



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:RHrg1936102

15 June 2020

The Hon. Mark Speakman SC MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Dear Attorney,

Mental Health and Cognitive Impairment Forensic Provisions Bill 2020

We refer to the Mental Health and Cognitive Impairment Forensic Provisions Bill 2020 (the Bill) introduced into Parliament on 3 June 2020.

The Law Society participated in the Government's review of the *Mental Health (Forensic Provisions) Act 1990*, and we commend the Department of Communities and Justice for undertaking a thorough consultation process.

We have reviewed the Bill and suggest two minor amendments, which assist with the aims of the reforms to provide greater guidance to the courts on the factors they should consider when deciding whether to make a diversion order and provide a clearer regime for diversion.

Section 15: Considerations of Magistrate when making order

While we note that section 15 provides a non-exhaustive list of factors to be taken into consideration when making an order, we consider it would be beneficial to add an additional identified factor, by inserting words to the effect that a Magistrate may consider: "any adverse impact to the person associated with proceeding to a defended hearing or disputed facts hearing".

The reason for this amendment is that the Magistrate should turn their mind to issues such as anxieties associated with delay in finalising matters, difficulties obtaining instructions or giving evidence, and the impact on the defendant's relationships with a witness (who might be an essential support to the person).

Section 17: Reports from treatment providers

In practice, treatment providers report failures to comply with conditions directly to the court. It may be appropriate for section 17 to reflect this reality. If the legislative intent is to give officers of the Department of Communities and Justice the power to oversee diversion orders, that power should be explicitly provided for in the Bill.

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Review of the legislation

We would welcome the opportunity to provide feedback to the Department of Communities and Justice on the operation of the new legislation 12 months after its commencement.

Resourcing for diversionary programs

Separate to the terms of the Bill, we wish to again raise the issue of the availability of diversionary programs.

People with cognitive and mental health impairments are over-represented throughout the criminal justice system. The Law Society strongly supports increased diversion at all stages of the criminal justice system for people with cognitive and mental health impairments.

It was acknowledged in the Second Reading Speech for the Bill that for people with a serious mental illness, diversion into treatment is associated with a significantly reduced risk of reoffending, regardless of the type of offence with which that person was charged. Diversion can benefit both the defendant and the wider community by addressing the causes of offending, and reducing offending behaviour, and has benefits such as reducing the costs associated with imprisonment and hospital readmissions.

Effective diversion requires the defendant to engage with appropriate and adequately resourced treatment and service providers. It is therefore crucial that the Government commits to increase resourcing for such providers, to accompany these legislative reforms.

We understand that the NSW Government intends to replace the Cognitive Impairment Diversion Program with a diversion model with a broader geographic coverage. While we support the expansion of the model, we submit that funding of the Cognitive Impairment Diversion Program should continue while a state-wide model is being developed. This will ensure that defendants with a cognitive impairment in the pilot locations can continue to be diverted into appropriate community-based services.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'R Harvey', with a stylized flourish at the end.

Richard Harvey
President