

New South Wales Bar Association Submission on Consultation Paper 11: Young people with cognitive and mental health impairments in the criminal justice system

The New South Wales Bar Association (the Association) is grateful for the opportunity to comment on New South Wales Law Reform Commission Consultation Paper 11 (the Paper).

This submission will address the issue of fitness to be tried as outlined in Chapter 5 of the Paper, and in particular, will respond to **Question 11.23**:

Should legislative powers and procedures dealing with unfit defendants be extended to the Children's Court? If so, should they be framed in a different manner from those available in the higher courts?

Fitness to be tried

The Association proposes the adoption of a new procedure for fitness to be tried in summary matters in the Local and Children's Court.

The proposed procedures are not limited in their application to young people. The procedures are designed to avoid the situation where a person is determined to be unfit to be tried and discharged (*Mantell v Molyneux* (2006) 68 NSWLR 46), but the Crown can still lay an *ex officio* indictment [*Police v AR* (Marien P, Children's Court, 19.11.2009)].

The goals of the proposed scheme are as follows:

- 1) Consistency as far as possible with the operation of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (*MHFPA*).
- 2) To determine criminal responsibility.
- 3) To avoid unnecessary delays.
- 4) Simplicity.

The elements of the proposed scheme are as follows:

Raising fitness to be tried

- 1) Fitness to be tried can be raised by the Court, prosecution or defence at any stage of proceedings, although preferably before commencement of hearing.
- 2) Fitness to be tried can be raised more than once.
- 3) Once raised, the hearing is suspended until fitness is determined.
- 4) Legal representation is legally aided, or alternatively paid by the Attorney-General.

Expert Reports

- 5) A Court can make orders for the preparation and service of expert reports, and any other orders that may be appropriate.
- 6) If an expert assesses a person as unfit to be tried, the expert must address the likelihood of the accused becoming fit in the next 12 months and must recommend a treatment plan.
- 7) After service of expert reports by one party on the other, the other party can decide if they want an expert report prepared.

Fitness Enquiry

- 8) When the matter comes before a Court, the first determination will always be whether it is appropriate to apply s 32 or s 33 *MHFPA*. Diversion will always be appropriate. If s 32 or s 33 *MHFPA* is not applicable, then a fitness enquiry is to take place.
- 9) Sections 12, 13 and 15 *MHFPA* are to apply to the fitness enquiry.
- 10) Fitness enquiries can be contested, uncontested, or with consent of parties.
- 11) If uncontested or with consent reports can be tendered without evidence required.
- 12) Experts can be called to give evidence.
- 13) A Court can inform itself as it considers appropriate.

Special hearing

- 14) If a Court finds a person unfit, it is to decide if the person is likely to become fit during the next 12 months. If the person is, the Court is to adjourn proceedings. If the person is not, a special hearing is to be held.
- 15) The procedure for a special hearing is to follow s 21 *MHFPA* as closely as possible and the verdicts available are those contained in s 22 *MHFPA*.
- 16) After a special hearing a Court can make any order currently available: s 23(2) *MHFPA*. In addition, the Court should be empowered to make a Community Treatment Order (which can currently only be made under s 33(1A) *MHFPA*).
- 17) If a limiting term is imposed the person is to be referred to the Mental Health Review Tribunal (MHRT) and consequent orders will be made to advise the MHRT of the person within 7 days. All reports are to be sent to the MHRT.
- 18) Orders to be made directing that a report for the MHRT must be prepared within 30 days by Justice Health in relation to the accused's diagnosis, prognosis and suggested treatment plan.
- 19) A Court can monitor progress and deal with variation or breach of community-based orders that are imposed: s 32A *MHFPA*.
- 20) A finding of unfitness is a bar to further prosecution in respect of the same circumstances (s 22(3) *MHFPA*).
- 21) The court or either party can re-list to seek variation or revocation. If revocation is sought the Court can consider all post-special hearing options previously available to it.
- 22) Appeals lie to the District Court:
 - a. from the Magistrate's determination that the accused is fit to be tried;
 - b. against the possible verdicts at a special hearing (other than not guilty);
 - c. following orders imposed after a special hearing (s 23(3) *MHFPA*).