Submission on Consultation Paper 7

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

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This submission is focused on the diversion of people with intellectual disability pursuant to s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (s 32).

Broad considerations

This submission is motivated by a number of broader considerations about the relationship between diversion and the rights and inclusion within society of persons with intellectual disability. These considerations are primarily related to conditional orders made under s 32 (rather than unconditional discharge).

1. **Human rights and social inclusion**: The benefits of diversion to defendants with intellectual disability are generally focused on the criminal justice and disability service context. That is, through access to disability services and cessation of the criminal process, diversion is an opportunity to prevent recidivism and provide access to disability services, and also to avoid exposing the defendant to the variety of problems they can encounter in their pathway through the criminal justice process by dint of vulnerabilities associated with their cognitive impairment. Certainly these factors can make diversion a positive option for defendants with intellectual disability. It is submitted, however, that for diversion to be truly beneficial to persons with intellectual disability, it must go further than merely addressing criminal justice and disability service issues – it needs to be thought of in terms of human rights and social inclusion.

   The NSWLRC refers to human rights in CP5 and contextualises criminal responsibility and its consequences in human rights terms in CP6. Unfortunately, however, CP7 does not formulate diversion in terms of human rights, with no references to human rights in this consultation paper. The fact that diversion shifts persons out of the criminal justice system and provides opportunities to access disability services is not necessarily enough in itself to ensure that diversion realises the broader human rights and social inclusion of defendants with intellectual

disability. The absence of an overt human rights perspective on diversion means that it risks becoming a mechanism that medicalises disability, conflates disability with criminality and deviancy, punishes individuals who have not pleaded guilty or convicted of a crime,[1] and removes the self-determination and choice of individuals through coercive engagement with services or treatment associated with conditional orders. In so doing, although diversion does shift persons out of the criminal justice system and provides opportunities to access services, it risks being contrary to general principles that are central to the rights of persons with intellectual disability, such as:

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- Non-discrimination;
- Full and effective participation and inclusion in society; and
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.[2]

It is particularly important that the human rights implications of conditional section 32 orders are thought through.

2. **Diversion and Principles of the Criminal Law**: In CP7, the NSWLRC leaves unresolved or unaddressed issues about how diversion sits with general principles of the criminal law (and civil rights associated with the criminal law). Section 32 (notably the making of conditional orders) is a punitive mechanism, insofar as conditional orders involve coercion of the individual to engage with services or

[1] McColl JA acknowledged that orders made under s 32 are still punitive despite the fact that they do not result in a custodial sentence:

> adopting the diversionary route does not mean that a defendant is not exposed to punishment. While an order under s 32(3) is not custodial in the strict sense, it may involve the imposition of conditions restricting a discharged defendant's freedom of movement and actions. Compliance with those conditions is ensured by the magistrate retaining a supervisory jurisdiction for 6 months after a s 32(3) order is made.: *DPP (NSW) v El Mawas* (2006) 66 NSWLR 93, [73] (McColl JA).

[2] See Convention on the Rights of Persons with Disabilities, GA Res 61/106, 61st session, UN Doc A/61/611, opened for signature 30 March 2007 (entered into force on 12 May 2008), art 3.

treatment and possible restrictions of liberty or movement.[3] It has never been adequately resolved how section 32 sits with principles of the criminal law or civil rights associated with the criminal law relating to the presumption of innocence, proportionality in sentencing and detention/punishment following finding of guilt.[4] Such considerations are not outlandish or irrelevant – they were flagged by various stakeholders during the consultation process of Report 80.[5] It is particularly important that these questions be thought through in relation to conditional section 32 orders.

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[3] See *DPP (NSW) v El Mawas* (2006) 66 NSWLR 93, [73] (McColl JA), discussed above at n 1.

[4] Contextualising s 32 diversion in criminal legal theory could draw on the debates surrounding preventive detention: Bernadette McSherry, Patrick Keyzer and Arie Freiberg, *Preventive detention for 'dangerous' offenders in Australia: a critical analysis and proposals for policy development* (2006) 75-85.

[5] See, eg:

1. submission by Magistrate MC Beveridge, Local Court NSW, 5 April 1994: 'The problem – legal and philosophical – of a criminal court imposing sanctions upon a person against whom no criminal offence has been proved is really quite simple.'
2. submission by Magistrate TG Cleary, NSW Local Court, 7 February 1995: 'In criminal proceedings there should not, in my view, be a conditional discharge of a person against whom a charge has been dismissed. If an order for the compulsory care and treatment of any person against whom a charge has been dismissed is demanded then it is for the legislature to introduce an appropriate law – a civil law not criminal.'
3. submission by Mark Ierace, Public Defenders, Carl Shannon Chambers, 16 December 1992: 'Essentially, section 32 is a re-casting of section 428W of the NSW Crimes Act. Whilst some of the ambiguities of the section were resolved by Campbell J in *Mackie v Hunt* (1989) 19 NSWLR 131, and legislative amendment, some difficulties remain. For instance, should the court have the power to discharge the defendant, subject to conditions, where there has been no finding of guilt? Is there any point in having the power to formulate conditions, when a breach of them would be without remedy (since the matter has been dismissed, and arguably cannot be revived)?'
4. submission by Intellectual Disability Rights Service, Redfern Legal Centre, January 1994: 'In principle, IDRS agrees with the idea of diversionary programs, but only where:

- the capacity of the person to understand the wrongfulness of their actions has been established *and*
- their guilt has been determined fairly by a court.

IDRS believes that people with an intellectual disability have the same right as other citizens to have their innocence or guilt of a crime proved. If and when these matters are established, it should be for the court to determine an appropriate sentence for an offender taking into account all relevant considerations, including:

- the principle that custodial options should only be used as a last resort
- factors which may have contributed to the person coming to the attention of the police, such as financial problems, homelessness
- the need to address challenging behaviours or other behavioural problems that may benefit from education/training, in a non-custodial environment.'

There seems to be a sense of 'false self-evidence'[6] around diversion such that it has not been the subject of any broader theoretical, philosophical or social critique. Perhaps with the growing popularity of 'therapeutic jurisprudence' and the rise of forensic disability services, such questions have become marginalised as the 'therapeutic' or 'service' context rather than 'criminal law' or 'civil rights' context of diversion dominates the thinking and debate around s 32 diversion. Perhaps these issues are not seen as important to this group because we implicitly conflate their disability with deviancy/criminality/future risk or presume a degree of incapacity that legitimises paternalism or coercion which would not be considered appropriate for other sub-groups in society.[7]

3. **Netwidening**: Section 32 is a mechanism that enables the linking up of defendants with intellectual disability with disability and other services or treatment and to coerce them to engage with these services. In general, these services would be available to the individuals in the community to be engaged with voluntarily through the exercise of self-determination and choice by persons with intellectual disability. If coercion was necessary, this could be achieved through guardianship orders, orders that are made not on the basis of considerations of community protection or the potential for future criminality, but on the basis of a high threshold test concerning the person's capacity and by reference to principles of the least restrictive alternative and the paramount significance of the person's welfare and interests.[8] In the context of s 32 itself, there is scope for unconditional orders, which

[6] Seddon uses this term in the context of the lack of critical analysis of contemporary policies for the management of prisoners with mental illness in the UK: Toby Seddon, *Punishment and Madness: Governing Prisoners with Mental Health Problems* (2007) 4.

[7] Even other sub-groups subject to diversion programs, which generally rely on voluntary participation or a plea of guilty or conviction.

[8] *Guardianship Act 1987* (NSW), s 3 'person in need of a guardian', s 4.

Simpson states that the benefits of the use of guardianship is that it focuses on the interests of the person in their entirety such that any restriction needs a net benefit and it looks at offending and restriction in the overall context of the person's life and needs.: Jim Simpson, *In Whose Interests?: Restricting the freedom of movement of potential offenders with intellectual disabilities* (Paper presented at Risk vs Rights, Australia and New Zealand Association of Psychiatry, Psychology and Law Annual Congress, Manly, 25 October 2008). See also Jim Simpson, 'Options to Imprisonment: Legal and related issues concerning the Department of Community Services providing restrictive services to alleged offenders with intellectual disabilities' (Department of Community Services, 1997).

would enable either voluntary engagement by the defendant themself or a third party to apply for a guardianship order.

In light of these alternative routes to services or treatment, one must question the appropriateness of the use of conditional s 32 orders, which are criminal, not civil, and punitive in nature, to effect engagement with services or treatment use where the individual *has not* been convicted. The use of conditional s 32 orders therefore has possible netwidening effects. As suggested in the *Enabling Justice* Report, diversion risks 'drawing people with intellectual disability into and maintaining them in the criminal justice system' insofar as it sees the criminal law as the means for addressing a defendant's service or treatment issues, where these could instead be addressed voluntarily by the person themself or coercively through guardianship laws.[9]

4. **Conflating Disability and Criminality:** If the criminal law, through diversion, is acting upon a defendant's disability/impairment, rather than a specific criminal charge (because the individual has not generally pleaded guilty, had the offence proven or been convicted, and because the conditional orders relate to engagement with disability services), then does this suggest that diversion is conflating disability and criminality/deviance, or punishing an individual because of their disability or because of behaviour that might breach society's norms or be considered challenging? And, if so, is diversion promoting appropriate ideas of disability? Further, is diversion advancing the broader rights and social inclusion of persons with disability?

5. **Marginalising and Legitimising Complex Processes of Disadvantage and Exclusion:** In CP7 the NSWLRC suggests that the 'cumulative effect of numerous social disadvantages' is a rationale for diversion. Whilst this might be the case insofar as diversion enables individuals to avoid imprisonment or some other onerous penalty and hence might acknowledge that such persons are not appropriate

[9] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 18.

subjects for such punishment, diversion only goes some way in acknowledging the 'cumulative effects of social disadvantages' and risks marginalising and legitimising complex processes of disadvantage and exclusion. This is on the basis that diversion (a) is still punitive, (b) in the case of conditional orders does not completely discharge someone from the regulation of the criminal law but subjects them to informal supervision and the possibility of their charges being brought back before the court if there is a failure to comply, (c) section 32 orders are noted on an individual's criminal record, and, (d) in being grounded in disability service or treatment responses to criminal charges individualises and internalises the causes of an individual's presence in the criminal justice system. Diversion ultimately still identifies the diverted subject as the individual responsible for their presence in the criminal justice system and focuses on 'fixing' them, notably their disability. Perhaps this reflects broader problems at the core of the criminal law relating to the model of individual, psychological responsibility and the associated marginalising or decontextualising of social and political factors in alleged criminal conduct.[10] Thus, although the capacity of diversion to effectively address the 'cumulative effect of numerous social disadvantages' might be limited by the broader nature of the criminal law, it is argued that arguments that diversion can address, rather than itself consolidate, social disadvantages should be made cautiously and in a nuanced manner.

The issues raised above do not indicate that diversion pursuant to s 32 is all together damaging to the broader position of persons with intellectual disability in society. Rather, what they suggest is that greater consideration needs to be given to the nature of conditional orders and how they relate to issues of human rights, criminal law principles, civil rights and structures of disadvantage and marginalisation. Conversely, perhaps the making of unconditional orders should be promoted as the making of these orders avoids the punishment of the individual, fully recognises that defendants should not be in the criminal justice system, and promotes independence and choice of persons with intellectual disability.

[10] See, eg, the critique in Alan W Norrie, *Crime, Reason and Punishment: A critical introduction to criminal law* (2001).

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?

Greater consideration should be given to enhancing (including through amendment to policies and guidelines) the application of existing discretionary police powers relating to charge and arrest (eg cautions and warnings) and court action (eg withdrawal of charges following representations), and increasing police use of 24 hour support services (such as Criminal Justice Support Network, Lifeline, Office of the Public Guardian if the person apprehended has a public guardian) and community based disability services.[11]

A formal legislative scheme could prevent alleged offenders with intellectual disability from having to (a) go through the court process, (b) being remanded in custody and (c) serving a term of imprisonment. On the other hand, however, there are concerns that a legislative scheme which involves conditions (similar to conditional s 32 orders) such as engaging with disability support services or receiving treatment could have a netwidening effect. That is, it might become a legitimate method of channelling people into disability support services, where these persons might otherwise have (a) not entered the criminal justice system, eg they might have been left alone by police, not even considered for charge, taken informally to relevant services or hospitals, and/or (b) could have entered these services voluntarily or coercively through civil guardianship provisions.

A formal system for police cautions and warnings is also potentially netwidening because it increases the contact between police and persons with intellectual disability which increases the risk of such persons being charged with trifecta offences associated with the confusion,

[11] This might also involve government departments such as ADHC developing 24 hour support lines that can receive referrals from police or talk directly with persons with cognitive impairment or mental illness who are in need to urgent or crisis assistance.

frustration and fear related to interactions with the police, particularly if police do not receive adequate training in disability.[12]

There is also the risk that persons with mental illness or cognitive impairment that come under the scheme will associate engagement with disability support services with coercion and punishment, perhaps hindering the willingness of individuals to participate in them. Related to this, such a scheme might encourage associations between disability and criminality/deviancy and be contrary to contemporary human rights approaches that encourage empowerment and self-determination of the individual and voluntary engagement with services.

It is thus suggested that existing powers be considered prior to introducing a formalised system that could inadvertently result in more persons coming to the attention of the police.

(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?

If a legislative scheme were to be introduced, the following aspects of such a scheme *are not* supported:

- Requirement that an alleged offender admit to the offence or plead guilty
- Formal conditions attached to the caution or warning that require persons to engage with support services or treatment and an associated power to charge the person if they fail to comply with the conditions (similar to the s 32 scheme)

The scheme should be accompanied by appropriate training of police officers and guidelines relating to charging persons with trifecta offences in the course of the cautioning and warning process. Issues relating to the risk of admissions in the course of the warning and cautioning process should also be thought through. There should also be an explicit right to legal representation and a support person, and provisions to invalidate the process (on application by the individual) if such rights are not recognised by police in the process.

[12] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 14.

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?

There needs to be greater, ongoing training of *all* police officers on disability. This training needs to cover 'identification' (ie the characteristics of disability) of disability, as well as communication techniques, how to treat persons with cognitive impairment and intellectual disability with dignity and respect, and on human rights (including the principles of inherent dignity, acceptance of difference, non-discrimination, equality, and social inclusion). This training should involve training by people with disability and be delivered by or developed in consultation with an external disability organisation such as the Intellectual Disability Rights Service's Criminal Justice Support Network.

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?

The writer is not familiar with the existing operation of s 22. It would seem, however, that the nature of community based services for people with cognitive impairment are fundamentally different to mental health facilities. The intake for disability services is generally operated out of offices that are only open during business hours, these services generally have long waiting lists and narrow eligibility criteria, involved intake processes and are not 'crisis' in nature.

If what is suggested is a cognitive impairment 'facility' that could provide crisis assessment and accommodation, the writer is opposed to this on the basis that it is unnecessary and is a

form of institutionalisation, medicalisation and segregation of persons with cognitive impairment. It also promotes the criminalisation of cognitive impairment.[13]

It is unclear on what basis an individual with cognitive impairment would need to be urgently transported to a hospital or social service such that this needed to be done by a police officer. The existing mental health provisions would cover crisis situations where a person with cognitive impairment was experiencing acute mental health issues, whereas guardianship provisions, including emergency medical treatment provisions, cover the coercive treatment or accommodation of persons with cognitive impairment. It would seem contrary to human rights of persons with disability to coercively take persons with cognitive impairment to a social service where they have not been charged with a criminal offence, are not having an acute mental health issue or are not subject to a guardianship order. Given there is unlikely to be an acute crisis, emergency situation resulting from an individual's cognitive impairment that cannot be covered by existing legislation, it is arguable that if a person is not suspected of committing a criminal offence, there is simply no need for the police to be involved with the individual. As discussed above, there are also risks of individuals being charged with 'trifecta' offences whilst being transported by police and risks that people might associate the disability service with punishment and coercion.

As noted by the NSWLRC in its discussion of this question, s 22 is linked to the civil provisions under the *Mental Health Act*. There is no such legislative framework governing the coercive engagement of persons with cognitive impairment with disability services.

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?

Please refer to 7.2 above.

[13] Garton has argued that historically the involvement of police in taking people to mental hospitals was a key reason for the increased criminalisation of insanity: see, eg, Stephen Garton, *Medicine and Madness: A social history of insanity in New South Wales, 1880-1940* (1988) 22.

Issue 7.9

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

The term should be given a broad definition that reflects contemporary psychological, disability service and policy understandings of this term.

(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?

'Developmentally disabled' should include people with 'intellectual disability', as this conforms to psychological, disability service and policy understandings of this term.[14] Similarly, disabilities affecting behaviour, such as autism and ADHD, that are acquired during the developmental period will also likely be covered by the psychological, disability service and policy understandings of 'developmentally disabled' and hence should be included in the definition of 'developmentally disabled' as used in s 32.

The scope of '*developmentally* disabled' cannot sensibly include people with cognitive impairment acquired in adulthood (ie not in the developmental period) although in the practical application of the provision by individual Magistrates, these individuals might fall under the provision.[15]

[14] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 28-29.

[15] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 28-29.

Instead of the definition of 'developmentally disabled' including people with a cognitive impairment acquired in adulthood, a new term, such as 'cognitive impairment' should be added to the list of disabilities in s 32. Guidance should be sought from organisations representing persons with acquired brain injury and neuropsychologists as to whether 'cognitive impairment' will be sufficient to cover persons with acquired brain injury whose injuries have caused a change in personality or a disturbance to behavioural or emotional functioning, rather than changes to cognitive abilities such as learning and memory.

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"?**

A defendant 'with a developmental disability' will accord with general practice in Australia to put the person rather than the disability first[16] (cf in UK where 'disabled' is the commonly used term by disability rights activists).

Issue 7.12

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

The term 'mental condition' should be defined in the Act. It is currently ambiguous and the rider 'for which treatment is available in a mental facility' has a limiting effect on the possible 'catch-all' purpose of the term 'mental condition'. As discussed below, consideration should be given to whether 'for which treatment is available in a mental health facility' or any other rider needs to be included in this term.

An examination of the legislative context relating to the insertion of the term in 1986 is insightful in showing that the term had a particular meaning which was related to forensic patients which is not necessarily appropriate for its use in s 32.

[16] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 29.

When s 428W (which was the original form of s 32) was originally inserted into the *Crimes Act 1900* (NSW) by the *Crimes (Mental Disorder) Amendment Act 1983* (NSW) the provision did not include 'mental condition' and only applied to a defendant who is 'developmentally disabled or mentally disordered but is not a mentally ill person within the meaning of the Mental Health Act, 1983'. Thus, in the original provision, there was *no reference* to 'mental condition'. The term 'mental condition for which treatment is available in a hospital' was introduced by the *Crimes (Mental Illness) Amendment Act 1986* (NSW), which amended s 428W to replace 'mentally disordered' with 'is suffering from a mental illness or is suffering from a mental condition for which treatment is available in a hospital'.[17]

The Crimes (Mental Illness) Amendment Bill 1986 was one of three cognate bills accompanying the main Bill, the Mental Health (Amendment) Bill. The *Mental Health (Amendment) Act 1986* (NSW) made amendments to the *Mental Health Act 1983* (NSW). One such amendment was to the reference to 'mental condition' in the *Mental Health Act 1983* (NSW). Part VII of the *Mental Health Act 1983* (NSW) concerned 'forensic patients'. This part contained provisions to enable the transfer of mentally ill prisoners to hospitals (s 123) and the transfer of 'other prisoners' to hospitals, ie prisoners with mental conditions, for which treatment was available in a hospital (s 124).[18]

The *Mental Health (Amendment) Act 1986* amended s 124 to clarify the meaning of 'mental condition for which treatment is available in a hospital' by inserting after 'mental condition': '(being a condition of disability of mind not including either mental illness or developmental disability of mind)'.[19]

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[17] *Crimes (Mental Illness) Amendment Act 1986* (NSW), sch 1.

[18] In the original 1983 Act:

Section 123 stated:

> Transfer of mentally ill prisoners to hospitals
>
> Where it appears to the Chief Medical Officer, acting personally on the certificates, in or to the effect of the form set out in Schedule 4, of 2 medical practitioners, one of whom shall be a psychiatrist, that a person imprisoned in a prison is mentally ill, the Chief Medical Officer may order that the person be transferred to a hospital.

Section 124 stated:

> Transfer of other prisoners to hospitals
>
> Without affecting section 123, where it appears to the Chief Medical Officer, acting personally, on the certificates, in or to the effect of the form set out in Schedule 4, of 2 medical practitioners, one of whom shall be a psychiatrist, that a person imprisoned in a prison is suffering from a mental condition for which treatment is available in a hospital, the Chief Medical Officer may, with the consent in writing of the person, order that the person be transferred to a hospital.

[19] *Mental Illness (Amendment) Act 1986* (NSW), sch 1, cl 9 (s 124).

It is clear from the second reading speech to the four Bills that the meaning of 'mental condition' in s 428W of the *Crimes Act 1900* (NSW) was linked to its meaning in the general mental health context (under the *Mental Health Act*):

> These amendments also provide a definition of the term mental condition which is used in both the new Mental Health Act and the Crimes (Mental Disorder) Amendment Act 1983.
>
> This term is used in both Acts to allow persons who are not mentally ill persons under the Mental Health Act but who suffer from an abnormal mental condition to be referred for appropriate treatment in a psychiatric hospital where the person consents to that course of action. For the purposes of clarification, the term mental condition is to be defined as a "condition of disability of mind not including either mental illness or developmental disability of mind". The term is intended to encompass conditions which are not covered by the term mental illness but which can be treated in a hospital, for example, drug or alcohol dependency'.
>
> ...
>
> The term mental condition [in s 428W] will have the same meaning as the meaning to be inserted into the Mental Health Act 1983 by the main bill. The term mentally disordered is to be replaced by the words "is suffering from a mental illness or is suffering from a mental condition for which treatment is available in a hospital".[20]

The Hon Dr Andrew Refshauge, the member for Marrickville, in supporting the bills stated that

> A change that seems understandable only by reading the legislation concerns the definition of mental condition. Although mental illness is defined by many international and national organisations in the way one would expect, because of the peculiar and special nature of mental health legislation, a specific definition of mental illness has been needed. Because of that limitation it is important to introduce the new term "mental condition" which will allow voluntary transfer of forensic patients from penal institutions to

[20] The Hon Ronald Joseph Mulock, Deputy Premier & Minister for Transport, NSW Legislative Assembly, 29 April 1986, 3075-3076.

> psychiatric institutions if it is considered by them and their medical advisers that mental health treatment, psychiatric treatment or other, may be of benefit to them. That does not in any way remove the rights they would have had if they had remained in the penal institution. By introducing this provision the best possible care will be available to all patients, whether voluntary, involuntary or forensic.[21]

In light of its origins, it is no wonder that the term 'mental condition for which treatment is available in a mental facility' seems so ambiguous and confusing. Restricting the class of persons with 'mental condition' to those who can receive treatment in a mental health hospital might have made sense when applying to prisoners, because it is likely that the purpose was to keep these persons physically confined in an institution (ie the mental hospital rather than the prison). However, the 'mental health facility' rider does not sit well in s 32, where the aim of the provision is to avoid institutionalisation and provide access to services in the community (s 33 instead providing for treatment in a mental health facility).

Although I am not familiar with the legislative classes of persons who can be admitted to a mental health facility under the *Mental Health Act 2007* (NSW), I question whether it is possible to articulate in advance a discrete class of persons who will fit the 'mental condition' category in s 32. I ask this in light of two considerations. The first is that under s 32(1) a person with a 'mental condition for which treatment is available in a mental health facility' cannot be a 'mentally ill person', which limits the circumstances under which a person can be admitted to a mental health facility under the *Mental Health Act 2007* (NSW) given that one of the major classes of persons admitted under this Act are 'mentally ill persons'. Secondly, if a person is not a 'mentally ill person' they might be admitted more on an ad hoc, case by case or crisis basis depending on the perceived need at the immediate time. For example, the other major class of persons who can be detained in mental health facilities are 'mentally disordered persons'. 'Mental disorder' is a temporary impairment relating to a 'person's behaviour for the time being' (see ss 12, 15 of the *Mental Health Act 2007)* and such a person can only be detained for a limited time period of 3 days (see s 31 of the *Mental Health Act 2007*). Mental disorder thus seems to have a meaning which is not conducive to long term (eg 6 month length of a s 32 conditional order) treatment in a mental health facility. It might be of use to have a senior person in the mental health facility sector

[21] The Hon Dr Andrew John Refshauge, Member for Marrickville, NSW Legislative Assembly, 30 April 1986, 3437-3438.

or a solicitor from the Mental Health Advocacy Sector clarify whether it is possible to define a discrete class of persons who are not a 'mentally ill person' and have a 'mental condition for which treatment is available in a mental health facility'.

On the basis of this, it is argued that the term 'mental condition for which treatment is available in a mental health facility' should be amended to remove the rider 'for which treatment is available in a mental health facility'. It should not be replaced with another rider.

Furthermore, 'mental condition' should be defined in the legislation in an inexhaustive manner that reflects psychological, disability service and policy understandings of this term and which is open to including new categories of mental conditions which emerge over time.

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 term 'for which treatment is available in a mental health facility' should be deleted from s 32(1)(a)(iii) for the following reasons:

1. As discussed above, the term 'for which treatment is available in a mental health facility' has a particular meaning peculiar to its relationship to the transfer of prisoners in the then *Mental Health Act 1986* (NSW). It is misplaced in s 32 which is focused not on prisoners but on non-convicted and non-imprisoned persons living in the community.
2. The notion of 'treatment' itself has attached to it negative connotations of medicalisation and curability.
3. The term 'availability' is ambiguous and superfluous. It is not clear whether the availability of treatment relates to availability specifically for the individual, or availability of treatment for the general mental condition that person is diagnosed with. If it is treatment for the individual, it is not clear whether this is treatment that is practically and immediately available and accessible to the individual, or whether

theoretically the person's condition is of the nature that treatment could be sought. Moreover, if it refers to the availability of treatment specifically for the individual, it seems superfluous to limit 'mental condition' in this way because the person is unlikely to qualify under the second limb of the s 32 test (appropriateness of diversion) if they do not have appropriate services or treatment that the Court thinks they require. It might also hinder the ability to make unconditional orders in relation to persons with mental condition given that unconditional orders do not require engagement with any services or treatment.

Given that the second limb of the test under s 32 (ie appropriateness) will identify whether persons require treatment and exclude persons who do not have appropriate treatment, it is argued that the term 'for which treatment is available in a mental health facility' should be deleted and should not be replaced by any other phrase, thus leaving s 32(1)(a)(iii) as 'mental condition'.

(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?

As above, the rider to 'mental condition' is superfluous, as the operation of the second limb of the test under s 32 will exclude from its application those defendants who do not have appropriate treatment or services in place. There should be no rider to 'mental condition' in s 32(1)(a)(iii). To change the rider as suggested to including social services programs etc would be contrary to the original meaning of this phrase as per the historical discussion above.

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?

It is difficult to see how one term could capture all of the existing s 32(1) disabilities, as well as other cognitive impairments not yet covered. It is unlikely there is one term that could equally reflect all of the disabilities. There is a risk that replacing them all with one term (eg

'mental impairment' or 'mental disorder') could result in some of the more unknown or marginalised disabilities, such as intellectual disability and acquired brain injury being collapsed into mental illness and then people with these impairments being judged against characteristic or perceptions of mental illness. This is already the case with the focus on mental illness in the title of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (despite submissions made by IDRS in the course of the James forensic mental health review to amend the title to reflect its application to persons with intellectual disability cognitive impairment), and the reference to 'mental' disorder in the title of Chapter 3.[22] Although it is important to capture all relevant disabilities in the listed disabilities under s 32(1), consideration should be given to the problems with a general category. It might be that the terms should be replaced with a few that refer to particular categories of impairments, eg mental, behavioural, cognitive.

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 discussed above, such a general term is not supported. In particular, the use of the term 'mental' in the general term would imply mental illness and hence marginalise or exclude people without a mental illness such as those with a developmental and intellectual disability or people with acquired brain injury.[23]

Issue 7.17

[22] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 30-32.

[23] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 30-32.

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?

It is argued that, ideally, seriousness should not be considered because (a) the person has not been convicted of the offence, (b) consideration of seriousness could easily result in inappropriate consideration of future risk and danger which draws more on ideas about the link between deviancy and disability rather than the nature of an alleged discrete criminal act, and (c) as the NSWLRC notes, the rationales for diversion relate to the recognition of the reduced culpability of the defendant and the impact of impairment and social disadvantage on the defendant's presence in the criminal justice system which suggest a reduced subjective seriousness of an offence regardless of its objective seriousness.

That said, it is acknowledged that the test under s 32 has been interpreted by the Courts as enabling a consideration of the 'seriousness' of an offence.[24] It is also acknowledged that the issue of the seriousness of the offence is a particularly contentious issue, particularly in light of the expanding jurisdiction of the Local Court which has resulted in more serious offences being shifted from the jurisdiction of the District Court to that of the Local Court.[25] It is therefore acknowledged that, realistically, seriousness is likely to remain a consideration by Magistrates in deciding whether to exercise their discretion under s 32.

It is submitted, however, that seriousness must not be *the* focus of the question of 'appropriateness' under the second limb of the s 32 test. It is but *one* consideration which goes towards the ultimate issue of 'appropriateness'. In the Court of Appeal decision of *DPP (NSW) v El Mawas*, McColl JA explained that this

> requires a balancing of 'the public interest in those charged with a criminal offence facing the full weight of the law against the public interest in treating, or regulating to the greatest extent practical, the conduct of individuals

[24] *DPP (NSW) v El Mawas* (2006) 66 NSWLR 93, [6] (Spigelman CJ), [77], (McColl JA); *Mantell v Molyneux* (2006) 68 NSWLR 46, [40].

[25] Helen Syme, 'Local Court Procedure and Sentencing of Offenders with Mental Illness' (Paper presented at UTS: Law Professional Development: Mental Health Act 2007, The Mental Health (Criminal Procedure) Act 1990 - Issues and Consequences), University of Technology Sydney, Ultimo, 28 March 2008) 15-17.

> suffering from [the relevant disability] … with the object of ensuring that the community is protected from the conduct of such persons'.[26]

Moreover, in noting that seriousness is a relevant factor to consider, she went on to clarify that s 32 is still

> available to serious offenders as long as it is regarded, in the Magistrate's opinion, as more appropriate than the alternative. No doubt a Magistrate considering that question will consider whether proceeding in accordance with s 32 will produce a better outcome both for the individual and the community.[27]

Thus, the seriousness of the offence is not itself the determining factor of the appropriateness of diversion, but rather is but one factor that goes towards the balancing exercise that characterises the exercise of discretion by the Magistrate under s 32(1). It is therefore argued that the seriousness of the offence should be weighed against other factors such as the availability of support services (eg supported accommodation, case management) or the potential to alter any environmental factors (eg moving the person out of an unsuitable living situation, making staffing changes) that could mitigate any perceived risk to the public associated with the seriousness of the offence. The Court's consideration of seriousness must also be mindful of the fact that the defendant has not yet been convicted of the offence, and that disability does not equate with deviancy or signify a future risk of criminality, danger or violence.

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 decision to divert should not depend upon a direct causal connection between the offence the relevant disability under s 32(1).

If the Court is satisfied that a defendant has a particular disability, then the defendant should not have to establish a direct causal connection. This is because:

[26] *DPP (NSW) v El Mawas* (2006) 66 NSWLR 93, [71] (McColl JA, Spigelman CJ & Handley JA agreeing).
[27] *DPP (NSW) v El Mawas* (2006) 66 NSWLR 93, [79] (McColl JA).

1. The idea that one can isolate an individual's impairment from the rest of their attributes suggests a medical approach to disability pursuant to which the disability is the cause of an internal, discrete mental dysfunction. This idea promotes ideas that conflate disability with criminality through the direct link between criminal conduct and impairment.

2. The idea of attributing alleged criminal conduct specifically to an isolated impairment ignores the reality that persons with intellectual disability as a group are characterised by their experiences of a range of personal, socioeconomic, health and education disadvantages such as lack of family support and social networks, poverty, homelessness, substance use, and low literacy, and structural problems such as social exclusion, discrimination and institutionalisation and segregation. These factors are inextricably linked to and likely compounded by impairment and are central in the pathways through the criminal justice system of persons with intellectual disability, as discussed by Baldry and Dowse et al in their research concerning people with mental health disorders and cognitive disability in the NSW criminal justice system.[28] There is a risk that if a direct connection between impairment and the criminal charge is needed, s 32 applications will be rejected by the court because defendants' offences are characterised as relating to social problems rather than 'impairment'. For example, the Court might attribute the cause of a shoplifting charge to a defendant's drug use or poverty, rather than to poor impulse control or lack of insight. This ignores the fact that the substance use and poverty are inextricably linked to and likely compounded by impairment.

3. There is the risk that requiring a direct causal connection would be contrary to s 32(6) 'a Magistrate may inform himself or herself as the Magistrate thinks fit, *but not so as to require a defendant to incriminate himself or herself*' and would also likely require the psychological report to discuss the causal connection which might result in admissions being included in the psychological report and/or the psychologist to

[28] See, eg, Eileen Baldry, 'Pathways to Prison: Intellectual Disability', *Presentation at the Coalition on Intellectual Disability in the Criminal Justice System Seminar*, University of New South Wales, Kensington, February 16, 2010; Eileen Baldry, Leanne Dowse & Melissa Clarence, 'Background Paper: Pathways to Prison for Mentally Ill and Cognitively Impaired Offenders', *NSW District Court Annual Conference 2010*, Sydney, April 6-7, 2010; Eileen Baldry, Leanne Dowse, Philip Snoyman, Melissa Clarence & Ian Webster, 'A Critical Perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System' in C Cunneen & M Salter (eds), *Proceedings of the 2nd Australian & New Zealand Critical Criminology Conference*, Sydney, June 19-20, 2008, pp. 30-45.

base their analysis on a range of hypotheses and assumptions because the defendant has not admitted to the offence.

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?

Consideration of the likely sentence should mean the realistic sentencing options that take account of the person's disability as well as other subjective factors.

The likely sentence should only be considered in the context of the broader issue of whether this sentence would provide a better outcome for the individual, rather than the question of whether the nature of the person's offence means they deserve the sentence rather than diversion. The realistic sentencing options available to the Magistrate should be considered in the context of the broader issue of whether this sentence would provide a better outcome for the individual, including such factors as the vulnerability of persons with intellectual disability in prison, the lack of disability support services in prison, and the problems of short prison terms for persons with intellectual disability vis-a-vis reintegrating and reengaging with community based disability services and the disruption to routine and housing/disability services in the community. These are all factors that are important considerations in suggesting why diversion is more appropriate than an alternative form of punishment. On the other hand, if the alternative sentence is likely to be a minor fine or the mere recording of the conviction, then it might be that an unconditional discharge is appropriate (rather than a conditional order which is more punitive than the realistic sentencing options).

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?

Section 32 should not include a list because it is a discretionary decision. Rather, the court should instead be guided by a statement of principles (as discussed below) that should guide the operation of the diversionary scheme overall.

(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?

Although I do not support a list of factors, if a list of factors were to be introduced, it should include:

- The environmental and social, economic and other personal/structural factors surrounding the alleged offence/s and that relate to the defendant's life more broadly.
- The human rights of the defendant, including rights relating to treatment within the criminal justice system and rights to disability services, as well as broader human rights relating to inherent dignity, independence and choice.

Factors that should be identified as expressly irrelevant to the exercise of the discretion are:

- A direct causal connection between the defendant's impairment and the alleged criminal offence/s.
- The guilt of the defendant or implicit assumptions that the defendant has committed the offences.

Issue 7.22

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

It might be beneficial to clarify the time limit on interlocutory orders. It is acknowledged that the open-ended time on interlocutory orders means that s 32(2) is sometimes used as a trial run to see if final s 32(3) orders would be successful, particularly where a Magistrate is

unsure about whether a defendant will comply with a final order, such as if there is a history of poor service engagement, serious charges or history of s 32 orders. Whilst this trial run function is arguably beneficial to the defendant if this means that ultimately their charges are dismissed pursuant to s 32, it might be problematic if the time period of the interlocutory orders is lengthy or if successive interlocutory orders are made because (a) this can cause the defendant to feel uncertain and stressed about the unresolved criminal charges, (b) it might be contrary to general approaches to the criminal justice process that seek to minimise the period that an individual is before the court on criminal charges and (c) it might be unjust to have an extended interlocutory period given the punitive nature of s 32 orders and the likely sentencing options the person might have if convicted (in the case of minor offences).

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 existing range of final orders is inappropriate for defendants with intellectual disability because they suggest a medicalised approach to disability. Neither s 32(3)(b) or (c) refer to attendance at services, engagement with case management or compliance with a treatment plan all of which are typical of s 32 orders for persons with acquired brain injury or intellectual disability. It would be appropriate to expand s 32(3) in order to include these. In expanding the range of final orders, however, one must consider whether they are able to be 'complied' with for the purposes of subs-s (3A)-(3D). For example, it might be difficult to 'comply' with a treatment plan, if the treatment plan refers to actions outside of the defendant's control (eg third parties making guardianship applications, accessing services that are subject to intake procedures or resource constraints).

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?

Please refer to 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?

Certainly there are issues relating to strict eligibility criteria, slow intake processes, the reticence of services to take on persons with complex needs and resource constraints, all of which can impact on the ability of a defendant to comply with a s 32 order. There are, however, problems with compelling a person or agency to implement an order. First, it might make services unwilling to take on s 32 clients or services might even refuse to take on such clients due to the perceived risk of legal repercussions. If service providers are under legal compulsion to provide services then when a client becomes 'too difficult' or there are issues with service engagement, the service might try to use coercion to enforce compliance so as to avoid any legal repercussions to the service, or might go to the court seeking to have order altered to remove their involvement with the defendant which could in turn result in s 32 orders being removed.

These issues might be more appropriately addressed through greater funding to services, increased tertiary support and training, and interagency coordination. If a Magistrate is of the view that it is not appropriate for a defendant to go through the criminal justice process, but there are no services available for a defendant (eg due to lack of resources particularly in regional and remote areas), Magistrates should consider making an unconditional s 32 order as this is ultimately more appropriate than effectively putting the defendant through the criminal justice system because of geographical, political and economic factors that have resulted in a lack of services.

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?

Please see discussion above in 7.25.

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?

There needs to be clarification of how one 'breaches' a s 32 order. Many conditional s 32 orders can be in very vague or broad terms, or open to future elaboration. For example, if they are in terms of 'comply with x treatment plan', and such a treatment plan contains numerous different strategies, treatments or services but no details as to what specifically the defendant themself is to do in relation to each of these then it might be unclear when a breach has occurred.

Further, as the conditions are generally so dependent on services, services themselves might effectively bring about a breach by their service delivery, their staff or resource constraints in a manner that is outside of the control of the defendant. The 'breach' could relate to a breakdown in the client/service relationship, a lack of experience of staff in working with people with complex needs or people involved in the criminal justice system, high turnover of staff which makes effective service delivery difficult, or the inappropriateness of the service for the individual (eg person does not get along with other clients, person does not identify as having a disability and hence does not feel comfortable in a service for people with disability). As discussed in the *Enabling Justice* Report:

> it cannot be assumed that a breach of s 32 conditions is a wilful act by the alleged offender.
>
> The success of s 32 orders typically relies upon both the alleged offender and the service provider. Section 32 orders create an unequal service recipient/service provider relationship because, whilst it is the service provider that has control over the provision of the services, the Court can only impose enforceable obligations in relation to services on the alleged offender. Many practitioners and support workers expressed concern regarding the lack of jurisdiction of the Court to bind service providers. Breakdown in service provision can result in s 32 breaches which can in turn result in the alleged offender being penalised for something which is outside of his or her control and is more the result of inappropriate or ineffective service provision. Such deficiencies in service provision may well not be

> apparent to Probation and Parole or the Magistrate who will often be reliant on the information provided by service providers.

On this basis, it is unfair for the defendant to be penalised by being brought back to court and the associated stress and uncertainty of possibly having the charges brought back.

Success or failure of a s 32 order is not always so 'black and white' or so arbitrary. Progress, particularly if someone has complex needs or is not familiar with working with services, can be slow or in 'shades of grey' such that a minor slip up might technically be a breach, but might for the individual still signal a vast improvement in their life. They might have other issues such as homelessness, poverty and drug use that are impacting on their ability to comply with requirements of a treatment plan. As the *Enabling Justice* Report states:

> Breaches also need to be seen within the context that behavioural change is often a slow and gradual process for a person with intellectual disability. One breach may in fact amount to considerable progress for an individual who is gradually learning more positive behaviours.[29]

As noted in the *Enabling Justice* Report, 'it is wrong in principle to impose sanctions on a dismissal of charges where there has been no plea or finding of guilt. This was the view of the Law Reform Commission [in Report 80].'[30] Section 32(3D), as well as the conditional nature of many s 32 orders, is at the core of many of the issues raised in the introduction to this submission.

On this basis, it is argued that the approach in sub-s (3A)-(3D) needs to be changed so that instead of focusing on 'failure to comply', it is concentrated on issues requiring amendment of a treatment plan. This reflects the enormity of the challenges that defendants with intellectual disability (and associated sources of disadvantage) face in engaging with multiple services, as well as recognising the generally multi-faceted nature of treatment plans and hence the likelihood of improvements linked to some other aspect of the treatment plan (even if very modest) and the slow and progressive nature of outcomes.

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[29] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 58.

[30] Intellectual Disability Rights Service, Coalition on Intellectual Disability and Criminal Justice & NSW Council for Intellectual Disability, *Enabling Justice: a report on problems and solutions in relation to diversion of alleged offenders with intellectual disability from the New South Wales local courts system* (2008) 57.

Section 32(3D) should be removed for the reasons discussed in the paragraph above as well as because of the stress and uncertainty it can cause defendants on s 32 orders to have their charges hanging over them for 6 months which itself can impede effective engagement with disability services or psychological therapy.

Section 32(3D), if it is retained, should be used as a last resort, if at all. In this respect, it is noted that subs-s (3D) is phrased in discretionary terms 'the Magistrate *may* deal with the charge as if the defendant had not been discharged'.

If the approach to sub-s (3A)-(3D) is changed as per above, then involving the Mental Health Review Tribunal might be unnecessary and create another level of complexity for defendants. Issues relating to whether defendants would be entitled to Legal Aid funding (including funding for the same legal representative that represented them at the Local Court) to attend the Mental Health Review Tribunal should also be considered.

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?

In light of the discussion in 7.27 above, the focus of sub-s (3A)-(3D) should be altered such as the focus is specifically on adjusting the conditions or the treatment plan the subject of the conditions rather than on bringing the charges back to Court. Sub-section (3D) should be removed from the Act.

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?

It is uncertain what action could be taken to enforce compliance, particularly in light of the discussions above about the vague and open ended nature of many s 32 orders which make the terms of 'compliance' difficult to pin down, and the role of services in bringing about 'breaches'.

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?

Persons under s 32 orders have not been convicted of an offence. They should not be supervised by Probation and Parole.

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?

Defendants should be given an opportunity to respond to the claims made in the treatment provider's reports prior to the matter going to Court, as well as being given access to relevant case notes etc held by the service reporting the breach that might relate to the breach.

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?

It is unclear why Police need to assess a defendants' disability themselves. There is a risk of involving NSW Police in the assessing of defendants because they are the defendants in any subsequent court matters relating to criminal charges. Moreover, there is a risk of admissions being made in the course of the psychological assessment which might then be available to Police who have requested the assessment. Police might request an assessment more to fulfil a certain level of curiosity or in a fishing expedition, rather than because they have a genuine interest in considering whether to proceed with charges in light of a diagnosis.

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?

The *Mental Health (Forensic Provisions) Act 1990* (NSW) should not expressly require the submission of certain reports and a case plan. The Act presently enables flexibility in what documents and information the Magistrate may use to determine a s 32 application (s 36). It is submitted that this flexibility is an important aspect of the s 32 application process and should remain as such. This is because what information that is required to satisfy a particular Magistrate concerning a particular defendant will differ between Magistrates as well as between disabilities (both because of differential nature of diagnoses, the varying expenses of reports from the different professions), between regions (depending on availability of services to prepare case plans and professionals who can write reports), and between individual defendants (eg the significance of other characteristics of the defendant such as dual diagnosis/comorbidity, substance use, homelessness might mean that letters of support or reports from medical, drug rehabilitation or welfare services are significant to the decisionmaking process).

Some defendants who are not eligible for Legal Aid funded reports might not be able to afford a professional report, whilst others who have chaotic living circumstances such as substance use and homelessness which might not be able to make appointments with a psychologist or be able to keep old documentation. However, these defendants might still be able to gather enough information from service providers and their general practitioner to satisfy the court of their diagnosis and the services they require.

Moreover, the nature of some impairments, such as intellectual disability and acquired brain injury, might mean that an old report might be sufficient, thus making the requirement for a recent report unnecessary.

Requiring a case plan might also result in an assumption that only conditional s 32 orders can be made, because the requirement of a case plan would presumably be unnecessary for an unconditional order.

(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?

If the Act is amended to require the submission of certain reports, the Act should not spell out the information that should be contained in reports because this will then disadvantage individuals who, because of such factors as poverty, geographical isolation or health, economic or chaotic life circumstances cannot obtain a report containing all the relevant information.

In particular, the Act should not require discussion of the link between the offence and the impairment because this risks the disclosure of admissions or information that can criminalise the defendant (note s 36 information should not 'require a defendant to incriminate himself or herself').

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?

In CP7, the NSWLRC characterises s 10(4) as a diversionary provision. It should be noted that, s 10(4) is not a diversionary provision. This was decided by the Court of Criminal Appeal in the 2007 decision of *Newman v R*,[31] a decision not mentioned in the NSWLRC's discussion of s 10(4) Consultation Paper.

The idea of s 10(4) as a diversionary mechanism has been explicitly rejected. In *Newman v R*[32] the appellant submitted that 'the purpose of the Act was to provide appropriate procedures for persons with a mental illness and/or mental condition, which respond to the capacity of such person to stand trial and give instruction with due consideration to their disability. It was submitted that the Act makes provision for what was described as "specific and more flexible procedures for the disposal of offences, alleged to have been committed by a person who has cognitive or mental disability".'[33] Spigelman CJ rejected the appellant's submissions, stating that the 'purpose of the Act is not ... to provide "specific and flexible procedures for the disposal of offences committed by persons who have a cognitive or mental disability".[34] Spigelman CJ did not consider s 10(4) to be diversionary:

> The relevant part of the Act is concerned to establish a regime for the determination of criminal guilt or innocence in circumstances where normal criminal procedures could not apply by reason of the mental condition of an accused at the time of trial. It is incorrect to describe the procedures as "diversionary" or as "flexible". They are alternative procedures designed to ensure that justice is done having in mind the possibility of a person's unfitness to be tried. Justice must, however, be done not only to the accused

[31] *Newman v R* (2007) 173 A Crim R 1.
[32] *Newman v R* (2007) 173 A Crim R 1.
[33] *Newman v R* (2007) 173 A Crim R 1, [28] (Spigelman CJ).
[34] *Newman v R* (2007) 173 A Crim R 1, [34] (Spigelman CJ).

> but to the victim, bearing in mind the public interest in resolving allegations of criminal conduct.[35]

Instead, Spigelman CJ was of the view that s 10(4) is analogous to s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which permits a court to dismiss a charge without recording a conviction even where the charge is proved,[36] such that the general approach in s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) 'is the correct general approach to adopt for the purposes of s 10(4) of the Act'.[37] Section 10(4) requires the court to:

> approach an application on the assumption of a finding of guilt, including a finding of qualified guilt, and then to apply a similar range of considerations as now apply as now arise under s 10 of the *Crimes (Sentencing Procedure) Act*. It permits the court to dismiss a charge without proceeding to a fitness hearing, on the assumption that there would be a finding of guilt if the matter did proceed to either a trial or a special hearing. Where the court would not impose any punishment, including the element of punishment implicit in a conviction, then the proceedings should be dismissed in limine without the need for a fitness hearing.[38]

The provision is 'expressly directed to the appropriateness of the infliction of punishment' such that significant weight is attached to the consequence that the inquiry called for would not occur and the charge will be dismissed.[39] By infliction of punishment, 'the Parliament had in mind … an end result in which the person accused was in fact convicted, either expressly or by special hearing, of the relevant offence'.[40]

Newman v R was applied in the subsequent District Court decision of *R v Chanthasaeng*.[41] District Court Judge Nicholson SC dismissed the accused's application under s 10(4). In so doing, he applied Spigelman CJ in *Newman v R*, describing the case as providing a 'close examination as to [s 10(4)'s] purpose, scope and proper interpretation'.[42] After quoting paras 34 to 46 of Spigelman CJ's judgment, he then stated that:

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[35] *Newman v R* (2007) 173 A Crim R 1, [35] (Spigelman CJ).
[36] *Newman v R* (2007) 173 A Crim R 1, [42] (Spigelman CJ).
[37] *Newman v R* (2007) 173 A Crim R 1, [45].
[38] *Newman v R* (2007) 173 A Crim R 1, [46] (Spigelman CJ).
[39] *Newman v R* (2007) 173 A Crim R 1, [38] (Spigelman CJ).
[40] *Newman v R* (2007) 173 A Crim R 1, [37] (Spigelman CJ).
[41] [2008] NSWDC 122; (2008) 7 DCLR (NSW).
[42] Para 19.

> Thus *Newman* stands for the proposition that s 10(4) of the *Mental Health (Criminal Procedure) Act* is analogous to situations where a court is permitted to dismiss a charge and dismiss an offender without recording a conviction. Section 10 of the *Crimes (Sentencing Procedure) Act* and s 556A of the *Crimes Act* were given as examples. It may be convenient for the exercise of my discretion to have regard to the criteria in the now repealed s 556A for consideration of circumstances in which it is inappropriate to inflict any punishment. That is, having regard to character, antecedents, age, health or mental condition of the person charged or to the trivial nation of the offence, or to extenuating circumstances.
>
> I should also note the Chief Justice's opinion that a conviction without more (see s 10A of the *Crimes (Sentencing Procedure) Act*) amounted to punishment.[43]

In light of the significance of this decision to the NSWLRC's discussion of diversion in the higher courts, Spigelman CJ's lengthy discussion of s 10(4), heading 'Interpreting s 10(4)' is reprinted in full below:

> **Interpreting s10(4)**
>
> 34 The Appellant's submission about the scope and purpose of the legislative scheme should be rejected. The purpose of the Act is not, in my opinion, to provide "specific and flexible procedures for the disposal of offences committed by persons who have a cognitive or mental disability". The Appellant's reference to the "diversionary/disability" purposes of the legislative scheme is also, in my opinion, incorrect. Similarly, it is not correct to infer that a focus "on disability" as distinct from a "focus on guilt" is required. I am unable to detect any such purposes in the legislative scheme. Finally, the Appellant's contention that the discretion is "broad" is likely to lead to error. The section confers a judicial discretion for specific purposes.
>
> 35 The relevant part of the Act is concerned to establish a regime for the determination of criminal guilt or innocence in circumstances where normal criminal procedures could not apply by reason of the mental condition of an accused at the time of trial. It is incorrect to describe the procedures as "diversionary" or as "flexible". They are alternative procedures designed to

[43] Paras 20-21.

ensure that justice is done having in mind the possibility of a person's unfitness to be tried. Justice must, however, be done not only to the accused but to the victim, bearing in mind the public interest in resolving allegations of criminal conduct.

36 Section 10(4) is expressly directed to the appropriateness of the infliction of punishment. A judgment that punishment would be "inappropriate" leads to the result that the inquiry called for would not occur and the charge will be dismissed. Significant weight is to be attached to this consequence. A person charged with crime will never be tried.

37 The use of the word "punishment" indicates, in my opinion, that what the Parliament had in mind was an end result in which the person accused was in fact convicted, either expressly or by special hearing, of the relevant offence. This section is not, in my opinion, concerned with the possibility of a finding of not guilty, whether simpliciter or on the grounds of mental illness at the time of the offence. Nevertheless, the result of the process is that the proceedings are dismissed without trial.

38 I do not share any of the difficulties of interpretation identified by Meagher JA in *DPP v Mills* supra at [3]-[8]. The two circumstances in which an issue of 'punishment' arises can only be either as a result of conviction after a normal trial, where the person has been found fit to plead, or as a result of a finding of guilty of the offence "on the limited evidence available", following a special hearing within the meaning of s22(1). The latter finding is identified in s22(3) as a "qualified finding of guilt". Upon such a finding the court can determine under s23 a "limiting term" of imprisonment or some other penalty or make any other order which the court could have made "on conviction … in a normal trial of criminal proceedings".

39 In my opinion, s10(4) has in mind both situations i.e. where a person is found fit to plead and is convicted and where the qualified finding of guilt is made after a special hearing. The principal purpose of the subsection is to avoid the unnecessary delays, costs and complications of the special procedure, which arises only in the case where an issue of unfitness to plead has arisen at or about the time of trial and which operates irrespective of

whether or not any mental illness was pertinent at the time of the commission of the offence.

40 The principal purpose of the fitness hearing is to facilitate the administration of criminal justice. The administration of criminal justice would not be enhanced in any manner, whether from the point of view of an accused or from that of a victim or from the point of view of the public interest, if the considerable added expense and delay of a fitness hearing is to be undertaken in circumstances where the court would, in the event, not inflict any punishment.

41 The reference to "any punishment" in s10(4) would, in my opinion, extend to the recording of a conviction which, of itself, without any additional penalty, has effects such as consequential effects on prospects of employment, loss of licences or a range of statutory consequences and, possibly, public opprobrium. (On public opprobrium see *Ryan v The Queen* (2001) 206 CLR 267 esp at [52]-[54]; [123]; c/f [177].) On other adverse consequences of a conviction see *R v Lancaster* (1991) 58 A Crim R 290; *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act (No 3 of 2002)* (2004) 61 NSWLR 305; [2004] NSWCCA 303 at [114]; *R v Rhodes* (NSWCCA Unreported 20 November 1996).) In my opinion, the recording of a conviction is itself a "punishment" within s10(4) of the Act. In any event, it is well established that the orders of the court after a special hearing constitute punishment. (*DPP v Mills* supra at [38]-[39]; *Smith v The Queen* [2007] NSWCCA 39 at [61]-[63].)

42 The formulation in s10(4) is analogous to the long-standing formulation which permits a court to dismiss a charge without recording a conviction even where the charge is proved. This provision is now found in s10 of the *Crimes (Sentencing Procedure) Act* 1999. At the time that s10(4) of the Act was first enacted in 1983 as s428F(5) of the *Crimes Act* 1900, the relevant section was s556A of the *Crimes Act.*

43 Section 556A relevantly stated:

"556A Where … the court thinks that the charge is proved, but is of the opinion that, having regard to the character, antecedents, age, health, or

mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment … the court may, without proceeding to conviction, make an order … dismissing the charge."

44 The basic structure of s10(4) and s556A is the same. In each case, relevantly, the ultimate power of the court is to dismiss a charge that has been, or may be, proven. The respective tests are equivalent, although the word "inexpedient" is replaced by what may appear to be more apposite terminology in the context of mental disability, i.e. "inappropriate". The list of matters to which regard may be had overlaps considerably, although the list in s556A has been shortened and a general, but not unrestricted, provision relating to "any other matter" inserted.

45 Nevertheless, in my opinion, the general approach adopted to s556A, and now to s10 of the *Crimes (Sentencing Procedure)* Act, is the correct general approach to adopt for the purposes of s10(4) of the Act. The task is to be conducted in anticipation of a finding of guilt, by either of the two courses which can flow from a fitness hearing, i.e. a normal criminal trial or a special hearing.

46 Section 10(4) requires the court to approach an application on the assumption of a finding of guilt, including a finding of qualified guilt, and then to apply a similar range of considerations as now arise under s10 of the *Crimes (Sentencing Procedure) Act* 1999. It permits the court to dismiss a charge without proceeding to a fitness hearing, on the assumption that there would be a finding of guilt if the matter did proceed to either a trial or a special hearing. Where the court would not impose any punishment, including the element of punishment implicit in a conviction, then the proceedings should be dismissed *in limine* without the need for a fitness hearing.[44]

With due respect, it is important that the NSWLRC acknowledge this oversight in its Discussion Paper as it has a significant bearing on an assessment of the adequacy of 'diversionary' options in the Supreme and District Courts.

[44]

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?

There is a need for a diversionary option in the Supreme and District Courts because, (a) there is currently no diversionary option available in these Courts (see discussion above concerning s 10(4)) and (b) in the absence of a diversionary option, the fitness and mental illness defence legal mechanisms do not cover all defendants with intellectual disability who should not be convicted and sentenced and these mechanisms result in significant restrictions on an individual which might be unnecessary.

Caution should be exercised in simply extending s 32 to the higher courts or by making a uniform diversion provision for all courts. This is because there is a risk that in order to make s 32 suitable to the greater seriousness of the offences heard in the higher courts and the related greater seriousness of the punishment options available in the higher courts, the provision might become more restricted in its application (eg express legislative provision relating to the consideration of seriousness and risk in making s 32 orders, more formalised rules concerning psychological reports and treatment plans) and it is possible that s 32 will become more punitive than it already is (longer breach periods, more formalised supervision arrangements).

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?

Yes.

(2) If so, what should this statement of principles include?

The statement of principles should include the following:

1. Make reference to the **human rights** of persons with intellectual disability, including those rights contained in the Convention on the Rights of Persons with Disabilities.[45] Express reference should be made to the rights relating to the criminal justice system and access to services, as well as those relating to the position of persons with intellectual disability in society more broadly such as respect for inherent dignity, individual autonomy including the freedom to make one's own choices, independence of persons, non-discrimination, social inclusion and respect for difference and acceptance of persons with disabilities.

2. Emphasise that in general, section 32 applicants have **not been found guilty** or convicted of the charge/s to which their application relates and hence the Court cannot and should not make assumptions based on these charges about the guilt of the applicant, their the criminality/deviancy, or their future risk.

3. Emphasise the need **to avoid conflating disability and criminality** and that the presence of a disability or impairment (particularly individuals whose impairment can manifest in challenging behaviour, violence or anti-social behaviour) and a criminal charge does not equate to a general propensity to deviant behaviour or future criminal behaviour.

4. Note that persons with intellectual disability are, as a group, subject to **complex and multiple personal and structural sources of disadvantage and oppression** which can impact on their entry into and pathways through the criminal justice system. Persons with intellectual disability should not be punished, through s 32 conditional orders, for situations that have their roots in such disadvantage and oppression.

[45] Convention on the Rights of Persons with Disabilities, GA Res 61/106, 61st session, UN Doc A/61/611, opened for signature 30 March 2007 (entered into force on 12 May 2008).

5. Emphasise that, in light of the unconvicted status of the defendant, the voluntary and coercive civil means to effect engagement with services and treatment, the disadvantage and oppression that brings persons with intellectual disability into the criminal justice system, and the importance of the dignity, choice and independence of persons with disability, that the **Court should always consider discharging matters unconditionally** prior to making a conditional order.