Mental Health
Review Tribunal

NSW MENTAL HEALTH REVIEW TRIBUNAL SUBMISSION REGARDING CONSULTATION PAPERS 6 & 7:

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

Criminal responsibility and consequences (6)

Diversion (7)

Scope of Submission

This NSW Law Reform Commission currently has a wide reference concerning the needs of people with cognitive and mental health impairments in their interaction with the criminal justice system. This submission does not intend to canvass all of the issues raised in the various consultation papers, but has focussed on the question of appropriate diversion options from the Local and Superior Courts of NSW. In drafting this submission, the Tribunal in particular considered the following issues raised in consultation papers 6 and 7:

<u>Issue 6.20</u>

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?

<u>Issue 6.36</u>

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

<u>Issue 6.54</u>

Should the court be provided with a power to refer a person to the civil jurisdiction of the MHRT, or to another appropriate agency, if the person poses a risk of harm to no-one but him or herself?

<u>Issue 6.72</u>

Is there any reason why Local Court magistrates should not have power to make orders in respect of persons who are UNA or NGMI?

<u>Issue 6.73</u>

If the Local Court should have powers for cases involving persons who are UNA or NGMI, should they be the same as the powers of the District and Supreme Courts? If not, what should be provided?

<u>Issue 7.17</u>

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?

<u>Issue 7.19</u>

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?

<u>Issue 7.20</u>

(1) Should s 32(1)(b) of the MHFPA include a list of factors that the court must or can take into account when deciding whether it is appropriate to make a diversionary order?

(2) If s 32(1)(b) were to include a list of factors to guide the exercise of the court's discretion, are there any factors other than those discussed in paragraphs 3.28-3.41 that should be included in the list? Are there any factors that should be expressly identified as irrelevant to the exercise of the discretion?

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?

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?

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?

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?

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?

Issue 7.33

(1) Should the MHFPA expressly require the submission of certain reports, such as a psychological or psychiatric report and a case plan, to support an application for an order under s 32?

(2) Should the Act spell out the information that should be included within these reports? If so, what are the key types of information that they should contain?

Issue 7.37

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

Issue 7.38

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

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?

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?

Issue 7.42

(1) Should there be a statement of principles included in legislation to assist in the interpretation and application of diversionary powers concerning offenders with a mental illness or cognitive impairment?

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

The Tribunal intends to make a further submission regarding other matters raised in the consultation papers at a later time.

Existing Diversion Options

The *Mental Health (Forensic Provisions) Act 1990* currently provides for the diversion of offenders with a mental impairment from the Local Court under either s32 or s33.

Section 32

Under s32, a Magistrate can discharge a defendant who is developmentally disabled, suffering from a mental illness, or suffering from a mental condition for which treatment is available in a mental health facility either subject to conditions or unconditionally.

If the defendant is released subject to conditions and it becomes apparent in the following 6 month period that the defendant has failed to comply with one of those conditions, then they can be brought back before the Magistrate and dealt with as if they had not been discharged.

In the discussion document prepared for the Tribunal's meeting with the Law Reform Commission in May 2011 one of the questions posed was:

> Should the Tribunal have a role in the supervision of orders under s 32 of the MHFPA? For example:
>
> (a) Should the court have the power to refer a defendant to the MHRT in certain circumstances?
>
> (b) Should the MHRT 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?
>
> (c) Should there be provision in s 32 of the MHRT to adjust conditions attached to a s 32(3) order if a defendant has failed to comply with the order?

The Tribunal's view is that due to time frame considerations it would generally not be appropriate for people diverted under s32 to be supervised by the Tribunal, or for the Tribunal to have a role in amending the orders made by the Local Court, or dealing with the defendant if they breach a condition of their release.

The conditions the Court can make under this provision extend well beyond the scope of mental health legislation. In particular, the consequence of breaching a condition is not hospitalisation (as is the case with a breach of a Community Treatment Order) but the defendant being brought back to be dealt with by the Court on the original charges. The Tribunal is not a trier of fact, and it would be inappropriate for it to assume this role on behalf of the Courts.

In any event the relevant period is only 6 months and that imposes a practical limitation on the matter being referred to the Tribunal, and the Tribunal being able to connect and follow-up in any meaningful way in such a short time. Realistically the Tribunal would probably only get one review within that time frame and at best two if everything went smoothly.

Section 33

Under s33 a Magistrate may divert a defendant who is a mentally ill person by directing them to attend a mental health facility for assessment, or by discharging them on a Community Treatment Order, or by releasing them unconditionally. Again, the defendant may be brought back before the Magistrate within a 6 month period of being so diverted to be dealt with in relation to the charges.

Assessment

As was noted in the discussion paper, there are many issues surrounding the diversion of defendants to a mental health facility for the purpose of assessment. It is often the case that defendants are turned away from emergency rooms as not being a mentally ill person without having an assessment by a fully qualified psychiatrist. There can also be some confusion as to who is the responsible body for ensuring that the defendant is then brought back before the Magistrate (if this was so ordered) and where the defendant should be housed pending this appearance.

However, the issues experienced around this diversion option are not legislatively based but due to gaps in the interface between the health and judicial systems.

For example, while the Court Liaison Service operated by Justice Health has greatly improved the information provided to Magistrates in many locations, the quality of information Magistrates receive to inform their decisions across New South Wales varies. Equally, the reality of the system to which the defendant is being diverted into, and in particular its limitations, are not always understood by the Magistrates and the lawyers making the applications on behalf of their clients.

Community Treatment Orders

Similarly, the issues the Tribunal has become aware of with regard to the option of diversion through a Community Treatment Order under s33 are not legislatively based, but due to gaps in the interface between the health and judicial systems.

One set of issues surrounds the Magistrates understanding and application of the provisions of the *Mental Health Act 2007* when making a Community Treatment Order. This includes ensuring that there is an identified mental health service capable of implementing the order and that there is a clear treatment plan addressing the requirements set out in s54 of the *Mental Health Act 2007*, and having regard to the 12 month limitation on the duration of a Community Treatment Order.

A second set of issues surround the treating teams understanding of the mechanism by which (and at times a lack of willingness) to report breaches of the Community Treatment Order to the Court.

MHRT Recommendations

Despite the existing operational issues, the Tribunal supports the continuation of these diversion options for defendants appearing in Local Court on low level offences.

The Tribunal would also support the extension of supports such as those offered by the Court Liaison Service to ensure that Magistrates are provided with accurate advice and information. In addition, it is clear that Magistrates and lawyers working within this environment need ongoing education around mental health issues, the appropriate use of these diversion options, and limitations of the system into which the defendant is being diverted.

The Tribunal would also support a clear acknowledgement in the legislation that a breach of a Community Treatment Order within the meaning of the *Mental Health Act 2007* should be dealt with under those provisions, rather than it resulting in the person being brought back before a Magistrate. That is, if the defendant refuses to comply with a condition of the Community Treatment Order and there is a significant risk of deterioration in their mental or physical condition, then the steps for breach, including eventual hospitalisation, should be followed. A relapse of this nature is a natural part of mental health recovery and should not result in the defendant being brought back before the Magistrate to be dealt with in regard to the charges. Such a clear acknowledgement may go someway to alleviate concerns among practitioners regarding the consequences of reporting a breach.

To ensure that the Court remains advised, the legislation could also be amended to provide that the Court is notified if this occurs. In addition, while s63 of the *Mental Health Act 2007* currently provides that if a person subject to a Community Treatment Order is so breached, then they are to be brought before the Tribunal not later than 3 months after they are detained, in the case of persons on a Community Treatment Order under s33, the requirement could be varied to 'as soon as practicable' and the Court could also be provided with a notice of the Tribunal's determination regarding the defendants ongoing care and treatment.

Of course, if the defendant is so non-compliant such that the service is no longer capable of implementing the Community Treatment Order, then the Court should be advised, and the defendant brought before the Magistrate to be dealt with appropriately.

It may also be the case that the Magistrate imposes conditions which are not amenable to breach under the provisions of the *Mental Health Act 2007*. For example, a requirement as to abstinence from alcohol or drugs of abuse and engagement in appropriate counselling would commonly be an appropriate condition. However, non compliance with this condition does not necessarily give rise to a concern that the defendants mental or physical condition would deteriorate, although it may give rise to a concern of a risk of harm to others. It may then be appropriate for such breaches to also be brought to the attention of the Magistrate.

With regard to those diverted for assessment under s33, the Tribunal notes that should they be found to be a mentally ill person and detained in a mental health facilitythey are already subject to review by the Tribunal in accordance with the provisions of the *Mental Health Act 2007*.

Extending Diversion Options

As discussed at a meeting between the Mental Health Review Tribunal and NSW Law Reform Commission in May 2011, there is a need for a more substantial diversion option for diversion for more serious offenders in the Local Court, and for more minor offenders in the superior courts.

Local Court

With regard to the Local Court, it is our understanding that the current diversion options available under the *Mental Health (Forensic Provisions) Act 1990* are not used when a defendant appears on more serious offences. Equally, if the defendant has had prior diversions which have failed, then the Court is understandably concerned about diverting the defendant once again.

However, at present, given the lack of mental health services available across the correctional system, and particularly outside metropolitan Sydney, the reality is that unless you are an inmate who is so acutely unwell that you are prioritised for one of the few places available in the Long Bay Prison Hospital, you will receive limited care and treatment while detained.

This is particularly problematic for offenders with a mental illness serving short terms in custody as it is long enough so that their relationship with the community treating team is disrupted, but they are not in custody for a sufficient length of time for any substantial form of intervention and treatment or appropriate discharge planning.

The Tribunal could provide excellent (anonymous) case studies of persons who have had multiple short term stays in prison with previous failures under s33. Even though some are in metropolitan Sydney there are still real difficulties due to the frequent short duration incarcerations for either the gaol or community mental health services to engage with the patients, stabilise their mental state by ensuring the appropriate administration of medication and develop a therapeutic relationship with a treating team.

Superior Courts

With regard to the superior courts, we are increasingly seeing a wider range of offences among those found not guilty by reason of mental illness including relatively low level offences such as send threatening letters and making false accusations against police. In appropriate cases the higher courts should be able to divert the patient, rather than them entering the forensic mental health system which is geared to managing people of a much higher risk of harm to others.

This presents particular problems in light of the current one size fits all forensic mental health system. As these individuals are often not in need of such intensive care and treatment they are not prioritised for placement in the forensic mental health facilities. This absurdly results in them spending longer periods waiting to move through the system.

MHRT Recommendations

The Tribunal would recommend a more intensive diversion option be available in the following circumstances:

- Defendants appearing in the Local Court where the maximum sentence is 2 or more years of imprisonment;
- Defendants appearing in the Local Court where there is evidence of previous diversion attempts under s32/33 which have failed; and
- Defendants appearing in the superior courts where the judge deems diversion as an appropriate mechanism.

The Tribunal would recommend that this diversion option be available for both those who are unfit to stand trial and for those who would otherwise have been found not guilty by reason of mental illness (the Tribunal notes these findings are not available at present in the Local Court but that the same standard should apply).

The Tribunal would recommend that the Court be able to make time limited orders for the person to be subject to a ***supervised treatment order***, with the limits being:

- 2 years for defendants appearing the Local Court; and
- 3 years for defendants appearing in superior courts.

The Court should be able to make an order either that the person be:

- initially detained in a mental health facility or other place (not being a correctional centre); or
- if the Court is satisfied that there would be no significant risk of harm to the defendant or any member of the community and that safe and effective care is available in the community, released into the community subject to conditions.
- if the Court is satisfied that there would be no significant risk of harm to the defendant or any member of the community and that safe and effective care is available in the community, released into the community unconditionally.

Where a court decides to divert under these provisions it would effectively dispose of the charges.

The Court would need to be provided with appropriate information concerning the availability of services for either of these orders to be implemented.

The terms of the release conditions should be similar to those available for persons found not guilty by reason of mental illness, as currently set out in s75 of the *Mental Health (Forensic Provisions) Act 1990.*

Supervising Authority

The Tribunal would recommend that persons subject to supervised treatment orders become forensic patients for the purpose of the *Mental Health (Forensic Provisions) Act 1990* and remain so for the length of order or until they are unconditionally released, whichever occurs first.

This would mean that they would be reviewed by the Tribunal as soon as practicable after the Court makes the initial supervision order, and thereafter at least once every six months. The Tribunal could then make orders concerning:

- care and treatment
- place of detention (although correctional centres should be excluded for this category of forensic patient)
- transfer between places of detention
- leave from places of detention
- release, either subject to conditions or unconditionally
- breach and orders for apprehension
- classifying the person as an involuntary patient in the six month period before they would otherwise cease to be a forensic patient.

There would be many benefits to the supervision of people subject to such orders coming within the ambit of the Mental Health Review Tribunal rather than the creation of a separate specialist body, such as a Mental Health Court.

The Mental Health Review Tribunal is already a specialised body operating state-wide in reviewing the care and treatment provided to individuals subject to an order either under the *Mental Health Act 2007* and the *Mental Health (Forensic Provisions) Act 1990.* In terms of the best use of resources and the administrative system required to support any specialised body undertaking this work, it is preferable to extend the operation of the Mental Health Review Tribunal to cover the review of persons subject to a diversion scheme such as the one outlined above rather than to duplicate much of the work of the Tribunal by establishing a separate body.

In addition, there are real benefits gained from the one body reviewing the care and treatment of persons at all stages of their journey through the mental health system, both in the civil and forensic areas. Already, the Tribunal utilises its full record when reviewing the care and treatment of civil and forensic clients. This means that the Tribunal often has a more complete record (and arguably understanding) of the patient's history and progress through the system than the treating team. Being able to access and utilise this extensive knowledge base benefits both the patient and the community in ensuring that the care and treatment provided truly is the least restrictive option consistent with safe and effective care. In particular, the Tribunal is able to ensure that key issues relating to the mental and physical wellbeing of the patient are followed up despite any change in treating team members or the person's status as they transition between the forensic and civil systems.

Further Recommendations

The MHRT can currently make a Forensic Community Treatment order for forensic patients in the community. This has the advantage of the terms being more understandable to both clinicians and patients who may have been subject to Community Treatment Orders under the *Mental Health Act 2007*, and also allows for better transition of care from the forensic to the civil system as the same treatment plan and conditions can move with the patient as they move between the two systems.

The Tribunal would therefore propose that in addition to an alternative diversion option as set out above, the making of Forensic Community Treatment Orders should be available to the courts in appropriate circumstances including:

- In conjunction with a conditional release order following a finding of not guilty by reason of mental illness.
- In conjunction with a conditional release order following the setting of a limiting term should the legislation be amended to provide for this type of order.
- In conjunction with a conditional release order under a diversion scheme similar to that set out above.

Further, the s33 provision allowing for Courts to make Community Treatment Orders for patients not otherwise subject to review by the Tribunal should be extended to the following circumstances:

- For those found to have committed the offence at a special hearing but for whom the Court would not have imposed a limiting term.
- If the Court is unconditionally releasing someone following a finding of not guilty by reason of mental illness.
- If the Court is unconditionally releasing someone following the setting of a limiting term should the legislation be amended to provide for this type of order.
- If the Court is unconditionally releasing someone under a diversion scheme similar to that set out above.

As is the requirement under s33, were these mechanisms to become available, the Court would need to be required to have regard to the same criteria and requirements for the making of a Community Treatment Order under the *Mental Health Act 2007*, particularly in regard to the availability of a service to implement the order and having an appropriate treatment plan prepared by the service.

Statement of Principles

Whatever form the diversion options for the Local and Superior Courts ultimately take, the Tribunal would support the creation of a clear statement of principles to assist in the interpretation and application of diversionary powers.

The Tribunal notes that in relation to the care, treatment, detention and release of forensic patients under the *Mental Health (Forensic Provisions) Act 1990*, section 76B of that Act makes it clear that the principles set out in section 68 (Principles for care and treatment) of the *Mental Health Act 2007* apply.

The Tribunal would recommend that these principles should similarly apply to those subject to a diversion option from either the Local or Superior Courts. As is the case with forensic patients, these considerations should be balanced against the safety of the patient or any member of the public to ensure that the appropriate diversion option is selected and appropriate conditions attached.