NSW Law Reform Commission Consultation concerning –

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

Submission of the Office of the Director of Public Prosecutions, NSW

Introduction

This submission has been prepared on behalf of the Office of the Director of Public Prosecutions. We have focused our response on areas that most impact upon the prosecution of serious offences in NSW.

General comments

We submit that:

- Where possible there should be codification of the principles and tests associated with the Mental Health (Forensic Provisions) Act (MHFPA), such as the *M'Naghten* test and *Presser* test.
- Consistent definitions should be introduced where possible across all criminal justice related legislation - the MHFPA and the Crimes Act 1900 and Criminal Procedure Act 1986: for instance, "cognitive impairment" as found in section 61H(1A) of the Crimes Act.
- There should be reform in the procedures for listing special hearings to address the delay in matters reaching a conclusion, particularly where it is clear the accused is not going to become fit within 12 months. Such reform should include extending the jurisdiction of the Local Court to allow for identifying matters where fitness is an issue earlier in the proceedings.
- Extending the jurisdiction of the Local Court to include fitness hearings and the defence of mental illness.
- Remove the partial defences of substantial impairment and infanticide.
- There should be more opportunities for diversion out of the criminal justice system.

Consultation Paper 5: An Overview

5.1 Should a broad umbrella definition of mental impairment, incorporating mental illness and cognitive impairment, be included in the MHFPA? What practical impact would this have?
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?

The interaction between the common law and MHFPA and other criminal justice legislation makes the whole area of mental illness difficult to navigate

for legal practitioners, medical practitioners, the public in general and victims of crime in particular.

There is a lack of consistency in the terms used in the various pieces of legislation, consistent with ad hoc legislative amendments that reflect terminology used at the particular time. It is highly confusing for all parties and this doubtless leads to people falling through the gaps and inconsistent results. An umbrella definition covering the full range of impairments and consistent use of definitions across the legislation is a highly desirable proposal to make the legislation more accessible. We are in favour of modern terminology being used and all other related legislation that uses terms relating to mental health being updated and amended accordingly.

If an umbrella definition were to be introduced it is appropriate to include mental illness, cognitive impairment or personality disorder, however and whenever caused, whether congenital or acquired.

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

We prefer the option in 5.5 to 5.4. We support a move to an umbrella definition of mental impairment which will include cognitive impairment. The terms "mental condition" and "developmental disability" should be replaced.

The definition of cognitive impairment should be consistent across the criminal justice legislation (see the definition in section 306M(2) of the Criminal Procedure Act 1986).

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 of the 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?

We support the introduction of a general power for courts to order an assessment. We consider that in NSW the issue of mental illness is often not raised when it should be, for tactical reasons. For this reason any party, including the court, should be able to raise the issue of mental illness.

We support the use of court appointed experts for this purpose. That has the benefit that the report is then available to both parties. It would result in less expense to the system as only one report will be required (currently if the defence get a report, the Crown will also get its own report). Because legal professional privilege applies to the report the system allows for "doctor shopping" (see also our comments at 6.40 re substantial impairment).

As an assessment report may be required at different points in the proceedings and for different reasons, the court order would need to specify what precisely is required. We favour a system like the South Australian system where the court, depending on the contents of the report and the type of case, has an option to proceed with hearing the objective evidence in the case or conduct a hearing on the mental competence of the accused. The procedure appears to give the court flexibility to address the particular facts and circumstances in the most practical and transparent way and give the accused an opportunity for acquittal if appropriate.

Consultation Paper 6

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?

It should be mandatory for the court to consider the issue when it first arises, but discretionary as to whether or not the process needs to be repeated if the issue has been fully considered by the court in the proceedings.

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

We support a review of the Presser standards and for the test to be included in the MHFPA. One of the problems we encounter is that reports do not drill down to the detail of the Crown and defence cases. There is often just a brief comment about the police facts or indictment to be presented for trial. In this regard there should be more disclosure by an accused's legal representative. The report provided to the court should address issues of the accused's ability to "reasonably participate" or "participate effectively " and also whether on balance the accused's mental state will deteriorate or not under the stress of a trial.

At 6.1.17 the LRC seems to be suggesting that 2 additional standards be added to the current 7 Presser criteria because the current criteria do not cover the field sufficiently. It is submitted that another available view is that those criteria are too extensive and that it is too easy for an accused to be found unfit. It is submitted that the number of Presser criteria be cut down substantially.

In addition it is submitted there are two criteria that should be taken out for other reasons. The first of these is that the accused should be able to exercise the right to challenge. This really assumes that the challenge of jurors does require the use of rational thought processes. At the moment the challenge is really a compromise between having no right of challenge and having at least some right but with no real knowledge of the people being challenged apart from what they look like. Challenging under such circumstances is really only on a "gut feeling" and is quite unsatisfactory. Because of this there is really very little thinking involved.

The 2nd criterion is the capacity for the accused to give proper instructions to counsel. On its face this would seem to be an important measure of fitness but the difficulty lies in bringing effective evidence before the court. The obvious source of such evidence is the legal representative for the accused, but one difficulty with this is lawyer/client privilege and another is the difficulty of taking evidence from those representatives.

A recent example of this occurred where the defence solicitor did give some evidence but the procedure was hamstrung by limited information due to appropriate privilege considerations. The Crown called a psychiatrist who had interviewed the accused and went to some of the areas involved in the case, in particular what the response of the accused was when the main points of the Crown case were put to him. This psychiatrist differed in opinion in some of the criteria of the Presser test, including the capacity to instruct counsel, but the resolution of this issue seemed to be in accordance with the defence submission which simply stated that he did not have the capacity.

One solution to this problem would be to simply not have this as one of the criteria. Of course such a capacity is important, but it is argued that a shortened list of criteria would cover this: for example, if the accused has the capacity to recall and relate facts and to make decisions

6.7 Should the procedure for determining fitness be changed and if so in what way

Yes, we agree with the Commission's proposal outlined at paragraph 1.38. In our view the delay occasioned by fitness hearings and then referral to the Mental Health Review Tribunal for 12 months before a special hearing can occur, is unacceptable in many cases. This is particularly so where the allegations against the accused are of child sexual assault. The delay occasioned by a 12 month adjournment to assess fitness compromises the Crown case and places an unacceptable burden on child witnesses.

We also agree that the findings of unfitness may be made by consent (6.9).

If the accused is likely to become fit within 12 months we would support reviews every 3 months and if not fit within 12 months the matter should be returned to the court automatically for a special hearing. To expedite matters we suggest that the court could set a date for special hearing/trial one year from the date of the finding.

6.10 – Should the Criminal Appeal Act 1912 (NSW) be amended to provide for the Court of Criminal Appeal to substitute finding 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?

We support this measure as it would save the expense and trauma of another hearing.

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?

At the very least one would want the Magistrate to order any reports as to fitness, so that the reports are ready when the matter goes to the District or Supreme Court. Orders could be made on the application of either party in this regard early in the proceedings when the brief orders are made. There is another option of referring the matter to the Mental Health Review Tribunal, given that matters often take 6 months or so in the Local Court before they are ready for committal.

Alternatively we suggest that there could be a "special committal" hearing where the magistrate is bound to assess the prosecution case on the objective facts. This would be akin to adopting the South Australian model of splitting up the case.

Chapter 2: Procedure Following A Finding Of Unfitness

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?

We support retaining the special hearing model, but allowing for flexibility in its conduct. Our concern is that special hearings can be drawn out and delayed and anything that can be done to keep the hearing on track should be encouraged. Because the spectrum of fitness issues that an accused may suffer from is quite diverse, every unfit accused is going to require a slightly different approach. The legislation should allow flexibility to allow the case to be conducted so as to most fairly present the evidence and to accommodate the needs of the accused.

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?

We prefer elements of the South Australian approach; namely, dividing the trial into objective elements and mental elements .

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

Yes, but only in exceptional circumstances such as where it can be demonstrated that the defendant's health will deteriorate under the stress of trial or where the defendant's behaviour will unduly disrupt proceedings.

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]"

We agree with the changes in terminology.

6.19 Should a verdict of NGMI continue to be available at special hearings? Are any additional safeguards necessary?

The defence of mental illness should continue to be available at special hearings. Special hearings are to be run as closely to trials as possible, so there is no basis to deny the accused the right to raise this defence if there is available expert evidence in support of it.

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?

It would not be appropriate to excuse accused persons from the court system and divert them into treatment when they are accused of having committed serious offences. Given the difficulty in determining which offences are so serious that they should be dealt with via the court process and which are such that it would be appropriate to divert into treatment, no change to the current system is recommended.

6.21 Should legislation expressly recognise cognitive impairment as a basis for acquitting a defendant in criminal proceedings?

Persons with cognitive impairment should only be acquitted if they satisfy the *M'Naghten* test. There is no need for a separate defence of cognitive impairment.

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?

Currently persons with extreme personality disorders can in some circumstances satisfy the *M'Naghten* criteria. It is only if they fit the criteria that the defence should be available to them. The inability to feel empathy should not be a basis for acquitting persons who commit serious crimes. It falls short of the required test and would open the floodgates. For instance, it is well known that "psychopaths" have an inability to feel empathy for their

victims. It is not desirable that such a defence would be available for that class of defendant.

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

We note that this is included in the SA legislation (section 296C(c)) but see no basis for including it in NSW. It can form the basis of a partial defence to murder of substantial impairment in NSW. We agree that the notion of irresistible impulse is flawed given the difficulty in distinguishing between an impulse that could not be resisted and an impulse that simply was not resisted. No change is needed on this 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?

As with cognitive impairment and personality orders, if a person has delusions such as he or she satisfies the *M'Naghten* test the defence is available to them. There is no basis for widening the test.

6.25, 6.26, 6.27, 6.28 and 6.29 M'Naghten Rules

It is our submission that no basis for changing the *M'Naghten* Rules has been established. They should, however, be formulated in legislation.

We also support a change of terminology from "not guilty by reason of mental illness". It is our experience that victims of crime, especially, find it confusing and unpalatable for the verdict, as presently expressed, to have the words "not guilty" feature prominently at the beginning of the phrase.

We suggest that, to convey a proper sense that the accused has been found objectively guilty (as is the case), the verdict could be formulated along the lines that: "the accused person committed the objective elements of the offence [or an offence available as an alternative] but did not have the mental elements required in order to establish guilt". It could be known as a verdict of objective guilt which the community generally may find more accurately expresses the situation in fact.

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?

The law already allows for self-induced intoxication to be relevant in criminal proceedings in a number of ways. Persons should not escape criminal conviction completely due to their personal choices in overconsumption of alcohol or drugs. There are clear policy reasons as to why this should continue to be the case. Obviously if the consumption was not voluntary that is a different matter.

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?

The current law is problematic on the issue of sane v insane automatism. The law set out at 3.100-103 of the LRC report highlights this fact. In some instances there can be only a fine line between whether a condition falls into "sane" or "insane" automatism and expert minds may differ (eg previously undiagnosed epilepsy). Importantly, the burden and standard of proof differs for the two "defences". If the defence is "sane automatism" it is for the Crown to prove voluntariness beyond reasonable doubt and if unsuccessful there is an outright acquittal. If it is "insane automatism" then it for the accused to prove this on the balance of probabilities and if he or she is successful the result is indeterminate detention at the discretion of the Mental Heath Review Tribunal. This leads to important questions that are not raised in the LRC report such as:

1. Is the question of whether a condition (eg undiagnosed epilepsy) falls into the category of "sane" or "insane" automatism a question of medical opinion or a legal test?
2. When conditions could fall into either category would it not be preferable to have the same standard and burden of proof for both?

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?

Yes. The Crown should be able to raise mental illness if there is a sufficient basis to do so with or without defence consent. It is not uncommon for obviously mentally ill persons who could rely upon the defence to choose not to, so as to avoid a situation whereby they are sentenced to a period of indeterminate detention. As a matter of policy it is appropriate that the issue be raised so that treatment can be available.

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?

Yes. The MHFPA should be amended to allow for a finding of "not guilty by reason of mental illness" to be entered with the consent of both parties. It is

not uncommon for experts to all agree on this result but the hearing has to formally proceed nonetheless, even though the result is inevitable. There should be no need for this to have to occur.

Issue 6.34 Should the court have 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?

Similarly with 6.32, the court should be able to do this in circumstances where there is evidence to suggest that the defence should be raised but the accused has chosen not to raise it.

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?

The issue of determining whether an accused person is not guilty by reason of mental illness should continue to be determined by a judge and jury in an ordinary trial. No basis has been established to change this.

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?

We can see no reason in principle why *M'Naghten* should not be available in the Local Court, given that the jurisdiction of the Local Court has expanded over the last 20 years and consistency in practice and procedure should be promoted within and between the jurisdictions. The defence should be available for at least Table 1 offences dealt with summarily.

Chapter 4 – Substantial Impairment

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

This question was posed in the *Report of the Royal Commission on Capital Punishment 1949 – 1953. (UK) (1953 Cmd 8932*). A very extensive consultation process was completed and most of those consulted who disagreed with the defence did so on the basis that mandatory life imprisonment for murder would not remain.

NSW does not have mandatory life imprisonment and indeed the vast majority of sentences for murder are discrete terms of imprisonment. Against that background it is more appropriate that any substantial impairment based on an underlying condition that existed at the time of the offence be taken into account as a mitigating factor in a sentence for murder.

It is arguably covered at the moment in Section 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999* as the offender not being fully aware of the consequences of his actions because of a disability.

The following is an extract from the Royal Commission report which provides a platform for discussion.

"Arguments against retention of the defence of diminished responsibility

- logically, as diminished responsibility reduces the defendant's *responsibility* for the killing, it ought to be viewed as a mitigating factor rather than a partial defence in a case where, by definition, the defendant's level of *culpability* is established by reference to the traditional concepts of conduct and mens rea;

- the issues addressed by the defence are matters of mitigation, which go to sentence. Instead, they have been, in the words of Buxton LJ, "artificially forced into the straightjacket of substantive liability". The defence was introduced to "sanitise the worst aspects of capital punishment";

- there are insuperable definitional problems. The definition contained in section 2 is "disastrous" and "beyond redemption";

- the "chaos of the present law" which has enabled the smuggling in of mercy is a very poor substitute for the rational sentencing exercise that could be undertaken, as in any other case of mental illness or social dislocation, once the mandatory sentence goes;

- the defence is "grossly abused" and whether a defendant finds a psychiatrist who will be prepared to testify that, for example, depression was responsible for his behaviour is "a lottery"; "

The 1st bullet point is a very logical starting point for this discussion with which we agree. Why should the basic principles relating to the law of homicide be tampered with to allow for a defence which could be adequately dealt with as a mitigating factor?

Bullet point 3 is also of relevance to the specific terms of Section 23A. The "capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself" needs to be substantially impaired. These seem fairly simple concepts, but in practice are very much matters of degree on which minds will differ. These concepts are essentially about value judgments and are much more relevant to sentencing than to reducing liability.

Bullet point 4 is somewhat extreme with the reference to the "smuggling in of mercy", but the point being made is that mercy (unless there is some

good reason for its reducing liability) is something more properly dealt with in the exercise of sentencing.

Bullet point 5 again has a lot or relevance to the situation in New South Wales 60 years later. The concept of underlying condition seems to have been extended to include depression and certain kinds of personality disorder. More importantly there is a real risk that this defence can be abused. Defence counsel are able to seek opinions from any number of psychiatrists. It is conceivable (and we believe it does happen) that the defence can keep getting opinions from psychiatrists until one supports the defence. It may be that the first four will not support it, but the fifth does. Of course it is obvious that experts can disagree, particularly in the field of psychiatry, but the difficulty posed for the prosecution is that they are effectively deprived of the first four opinions. This is due to privilege of the accused.

Another relevant matter is to ask why there should be this kind of defence in relation to murder and not all other offences? The answer is that this defence came into being as a way of avoiding capital punishment for conviction on a murder count. The rationale for its existence no longer exists and it is in reality an historical anomaly which often becomes the only defence available to an accused person.

A survey of all of the defended murder matters that are heard in NSW would reveal that the majority of them are defended on the basis of substantial impairment.

Consequently we submit that the defence of substantial impairment should be abolished.

Chapter 5 – Infanticide

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

We agree that there is no need to continue with the offence of infanticide.

Chapter 6 – 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

6.45 To what extent should sentencing principles continue to apply to the court's decision whether to detain or release a person who is UNA?

We agree with the conclusions drawn in paragraph 6.30 on this issue. Sentencing principles should apply principally to give victims and the public a sense that justice has been done in a manner comparable with normal criminal proceedings. However, the criminal law should not be extended so as

to be used as a means to detain people who represent a risk to public safety. The civil aspects of the mental health system should apply in this respect.

6.58 Should a presumption in favour of detention continue to apply when courts are making decisions about persons who are UNA or NGMI

We support the presumption to continue to be applied. Section 30 of the MHFPA provides appropriate safeguards for a person to be released if it can be established that they are safe to be released.

6.60 In relation to court proceedings involving people who are UNA or NGMI, are the current provisions concerning notification to, and participation by: a)Victims; and b) Carers, adequate and appropriate?

In relation to 6.74 victims have no legislative right to submit a victim impact statement (VIS) in respect of persons who are UNA or NGMI. While arguably they have a common law right, this does not provide any certainty for a victim who may wish to submit a VIS. As outlined in 6.74 a victim's concerns about their safety can be relevant to a court's decisions about the defendant's release or not, conditions imposed and so on. Information within the VIS can also assist in the rehabilitation of the defendant. The defendants in these matters are often known to the victims and the victims may be aware of an escalating problem with the defendants. For instance, the defendant may not been taking his or her medication in the time leading up to the offence. While there is generally no argument about the objective elements, the issue is about the culpability of the defendant. Such information can often be obtained within the VIS. A VIS also allows a voice for the victim in proceedings where the victim has not given evidence. Allowing VIS in these proceedings also conforms to rights accorded victims in the *Victims Rights Act* 1996.

In addition, the provisions for vulnerable witnesses and sexual assault complainants when giving evidence in Part 5 Division 1 and 3, Part 6 Division 1 of the *Criminal Procedure Act* 1986 should also be available in special hearings and retrials or trials once the accused becomes fit; e.g. taping evidence at a special hearing and this being available for any subsequent hearing. For example, in a matter currently on appeal to the CCA, the complainant gave evidence in a trial before the accused became unfit and then the tapes were played at a subsequent special hearing. The CCA has indicated that the evidence was inadmissible at the special hearing[1].

We agree the provisions that facilitate the involvement of carers should be extended to the court as carers can often provide information that may not be known to other services.

[1] *EK* 04/21/3337, matter has been adjourned awaiting judgement

Consultation Paper 7: Diversion

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 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 defined forms of mental illness or cognitive impairment ?
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?

A legislative scheme like the scheme for Young Offenders whereby the Police could divert mentally impaired offenders has merit in terms of saving court time and trauma to the accused. There would be a number of practical impediments to a scheme operating equitably, particularly the fact that police would not necessarily be able to identify those eligible for the scheme (and for that reason any scheme would probably need to be defined by the type of offences rather than the mental condition of the accused.) On the other hand some mentally impaired accused may be well known to the police. Any scheme probably should not be limited by the number of offences on the accused's record but by the type of offence and perhaps the existence of or consent of the victim.

As a pre-court diversionary scheme would capture a significant number of the more trivial matters dealt with under section 32 of the *MHFPA*, perhaps pre-court diversion by the Police could be legislated as an extension of section 32. A record of the caution could be made and entered on the accused's record. This would reduce any criticism of any inequity that might arise by the Police failing to identify the offender as eligible for the scheme. That is, the outcome would be the same on the record. Indeed, if the accused has a history of entries pursuant to section 32 the Police could use that as a basis for diversion.

7.5 *Do the existing practices and policies of the Police and the DPP Guidelines 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 an alleged offender?*

It is important to recognise that the ODPP deals mainly with serious crime and most of the crimes involving persons with a mental impairment involve a victim. Tragically it is often a close family member of the accused who is the victim.

In serious cases involving a victim it is very important for there to be a court process that is open and consistent with the degree of harm suffered. An oft-voiced criticism from victims about the mental health criminal justice system is the inconsistencies between trials and special hearings, where the victim's interest in the process is not properly accounted for; for example, the admission of victim impact statements and the delay in having matters dealt with.

The competing factors of the accused's treatment and the victim's needs are dealt with case by case by the ODPP as prescribed by the current Prosecution Guidelines. An important aspect of section 32 is that it allows for any party to raise the issue of mental health. For example, in one case the mother was the victim of an assault, the son had a long well-documented history and she wished him to be diverted from the system. The defence refused to raise his mental health status with the court, but as section 32 allowed any party to raise the issue, the prosecution successfully raised the issue with medical reports provided by the mother.

We submit, however, that there is scope in this area for police to encourage diversion. See our comments above.

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?

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

We agree that the *Bail Act* – with its overly prescriptive approach imposing presumptions against bail for repeat offences and breaches of other orders – makes it very hard for mentally impaired offenders to get bail. The Act should either include a countering consideration about the offender's mental illness or cognitive impairment or incorporate more discretion for the decision maker. Another factor, particularly relevant for more violent offenders, is the lack of suitable places in treatment facilities to accommodate offenders who cannot return to their homes while on bail.

Chapter 3 Diversion under section 32

7.9 (1) Should the term "developmentally disabled" in s32(1) (a) (i) of the MHFPA be defined?

Section 32 should be recast in light of the umbrella definition of mental impairment, rather than listing all the conditions in the section. The conditions satisfying mental impairment should qualify for diversion under section 32, if appropriate. We agree with the approach suggested in paragraph 3.22.

7.17 Should a magistrate take account of the seriousness of the offence when deciding whether or not to divert a defendant according to s32 of the MHFPA? Why or why not?
7.18 Should the decision to divert a defendant according to s32 of the MHFPA depend upon a direct causal connection between the offence and the defendant's developmental disability, mental illness, or mental condition?
7.19 Should the decision whether or not to divert a defendant according to s32 of the MHFPA take into account the sentence that is likely to be imposed on the defendant if he or she is convicted?
7.20 (1) Should s32(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 s32(1) (b) were to include a list of factors to guide the exercise of the courts discretion, are there any factors other than those discussed that should be included in the list ? Are there any factor that should be expressly identified as irrelevant to the exercise of discretion?

When section 32 is recast it should list the various factors that a Magistrate (or Judge) needs to take into account, these could include:

- The seriousness of the offence
- The nexus/causal connection of the mental impairment with the offence
- Any likely sentence
- Views of the victim
- History of the offender
- Availability of support, treatment, programs
- Views of the police.

Chapter 5: Enhancing Diversion in the superior courts

7.40 Does s10(4) MHFPA provide the superior courts with an adequate power to divert defendants with a mental illness or cognitive impairment?
7.41 Should s32 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?

In our view there is inadequate scope to divert offenders in superior courts and a full range of options should be available such as in sections 32 and 33.

A list of criteria, including seriousness of the offence, to be taken into account would assist in striking the right balance.

7.42 (1) Should there be a statement of principles included in the 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?

We would support a statement of principles to guide judges to assist with coherence and consistency.

CP 8 Forensic Samples

8.1Should 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 s32 or 33 of the MHFPA or should the legislation be amended in some other way referable to the particular order made?
8.2 Should the C(FP)A be amended to require the destruction as soon as possible of forensic material taken from a suspect following a verdict of not guilty by reason of mental illness?
8.3 Should the C(FP)A be amended to require the destruction as soon as practicable of forensic material taken from a suspect following:
(a) a decision by the DPP not to continue with the proceedings
(b) a finding at a special hearing that, on the limited evidence available, the defendant has committed the offence?
If so, in what way?

Generally we support the factors outlined in the consultation paper at 1.7 in favour of retaining the forensic material on the database, although we concede the competing arguments against retaining the material are very strong. Ultimately the resolution of these questions will be policy decisions.

Office of the Director of Public Prosecutions
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