

# Reforms to the Mental Health (Forensic Provisions) Act 1900

Legal Aid NSW Submission  
to the  
NSW Department of Justice

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Clients with a mental illness are of Legal Aid NSW's priority client groups. Our Mental Health Advocacy Service ("MHAS") provides and coordinates duty representation in metropolitan and regional NSW for people who are subject to involuntary treatment or detention

under the Mental Health Act 2007 ("MHA"). One of its other core work is representing forensic patients under the Mental Health (Forensic Provisions) Act 1990 ("MHFPA").

Legal Aid NSW welcomes the opportunity to respond to the NSW Department of Justice Paper *Issues for Consultation* arising out of the NSW Law Reform Commission's recommendations in its Report 138 *Criminal Responsibility and Consequences*.

Should you require further information or would like to discuss any of our recommendations, the contact officer is:

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## Introduction

Comments have been sought from stakeholders on a number of issues that have been subject of recommendations of the New South Wales Law Reform Commission (“LRC”) Report 138 *Criminal Responsibility and Consequences*. Several of the issues raised are not directly addressed by the LRC but have been put forward by stakeholders as potential areas for reform.

Legal Aid NSW notes that the proposals below assume implementation of the NSW Government’s response to the LRC Report 135 *Diversion*. A limited response to that Report was provided by Government on 7 May 2014. The only recommendation not supported by Government at that time was the establishment of a specialist list (the CRISP List).

We also note that the LRC in its Report 141 *Encouraging Appropriate Early Guilty Pleas* recommended the abolition of committals, and that the Department of Justice supports that recommendation, although there is stakeholder support for a refined proposal regarding the committal decision. Whatever the outcome of that reform process, at least committals process will be retained in the short term.

Our response below therefore pre-supposes both implementation of the balance of the LRC recommendations in Report 135 (except the establishment of a CRISP list) and the retention of a committals process.

## Bail and remand pending a fitness review

Under the LRC’s proposed model, if the court finds a person unfit to stand trial but thinks that they may become fit, the court may adjourn proceedings for up to 12 months and refer the person to the Mental Health Review Tribunal (MHRT) for review. The court may grant bail or remand the person in custody for the period of the adjournment. People remanded in custody in need of treatment may be transferred to the forensic hospital as correctional patients. A person granted bail is not a forensic patient.

### *How can a person granted bail be compelled to appear before the MHRT, or to attend assessments with mental health services?*

Section 14(b)(ii) of the *Mental Health (Forensic Provisions) Act 1990* (“MHFPA”) provides where a determination is made that the person is unfit to be tried, the Court may, pending the determination of the MHRT, grant bail under the *Bail Act 2013* (“Bail Act”). Section 17(2) of the Bail Act allows the court to grant bail following a determination by the MHRT that the person may become fit within 12 months.

Section 25 of the Bail Act allows the court to impose a conduct condition as a condition of bail.

Legal Aid NSW considers that it is unnecessary to include a non-exhaustive list of bail conditions in the MHFPA to guide the court when bail is being granted in these circumstances.

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Under section 25 of the Bail Act, the court already has a wide discretion in setting bail conditions. This could include a condition requiring the person to appear before the MHRT as directed and to attend assessments with mental health services. A list of conditions in the MHFPA would serve as little more than an aide memoire. We suggest that the judicial bench books would be a preferable source for a list of possible bail conditions in these circumstances.

In this context, Legal Aid NSW is concerned about any move toward the imposition of overly prescriptive bail conditions which may be unnecessary, inflexible and increase the risk of inadvertent breach where they are difficult for a mentally ill person to understand.

*How should the MHRT respond if a person's condition deteriorates while they are on bail and they require inpatient treatment?*

Legal Aid NSW agrees with the proposed option that any deterioration of a person's mental health while they are on bail should be dealt with in the civil mental health system under the Mental Health Act ("MH Act").

We note in this context that recommendation 6.1(2)(b) of LRC Report 138 is that the MHRT must review the person's case periodically to determine whether or not the person has become fit to be tried. If, during such review, the MHRT finds that the person is unfit to be tried, then the matter should be referred to the ODPP and to the court for a special hearing.

We agree with that recommendation. This approach is justified in light of the fact that a person who is unfit to be tried and on bail will be subject to ongoing treatment in the vast majority, if not all, cases. It is difficult to conceive of a situation where a person who is unfit to be tried would not be under the care of mental health services.

Legal Aid NSW notes that the MH Act provides a comprehensive regime for the detention and care of involuntary patients within the civil mental health system. Section 4 of the MH Act operates to include the person who is ordered to be detained as an involuntary patient.

It should remain open for the legal representative to reapply for bail in those cases where a person is remanded in custody during the 12 month adjournment. Legal Aid NSW is of the view that the jurisdiction for a bail application should not be restricted to the Supreme Court but should include the District Court where the special hearing would be heard in the District Court.

*How should the MHRT respond if a person's condition improves while they are remanded in custody and they no longer need to be detained for treatment?*

Legal Aid NSW agrees with the option proposed in the Issues Paper, that if a person's mental health improves while they are remanded in custody, they be able to apply for bail.

However, as suggested above, Legal Aid NSW is of the view that the jurisdiction for a bail application should not be restricted to the Supreme Court and should include the District Court where the special hearing would be heard in the District Court.

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### *Suggestions for helping defendants who may be unfit to comply with bail conditions*

Practical suggestions to help defendants comply with bail conditions over and above the support of mental health professionals are difficult to identify. Without adequate resourcing of such professionals and other mental health service providers, legal responses to this issue will not suffice. In this context, the accepted link between mental health issues and homelessness cannot be ignored, particularly for children and youth, where mental health issues within their family unit place them at increased risk of homelessness.<sup>1</sup> As a minimum, greater resources should be directed towards ensuring secure and stable housing for the duration of a person's bail.

Notwithstanding these comments, we would support a mechanism by which the MHRT can request that the court considers adding to or varying the person's bail conditions as a result of its periodic review of the person during the 12 month period.

Legal Aid NSW also suggests that the bench books be amended to contain guidance for judicial officers about how to approach a breach of bail a person for a person who has been found unfit to be tried.

### *Consequences of breach when a non-custodial sentence is imposed*

#### *Views on proposed option*

The question of how breaches of non-custodial penalties imposed following a special hearing should be dealt with is raised in the context of the LRC's concerns that the status quo "entrenches people in the criminal justice system." We note at the outset that this issue is likely to arise less frequently if the powers under sections 32 and 33 of the MHFPA are extended to the District and Supreme Court to divert offenders as recommended by the LRC in Report<sup>2</sup>. Legal Aid NSW is in full support of that recommendation.

The LRC went on to recommend that a person sentenced to a non-custodial sentence following a special hearing should be dealt with as a forensic patient and referred to the MHRT, and subject to a presumption of release.<sup>3</sup>

On the assumption that this recommendation is not ultimately adopted, we would support the option now proposed that if a court revokes a non-custodial order imposed following a special hearing, the orders it can make would be those available under the MHFPA, not the *Crimes (Sentencing Procedure) Act 1999*.

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<sup>1</sup> Mental Health Commission NSW *Final Report into Mental Health and Homelessness* (June 2013), p1

<sup>2</sup> LRC Report 135 at [7.119], Recommendation 13.2

<sup>3</sup> Recommendation 7.4.

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## Fitness Raised at Committal

### *Views on process outlined*

Processes for two circumstances are outlined. One is based on the status quo of there being committals. The other is on the basis of implementation of the blueprint for reform in LRC Report 141, which recommends the abolition of committals and its replacement with a process of Local Court case management and mandatory criminal case conferencing.

### **Current committals regime**

Assuming the retention of committal proceedings, at least for the foreseeable future, as previously submitted, Legal Aid NSW agrees with recommendation 12.1 of LRC Report 138 that the Local Court should be empowered to conduct fitness inquires, including during the committals process.

Subject to that, Legal Aid NSW agrees with the recommendation of the LRC in Report 138 that, if fitness is raised at a committal hearing, the hearing should be completed as normal and then fitness should be dealt with once the matter reached the higher court. There are a number of good reasons for having a committal where a person is unfit to be tried:

- There may well be deficiencies in the brief of evidence which can be dealt with more expeditiously and at less cost in the Local Court than in the higher court. Despite a client being unfit, a lawyer can still make submissions to the DPP for a charge to be withdrawn or a lesser more appropriate charge to be laid in light of the evidence in the brief. Sometimes these negotiations lead to the DPP proceeding with lesser charges which can be dealt with in the Local Court, where diversion under section 32 is available. This would not be the case if the matter proceeded to the higher court for committal, once fitness was identified as an issue (unless, as noted above, section 32 is extended to the higher courts).
- Other purposes of committal, such as obtaining further and better particulars for a special hearing, establishing the basis for a possible defences (such as intoxication, self-defence or claim of right) and understanding expert evidence may well be served by a contested committal in appropriate matters despite the client being unfit. Very often the consideration of whether or not to have a contested committal is not a matter in where a client is required to make a specific decision, but rather a legal and strategic decision for their lawyer.

### **Regime under blueprint for reform**

Where the question of fitness is raised in the Local Court, the matter would not need to proceed directly to a fitness inquiry in the higher court if recommendation 12.1 of LRC Report 138 to allow the Local Court to conduct fitness inquires, including during the committals process, was implemented.

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Assuming this is not implemented, Legal Aid NSW is of the view that where fitness is raised proceedings should not be referred to a higher court in every case and, instead, there should be a presumption in favor of continuing the case management process. There reasons for this are the same as those outlined above for having a committal where a person is unfit to be tried. However, the court should have a discretion to send the matter to the higher court to determine fitness, on application of the accused.

If the person is found unfit the matter would either proceed to a special hearing or be adjourned for up to 12 months.

#### *Option A or B for case management*

If the person is found fit, the question is whether the matter will proceed in the higher court with or without a committal-type/case management process, which is option A or whether the matter will be remitted to the Local Court for completion of the case management process, which is option B.

Legal Aid NSW prefers option B, if the accused so elects. Case management will be the business of the Local court and matters will be able to be dealt with at less cost more expeditiously in the Local Court than in the higher court.

Legal Aid NSW confirms the advice in the Issues Paper that a person found fit to be tried should not be disadvantaged in relation to available sentencing discounts as a result of fitness being raised and the defendant being then determined fit.

#### *Whether a higher court should conduct a committal type process*

We consider the committal process, if resumed, should be conducted in the Local Court.

### Absence from detention during a limiting term

#### *Suspension of limiting term during period of unlawful absence of detention*

Input is sought on the consequences of both lawful and unlawful absence from detention during a limited term.

The circumstances surrounding a person's absconding during a limited term are potentially wide and varied. They may include failure of a patient to return to a mental health facility at a time specified in the leave application, or may involve lengthier or more significant absences. Reasons for absconding will also vary, and may be linked to the decline in the mental health of the individual. An inflexible approach to this issue is not supported.

Section 69 of the MHFPA appropriately gives the MHRT a broad discretion to make such orders as it sees fit concerning the detention or release of the person following their apprehension under section 68. Legal Aid NSW considers that such discretion should not be fettered by the automatic suspension of a limiting term.

However, we are not opposed to the MHRT having the power to suspend a limiting term, where appropriate and considered on a case by case basis.

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### *Circumstances where appropriate to suspend the limiting term during lawful absence*

Legal Aid NSW does not consider there is any justification for suspension of a limited term during lawful absence from detention.

### Appeals against s 32 orders

#### *Right of appeal against section 32 orders*

##### **Inconsistent with increased focus on diversion**

Legal Aid NSW does not agree with the proposal to create a right of appeal by way of rehearing against an order made under section 32 of the MHFPA.

The proposal runs counter to the overall objective of the LRC's Reports 135 and 138 of increasing available options for diversion from the criminal justice system. In this regard, we consider any reforms to section 32 should take as their starting point the comprehensive work undertaken by the LRC and its resulting recommendations.

In particular, Recommendation 9.2 of LRC Report 135, would address the very concerns raised in the present Issues Paper around dismissal of serious offences under section 32. That recommendation is that section 32 be amended to require a court to take into account, inter alia, "the nature, seriousness of and circumstances of the alleged offence." Stakeholders consulted by the LRC, including the ODPP, supported this amendment, arguing that the inclusion of express criteria such as the seriousness of the offence "would assist in striking the right balance."<sup>4</sup>

That said, the proposal is not strictly necessary given the seriousness of the offence is expressly dealt with by section 31 MHFPA, which limits the diversionary provisions to summary offences and indictable offences triable summarily. In respect of offences dealt with summarily, common law authority is clear that the seriousness of the offence must be taken into account in the balancing exercise required under section 32(1)(b):

*In order to determine whether it is more appropriate to deal with the applicant under Part 3 the Magistrate has to perform a balancing exercise; weighing up, on one hand, the purposes of punishment and, on the other, the public interest in diverting the mentally disordered offender from the criminal justice system. It is a discretionary judgment upon which reasonable minds may reach different conclusions in any particular case. But it is one that cannot be exercised properly without due regard being paid to the seriousness of the offending conduct for which the defendant is before the court. Clearly the more serious the offending, the more important will be the public interest in punishment being imposed for the protection of the community and the less likely will it be appropriate to deal with the defendant in accordance with the provisions of the Act.<sup>5</sup> (Our emphasis)*

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<sup>4</sup> LRC Report 135 at [13.46].

<sup>5</sup> DPP v Confos [2004] NSW SC 1159 at [17].

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It is the experience of Legal Aid NSW practitioners that section 32 applications are regularly refused by magistrates on the basis that the charges are too serious. This is often linked to the fact that the monitoring period under the MHFPA of six months is not considered a sufficient supervisory period for serious charges.

### **Context is crucial**

As noted by the LRC, section 32 decisions are highly contextual, may be very complex, and require the weighing in the balance of a number of relevant matters.<sup>6</sup>

Focusing on one aspect of the balancing test - the particular offence type – overlooks other relevant issues at play, such as the context of the offending, the nature of the mental condition or developmental disability, the availability of treatment and the likely penalty were the matter dealt with at law.

It is also important to bear in mind that when a defendant is dealt with under section 32, the defendant has not pleaded guilty or been convicted of the offence, however serious it may be.<sup>7</sup>

### *Adverse impact of section 32 appeal right on District Court's workload*

The vast majority of diversion of criminal charges takes place in the Local Court. Section 32 provides an efficient and more appropriate alternative to the complex fitness regime that occurs at higher court level.

Legal Aid NSW considers that given the large number of section 32 applications, expanding the rights of appeal against a disposal under that section will have a significant adverse impact on both the District Court's workload, as well as remand rates because this would likely give rise to an increase in numbers of accused on bail, and commensurate breach rates.

Finally, we note that if serious driving offences are motivating the desire to expand section 32 appeal rights, the caution of the LRC in its Report on *Appeals* should not be overlooked:

*In our view, a review of the system of criminal appeals from the Local Court to the District Court cannot be properly conducted without an appreciation of the significant impact that driving related offences have on the appeal workload. This suggests to us that reform should not concentrate solely on the procedural mechanism for appealing to the District Court, but also on the current structure of offences and penalties for driving related offences.*<sup>8</sup>

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<sup>6</sup> LRC Report 135 at [9.23]

<sup>7</sup> Ibid

<sup>8</sup> LRC report on appeals at 5.36