



Mental Health & Wellbeing
Consumer Advisory Group

Submission

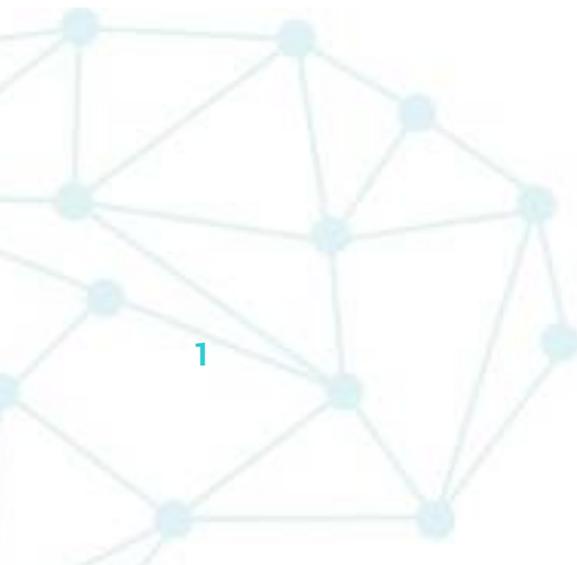
Mental Health and Cognitive Impairment Forensic Provisions Bill

Justice NSW

3rd August 2018

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For inquiries about this submission, Please email us on info@being.org.au or phone 9332 0200. Find out more about our organisation at <http://www.being.org.au>

Introduction

Being | Mental Health and Wellbeing Consumer Advisory Group (*Being*) is the independent, NSW peak organisation for people with a lived/living experience of mental health issues and emotional distress. Our primary focus is to ensure the voices of people with mental health issues are heard by decision makers, service providers, and the community. With a long-standing history of operation, *Being* is in a unique position to influence NSW policy, legislation, and service delivery, to improve the outcomes for the communities we serve by providing advice to the mental health sector on people's views and experiences of the way mental health services are delivered. We support people to advocate and provide input into decision making at all levels through a co-design process and peer-led activities.

Being has a strong focus on human rights, and as such advocates for the rights of people with mental health issues and emotional distress to live and participate in the communities they choose. We are a value based organisation whose work is underpinned by Recovery-Oriented and Trauma Informed principles including respect, social justice, and transparency, and a belief that recovery is possible for every individual.

Being engages with their members, Government, Community Managed Organisations, and the community through the provision of resources and information, consultations and submissions, research and evaluation, and education and training.

Our work is guided by eight principles:

- Principles of recovery underpin all our work
- Recognition of the importance of a holistic approach
- Collaboration and team work
- Flexibility, responsiveness and innovation
- Consultative and participatory processes that have consumers at the centre
- Promoting equity and positive images to address discrimination and prejudice
- Accessible and approachable for all
- Promotion of professionalism and quality practice

Being receives core funding from the Mental Health Commission of NSW, and project funding from the Ministry of Health – Mental Health Branch, and Fair Trading NSW.

We would like to thank the people of NSW for sharing their time and experiences with us, in a way which assists us to advocate for change at a systemic level.

We would also like to thank Justice NSW for the opportunity to contribute to the development of the *Mental Health and Cognitive Impairment Bill 2018*.

Recommendations:

1. Further consultation with a broader spectrum of forensic clients is needed to ensure that people who will come under the *Mental Health and Cognitive Impairment Bill (2018)* are able to participate in a co-design process of the Bill;
2. The language in the *Mental Health and Cognitive Impairment Bill (2018)* is not in line with with the mainstream mental health sector's understanding of recovery orientation, particularly in reference to the use of terms such as 'Impairment', which are counterproductive to recovery, and places greater stigma and discrimination on people with mental health issues.
3. The outline of diagnoses as listed in Part 1.4, puts people with these diagnoses into a category or box. If the Forensic Provisions Bill is to include diagnoses, there needs to be an inclusion of a broader range of diagnoses such as Personality Disorders.
4. Mechanisms to ensure people are diagnosed as part of the Forensic Provisions Bill 2018 so they can go through the Forensic system rather than the criminal system.

Language

In 2013 the Australian Health Ministers Advisory Council made a commitment to using the *National framework for recovery oriented mental health services* as a guide in the development and reform of mental health services across Australia. Recovery is defined as “*being able to create and live a meaningful and contributing life in a community of choice with or without the presence of mental health issues*” (Commonwealth of Australia, 2013 (a), Pg. 25).

An important element of supporting mental health consumers to achieve recovery is to ensure that the language which legislation and services use to describe consumer experience is not stigmatizing. Services and legislators are encouraged to use person first language in which terms like 'client', 'service user', and 'patient' are replaced by terms like 'person', 'people with lived experience' and 'experts by experience'. It is also noted that the terms 'consumer'

and 'carer' are used by many people who have contact with the public mental health system in NSW (Commonwealth of Australia, 2013 (a), Pg. 28).¹

Being encourages Justice NSW and the NSW government to give further consideration to aligning the language of the proposed act with the inter-governmental commitments made to implementing recovery oriented mental health services in the *National framework for recovery oriented mental health services*.

Victim rights and forensic mental health consumer rights

Being notes that a key driver behind the development of the proposed new act has been a desire to balance the rights of victims with the rights of forensic mental health consumers.

Being welcomes the work carried out by the *Mental Health Review Tribunal* in *A Review in Respect of Forensic Patients* to assess the needs of victims, as well as the needs of forensic mental health consumers and clinicians. However it is concerning that only 7 people were consulted as representatives of consumer, care and advocacy groups during the round table consultation process, given that the issues under consideration have an enormous impact on consumers.

In seeking to harmonise the rights of victims as legislated in the *Victim's Rights and Support Act 2013*, it is important to remember that consideration is being given to allowing yet another group to have a say about decisions made about forensic mental health consumers. Forensic mental health consumers are already a very disempowered group. It is important to ensure that, as specified by Section 68(a) of the *Mental Health Act 2007, no 8*, the least restrictive treatment option is always made available to consumers within the forensic mental health network.

It should also not be forgotten that the primary role of the Mental Health Review Tribunal (MHRT) is to ensure that the civil liberties of mental health consumers are protected at the same time as striving to ensure that consumer and community safety are not compromised. Ensuring safety for victims does not require greater victim participation in tribunal proceedings.

¹ Further advice on the use of recovery focused language can also be found in the *Recovery oriented language guide*, developed by the Mental Health Coordinating Council with the support of NSW Health. It can be found at <http://mob.mhcc.org.au/media/5902/mhcc-recovery-oriented-language-guide-final-web.pdf>.

Being believes that the rights of victims of crime as legislated in the charter of victim's rights (NSW Government, 2013, Sections 6 and 7) can be adequately and appropriately recognised without giving victims undue influence over the leave and release decisions made by the MHRT whose decisions should be primarily informed by consumers, clinicians and carers and in particular by an understanding of the therapeutic progress made by the consumer at the date of the Tribunal sitting.

Definitions of 'mental health impairment' and 'cognitive impairment'

It is generally positive that the scope of the act has been clarified by providing clear definitions of mental health issues (NSW Government, 2018, Part 1, Section 4) and cognitive disability (NSW Government, 2018, Part 1, Section 5) that are more aligned with contemporary understandings of psychosocial disability.

However less stigmatising and more recovery-oriented language could be used in sections 4 and 5 of the proposed act. 'Mental health impairment', should be replaced with a more person-centred alternative, such as 'People living with mental health issues' and 'cognitive impairment' with 'People living with cognitive challenges'. These would be more consistent with the whole of government commitment made in *A national framework for recovery oriented mental health services: Policy and theory* (Commonwealth of Australia, 2013 (a)).

Exclusion of personality disorders

It is unclear why personality disorders are excluded as mental health issues for the purposes of the act.

Being notes that the Law Reform Commission of NSW (NSW Law reform Commission, 2012 , Pg. 117), discusses this issue. Three points are raised regarding the challenges of including personality disorders as grounds for being found not guilty by virtue of mental illness. The Commission notes that there is a divergence of opinion regarding whether personality disorders are mental illnesses, that there is a problem of circularity because criminal behaviour is included in the definition of some personality disorders and finally that it is arguable that personality disorders are not treatable.

Particularly noteworthy is the suggestion made by the Commission that including personality disorders would be tantamount to "opening the floodgates" to allow everyone in court to have a mental health issue (NSW Law Reform Commission, 2012, Pg. 117).

Being notes that personality disorders in the *Diagnostic and Statistical Manual of Mental Disorders Version 5* (the standard classification of psychopathology utilised by psychiatrists and clinical psychologists in Australia), are constituted by pervasive patterns of behaviour, which may include disregard for the rights of others, as is the case with antisocial personality disorder, but may also include a range of other persistent behavioural patterns. Most of these other patterns of behaviour do not by default include criminality.

There are also established peer reviewed treatments for some personality disorders. One example would be the use of Dialectical Behaviour Therapy² to assist people who live with the challenges of Borderline Personality Disorder. *Being* strongly encourages the Government to seek further advice from consumers who live with personality disorders before finalising this exclusion.

Hospital Leave

A review in *Respect of Forensic Patients* noted that forensic mental health consumers had consistently lower reoffending rates than other prisoner groups (NSW Health, 2018, Pg. 33). This suggests that forensic mental health consumers are not a high-risk group in relation to hospital leave or release. It should also be noted that leave is not a reward for good behaviour, but a way of testing the progress of therapeutic interventions and assessing their effectiveness outside of the hospital setting.

The suggestion by the Department of Justice that parole hearings (which victims are allowed to contribute to), are analogous to MHRT decisions (NSW Health, 2018, Pg. 40) misses the point that the MHRT makes decisions which are informed primarily by the therapeutic progress of an individual. The key question in that context is whether the individual is well enough not to be a risk to themselves, or others. The victim's input is not required to be able to assess whether there is a threat to the victim. If the victim nevertheless still feels threatened they require trauma informed support to manage this very difficult feeling and not the opportunity to express it at a session of the MHRT.

Currently victims of crimes committed by forensic mental health consumers are able to request geographical or non-association restrictions on forensic mental health consumer leave (NSW Health, 2018, Pg. 40) as a way of ensuring victim safety. *Being* is supportive of maintaining the current limitations on victim submissions to tribunal hearings. The proposal to allow more scope for victims to make broad submissions to the tribunal on leave and release (NSW Health, 2018, Recommendation 11) and the right to have a legal representative

² For a quick overview see <https://www.sane.org/mental-health-and-illness/facts-and-guides/dialectical-behaviour-therapy-dbt>

appear of the victim's behalf at tribunal sessions (NSW Health, 2018, Recommendation 12) are an unnecessary and possibly destructive expansion of victim rights.

Victims should be provided with sufficient support to allow them to recover from the trauma of violent crimes, but not encouraged to continue participating in the forensic consumer's treatment unless they have a prior relationship to the forensic consumer that provides a context for their participation other than simply being his, or her victim. One reason for this continued participation would be when a family member or carer is the victim of crime and continuing involvement may be supportive of recovery for both the family member or carer, and the forensic mental health consumer.

Updated surveillance technologies

The NSW Government is in support of expanding the surveillance options available to the MHRT in relation to allowing leave, or release for forensic mental health consumers. This is in line with recommendations 20 and 21 of *A review in respect of Forensic Patients*.

This is despite the fact that the recidivism rate for consumers released from the forensic mental health network is low and that there is strong support for maintaining the current supervision systems from both clinicians and forensic mental health consumers (NSW Health, 2018, Pg. 46).

Being encourages the MHRT not to expand the utilisation of surveillance mechanisms in place of the support currently provided by case managers, psychiatrists and community mental health workers to people on leave or discharged from the forensic mental health network. Unjustified community fears should not be the primary determining factor behind the assessment of surveillance levels. Excessive surveillance of people on leave from the forensic mental health network will simply reinforce stigma and discrimination, and make recovery more difficult.

Capital works to expand the forensic mental health network

One of the findings of *A review in respect of forensic patients* (NSW Health, 2018, Pg. 48) was that the forensic mental health network currently has too few medium and low security beds. People who are being provided with mental health care within the forensic mental health network in NSW have the same rights as other mental health consumers as laid out in Division one, section 68, subsection (a) of the *Mental Health Act 2007, No 8*, which asserts that

people with a mental illness have the right to the “least restrictive environment” given the balance of risk to self and others.

In the case of the forensic mental health network this can be understood as the right to a medium, or low security bed as appropriate given individual progress in recovery. **Being** is strongly supportive of NSW Health prioritising a capital works program to ensure that the rights of mental health consumers within the NSW forensic mental health network are respected.

Victim impact statements

Being is supportive of recommendation 4 of *A Review in Respect of Forensic Patients* (NSW Health, 2018, Pg. 38), which recommends that victims of forensic mental health consumers be allowed to submit a victim impact statement when someone is found Unfit and Not Acquitted (UNA), or not guilty by virtue of mental illness (NGMI), however we do not see it as beneficial for victims to provide a more up to date victim impact statement to the tribunal as stated in recommendation 6 (NSW Health, 2018, Pg. 38).

Whilst victims may well suffer continuing fear, anxiety, and trauma following a violent crime, these issues would be better addressed by ensuring that victims of crimes are provided with the best possible trauma informed and recovery-oriented support, both clinically and as regards the functioning of the forensic mental health network.

Expanded Psychological Support for Victims

Being is supportive of the Establishment of a Victim Support unit as recommended in recommendation 22 (NSW Health, 2018, Pg. 53) to ensure that victims are identified, provided with appropriate crisis referral, case management, trauma informed counselling and with support to provide victim impact statements.

We are also concerned that providing victims with an information pack about the forensic mental health consumer, may fail to respect the right to privacy of forensic mental health consumers. Due regard must be given to forensic mental health consumer’s rights to privacy in the provision of information to any third party who is not the consumer’s designated carer (NSW Government, 2007, section 72), principal care provider (NSW Government, 2007, section 72a), the consumer’s treatment team, or the MHRT. Under the whole of Australian government *Mental Health Statement of Rights and Responsibilities*, the Mental Health Drug and Alcohol Principal Committee of the Australian Health Minister’s Advisory Council, committed

to respecting the privacy and confidentiality of mental health consumers (see for example, Part 2, section 5, b; Part IV, subsection II, section 19, j). These principles are reflective of Australia's obligations as a signatory to the UN *Convention on the Rights of Persons with Disabilities*.

Being is supportive of the using the model of providing information notices followed by the Queensland Government ³, but also believes that further consultation is required to ensure that the right to privacy of forensic mental health consumers is respected.

³ For a brief overview of the Queensland system see https://www.health.qld.gov.au/qhvss/information_notices. The review found that Queensland currently has the most developed processes to support victims of crimes committed by forensic consumers (Pg. 34).

Acronyms

UNA – Unfit and not acquitted.

NGMI – Not guilty by virtue of mental illness.

MHRT – Mental Health Review Tribunal

Glossary of Terms

NSW Forensic Mental Health Network – The system of mental health services established to provide treatment to and support mental health consumers who have committed violent crimes as a result of their mental health issues.

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