

**Submission to the review of the forensic provisions of the
Mental Health Act 1990 and the
*Mental Health (Criminal Procedure) Act 1990***



April 2007

NSW Consumer Advisory Group – Mental Health Inc. (NSW CAG)
501/80 William St, Sydney 2000
Ph: 02 9332 0200, Fax: 02 9332 0299, email: eo.nswcag@tpg.com.au



NSW Consumer Advisory Group – Mental Health Inc
ABN 82 549 537 349

10th April 2007

Ms Margaret Lawrence
Review Secretary
Mental Health Review Tribunal
PO Box 2019
Boronia Park
NSW 2111

Dear Ms Lawrence,

Regarding: Submission to the review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990*.

Please find in the following pages our submission to the review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990*.

The NSW Consumer Advisory Group – Mental Health Inc. (NSW CAG) is the independent, statewide organisation representing the views of mental health consumers and carers at a policy level, working to achieve and support systemic change. Our vision is empowered mental health consumers and carers who experience their rights to respect, dignity and self-determination every day.

We welcome the review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health Criminal Procedure Act 1990*, and the opportunity to represent the views of people who have experience using the forensic mental health system. Our submission is based on consultation with over thirty people who: either currently or previously have experience using forensic mental health services; or are committed to consumer advocacy in this area. Our submission aims to build further on the foundation for reform laid in the Consultation Paper.

Yours sincerely

Dr Gillian Malins
Executive Officer

Response & Recommendations regarding the Consultation Paper: Review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990*

Introduction

NSW CAG considers that change in NSW around the forensic mental health system is urgently needed. Our organisation welcomes the opportunity to provide comment on the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990*. The current review shows the real potential for positive reform in NSW, and NSW CAG congratulates the NSW Government for its undertaking in this review to address the serious human rights issues that underpin reform in this area.

NSW CAG has heard first hand from over 25 people experienced in using the forensic mental health system during our consultations to prepare this submission, about the many areas requiring improvement within that system. We have also had ongoing relationships with other people using the forensic system in NSW, and with consumers committed to advocacy in the area. What we have heard, consistently, is that the current system in NSW falls short of meeting the objects and principles of the *Mental Health Act 1990*, and of meeting Australia's obligations under international law in relation to mental health law and in relation to the treatment of people with a mental illness.

In our submission, we will firstly address comment to the need for broad reform. The Consultation Paper indicates that the principle issue to be considered in the review is what individual or body should be empowered to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients. The following section of our submission addresses this issue specifically (p.4). Finally, the submission then outlines NSW CAG's position in relation to the options provided in the Consultation Paper.

General Comments: the need for broad reform

During the consultations held by NSW CAG, it was made clear that there is urgent need for consideration both of the legislation itself, as well as of the broader structures and resources of the forensic mental health system. Therefore, while the issues raised in this section do not necessarily relate specifically to review of the legislation, NSW CAG wishes to make comment on the broader need for reform, based on the feedback we received from people who use forensic mental health services:

- **Resources.**

There is an apparent need for greater resources in the forensic mental health system. During consultations, we heard of situations where people have been kept in inappropriate facilities, because places are not available in more appropriate facilities. More facilities are required, to ensure that people can move through the forensic system in an appropriately supported and timely way. It is clearly not in the best interests of people's mental health to be in facilities that are more restrictive than necessary. We heard, first hand, of the damage to people's mental health that occurs if they are required to stay in a facility that is not providing opportunities for rehabilitation and recovery that matches the stage of recovery they have reached.

- **Prevention.**

It is noted that often, people seriously attempt to access psychiatric help before committing an offence and coming into the forensic system. People are, however, regularly turned away from help at these early stages. More services are needed to assist preventing progress to the stage of committing an offence.

- **Recovery and psychiatric rehabilitation.**

The focus of the forensic mental health system should be on recovery and psychiatric rehabilitation; however, it was apparent during NSW CAG's consultations that this focus is not always well maintained. A number of concerns were raised, which include

- ◆ the lack of engaging opportunity for recovery focused activity within the services;
- ◆ a lack of personalised, flexible service approached within the system. During our consultations, people reported frequently on the rigidity of the forensic system, and that

individual needs for recovery and rehabilitation are not well supported. This has obvious impacts on the progress people feel they are able to make in their recovery.

- ◆ the extended process of seeking and attaining leave privileges, and how often this is a slow, drawn out process. Having access to leave, which allows individuals to begin integrating back into mainstream communities, is however, an essential step in the recovery and rehabilitation process.
- ◆ the punitive approach and atmosphere that pervades, despite an understanding that the forensic mental health system's focus is not punishment.
- ◆ being part of the forensic system as it is currently leads to anxiety, confusion and distress for many.
- ◆ poor, or very limited, relationships were discussed as existing between the forensic mental health system and other relevant organisations within the community. Greater integration and continuity between the forensic system and other services would be valuable in supporting people's transition back into their communities.

- **Appropriate support.**

Concern about people's access to appropriate support throughout their experience with the forensic mental health system was raised. It is necessary to ensure consumers have access to good legal advice and representation right throughout the process. A particular time of vulnerability is immediately prior to becoming a 'forensic patient.' The importance of ensuring that people are provided with clear information about their options, and the implications of becoming a forensic patient cannot be overemphasised.

- **Transparency.**

There is an extreme lack of transparency in the current system, some of which relates directly to the process of decision-making. During our consultations, it was clear that people experience the system as, often baffling, because there is not clarity or necessarily consistency of process. Variations in process, and apparently contradictory advice and decisions result in people feeling confused about the system, and about the requirements for them in terms of their rehabilitation.

Decision-making for forensic patients

It was apparent throughout the consultation process conducted by NSW CAG that the current system of decision-making for forensic patients is deeply unsatisfactory. This system of decision-making contrasts to the objects and principles of the *Mental Health Act*, which relate to providing the "best possible care in the least restrictive environment", while ensuring this is "timely and high quality treatment and care in accordance with professionally accepted standards".

Overwhelmingly, the thirty plus participants in our consultation process reported extensive delay in decision-making under the current system; raised questions relating to the Minister's specific knowledge in relation to determining "the best possible care"; and identified lack of transparency in the current system. It is commonly known a substantial number of recommendations for conditional or unconditional release are rejected by the Minister. It was apparent in consulting with people using the forensic system, that the current process for decision-making contributes to high levels of frustration for both patients and staff, and that frequently, this can be detrimental to recovery and rehabilitation work.

There was unanimous agreement that a different system for decision-making is required. Consensus in relation to reform of decision-making was to adopt Option 4, where decision-making is transferred to the Mental Health Review Tribunal (MHRT/ The Tribunal), subject to appeal to the Supreme Court. The Tribunal was considered the most appropriate body for decision-making due to its expertise, its non-adversarial approach, and its function in supporting rehabilitation.

An option not proposed in NSW Health's consultation paper, however, advocated by some participants in our consultations, is for the formation of a specialist mental health division of the Supreme Court, to be responsible for those decisions that will remain, necessarily, within the Court system. The Mental Health Review Tribunal would then have the power to make all other decisions.

Options and Recommendations

| Subject | Section | Recommendation | |
|---|---------|------------------|--|
| | | Preferred option | Comments |
| Definition of a forensic patient | 4 | Option 2. | NSW CAG broadly supports the development of a simplified definition of forensic patient in the legislation. It is essential, however, that a simplified definition is developed with the community, and the input of consumers. NSW CAG recommends that the simplified definition, is therefore, developed in partnership with key stakeholders. |
| Detention | 4 | Option 2. | NSW CAG supports that the forensic mental health legislation be amended to define expressly <ol style="list-style-type: none"> i. the power to detain; ii. the power to release; and iii. commencement and termination of forensic status. As above, these definitions, in our view, should be developed in consultation with key stakeholders, and must be consistent with Australia's obligations under international law. |
| Intellectual disability | 4 | Option 3. | It is apparent to NSW CAG that there is urgent need for changes relating to how people with intellectual disabilities are treated within the criminal justice system. There is urgent need to develop greater understanding relating to specific provision for people with an intellectual disability. In our view, it is inappropriate and unjust for people with intellectual disability to be included under mental health legislation. |
| Children | 4 | Option 2 & 3. | NSW CAG supports Options 2 and 3. In our view, specific provision for children within the forensic mental health system is required within the legislation; however, there is a need for further information and consultation to develop appropriate age specific strategies and pathways. It is our view that children need to be diverted from the forensic mental health system. An aim of any inquiry should be to result in changes to the legislation. |
| Federal offenders | 4 | Option 3. | It is essential that all people in need of mental health care and treatment have access to the necessary level of that care and treatment required. NSW CAG supports Option 3, that the NSW Government conduct a further inquiry into the need for specific provision for people detained under federal legislation within the NSW forensic mental health system. As above, in our view, an aim of any inquiry should be to result in changes to the legislation. |
| References to mental illness and mental condition | 4 | Option 2. | It is NSW CAG's view that people should be ensured appropriate care, treatment and rehabilitation irrespective of a label attached to them. We therefore have concern about the use of undefined terms in the legislation, particularly when these appear to give rise to the possibility of excluding particular people from appropriate care and treatment. NSW CAG supports Option 2, that the NSW Government conduct a review of the terminology used in forensic mental health legislation including the terms 'mental illness' and 'mental condition'. |

| Subject | Section | Recommendation | |
|---|---------|----------------------|--|
| | | Preferred option | Comments |
| Decision-Making, Reform to Executive Discretion | 5 | Option 4 | <p>NSW CAG is strongly of the view that executive discretion over recommendations of the Mental Health Review Tribunal should be removed. NSW CAG contends that the current system is outdated, unjust, undemocratic, and does not result in the best possible treatment and care of people with a mental illness. NSW CAG considers that the Minister for Health is not qualified to judge a person's readiness for release, and that decisions made by the Minister become a political process rather than an open and transparent decision. In our view, the Mental Health Review Tribunal (MHRT) is the appropriate body to make decisions in relation to people within the forensic system; therefore, we support Option 4.</p> <p>NSW CAG recommends that the NSW Government undertake further consultation with key stakeholders once more detailed mechanisms of the reformed decision-making model are developed.</p> |
| Review of decisions | 5 | Option 1 | |
| Tribunal's constitution | 5 | Option 2 | NSW CAG supports Option 2, that the legislation be amended to provide that the President of the MHRT may establish a division of the Tribunal for matters relating to forensic patients. NSW CAG would strongly oppose any reduction to the constitution of the MHRT in the case of a special forensic division were to be established. |
| Notice of hearings | 5 | Option 2 - qualified | NSW CAG supports Option 2 with qualification. Broadly, we are supportive of the introduction of a statutory requirement to give notice of hearings, and consider it essential that notice be given to the forensic patient and his or her legal representative. |
| Production of reports | 5 | Option 2. | Decision-making based on reports from relevant sources is essential if the rights of consumers are to be upheld. For this reason, NSW CAG supports Option 2, that the legislation be amended to provide that the review and determining body may only make a recommendation or determination after considering certain prescribed information, and may require the production of reports and other information from any relevant person or public official involved in the detention, care, treatment, or supervision of a forensic patient. NSW CAG considers, however, that further information is required regarding what "certain prescribed information" may be, and looks forward to reviewing more detailed proposals before amended legislation is adopted. |

| Subject | Section | Recommendation | |
|------------------------|---------|----------------------|---|
| | | Preferred option | Comments |
| Reasons for decisions | 5 | Option 2 - qualified | In NSW CAG's view, a transparent system must ensure that the determining body provide reasons for its decisions to the forensic patient and/or his or her representative. The legislation should retain the protection against publication or broadcast of the name of any forensic patient appearing before the Tribunal or determining body. It is NSW CAG's view that these reasons should be provided at no cost to the forensic patient. NSW CAG, however, qualifies it's support in relation to provision of reasons to any other person with sufficient legal interest. In our view, further discussion and consultation, particularly with people who have used the forensic system is required in relation to this aspect of the Option. |
| Compliance with orders | 5 | Option 2 | NSW CAG supports Option 2 that that the legislation provide a duty to comply with the orders of the determining body, and provide a sanction for non-compliance without reasonable excuse. NSW CAG, however, holds concern about the usefulness of Option 2 while it retains the clause "without reasonable excuse", and recommends that the legislation also require any entity that is unable to comply with an order to report that to the determining body within a specified time-frame. |

| Subject | Section | Recommendation | |
|-------------------------------|---------|------------------|--|
| | | Preferred option | Comments |
| The current law | 6 | Option 2. | NSW CAG supports Option 2, that the legislation be amended to declare that the forensic status continues after the Tribunal has made its determination, and before a judge sets a limiting term. |
| The fitness framework | 6 | Option 3. | The Tribunal's special expertise in the area of mental illness means it is the best placed to understand the issues relevant to make the determinations referred to in the Consultation Paper. NSW CAG supports Option 3. |
| Power to order an examination | 6 | Option 2. | NSW CAG supports Option 2, however, recommends that all assessments must be conducted in a culturally appropriate and sensitive manner. |
| Alternative orders | 6 | Option 2. | NSW CAG is supportive of the determining body having a range of additional options available that may be specifically relevant and applicable as alternatives to sentencing in forensic mental health legislation. |
| Limiting terms | 6 | Option 2. | |
| The mental illness defence | 7 | Option 2. | NSW CAG supports Option 2, that the NSW Government conduct a further inquiry into the need to reform the defence of mental illness to better address intellectual disability. As already stated in this submission, NSW CAG is of the view that application of the defence of mental illness to people with an intellectual disability is inappropriate. Intellectual disability is not a mental illness, and the current legislation results in people with an intellectual disability being assessed and treated as though the two are the same, which results in decisions that are neither appropriate nor effective. The mental health system is not established to meet the different needs of people with an intellectual disability. |
| Alternatives to detention | 7 | Option 2. | NSW CAG strongly supports the relevant decision-making body having a broader range of options in relation to a person's ongoing care and treatment when subject to a special verdict. |
| The length of detention | 7 | Option 2. | NSW CAG strongly supports amendment of the legislation to provide persons detained as forensic patients with a sense of when their detention will come to an end. Structures regarding how release criteria are determined and how specific entities will be engaged in ensuring appropriate support is provided to individuals will need to be developed. |

| Subject | Section | Recommendation | |
|---|---------|------------------|--|
| | | Preferred option | Comments |
| Offenders and inmates | 8 | Option 2. | NSW CAG supports Option 2, that the legislation be amended to provide for 'security patients', being convicted offenders who are transferred from a correctional centre to a hospital for treatment, and make provision for their treatment, security, leave, release and inter-jurisdictional transfer. Whilst supportive of a new category, NSW CAG strongly advocates that this group should have full access to the care and treatment available within the forensic mental health system. |
| Expiry of non parole period | 8 | Option 2 ii. | NSW CAG supports a change in the legislation to ensure that forensic patients are not disadvantaged in relation to parole by comparison with prisoners. NSW CAG advocates, however, that any amendment should be on the basis that a person is transferred to a secure, non-correctional mental health care and treatment facility. |
| Grounds for transfer | 8 | Option 3. | NSW CAG considers that consistency with the civil provisions of the <i>Mental Health Act</i> is the most appropriate option. |
| Transferees and continued treatment orders | 8 | Option 2. | NSW CAG supports Option 2, that the legislation be amended to provide that a transferee may also be classified as a continuing treatment patient immediately before or at the expiry of the non-parole period. |
| Community treatment orders for prison inmates | 8 | Option 2. | NSW CAG supports Option 2, based on the principle that people with a mental illness, whether in the community or in gaol, should have equal access to care and treatment, and in relation to these things, should be treated no differently. |
| Notifying the tribunal | 9 | Option 2. | NSW CAG supports Option 2, and recommends that the specified period be no more than 7 days. |
| The review provisions | 9 | Option 2. | NSW CAG supports changes which will simplify and consolidate the provisions for initial and ongoing review, and recommend that this be done in consultation with key stakeholders, including consumer groups. |
| Timing of reviews | 9 | Option 1. | NSW CAG strongly opposes any amendment which lengthens frequency of review. The forensic system is experienced as unjustly slow currently, and in our view, reducing frequency of review will exacerbate this experience, and put forensic patients at risk of greater injustice. Therefore, NSW CAG supports Option 1, that the current provisions regarding frequency of reviews of forensic patients be retained. |
| Review if conditions of detention, care and treatment | 9 | Option 2. | NSW CAG strongly supports Option 2, given existing concern regarding abuse of human rights and use of solitary confinement. NSW CAG recommends that the legislation also require that the Tribunal and determining body make such orders consistent with international human rights standards and laws. |
| Informal reviews | 9 | Option 2. | NSW CAG considers that informal reviews provide a valuable safeguard for an accused person, and supports Option 2, to provide the Tribunal with greater powers to address the concerns. |

| Subject | Section | Recommendation | |
|--|---------|----------------------|---|
| | | Preferred option | Comments |
| Leaves of absence | 10 | Option 3. | NSW CAG does not support the incarceration of forensic patients within correctional facilities. Despite this, under circumstances where a forensic patient may be held in a correctional centre, NSW CAG supports the Tribunal having powers to grant access to leave privileges, along with establishing a new security classification category for forensic patients held in correctional centres to better facilitate this process. |
| Criteria for decision-making | 10 | Option 2. | NSW CAG Option 2, which, in NSW CAG's opinion, will ensure a clear, understandable and transparent process for forensic patients as well as others involved, such as victims and their families. In our view, Option 3 goes too far in establishing criteria upon which to base release decisions. |
| Conditions placed on release | 10 | Option 2. | NSW CAG supports Option 2, to amend the legislation to provide a non-exhaustive list of conditions that the determining body may place on a forensic patient's conditional release. It is NSW CAG's view that more transparent, open legislation is a positive change. |
| Notification of release | 10 | Option 3. | NSW CAG supports Option 3, to remove all of the notification requirements regarding the possible or proposed release of a forensic patient. Not only do the notification requirements that currently exist perpetuate misconceptions that people with a mental illness are excessively violent, but notification of the Attorney General, Director of Public Prosecutions and Commissioner of Police is, in NSW CAG's view, discriminatory, breaching human rights. |
| Supervision of released patients | 10 | Option 2 & Option 3. | NSW CAG supports changes to the legislation that assist in greater coordination of support services, placing the consumer at the centre. In our view, ensuring through legislation, that the support system operates effectively in a coordinated fashion is a positive step. |
| Breach of conditional release | 10 | Option 2. | NSW CAG strongly recommends that appropriate, coherent support needs to be provided to people to ensure they succeed once they have conditional release. In our view, this type of supportive system includes a hierarchy of responses according to the seriousness of an alleged breach of conditional release, which ensures harsh penalties are not attracted for relatively minor breaches. NSW CAG recommends that this hierarchy be developed in further consultation with key stakeholders, including consumer groups. |
| Termination of forensic patient status | 10 | Option 2. | NSW CAG supports Option 2, to replace the current provisions for termination of forensic status with a new, consistent and consolidated provision. In our view, it is important, and in line with the objects and principles of the <i>Mental Health Act</i> , termination of forensic patient status at the earliest time is essential. |
| Bail | 10 | Option 2. | NSW CAG supports Option 2, to amend the legislation to clarify the powers to make recommendations and orders concerning a person who is granted bail after being found unfit. It is our view that every effort to ensure the legislation is clear is important in ensuring transparency. |

| Subject | Section | Recommendation | |
|-------------------------------------|---------|------------------|---|
| | | Preferred option | Comments |
| Victims of Crime | 11 | Option 3. | It is NSW CAG's view that the role that victims are playing in the current process for decision-making is problematic. It is of concern to us that the current system is not supportive of the objects and principles of the <i>Mental Health Act</i> , and additionally, is not meeting the needs of victims. We suggest there is a need for greater support for victims through accessible, appropriate support services, and through education and information about the forensic system. In our view, the Tribunal should not be an outlet for victim's and their families to vent their anger. It is also possible that other avenues, such as mediation, may be of benefit to both to some forensic patients and people impacted upon. These types of services should be available as part of the suite of options open to consumers. |
| Inter-jurisdictional arrangements | 12 | Option 2. | |
| Interaction between the legislation | 12 | | In NSW CAG's view, all provisions dealing with the care and treatment of people with a mental illness should be consolidated into the <i>Mental Health Act</i> . |