# Section 32 *Mental Health Act* amendments fall short of recommended reform

By Karen Weeks

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## Snapshot

- Amendments to the eligibility criteria in section 32 of the *Mental Health (Forensic Provisions) Act 1990* commenced on 28 August 2017 extending the diversionary regime to those with cognitive impairment.
- The amendments are limited in scope and fall short of the extensive reform recommended by the NSW Law Reform Commission and the Mental Health Commission who called for an expansion of diversionary programs to prevent and reduce reoffending.

On 28 August 2017, amendments to section 32 of the *Mental Health (Forensic Provisions) Act 1990* ('***MHFPA***') commenced with the proclamation of the *Justice Legislation Amendment Act 2017* (the '***2017 amendments***'). The long-awaited amendments to the diversionary regime are limited in effect and it is this authors' contention that they fail to address the extensive reform recommended by the NSW Law Reform Commission (**'NSWLRC**') in 2012 (New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system – Diversion,* Report 135, 2012) ('**2012 Report**').

### Background – the calls for reform

It is well known that the state's prison population continues to reach record levels. According to the *NSW Custody Statistics: Quarterly Update June 2017*, issued by the Bureau of Crime Statistics and Research ('**BOCSAR**') in June 2017, 13,092 prisoners were in custody in NSW, excluding those held in police cells, and this figure is set to increase in 2018.

The overrepresentation of people with cognitive or mental health impairments is also well known, and the diversionary regimes in the *MHFPA* were enacted by the legislature to address the issue (Hansard, Legislative Assembly, 8 November 2005, 19214). Sections 32 and 33 provide the Local Court with discretionary powers to divert eligible persons from the criminal justice system.

The NSWLRC's 2012 report was presented as 'a comprehensive look at the opportunities to enhance diversion at all stages of the criminal justice system for people with cognitive and mental health impairments … consistent with the government's priorities … particularly to prevent and reduce reoffending' (2012 Report, 0.2). The NSWLRC made over 100 recommendations including expanding the diversionary regimes in ss 32 and 33 *MHFPA* to higher courts (Recommendation 13.2), increasing services in the Local Court to assist with the early identification, assessment and case management of those with cognitive or mental health impairments (Recommendations 7.1 – 7.7) and the introduction of pre-court diversion by police officers (Recommendations 8.1 – 8.6).

The release of the 2012 report coincided with the establishment of the NSW Mental Health Commission ('**MHC**'), a statutory agency responsible for monitoring and improving mental health in the state. In its July 2017 report, *Towards a just system: Mental illness and cognitive impairment in the criminal justice system. Directions for Action,* the MHC addressed the overrepresentation of those with cognitive or mental health impairments in the criminal justice system, noting half of all adult inmates suffer mental ill-health and 87 per cent of young people in custody had a past or present psychological disorder. The rate was higher for indigenous youth in custody (at 8) and a staggering 81 per cent of young women in custody were found to have been abused or neglected (at 9).

The MHC found that increasing demand had been placed on mental health and disability services in the correctional system, a system designed for only 11,000 inmates (at 8). It concluded: 'It is clear that prison is not working to deter people from re-offending', finding 48 per cent of inmates returned to custody within two years (at 8). The MHC said it was critical that action be taken by the government, given diversion at the earliest opportunity helps to reduce the number of people entering the criminal justice system (at 16).

Unfortunately, diversion has not been popular in the Local Court. According to data recently provided by BOCSR to the author, only 1.4 per cent of criminal charges in the Local Court were diverted pursuant to s 32 in 2016. The rate has been slowly declining since 2012 (1.7 per cent).

### 2017 amendments – cognitive impairment

Criminal law practitioners will recall three determinations are required of a Magistrate pursuant to s 32 *MHFPA* (*DPP v El Mawas* [2006] NSWCA 154 at [75]):

(i) the jurisdictional decision (or 'first limb') - whether the accused is eligible to be dealt with under s 32(1)(a) *MHFPA*;

(ii) the discretionary decision (or 'second limb') - whether it is more appropriate to divert an accused or deal with him/her in accordance with law (s 32(1)(b) *MHFPA*); and then

(iii) whether to make orders pursuant to s 32(2) or s 32(3) *MHFPA*.

(For an extensive discussion on the history of the legislation, case law and tips for preparing s 32 applications see KWeeks, 'To section 32 or not? Applications under s 32 Mental Health (Forensic Provisions) Act 1990 in the Local Court', *LSJ*, May 2010, 49-55).

The 2017 amendments appear to be limited. 'Developmentally disabled' has been removed from s 32(1)(a)(i) and replaced with 'cognitively impaired'. The eligibility criteria in s 32(1)(ii) and (iii) remain unaffected (see discussion below). Section 32 now provides:

'32 Persons suffering from mental illness or condition or cognitive impairment

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

(i) cognitively impaired, or

(ii) suffering from mental illness, or

(iii) suffering from a mental condition for which treatment is available in a mental health facility, but is not a mentally ill person, and

(b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law, the Magistrate may take the action set out in subsection (2) or (3).

A new section 32(6) has been inserted defining cognitive impairment. It provides: '***cognitive impairment*** means ongoing impairment of a person's comprehension, reasoning, adaptive functioning, judgment, learning or memory that materially affects the person's ability to function in daily life and is the result of damage to, or dysfunction, developmental delay or deterioration of, the person's brain or mind, and includes (without limitation) any of the following:

(a) intellectual disability,

(b) borderline intellectual functioning,

(c) dementia,

(d) acquired brain injury,

(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,

(f) autism spectrum disorder.'

A new s 32(3)(b)(ii) has been introduced giving effect to the NSWLRC's finding that treatment plans are not possible or appropriate for those with cognitive impairments given they do not have a medical condition that requires treatment (9.60). Section 32(3) now provides that '[t]he Magistrate may make an order dismissing the charge and discharge the defendant:

(a) into the care of a responsible person, unconditionally or subject to conditions, or

(b) on the condition that the defendant attend on a person or at a place specified by the Magistrate:

(i) for assessment or treatment (or both) of the defendant's mental condition or cognitive impairment, or

(ii) to enable the provision of support in relation to the defendant's cognitive impairment, or

(c) unconditionally.'

While intellectual disabilities, dementia, autistic spectrum disorders, acquired brain injuries and other conditions are now specifically included in the s 32(1)(a) eligibility criteria, the legislature has applied a brake by introducing a restriction for eligibility - the cognitive impairment must '*materially affect* the person's ability to function in daily life'. Unfortunately, no definition of 'materially affect' or 'function' was included in the amendments, leaving much uncertainty as to how the terms will be defined and by whom.

In this respect, it is relevant to note the NSWLRC rejected the inclusion of the term 'significant disability' in the definition of cognitive impairment after concerns were raised the term was imprecise, left excessive room for discretion and had the potential to result in unequal treatment between different types of cognitive impairment (5.124).

Arguably the same criticisms can be made of the 'materially affect' restriction. Given the calls from the NSWLRC and MHC for the s 32 diversionary regime to be expanded, it is difficult to see why the legislature decided to apply a brake at the first step. Further, the very low rate of s 32 diversion would suggest restrictions on the eligibility criteria are unwarranted. An applicant must still satisfy the second limb and persuade the court that diversion is more appropriate. It is at this discretionary point that the overwhelming majority of s 32 applications succeed or fail.

### 'Mental illness' and 'mental condition for which treatment is available in a health facility'

Unfortunately, the uncertainty and restrictions in the remaining eligibility criteria have not been addressed by the legislature despite NSWLRC recommendations for reform.

'Mental illness' and 'mental condition for which treatment is available in a health facility' in s 32(1)(a)(ii) and (iii) were also found by the NSWLRC to be unduly restrictive (5.147 & 9.7). It recommended they be replaced with 'mental health impairment'. It further recommended the removal of the exclusion of 'mentally ill persons', as defined by the *MHA*, finding it did not perform a useful function and posed a barrier to an appropriate order in some cases (9.9).

Other problems with s 32 identified by the NSWLRC have not been addressed by the legislature to date. This includes the low rate of reporting of non-compliance (9.45 – 9.53), the six-month limit on a court's ability to supervise a s 32 order (9.65) and the very low rate of diversion (9.41).

### Conclusion

Arguably the very low rate of diversion is unlikely to change as a result of the 2017 amendments given the uncertainty and the restrictions that remain in the eligibility criteria. This is concerning. As the NSWLRC concluded: '[I]t seems likely that there is scope for s 32 to be used more extensively. Opportunities for diversion that might effectively prevent or reduce offending may be being missed, and defendants who should be dealt with by way of diversion may instead be dealt with according to law. The data ... on the percentage of people in prison with cognitive or mental health impairments would indicate that some of these defendants are ultimately incarcerated for repeat offending' (9.44).

It remains to be seen whether the government will implement further reforms. **LSJ**