NEW SOUTH WALES

The Chief Magistrate of the Local Court

25 June 2010

The Hon. J Wood AO QC
NSW Law Reform Commission
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SYDNEY NSW 2001

By email: nsw_lrc@agd.nsw.gov.au

Dear Chairperson

Re: Submission – People with cognitive and mental health impairments in the criminal justice system

Thank you for the opportunity to provide a submission in respect of the above inquiry. As you will appreciate, the four Consultation Papers released cover a variety of issues. I am therefore responding in relation to those areas of most direct relevance to the Local Court.

Fitness procedures in the Local Court

Issue 6.11 raises the questions of whether fitness procedures should apply in the Local Court and if so, how they should be framed.

It is noted that common law position, as stated in *Mantell v Molyneaux*,[1] is applied in the Local Court, although the fitness procedures set out in Part 2 of the *Mental Health (Forensic Provisions) Act* 1990 ("MHFPA") do not operate. However, it would be erroneous to assume that, in the absence of a statutory scheme, the Local Court does not deal with cases in which fitness to stand trial is at issue.

If the fitness of a defendant to stand trial is raised as an issue in the Local Court, the question will be determined having regard to the *Presser* standards, with the potential consequence that a person may be discharged if he or she cannot or should not be dealt with pursuant to the *Mental Health Act* 2007 ("MHA") or Part 3 of the MHFPA. Briefly put, *Mantell v Molyneaux* is authority that:

- Although there is no statutory scheme applicable to the Local Court in dealing with the question of fitness to be tried or what should occur if a person is found to be unfit to be tried, the effect of the High Court's decision in *Ngatai v The Queen* (1980) 147 CLR 1 is that where a defendant is found not to be fit to be tried, he or she must be discharged.[2]

[1] [2006] NSWSC 955
[2] Note 1 at [28]

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- Where there is no relevant mental (or physical) disability that would bring the person within the provisions of the *Mental Health Act* or another enactment so as to enable the person to continue to be detained, the consequence must be that the person is discharged.[3]

- If a defendant is not fit to stand trial having regard to the matters referred to in *Presser*, the trial is necessarily unfair as a result and the public interest in the prosecution of the person must give way.[4]

I therefore turn to the question of whether or not the Local Court would benefit from a simplified statutory fitness procedure covering the matters addressed at paragraph 1.48 of CP 6, including the express power to order that a person become a forensic patient subject to the supervision of the Mental Health Review Tribunal.

The current regime in the Local Court, which enables the diversion of a defendant pursuant to Part 3 of the MHFPA, has its origins in and is reflective of the Court's historical role in dealing with comparatively minor offences. As is noted at paragraph 1.47 of CP 6, that is no longer the case, with the Court sharing the jurisdiction of the District Court in relation to an ever-expanding list of Table offences as set out in Schedule 1 of the *Criminal Procedure Act*.

Sometimes, there may be a gap in instances where a person is not fit to stand trial but is not eligible[5] or the circumstances are judged as not being appropriate for diversion. When considering if it is appropriate to deal with a matter by way of diversion, the seriousness of the charge has long been stated by the higher courts as being relevant, with the decision involving balancing consideration of the health interests of the defendant with the public interest in the prosecution of criminal conduct.[6] Thus, a defendant might be unfit to stand trial but due to the seriousness of the charge, a magistrate may be reluctant to consider diversion as being more appropriate than dealing with the matter according to law.

This has the potential lead to the somewhat anomalous situation where an unfit defendant charged with a more serious offence might ultimately be discharged without supervision or treatment pursuant to the approach set out in *Mantell v Molyneaux* whereas an unfit defendant charged with a less serious offence might be diverted pursuant to Part 3, facilitating treatment and supervision with the possibility of being recalled before the Court if in breach of a treatment plan.[7] In noting this, I do not seek to oversimplify what is an exercise of discretion involving consideration of the many relevant features of each case by a magistrate; I merely wish to point out diversion will not always be available or appropriate, having regard to relevant considerations such as the seriousness of the charges, but in such instances it seems there is no power other than to discharge an unfit defendant.

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[3] Note 1 at [29]

[4] Note 1 at [33]

[5] Note that there may be other reasons for unfitness beyond the existence of a developmental disability, mental condition or mental illness.

[6] For instance, see *DPP v El Mawas* [2006] NSWCA 154 at [71]; *DPP v Confos* [2004] NSWSC 1159 at [17]; *Mantell v Molyneaux* [2006] NSWSC at [40]-[41]

[7] The efficacy of the enforcement provisions in Part 3 of the MHFPA is discussed further below.

I am consequently of the view that there is a need for an alternative of detaining a person as a forensic patient. Given this is may be a comparatively strict measure, in circumstances where, alongside the growing number of indictable offences heard summarily, the Local Court continues to hear and determine a range of summary offences, it would be more appropriate for such a procedure to be limited in the types of offences to which it could apply and operate in parallel to the existing diversionary scheme. In my view, such a procedure should be limited at the very least only to persons charged with offences that involve an element of subjective intent and preferably to Table 1 offences (that is, indictable offences that may be dealt with summarily in the Local Court unless either party elects to proceed on indictment).

The proposal is silent as to whether, in addition to the continued operation of the existing diversionary measures set out in Part 3 of the MHFPA, the common law provisions set out in *Mantell v Molyneaux* would continue to apply, or whether it is proposed that the statutory procedure would replace the common law procedure. I am of the view that the scope to discharge a defendant who is not fit to stand trial but is not otherwise eligible or suitable for diversion pursuant to Part 3 of the MHFPA should be retained.

The hearing of fitness issues at committal

Issue 6.12 raises the question of whether legislation should provide for the situation where a committal hearing is to be held in respect of an accused person who is or appears to be unfit to be tried.

Some members of this Court have raised concerns about the appropriateness of determining questions of fitness at a committal hearing, due to the unique nature of the committal within the criminal process. The High Court has indicated that the committal proceeding is properly regarded as non-judicial in character. It is not a judicial proceeding as there is no final determination of a person's rights.[8] The NSW Supreme Court has similarly commented that a committal proceeding is a quasi-judicial inquiry conducted by a magistrate,[9] whose duties in carrying out committal proceedings are executive rather than judicial in nature.[10] Put simply, the committal is a preliminary assessment of the evidence against the accused person.

Having regard to this function and the committal's executive character, the introduction of fitness hearings as a possible aspect of the committal itself would require a clear legislative warrant, particularly as the effect of determining fitness issues at the committal stage would presumably be to obviate the need in many, if not all, cases to conduct a fitness hearing in the District or Supreme Courts at a later point in proceedings. Although the Local Court would be prepared to take on this role, the following issues would need to be addressed:

- It can reasonably be anticipated that the Court would need to be conferred with powers to make orders of the same nature as those presently made in the District and Supreme Courts pursuant to Part 2 of the MHFPA.

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[8] *R v Murphy* (1985) 158 CLR 596 at 616
[9] *Maddison v Goldrick* [1975] 1 NSWLR 557
[10] *Ex parte Cousens; Re Blacket* (1946) 47 SR(NSW) 145

- Dealing with fitness questions at the committal stage might lead to an increase in such issues being raised, or the misplaced expectations that running a fitness hearing might require less preparation and/or that a finding of unfitness might be more easily obtained. Where a matter involving a defendant charged with a strictly indictable offence might require a determination of fitness, the Court would expect a properly instructed practitioner from the ODPP to appear, as would be the case in the District and Supreme Courts. Similarly the Court would be reluctant to entertain those who may seek to 'try on' an application if the process is perceived as being simpler and inexpensive when compared to the current processes in the District and Supreme Courts. Magistrates would also require ongoing judicial education to develop and maintain consistency in approach.

- Where a finding on fitness made at committal is that the defendant is fit to stand trial and the defendant is committed for trial in a higher court, the question of whether this would be determinative of the issue or whether the defendant may continue to agitate the issue at trial would need to be considered.

- It can reasonably be expected that the determination of fitness issues at committal would result in a significant impact upon the Court's workload, which would need to be supported by adequate resources.

The defence of mental illness in the Local Court

Issue 6.36 has raised the questions of whether there should there be a defence of mental illness available generally in the Local Court and, if so, whether it should be made available in all cases.

As with the issue of the fitness procedures that are available in the Local Court, the present situation is that the common law based upon the *M'Naghten* rules would theoretically apply, although the reality of the Court's experience is that the common law defence of mental illness is virtually never raised. This observation is consistent with the Commission's comment at paragraph 3.6 of CP 6 that in practice it is only raised in relation to the most serious crimes, particularly murder.

In view of the nature of the offences that may be heard in the Local Court, it seems that the extension of a statutory defence of mental illness to the Court may be unnecessary and unhelpful in the vast majority of cases, particularly matters concerning summary offences. However, as with fitness procedures, it may be appropriate to make the statutory scheme available in the Local Court but limit its availability to Table 1 offences. This would provide the benefit of maintaining consistency with the District Court, where Part 4 of the MHFPA is available in respect of Table 1 offences tried on indictment. Codification of the approach and powers of the Court would also provide a measure of clarity in the event that the defence of mental illness was raised in the Local Court, which may well occur more often in the future should the trend towards increasing the Court's jurisdiction to hear more serious offences continue.

However, these potential benefits need to be balanced against the consideration that any statutory scheme should not simply add an extra layer of complexity to matters coming before the Local Court. Similarly, it would not in my view be desirable for a

statutory scheme to have the effect of substantially increasing the number of individuals who may be detained as forensic patients, for comparatively minor offences. For these reasons I do not support a statutory defence of mental illness that would apply in relation to summary offences. In my view, the diversionary measures set out in Part 3 of the MHFPA should continue to apply in respect of summary matters.

The experience in South Australia over the past decade appears to support my view. In 1996, South Australia's *Criminal Law Consolidation Act* 1935 was amended in 1996 to insert Part 8A, which sets out the procedure for dealing with a person who is 'mentally incompetent to commit an offence', and applies in the Supreme Court, District Court and Magistrates Court. Briefly put, Part 8A separates the question of mental competence from the remainder of the trial, then enables a defendant who is declared not guilty by reason of mental impairment to be discharged or subject to a supervision order. However, notwithstanding the applicability of the Part 8A provisions in the South Australian Magistrates Court, a Court Diversion Program for those who might otherwise have a defence of mental impairment has also operated since 1999. It was introduced as an alternative to the use of the defence following a substantial increase in the number of matters raising mental impairment as an issue in respect of summary matters, which had apparently led to the result that:

> *...some individuals accused of minor offences who chose to pursue a defence under Part 8A were caught up in a protracted and costly procedural and assessment process (primarily designed to be used by defendants charged with serious offences) which seemed disproportionate to the level of their offending behaviour.*[11]

Bail considerations

Issue 7.6 raises the question of whether the considerations set out in section 32 of the *Bail Act* 1978 make it harder for a person with a mental illness or cognitive impairment to be granted bail than other accused persons. In the Court's experience, it does not appear that this is the case.

It is somewhat trite to observe that the aim of the bail decision is to secure an accused person's appearance before the court at a later date, which requires the Court to balance a range of considerations including the likelihood of reappearance, the interests of the person and his or her need to be free, and the protection and welfare of the community and any victim.

Leaving aside the issue of the terminology used, the *Bail Act* already requires the Court to take into account mental illness or intellectual disability when making a bail decision. Section 32(b) expressly requires the judicial officer to consider the interests of the person, having regard to an exclusive list of factors including:

> *(v) if the person ... has an intellectual disability or is mentally ill, any special needs of the person arising from that fact.*

[11] Hunter N & McRostie H, Office of Crime Statistics Information Bulletin, No. 20 (July 2001), 'Magistrates Court Diversion Program', p 3

If the material before the Court indicates that a person is mentally ill, a pertinent consideration (to be balanced against the other considerations set out in section 32) will be the possible effects should bail be refused. For instance, this might include a heightened risk of self-harm if remanded in custody. Another relevant consideration would be if the accused is receiving any treatment for his or her mental illness and the detriment to that person of a breakdown in that treatment should bail be refused.

Diversion of people with cognitive or mental health impairments

Options before the court process begins

A graduated scheme of cautions and warnings similar to that set out in the *Young Offenders Act* is raised as a possibility in issue 7.1. One concern about the potential effectiveness such a scheme is whether the police cautions or warnings would be properly understood by the persons receiving them.

In relation to individuals with mental health impairments, I am of the view that existing options for limiting the number of defendants with mental health issues coming before it could be utilised more effectively. As you know, section 22 of the *Mental Health Act* 2007 empowers the police to apprehend a person who is or appears to be mentally ill or mentally disturbed, and who is committing or has just committed an offence, and take the person to a mental health facility, if *"it would be beneficial to the person's welfare to be dealt with in accordance with this Act, rather than otherwise in accordance with law"*. In my view, section 22 provides a significant potential for diverting persons with a mental illness away from the criminal justice system into treatment and should be used wherever appropriate.

It is noted that section 22 applies in instances where a person appears to be mentally ill or disturbed, and is not therefore of assistance where a person may have a cognitive impairment. However, in all instances, the police have a significant discretion in determining whether or not to charge a person. This may be particularly pertinent having regard to the nature or relative seriousness (or otherwise) of the possible charge in question.

By way of illustration, the Local Court's criminal jurisdiction includes comparatively minor summary offences under the *Summary Offences Act* 1988 such as offensive language and offensive conduct. In the two-year period from July 2007 to June 2009, the Local Court recorded convictions for the following summary offences:[12]

- 3,184 instances of offensive conduct
- 2,379 instances of offensive language
- 562 cases of obscene exposure
- 89 cases of fail/refuse to comply with direction
- 27 cases of obstruct traffic

[12] Source: Judicial Information Research System (JIRS), as at 14/5/10

The most commonly imposed penalty for these offences was a fine, followed by section 10 orders either with or without a bond. Sentences of imprisonment were not unknown, but were relatively uncommon.[13]

Whilst this data does not indicate whether the individuals convicted had a mental health or cognitive impairment, it seems reasonable to surmise that there would be a significant number of individuals within this cohort with one or both. There have been various studies into the link between mental health or cognitive impairment and involvement in the criminal justice system, which point to the overrepresentation of such individuals. In a current study, a University of NSW research team headed by Professor Eileen Baldry has tracked more than 2,700 individuals who have come into contact with the criminal justice system. In addition to finding an overrepresentation of individuals with a mental health problem, intellectual disability or cognitive disability, the authors have found that those with a cognitive disability are more likely to have committed a public order offence. Many offences were deemed to be "lower level", possibly avoidable offences.[14]

In the Court's view, the utilisation of the discretion not to charge an individual with a mental health or cognitive impairment, particularly in instances of lower level offending such as these summary offences, is to be preferred to the practice of charging and leaving the question of mental health or cognitive impairment to the Court to determine. It appears that the present practice is that if police are in any doubt as to whether an individual may have a mental health or cognitive impairment, charges are laid. It is, however, recognised that without specialist resources there may be difficulties in identifying individuals with mental health and cognitive impairments at the stage of determining whether to charge.

The Mental Health Liaison Service

The current numbers of people who appear before the Court and are assessed as having a mental health impairment further indicate that section 22 and/or the charging discretion of the police could be better utilised. Since 1999, the Mental Health Liaison Service (MHLS) has operated in a growing number of Local Court locations in NSW. The program is currently provided by Justice Health and operates in 17 Local Court locations. It has been of great assistance to magistrates in identifying defendants with a mental illness and providing a source of access to information about treatment options. In the 2008/09 financial year, 14,758 individuals were screened for mental health issues, of which 2,314 received a comprehensive assessment.[15] A substantial majority were found to have a mental illness, disorder or condition.

[13] With the exception of the offensive of obscene exposure, the proportion of cases in which fines ranged from 63% (offensive conduct) to 79% (offensive language). The proportion of cases in which section 10 orders were recorded ranged from 17% (offensive language) to 27% (fail/refuse to comply with direction). Sentences of imprisonment were only recorded in relation to charges of obscene exposure (7% of cases) and offensive conduct (2% of cases).

[14] Baldry E, *Intellectual Disability and Mental Health – Current Developments*, presentation to Public Defenders Conference 2010, 28/3/10, Sydney. Powerpoint presentation accessed (28/5/10) at www.lawlink.nsw.gov.au/.../MHDCDinCJSCurrentDevelopments.../MHDCDinCJSCurrentDevelopments.ppt

[15] Statistics provided by Justice Health

The MHLS does appear to be having an effect in reducing future contact with the criminal justice system amongst the individuals it identifies as having a mental health impairment. An evaluation of the service by the Bureau of Crime Statistics and Research (BOCSAR) was published in 2009. It compared the rate of re-offending amongst two groups of defendants identified as having mental health impairments and dealt with under the MHFPA: those who were referred to the liaison service, and those where the service was not available. In comparing the rates of re-offending for each group in the 18 months before and after their court appearances, a significant decrease in appearances was revealed amongst members of the former group, but not the latter group. The evaluation concluded that the findings provide some evidence that the MHLS *"has a positive impact on reducing the frequency with which clients come into contact with the criminal justice system."*[16]

Whilst the service assists the Court in allowing appropriate matters to be diverted at an early stage, the appropriate diversion of individuals through section 22 and/or the charging discretion of the police before the matter reaches court would in my view be both pragmatic and compassionate. Diversion at the commencement of the Court process requires significant public resources, particularly where an accused needs to be transferred to a mental health facility for assessment. It also causes unnecessary trauma for individuals who would more appropriately be treated in the mental health system, rather than the criminal justice system.

Another challenge for the Court is the absence of a similar service to the MHLS that enables the assessment of individuals who may have a cognitive rather than mental impairment. Indeed, a dearth of expertise in this area within both mainstream mental health services and corrections personnel has been identified as a particular challenge in the treatment of such individuals within the criminal justice system.[17] In view of the benefits seen from the services provided by the MHLS, the Court would be further assisted by the extension of the Service to include nurses with expertise in the identification and assessment of individuals with cognitive impairments.

Other Local Court diversionary programs

The link between mental health and/or cognitive impairments, substance abuse and contact with the criminal justice system has been drawn by various studies. For instance, Hayes et al, in a study of voluntary participants appearing before the Local Court, have reported a correlation between an intellectual disability and/or mental and general health problems, substance abuse, and poverty. [18] A recently released study performed by BOCSAR, which tracked 1,208 prisoners who had participated in the 2001 mental Health Survey conducted by NSW JusticeHealth, further found that not only did 41.2 percent of prisoners tracked have comorbid substance and non-substance mental health disorders, but there was a greater rate of re-offending amongst this cohort compared with those who only had either a substance disorder or non-substance mental health disorder.[19] I therefore wish to raise briefly the

[16] Bradford D & Smith N (2009) *An Evaluation of the NSW Court Liaison Services*, p viii

[17] Hayes S, *The Implications for Magistrates of Cognitive Impairment in the Offender Population*, presentation to the Local Court of NSW Annual Conference, 3/6/10, Sydney

[18] Note 17 above

[19] Smith N & Trimboli L, *Contemporary Issues in Crime and Justice*, No 140 (May 2010) 'Comorbid substance and non-substance mental health disorders and re-offending among NSW prisoners'

Magistrates Early Referral Into Treatment (MERIT) program operating within the Local Court that may be made available to defendants with substance abuse or dependence problems, who may also have a mental health or cognitive impairment.

MERIT is one of the longest-running diversionary programs operating in the Local Court. The program commenced as a pilot scheme in Lismore Local Court in 2000 and, after a two-year trial, has progressively been expanded to other Local Court locations throughout the state. Generally speaking, it is now regarded as the most effective diversionary programs ever to be utilised in the Court and is available at over 60 locations throughout the state, which collectively manage about 80% of all Local Court appearances. In some locations, MERIT has been expanded to allow the referral of defendants whose substance of concern is alcohol, following the incorporation of the Rural Alcohol Diversion scheme into MERIT in 2009. As at 30 June 2009, 19,504 people have been referred for assessment, 12,044 were accepted for treatment and 6,850 have successfully completed the program.

MERIT is a pre-plea three-month drug treatment and rehabilitation program that aims to prevent drug-related re-offending in adult defendants. For those individuals who are assessed as suitable and go on to complete the program, at the end of the program period a comprehensive report as to performance and possible options for post MERIT drug treatment is provided to the Court. For those matters where a plea of guilty is then entered or a defendant is ultimately found guilty after a plea of not guilty, the MERIT report provides an important consideration in relation to the provisions of section 3A(d) of the Crimes *(Sentencing Procedure) Act* 1999, which identifies rehabilitation as one of the purposes of sentencing.

Aside from having an impact in reducing rates of re-offending,[20] according to a health outcomes study by NSW Health,[21] MERIT has been successful in improving the health outcomes of participants who complete the program. By program exit after 3 months, levels and types of illicit drug use and associated risk behaviours were reduced by significant amounts. A high proportion had substantially decreased the frequency and intensity of their drug use and many reported abstinence from their principal drug of concern. Most pertinently, the NSW Health study supports the observation of a linkage between mental health and substance abuse issues. Measures of health and psychological adjustment showed significantly lower levels of physical and psychological health among participants at program entry than in the general population. For those who successfully completed MERIT, most recorded a significant decline in psychological distress levels[22] from when they entered the program.[23] Most also displayed improved physical and psychological wellbeing,[24] with levels approaching that of the general population.[25]

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[20] See Lulham R, *Contemporary Issues in Crime and Justice*, No 131 (July 2009) 'The Magistrates Early Referral into Treatment Program'. According to the authors, acceptance and completion of the MERIT program by defendants resulted in a reduction in committing any type of offence by an estimated 12 percent.

[21] (2007) *The Magistrates Early Referral Into Treatment (MERIT) program: health outcomes*

[22] Based on the Kessler-10 measure

[23] Note 21 above, at [4.7]. Although about 10% recorded high psychological distress levels at program exit, this was possibly attributable to the long-standing nature of their mental health conditions.

[24] Based on the SF-36 measure

[25] Note 21 above, at [4.8]

Whilst such results are promising in relation to the treatment of defendants with a substance abuse problem who also have a mental health issue, the effectiveness of the program for defendants with a cognitive development is less certain. To my knowledge, there is no data available as to the extent to which defendants participating in MERIT may also have a cognitive impairment. However, there is some suggestion that due to the methods of this and other diversion programs, they may not well-suited to such individuals: the duration of diversionary programs and period of supervision may be too short to effectively teach behavioural change, while individuals with a cognitive impairment often require special education techniques and more focused attention than group treatment sessions will allow.[26]

Further investigation into the numbers of individuals with cognitive impairments being referred to programs such as MERIT, the efficacy of diversionary programs in improving health outcomes and reducing future contact with the criminal justice system, and the development of appropriate targeted programs would be welcomed.

Centralised identification systems

CP 7 has also raised the issue of whether centralised systems could be established within the Local Court and the NSW Police for assessing defendants for cognitive impairment or mental illness at the outset of criminal proceedings. It is difficult to comment on this proposal without clearer conceptualisation of the features and proposed operation of such systems. The Court recognises the value of proposals seeking to assist in the stated aim of ensuring that fewer individuals "fall between the cracks" due to symptoms of mental illness, disorder or impairment not being recognised, but has some preliminary comments on the challenges in making such systems effective in the Local Court.

Firstly, there is the question of at what stage in this system a person might be identified and assessed as to his or her appropriateness for diversion. If police were to identify persons potentially requiring assessment, with court services then to follow up on these individuals and bring the matter to the Court's attention once criminal proceedings have been commenced, the issues raised above in relation to options for diversion before the court process would again arise. As I have stressed, the priority for any diversion of individuals with a mental health or cognitive impairment is that it occurs as early as possible. Any centralised systems of the type suggested should not have the effect of encouraging the practice of charging and leaving the question of mental health or cognitive impairment to the Court rather than utilising the charging discretion and power in section 22 in appropriate cases.

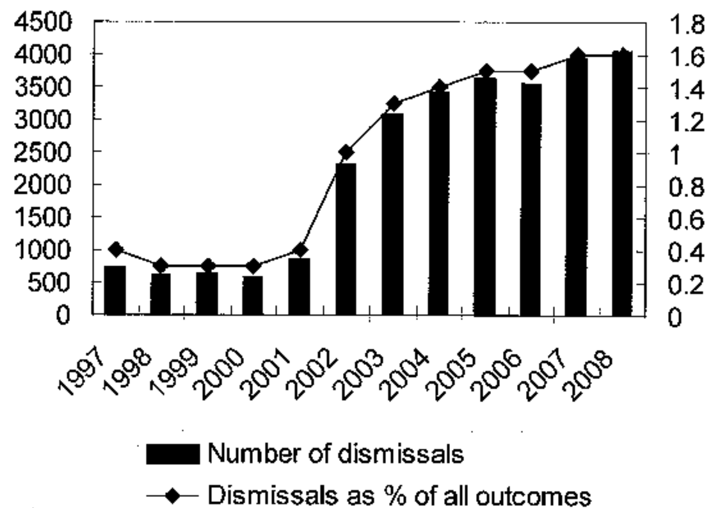
Secondly, there is the practical challenge arising from the geographic distribution of Local Court locations and the resources available to the Court. The system proposed is that court services would undertake the task of identifying defendants with a potential mental health issue and bring these to the court's attention, which would require matching data in the system with the relevant court file and making a note on the file. Such a process would be complicated by the realities of the Court's resource levels. Magistrates do not have associates like the judicial officers in higher jurisdictions who might be able to perform this task. Without specific additional

[26] Note 17 above

support, whether from associates or other specially trained support services, such a task would fall to registry staff. The Court sits in approximately 148 locations across NSW. Some courts are busy, multi-court complexes in Sydney and regional centres, whereas others are single-court, geographically remote locations. There is a corresponding difference in the staff levels and facilities available. In many locations, registries are already under-resourced and experiencing processing delays. It is foreseeable that these circumstances may create difficulties when attempting to achieve diversion from the court process at the earliest opportunity.

Part 3, MHFPA diversionary procedures

As a preliminary observation, it should be noted that the proportion of defendants dealt with under the Local Court diversionary schemes set out in the MHFPA has remained relatively steady (between 1.3 and 1.6 percent) since 2003:[27]



Section 32

<u>Definitions</u>

This submission does not propose to address all of the definitional issues raised in CP 7, except to comment as follows:

- In interpreting terms such as "developmentally disabled", "mental illness" and "mental condition", the Court will have regard to appropriate material placed before it. Applications under section 32 (and section 33) will involve psychological and/or psychiatric assessment of the accused. The magistrate will rely upon the report of the psychologist or psychiatrist to specifically to address these issues.

- The term "treatment" is understood by members of the Court to refer to an option to assist the person in living in and functioning as a member of the community, rather than a narrower definition of fixing a condition or assuming that the plan will involve medication. As noted in the Court's preliminary submission, a difficulty

[27] Source: data obtained from annual BOCSAR *NSW Criminal Court Statistics*, 1997-2008

that arises is not so much any confusion as to the meaning of "treatment", but the availability of an effective treatment plan that can be put before the court in instances where appropriate support services are not available.

Eligibility criteria

Turning to the question of whether section 32 should provide a specific list of criteria for consideration by the Court, or alternatively, exclude certain considerations such as the seriousness of the offence, a general observation is that in instances where legislation is prescriptive and removes or limits judicial discretion the effect is often to prevent cases from being determined on their particular merits.

A decision on a section 32 application will involve an attempt to resolve the tension between ensuring that a person will receive effective treatment and the need for the protection of the community. In these circumstances, magistrates appreciate that a substantial proportion of defendants making section 32 applications may have conditions that will never be resolved. Consequently, the decision-making process should, in the Court's view, be unconstrained to fully explore and balance the tensions inherent in the application of section 32.

For example, it is not uncommon to observe that an applicant's record contains one or more prior instances of matters being dealt with pursuant to section 32. In such instances, one must query whether the legislative intent of diversion established by section 32 is being achieved. There may be instances of defendants with mental health issues who are aware and seek to take advantage of section 32. However, to respond to this by legislating to provide, for instance, that if a person has been dealt with under section 32 once, he or she is not eligible to be dealt with under section 32 in the event of a subsequent charge, would likely result in manifest injustices. Particularly in the case of ongoing or recurrent conditions or illnesses, subsequent offending might be influenced by changes in treatment such as dosages or types of medications. The importance of the ability of the Court to consider each application on its merits having regard to the facts before the Court cannot be overemphasised.

Orders

Another issue raised is the adequacy of the orders available to magistrates under section 32. Overall, the Court considers that whilst the range of interlocutory and final orders available under subsections (2) and (3) are appropriate, the provisions for ensuring their effectiveness are poor for several reasons. These include the insufficiency of the six-month period for supervision of orders in subsection (3A) and the lack of measures to bring non-compliance to the Court's attention.

In respect of the former, the fact that pursuant to subsection (3A) a magistrate is only able to recall a defendant within six months of a final order being made has *not* been seen as a reason not to divert defendants (as might be inferred from the relatively higher rates of diversion from 2004 onwards). Instead, magistrates may make use of the power to make interlocutory orders in subsection (2) to effectively extend the period of supervision, for instance, by placing the defendant on conditional bail that requires him or her to receive treatment and adjourning the matter for a period of time, before making a final order. Whilst effective in ensuring that the Court can

monitor a defendant for a greater period of time, it would be preferable for magistrates not to need to be creative in the framing of interlocutory orders so as to overcome the time limit in subsection (3A). An alternative preferred by the Court would be for the time limit in subsection (3A) to be discretionary, but subject to a maximum period of time- perhaps similar to section 9 of the *Crimes (Sentencing Procedure) Act* 1999, which enables the Court to impose a good behaviour bond (with or without supervision) for a specified time of up to five years.

Irrespective of the length of the time limit provided in subsection (3A), the efficacy of the enforcement provision depends upon mechanisms for bringing breaches to the magistrate's attention. Subsection (3A) currently refers to a situation where a defendant can be recalled if the magistrate "suspects" a treatment plan is not being complied with, which realistically requires notification. While a treatment provide may report non-compliance to the Probation and Parole Service or the Department of Human Services pursuant to section 32A, there is no structured mechanism for reporting and no formal mechanism for ensuring that such reports are then directed to the attention of the Court. A further issue may be the willingness of health care providers to report breaches, who may consider that this might adversely affect the therapeutic relationship with the defendant. As a result, in the vast majority of instances, the Court never finds out if a treatment plan has been followed or is effective.[28]

Thus, some issues to consider are the extent to which treatment providers are aware that they can report a breach, and a mechanism to require the Court to be informed of a breach. Another possibility may be a requirement that a treatment plan to be served on the treatment provider to ensure they are fully aware of what it entails.

Section 33

Issue 7.37 has raised whether the existing orders available under s 33 of the MHFPA are adequate and working effectively. In the Court's experience, they are often not adequate or effective. Several difficulties regularly arise:

- *Proceedings to which section 33 applies:* section 31 enables a magistrate to make an order pursuant to section 33 only in relation to proceedings in respect of summary offences or indictable offences triable summarily. In cases where the accused is before the court for a Table 1 offence where there has not yet been consideration of whether an election will be made to proceed with the matter on indictment (as there will typically not have been at the first appearance), the court cannot make an order under section 33 until this is resolved.

  This issue will often arise at the first appearance, where the usual progress of a matter involving a charge for a Table 1 offence is for a 14-day adjournment to be allowed to enable time to determine if an election is to be made, although in some cases, it may be possible for the police prosecutor to inform the court at the first appearance date that an election will not be made. The inability to make an order under section 33 until the election issue is resolved is problematic, given

[28] See also Judicial Commission of New South Wales, Monograph 31 (March 2008) *Diverting mentally disordered offenders in the NSW Local Court*, p 20

that although a section 33 application can be made at any time in the proceedings, the diversion from the court system and treatment of mentally ill persons should ideally occur as soon as possible.

- *Reporting following assessment:* in the Court's experience, it is not uncommon to see a reluctance of hospitals to admit accused persons, particularly where an order is made under section 33(1)(b) (enabling the accused to be brought back before the court) or if the accused is violent. When this occurs, but it continues to appear to the court that the accused is a mentally ill person, an accused may be sent back and forth between the court and the hospital on several occasions. This situation may be resolved in one of two ways: the court may make an order under section 33(1)(a), where there is no option for the accused person to be returned to the court, or the accused person may be refused bail despite appearing to be mentally ill, and be detained in prison where treatment will be provided in a secure environment. Neither of these options is desirable.

  One possible underlying cause of this problem is that the MHFPA does not appear to provide for any system requiring the hospital to report back to the court. On some occasions, a report may be sent with the police when returning the accused to court or the mental health nurse may be able to provide a report, but in many instances the court receives no information about the assessment of the accused or any reasons why he or she was not admitted.

  In my view, section 33 should be amended to include a provision to the effect that wherever an assessment of an accused takes place pursuant to an order under that section and the person is not admitted and returned to the court, the hospital must provide the court with a report indicating the outcome of the assessment and reasons for the opinions set out in the assessment. Otherwise, situations in which accused persons may be sent back and forth between the court and the hospital seem likely to continue to arise. It is recognised that other underlying issues, such as the level of resources available to hospitals in order to assess and admit persons for treatment, may similarly need to be addressed to better facilitate assessment and treatment of mentally ill persons pursuant to section 33.

- *Bail*: although the Court's Bench Book advises that bail should not be considered in circumstances where an order is being made pursuant to section 33(1)(b), this practice still occurs on occasion. The result of bail being refused where an accused is to be taken to a mental health facility is that the person is effectively 'in custody' and should be guarded by the police or Corrective Services for the period of time he or she is at the mental health facility (if admitted). The practical effect in such instances is for the accused to be refused admission to the facility, as police/hospital protocols do not allow admission if bail is refused.

  It may be that orders refusing bail continue to be made despite the making of a section 33(1)(b) order due to the wording of section 33(1), which notes that the magistrate's powers to make an order do not derogate from any order that the magistrate may make in relation to the granting of bail. This may create the erroneous impression that the magistrate should consider bail at the time of a section 33 application. To avoid the outcome described above, it may be

appropriate to amend section 33 to expressly require that if an order is made pursuant to section, then bail is not to be refused.

- *Community treatment orders*: although section 33(1A) contemplates the making of community treatment orders, the rigorous requirements for making such an order has resulted in the provision being rarely, if ever, used.

- *Conveying the accused to the mental health facility:* section 33(5A)(b) provides that an accused person may be taken to a mental health facility following an order under section 33 by a person prescribed by the regulations, which currently includes Corrective Services officers. However, Corrective Services has been reluctant to convey accused persons to hospital, on the basis that where the accused being conveyed is not bail refused and thus 'at large', its officers lack the powers to return an accused to the court or to arrest a person should he or she attempt to escape. This should be corrected by provisions setting out the powers of persons conveying accused persons to and from mental health facilities.

- *Time for discharge of accused:* section 33(2) provides that if an accused is dealt with under section 33, then if the person is not brought back to court to be dealt with further within six months, the charge is taken to be dismissed upon the expiration of the six month period. In my view, this should not apply to orders made pursuant to section 33(1)(a), which are generally utilised in cases involving less serious charges.[29] In practice, if an order is made under section 33(1)(a) - which does not allow for the accused person to be brought back before the court - the six month period specified in the legislation serves no purpose as the matter will not dealt with again. At the time of making a section 33(1)(a) order, the court papers will be marked "Order made under section 33(1)(a)" and filed. No further order dismissing the matter will be made six months later.

Disqualification of magistrates

As the Commission has noted, the requirement that a magistrate disqualify him- or herself from hearing a matter following the refusal of a section 32 or section 33 application previously appeared in section 34 of the MHFPA and has been removed.

The Court does not support the reintroduction of a provision to the effect that an application for a magistrate to disqualify him- or herself may be made, primarily on the basis that such a provision would be open to abuse. Where an unsuccessful defendant may be genuinely aggrieved, such application might already be made nonetheless. The absence of a specific section in the MHFPA does not preclude this.

Disqualification may be appropriate if there is a suggestion that the hearing may be prejudiced, for instance, due to the disclosure of information in the application proceedings that may be at issue or the subject of cross-examination in the hearing. However, in many cases it is appropriate, even preferable, for a magistrate who has

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[29] As an observation, it might be noted that those matters where section 33(1)(a) is utilised by the Court may be those in respect of which use of the police power to convey a person to a mental health facility pursuant to section 22 may have been appropriate, thereby removing the need for the accused person to be brought before the Court at all.

considered material under section 32 to continue to deal with a matter, such as where the defendant pleads guilty and the matter proceeds to sentencing.[30]

Procedure

Another issue that has been raised is whether section 32 or section 33 applications should be heard in alternative ways to the traditional adversarial court process, and if so, whether these should be the subject of legislative intervention or left to court administrative arrangement.

The Court does not support dispensing with the adversarial nature of proceedings for the purpose of section 32 or section 33 applications. Currently, application proceedings tend to be conducted on the basis of submissions made on behalf of each party. Non-adversarial proceedings contemplate that the source of the information coming before the court would be the applicant (or his or her legal representative). As a consequence it might be expected that any material provided would be self-serving to some degree or at least one-sided. In the context of the need to balance the tensions between treatment of the defendant and protection of the community discussed above, it is not desirable that the adversarial structure of the application process be replaced with a non-adversarial structure. Similarly, because applications under section 32 and section 33 take place in the course of criminal proceedings, there is a strong public interest in ensuring that they are held in open court, particularly in the absence of a legislative directive to the contrary.

However, notwithstanding these matters, the Court recognises and believes that it is important that steps are taken by magistrates to conduct the hearing of an application in a matter that aims to reduce the stress caused to a defendant with a mental health or cognitive impairment and make the process less intimidating. Thus, as the Commission has noted, individual magistrates will adopt appropriate techniques such as dealing with applications later in the day when the court is less busy. Continuing development of skills of court-craft to address specific situations such as these is an ongoing feature of magistrates' education.

Thank you for the opportunity to contribute to this inquiry.

Should you have any questions in respect of the enclosed submission or wish to discuss and details with me further, please do not hesitate to contact me.

Yours sincerely,

Graeme Henson
Chief Magistrate

[30] See, for instance, *Police v Goodworth* [2007] NSWLC 2