Consultation Paper 5

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

Legislative concepts of cognitive and mental health impairments

Issue 5.1: Should a broad umbrella definition of mental health impairment, incorporating mental illness and cognitive impairment, be included in the MHFPA? What practical impact would this have? See pg 70.

Whilst it is acknowledged that a single definition of mental health impairment, encompassing a range of conditions would be convenient and 'neater' than current arrangements, the NSW Police Force believes that, because of the range of 'conditions' with which police have to deal (see Tabs A & B), any umbrella definition is unlikely to be practical.

The definition of mental illness is articulated in s4 of the MHA as ‘a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

(a) delusions
(b) hallucinations
(c) serious disorder of thought form
(d) a severe disturbance of mood
(e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d).

It should also be noted that there are a wide variety of legislative definitions of ‘intellectual disability’ or ‘cognitive impairment’ (see the summary of legislative definitions of cognitive impairments and a list of categories relating to cognitive impairment in the DSM IV attached at Tab A & Tab B respectively).

The NSW Police Force emphasises the need for separate definitions of mental illness and cognitive impairment to assist police in identifying different groups of what may be 'vulnerable people'.

On a related note, any changes to legislation that might impose responsibilities on agencies will need to be preceded by consultation with those agencies to ensure they have adequate resources to meet any additional responsibilities.

More generally, the NSW Police Force believes that the use of agreed terminology, particularly in respect of definitions, needs to be consistent in legislation and policy application across all agencies.

Issue 5.2: If an umbrella definition were to be adopted, would it be appropriate to state that mental impairment includes a mental illness, cognitive impairment, or personality disorder, however and whenever caused, whether congenital or acquired? See pg 70

See issue 5.1.

Issue 5.3: Should the term "mental illness" as used in Part 4 of the MHFPA be replaced with the term "mental impairment"? See pg 71.

No, the existing demarcated definition for mental illness and mentally ill person is considered appropriate.

Issue 5.4: Should the MHFPA continue to refer to the terms "mental condition" and "developmentally disabled"? If so, in what way could the terms be recast? See pg 73.

See issue 5.1.

Issue 5.5: Alternatively, should the MHFPA include a definition of cognitive impairment or disability? If so, should that definition be "a significant disability in comprehension, reason, judgment, learning or memory, that is the result of any damage to, or disorder, developmental delay, impairment or deterioration of, the brain or mind"? See pg 73.

See issue 5.1.

Identifying existence of a cognitive or mental impairment

Issue 5.6: Should the MHFPA be amended to create a general power of the court to order an assessment of an offender at any stage during proceedings?
If so, (a) who should conduct the assessment?
(b) what should an assessment report contain?
(c) should any restrictions be placed on how the information contained in an assessment report should be used? See pg 82.

Current legislation under sections 32 and 33 of the MHFP Act permit Local Courts to order assessments at any stage of proceedings.

(a) Any assessment should continue to be facilitated by the Nurse Court Liaison, Justice Health.
(b) The contents should include basic psychiatric clinical assessment questions and the regulation or legislation should include a template outlining the type of content for the assessment report.
(c) The NSW Police Force has no comment at this time.

Consultation Paper 6

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

Fitness for trial

Issue 6.1: Should the MHFPA expressly require the court to consider the issue of fitness whenever it appears that the accused person may be unfit to be tried?

The current approach in relation to 'fitness to be tried' has evolved from the common law and has been in existence for some 50 years. The 'Presser test' (formulated by Smith J in *R v Presser [1958] VR 45)* has been widely applied in most Australian jurisdictions and has been endorsed and adopted by the High Court of Australia. The 'Presser test' emphasises the capacity of the accused to understand the proceedings at trial so as to be able to mount a proper defence.

The NSW Police Force does not see any merit in seeking to codify this flexible approach to establishing a defendant's fitness for trial. Changes to the current system are not supported.

Issue 6.2: Do the Presser standards remain relevant and sufficient criteria for determining a defendant's fitness for trial?

See issue 6.1.

Issue 6.3: Should the test for fitness to stand trial be amended by legislation to incorporate an assessment of the ability of the accused to make rational decisions concerning the proceedings?
If so, should this be achieved by:
(a) the addition of a new standard to the Presser formulation, or
(b) by amendment of relevant standards in the existing formulation?

See issue 6.1.

Issue 6.4: As an alternative to the proposal in Issue 6.3, should legislation identify the ability of the accused to participate effectively in the trial as the general principle underlying fitness determinations, with the Presser standards being listed as the minimum standards that the accused must meet?

See issue 6.1.

Issue 6.5: Should the minimum standards identified in Presser be expanded to include deterioration under the stress of trial?

See issue 6.1.

Issue 6.6: Should the minimum standards identified in Presser be altered in some other way?

See issue 6.1.

Issue 6.7: Should the procedure for determining fitness be changed and, if so, in what way?

See issue 6.1.

Issue 6.8: What should be the role of:
(a) the court; and
(b) the MHRT
in determining a defendant's fitness to be tried?

See issue 6.1.

Issue 6.9: Should provision be made for the defence and prosecution to consent to a finding of unfitness?

See issue 6.1.

Issue 6.10: Should the Criminal Appeal Act 1912 (NSW) be amended to provide for the Court of Criminal Appeal to substitute a "qualified finding of guilt" in cases where a conviction is quashed due to the possible unfitness of the accused person at the time of trial?

No. The role of the Court of Criminal Appeal is to review the procedures and conduct of the original trial. The role of an appellant court is not to conduct a fresh hearing and questions of fitness for trial are properly decided by the District Court or Supreme Court during a trial.

Issue 6.11: Should fitness procedures apply in Local Courts? If so, how should they be framed?

The NSW Police Force does not support the introduction of 'fitness to plead' procedures in the Local Courts. The NSW Police Force is of the view that Local Courts do not have sufficient resources to support such a proposal.

Current arrangements under sections 32 and 33 of the MHFPA provide a convenient and practical method of dealing with defendants affected by mental disorders.

Issue 6.12: Should legislation 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? If so, what should be provided?

See issue 6.11.

Procedure following a finding of unfitness

Issue 6.13: Should the special hearing procedure continue at all, or in its present form? If not, how should an unfit offender be given an opportunity to be acquitted?

The Local Court does not have jurisdiction over special hearings following a finding that a defendant is unfit to stand trial. Special hearings take place in the higher courts and as such, the NSW Police Force is not suitably placed to provide comment on the issues raised.

Issue 6.14: Should a procedure be introduced whereby the court, if not satisfied that the prosecution has established a prima facie case against the unfit accused, can acquit the accused at an early stage?

See issue 6.13.

Issue 6.15: Should deferral of the determination of fitness be available as an expeditious means of providing the accused with an opportunity of acquittal?

See issue 6.13.

Issue 6.16: Should the special hearing be made more flexible? If so, how?

See issue 6.13.

Issue 6.17: Should the MHFPA provide for the defendant to be excused from a special hearing?

See issue 6.13.

Issue 6.18: Should the finding that "on the limited evidence available, the accused person committed the offence charged [or an offence available as an alternative]" be replaced with a finding that "the accused person was unfit to be tried and was not acquitted of the offence charged [or an offence available as an alternative]"?

See issue 6.13.

Issue 6.19 Should a verdict of "not guilty by reason of mental illness" continue to be available at special hearings? Are any additional safeguards necessary?

See issue 6.13.

The defence of mental illness

Issue 6.20: Should the defence of mental illness be replaced with an alternative way of excusing defendants from criminal responsibility and directing them into compulsory treatment for mental health problems (where necessary)? For example, should it be replaced with a power to divert a defendant out of criminal proceedings and into treatment?

The defence of mental illness is a corner stone of our judicial system, which focuses on the 'guilty mind' rather than actions to determine culpability. The suggestion that there should be a capacity to divert persons into treatment as an alternative to the 'defence' is not supported, as it discloses a fundamental misunderstanding of what the defence is. A defendant may be fit to plead and stand trial, and not be in need of treatment, but may have been mentally ill at the time of the offences and therefore found to be not guilty.

Issue 6.21: Should legislation expressly recognise cognitive impairment as a basis for acquitting a defendant in criminal proceedings?
If yes, should the legislation expressly include cognitive impairment as a condition coming within the scope of the defence of mental illness, or is it preferable that a separate defence of cognitive impairment be formulated as a ground for acquittal?

The NSW Police Force does not support the expansion of categories that might be relied upon by defendants to avoid liability for their crimes.

Issue 6.22: Should the defence of mental illness be available to defendants with a personality disorder, in particular those demonstrating an inability to feel empathy for others?

See issue 6.21.

Issue 6.23: Should the defence of mental illness be available to defendants who lack the capacity to control their actions?

See issue 6.21.

Issue 6.24: Should the test for the defence of mental illness expressly refer to delusional belief as a condition that can be brought within the scope of the defence? If yes, should the criminal responsibility of a defendant who acts under a delusional belief be measured as if the facts were really as the defendant believed them to be?

See issue 6.21.

Issue 6.25: Should the current test for determining the application of the defence of mental illness be retained without change?

Yes, the NSW Police Force does not support legislative change to an extensive body of established law.

Issue 6.26: If the M'Naghten rules were reformulated in legislation, should the legislation define the concept of a disease of the mind? If so, how should it be defined? Should the common law requirement for a "defect of reason" be omitted from the statutory formulation?

See issue 6.25.

Issue 6.27: If the M'Naghten rules were reformulated in legislation, should the legislation recognise, as one way of satisfying the defence, a lack of knowledge of the nature and quality of the act? If so, should the legislation provide for a lack of actual knowledge, or a lack of capacity to know?

See issue 6.25.

Issue 6.28: If the M'Naghten rules were reformulated in legislation, should the legislation recognise, as one way of satisfying the defence, a lack of knowledge that the criminal conduct was wrong? If so, should the legislation provide any guidance about the meaning of this alternative? For example, should it require that the defendant could not have reasoned with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong? Should the legislation require a lack of capacity to know, rather than a lack of actual knowledge?

See issue 6.25.

Issue 6.29: Should the approach for determining the application of the defence of mental illness under the M'Naghten rules be replaced with a different formulation? If so, how should the law determine the circumstances in which a defendant should not be held criminally responsible for his or her actions due to mental illness or other impairment of mental function?

See issue 6.25.

Issue 6.30: Should a defendant's self-induced intoxication or withdrawal from an intoxicant be able to form a basis for claiming that the defendant is not guilty of a charge by reason of mental illness and, if so, in what circumstances?

See issue 6.21.

Issue 6.31: Should the defence of mental illness apply to a defendant's involuntary act if that involuntary act was caused by a disease of the mind? If yes, should legislation provide a test for determining involuntary acts that result from a disease of the mind as opposed to involuntary acts that come within the scope of the defence of automatism, and if so, how should that test be formulated?

No, by definition an involuntary act is not subject to conscious control, whether that state of consciousness is 'normal' or abnormal due to mental illness.

Further, the criminal law does not punish involuntary acts. For example, if a person deliberately strikes another, this is generally considered an assault. However if a person has an epileptic fit and strikes another whilst convulsing, this would not be considered a criminal act.

Issue 6.32: Should the MHFPA be amended to allow the prosecution, or the court, to raise the defence of mental illness, with or without the defendant's consent?

The current legislation does not preclude the prosecution or the court from considering mental illness issues until such time as they are raised by the defence. It should be noted that it is not the role of the court or the prosecution to take over the conduct of the defence case.

Issue 6.33: Should the MHFPA be amended to allow for a finding of "not guilty by reason of mental illness" to be entered by consent of both parties?

There may be a practical utility in allowing prosecution and defence to agree that a verdict of not guilty by virtue of mental illness is appropriate. However, the Court would still need to be satisfied that such a finding is appropriate.

Issue 6.34: Should the court have the power to order an assessment of the defendant for the purpose of determining whether he or she is entitled to a defence of mental illness?

No, it is not the role of the court to take over the conduct of the defence case.

Issue 6.35: Should a process other than an ordinary trial be used to determine whether a defendant is not guilty by reason of mental illness?

No, a trial is the only appropriate vehicle to determine guilt or innocence, whether it be on the grounds of mental illness or any other basis.

Issue 6.36: Should the defence of mental illness be available generally in the Local Court and, if so, should it be available in all cases?

The defence of mental illness is already available at law in any court exercising criminal jurisdiction, including the Local Court.

The partial defence of substantial impairment

Issue 6.37: If the umbrella definition of cognitive and mental impairment suggested in Consultation Paper 5, Issue 5.2 were to be adopted, should it also apply to the partial defence of substantial impairment?

Under section 23A of the *Crimes Act* a court can acquit a person of murder and enter a conviction of manslaughter where the defendant has a 'substantial impairment of the mind'.

The proposals to further define or describe the provisions of s23A are not supported as to do so would risk removing the courts discretion that may otherwise have been appropriate to exercise.

Issue 6.38: As an alternative to an umbrella definition of cognitive and mental impairment, should the mental state required by s 23A be revised? If so, how?

See issue 6.37.

Issue 6.39: Is the requirement in s 23A of the Crimes Act that the impairment be "so substantial as to warrant liability for murder being reduced to manslaughter" sufficiently clear? If not, how should it be modified?

See issue 6.37.

Issue 6.40: Should the defence of substantial impairment be retained or abolished? Why or why not?

See issue 6.37.

Infanticide

Issue 6.41: Is there a continuing need for infanticide to operate, either as an offence in itself, or as a partial defence to murder?

Section 22A of the *Crimes Act* relates to the special finding of 'infanticide' that is available to a Supreme Court jury.

As this provision is beyond the jurisdiction of the NSW Police Force, no further comment is provided on the issues raised.

Issue 6.42: Should the continued operation of the infanticide provisions be conditional on the retention of the partial defence of substantial impairment?

See issue 6.41.

Issue 6.43: If infanticide is to be retained, should it be recast? If so, how?

See issue 6.41.

Powers of the court following a qualified finding of guilt at a special hearing or a verdict of not guilty by reason of mental illness

The NSW Police Force has no comments or suggestions to make regarding the matters raised in ***Issues 6.44 – 6.73.***

Management of forensic patients following court proceedings

The NSW Police Force has no comments or suggestions to make regarding the matters raised in ***Issues 6.74 – 6.78.***

Issue 6.79 Are the procedures relating to breaches of orders adequate and appropriate? If not, what else should be provided?

The procedures relating to breaches of orders are currently outlined in ss 32 (3A and 3D) and 33 (1B) of the MHFPA.

Police believe there is a lack of accountability in relation to s 32 & 33 of MHFPA. For example, the difficulties involved in confirming if the person is indeed compliant or in breach of a court order.

The NSW Police Force believes that the intent of the legislation, namely the rehabilitation of individuals and the safety of the community, could be undermined if enforcement and accountability measures are not effective. For example the compliance period of six months in respect of 32 (3) is too brief and could be perceived as being a 'bandaid solution' (see: *Mantell v Molyneux* [2006] NSWSC 955 at 14).

On a related note, there may not be adequate provision of mental health and psycho-social services for individuals with cognitive disability to help them meet conditions imposed upon them by court orders. A relevant mental health (medical) and psycho-social case management model for persons dealt with under the court directed treatment plans under ss 32 and 33 of the MHFPA includes the Housing and Accommodation Support Initiative (HASI) for persons with mental illness (see http://www.health.nsw.gov.au/pubs/2007/pdf/hasi_initiative.pdf).

The NSW Police Force has no comments or suggestions to make regarding the matters raised in ***Issues 6.80 – 6.103.***

Sentencing: principles and options

The NSW Police Force has no comments or suggestions to make regarding the matters raised in ***Issues 6.104 – 6.115.***

Consultation Paper 7

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

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? See pg 11.

The NSW Police Force is open to the idea of a diversionary scheme for people with a cognitive impairment and/or mental illness. The specific details of the scheme and how it would operate would need to be further discussed. Any diversionary scheme would need to recognise the difficulty for police officers in correctly identifying that a person has a cognitive impairment and/or mental illness, and as such, police officers should not be expected to make any diagnosis or assessment. Police officers will retain their discretion to caution offenders instead of laying any charges, but the diversion scheme should primarily operate within the court system. This would allow for proper assessments to be made of a person's impairment or illness and for the diversion process to be monitored by the court.

Questions around appropriate resourcing for the scheme and support services would also need to be addressed. Proper consultation with advocacy groups representing the interests of victims of crime should also occur, to ensure that victims' rights are not compromised by diversion of these offenders. Police officers would also need to retain a level of discretion in the operation of the scheme, so that they are able to deal with complex cases and recidivist offenders. ***(This section updated by the NSW Police Force in October 2011).***

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? See pg 11.

See issue 7.1.

Issue 7.3: Does s 22 of the MHA work well in practice? See pg 11.

The NSW Police Force is of the view that s 22 of the MHA works adequately 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? See pg 12.

The NSW Police Force does not consider there would be significant benefits to such a scheme and, as identified in issue 7.1, police are faced with the difficulties associated with identifying cognitive impairment.

Whilst police refer vulnerable people to a variety of services (consistent with obligations under LEPRA), the complexity of training and referral processes required to implement such a scheme would be impractical.

On a related note, cognitive impairment and mental illness/disorder are separate conditions and would therefore need to be addressed in separate legislation.

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? See pg 12.

The NSW Police Force cannot comment on behalf of the DPP. However, the NSW Police Force has implemented a number of policies and practices intended to divert people with a mental illness or cognitive impairment away from the criminal justice system.

The NSW Police Force also offers comprehensive Mental Health Intervention Team training which includes four days of training, focussing on the importance of diverting persons with a mental illness from the criminal justice system. Police trainees are also taught about cognitive impairment and diversion at the NSW Police College during their initial training.

It should also be noted that s22 of the MHA enables police to divert persons who appear to be mentally ill or mentally disturbed to mental health facilities.

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? See pg 14.

Provisions in the *Bail Act* setting out the conditions of the grant of bail do not make it more difficult for an accused person with mental illness or cognitive impairment to obtain bail.

Bail determination is an exercise in risk management which requires a largely subjective assessment of any risk posed by the accused remaining at liberty. All of the circumstances surrounding a particular case must be weighed up to determine the level of risk. Factors such as mental illness, cognitive impairment and drug dependency etc are all examples of the attributes of the individual that are considered by the court in assessing the level of risk posed by the accused.

Once the level of risk has been determined, consideration must then be given to what conditions of bail should be imposed to ameliorate that risk to an acceptable level. There is a very broad discretion to impose whatever conditions are appropriate to each case, and if the risk is too great to be managed adequately, bail is refused.

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? See pg 14.

The NSW Police Force considers it unnecessary to change the *Bail Act* with respect to granting bail to persons with mental illness or cognitive impairment.

Further, the NSW Police Force has identified practical implications regarding how the person making a bail determination (i.e. a sergeant at a police station) might be satisfied as to the nature and degree of any mental or cognitive condition.

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? See pg 15.

The NSW Police Force believes current training is adequate to meet current needs.

Diversion under section 32

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? See pg 23.

(1) See issue 5.1.
(2) The NSW Police Force has no comment to make on this issue.

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"? See pg 24.

The NSW Police Force supports the use of language that does not stigmatise vulnerable communities. The use of 'people with a developmental disability' is preferable to the 'developmentally disabled'.

Issue 7.11: Should the term, "mental illness" in s 32(1) (a) (ii) of the MHFPA be defined in the legislation? See pg 25.

The NSW Police Force believes the term, 'mental illness' in s 32(1) (a) (ii) of the MHFPA should be defined in the legislation. The use of terms needs to be consistent in legislation and policy application across all agencies.

Issue 7.12: Should the term, "mental condition" in s 32(1) (a) (iii) of the MHFPA be defined in the legislation? See pg 26.

See issue 5.1.

Issue 7.13 (1): Should the requirement in s 32(1) (a) (iii) of the MHFPA for a mental conditions "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"? See pg 27.
(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? See pg 27.

The NSW Police Force supports the proposal to change s 32 (1) (a) (iii) of the MHFPA from 'for which treatment is available in a mental health facility' to '*for which treatment is available*'.

Any amendment to legislation would need to be supported by appropriate services and powers to ensure compliance and accountability.

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? See pg 29.

See issue 5.1.

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? See pg 29.

Consistent with issue 5.1, the use of 'umbrella' terms may be impractical. See issue 5.1.

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? See pg 29.

The current drafting of s32 of the MHFPA enables a magistrate to exercise discretion through diversion from the criminal justice system to the mental health services. Conditions such as drug and alcohol use or abuse, coupled with a mental illness, can result in complex co-morbidities that should be addressed holistically by the

magistrate. The NSW Police Force believes current provisions outlined in s 32 of the MHFPA provide appropriate discretion to achieve a better outcome for individuals with a range of conditions.

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? See pg 33.

Yes, the seriousness of the offence should be considered by the magistrate when deciding to divert a person under the MHFPA. The current case law demonstrates that this already the practice.

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? See pg 34.

Whilst it would be ideal to demonstrate the causal connection, people with mental illness and/or cognitive impairment often have complex histories and behaviours and there may be difficulty involved in attempting to identify the cause of the behaviour at the time of the incident. Determining the causal connection between the offence and the defendant's condition is a matter left to the discretion of the magistrate.

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? See pg 35.

The NSW Police Force has no comment to make on this issue.

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? See pg 37

Current provisions do not provide enough detail to inform or guide the exercise of the court's discretion. The NSW Police Force notes that there may be some merit in the development of a list of factors that the court can take into account when deciding if a diversionary order is appropriate.

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? See pg 38.

The application of existing general powers to make interlocutory orders are not displaced by the application of s 32(2) of the MHFPA.

There may be some merit in there being a separate provision in section 32 that clearly identifies the court's interlocutory powers (even if the court already has a general power to make such interlocutory orders). The existing provisions are not overtly clear in their proscription.

Issue 7.22: Are the interlocutory powers in s 32(2) of the MHFPA adequate or should they be widened to include additional powers? See pg 39.

The NSW Police Force has no comment to make on this issue.

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? See pg 42.

The NSW Police Force considers that the existing range of final orders under s 32 (3) are wide, discretionary and adequate.

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? See pg 42.

The NSW Police Force emphasises the need for separate definitions of mental illness and cognitive impairment to be addressed in separate legislation. See issue 5.1.

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? See pg 42.

The NSW Police Force believes that the legislation should require the court to consider whether a person or agency compelled to implement an order is adequately resourced and capable of doing so.

The resource implications for regional and remote areas in NSW resource should also be noted, as a lack of resources may create a potential barrier to successful diversion under s 32 for people living in these areas.

Where appropriate the legislation should compel an agency to implement an order, subject to the availability of resources.

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? See pg 45.

Historically, existing legislation which enables the enforcement of a final order for a period of six months is considered sufficient, after which time a community treatment order can be implemented.

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? See pg 47.

The NSW Police Force believes that the MHRT should have power to consider breaches of orders made under s 32 (3) of the MHFPA. However, it is noted that there may be legal issues that might preclude this from occurring which would need to be explored.

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 an s 32(3) order if a defendant has failed to comply with the order? See pg 47.

The NSW Police Force has no comment to make on this issue.

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? See pg 48.

No. The NSW Police Force believes this may lead to the service provider also becoming the enforcers. Compliance checking should be the role of the 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? See pg 48.

The NSW Police Force agrees that the role of the Probation and Parole Service with respect to supervising compliance with and reporting on breaches of orders made under s 32(3) should be clarified.

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? See pg 48.

The NSW Police Force believes that no other changes are necessary.

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? See pg 50.

The NSW Police Force notes that currently the Local Courts use the Court Liaison Service, part of the Justice Health Service to assess defendants for mental illness. However, we note that this does not currently extend to primary assessments for people with cognitive impairment. Whilst court processes for assessing cognitive impairment could be improved, it is acknowledged that additional screening processes would be resource intensive.

Where appropriate, the NSW Police Force aims to divert persons with mental illness and/or cognitive impairment under relevant legislation. The *NSW Police Force Handbook* has guidelines for screening intellectual disability, however it should be noted that it is not the responsibility of operational police to 'diagnose' intellectual disability.

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?
See pg 52.

Yes, the MHFPA should 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. A template for reports should be attached in regulation, or be part of the legislation.

Yes, the Act should identify the general information that should be included within these reports by way of a general template (i.e. outlines the basics to be covered in reports).

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? See pg 53.

Yes, the legislation should 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 (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? See pg 55.

There are advantages to alternative ways of hearing s 32 applications under the MHFPA rather than through the traditional, formal adversarial court procedures. For

example, Circle Sentencing (NSW), Forum Sentencing (NSW), Homeless Persons Court Diversion Programs have been successful formats that are not in formal court settings. The implementation of any such alternative should be done so on a trial basis to obtain evidence of effectiveness in achieving stated aims.

An existing model for the Commission to consider is Queensland's Special Circumstances Court Diversion Program, which includes people with mental illness, intellectual disability, cognitive impairment or brain and neurological disorders, and aims to address the causes of offending.

Diversion under section 33

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? See pg 60.

See issue 7.18.

Issue 7.37: Are the existing orders available to the court under s 33 of the MHFPA adequate and are they working effectively? See pg 62.

Whilst the NSW Police Force has some concerns about the transport of persons by police to mental health facilities these issues are being addressed in other forums.

Issue 7.38 Should legislation provide for any additional powers to enforce compliance with an order made under s 33 of the MHFPA? See pg 63.

See answer to 7.27-7.30, 7.37.

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? See pg 64.

Yes, if ss 32 and 33 of the MHFPA were combined it could make for a more streamlined approach. The sub sections could specifically address mental illness, cognitive impairment or mental condition.

Enhancing diversion in the superior courts

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? See pg 68.

The NSW Police Force notes that s10(4) gives the District and Supreme Courts broad discretion to discharge and release a defendant with mental health issues, where appropriate. This discretion provides ample capacity for diversion and is considered appropriate.

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? See pg 68.

Sections 32 and 33 of the MHFPA provide an expedient diversionary scheme for defendants in matters being dealt with summarily by the Local Court. The District and Supreme Courts deal with more serious offences, therefore a more rigorous regime to deal with accused persons would be more appropriate. It is important to balance the public interest in having persons charged with serious crime appropriately dealt with against an abbreviated and expedient scheme that is oriented towards a therapeutic outcome. The importance of determining significant criminal matters should not be overlooked.

The NSW Police Force does not support the extension of ss 32 and 33 of the MHFPA to the District and Supreme Courts.

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? See pg 68.

Yes. There should 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. Such a statement should identify the difference between MI and CI and clearly identify the beneficial nature of legislation and the benefits of diversion. Such a statement of principles should use the language of relevant human rights instruments to which Australia is a signatory.

Consultation Paper 8

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

Issue 8.1 Should the Crimes (Forensic Procedures) Act 2000 (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following a diversionary order under s 32 or s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW), or should the legislation be amended in some other way referable to the particular order made? See pg 6.

The NSW Police Force does not support amending the legislation as described above. This position is consistent with a submission provided by the NSW Police Force to a current review of the *NSW Crimes (Forensic Procedures) Act 2000*, undertaken by Justice Graham Barr at the request of the NSW Attorney General.

Issue 8.2 Should the Crimes (Forensic Procedures) Act 2000 (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following a verdict of not guilty on the ground of mental illness? See pg 8.

See issue 8.1.

Issue 8.3 Should the Crimes (Forensic Procedures) Act 2000 (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following:
(a) a decision by the Director of Public Prosecutions not to continue with the proceedings, or
(b) a finding at a special hearing that, on the limited evidence available, the defendant has committed an offence?
If so, in what way? See pg 14.

See issue 8.1.

Issue 8.4 Should the Crimes (Forensic Procedures) Act 2000 (NSW) be amended to require the compulsory retention of forensic material in any of the following cases, namely:
(a) persons who, because of cognitive or mental health impairment, are diverted from the criminal justice system under s 32 or s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW);
(b) persons found not guilty by reason of mental illness;
(c) persons, having been found unfit to be tried, are found, on the limited evidence available at a special hearing, to have committed an offence?
If so, in what way should the legislation be amended? See pg 16.

See issue 8.1.