

27th April 2020

The Hon. Bronwyn Taylor, MLC
Minister for Mental Health, Regional Youth and Women
GPO Box 5341
SYDNEY NSW 2001

RE: Emergency Measures Bill – Consumer perspectives to amendments to the NSW Mental Health Act (2007)

Dear Minister Taylor,

I am writing to you in relation to the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No. 1*. BEING has sought comment from our members and the broader community of people living with mental health issues in NSW through a series of online meetings in relation to the amendments which have recently been made to the *NSW Mental Health Act 2007 No. 8*, as specified in section 2.13 of the Emergency Measures Act.

Whilst there are several significant concerns for our members, a key concern relates to the lack of consultation with consumers, or awareness made to them of the drafting of the bill. As a result, consumers in NSW did not have an opportunity to contribute to the formulation of the legislative amendments, nor were they aware of the passing of such amendments. Our members asked BEING to reiterate in their letter that such processes go against the Government's commitment to co-design and co-produce policy and legislation at state and national levels. Our members also requested we reiterate that engagement of consumers as experts in their own lives, is critical to mental health reform. Much has been achieved over the years, and continues to be achieved, to bring about positive change to service provision through consumer engagement and involvement. As a consumer community we stand by the motto 'Nothing about us without us'.

Whilst we understand that we are all currently navigating very challenging circumstances, our members felt that it would have been fitting for consultations to take place with the consumer cohort, more specifically with the many who access public mental health services, as well as BEING as the peak body representing the views and perspectives of its members and the broader mental health consumer community. This is especially so at a time when many of our members expressed concerns with their rights being compromised due to the focus on system needs rather than what is in the best interest for the consumer from a rights perspective. It is vitally important to acknowledge the fundamental element of protecting people's rights and opening opportunities for people to have a say. This is especially so when the resulting legislative changes will have a direct impact on individual freedom.

Although these legislative changes have already been assented to by the NSW Parliament, we feel it is still important to consult with people living with mental health issues to better understand how this new legislation will impact them. We hope that this will inform the ways in which these short-term legislative amendments are applied in the future.

Further concerns relate to section 2.13, subsection 202, clause 3, where it is noted that the Mental Health Review Tribunal (MHRT) will be able to adjourn mental health inquiries for up to 28 days. Some participants in our consultations were concerned that this would lead to situations where people living with mental health issues would remain needlessly hospitalised at a time when they felt being in hospital left them at higher risk of infection by the coronavirus. Whilst we do not doubt the adequacy of the infectious disease management protocols which will be applied if someone in an inpatient unit is found to have the COVID-19 infection, our members comments suggest that it would be useful to inform consumers about the steps that will be taken to balance physical health care with mental health care needs during this time.

To ensure full transparency and reduce anxiety, it is vitally important to ensure that key workers, including peer support workers and workers in the community managed sector, are also made aware of any mental health policy changes made as a result of the COVID-19 pandemic, and as priority measures. In recent consultations with peer support workers, we were informed that peer workers and community mental health teams have not all been provided with information around the changes to the Mental Health Act, and therefore unable to relay such important changes on to their clients.

Further concerns were expressed about the lack of clarity around the grounds for adjourning mental health inquiries. Rather than providing explicit criteria which should be applied in making these decisions, the legislative amendments allow the tribunal to make its own decisions on the basis that circumstances resulting from the COVID-19 pandemic require such an adjournment (Section 2.13, subsection 202, clause 5). This approach places a significant amount of power into the hands of the MHRT, and leaves open opportunities for services to interpret as they so feel. We understand that these amendments were introduced to allow for continuity of service in circumstances where several tribunal members become unwell at the same time. What is concerning for our members is the lack of clarity or clear guidelines of how the temporary amendments are applied.

The amendments also allow for potential extensions of Community Treatment Orders (CTO) by up to 3 months even if this extends the length of the order beyond the usual 12-month period (Section 2.13, Subsection 202, clause 3). Whilst a small number of people consulted expressed positive experiences with community treatment orders, the majority raised concerns with the amended measures, and the extension to time provisions put in place.

Many participants reflected their concerns with such measures, with one member stating that they [will] “lock you into services for longer than expected”. Another member from rural NSW expressed concerns that the new measures might lead to people with lived experience having to endure longer terms of negative medication side effects without being able to appeal to the tribunal, at the very least for a reconsideration of medication regimes. The individual felt this was a greater concern in rural areas, because of the limited availability and accessibility of psychiatric consultation and opportunities to negotiate medication regimes and side effects.

Once again, the criteria to be applied in making the decision to extend CTO ‘s are left wide open. If the COVID-19 pandemic justifies an extension in the view of the MHRT, then it appears to be justified from their end. One participant to our consultation asked, “on what grounds will the Tribunal make such a decision to extend and how would the decision be COVID specific related?”.

Given the wide scope of the decision-making powers now granted to the MHRT, it is more important than ever that full transparency be maintained when decisions are made under these new powers. The

reasons for decisions must be made available to consumers in an accessible and timely way, to allow them to be informed and to deliberate prior to the hearing on putting their case forward to the tribunal members.

The MHRT requested that in our discussions with consumers we also ask what consumers felt would be the best way to manage situations where there is only a single tribunal member available to sit, and in particular when that member only has a legal background. One participant in our consultations had previously experienced a situation where there was only a legally qualified member available for the hearing. Although the individual found that the overall outcome was satisfactory, they felt that they were not treated with the same level of compassion and understanding that they had experienced when dealing with members who have a deeper understanding of mental health issues, such as the Other Suitably Qualifies member and psychiatrists members.

Another person suggested that in the event that such a process would become necessary, it would be appropriate for the tribunal member to seek external advice from an appropriately qualified professional. It may be appropriate for consideration to be given to finding additional qualified people to carry out this role, if required and only in urgent situations. However careful consideration must be given to the process to ensure a broader understanding of the legal rights framework of the MHRT and the legislation. Creativity is required to ensure that the tribunal can fully serve the mental health as well as the legal needs of consumers in this situation.

In addition to these comments, I have also included a report which BEING has compiled after consulting with consumers about the challenges they are facing in relation to the COVID-19 pandemic. This report has been shared with the Mental Health Commission of NSW, and we hope that it will assist with the planning being progressed to support people living with mental health issues during the COVID-19 pandemic and beyond.

Please do not hesitate to contact me if you require any further information regarding the above or the attached report.

Yours sincerely



Irene Gallagher

Chief Executive Officer

NSW Consumer Advisory Group – Mental Health Inc
t/a BEING

Cc to Catherine Lourey - Commissioner Mental Health Commission of NSW
Pam Rutledge - Deputy Commissioner Mental Health Commission of NSW