

Mental Health

Legal Aid NSW submission to
Productivity Commission

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323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

Legal Aid
NEW SOUTH WALES 

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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). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal

services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW's Mental Health Advocacy Service (MHAS) is based at Burwood and provides advice and representation to all forensic patients in NSW. Legislation requires all forensic patients having any matter before the Mental Health Review Tribunal (the Tribunal) to be represented by a legal practitioner.

Legal Aid NSW welcomes the opportunity to make a submission to the Commission's Inquiry. Should you require any further information, please contact

Bridget O'Keefe
Manager
Strategic Law Reform Unit



Introduction

Legal Aid NSW welcomes the Commission's inquiry into the economic impacts of mental ill health.

As a frontline provider of legal services to people with mental health impairments, Legal Aid NSW sees, on a daily basis, the impact of insufficient investment in mental health services in NSW.

As highlighted by the NSW Mental Health Commission in its 2017 report, *Towards a Just System*, there are significant costs associated with managing people with mental health impairments in the criminal justice system.¹ These include:

- costs of adult and juvenile detention
- health services provided in detention, including to forensic patients
- costs of those being supervised in the community (this can include probation and parole as well as health and other community support services, such as housing)
- lost potential productivity of the individuals concerned
- costs and potential loss of productivity for the victims of crime, particularly for violent offences
- Justice administration costs that include:
 - ○ Police resources
 - ○ courts and tribunals
 - ○ legal aid and prosecution costs²

The report concluded that, among other things, NSW requires a sustainable and ongoing funding model to support investment in early intervention initiatives, and alternatives to incarceration. While repeated reviews in NSW have called for increased investment to reduce the entrenchment of people with mental ill health and cognitive impairments in the criminal justice system,³ significant change has not followed.

The Commission's inquiry provides an opportunity to consider the real benefits that can flow from providing adequate supports to people with mental ill health living in the community. These include obvious improvements to individual and community wellbeing, but also economic returns in the form of reduced investment in prisons.

¹ NSW Mental Health Commission, *Towards a just system: Mental illness and cognitive impairment in the criminal justice system* (2017)

² Ibid, 10.

³ Ibid, 7.

In the following sections, we draw the Commission's attention to two specific issues that are particularly relevant to our practice, both involving forensic patients. .

The *Mental Health (Forensic Provisions) Act 1990* (NSW) defines who is considered to be a forensic patient.⁴ For the purpose of this discussion forensic patients are those found not guilty by reason of mental illness (**NGMI**) and/or unfit to be tried and subject to a limiting term.

Inappropriate detention of forensic patients in non-therapeutic environments

By definition, forensic patients found NGMI are not criminally responsible and, as such, punishment should not be a relevant consideration when they are detained. Where detention is required for community safety, security requirements should be met through detention in a secure mental health facility, which will also address the health needs of the patient.

Despite this, 16% of all forensic patients are detained in custody.⁵ As the Mental Health Review Tribunal points out:

Delays in admission to a mental health facility mean that patients struggle to maintain optimism and hope for the future, which are key components to a successful recovery. Patients learn prison coping mechanisms that can take years to unlearn. For a forensic patient, time spent in prison is not merely treading water. All too often, the forensic patient is going backwards. Where a person has not been convicted of an offence, this is unconscionable.

In our extensive casework experience, it is a common pathway for forensic patients to remain detained within a correctional centre on remand for around two years while waiting for court proceedings to be finalised. Even after the court makes a finding of NGMI, it is typical for someone to continue to be detained in a correctional facility for a further two years while awaiting transfer to a mental health facility, such as the Forensic Hospital at Malabar.

Forensic patients subject to a limiting term often experience an intellectual rather than psychiatric disability. These patients are regularly detained within correctional centres, and often do not have access to rehabilitation programs targeting offending behaviours. This may be as a result of having been assessed as having low service needs, or because their disability impedes their ability to participate in rehabilitation programs. Because these patients have not undertaken requisite rehabilitation, they are often detained within the correctional environment for the majority of the limiting term. In addition, the lack of participation in these programs increases the risk that the person will be subject to an application for an extension order at the end of their limiting term, which means that their

⁴ Section 42.

⁵ NSW Mental Health Review Tribunal, *Annual Report (2017-18)*, 5.

status as a forensic patient, and their inappropriate detention in a correctional facility continues beyond the expiry of their term.

In its 2018 report on the Parklea Correctional Centre and other operational issues, the NSW Legislative Council highlighted that 60 patients who were being held in a prison environment had been ordered to be detained in prison only until a forensic bed became available, or had been ordered to be moved to the forensic hospital within a specified time.

Unfortunately, the Forensic Hospital does not have sufficient beds to allow for timely admission of new patients. This is compounded by the lack of beds in medium-secure facilities, which prevents patients being transferred out of the Forensic Hospital at the earliest opportunity.

Further, it is not uncommon for forensic patients to be detained at the Forensic Hospital despite not experiencing a mental illness but rather intellectual disability or neurological disorders such as epilepsy. As a mental health facility, the staff and facilities at the Forensic Hospital are not equipped to provide care, treatment and rehabilitation to these patients. This results in increased costs associated with patients remaining detained at the Forensic Hospital because they are unable to access appropriate care and treatment.

The inadequate resourcing of the forensic mental health system, and the lack of appropriate accommodation and services for forensic patients with cognitive impairments, mean that forensic patients often spend extended periods in prison, where they are unable to begin their recovery. These delays result in an extended loss of capacity to work, participate in the community and support family. They also result in increased costs associated with detention and with lengthier periods of reliance on social security benefits while detained in a health care setting.

Inability of forensic patients to progress to community living

The inability to move patients from the correctional environment to a health care facility is often the flow on effect of a lack of community based accommodation and support for people.

The release of a forensic patient is dependent on the availability of these types of supports. People often remain in detention until such supports can be secured.

The implementation of the NDIS has created barriers for some forensic patients, as requirements imposed by the Mental Health Review Tribunal, such as supervision in the community, are deemed by the NDIA as being a justice rather than health/disability issue. In one example, a forensic patient was denied NDIS coverage for 'line of sight' support' and supervision which had been imposed by the Mental Health Review Tribunal as a necessary condition of release.

However, forensic patients are also unable to obtain these supports through the justice system, as they are not justice clients. For example, they are not eligible for the supports and accommodation provided by Corrective Services NSW to those subject to parole.

These supports include community based supervision, and community-based rehabilitation and education programs.

Again, these service gaps result in slower progression through the system, less community contact and delayed recovery.

We suggest that the Commission should consider options for ensuring that step-down facilities and services are more readily available within the forensic mental health system, so that forensic patients can progress through the various stages of detention in a timely way and transition successfully back into the community.

We look forward to the Commission's report on these important issues, and hope it will prompt action and meaningful investment to help more people with mental ill health live in, and contribute to, their communities.