It has since been suggested that there is no real legal basis for implying a six month time limit on orders simply because the legislation imposes a six month limit on the power to enforce them.⁸⁶ From a practical point of view, however, even if an order imposing a condition extends beyond the six month period, if there is no means to enforce it then it may have little real value.

3.61 It has been suggested that the duration of the Court's supervisory powers over conditional discharges may be extended significantly by the use of interlocutory orders.⁸⁷ For example, a magistrate may make an interlocutory order requiring the defendant to obtain treatment while on bail, and may then impose a condition upon discharge as part of a final order under s 32(3). It seems that this does happen in practice.⁸⁸

3.62 The Intellectual Disability Rights Service expressed the view that six months is sufficient for the duration of a final order under s 32(3), in view of the informal extensions sometimes effected by the use of adjournment powers.⁸⁹

3.63 The Deputy Chief Magistrate expressed concern that service providers might be unable to maintain for longer than six months the

85. See *Mantell v Molyneux* (2006) 165 A Crim R 83.

86. See Judicial Commission report, 15-16.

87. See *Mantell v Molyneux* (2006) 165 A Crim R 83.

88. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*; Intellectual Disability Rights Service, *Consultation*.

89. See Intellectual Disability Rights Service, *Consultation*.

level of service delivery and supervision that a s 32 order requires.⁹⁰ Her Honour expressed the view that some matters *are* too serious to be dealt with under s 32 or 33, given the short six month period of court supervision.⁹¹ Rather than extending this period of supervision, it may be preferable if the Court had additional powers to deal with defendants with a cognitive impairment or mental illness, including the power to refer a defendant to the Mental Health Review Tribunal.⁹²

3.64 The Chief Magistrate submitted that the duration of orders under s 32, which can effectively require a defendant to submit to treatment, should be consistent with the powers exercised by magistrates in relation to involuntary mental health treatment in the community under the MHA.⁹³ The maximum duration of community treatment orders has recently been extended, from six months to 12 months.⁹⁴

3.65 Diversion mechanisms in other Australian jurisdictions have timeframes ranging from six months to indefinite orders.⁹⁵

90. See Deputy Chief Magistrate, Local Court of NSW, *Consultation*.

91. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*. Her Honour gave an example of a case where a man, who was mentally ill at the time, broke a bottle then walked down the street and shoved the broken end into the face of a random passer-by, causing serious injury. See also for example *Mantell v Molyneux* (2006) 165 A Crim R 83, 89-90; *R v McMahon* (2006) 3 DCLR(NSW) 398; *R v Goodworth* [2007] NSWLC 2.

92. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation* and see discussion in CP 6, ch 1 and 3 of Local Court powers in cases involving unfitness or the defence of mental illness.

93. See Chief Magistrate, Local Court of NSW, *Preliminary Submission*, 7.

94. See MHA s 53(6), s 56(2); but see *Mental Health Act 1990* (NSW) s 135 (repealed).

95. In South Australia, under the Magistrates Court Diversion Program, the final court review is usually held approximately six months after the defendant commences the program: see Courts Administration Authority (SA), "Magistrates Court – Court Diversion Program", <www.courts.sa.gov.au/courts/magistrates/index.html> at 8 August 2007. Under the Commonwealth diversion mechanism, the dispositions are identical to those available under s 32. The duration of the order is for up to three years. However, there is no provision for review, variation, or revocation of the order, nor to return the defendant to court in the event of non-compliance: see *Crimes Act 1914* (Cth) s 20BQ. The Intellectual Disability Rights Service expressed the view that the three year duration of Commonwealth orders is too long, in view of the restrictions on the liberty of the person: see Intellectual Disability Rights Service, *Consultation*. In the ACT, if the court is satisfied that it is "appropriate" to deal with a defendant

Issue 7.26

Should s 32 of the MHFPA specify a maximum time limit for the duration of a final order made under s 32(3) and/or an interlocutory order made under s 32(2)? If so, what should these maximum time limits be?

Powers to enforce a final order

3.66 The discussion above noted the magistrate’s power under s 32(3A) to call a defendant to appear before the court if it is suspected that the defendant has not complied with a condition of a final order imposed under s 32(3). As originally enacted, s 32 did not provide for any enforcement procedures in the event of a defendant failing to comply with the conditions of discharge. As a result, it seems that magistrates were reluctant to apply the section.⁹⁶ The section was amended in 2004 to include the enforcement procedures set out in s 32(3A).⁹⁷

3.67 If a defendant is brought before the court for failing to comply with a final order according to s 32(3A), the magistrate “may deal with the charge as if the defendant had not been discharged.”⁹⁸ The magistrate may make another s 32 order, or may instead proceed according to law.⁹⁹ The procedure is similar to the procedure for failing to comply with a good behaviour bond.¹⁰⁰ Re-offending does not amount to a breach of a s 32 order,¹⁰¹ although it may signify that the particular conditions imposed are insufficient to address the causes of the person’s offending.

under the diversion mechanism, it may dismiss the charges and either release the defendant unconditionally or require the defendant to submit to the jurisdiction of the Mental Health Tribunal for the making of a “mental health order”. Mental health orders made in respect of a person diverted from court appear to be of indefinite duration. The Tribunal has the power to review, vary and revoke mental health orders, including if an order is breached: see *Crimes Act 1900* (ACT) s 334; *Mental Health (Treatment and Care) Act 1994* (ACT) s 3, dictionary and pt 4, s 36J(2).

96. See M Spiers, “Summary disposal of criminal offences under s 32 *Mental Health (Forensic Provisions) Act 1990*” (2004) 16(2) *Judicial Officers Bulletin* 1, 1.

97. See MHFPA s 32(3A)-(3D) inserted by *Crimes Legislation Amendment Act 2002* (NSW) sch 9 cl 3.

98. See MHFPA s 32(3D).

99. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

100. See *Crimes Legislation Amendment Act 2002* (NSW) sch 9, Explanatory Note.

101. See Judicial Commission of NSW, *Local Courts Bench Book* (2004) [4120]; Deputy Chief Magistrate of the Local Court of NSW, *Consultation*; and see M Spiers,

3.68 There is no available case law involving the application of the breach provisions, which are rarely invoked.¹⁰²

3.69 The Judicial Commission observed that the policy underlying s 32, which is to modify defendants' behaviour in order to prevent further contact with the criminal justice system, is undermined if mechanisms for enforceability, and therefore accountability, are ineffective.¹⁰³

3.70 Section 32A of the MHFPA authorises a treatment provider (that is, a person providing treatment under a s 32(3) order) to report a breach of a s 32(3) order to the Probation and Parole Service or to a juvenile justice officer.¹⁰⁴ The Department of Corrective Services submitted that if a treatment provider reports a breach to a Probation and Parole Officer, “[t]here is no reference to what the Probation and Parole Officer is required to do with the information, but presumably the officer would report the failure to comply [to] the court”. That “appears to indicate that a further condition of the order made under section 32 ... require[s] the defendant to be supervised by the Probation and Parole Service”. The Department submitted that clarification of its obligations and of the Court's powers under s 32 is required.¹⁰⁵

3.71 Some groups opposed the idea that a failure to comply with a s 32 order should lead to the person being returned to court, and hence back into contact with the criminal justice system.¹⁰⁶ The Public Interest Advocacy Centre acknowledged that it was desirable to ensure some form of accountability through the use of the breach provisions. However, from a human rights perspective, the Centre's view is that

“Summary disposal of criminal offences under s 32 *Mental Health (Criminal Procedure) Act*” (2004) 16(2) *Judicial Officers Bulletin* 1, 2.

102. Only 38 breach proceedings were instigated in 2004-2006, whereas 2711 persons were discharged under s 32: see Judicial Commission report, 20-21.

103. See Judicial Commission report, 22.

104. Section 32A was introduced in 2006, inserted by the *Mental Health (Criminal Procedure) Amendment Act 2005* (NSW) sch 1 cl 19. The provision was intended “to ameliorate concerns of service providers in relation to client confidentiality issues” in order to facilitate reporting of failures to comply: see NSW, *Parliamentary Debates*, Legislative Assembly, 8 November 2005, 19216 (Alison Megarrity, Parliamentary Secretary).

105. See Department of Corrective Services, *Preliminary Submission*, 1 (emphasis added).

106. See Intellectual Disability Rights Service, *Preliminary Submission*, 2.

“people who shouldn’t be dealt with by courts *should not* be dealt with by the courts”. The Centre considered that the Mental Health Review Tribunal is better placed than magistrates to assess compliance and adjust conditions if necessary.¹⁰⁷

3.72 The Intellectual Disability Rights Service suggested that there should be scope for adjustment of the terms of the order if it is breached, rather than proceeding with the matter according to law.¹⁰⁸ Otherwise, a person with an intellectual disability may effectively be punished for the inadequacies of a treatment plan.¹⁰⁹

3.73 Professor Susan Hayes expressed the view that it would be helpful if conditions were *immediately* enforceable. For example, if it is a condition of discharge that a person reside at a residential facility and he or she then absconds, the facility supervisor should be able to contact police to have the person apprehended and returned to the facility. The police could have a discretion not to return the matter to court unless, for example, a condition of the order required adjustment.¹¹⁰

Issue 7.27

Should the Mental Health Review Tribunal have power to consider breaches of orders made under s 32(3) of the MHFPA, either instead of or in addition to the Local Court?

Issue 7.28

Should there be provision in s 32 of the MHFPA for the Local Court or the Mental Health Review Tribunal to adjust conditions attached to a s 32(3) order if a defendant has failed to comply with the order?

107. See Public Interest Advocacy Centre, *Consultation*.

108. See Intellectual Disability Rights Service, *Consultation*. However, the MHFPA s 32(3D) provides that, in the event of failure to comply with the order, “the Magistrate may deal with the charge as if the defendant had not been discharged”. This leaves open the possibility of applying sections 32 or 33: see Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

109. See Intellectual Disability Rights Service, *Consultation*.

110. See Prof Susan Hayes, *Consultation*.

Issue 7.29

Should s 32 of the MHFPA authorise action to be taken against a defendant to enforce compliance with a s 32(3) order, without requiring the defendant to be brought before the Local Court?

Issue 7.30

Should the MHFPA clarify the role and obligations of the Probation and Parole Service with respect to supervising compliance with and reporting on breaches of orders made under s 32(3)? What should these obligations be?

Issue 7.31

Are there any other changes that should be made to s 32(3A) of the MHFPA to ensure the efficient operation of s 32?

HEARING APPLICATIONS UNDER SECTION 32

3.74 A number of concerns have been raised about the way applications under s 32 are heard. Most of these relate more to the administrative arrangements for making and determining s 32 applications, and in particular to shortages in funding that may impede the effective operation of the legislation, rather than the legislation itself. Our terms of reference limit the extent to which we can consider the administrative schemes that support the operation of s 32. At the same time, we recognise that, in practice, the success or otherwise of the section will be largely determined by adequate funding and well-considered procedures to administer the diversionary scheme. The following discussion notes the concerns that have been voiced, and raises questions aimed at discerning what changes, if any, we can recommend.

Identifying a defendant's cognitive impairment or mental health problem

3.75 To derive the potential benefits offered by s 32, a defendant must first be identified as being possibly eligible to apply for diversion. This means that his or her cognitive impairment or mental health problem must be detected and considered as possibly coming within the scope of s 32(1). The Intellectual Disability Rights Service has commented that, in the context of defendants with an intellectual disability, it is unclear who is responsible for identifying that a defendant has an intellectual disability. At best, it may be that the only person with a legal obligation to detect a defendant's cognitive impairment or mental illness is the defendant's legal representative. That poses significant problems for a

defendant who is unrepresented or even, for example, for defendants represented by lawyers with little experience in dealing with mental illness or cognitive impairment, or by Legal Aid lawyers who often have a very short time to meet with their clients before representing them in court.¹¹¹

3.76 An administrative scheme has been set up in a number of Local Court and Children’s Court locations to assist the Courts to manage people with psychiatric illnesses. Under this scheme, mental health nurses attend court to enable early diagnosis of a defendant’s mental health problem, among other things.¹¹² No such scheme exists to assist in the identification of cognitive impairment in defendants appearing in the Local Court. As a result, there is concern that defendants with a cognitive impairment are even more likely than those with a mental health problem to slip through the cracks of the criminal justice system to have their disability remain undetected.¹¹³

3.77 Obviously, s 32 will fail at the outset if defendants cannot be systematically and effectively identified as potential candidates for its diversionary measures. It is not a foolproof method of detection to leave this responsibility solely in the hands of a defendant’s legal representative. Recent initiatives to set up more formalised schemes to identify defendants with mental health problems will assist in ensuring that these defendants are properly considered for their prospects for diversion. Defendants with a cognitive impairment remain at risk of missing out on the benefits of these diversionary measures in the absence of a more systematic means of assessing their impairment. Ideally, a system for detecting cognitive impairment or mental health problems in offenders at the time of first contact with the police would ensure that their disability was properly noted well before they reach court proceedings. Court services that were then able to follow up on this

111. See *Enabling Justice* report, 37.

112. See NSW, Chief Magistrate’s Office, *Annual Review 2008*, 30; NSW, Justice Health, *Annual Report 2006/07*, 31.

113. See *Enabling Justice* report, 38; NSW Law Society, *Preliminary Submission*, 1-2. It was acknowledged that, as part of the process of screening for mental health problems, defendants will also often be screened for intellectual disability, but that this is of limited utility because the mental health liaison officers are not able to link defendants with an intellectual disability up with support services because these are the responsibility of the Department of Ageing, Disability, and Home Care.

preliminary identification would ensure that those suitable for diversion were brought to the court's attention.

Issue 7.32

Is there a need for centralised systems within the Local Court and the NSW Police for assessing defendants for cognitive impairment or mental illness at the outset of criminal proceedings against them?

Preparation of reports to support a section 32 application

3.78 While there are no specific legislative requirements, it has been noted that an application under s 32 generally involves the preparation of at least two court reports.¹¹⁴ A psychological report is usually submitted to the court to establish that the defendant has a disability or illness that satisfies the criteria for eligibility under s 32(1)(a). A case plan, also known as a treatment plan,¹¹⁵ is usually submitted to show that it is more appropriate to deal with the defendant under s 32 rather than according to law.

3.79 Two concerns arise from the preparation of these reports. First, it has been noted that there is often a fair amount of expense and delay involved in their preparation. The process can be particularly expensive for those defendants who are not legally aided or eligible for the provision of services by the Department of Ageing, Disability and Home Care.

3.80 A second concern relates to the content of these reports. The legislation makes no mention of what they should contain. Magistrates surveyed by the Judicial Commission commented that the quality of case plans can vary, and that adjournments are often required so that case plans can be amended to include necessary details.¹¹⁶ The Intellectual Disability Rights Service has noted that some solicitors are unaware of the need and processes for liaising with service providers to formulate a case

114. See *Enabling Justice* report, 35.

115. The Intellectual Disability Rights Service objects to the term, "treatment plan" as inappropriate in relation to people with an intellectual disability because it suggests a plan with medical goals rather than behaviour intervention and support goals: see *Enabling Justice* report, 35.

116. See Judicial Commission report, 17.

plan.¹¹⁷ NSW Police have expressed concern that in some instances, a magistrate will make a s 32 order without a case plan, placing the onus on the defendant to follow up with the service provider for treatment.¹¹⁸ On the other hand, the Law Society submitted that magistrates and prosecutors place too much emphasis on the particulars of a case plan and that s 32 applications should not fail because of a lack of detail. It was argued that psychologists and psychiatrists are often hesitant to prepare a detailed plan because it is difficult to predict the changing needs of the defendant. It was submitted that there is a need for clarification about what is required in a case plan.¹¹⁹

3.81 It has been pointed out that a number of agencies have already developed their own guidelines to help in the preparation of court reports, indicating, for example, the key information that should be included and the need to identify the services that will be involved.¹²⁰ The Judicial Commission has also put forward a suggestion about the information that should be included within a case plan and related reports, which includes details of any testing and assessment of the defendant's condition as well as the resources required to carry out a case plan.¹²¹ While supportive of the notion of guidelines to assist in the preparation of court reports, the Intellectual Disability Rights Service has warned that they should not be so prescriptive as to inhibit flexibility in the content of a report.¹²²

3.82 An alternate approach to the development of guidelines, particular to the various agencies involved, would be to provide guidance in the legislation about the need for court reports to support a s 32 application, and the content of these reports. In our discussion of orders binding third parties in paragraphs 3.56-3.58 above, we referred to the provisions in the *Mental Health Act 2007* relating to community treatment orders. We noted that these provisions spell out the information that should be included in

117. See Intellectual Disability Rights Service, *Consultation*.

118. See NSW Police, *Consultation*.

119. See Law Society of NSW, *Preliminary Submission*, 3.

120. See *Enabling Justice* report, 36.

121. See Judicial Commission report, 18.

122. See *Enabling Justice* report, 36.

a treatment plan in support of an application for a community treatment order.¹²³

Issue 7.33

- (1) Should the MHFPA expressly require the submission of certain reports, such as a psychological or psychiatric report and a case plan, to support an application for an order under s 32?
- (2) Should the Act spell out the information that should be included within these reports? If so, what are the key types of information that they should contain?

Concerns about bias

3.83 An application for a s 32 order can involve the disclosure of incriminating information and admissions on the defendant's part. If the magistrate refuses the application, the charge against the defendant will usually proceed to be heard according to the ordinary criminal process. If the magistrate who refused the s 32 application then goes on to hear the charge against the defendant, he or she will need to disregard any information or admission that was revealed in the s 32 application in order to determine the defendant's guilt at the criminal hearing. There is concern that this procedure runs the risk of an appearance of bias against the defendant.

3.84 Magistrates are obliged to disqualify themselves from hearing a matter if there is a reasonable apprehension of bias.¹²⁴ While in theory this general safeguard protects the fairness of the criminal process, it has been argued that, in practice, opinions can easily differ about what amounts to a reasonable apprehension of bias.¹²⁵ It has been suggested that it would be preferable to reintroduce a provision in the legislation to allow defendants to apply to have a magistrate disqualified from hearing their charge if the same magistrate has already heard and refused their s 32

123. See MHA s 54(b).

124. See *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd* (2000) 205 CLR 337; *John Fairfax Publications Pty Ltd v Maurice Kriss* [2007] NSWCA 79.

125. See *Enabling Justice* report, 37. See also Intellectual Disability Rights Service, *Consultation*.

application.¹²⁶ It was argued that a provision to this effect would not open the floodgates to forum shopping if it was limited to defendants whose s 32 applications had been rejected, and to the particular magistrates who had heard the s 32 applications.¹²⁷ Because of the general protection available at common law to guard against actual or apprehended bias, the reintroduction of a provision like this would, strictly speaking, be unnecessary. Nevertheless, it is a matter for consultation whether it would be desirable to spell out the defendant's entitlements in this regard.

Issue 7.34

Should the MHFPA allow a defendant to apply for a magistrate to disqualify himself or herself from hearing a charge against the defendant if the same magistrate has previously refused an application for an order under s 32 in respect of the same charge?

An alternative model for hearing section 32 applications

3.85 The formal, adversarial setting of the courtroom can be intimidating and confusing to any defendant, especially one with a cognitive impairment or mental health problem. A less formal way of hearing s 32 applications, one which is more conducive to the defendant understanding and communicating freely, may go further in ensuring that the defendant is dealt with fairly and is able to comply with any orders that are made.

3.86 There have been a number of initiatives already suggested for alternative modes of hearing s 32 applications. Some of these initiatives do not require a radical reshaping of the system but instead involve more simple administrative arrangements to make the current processes more

126. There was previously a provision in the *Mental Health (Criminal Procedure) Act 1990* (NSW) that allowed a defendant to make an application for a magistrate to be disqualified in these circumstances: see s 34 (repealed by *Mental Health (Criminal Procedure) Amendment Act 2005* (NSW) sch 1 cl 21). That provision was repealed in 2005 because of a concern about "magistrate shopping", particularly in relation to regional areas serviced by one magistrate: see NSW, *Parliamentary Debates*, Legislative Assembly, 8 November 2005, 19216 (Alison Megarrity, Parliamentary Secretary).

127. See *Enabling Justice* report, 37.

effective in dealing with these groups of defendants. For example, one initiative has been to list all s 32 applications in court on a particular day of the month, with the various agencies and those with experience working with these groups of defendants present in court on that day to provide assistance.¹²⁸ Another suggestion is simply to make sure that s 32 applications are listed to come before the Court in the afternoon rather than the morning, on the assumption that the courtroom is usually less crowded in the afternoon (and therefore the defendant is likely to feel less anxious and overwhelmed) and the magistrate and the defendant will have more time to interact meaningfully with each other.¹²⁹

3.87 More fundamental reforms have also been suggested to change the way s 32 applications are heard. One suggestion is to hear these applications in a conference-style court rather than an adversarial setting, allowing the various parties involved in the matter to meet together. It is argued that conferencing provides greater opportunity than the traditional court procedures to respond flexibly to the defendant's particular circumstances and find ways to reduce the risk of recidivism. There are various ways that conferencing could be used for s 32 applications. It could be used either in conjunction with the traditional court procedures, or it could replace a court hearing altogether.¹³⁰

3.88 It is difficult to separate concerns about the processes for hearing s 32 applications from more general issues about the way the court system responds to the particular needs of defendants with a cognitive impairment or mental health problem. It could be argued that any shortcomings in the current court procedures for hearing s 32 applications are just one illustration of a broader need for examining alternatives to the formal adversarial system for hearing matters relating to defendants with a cognitive impairment or mental health problem.¹³¹

128. This is an initiative already in operation in the Local Court at Newcastle: see the description in the *Enabling Justice* report, 38-39.

129. See *Enabling Justice* report, 43.

130. See *Enabling Justice* report, 39-44.

131. The Public Interest Advocacy Centre ("PIAC") is currently working on its Mental Health Legal Services Project, which looks at ways of responding to the unmet legal needs of people with mental illnesses. As part of this project, PIAC is looking at alternate models from the traditional court setting. See *Enabling Justice* report, 43. See too PIAC, "The Mental Health Legal Services Project (MHLSP)", <<http://piac.asn.au/system/MHLSP.html>> at 5 January 2010.

Issue 7.35

- (1) Should there be alternative ways of hearing s 32 applications under the MHFPA rather than through the traditional, adversarial court procedures? For example, should there be opportunity to use a conferencing-based system either to replace or to enhance the current court procedures?
- (2) If so, should these alternative models be provided for in the legislation or should they be left to administrative arrangement?

4. **Diversion under section 33**

- Eligibility for a section 33 order
- Orders that the court can make
- A continuing need for section 33?

4.1 Section 33 of the MHFPA is the second provision underpinning the Local Court’s legislative scheme for diverting defendants with a mental health problem or cognitive impairment. The purpose of s 33 is to allow defendants to be diverted out of the criminal process and into treatment for mental health problems where treatment is urgently required. Because its purpose is quite specific, it is much more limited than s 32 in its application, applying only to a defendant who, at the time of the hearing, appears to be a “mentally ill person”.

4.2 The following discussion considers the current rules for determining whether defendants are eligible to be considered for diversion under s 33 and the orders that a magistrate can make under s 33 once a decision to divert has been made.

ELIGIBILITY FOR A SECTION 33 ORDER

Meaning of a “mentally ill person”

4.3 A defendant will only be eligible for consideration for an order under s 33 if he or she is a “mentally ill person”. The definition of a “mentally ill person” is intended to cover only those whose mental illness is so acute or severe as to raise concerns about their or others’ safety. The legislation defines a “mentally ill person” as a person who has a mental illness that makes it reasonable to believe that care, treatment or control of the person is necessary to protect that person or others from serious harm.¹ A person will only qualify as a mentally ill person if his or her condition meets the criteria for mental illness as defined in the legislation, that is, it must be a condition which seriously impairs, either temporarily or permanently, the person’s mental functioning and must be characterised by delusions, hallucinations, serious disorder of thought form, a severe disturbance of mood, and/or sustained or repeated irrational behaviour indicating the presence of any one or more of these symptoms.²

4.4 The definitions of “mental illness” and “mentally ill” are considered in Chapter 5 of CP 5, which raises the question whether it would be preferable to replace existing terms with a single, overarching term. In the context of s 33, it should be kept in mind that the purpose of

1. See MHFPA s 3(1); MHA s 14.

2. See MHA s 4(1).

the provision is to allow offenders to be brought within the civil mental health system for treatment. The forms of mental illness brought within s 33 need to be able to meet the criteria for mental illness under the MHA in order to allow for the involuntary admission of an offender diverted from criminal proceedings. The question remains whether it is necessary to continue to make separate provision for this fairly specific situation, or whether it could be adequately covered by the more general diversionary mechanisms set up in s 32. This question is discussed below from paragraph 4.17.

Timing

4.5 Section 33(1) limits the application of the section to a defendant who meets the criteria for a mentally ill person “at the commencement or at any time during the course of the hearing of proceedings”. The requirement that the defendant appear to be a mentally ill person at the time of the hearing of a criminal charge does not mean that he or she must have been so at the time when the offence was said to have been committed. The defendant might, at the time of the alleged commission of the offence, have been in a state of mind entirely consistent with criminal responsibility and s 33 may still apply. Conversely, the defendant may have met the criteria for a mentally ill person at the time of allegedly committing the offence, but may no longer be considered so at the time of the hearing. If this is the case, then he or she will not be eligible for consideration under s 33.

4.6 In consultation, NSW Police were critical of the fact that s 33 does not require an evaluation of whether the defendant’s mental illness negates his or her criminal responsibility for the offence.³ The Public Interest Advocacy Centre drew attention to the inconsistency between s 33, which considers only the defendant’s mental state at the time of the hearing, and s 32, which applies either where the mental state was present at the time of the hearing or where it was present at the time of committing the offence.⁴

4.7 Section 33 provides a means for diverting defendants into treatment in the civil mental health system. The section focuses on a defendant’s current mental state, at the time of hearing, because it is only

3. See NSW Police, *Consultation*.

4. See MHFPA s 32(1)(a). See Public Interest Advocacy Centre, *Consultation*. See also NSW Crown Advocate, *Preliminary Submission*, 3.

if his or her mental state meets the criteria under the *Mental Health Act 2007* (NSW) that he or she can be compelled to undergo involuntary treatment, either by admission into hospital or in the community.⁵ If a defendant suffered from a mental illness at the time of allegedly committing the offence, but no longer suffers from that illness, then there is no basis for compelling him or her to undergo involuntary treatment now, at the time of the hearing. In relation to the converse situation, where a defendant was not mentally ill at the time of allegedly committing the offence but subsequently meets the criteria for a mentally ill person at the time of the hearing, the question arises whether a defendant must be shown to have a lesser form of criminal responsibility in order to “benefit” from the diversionary measures offered by s 33. This is basically a question of principle about whether diversion should only be justified for offenders whose criminal responsibility is reduced.

Issue 7.36

Should s 33 of the MHFPA require a causal connection between the defendant’s mental illness and the alleged commission of the offence?

ORDERS THAT THE COURT CAN MAKE

4.8 The court can make four types of orders when granting an application under s 33. It can order that:

- the defendant be taken to, and detained in, a mental health facility for assessment and treatment (if required);
- the defendant be taken to, and detained in, a mental health facility for assessment and treatment on the condition that, if the mental health facility finds that the defendant is not a “mentally ill person” or a “mentally disordered person”, the person be brought back to court;
- the defendant be discharged, either conditionally or unconditionally, into the care of a responsible person; or
- the defendant be placed under a community treatment order.⁶

4.9 The power to refer the defendant for assessment without requiring that he or she be returned to court is generally used for low-level

5. See MHA ch 3 pt 1.

6. MHFPA s 33(1), (1A).

offending where the magistrate would, in the event that the charges were proven, probably discharge the defendant without conviction.⁷

4.10 The power to refer for assessment *and* require the defendant to be brought back to court is generally relied on if the offending is more serious or if the magistrate doubts the defendant's capacity to participate in proceedings.⁸ On the defendant's return to court, the psychiatric report provided through the assessment process assists the magistrate to assess the defendant's capacity and the objective facts.⁹

4.11 The power to discharge a defendant who appears to be a mentally ill person into the care of a responsible person (with or without conditions) is apparently infrequently used.¹⁰ It is usually a family member who volunteers to act as the responsible person.¹¹ A common reason why a person with a mental illness comes into contact with the criminal justice system is that he or she lacks an adequate family support network to meet his or her needs.¹² As a result, a "responsible person" is not always readily available.

4.12 The fourth type of order available under s 33 is a community treatment order,¹³ which is an order requiring the defendant to attend a specified health care facility at stated times to receive medication, therapy, rehabilitation and other services.¹⁴ A community treatment order may only be made if the magistrate is satisfied that: the person would benefit from the order and that it is "the least restrictive alternative consistent with safe and effective care";¹⁵ a health care agency has developed, and is capable of implementing, an appropriate treatment plan;¹⁶ and that either it is the first time the person has been diagnosed

7. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

8. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

9. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

10. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

11. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

12. Australia, Senate Select Committee on Mental Health, *A National Approach to Mental Health – From Crisis to Community*, First Report (2006) 232-233, 265, 267-268.

13. See MHFPA s 33(1A);

14. See MHA s 56(1).

15. See MHA s 53(3)(a).

16. See MHA s 53(3)(b).

with a mental illness,¹⁷ or the person has previously refused to accept treatment, leading to a relapse of the mental illness and subsequent deterioration of the person's mental or physical condition which might have been ameliorated or prevented by care and treatment.¹⁸ A community treatment order is usually made only in relatively serious cases.¹⁹ It requires extensive cooperation between the Court and the relevant service providers, which can be difficult to coordinate in the court setting.²⁰

Issue 7.37

Are the existing orders available to the court under s 33 of the MHFPA adequate and are they working effectively?

Duration of orders

4.13 If a defendant is referred to a mental health facility under s 33, the MHA governs the length of time for which he or she may be detained there.²¹ An initial examination must be conducted within 12 hours of admission.²² The person can only be detained after that examination if he or she is a “mentally ill person” (may be detained for up to three months) or a “mentally disordered person” (may be detained for up to three days, up to three times in one month).²³

4.14 Any time spent in hospital as a consequence of a s 33 order must be taken into account if the defendant is later returned to court.²⁴

4.15 A community treatment order applies for the period specified in the order, up to 12 months.²⁵ There is no limit to the number of times an order can be made in respect of a person.²⁶

17. See MHA s 53(4).

18. See MHA s 53(5).

19. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

20. See Deputy Chief Magistrate of the Local Court of NSW, *Consultation*.

21. See MHA ch 3 pt 1-2.

22. See MHA s 27(a).

23. See MHA s 27(a), 31, 34-45.

24. See MHFPA s 33(3).

25. See MHA s 53(6), s 56(2).

26. See MHA s 51(4), (5), 53(2).

Non-compliance with an order

4.16 There is no specific provision for a defendant to be arrested or summoned to appear in court if the conditions of a s 33 order are breached. However, the charge against the defendant remains on foot for six months from the time of making a s 33 order²⁷ and so the Court could rely on its general powers to issue warrants for the defendant's arrest within that six month period.²⁸ In addition, the MHA provides for people who are the subject of involuntary treatment in a mental health facility or under a community treatment order to be arrested if they abscond from the facility or fail to comply with the order.²⁹

Issue 7.38

Should legislation provide for any additional powers to enforce compliance with an order made under s 33 of the MHFPA?

A CONTINUING NEED FOR SECTION 33?

4.17 One final issue concerning s 33 is whether there is a need to retain the section at all, or whether the substance of what now appears in s 33 could be adequately subsumed in s 32. If the prohibition were removed from s 32(1)(a) and the section was expressed to include within its scope those people who were mentally ill, then presumably a defendant suffering from an acute mental illness who currently comes within the scope of s 33 could be brought within the scope of s 32. Alternatively, if the existing categories in s 32(1)(a) were replaced by a single, general term such as mental impairment, which would include mental illness within its definition, then those currently brought within the scope of s 33 could be easily brought within the scope of s 32 instead. The orders available under s 32 are broad enough to allow the Local Court to order the treatment of a defendant in a psychiatric hospital. The interim powers available to the Court under s 32(2) would also allow it to order a defendant to be taken to a hospital for a psychiatric assessment and returned to the Court, as currently happens under s 33.

27. See MHFPA s 33(2).

28. See *Criminal Procedure Act 1986* (NSW) ch 4 pt 4.

29. See MHA s 48, 58-59.

4.18 It is true that s 32(b) expressly requires a magistrate, when deciding whether to make a diversionary order under the section, to consider whether it would be more appropriate to deal with the defendant according to a diversionary order rather than according to law. No such requirement is spelt out in s 33 when deciding whether to make an order under that section. It is open to question whether, if s 33 were abolished and the defendants currently brought within its scope were redirected to s 32, it would be more difficult for them to succeed in being diverted into treatment than is currently the case.

Issue 7.39

Is it preferable to abolish s 33 of the MHFPA and broaden the scope of s 32 of the MHFPA to include defendants who are mentally ill persons?

5. **Enhancing
diversion in the
superior courts**

5.1 This last chapter considers a suggestion to extend the operation of s 32 and 33 of the MHFPA to the superior courts.

5.2 As we have noted,¹ s 32 and 33 currently apply to criminal proceedings in the Local Court and the Children’s Court. The Local Court has traditionally been responsible for hearing proceedings for less serious criminal offences. While legislation does provide the Supreme and District Courts with power to divert a defendant where a question concerning his or her fitness to plead has been raised,² this power is very limited in comparison to those provided under s 32 and 33. It is open to question whether the extension of s 32 and 33 to the superior courts would allow them to respond more appropriately to certain situations involving defendants with a cognitive impairment or mental illness.

5.3 A reform of this kind would be consistent with a move to extend to the Local Court the operation of the legislative provisions concerning fitness to plead and the special verdict of not guilty by reason of mental illness, an initiative that we discuss in CP 6, Chapter 1 and 3, respectively. Together, such reforms would work to ensure a more streamlined, consistent, and straightforward approach in dealing with defendants with a mental illness or cognitive impairment across all three courts.

Existing diversionary powers of the superior courts: section 10 of the MHFPA

5.4 Legislation already recognises that there may be circumstances where the superior courts should divert a defendant with a mental illness or cognitive impairment away from the criminal process. But as we have just noted, this power to divert is extremely curtailed. Section 10(4) of the MHFPA allows the court to dismiss charges against a defendant and order his or her release, but only in cases where the question of the defendant’s fitness to be tried has been raised.

5.5 Section 10(4) provides:

If, in respect of a person charged with an offence, the Court is of the opinion that it is inappropriate, having regard to the trivial nature of the charge or offence, the nature of the person’s disability or any other matter which the Court thinks proper to consider, to inflict any punishment, the Court may determine not to conduct an

1. See para 3.2.

2. See MHFPA s 10(4).

inquiry and may dismiss the charge and order that the person be released.

5.6 The diversionary measure provided by s 10(4) is only available to those defendants whose condition or disability is of a nature to raise concerns about their ability to stand trial. In addition, although s 10(4) does not exclude more serious offences from potentially giving rise to a diversionary order, in practice it seems likely that only the more trivial offences will be considered suitable.³ In relation to the orders that the court can make once it decides to divert a defendant under s 10(4), again its powers are extremely limited. While it has interlocutory powers that may be used to direct a defendant into some form of treatment for a limited time,⁴ once it makes a final determination to divert under s 10(4), the only order available is to dismiss the charge and release the defendant, with no supervisory powers over the defendant once released.

5.7 Clearly, s 10(4) of the MHFPA provides the superior courts with a much more limited diversionary power than those provided to the Local Court by s 32 and 33. Ultimately, the question whether s 32 and 33 should be extended to apply to superior court proceedings involves a policy decision about whether the more serious range of offences coming within the jurisdictions of the superior courts should be capable of giving rise to broader diversionary orders, or whether these are offences of such an objectively serious nature that those who commit them should not be able to be diverted out of the criminal process.

3. Section 10(4) requires the court to determine that it is inappropriate to inflict any punishment before dismissing proceedings. The word, “punishment” has been interpreted broadly to include even the most minimal of punishments, such as the recording of a conviction without any additional penalty: see *DPP v Mills* [2000] NSWCA 236, [9]. It could be argued as a consequence that it will be rare that the circumstances of a case allow a court to conclude that it is inappropriate to inflict any punishment, even the recording of a conviction, except for the most trivial offences.

4. See MHFPA s 10(3).

Issue 7.40

Does 10(4) of the MHFPA provide the superior courts with an adequate power to divert defendants with a mental illness or cognitive impairment?

Issue 7.41

Should s 32 and 33 of the MHFPA apply to proceedings for indictable offences in the Supreme and District Courts as well as proceedings in the Local Court?

Formulating a legislative list of principles for these extended diversionary powers?

5.8 The question whether to extend s 32 and 33 to the superior courts involves consideration of the principles that should underpin any such reform and guide the operation of these broader powers across the three courts. The existing diversionary powers of the courts as well as the police are not clearly defined and operate separately from each other rather than as a coherent whole, as should be evident from the discussion of these various powers in this Consultation Paper. Because of their piecemeal nature, it is difficult to identify any clear statement of principle about what they should be aiming to achieve and the situations in which it is appropriate to apply them. If the Local Court's diversionary powers were extended to the superior courts as a way of providing a more streamlined system, there would be an argument for ensuring that this move was based on a coherent set of principles to underpin the operation of these extended powers, involving a statement about the aims of diversion in this area and the situations where diversion may and may not be appropriate. It is open to question whether there would be any advantage in including within the legislation that granted these diversionary powers to the three courts, a statement of principle aimed at achieving a consistent and coherent approach in the application of these powers.

Issue 7.42

- (1) Should there be a statement of principles included in legislation to assist in the interpretation and application of diversionary powers concerning offenders with a mental illness or cognitive impairment?
- (2) If so, what should this statement of principles include?

Interaction of s 32, 33, fitness to plead provisions and provisions governing the special verdict of not guilty by reason of mental illness

5.9 If there is a move to extend the application of s 32 and 33 of the MHFPA to the superior courts, consideration will need to be given to the interaction of these diversionary provisions with the legislative powers of those courts to find a defendant unfit to be tried and not guilty by reason of mental illness. Similarly, if the legislative powers governing fitness to be tried and the defence of mental illness are extended to apply to the Local Court (issues that are discussed in CP 6, Chapters 1 and 3), then the interaction of these provisions with s 32 and 33 will again need to be considered. In any event, as we discuss in CP 6, even if the legislative provisions governing fitness to be tried and the defence of mental illness do not currently apply to Local Court proceedings, it is likely that the common law provides the Local Court with some power to find a defendant not guilty by reason of mental illness or unfit to be tried, and the interaction of these powers with the Court's legislative powers to divert should be considered.

5.10 The interaction of these various powers requires consideration of two main issues. The first relates to the timing of the application of these powers. If a court has the power to divert a defendant and also the power to find him or her unfit to be tried, should it always be required to consider the application of one power before the other? For example, should an application to divert a defendant be required to be made and considered before an application to determine the defendant's fitness to be tried? The second issue relates to the scope of these various powers and whether they should be formulated to apply to the same group of defendants and in respect of the same offences. If this is the case, then the tests for eligibility for the application of these various powers will need to be considered to see if they are consistent with each other. These matters are discussed in greater detail in CP 6.

**Appendix: Mental
Health (Forensic
Provisions) Act
1990 (NSW)**

MENTAL HEALTH (FORENSIC PROVISIONS) ACT 1990 (NSW)

32. Persons suffering from mental illness or condition

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

- (i) developmentally disabled, or
- (ii) suffering from mental illness, or
- (iii) suffering from a mental condition for which treatment is available in a mental health facility,

but is not a mentally ill person, and

(b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law, the Magistrate may take the action set out in subsection (2) or (3).

(2) The Magistrate may do any one or more of the following:

- (a) adjourn the proceedings,
- (b) grant the defendant bail in accordance with the *Bail Act 1978* (NSW),
- (c) make any other order that the Magistrate considers appropriate.

(3) The Magistrate may make an order dismissing the charge and discharge the defendant:

- (a) into the care of a responsible person, unconditionally or subject to conditions, or
- (b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of the defendant's mental condition or treatment or both, or
- (c) unconditionally.

(3A) If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate may, within 6 months of the

order being made, call on the defendant to appear before the Magistrate.

(3B) If the defendant fails to appear, the Magistrate may:

- (a) issue a warrant for the defendant's arrest, or
- (b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* (NSW) to issue a warrant for the defendant's arrest.

(3C) If, however, at the time the Magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the Magistrate, the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately:

- (a) issue a warrant for the defendant's arrest, or
- (b) authorise an authorised officer within the meaning of the *Criminal Procedure Act 1986* (NSW) to issue a warrant for the defendant's arrest.

(3D) If a Magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

(4) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with under subsection (2) or (3).

(4B) A failure to comply with subsection (4A) does not invalidate any decision of a Magistrate under this section.

(5) The regulations may prescribe the form of an order under this section.

33. Mentally ill persons

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate that the defendant is a mentally ill person, the Magistrate (without derogating from any other order the Magistrate may make in relation to the defendant, whether by way of adjournment, the granting of bail in accordance with the *Bail Act 1978* (NSW) or otherwise):

- (a) may order that the defendant be taken to, and detained in, a mental health facility for assessment, or
- (b) may order that the defendant be taken to, and detained in, a mental health facility for assessment and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the person be brought back before a Magistrate or an authorised officer, or
- (c) may discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person.

(1A) Without limiting subsection (1) (c), at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, the Magistrate may make a community treatment order in accordance with the *Mental Health Act 2007* (NSW) for implementation by a declared mental health facility in relation to the defendant, if the Magistrate is satisfied that all of the requirements for the making of a community treatment order by a Magistrate under that Act (other than the holding of an inquiry) have been met in respect of the defendant.

(1B) The provisions of the *Mental Health Act 2007* (NSW) (other than section 51 (1) and (2)) apply to and in respect of the defendant and that order as if the order had been made by a Magistrate under that Act.

(1C) A Magistrate must, before making an order under subsection (1A), notify the Director-General of the Department of Health, or a person authorised by the Director-General of the Department of Health for the purposes of this section, of the proposed order.

(1D) If, at the commencement or at any time during the course of the hearing of proceedings under the *Bail Act 1978* (NSW) before an authorised officer, it appears to the authorised officer that the defendant is a mentally ill person, the authorised officer (without derogating from any other order under the *Bail Act 1978* (NSW) that the officer may make in relation to the defendant):

- (a) may order that the defendant be taken to, and detained in, a mental health facility for assessment, or
- (b) may order that the defendant be taken to, and detained in, a mental health facility for assessment and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the defendant be brought back before a Magistrate or an authorised officer.

(2) If a defendant is dealt with at the commencement or at any time during the course of the hearing of proceedings before a Magistrate or authorised officer in accordance with this section, the charge which gave rise to the proceedings, on the expiration of the period of 6 months after the date on which the defendant is so dealt with, is to be taken to have been dismissed unless, within that period, the defendant is brought before a Magistrate to be further dealt with in relation to the charge.

(3) If a defendant is brought before a Magistrate to be further dealt with in relation to a charge as referred to in subsection (2), the Magistrate must, in dealing with the charge, take account of any period during which the defendant was in a mental health facility as a consequence of an order made under this section.

(4) The fact that charges are to be taken to have been dismissed under subsection (2) does not constitute a finding that the charges against the defendant are proven or otherwise.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under subsection (1) or (1A).

(4B) An authorised officer is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under subsection (1D).

(4C) A failure to comply with subsection (4A) or (4B) does not invalidate any decision of a Magistrate or authorised officer under this section.

(5) The regulations may prescribe the form of an order under this section.

(5A) An order under this section may provide that a defendant:

(a) in the case of a defendant who is a juvenile, be taken to or from a place by a juvenile justice officer employed in the Department of Human Services, or

(b) in the case of any defendant, be taken to or from a place by a person of a kind prescribed for the purposes of this section.

(6) In this section, a reference to an authorised officer is a reference to an authorised officer within the meaning of the *Criminal Procedure Act 1986* (NSW).

