



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Mr Paul McKnight  
Executive Director  
New South Wales Law Reform Commission  
GPO Box 5199  
SYDNEY NSW 2001

*By email to nsw\_lrc@agd.nsw.gov.au*

Dear Mr McKnight,

**Review of the Criminal Law and Procedures in New South Wales that Apply to People with Cognitive and Mental Health Impairments**

Thank you for the opportunity to make a submission as part of the Review of criminal law and procedures that apply to people with mental illness and/or cognitive impairments. The robust protection of the rights of the most vulnerable persons among us is a hallmark of a humane and just society, and we welcome the Review.

While the Criminal Law Committee of the Law Society (Committee) has reviewed the Consultation Papers issued by the Commission, and its response to the questions raised is attached, I would like to take the opportunity to offer some brief additional comments on the subject of the Review.

In the first instance, the Law Society would like to commend the wide ambit of the Commission's approach to the subject matter of the Review. The Commission has undertaken a detailed inquiry into the technical amendments needed to modernise our State's statutes, and into the legal principles underpinning the legislation. However, we welcome the fact that the broader social implications of disadvantage and the important issue of agency resourcing have also been examined.

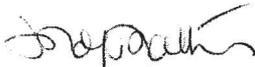
Within the broad scope of the Review, the Commission has also scrutinised the procedural provisions (such as section 33 of the *Mental Health (Forensic Provisions) Act 1990*) that operate in New South Wales with respect to people who are a danger to themselves or to others, and the Committee has offered its views in relation to those provisions. Given the significance of these powers, however, it may be apposite to highlight the fact that the majority of people who live with a mental illness or cognitive impairment do so without the need for state-based strictures.

These procedural provisions are vital, and should be safeguarded, however they must always be finely attuned to the protection of the rights of the individual.

Finally, in response to the questions posed, the Criminal Law Committee has called for agencies involved in the assessment, reporting and treatment stages to be granted a legal mandate for their involvement, together with resources to enable them to provide their much-needed services. It is arguably the case that individuals with cognitive and mental health impairments come in contact with the criminal justice system because the public health and other social systems have failed them. As a consequence, it is important to ensure that a treatment-oriented approach is encouraged at every point of their contact with the criminal justice system, and that this process is adequately resourced. The role of legislation in relation to those with cognitive and mental impairments must be focused on treatment as a first priority, and service provision resourced so that it may follow where the law leads.

Again, thank you very much for the opportunity to contribute to this Review. The Society is grateful for the opportunity to comment and would welcome an opportunity to be involved in any ongoing process.

Yours sincerely,



Mary Macken  
**President**

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

New South Wales Law Reform Commission Reference

### **A Submission by the Criminal Law Committee of the Law Society of New South Wales**

#### **Consultation Paper 5: An overview**

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

Yes. A broad umbrella definition of mental health impairment, incorporating mental illness and cognitive impairment, should be included in the *Mental Health (Forensic Provisions) Act 1990* (MHFPA). Within the scheme of the MHFPA, the definition would establish threshold criteria, and the accused person would still need to meet the second limb of any given test.

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

Yes. The Committee is of the view that it would be appropriate to state that mental impairment includes a mental illness, cognitive impairment, or personality disorder, however and whenever caused, whether congenital or acquired.

The Committee supports an inclusive definition.

**Issue 5.3**      **Should the term “mental illness” as used in Part 4 of the MHFPA be replaced with the term “mental impairment”?**

Yes, “mental impairment” could be adopted in place of “mental illness” for the reasons set out by the Commission at p 71 (CP5), for the purposes of Part 4 of the Act, provided that it is a term that is defined, where the definition is broad and inclusive.

**Issue 5.4 Should the MHFPA continue to refer to the terms “mental condition” and “developmentally disabled”? If so, in what way could the terms be recast?**

If retained, the terms should be recast in the manner set out in response to Issue 7.13 (“mental condition”) and Issue 7.9 (“developmental disability”). However, there is no need to continue to refer to these terms if a broad definition of “mental health impairment” or “mental impairment” is adopted. The Committee refers the Commission to the responses made to Issues 5.1, and 7.14.

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

The Committee supports the proposed definition of cognitive impairment, noting that this term could usefully be a defined term even if an umbrella definition is ultimately adopted.

**Issue 5.6 Should the MHFPA be amended to create a general power of the court to order an assessment of an offender at any stage during proceedings?**

If so,

**(a) who should conduct the assessment?**

**(b) what should an assessment report contain?**

**(c) should any restrictions be placed on how the information contained in an assessment report should be used?**

Yes. The Court should have a general power to order an assessment of an offender at any stage during the proceedings, provided that there is a designated agency (such as Justice Health, Department of Ageing Disability and Home Care, or any other appropriate body) which is legally mandated but also funded to prepare the reports and also to prepare and monitor the care plans.

Self-incriminating statements should not be admissible. The Committee considers appropriate protections in this regard to be essential. It would appropriate to include provisions analogous to

ss 315 – 319, inclusive, of the *Mental Health Act 2000* (Qld) in the MHFPA.

### **First Point of Contact – The Police**

In addition to the specific issues raised by the NSW Law Reform Commission, the Committee wishes to highlight concerns regarding the first point of contact that an offender (or alleged offender) will have with the criminal justice system. The Committee is concerned about the inability on the part of members of the NSW Police Force to appropriately deal with people with a mental illness or cognitive impairment. The following aspects of police conduct are of specific and practical concern:

- Overbearing and violent actions against people with a mental illness or cognitive impairment by police officers in the course of apprehension.
- Little or, in some cases, no attempt to ensure those persons' rights under Part 9 *Law Enforcement (Powers and Responsibilities) Act 2002*. When dealing with a person with an intellectual disability the police should contact the Criminal Justice Support Network which has a 24 hour phone service. This ensures access to a support person who can link the person with an intellectual disability to legal advice.
- Disregarding the rights of such people in respect of interviews by:
  - i. refusing to obtain support persons; and
  - ii. asking inappropriate and leading questions designed to elicit answers from those unable to stand pressure.
- A lack of effort by many Custody Managers to ensure the rights of people with a mental illness or cognitive impairment are respected, particularly in the interviewing process. For example, Custody Managers have been known not to call a support person where such support is required.

There is a need for appropriate training to address how to deal with people with a mental illness or cognitive impairment. The Committee is of the view that this needs to be delivered to police officers in training at the Police Academy, and reinforced through ongoing training and the supervision and training of graduates and existing police officers.

### **Consultation Paper 6: Criminal responsibility and consequences**

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

The law on unfitness to be tried is a protection for an accused person. The fact that the defence, the prosecution or the judge may raise the issue of unfitness is a legacy of the historical situation whereby anyone with knowledge about a defendant's unfitness could raise the issue at trial. Since the nineteenth century all aspects of criminal law and procedure have undergone a process of formalisation, and the law on unfitness has become less a substantive protection for defendants and more a technical aspect of the trial process. Despite this, it remains the case that the trial of an unfit person is an abuse of court process. As such, it is in the interests of justice, broadly conceived, to require the court to consider the issue of fitness whenever it appears.

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

As a protection for an accused person, and due to its intimate connection to the integrity of the trial process, it is in the interests of justice that the standard for determining fitness to be tried remains sufficiently robust in the current era. In this respect, the criminal law standard now falls short, particularly when compared with the standard for decision-making competency adopted in the civil law. The development of a more robust set of criteria for a finding of unfitness would ensure that a larger number of defendants would be able to rely on the protection offered by the law on unfitness.

**Issue 6.3 Should the test for fitness to stand trial be amended by legislation to incorporate an assessment of the ability of the accused to make rational decisions concerning the proceedings?**

**If so, should this be achieved by:**

**(a) the addition of a new standard to the Presser formulation, or**

**(b) by amendment of relevant standards in the existing formulation?**

The proposed inclusion of a general requirement that the accused be able to make rational decisions in relation to his or her participation in the trial alongside existing Presser criteria is attractive. However, subsuming the Presser standards into a general principle that the accused should be able to "participate

effectively” is preferable because it is likely to provide greater protection to vulnerable defendants.

As the NSW Law Reform Commission is aware, reform in the direction of the civil law standard of competency has recently been proposed by the Scottish Law Commission, which reasoned that a test of “effective participation” in criminal trials would meet European Convention on Human Rights standards on a fair trial (2004: Paragraph 4.30). This thicker idea of capacity is also used as a basis for determining competency to stand trial (so called) in jurisdictions in the United States.

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

This proposal – combining the advantages of a general standard (effective participation) and the specifically enumerated Presser criteria – is attractive. As the effective participation standard is likely to provide greater protection to vulnerable defendants, it would form a solid base on which the Presser criteria may rest. The latter would then provide useful guidance to the judiciary. The Committee supports this proposal (subject to the comments below, in relation to Issue 6.5).

[Issue 6.5](#) **Should the minimum standards identified in Presser be expanded to include deterioration under the stress of trial?**

As the Presser criteria can accommodate deterioration under the stress of the trial, it might be argued that an addition to the criteria on this point is unnecessary. However, bearing in mind that the Presser criteria direct judicial decision-making, it would be useful to have judicial attention specifically directed to the possibility of deterioration under the stress of the trial.

[Issue 6.6](#) **Should the minimum standards identified in Presser be altered in some other way?**

No.

[Issue 6.7](#) **Should the procedure for determining fitness be changed and, if so, in what way?**

Yes. The current procedure for determining fitness should be streamlined as proposed by the NSW Law Reform Commission.

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

As proposed by the NSW Law Reform Commission, a finding of unfitness should be made exclusively by a court with input from expert witnesses as appropriate. Decisions that involve considerations about the person's clinical needs, and community setting or facility should be made by the MHRT.

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

Yes. The ability to consent to findings of unfitness is in the interests of both defence and prosecution.

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

Yes.

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

Fitness procedures should apply in Local Courts. While a defendant can make a s 32 application, the Magistrate is required to exercise their discretion having regard to not only the nexus between the mental illness and the offending behaviour, but also treatment plans and appropriateness in the light of matters such as seriousness of offence and criminal history. Although a client may be unfit, where a magistrate determines that a s 32 application is inappropriate, the matter is subject to a criminal justice response as there is no other diversionary procedure.

The NSW Law Reform Commission proposal for a simplified fitness procedure in Local Courts is supported.

**Issue 6.12 Should legislation provide for the situation where a committal hearing is to be held in respect of an accused person who is or appears to be unfit to be tried? If so, what should be provided?**

Legislation should not prevent a committal hearing from proceeding so as to provide an opportunity for early discharge, or to screen and test the evidence. However, the proposal that legislation confer powers on a magistrate to determine fitness where there is insufficient evidence for committal for trial is supported. If unfit, the accused could be committed for a special hearing, or interim orders could be made to allow time for the accused person to become fit, if appropriate.

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

Subject to the comments below, in relation to Issue 6.14, the special hearing procedure should continue. It is essential that a finding of unfitness not operate to deny an accused the opportunity to be acquitted.

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

The Committee concurs with the NSW Law Reform Commission that the requirement to establish a prima facie case provides a less cumbersome means for providing the accused with an opportunity for acquittal than proceeding to a full special hearing. The Committee also agrees that this requirement would be effective in relation to summary trials.

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

Yes.

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

Yes. The court should have a broad discretion to modify the way in which proceedings are conducted.

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

Yes. The court should have the power to excuse the accused from attending all or part of the special hearing.

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

This substitution is desirable as it is a more accurate encapsulation of the finding of the court.

[Issue 6.19](#) **Should a verdict of “not guilty by reason of mental illness” continue to be available at special hearings? Are any additional safeguards necessary?**

No, this verdict option should be excluded for the reasons given by the NSW Law Reform Commission.

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

Subject to the responses below, the current defence of mental illness should be retained. It should however be supplemented with enhanced powers of diversion into treatment.

[Issue 6.21](#) **Should legislation expressly recognise cognitive impairment as a basis for acquitting a defendant in criminal proceedings?**

Yes.

**If yes, should the legislation expressly include cognitive impairment as a condition coming within the scope of the defence of mental illness, or is it preferable that a separate defence of cognitive impairment be formulated as a ground for acquittal?**

Legislation should expressly include cognitive impairment as a condition coming within the scope of the defence of mental illness.

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

No.

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

Yes, for the reasons the NSW Law Reform Commission gives. Whether an impulse is one that could not be resisted, or one that the accused simply did not resist, is an evidentiary issue. It is possible to leave this question of fact to the jury and to open the defence of mental illness out to include “irresistible impulse.”

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

Yes. However, it would be unfair to measure the criminal responsibility of a defendant who acts under a delusional belief as if the facts were really as the defendant believed them to be.

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

The contemporary defence of mental illness (or insanity, as it is known in some jurisdictions) has long been recognised as overly narrow (see for example Butler Report 1975: Paragraph 18.7). With its restricted base in cognitive impairment, the M’Naghten defence of mental illness excludes many defendants who, although they do not come within the Rules, are nevertheless so disordered that they should not be held responsible for their actions (Butler Report 1975: Paragraph 18.5). However, perversely, the defence of mental illness might also be said to be too broad. In England and Wales, for instance, the effect of an expansive approach to the phrase “disease of the mind” in the M’Naghten Rules has been twofold. First, the interpretation of “disease of the mind” as a “disease which affects the proper functioning of the mind” (*R v Hennessy* [1989] 1 WLR 287 at 292) has led to the odd situation where some physical disorders, such as hyperglycaemia (*Hennessy*), sleepwalking (*Burgess*) and epilepsy (*Sullivan* [1983] 2 All ER 673) fall within the ambit of “disease of the mind” and thus within the bounds of the insanity defence.

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

The requirement that a defendant seeking to rely on the insanity defence suffer from a “disease of the mind” has become a key feature of the law on mental incapacity as it marks the boundary between insanity and automatism and thus the boundary between the special verdict and an ordinary acquittal. However, the phrase has a spurious technicality and does not correspond to any scientific or medical categorisation or aetiology.

The requirement that a defendant seeking to rely on the defence of mental illness must suffer from a “defect of reason” has been narrowly interpreted to refer to cognitive defects. As the Butler Committee noted in 1975, this component of the insanity defence excludes many individuals, such as those with mood disorders, who can only be described as ‘mad’ (1975: Paragraph 18.6). For the Butler Committee, the ‘main defect’ of M’Naghten insanity lay in the fact that it relies on a ‘now obsolete belief in the pre-eminent role of reason in controlling social behaviour’ (Butler Report 1975: Paragraph 18.6).

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

If the M’Naghten Rules were reformulated in legislation, the option of satisfying the defence by lack of knowledge of the nature and quality of the act should be retained and expanded by reference to capacity to know. On the basis that it is possible that this formulation is slightly broader than the common law, such a change would be welcome.

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

If the M’Naghten Rules were reformulated in legislation, the legislation should recognise, as one way of satisfying the defence, a lack of knowledge that the criminal conduct was wrong. Again, on the basis that the proposed reformulation

would broaden the scope of the defence, reference to capacity to know something to be wrong is welcome.

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

While reforms relating to the procedure relating to the defence of mental illness have been instituted, the defence itself has been remarkably resistant to reform. The cognitive competency approach is preferable to the approach based on symptoms and presumed causation. This is because the former provides a broader base for the defence, encompassing disorders of volition as well as cognitive disorders.

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

Yes, in those circumstances in which the defendant has a medically-recognised clinical condition such as addiction or alcoholism.

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

The defence of mental illness should apply to a defendant’s involuntary act if that involuntary act was caused by a disease of the mind.

The issue of whether there should be a statutory test for determining involuntary acts that result from a disease of the mind as opposed to involuntary acts that come within the scope of the defence of automatism is a difficult one.

The precise boundary between insanity and automatism has resisted definitive judicial enunciation, arguably because of the policy drivers governing the development of this area of the law. The effect of judicial interpretation of “disease of the mind” is to exclude those defendants whose incapacity (“defect of reason”)

is the result of an external as opposed to an internal cause. The presence of an external trigger, such as a diabetic's injection of insulin, means that a defendant can rely on the defence of (non-insane) automatism (see, for example, *R v Quick & Anor* [1973] 3 All ER 347). As Professor R D Mackay has argued, the scope of the phrase "disease of the mind" has ensured that most states of automatism fall within the bounds of insanity (rather than non-insane automatism) and thus result in special verdicts as opposed to acquittals. Although the internal/external distinction built on the concept of "disease of the mind" might be said to be an intellectually tidy arrangement, it is arguably an artificial construction of exculpatory mental incapacity which produces arbitrary results. Any definition of involuntary acts that result from a disease of the mind as opposed to involuntary acts that come within the scope of the defence of automatism would be bound to perpetuate some of the difficulties in this area as it would perpetuate the existing terminology.

In light of the above, one approach might be to define acts that come within the scope of the defence of automatism (leaving insanity as the "catch all" defence). Such a definition might usefully follow the more elaborate UK jurisprudence and adopt a definition whereby a defendant will be able to rely on the defence of automatism if he or she meets three conditions: the cause of the automatic or automatistic behaviour is "external", the defendant is not "at fault" for getting into a state of automatism, and he or she lost "total control" over his or her actions. This definition would preserve the unique feature of automatism – that it does not prescribe a particular disability (such as insanity or intoxication) as a baseline condition for exculpation – and thus ensure some flexibility in this area of the law.

[Issue 6.32](#) **Should the MHFPA be amended to allow the prosecution, or the court, to raise the defence of mental illness, with or without the defendant's consent?**

Yes, only to the extent that the court may then seek expert evidence about the defendant's condition.

[Issue 6.33](#) **Should the MHFPA be amended to allow for a finding of "not guilty by reason of mental illness" to be entered by consent of both parties?**

Yes.

[Issue 6.34](#) **Should the court have the power to order an assessment of the defendant for the purpose of determining whether he or she is entitled to a defence of mental illness?**

Yes.

[Issue 6.35](#) **Should a process other than an ordinary trial be used to determine whether a defendant is not guilty by reason of mental illness?**

No. It is important for lay people to continue to be involved in decision-making in relation to the defence of mental illness for the legitimacy of the special verdict, and, more generally, for the value of lay participation in criminal justice.

[Issue 6.36](#) **Should the defence of mental illness be available generally in the Local Court and, if so, should it be available in all cases?**

There has long been confusion about whether the defence of mental illness was available to defendants tried summarily. The *Criminal Lunatics Act 1800* had restricted the special verdict to offences of treason, murder and felony, and, despite its extension to misdemeanours via the 1840 Act, it was generally assumed that the insanity defence was unavailable in magistrates' courts. However, arguably, this assumption was incorrect. Extending the defence of mental illness to defendants tried summarily would correct this historical accident.

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

Yes.

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

Yes, as proposed by the NSW Law Reform Commission.

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

A preferred reformulation is: "so substantial as to warrant liability for the killing being reduced from murder to manslaughter."

[Issue 6.40](#) **Should the defence of substantial impairment be retained or abolished? Why or why not?**

The defence of substantial impairment should be retained in its current form. The more overly morally-evaluative form of the

defence currently in place is attractive as it clearly demarcates the role of the lay fact-finder, and thus reduces the risk of “trial by expert.”

There is an argument for a slight reformulation of the defence so as to expressly encompass developmental immaturity for a defendant under 18.

In their recent review of the law of homicide, the Law Commission for England and Wales set out a detailed proposal for a reformulated diminished responsibility defence (as it is known in the UK). The Law Commission proposed that diminished responsibility be retained as a partial defence, reducing first degree murder to second degree murder according to their proposed restructure of homicide (2006: Paragraph 5.83). Given that the mandatory life sentence would apply to first degree murder, a successful diminished responsibility defence would continue to provide a means of introducing discretion in sentencing. The Law Commission proposed modernising the definition of the defence ‘so that it is clearer and better able to accommodate developments in expert diagnostic practice’ (2006: Paragraph 5.107). The reformulated defence reflects an undesirable and arguably inaccurate assumption about the causal relationship between diminished responsibility and killing. The Law Commission’s reformulated defence provides a partial defence where a defendant was unable to understand the nature of his or her conduct, or where he or she was unable to form a rational judgment or his or her self-control was ‘substantially impaired by an abnormality of mental functioning arising from a recognised medical condition,’ or developmental immaturity for a defendant under 18, where that abnormality or developmental immaturity ‘provides an explanation for the defendant’s [homicidal] conduct’ (2006: Paragraph 5.112).

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

There is a continuing need for infanticide to operate as both an offence and a (partial) defence. It should be able to be raised by either the prosecution (before trial, in charging infanticide), or the defence (in pleading it in response to a murder charge).

This has been the approach taken in England and Wales. The most recent set of reform proposals developed in the UK have been developed by the Law Commission for England and Wales, and follows the same line as the UK’s Criminal Law Revision Committee. In *A New Homicide Act for England and Wales?* (Consultation Paper No. 177, 2006), the Law Commission considered the abolitionist position, and three

options (minimal, moderate and radical) for retaining but reforming infanticide law. The Commission made a provisional proposal in favour of minimal reform.

Under their proposal, the *Infanticide Act 1938* provision would remain in its current form but the reference to lactation would be removed, and the age limit of the child victim would be raised to two years (2006: Paragraph 9.75-9.78). In rejecting the moderate and radical reform proposals, the Law Commission rejected a requirement that the act or omission leading to the infant's death be causally connected to the defendant's 'disturbance of mind' (Paragraph 9.84). Without a causal requirement, environmental factors which may influence a defendant's state of mind may be taken into account. The Law Commission stated that the cause of the mental disturbance should have only an 'evidential relevance, that is, going to whether or not the mind was disturbed or disordered' (Paragraph 9.63). The Law Commission concluded that this approach ensures that evidence supporting infanticide can evolve as medical practice evolves (Paragraph 9.63).

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

No.

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

The infanticide offence/defence should be retained. However, it should be recast.

One possible option for recasting the offence/defence is provided by the UK's Criminal Law Revision Committee (CLRC)'s Fourteenth Report on Offences Against the Person, in which a majority of the Committee recommended retaining and extending the offence/defence of infanticide (1980: Paragraph 102). The Committee acknowledged that the 'medical principles' underlying the *Infanticide Act 1938* are 'not proven' but considered that the 'types of situations' that the courts are currently taking into account in cases of infanticide, such as family stress and poverty, 'should continue to fall within the ambit of the offence' (1980: Paragraph 105). According to the CLRC, each of these considerations 'rests on a mental disturbance resulting in a real sense from childbirth' (1980: Paragraph 105). In its report, the CLRC stated that 'in cases now dealt with as infanticide it is a matter of human experience that the mental disturbance is connected with the fact of birth...even where it is primarily related to environmental or

other stresses consequent upon the birth' (1980: Paragraph 105). The CLRC expressed concern that the connection between these relevant factors and mental disturbance 'might be difficult to establish by medical evidence if expressed in a modern statute as a direct consequence of the birth' (1980: Paragraph 105). On this basis, the CLRC concluded that the infanticide provision should be broadened to provide that the balance of a woman's mind was disturbed 'by reason of the effect of giving birth or circumstances consequent upon that birth' (1980: Paragraph 105).

[Issue 6.44](#) **Should the MHFPA be amended to provide a mechanism and/or requirement for the court to notify the MHRT of the terms of its order under s 27 of the MHFPA?**

Yes, the MHFPA should be amended to provide a mechanism and requirement for the court to notify the Mental Health Review Tribunal (MHRT) of the terms of its order under s 27 of the MHFPA.

[Issue 6.45](#) **To what extent (if any) should sentencing principles continue to apply to the court's decision whether to detain or release a person who is UNA?**

Sentencing principles are not an appropriate basis for deciding whether or not to detain a person who is 'unfit to be tried and not acquitted' (UNA). The length of time for which a UNA remains a forensic patient should be referable to the need to protect others from serious harm.

However, sentencing principles continue to operate as a limit on, but not as a basis for, the court's discretion to detain the person.

The current "all or nothing" approach that is employed in relation to persons who are UNA – unconditional release on the one hand or detention in a "mental health facility" or "place other than a mental health facility" (i.e. prison) on the other – is unsatisfactory. As noted in the consultation paper, in practice it is rare for the court to regard unconditional discharge as an acceptable outcome in a case where a sentence of imprisonment would have been imposed at an ordinary trial. For this reason it is worth considering the possibility of conditional release orders, like those available under s 39 for persons who are NGMI.

[Issue 6.46](#) **Should the MHFPA be amended to provide additional guidance to the court in deciding whether to order detention or release of persons found NGMI?**

Yes.

[Issue 6.47](#) **Should the MHFPA be amended to provide guidance to the court in relation to the conditions that may be attached to an order for conditional release?**

Yes.

[Issue 6.48](#) **Is there any reason to retain a distinction between the orders available to the court in cases where the person is UNA or NGMI?**

No. There are no reasons of substance to retain a distinction between the orders available to the court in cases where the person is UNA or 'not guilty on the ground of mental illness' (NGMI).

[Issue 6.49](#) **If the present frameworks are to be retained:  
(a) should the definition of "forensic patient" be amended to include a person who is UNA and in respect of whom a non-custodial order is made?**

Yes.

**(b) should the MHFPA be amended to provide a power for the court to order conditional release if it does not make an order for detention under s 27?**

Yes.

[Issue 6.50](#) **What orders should be available to the court?**

Option D is most appropriate. However, the court should retain the ability to limit detention of the person, or the period or place of detention of a person (e.g. not limited to prison).

[Issue 6.51](#) **Should the same orders be available both for persons who are UNA and for those who are found NGMI?**

Yes.

[Issue 6.52](#) **What orders should result in a person becom[ing] a "forensic patient"?**

The person would become a "forensic patient" if detained or conditionally released by the court.

[Issue 6.53](#) **To what extent (if any) should the court take into account a risk of harm to the person him- or herself, as distinct from the risk (if any) to other members of the community?**

It is inappropriate for a criminal court take into account a risk of harm the accused poses to him- or herself, as distinct from the risk (if any) to other members of the community, subject to the comments made in relation to Issue 6.54. It would be more appropriate to provide mechanisms for the court to refer a person in need of care and who is no threat to others into the civil health system or other care arrangements.

[Issue 6.54](#) **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?**

Yes.

[Issue 6.55](#) **What kind of possible “harm” should be relevant to decisions by the court to detain or release persons who are UNA or NGMI?**

“Harm” relevant to decisions by the court to detain or release persons who are UNA or NGMI should be serious physical harm occasioned by criminal conduct to other members of the community.

[Issue 6.56](#) **Should “harm” be defined in the MHFPA?**

Yes.

[Issue 6.57](#) **How should the relevant degree of risk of harm be expressed in the MHFPA? Should it be defined?**

The relevant degree of risk of harm should be defined in the MHFPA as likely to pose a significant risk of serious physical harm occasioned by criminal conduct to other members of the community.

[Issue 6.58](#) **Should a presumption in favour of detention continue to apply when courts are making decisions about persons who are UNA or NGMI?**

No.

[Issue 6.59](#) **When deciding what order to make in respect of a person who is UNA or NGMI, should the court be required to apply a principle of least restriction consistent with:**  
**(a) the safety of the community?**  
**(b) the safety of the person concerned? and/or**  
**(c) some other object(s)?**

When deciding what order to make in respect of a person who is UNA or NGMI, the court should be required to apply a principle of least restriction consistent with the safety of the community.

[Issue 6.60](#) **In relation to court proceedings involving people who are UNA or NGMI, are the current provisions concerning notification to, and participation by:**  
**(a) victims; and**  
**(b) carers**  
**adequate and appropriate?**

Yes, in the context of the criminal justice response.

[Issue 6.61](#) **What principles should apply when courts are making decisions about persons who are UNA or NGMI?**

Apart from the principle of least restriction, the only principle that should apply when courts are making decisions about persons who are UNA or NGMI is the public interest.

[Issue 6.62](#) **What factors should courts be allowed and/or required to take into account when making decisions about persons who are UNA or NGMI?**

A factor highlighted by the NSW Law Reform Commission that courts should be required to take into account when making decisions about persons who are UNA or NGMI, is lack of appropriate detention facilities.

[Issue 6.63](#) **In cases where the person is UNA, should the possibility that the person will become fit to be tried be a sufficient basis for the court to make an order of some kind?**

No. There should be no restrictions on the person's liberty unless it is warranted in the public interest.

[Issue 6.64](#) **Should legislation specify what standard of proof applies to facts which form the basis of the court's decision as to what order to make in respect of a person who is UNA or who has been found NGMI? If so, what standard of proof should be specified?**

Factual matters adverse to the person should be established beyond reasonable doubt, and the balance of probabilities to favourable matters.

[Issue 6.65](#) **What powers or procedures (if any) should be provided to assist the court in determining the appropriate order in cases where the person is UNA or NGMI?**

The court would be aided by the establishment of a court liaison service, particularly in relation to resources or facilities available to implement detention orders, or lack thereof.

[Issue 6.66](#) **Should legislation provide a mechanism for the court to notify the MHRT of its final order in cases where the person is UNA or NGMI?**

Yes.

[Issue 6.67](#) **In what circumstances (if any) should the Criminal Appeal Act provide for the person the subject of the proceedings to appeal against:**  
**(a) a verdict of NGMI;**  
**(b) orders by the court in cases where the person is NGMI;**  
**(c) non-acquittal at a special hearing?**  
**(d) orders by the court in cases where the person is UNA?**

The *Criminal Appeal Act* should provide for the person the subject of the proceedings to appeal against:

- (a) a verdict of NGMI, and
- (b) orders by the court in cases where the person is NGMI whether or not the defence was raised by the person found NGMI.

Although an appeal against a verdict of NGMI would be rare, there should be provision for it, consistent with the broad interpretation of the Court of Criminal Appeal. The verdict of NGMI should be deemed to be a conviction, and as a result, the person would be able to appeal against an order by the trial court for detention or conditional release consistent with the human rights principle that a person who is detained is entitled to judicial review of the lawfulness of the detention.

As is currently the case, the *Criminal Appeal Act* should provide for the person the subject of the proceedings to appeal against:

- (a) non-acquittal at a special hearing, and
- (b) orders by the court in cases where the person is UNA.

[Issue 6.68](#) **In what circumstances (if any) should the Criminal Appeal Act allow the prosecution to appeal against:**  
**(a) a verdict of NGMI?**  
**(b) orders by the court in cases where the person is NGMI?**  
**(c) orders by the court in cases where the person is UNA?**

The Committee supports the current regime relating to rights of appeal.

[Issue 6.69](#) **Should the Criminal Appeal Act be amended to require the Court of Criminal Appeal to consider the safety of the person and/or the community prior to making an order for release?**

The *Criminal Appeal Act* should be amended to require the Court of Criminal Appeal to consider the safety of the community prior to making an order for release.

[Issue 6.70](#) **What manner of appeal is most appropriate for reviewing:  
(a) findings; and  
(b) consequent orders in cases where the person is UNA or NGMI?**

The manner in which cases involving people who are UNA or NGMI should be the same as ordinary appeals – by way of rehearing of evidence which was before the trial court with a discretion in the court to allow fresh evidence.

[Issue 6.71](#) **Should any ancillary powers be provided to assist the Court of Criminal Appeal in deciding such cases?**

No.

[Issue 6.72](#) **Is there any reason why Local Court magistrates should not have power to make orders in respect of persons who are UNA or NGMI?**

No.

[Issue 6.73](#) **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?**

Yes, the Local Court should have the same as the powers of the District and Supreme Courts for cases involving persons who are UNA or NGMI.

[Issue 6.74](#) **Should the MHFPA provide for a forensic patient to apply for a review of his or her case?**

The MHFPA should specifically provide for the right of a forensic patient to apply for a review of his or her case. The incidence of

frivolous applications could be minimised or avoided by attaching requirements similar to those currently found in s 65(3) of the *Mental Health Act 2007* (MHA) in relation to the variation or revocation of orders by the MHRT.

**Issue 6.75 Are the provisions regarding the conditions that may attach to leave or release adequate and appropriate? If not, what changes should be made?**

Provisions regarding the conditions that may attach to leave or release are adequate and appropriate.

However, a frequent practice of the MHRT to apply “drug testing” as a standard condition, although the forensic patient has no history of alcohol or drug abuse, is regarded as unfairly onerous.

**Issue 6.76 Should the MHFPA be amended to abolish the requirement for the MHRT to notify**

- **the Minister for Police;**
- **the Minister for Health; and/or**
- **the Attorney General**

**of an order for release?**

The MHFPA should be amended to abolish the requirement for the MHRT to notify the Minister for Police. As the NSW Law Reform Commission notes, this is a relic of the previous regime. It is inconsistent with the current legislative framework.

**Issue 6.77 Should legislation provide specific roles for an agency or agencies in relation to supporting and supervising forensic patients in the community?**

No.

It is assumed that s 76K(1) of the MHFPA is worded in general terms in recognition of the resourcing constraints of agencies. Legislating specific roles for an agency or agencies in relation to supporting and supervising forensic patients in the community would not resolve the issue of lack of resources. It may even work to silo the roles of each agency. This would diminish the current arrangements in which, on the whole, agencies work collaboratively in providing services to forensic patients who have been released.

**Issue 6.78 Are there any legislative changes that should be made in relation to the making and implementation of orders for:**

- leave; and/or
- conditional release

**of forensic patients?**

Equivalent requirements should apply where a forensic patient is being released, regardless of where they are being released from a mental health facility, or from a place other than a mental health facility.

A legislative change should be made to require that prior to releasing a person from a place other than a mental health facility, the “authorised medical officer” must take “all reasonably practicable steps” to make arrangements for a person’s release or leave, in consultation with the person, the person’s carer and relevant agencies.

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

The current procedures are appropriate.

**Issue 6.80 Are the current provisions concerning notification to, and participation by victims in proceedings of the MHRT adequate and appropriate? If not, what else should be provided?**

The current provisions concerning notification to, and participation by victims in proceedings of the MHRT are not adequate.

Legislation should provide for the views of carers to be taken into account when decisions are being made about forensic patients, particularly in regard to their release. However, the MHRT should exercise discretion to limit the attendance of third parties where it is inappropriate for them to be present due to privacy issues, such as when a patient’s medical history is being detailed.

**Issue 6.81 Are the current provisions concerning notification to, and participation by carers in proceedings of the MHRT adequate and appropriate? If not, what else should be provided?**

There should be a formal requirement for carers to be notified about proceedings in the MHRT.

[Issue 6.82](#) **Are the current provisions relating to people who are UNA who become fit to be tried adequate and appropriate?**

Yes, the current procedures are adequate and appropriate, subject to the comments in relation to Issue 6.84.

[Issue 6.83](#) **Should a person cease to be a forensic patient if he or she becomes fit to be tried and the Director of Public Prosecutions decides that no further proceedings are to be taken?**

Yes. If a person becomes fit to be tried and the Director of Public Prosecutions decides that no further proceedings are to be taken, there is no basis for the person to be a forensic patient.

[Issue 6.84](#) **Should legislation specify circumstances in which, or a period after which, fitness ceases to be an issue?**

Yes. The Canadian approach referred to in the Consultation Paper is supported.

[Issue 6.85](#) **Should the requirement that the MHRT have regard to whether a forensic patient who was UNA has spent “sufficient” time in custody be abrogated?**

Yes, for the reasons outlined by the NSW Law Reform Commission.

[Issue 6.86](#) **Are the provisions of the MHFPA which define the circumstances in which a person ceases to be a forensic patient sufficient and appropriate? If not, are there any additional circumstances in which a person should cease to be a forensic patient?**

The provisions of the MHFPA which define the circumstances in which a person who is a UNA ceases to be a forensic patient are sufficient and appropriate.

[Issue 6.87](#) **Should there be provisions for referring a person who is UNA into other care, support and/or supervision arrangements at the expiry of the limiting term? If so, what should they be?**

Yes.

**Issue 6.88 Are the provisions regarding the entitlement to be released from detention upon ceasing to be a forensic patient adequate and appropriate? If not, what else should be provided?**

The legislation should be amended to require the release of a person who is detained in a correctional centre or “other place” immediately prior to the termination of his or her status as a forensic patient.

Additionally, legislation should be amended to provide an entitlement to release where a person ceases to be a forensic patient because he or she was UNA and has become fit and no further proceedings are to be taken.

**Issue 6.89 Are the provisions for appeals against decisions by the MHRT adequate and appropriate? If not, how should they be modified?**

A forensic patient should be able to apply to the Supreme Court regarding release.

**Issue 6.90 Should the MHFPA be amended to exclude the detention of forensic patients in correctional centres?**

Yes, for the reasons outlined by the NSW Law Reform Commission.

**Issue 6.91 If detaining forensic patients in correctional centres is to continue, are legislative measures needed to improve the way in which forensic patients are managed within the correctional system?**

Yes. As forensic patients are people who have not been convicted of an offence, a special classification should be created for forensic patients in prison to ensure that appropriate custody arrangements and programs are made available to them, and to avoid them being housed in protective custody or segregated unnecessarily.

Legislation should prohibit forensic patients from being confined to their cells for any longer than is necessary, and any decision to do so should take into account their clinical needs. Such confinement can be counter-therapeutic, a factor that is not currently considered when decisions are made about the confinement of forensic patients within a correctional facility.

[Issue 6.92](#) **Under what circumstances, if any, should forensic patients be subject to compulsory treatment?**

The NSW forensic provisions should comply with the National Principles, and specifically, the inherent principles that a forensic patient should not be subject to medical treatment without his or her informed consent, and that if such consent cannot be given, then the treatment should only be given in accordance with safeguards that are on par with those that apply to other members of the community.

[Issue 6.93](#) **Should different criteria apply to:**

- different types of treatment; and/or
- forensic patients with different types of impairment?

Yes.

[Issue 6.94](#) **Is the range of interventions for which the MHA and the MHFPA provide adequate and appropriate for all forensic patients? In particular, are different or additional provisions needed for forensic patients who have cognitive impairments?**

No, the range of interventions for which the MHA and the MHFPA make provision are not adequate or appropriate for all forensic patients.

Specific provisions should apply to forensic patients with intellectual disabilities and/or cognitive impairments, consistent with the National Principles. The range of interventions should be determined by the nature of the cognitive impairment.

[Issue 6.95](#) **Are the present safeguards regarding compulsory treatment of forensic patients adequate? If not, what other safeguards are needed?**

No, the present safeguards regarding compulsory treatment of forensic patients are not adequate.

Consistent with the civil criteria, a person who is a forensic patient should not be subject to compulsory treatment unless the person is either a "mentally disordered person," or "a mentally ill person," and in need of treatment in order to prevent a risk of harm to themselves or others.

[Issue 6.96](#) **Should the MHFPA provide any additional factors to which the MHRT must have regard when making decisions about forensic patients?**

The MHFPA should specifically provide that, when making decisions about forensic patients, the MHRT must have regard to issues concerning consent to treatment, including capacity and reasons for refusal consistent with the National Principles.

Under s 43, there should be a presumption in favour of release of a forensic patient. In addition, the criteria in s 43(a) should be confined to seriously endangering a member of the public, and not the patient.

[Issue 6.97](#) **Should the relevant risk of harm be expressed and defined in the same way for the purposes of decisions by the Forensic Division of the MHRT as it is for the court? If not, how should the provisions relating to the MHRT be different?**

Yes, the relevant risk of harm should be expressed and defined in the same way for the purposes of decisions by the Forensic Division of the MHRT as it is for the court.

[Issue 6.98](#) **In what circumstances, and to what extent should the Forensic Division of the MHRT be required to have regard to a risk of harm only to the person concerned, in the absence of any risk to others?**

The Forensic Division of the MHRT should not be required to have regard to a risk of harm only to the person concerned, in the absence of any risk to others.

There is no justification for detaining a person in the forensic mental health system if that person poses a danger only to him or herself. Such patients should be transferred to the civil mental health system if the criteria for treatment for a mental health condition apply.

[Issue 6.99](#) **Should a requirement to impose only the “least restriction” apply to all decisions regarding forensic patients?**

Yes.

[Issue 6.100](#) **How should any such principle of “least restriction” be expressed in the MHFPA? Should it be expressed differently for the purposes of different types of decisions?**

In the MHFPA the principle of “least restriction” should be consistent with the statement of principle in the MHA.

In the context of decisions about detention or release, the principle of “least restriction” should be expressed as “least restriction consistent with the safety of the community.”

[Issue 6.101](#) **Should a limit apply to the length of time for which people who are UNA and/or people who are NGMI remain subject to the forensic mental health system?**

Yes, a limit should apply to the length of time for which people who are UNA and people who are NGMI remain subject to the forensic mental health system for the myriad of reasons set out in the Consultation Paper.

As acknowledged by the NSW Law Reform Commission, concerns about persons who pose a risk of harm to others at the end of their time limit could be addressed by legislation that provides for transfer to the civil mental health system or other care, support and/or supervision arrangements.

[Issue 6.102](#) **If there is a time limit, on what basis should it be determined?**

As acknowledged by the NSW Law Reform Commission, a sentencing-based time limit is not without its difficulties, both conceptually and in practice.

The formulaic approach is attractive as a starting point. However, it would need to be coupled with a discretion for the court to pronounce a period that varies from the prescribed time limit, taking into account factors including the circumstances of each case, the relationship between the cognitive or mental impairment and the offending behaviour, the anticipated duration of necessary treatment referable to the need to protect others from serious harm.

The preferred formulaic starting point is time equivalent to the average non-parole period for the offence.

[Issue 6.103](#) **Should the same approach be used both for persons who are UNA and for those who have been found NGMI?**

Yes.

[Issue 6.104](#) **Should s 21A of the CSPA be amended to include “cognitive and mental health impairment” as a factor in sentencing?**

Yes, s 21A of the *Crimes (Sentencing Procedure) Act 1999* (CPSA) should be amended to include express reference to “cognitive and mental health impairment” as a factor in sentencing.

**Issue 6.105 Further, should the CPSA contain a more general statement directing the court’s attention to the special considerations that arise when sentencing an offender with cognitive or mental impairments? If so, how should that statement be framed?**

Yes, the CPSA should contain a more general statement directing the court’s attention to the special considerations that arise when sentencing an offender with cognitive or mental impairments.

That statement should be framed to reflect the principles in *Hemsley* as set out in 8.41 of the Consultation Paper, as well as the considerations set out in 8.42 of the Consultation Paper.

**Issue 6.106 Should the purposes of sentencing as set out in s 3(1)(a) of the CPSA be modified in terms of their relevance to offenders with cognitive and mental health impairments? If so, how?**

Yes, the purposes of sentencing as set out in s 3(1)(a) of the CPSA should be modified in terms of their relevance to offenders with cognitive and mental health impairments.

Section 3(1)(a) of the CPSA should state that in sentencing an offender with a cognitive or mental health impairment, where the impairment is considered sufficient to mitigate the severity of the sentence, or to reduce an offender’s moral culpability for an offence, the aim of the sentencing process is to promote the offender’s prospects of rehabilitation, to be balanced against the harm done to the victim and the community, and protecting the community from any serious risk likely to be posed by the offender.

**Issue 6.107 Should the CPSA be amended to make it mandatory for a court to order a pre-sentence report when considering sentencing offenders with cognitive or mental health impairments to prison?**

**If so:**

**(a) what should the report contain?**

**(b) should the contents be prescribed in the relevant legislation?**

The CSPA be should be amended to make it mandatory for a court to order a pre-sentence report when considering sentencing offenders with cognitive or mental health impairments to prison where the offender is unrepresented.

The report should contain an assessment of:

- the nature and severity of the offender's impairment;
- the type and availability of community based services;
- the offender's suitability for semi and non-custodial sentencing options, taking into account the type and availability of community-based services; and
- the availability of a mental health facility, or a specialist unit for intellectual disability in which the offender might serve a sentence of imprisonment, rather than a prison.

**Issue 6.108 Should the CSPA be amended to give courts the power to order that offenders with cognitive or mental health impairments be detained in facilities other than prison? If so, how should such a power be framed?**

Yes. The CSPA should be amended to require that:

- where the offender has a cognitive or mental health impairment; and
- the impairment is considered sufficient to mitigate the severity of the sentence, or to reduce an offender's moral culpability for an offence; and
- the court intends to impose a sentence of full-time imprisonment;

the court order that the offender serve that sentence in a mental health facility, or a specialist unit for intellectual disability, rather than a prison, where such facilities are available.

**Issue 6.109 Should the CSPA provide a mechanism for courts to notify other agencies and tribunals of the needs of offenders with cognitive and mental health impairments who are sentenced to imprisonment? If so, should the legislation state that the sentencing court: (a) may make recommendations on the warrant of commitment concerning the need for psychiatric evaluation, or other assessment of an offender's mental condition as soon as practicable after reception into a correctional centre; and/or (b) may forward copies of any reports concerning an offender's impairment-related needs to the correctional centre, Justice Health, the MHRT, or the Disability Services Unit within DCS, if appropriate?**

There are Local Court and District Court Practice Notes that require the transmission of psychiatric and psychological reports tendered in proceedings from the courts to DCS.

As noted by the NSW Law Reform Commission, there is evidence that the information concerning the offender's impairment is not routinely transmitted from the courts to DCS.

DCS are currently formalising procedure to comply with the Practice Notes, for DCS to deliver these reports to Justice Health.

It would be preferable if the CSPA provided a mechanism for courts to notify other agencies and tribunals, including Justice Health, the MHRT, or the Disability Services Unit within DCS of the needs of offenders with cognitive and mental health impairments who are sentenced to imprisonment, and for such legislation to provide specifically for the transmission of such reports.

In addition, it would be desirable if the legislation were to provide that the sentencing court may make recommendations on the warrant of commitment concerning the need for psychiatric evaluation, or other assessment of an offender's mental condition as soon as practicable after reception into a correctional centre.

[Issue 6.110](#) **Should the CSPA be amended to empower the court, when considering imposing a sentence of imprisonment on an offender with a mental illness, to request that the MHRT assess the offender with a view to making a community treatment order pursuant to s 67(1)(d) of the MFPA?**

Yes.

[Issue 6.111](#) **What similar powers, if any, should the court have with regard to offenders with other mental conditions or cognitive impairments?**

The CSPA should be amended to empower the court, when considering imposing a sentence of imprisonment on an offender with a mental conditions other than a mental illness, or cognitive impairments, to request that the MHRT assess the offender with a view to making a community treatment order pursuant to s 67(1)(d) of the MFPA.

[Issue 6.112](#) **Should provisions regarding parole be amended to refer specifically to offenders with cognitive and mental health impairments? In particular, should the relevant legislation require specific consideration of an offender's cognitive or**

**mental impairment:**

- (a) by the Probation and Parole Service when preparing reports for the Parole Authority;**
- (b) by the court when setting parole conditions; or**
- (c) by the Parole Authority when determining whether to grant or revoke parole, and when determining parole conditions.**

Provisions regarding parole should be amended to include express reference to offenders with cognitive and mental health impairments for the reasons advanced by the NSW Law Reform Commission.

However, experience suggests that consideration of an offender's cognitive or mental impairment has little impact on parole decisions when there are no appropriate community services available to assist that person, which is not uncommon. Where appropriate community services are not available to assist the offender, the State Parole Authority may not grant parole because without appropriate structured treatment and accommodation for the offender the risk of that person re-offending is too high.

[Issue 6.113](#) **Should the relevant legislation dealing with periodic detention, home detention, community service orders and good behaviour bonds be amended to increase the relevance and appropriateness of these sentencing options for offenders with cognitive or mental impairments?**

Yes.

However, experience suggests that that the level of compliance required by periodic detention and home detention is too high for people with cognitive or mental health impairments. As a result, many such orders are breached, and offenders are sentenced to full-time imprisonment. Periodic detention is soon to be eliminated as a sentencing option with the implementation of intensive correction orders which will incorporate even more restrictive conditions.

Community service orders (CSOs) and good behaviour bonds are more appropriate options for people with a cognitive or mental health impairment because a court dealing with a breach has more discretion. Where a CSO is breached, the court can re-sentence the offender for the original offence. Where a bond is breached, the court can waive the breach or adjourn the proceedings to give the offender another chance to comply.

[Issue 6.114](#) **In particular, how could:**  
**(a) the eligibility and suitability requirements applicable to each type of order; and**  
**(b) the conditions that may attach to each semi or non-custodial option**  
**be adapted to meet the requirements of offenders with cognitive or mental impairments?**

Clearly access to semi and non-custodial sentencing options would be more relevant and appropriate for offenders with cognitive or mental impairments if there were more latitude for these impairments to be taken into account by the court in the event of breach, and greater community support for such offenders to assist compliance. This, however, is dependent upon adequate resourcing.

[Issue 6.115](#) **Should s 11 of the CSPA concerning deferral of sentencing be amended to refer expressly to rehabilitation or intervention programs for offenders with cognitive or mental health impairments?**

Yes.

## **Consultation Paper 7: Diversion**

### **Issue 7.1 (1) Should a legislative scheme be established for police to deal with offenders with a cognitive impairment or mental illness by way of a caution or a warning, in certain circumstances?**

The rationale underlying the establishment of a legislative scheme for police at the pre-court stage to deal with persons with a cognitive impairment or mental illness by way of cautions and warnings (in particular circumstances) parallels the rationale for such a legislative scheme already existing regarding young offenders.

Similar to children, people with intellectual disabilities may have poorly-developed cognitive skills, can be easily suggestible, and are vulnerable when dealing with police. From this perspective, a person with intellectual disabilities should be afforded the same assistance and guidance that our legal system grants a young person. A pre-court (caution and warning) legislative scheme dealing with people with cognitive impairments or mental illnesses is one such mechanism which would contribute to providing them with necessary guidance and assistance.

When applied in suitable circumstances, such a legislative scheme could spare a person with an intellectual disability and/or mental health impairment from being disproportionately dealt with in the later stages of the criminal process, which evidence suggests that, rather than rehabilitate, is more likely to exacerbate the adverse effects of their condition.

The Committee would emphasise that such a scheme should be the result of further consultation and must be carefully drafted, and developed with close attention to the rights of vulnerable people.

### **(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?**

In relation to the nature of the offence, the Committee notes that to restrict the scheme to summary offences would be to exclude many petty offences, such as petty larceny. The Committee is of the view that the scheme should cover summary offences and indictable offences that are capable of being dealt with summarily. If the offence is considered to be sufficiently serious,

however, it would be appropriate in those circumstances for police to retain a discretion not to refer people to the scheme.

In relation to the type of mental illness or cognitive impairment that should determine the parameters of the scheme's application, the Committee notes that mental illnesses and cognitive impairments are difficult to identify without expert knowledge and assessment. Accordingly, it is essential that the NSW Police Force be sufficiently resourced and trained to identify and assess whether a person has a mental illness or cognitive impairment.

The Committee suggests that the caution/warning scheme should be accompanied with a referral to support services aimed at preventing re-offending. To ensure effectiveness, such a referral system accompanying the scheme must not suffer from generic procedures and "tick a box" assessments, but instead must be infused with procedures which accurately identify and propose treatment services that are specific to a given defendant's condition and circumstances.

#### 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?**

A formalised scheme for cautions and warnings to deal with offenders with a cognitive impairment and mental illness must have some crucial features in order to be effective in practice. It would be sensible to operate a referral scheme in conjunction with the cautions and warnings scheme, to ensure that offenders are referred to adequate rehabilitative measures aimed to prevent re-offending.

As a pre-requisite, the police must be adequately furnished with the know-how and skill set to identify the offenders eligible for the scheme. Further, a procedure would need to be developed to define the method by which police obtain documentation from the person's current treatment provider or, where this is not possible, arrange a referral for assessment (such as to ADHC or another service in the manner of the existing Mental Health Court Liaison Service).

#### Issue 7.3

**Does s 22 of the MHA work well in practice?**

The wording of s 22 of the MHA seems to make it inapplicable to people with a cognitive impairment. From this standpoint, it does

not seem to benefit people with intellectual disabilities. The definitions used in its provisions, “mentally ill” and “mentally disturbed,” have been suggested as not being broad enough to encompass offenders with a cognitive impairment. For this reason, the scope of s 22 should be expanded to encapsulate people with significant cognitive impairments whose behaviour is such that they need to be strictly supervised or detained in a secure facility. This could be done by drafting additional definitions into s 22 to expand its application to persons with cognitive impairments.

Furthermore, Shopfront Youth Legal Centre has indicated that s 22 is practically ineffective due to a severe lack of resources in the NSW mental health system. The Committee notes that this is a matter of crucial concern. We understand that health service providers will often interpret the terms “mentally ill person” and “mentally disturbed person” differently, depending on the number of beds that are available at the time.

#### 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?**

It seems appropriate for police to have express legislative powers to take a person to 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 underlying rationale is that offenders with cognitive impairments would be provided with much better opportunities of successful rehabilitation under the appropriate social service facilities as compared with the criminal process. If an offender with a cognitive impairment is referred to an appropriate social service, he or she is more likely to be treated by trained personnel who understand their conditions and are better equipped to assist in the rehabilitation or education of the offender for the purposes of negating recidivism.

However, such a power granted to the police must be conditional upon providing adequate training for those officers who are to use them. Education and training initiatives that allow the police to identify, understand and deal with people with cognitive and mental impairments are crucial if such a power is to operate purposefully and efficiently.

Further, such a power should be limited to cases where the person has a severe cognitive impairment only, and who consequently poses an immediate risk to him/herself or to

others. The Committee is of the view that the power must not be grounds for the intervention in the lives of people whose impairment falls within the borderline range of cognitive impairment, as this would constitute a serious abrogation of the civil liberties of such persons.

[Issue 7.5](#) **Do the existing practices and policies of the Police and the DPP give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender?**

The Committee is of the view that a formal diversionary scheme will encourage police to consider diversion in preference to prosecution.

The Committee understands that police will from time to time decline to charge the alleged offender and instead take them to hospital for admission under the civil provisions of the MHA. However, the Committee is aware that police will await the person's discharge from hospital and then lay charges. It is concerning that this occurs with relative frequency.

The fact that people with cognitive and mental health impairments are over-represented in the criminal process would indicate that existing policies and practices of the police and the DPP fail to give enough emphasis to diverting offenders with such impairments from the criminal justice process. The existing guidelines regarding the discretion of the DPP to prosecute an offender do provide that consideration be given to an alleged offender's mental health or special disability. However, the guidelines have a merely influential effect upon a discretionary process, a process that in turn may ultimately be opaque.

[Issue 7.6](#) **Do provisions in the Bail Act 1978 (NSW) setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders?**

The provisions in the *Bail Act 1978* (NSW) setting out the conditions for the grant of bail may make it harder for a person with a mental illness or cognitive impairment to be granted bail in comparison to other alleged offenders. Alleged offenders with cognitive or mental impairments are more prone to breach bail conditions imposed on them than are other alleged offenders. This is because they are not always adequately supported to ensure that they understand and comply with their bail conditions. Accordingly, provisions such as s 8(2)(a) adversely affect the chances of offenders with cognitive or mental

impairments successfully applying for bail. Section 8(2)(a) provides that bail which may otherwise be granted may be refused if a person has previously failed to comply with a bail undertaking or bail condition imposed in respect of the offence.

It is the understanding of the Committee that a person with a mental illness or cognitive impairment will often find it more difficult to obtain a grant of bail compared with other alleged offenders, particularly if the alleged offence is a violent one. Where appropriate accommodation, and provision for treatment and care are unavailable it will be difficult to address the court's concerns about the protection of the community.

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

There is merit in the view that the *Bail Act 1978* (NSW) include an express provision requiring the court or police to take account of a person's mental illness or cognitive impairment when deciding whether or not to grant bail. This is because a grant of bail can be the first step of not only diverting alleged offenders with cognitive or mental impairments away from the criminal process but can also be the first step in a successful rehabilitation process. Where the applicant for bail has a cognitive or mental impairment, the order is usually subject to a range of conditions which, when tailored carefully to the circumstances, can act as a framework for rehabilitation.

[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?**

Further education and training will be essential if the police force is to effectively divert alleged offenders with a mental illness or cognitive impairment from the criminal system. Training should be geared toward assisting police to identify mental disorders and cognitive disabilities and improving the interface between police and alleged offenders with a mental illness or cognitive impairment. The tactics needed to defuse a potentially violent situation involving a person with a mental illness, or dealing with a cognitively impaired person who is behaving in a challenging manner, demand a degree of skill which not all police officers possess.

[Issue 7.9](#)

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

**(2) Should “developmentally disabled” include people with an intellectual disability, as well as people with a cognitive impairment acquired in adulthood and people with disabilities affecting behaviour, such as autism and ADHD? Should the legislation use distinct terms to refer to these groups separately?**

Section 32 should not limit its scope to persons who have acquired a developmental disability during childhood. A person who has acquired a developmental disability after childhood is still be a vulnerable person who needs support when facing the criminal process. Eligibility for s 32 should focus on what a person’s cognitive or mental impairment is rather than when the person acquired the said impairment. As long as the person is affected by the impairment when charged with the offence, s 32 should apply.

The Commission has suggested the possibility of drafting s 32(1) using an overarching term. In this regard, the Committee refers to the responses to Issues 5.1, 5.2, 5.4 and 7.14. If a variation of the term “developmentally disabled” is, however, to be retained, it must be recast in a manner that would include disorders such as ADHD, autism, and Asperger’s syndrome, as well as those with an impairment acquired in adulthood, such as dementia or a brain injury arising from accident or disease. A “person with a cognitive impairment or developmental disability” would be an appropriate term.

Alternatively again, the Act could refer, at s 32(1)(a)(i), to a schedule of conditions deemed to come within the definition of “developmentally disabled.” This, in turn, must not be an exhaustive list, but rather an ‘includes’ schedule.

[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”?**

If the term is to be retained, the Committee prefers the former formulation over the latter. The former description emphasises a person with a disability as being a person first and their disability as an ancillary factor of who they are as a person. The latter description does the contrary, placing emphasis on the person’s disability. It has the effect of defining a person entirely by reference to their disability.

From a black-letter law perspective, there may be no difference between the two phrases. However, by adopting a more neutral wording, it may promote the public perception of people with such disabilities in a more egalitarian light, translating in turn, perhaps, into greater public participation and involvement in support programs for persons with cognitive and mental health impairments. It is critical that legislation describe persons with cognitive and mental health impairments in a way that is neutral, as legislation should reflect and lead the values and policies of the wider community.

**Issue 7.11 Should the term, “mental illness” in s 32(1)(a)(ii) of the MHFPA be defined in the legislation?**

The Committee refers to its response to Issue 7.12.

**Issue 7.12 Should the term, “mental condition” in s 32(1)(a)(iii) of the MHFPA be defined in the legislation?**

The Committee is not unanimously in favour of defining the terms “mental condition” and “mental illness.” The Committee notes that the current definition of “mental condition” under the MHFPA is unhelpful. Further, it is important that the nexus between a mental condition and treatment available in a mental health facility be removed. The Committee notes further, that:

- the term “mental illness” is already defined in the MHA, and this definition operates effectively in Part 3 of the MHFPA; and
- it is important not to restrict the scope of s 32 and render it inapplicable to some offenders by adopting a narrow definition.

In the view of the Committee, the more pressing issue here is not the definition of “mental illness” in the MHFPA but rather, the need to educate the legal community (including police and other criminal justice agencies) as to the distinction between mental illnesses and intellectual disabilities.

**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”?**

Yes, either of these options would be suitable and a change to either one of the options proposed is necessary. The current wording of s 32(1)(a)(iii) is obsolete in light of the mental health

care currently available. Mental health care providers are not necessarily restricted to operating within a mental health facility. Indeed, one of the most effective treatments for managing certain personality disorders, dialectical behavioural therapy, is far more likely to be available from private providers than a mental health facility. The current wording of s 32(1)(a)(iii) raises an unnecessary and counter-productive hurdle to be overcome before a s 32 application can be granted.

Ultimately, the object of s 32 is to divert offenders with cognitive and mental health impairments away from the criminal process to some form of treatment process aimed at circumventing recidivism. It should not matter where or from what sources the applicant is to receive these treatments, provided that the treatment is effective and suited to the person's condition/s and circumstances.

**(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?**

Yes. Involvement in social service programs is in many instances an essential element of a treatment process to minimise re-offending. Persons with cognitive or mental health impairments may be prone to commit offences because they are disadvantaged socially and/or economically. By linking them to social service programs as part of their treatment process, they are likely to be in a better position to manage the social and/or economical challenges that they face. These improvements can only decrease the likelihood of a future interaction with the criminal process.

[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?**

The Committee refers to observations made above (Issue 7.9: "developmental disability;" Issue 7.13: "mental condition").

If the terms are to be replaced altogether, the Committee suggests that reference be made to a schedule setting out in greater detail conditions, categories, characteristics, circumstances and qualifications which augment the existing categories. Such a list would be inclusive rather than exhaustive, so as to not unduly restrict the scope of this important provision.

[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?**

The Committee refers to the response to Issue 7.14, above.

[Issue 7.16](#) **Are there specific conditions that should be expressly excluded from the definition of “mental impairment”, or any other term that is preferred as a general term to determine eligibility under s 32 of the MHFPA? For example, should conditions related to drug or alcohol use or abuse be excluded? Should personality disorders be excluded?**

The Committee is of the view that express exclusions from s 32 should not be introduced. Instead, the determination of the ambit of s 32 in this respect should be left to the discretion of the magistrate. The introduction of exclusions could unnecessarily complicate the operation of the provision and lead to unfair results, particularly where dual diagnoses are involved. For example, the exclusion of conditions related to substance abuse could also exclude defendants with cognitive impairments or mental illnesses for whom diversion would otherwise be the most appropriate outcome.

[Issue 7.17](#) **Should a magistrate take account of the seriousness of the offence when deciding whether or not to divert a defendant according to s 32 of the MHFPA? Why or why not?**

The Committee is of the view that the seriousness of the offence ought to be taken into account, but only in a limited way. Regardless of the seriousness of the offence alleged, however, it is important to bear in mind that at this stage of the proceedings the offence has not been proven and may not in fact be capable of being proven. The strength of the case of the prosecution is a relevant factor for the magistrate to consider, and this mitigates against the consideration of the seriousness of the unproven offence.

[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 Committee is of the view that to require a direct causal relationship between the offence and the condition is inappropriate, for reasons which are set out in the Consultation Paper.

The Committee notes that the issue of the causal relationship between the offence and the condition under s 32 was considered in *Sami El Mawas v DPP* (2005) NSWSC 243. Although the case was successfully appealed, the New South Wales Court of Appeal affirmed that the power to be exercised pursuant to s 32 by the trial judge is a broad discretionary power, and that serious offences without a direct causal connection may be dealt with under s 32.

The Committee agrees that a test of direct causality can exclude consideration of the broader context in which a condition has developed, and in so doing, deprive a deserving defendant of the ability to benefit from a diversion order under this provision.

[Issue 7.19](#) **Should the decision whether or not to divert a defendant according to s 32 of the MHFPA take into account the sentence that is likely to be imposed on the defendant if he or she is convicted?**

The Committee is of the view that while the likely sentence should the alleged offender be convicted is an appropriate consideration, it must be understood in the context of the fact that at the time when the application is before the court, the offence is not one that has been proven and in fact may be incapable of being proven.

[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?**

Yes, the Committee would advocate for the insertion of a non-exhaustive list of factors to increase the degree of certainty and transparency associated with a s 32 application. The Committee is of the view that such a list of factors should supplement and not displace the case law.

The Committee notes that the inclusion of a list of factors might also prompt commentary from the courts on the subject of eligibility under s 32, which would be of assistance to all parties.

**(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?**

Yes. The Committee is of the view that the following additional factors should be included in the list:

- The consequences for a defendant who would otherwise be likely to be found unfit to plead or not guilty by reason of mental impairment, but who is not dealt with under s 32. The Committee notes that a finding of unfitness in Local Court proceedings is grounds for a permanent stay, and a finding of NGMI has the same effect as a finding of not guilty.
- The defendant's ability to comprehend and cope with traditional criminal court processes. The Committee would again emphasise that s 32 does not operate to introduce alternative sentencing options for people who have been found guilty of offences. Rather, it is the function of s 32 to provide a flexible procedure that alleviates the need for cumbersome court processes which would be inappropriate to the circumstances of the alleged offence or the alleged offender.

[Issue 7.21](#)

**(1) Do the interlocutory orders available under s 32(2) of the MHFPA give the Local Court any additional powers beyond its existing general powers to make interlocutory orders?**

The order powers under s 32(2) do not appear to give the Local Court any additional powers.

**(2) Is it necessary or desirable to retain a separate provision spelling out the Court's interlocutory powers in respect of s 32 even if the Court already has a general power to make such interlocutory orders?**

It is desirable to retain a separate provision, such as s 32(2), to clarify the fact that interlocutory orders are available under s 32.

[Issue 7.22](#)

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

The Committee is of the view that a power to require the defendant to attend for assessment or treatment should be articulated.

**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 available should be expanded to include the power of granting a conditional discharge without the need for a “responsible person.”

A magistrate would typically discharge the defendant subject to conditions. The court may discharge the defendant under s 32(3)(b) on the condition that he or she attends a particular person or place for assessment or treatment. However, if the magistrate wishes to impose other conditions (as is most often the case), the defendant must be discharged into the care of a “responsible person.”

This causes many obstacles including how to identify an appropriate “responsible person,” and defining their role. The power to discharge into the care of a “responsible person” should be retained, as it may be appropriate in particular cases. However, while some service providers are willing to work with a defendant with mental health issues, most are very reluctant to be nominated as their “responsible person.” Including a similar power which does not depend for its exercise on the identification of a “responsible person” would give much more flexibility to the court to tailor an order according to the unique circumstances of each defendant.

Ultimately, the Court’s flexibility is the key to improving the efficacy and efficiency of s 32 orders.

**Issue 7.24 Are the orders currently available under s 32(3) of the MHFPA appropriate in meeting the needs and circumstances of defendants with a cognitive impairment, as distinct from those with mental health problems?**

The Committee refers to the response to Issue 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?**

The Committee notes that in practice, a magistrate will not make an order under s 32(3) unless satisfied that a particular person or agency is capable of implementing the proposed order. The person or agency will usually provide a report and, in some cases, be present in court.

As to whether the legislation should provide for a means of compelling a person or agency to implement an order, the Committee is of the view that this must be predicated on a legislative mandate being given to relevant agencies and, importantly, that the resources needed to fulfil the role be allocated to them. Treatment providers and case managers are often from under-resourced non-government organisations or community mental health services. Legislative mandates for them to implement any proposed orders will only be reasonable if such persons and agencies are sufficiently resourced.

[Issue 7.26](#) **Should s 32 of the MHFPA specify a maximum time limit for the duration of a final order made under s 32(3) and/or an interlocutory order made under s 32(2)? If so, what should these maximum time limits be?**

The Committee notes that at present, the current maximum time within which the Court has the power to supervise compliance with a final order is six months. However, the court has a range of interlocutory powers which may extend the treatment process, and can adjourn proceedings.

Section 11 of the *Crimes (Sentencing Procedure) Act 1999* allows the court to adjourn sentence proceedings for the purposes of rehabilitation for up to twelve months from the date of conviction.

The Committee is of the view that timeframes for the final orders are necessary to manage the resources of the court. Twelve months from the making of a finding that the defendant is eligible under the first limb of s 32 would be an appropriate upper limit.

[Issue 7.27](#) **Should the Mental Health Review Tribunal have power to consider breaches of orders made under s 32(3) of the MHFPA, either instead of or in addition to the Local Court?**

The Committee supports maintaining the jurisdiction of the Local Court, and not extending the jurisdiction of the MHRT in the manner proposed, because in the event that a defendant breaches a s 32(3) order, and that breach is not excused, the Local Court has jurisdiction to deal with the matter according to law, but the MHRT does not. The retention of the status quo in this regard would save unnecessary expenditure and delay.

**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?**

For the reasons set out in response to Issue 7.27 in relation to the approach of the Local Courts, the Committee is of the view that would be appropriate with respect to the Local Court only. Otherwise, the ability to adjust conditions is consistent with the underlying rationale for the availability of orders under s 32.

**Issue 7.29 Should s 32 of the MHFPA authorise action to be taken against a defendant to enforce compliance with a s 32(3) order, without requiring the defendant to be brought before the Local Court?**

The Committee does not support the authorisation of enforcement without hearing before a magistrate. The Committee is concerned not to import existing problems with respect to the interface between police and vulnerable persons, such as those that attend arrests for breach of bail, into the context of s 32 orders. The Committee is concerned to see the existing role of the court preserved in this regard, without change.

**Issue 7.30 Should the MHFPA clarify the role and obligations of the Probation and Parole Service with respect to supervising compliance with and reporting on breaches of orders made under s 32(3)? What should these obligations be?**

The Committee is of the view that a specialist service, as distinct from the Probation and Parole Service, should be empowered to supervise compliance.

**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?**

The Committee has no submission to make in this regard.

**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?**

Yes. To derive potential benefits from the diversionary measures of s 32, a defendant must first be identified as being potentially eligible in accordance with s 32. This identification may be

extremely difficult for untrained personnel to make if proper examination procedures are not in place.

At present, the identification of a mental illness or cognitive impairment is in practice often the responsibility of the defendant's legal representative. This gives rise to a number of issues, particularly that legal representatives are not always equipped with the adequate knowledge and skills to identify whether a defendant is potentially eligible for a s 32 order. As a consequence, a defendant's ability to retain a legal representative who is knowledgeable about s 32 may ultimately determine the success of their s 32 application.

Furthermore, defendants may be ineligible for Legal Aid yet not have the means to attain legal representation. The burden then unreasonably falls upon the defendant themselves to demonstrate eligibility for a s 32 order. This can be an insurmountable obstacle for the defendant.

The Committee is of the view that any centralised system should be optional, so that the defendant could elect to be assessed by a private provider of his or her own choosing.

Having a centralised system for assessing defendants for cognitive impairments and mental disabilities operating at the outset of criminal proceedings would ease the burden upon defendants and their legal representatives in having to determine eligibility for s 32. This would be crucial and beneficial for defendants who do not have the resources to do so themselves.

[Issue 7.33](#) **(1) Should the MHFPA expressly require the submission of certain reports, such as a psychological or psychiatric report and a case plan, to support an application for an order under s 32?**

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

The Committee has concerns about this proposal, on the grounds that it might exclude otherwise worthy persons from obtaining an order under s 32. For example, it may be the case that due to a lack of resources, a psychiatric report cannot be obtained. Whilst it would be desirable in each instance to obtain psychiatric and/or psychologists' reports and documented case plans, to make provision of such documentation mandatory could in fact prejudice the most needy defendants.

**Issue 7.34 Should the MHFPA allow a defendant to apply for a magistrate to disqualify himself or herself from hearing a charge against the defendant if the same magistrate has previously refused an application for an order under s 32 in respect of the same charge?**

Yes. The common law requirement that magistrates are obliged to disqualify themselves from hearing a matter if there is a reasonable apprehension of bias may be inadequate considering that opinions can easily differ about what amounts to a reasonable apprehension of bias. A specific provision in the legislation to allow defendants to apply to have a magistrate disqualified from hearing their charge if the same magistrate has already heard and refused their s 32 application would have the effect of upholding a defendant's entitlement to a trial free from bias. If the effect of such a provision is limited to defendants whose s 32 applications had been rejected, and to the particular magistrates who have heard the s 32 applications, there should be no real risk of this entitlement being abused by "forum shopping."

**Issue 7.35 (1) Should there be alternative ways of hearing s 32 applications under the MHFPA rather than through the traditional, adversarial court procedures? For example, should there be opportunity to use a conferencing-based system either to replace or to enhance the current court procedures?**

Yes. A conference-style rather than an adversarial setting is likely to be more conducive to the defendant understanding the situation and consequences, and communicating freely. A change in setting could provide the flexibility needed to effectively engage with the issues faced by the defendant, and reduce the risk of recidivism.

The Committee would draw the Commission's attention to the MERIT program, which could prove a useful model for dealing with alleged offenders who may be eligible for an order under s32. The Committee would endorse the diversion of defendants with intellectual disabilities or mental health problems at an early stage, in a system where they have access to a team of clinicians to perform assessments, develop case plans and oversee their implementation. Such a program could include a system of report-back to the court after a certain period. If a successful case plan has been developed, the court could then consider a final order under s 32.

**(2) If so, should these alternative models be provided for in the legislation or should they be left to administrative arrangement?**

Administrative arrangements are sufficient to make the current processes more effective in dealing with cognitive or mentally impaired defendants, within a legislative framework. Arrangements such as, for example, simply listing all s 32 applications in court on a particular day of the month so that various agencies and specialised personnel may be present in court on that day to provide assistance, would improve the process.

[Issue 7.36](#) **Should s 33 of the MHFPA require a causal connection between the defendant's mental illness and the alleged commission of the offence?**

The reasons set out in response to Issue 7.18 apply as equally to s 33 as to s 32.

[Issue 7.37](#) **Are existing orders available to the court under s 33 of the MHFPA adequate and are they working effectively?**

The Committee is of the view that the operation of s 33 would be improved if the court's power to make interlocutory orders were clarified.

[Issue 7.38](#) **Should legislation provide for any additional powers to enforce compliance with an order made under s 33 of the MHFPA?**

No. The Committee is of the view that the MHA confers adequate enforcement powers.

[Issue 7.39](#) **Is it preferable to abolish s 33 of the MHFPA and broaden the scope of s 32 of the MHFPA to include defendants who are mentally ill persons?**

No. The Committee notes that the specific purpose of s 33 is to enable defendants who are seriously ill to receive appropriate treatment in a mental health facility rather than be incarcerated. It would be inappropriate to remove the distinction between these discrete provisions.

[Issue 7.40](#) **Does s10(4) of the MHFPA provide the superior courts with an adequate power to divert defendants with a mental illness or cognitive impairment?**

As discussed in the Consultation Paper, the scope of the power under s 10(4) is limited in a number of ways. The problem arises from judicial interpretation of the term “punishment,” and the need to have regard to the trivial nature of the offence. Due to the latter consideration, the discretion is exercised with respect to only the most trivial of offences. With respect to the former consideration, the Committee concurs with the observations made in the Consultation Paper in relation to *DPP v Mills* [2000] NSWCA 236. Further, we note that the section has been approached in a manner akin to the exercise of the power under s 10 *Crimes Sentencing Procedure) Act 1999* (see *Haydon John Newman v Regina* (2007) 173 A Crim R 1 at 45, Spigelman CJ). A pre-requisite of the exercise of the discretion conferred under that section is that the person is guilty of an offence.

For these reasons, the Committee is of the view that the power under s 10(4) of the MHFPA is inadequate and that a broader and more explicit diversionary power should be conferred upon the superior courts.

[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?**

Yes, with respect to less serious indictable offences. The Committee is also of the view that the power to make interlocutory orders under 33 should be extended to committal proceedings.

The Committee endorses the submission made by the Shopfront Youth Legal Centre with respect to this Issue.

[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?**

The Committee is of the view that a statement of principles may be of assistance.

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

Any reference to the public interest in protecting the community would depend where such a statement of principles would be situated within the overall scheme of the Act. However, the statement should set out that the objects of the diversionary powers are to ensure that the rights of persons with a mental illness or cognitive impairment are protected by:

- (a) ensuring that the presumption of innocence is accorded to the person, in accordance with law; and
- (b) ensuring that an appropriate balance is achieved between, on the one hand, the need to deter criminal conduct, bearing in mind the presumption of innocence and, on the other, the need to protect the right of a vulnerable person to receive appropriate care in the least restrictive manner possible in the circumstances.

## **Consultation Paper 8**

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

The *Crimes (Forensic Procedures) Act 2000* (NSW) should be amended to require the destruction as soon as practicable of forensic material taken from a suspect following the unconditional discharge of a person who was the subject of an order under s 32 or s 33, and in the case of a conditional discharge, following a s 33 application.

In the case of a conditional discharge under s 32, the Act should be amended to require the destruction of the material as soon as is practicable, where the defendant in the matter has complied with the conditions during the first six months after being discharged.

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

Yes.

**Issue 8.3** Should the Crimes (Forensic Procedures) Act 2000 (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following:

**(a) a decision by the Director of Public Prosecutions not to continue with the proceedings, or**

**(b) a finding at a special hearing that, on the limited evidence available, the defendant has committed an offence?**

If so, in what way?

(a) Yes.

(b) The “as soon as practicable condition” should not apply here as the defendant may become fit to stand trial at some later time.

**Issue 8.4**

**Should the Crimes (Forensic Procedures) Act 2000 (NSW) be amended to require the compulsory retention of forensic material in any of the following cases, namely:**

**(a) persons who, because of cognitive or mental health impairment, are diverted from the criminal justice system under s 32 or s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW);**

**(b) persons found not guilty by reason of mental illness;**

**(c) persons, having been found unfit to be tried, are found, on the limited evidence available at a special hearing, to have committed an offence?**

**If so, in what way should the legislation be amended?**

**(a) No.**

**(b) No.**

**(c) No.**