THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/EErg:1777127

2 September 2019

Mr Paul McKnight
Executive Director, Policy and Reform
Department of Communities and Justice
Level 3, Henry Deane Building
20 Lee Street
Sydney NSW 2000

By email: Sallie.McLean@justice.nsw.gov.au

Dear Mr McKnight,

Consultation paper: diversion in the summary jurisdiction

Thank you for seeking the Law Society's comments on diversion provisions that apply in the summary jurisdiction, as part of the Government's review into forensic mental health.

Our responses to the questions raised in the consultation paper are contained in the attached submission.

We look forward to further consultation with the Department on this important area of reform.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who is available on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

Section 32 orders

1. **Should the revised Draft Bill expressly state that a guilty plea is not required to access a diversion order under the s 32 equivalent?**
   Yes. As discussed in the consultation paper, a plea or an indication of a willingness to enter a guilty plea is not required by the court prior to a section 32 order being made. We suggest that the revised draft Bill should expressly state that a plea *of any type* is not required to access a section 32 order.

2. **Is it necessary to introduce an evidentiary provision prescribing that, for the purposes of diversion, a person need not submit to the court a report from a psychiatrist or other treating physician to establish a mental health impairment?**
   Yes. We consider this proposal will assist Magistrates to understand that reports are not necessary, and defendants can rely on, for instance, hospital notes and summaries for diagnosis, GP reports where they have a diagnosis on file, prescribe medication and oversee treatment etc. However, care must be taken with the wording of the provision so that it does not unintentionally result in defendants having to submit other forms of reports in order to receive a diversion order.

   We also query what is meant by "significant" in the definition of "mental health impairment", as in proposed clause 4(1)(b): "the disturbance would be regarded as *significant* for clinical diagnostic purposes".

3. **Should the revised Draft Bill provide a list of discretionary non-exhaustive factors that the court may refer to when making a diversion decision?**
   Yes. We support the inclusion of a discretionary non-exhaustive list of factors to provide guidance to both practitioners and Magistrates.

   We would prefer more emphasis on the diversionary aspect of the decision making, and therefore support the inclusion of the following considerations suggested by the Law Reform Commission: "the benefits of diversion to the defendant and/or the community" and "the desirability of making the order that has the least restrictive effect on the defendant that is appropriate in the circumstances of the case".

4. **Should the revised Draft Bill provide examples of the type of interlocutory orders the court can make?**
   Yes. We consider this would be useful to remind both practitioners and Magistrates to consider giving the defendant time to establish plans and demonstrate progress.

5. **Should treatment and support plans be recognised in statute?**
   We support recognising treatment and support plans in the legislation, but only to the extent that it is part of the non-exhaustive list the court may consider under clause 7(g).

6. **Should the call-back time of the provision be expanded from six to 12 months?**
   Yes. We are aware that the current six-month limitation on the existing call-back timeframe has resulted in Magistrates not making section 32 orders. We support limiting adjournments to six months and expanding the call-back provision to up to 12 months.

7. **Should statute expressly require sentencing courts to take participation in a treatment or support plan into account?**
   Yes. We agree that the legislation should take into account, in favour of the defendant, the extent to which the defendant participated in the treatment or support plan.

We suggest that the time spent in a mental health facility under section 33 should also be taken into account on sentence (as the defendant has been involuntarily detained in relation to a criminal offence), similar to the time spent in custody when bail is refused.

8. **Should *Part 2 Diversion in summary proceedings* of the revised Draft Bill apply to the Land and Environment Court?**
   We have no opposition to this proposal; defendants in these matters should have the diversion provisions available to them. It may be preferable for these matters to be referred to the Local Court where the specialist knowledge in relation to section 32 exists.

Section 33 orders

9. **Should the revised Draft Bill refer to both a 'mentally ill' and 'mentally disordered' person?**
   Yes, the revised Draft Bill should refer to both a 'mentally ill' and 'mentally disordered' person, to resolve the anomaly in the drafting of section 33(1).

10. **Is it necessary to prescribe the period of time by which a defendant released by a mental health facility prior to any return date is to be brought back before the court - should it be 'as soon as practicable'?**
    The Law Society has no comments on this proposal.

11. **Is it necessary or appropriate for s 33-type orders to also be extended from six to 12 months?**
    No. The court does not have the same enforceability concerns with section 33 as it does with section 32, so an extension is unnecessary.

No further application of the MHFPA to the summary jurisdiction

We agree with the Department's position that the application of the statutory procedures following a finding of unfitness or NGMI should not be expanded to the Local Court, particularly in circumstances where the current reforms will strengthen and lengthen section 32 orders. Findings of unfitness and NGMI in the Local Court are rare, and the strengthening of section 32 orders is likely to lead to these cases being diverted and the person being discharged into the care of their treating mental health professionals.

Expansion of section 32 to the higher courts

The Department has sought views on its decision not to progress with the Law Reform Commission recommendation that diversion apply to the higher courts.

We note that the Law Society, NSW Bar Association, the DPP and NSW Law Reform Commission all recommended or supported the expansion of section 32 to the higher courts. We note at paragraph 44 of the consultation paper that the Department has indicated that it will not be progressing the expansion of section 32 to the District and Supreme Courts, and has sought views on this approach.

We are disappointed with the decision, given the overrepresentation of mentally ill and cognitively impaired people in custody and the justice system and the desperate need to ensure people who should be appropriately diverted from the criminal just system are diverted. We are particularly concerned due to the lack of pathways for people suffering a mental or cognitive impairment in the higher courts – this is an issue we raised at earlier stages of the consultation.

Since the last round of consultations there has been a major study released by Allnutt, Greenberg et al (2019) which reported:

> Our findings indicate that diversion into treatment is associated with a significantly lower rate of subsequent re-offending in men and women, regardless of offence type (violent or non-violent). Those with psychosis who received a treatment order had a 12% lower reoffending rate than those in the comparison group who received a punitive sanction such as a fine, community order or good behaviour bond. Overall, the effectiveness of receiving a treatment order increased – re-offending was 32% lower hazard than in the punitive sanction group …[1]

This research provides evidence that diversion can make our community safer.

The Law Society understands that the Department is concerned, as expressed at paragraph 44, that "the seriousness of indictable offences, especially those that are heard in the Supreme Court, is such that diversion pursuant to the MHFPA should not be applied" and suggests that fitness and mitigation on sentence are the pathways open. We respectfully submit that mitigation on sentence cannot deliver the benefits to the defendant, and the community, that diversion can, and fitness is obviously reserved for the small number of people who are unable to engage in the process because they fail the *Presser* test.

An alternative approach

The Law Society, while maintaining the view that the higher courts could effectively divert appropriate cases, acknowledges that the Department has expressed a clear view about extending diversion to the Supreme Court and to serious District Court matters.

On this basis, we strongly urge the Department to consider extending the section 32 provisions to the District Court (not the Supreme Court) to charges which the court determines, if dealt with at law, would not attract a penalty which is greater than the Local Court jurisdictional limit. That is:

- exclude section 32 from applying to the Supreme Court (overcoming the seriousness concern specifically referred to in paragraph 44);
- exclude section 32 committal proceedings in the Local Court (because the matters are not yet resolved);
- allow the section to apply in the District Court where the court determines that, if the offence was proven:
  - the court would impose a community-based option; or
  - the court would not impose a sentence of imprisonment of more than two years.

This proposal addresses the "seriousness" concern of the Department while also:

- diverting appropriate cases from the criminal justice system;
- improving community safety through diversion and treatment;
- saving time and expense of trial on less serious matters;
- reducing expenditure on State resources which are required when dealing with the matter at law.

Expanding section 32, even in this limited way, could have the important impact of reducing the overrepresentation of mentally ill and cognitively impaired people in our prisons and ensure they receive the treatment they require.

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[1] British Allnutt, Greenberg et al, *Court diversion for those with psychosis and its impact on re-offending rates: results from a longitudinal data-linkage study*, 2019, BJPsych Open, Vol 5, p7-8.

'Mental illness'

We also note that 'mental illness' is not currently defined. The usual course is that the definition of 'mental illness' is imported from the *Mental Health Act 2007*. Given that many of the suggested amendments are about introducing certainty and clarity to the legislation, we support including an explicit reference to the 'mental illness' definition in the *Mental Health Act 2007* in the Draft Bill.