Children's Court of New South Wales

20 August 2010

Ms Hilary Astor
Commissioner
New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Ms Astor,

Re: People with Cognitive and Mental Health Impairments in the Criminal Justice System

Thank you for the opportunity to respond to the ***People with Cognitive and Mental Health Impairments in the Criminal Justice System*** consultation papers. I apologise for the delay in providing you with my response.

Below are the Children's Court's views on fitness proceedings and diversion under the *Mental Health (Forensic Provisions) Act* 1990 (MHFPA).

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

The Court agrees with the NSW Law Reform Commission's proposal that a "simplified fitness procedure" should be introduced in the Local Court/ Children's Court which would at least, empower the magistrate to:

- order a psychological or psychiatric assessment of the defendant;
- determine the question of fitness;
- determine whether the defendant should be acquitted, or discharged pursuant to the existing diversionary measures (eg ss. 32 and 33) which would operate in parallel; and
- order that the defendant become a forensic patient, that is, subject to the supervision of the Mental Health Review Tribunal (MHRT))

Although these cases are rare, there are a number of defendants who are unfit to plead and whose case is a summary matter or in indictable matter which would not be committed to the District Court.

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?

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The Court is of the view that in cases that deal with strictly indictable offences the Local/Children's Court should have the power to dispense with a committal hearing and commit the person to the District Court for the purpose of a fitness hearing. The District Court should have the power to remit the person to the Local/Children's Court for committal if the person is found fit to plead.

The Court is of the view that this procedure would be useful in cases where the offence committed is seriousness. Otherwise the simplified fitness procedure would probably be appropriate.

Issue 7.9

(1) Should the term, "developmentally disabled", in s 32(1)(a)(i) of the MHFPA be defined?

The Court agrees that it would be very beneficial if the term "developmentally disabled" were clearly defined by the legislation. Howard and Westmore noted that while the term "developmentally disabled" is for practical purposes synonymous with "intellectually disabled", it is a more specific term indicating that the intellectual disability is inherent to the person as distinct from acquired.[1] The Court would strongly support the inclusion of a definition which makes these factors clear.

(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?

As indicated above, the Court is of the view that the term developmentally disabled should not include acquired cognitive impairment. As explained by Howard and Westmore, an acquired cognitive impairment such as an acquired brain injury resulting in reduced cognitive capacity is a condition more appropriately categorised as a "mental condition", not a developmental disability.[2]

On the other hand the categorisation of disabilities affecting behaviour such as autism and attention deficit hyperactivity disorder (ADHD) depends on whether or not these conditions are recognised as inherent intellectual disabilities or acquired intellectual disabilities. If they are recognised as inherent intellectual disabilities then they should be included in the definition of a "developmental disability". On the other hand, if they are more accurately described as acquired intellectual disabilities it would be more appropriate for them to be included in the definition of a "mental condition".

The Court notes that the cause of these conditions is still unknown making it difficult for them to be categorised one way or another. The Court is of the view that as long as these conditions are covered by section 32 their ultimate categorisation as a developmental disability or a mental condition is irrelevant. The Court also notes that Howard and Westmore defined these psychiatric conditions as "mental conditions" and would support that finding.[3]

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[1] Dan Howard and Bruce Westmore, *Crime and Mental Health Law in New South Wales*, 2005, LexisNexis Butterworths, at [17.21].
[2] Ibid. at [17.22].
[3] Ibid.

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"?

The Court supports this amendment as it is more respectful and focuses on the real issue – the disability and not the person.

Issue 7.11

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

The Court is of the view that *MHFPA* should include a definition of "mental illness" included in Schedule 1 of the *Mental Health Act* 2007 which states:

> ***Mental illness*** means 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).

Issue 7.12

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

The Court notes that the term "mental condition" is defined in section 3 of MHFPA as a "*condition of disability of mind not including either mental illness or developmental disability of mind*". Provided that the Court's views expressed at 7.9 and 7.11 above are adopted the definition may only need to clarify whether or not psychiatric conditions such as autism and ADHD are "mental conditions" as opposed to "developmental disabilities". The Court further notes that clear indication should also be given regarding whether personality disorders are included.

Issue 7.13

(1) Should the requirement in s 32(1)(a)(iii) of the MHFPA for a mental condition "for which treatment is available in a mental health facility" be changed to "for which treatment is available in the community" or alternatively, "for which treatment is available"?

The Court is of the view that s32(1)(a)(iii) should be amended to state "*for which professional mental health treatment is available in a mental health facility or the community*". By amending the section in this way, the provision will make it clear that

the type of treatment the person should receive is of a mental health nature, and will also recognise that such treatment can be received in the community.

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?

As indicated above, the Court is of the view that a general term recognised in the mental health field should be adopted when determining eligibility for s32 orders. In addition, it would be beneficial if the nature of the mental impairment were qualified by a general principle or set of principles. For example, the section could state that the person suffers from a mental impairment which interferes with the person's ability to deal with the criminal justice system, or makes him or her more vulnerable to influences towards criminal offending.

The Court is of the view that an inclusive rather than an exclusive list of conditions would be preferable.

The Court is further of the view that the provision should impose a requirement that some form of treatment for the mental impairment is available so as to clarify that only treatable, not necessarily curable conditions satisfy the requirements of s32.

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?

The Court is of the view that conditions related to drug or alcohol use or abuse should not be expressly excluded. In determining whether or not a person should be dealt with under section 32 the Magistrate will have regard to the nature of the mental condition from which the person suffered at the time of committing the offence as well as facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant and will only then determine whether it would be more appropriate to deal with the person in accordance with the provisions than in accordance with law.

The Court is also of the view that personality disorders should be included in the definition, as the mere presence of a personality disorder does not mean that it would be appropriate for the person to be dealt with in accordance with the provision. As noted above, the ultimate decision will depend on the circumstances of the case and the Magistrate's determination about the appropriateness of dealing with the person in accordance with the provisions.

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?

The Court is of the view that the seriousness of the offence should be taken into account when deciding whether or not to divert a defendant under s32 of the Act. One of the important considerations in making a decision under s32 is the prevention of re-offending. Although seriousness of the offence does not predict the likelihood of further offending it does indicate that the Court should employ greater caution when exercising these powers. Specific deterrence should also be a consideration guiding the ultimate decision. A magistrate should also be required to take into account the criminal history of the person: see **DPP v El Mawas** (2006) 66 NSWLR 93 and **Confos v DPP** [2004] NSWSC 1159.

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?

The Court is of the view that given the diversionary nature of the provision the proposed requirement is unnecessary. Although the connection between the defendant's developmental disability, mental illness, or mental condition may be relevant, one of the purposes of this provision is to avoid unnecessary distress to people who should be cared for by way of diversion.

Issue 7.19

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

The Court is of the view that the sentence which is likely to be imposed if the defendant is convicted is not a relevant consideration when determining whether or not to divert the defendant under s32 of the Act, as the likely sentence to be imposed upon a finding of guilt does not detract from the key issue which is the defendant's mental illness or mental condition or developmental disability. However, as the Court stated above at 7.17 the Court should take into account the seriousness of the offence and whether then defendant has a history of similar offending.

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?

As indicated above, the Court is not of the view that the likely sentencing outcome or the connection between the person's condition and the commission of the offence should be relevant factors in determining whether or not the discretion under s32 should be exercised. However the Court does consider that the defendant's criminal record, including whether prior matters have been dealt with under ss32 or 33, and whether or not the offence is a repeat offence should be listed as factors which a magistrate may legitimately take into account.

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?

The Court is of the view that although it is not strictly necessary that these powers be spelt out, it would nonetheless be desirable.

Issue 7.22

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

The Court is of the view that the interlocutory powers are very broad, and that as a result there is no need for them to be extended.

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?

The Court is of the view that the existing range of final orders is unduly restrictive. A further subclause should be added to the effect of " *or such other conditions as the magistrate determines appropriate for the treatment or assessment of the person or both*". In the Court's experience case plans presented by treatment providers often do not require orders that could be made under (a) or (b) but which nevertheless require the taking of medication, the participation in therapeutic groups to which the person may be referred by a treatment provider, or some other action by the defendant which the current provision does not easily lend itself to enforcing.

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?

The Court is of the view that the current orders are not adequate for reasons indicated at 7.23 above.

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?

An order pursuant to s32(3) of the Act is completely redundant unless it can be put into effect. Prior to making a s32(3) order, the Court ordinarily attempts to obtain

information regarding the availability of treatment under the proposed order. However, the Court is of the view that it would be useful to make this a specific consideration.

The Court notes that it would not be appropriate to compel a person or an agency who is not a party to the proceedings to implement a court order, and for that reason does not support an amendment to that effect.

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?

The Court is of the view that the practical effect of s32(3A) is that the duration of a final order is six months. If some other period of time was to be specified then this section should also be amended. In most circumstances a person will have become established in a treatment regime within six months unless there has been some delay in commencement, usually due to long waiting lists for the provision of services. Nevertheless where a person's mental illness has not been addressed within six months after the making of the order, the Court is of the view that it would be beneficial to extend the time limit of an order under s32(3) beyond a period of six months.

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?

The Court is of the view that if this proposal were to be adopted, review of breaches of orders by the MHRT should only be available in addition to the Local or Children's Court and only where the MHRT is otherwise dealing with the person. To require breaches which occur in rural areas to be dealt with by the MHRT, would be an extra imposition on a person who has been recognized as vulnerable. The fundamental matter which is being dealt with is a criminal matter and squarely within the expertise of the Local or Children's Court.

Issue 7.28

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

The Court is of the view that an amendment to section 32(3) permitting the adjustment of conditions attached to the order would enable the Court to alter the order with the view to enhancing its effectiveness if it is shown that the original order is not producing the intended diversionary results.

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?

The Court is of the view that it is not appropriate for an executive agency rather than a court to impose punitive sanctions. An issue may arise as to whether or not there has been compliance with the order. The determination of that issue is a matter for the court and not an administrative decision.

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?

The Court agrees with the proposal that the Act should clarify the role of the Probation and Parole Service with respect to supervising compliance with the orders under the Act. The Court is also of the view that the Act should impose an obligation on the Probation and Parole Service, Juvenile Justice and other government agencies such as the Health Department and DADHC to report apparent breaches to the court in order to enhance the effectiveness of those orders.

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?

The Court would support the introduction of a centralised system for assessing defendants for cognitive impairment similar to the scheme currently operating in some Local and Children's Courts for people with psychiatric illnesses. The Court's only concern is that in the event that such a scheme is not available in rural areas a defendant would need to travel some distance to be assessed, which could place an additional burden on a vulnerable person. The Court is also of the view that a common protocol or methodology for assessing a person's mental health or cognitive state would standardise the assessment process making it easier and more expeditious.

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?

The Court is of the view that in most cases some form of a report or plan will be essential. There will however be some instances where such a report would not be necessary. For example, a person with an intellectual disability whose parent could give evidence of their attendance at a special school, assessments of various stages through life and current supports and treatment, would adequately support an application for a s32 order. In these circumstances requiring a report would only cause expense and delay.

While in most cases some form of a report is essential, there is a danger in prescribing the information required because it may lead to unnecessary delay or expense. At the moment reports used to support a s32 application are often done as

a result of the goodwill of the reporter or are reports prepared for another purpose such as personal injury litigation or the provision of special education. In most instances these reports are sufficient for the purposes of the application.

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?

The Court is not of the view that a provision of this nature is necessary. There is currently no provision for a magistrate who has refused a bail application to disqualify him or herself from conducting the substantive hearing. A determination regarding the person's eligibility for a s32 order should not adversely affect decisions about whether an offence has been proved or what the appropriate sentence is.

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?

The Court is of the view that as the proceedings are of a criminal nature it would not be appropriate to conduct these proceedings in a non-adversarial manner.

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?

The Court is of the view that while a causal connection between the defendant's mental illness and the commission of the offence could be a factor that the Magistrate is required to consider before making an order, it should not be a prerequisite to the making of the order. There may be circumstances where a person was not unwell when an offence was committed but has become mentally ill subsequently and there is both a personal and public interest in diverting them from the criminal justice system.

Issue 7.37

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

Children's Court Magistrates agree that there are a number of problems with the current section 33. Where it appears to the Magistrate that a defendant may be a mentally ill person, the Magistrate has the power under subsection 1(b) to order the defendant to be taken into, or detained in a mental health facility for assessment and to be brought back before the Court if the defendant is found not to be a mentally ill or a mentally disordered person. The section does not clarify however, how the defendant is to be brought back to Court. If the defendant is in a highly florid state,

the practice of the court is not to place the defendant on bail, as the defendant is unlikely to have the capacity to enter into a bail undertaking at that time. As a result, the defendant is not obliged by the terms of a bail undertaking to voluntarily return to Court. Equally the Court does not ordinarily refuse bail in these circumstances as refusal of bail would mean that the defendant could only be assessed in custody by Justice Health professionals, a process which can take a long time and which may be inappropriate in the circumstances.

In the Court's experience it is not uncommon for a person who has been found not to be mentally ill or a mentally disordered person, or who is not mentally ill or mentally disordered upon receiving treatment from the mental health facility, to be subsequently released into community and not return to Court at all. It would appear that the reason for this is that the police or Corrections officials are not informed about the defendant's pending release. In these circumstances, if the defendant does not return to Court voluntarily and the Court makes no further orders, at the expiration of six months the charges against the defendant are dismissed. The Court is of the view that most, if not all, persons who are referred to assessment should return to Court. For these reasons the Court is of the view that subsection (1) should introduce report-back procedures which will ensure that those defendants who have been ordered to return to Court do in fact return.

The Court is further of the view that section 33 should include a provision whereby the Court may request the mental health facility to provide the Court with information about the defendant's condition if upon assessment the defendant is found to be a mentally ill or a mentally disordered person. From time to time mental health facilities fail to provide the Court with any information following a finding that the defendant is mentally ill which makes it very difficult for the Court to dispose of the charge or determine the best way to proceed.

The Court is also of the view that subsection 1 (a) does not adequately explain what is to occur after the defendant has been assessed. As a result of this confusion, Magistrates are often reluctant to make orders pursuant to this subsection.

The Court would also benefit from some clarification regarding the procedure for making a community treatment order under subsection (1A). This subsection states that a "*Magistrate may make a community treatment order in accordance with the Mental Health Act 2007 for implementation by a declared mental health facility in relation to the defendant, if the Magistrate is satisfied that all of the requirements for the making of a community treatment order under that Act (other than the holding of an inquiry) have been met in respect of the defendant*". However, the section does not indicate whether the Magistrates should follow the procedures outlined in section 53 of the *Mental Health Act* 2007, and whether the assessment facility or the parties to the proceedings should furnish the Court with the requisite documentation, including a treatment plan. In the absence of a clear procedure for making orders under subsection (1A), Magistrates are often reluctant to exercise their powers under this provision.

Issue 7.38

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

As indicated above, the Court is of the view that the legislation should be amended to enable the Court to request that a doctor who has assessed the defendant regarding any potential mental illness or mental disorder to provide a report to the court about

that determination (i) when the person is returned to the court if the determination is that they are not a mentally ill person or (ii) prior to their being discharged within three working days whichever is sooner if it is determined that they are a mentally ill person. The requirements under this proposal could be satisfied by providing the Court with a copy of the documents required following an examination under the *Mental Health Act* 2007. Further, as indicated above, section 33 should also include an express power which would enable Magistrates to ensure that the defendant returns to Court following assessment.

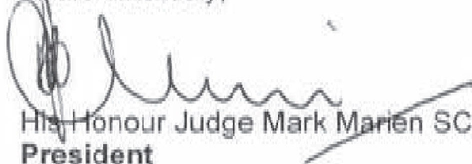
Issue 7.39

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?

The Court does not support the proposal to abolish s33 and expand the powers under s32 to include defendants who are mentally ill. The scope and purpose of the two provisions is quite different and the Court considers these distinctions important.

In particular, s33 requires the Magistrate to consider whether the defendant poses a serious risk of harm to themselves or to others and whether or not the person should be detained for assessment.

Yours sincerely,



His Honour Judge Mark Marien SC
President