

Submission of the

NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES

to the

NSW Department of Health

Review of the forensic provisions of the
Mental Health Act 1990 & the Mental Health
(Criminal Procedure) Act 1990

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|-----|---------------------------------------------------------------------------------------------------|---|
| 1. | EXECUTIVE SUMMARY | 2 |
| 2. | SCOPE OF THE REVIEW | 3 |
| 3. | FIRST PRINCIPLES: INDEPENDENT DECISION-MAKING, THE RULE OF LAW AND LEAST RESTRICTIVE CARE..... | 3 |
| 3.1 | <i>least restrictive alternative principle</i> | 4 |
| 4. | DECISION-MAKING FOR FORENSIC PATIENTS | 5 |
| 4.1 | <i>constitution of the panel</i> | 6 |
| 4.2 | <i>parties, appearances and representation</i> | 6 |
| 4.3 | <i>participation of victims</i> | 7 |
| 4.4 | <i>appeal process</i> | 8 |

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1. Executive Summary

The NSW Council for Civil Liberties (CCL) makes the following specific recommendations:

1. All decision-making in relation to forensic patients should be transferred to the Mental Health Review Tribunal (MHRT) and subject to appeal to the Supreme Court of New South Wales;
2. A specialist division of the Supreme Court should be established to hear appeals against decisions of the MHRT on points of fact or law;
3. The MHRT should comprise a multi-disciplinary panel of at least 3 members for the purposes of conducting forensic proceedings;
4. Mandatory six monthly MRHT review of forensic cases should be maintained;
5. Free legal representation for individuals subject to MHRT forensic proceedings should continue to be provided;
6. In addition to a right for the person who is the subject of the proceedings and the Attorney General to appear before the MHRT, any person who has a substantial interest in protecting the interests of the person should be able to appear with leave and should have a right of appeal to the Supreme Court with leave; and
7. The role of victims in the decision making process should be confined to making written submissions which the MHRT can take account of so far as they are relevant. Otherwise the interests of victims can appropriately be represented in hearings by the Attorney General.

More generally, CCL is concerned that a lack of coordinated services prevents forensic patients being released even when it is clinically warranted and legally appropriate. It is critical that appropriate services in both prisons and the community are provided so as to facilitate the gradual lessening of restrictions on the custody and care of forensic patients.

Finally CCL is concerned that the terms of the present enquiry are too board and believes that a more comprehensive review of criminal procedure and diversionary options relevant to forensic patients should be conducted by a well resourced policy body such as the NSW Law Reform Commission.

2. Scope of the review

1. This submission will focus on the discrete issue of decision-making about the release of forensic patients, a process which is in urgent need of change and which may be properly dealt with by the present review of the NSW forensic mental health system.
2. CCL is concerned that the terms of reference of the present review are too broad. The issue of the 'therapeutic and detention mechanisms for forensic patients and the inter relationship of the mental health and justice systems'¹ warrants far more extensive consultations and investigations than are possible within the framework of the present review. In particular, more work must be done to ensure that the *unique* needs of people with a mental illness, people with a mental condition, and people with an intellectual disability are met by the forensic mental health system—while simultaneously ensuring that the system is better able to cater for their common needs.
3. The Consultation Paper does not appear to have been informed by sufficient comparative evaluation of approaches taken in other local and international jurisdictions. The Canadian regime for decision-making about forensic patients is one example of a well-functioning model from which NSW could learn.
4. CCL agrees that the forensic mental health system as a whole requires reform so that it has strong legislative foundations and sufficient resources to be able to deal with defendants with a mental illness, mental condition and/or intellectual disability in a more humane fashion—in ways consistent with maximum protection of their civil rights and which ensure diversion out of the criminal justice system in appropriate cases is better and more efficiently facilitated. Immediate reforms to this end may well be justified.

However, CCL recommends that a further more comprehensive review of criminal procedure and diversionary options relating to forensic patients be conducted by a well resourced body such as the NSW Law Reform Commission, recruiting the assistance of professionals with relevant expertise.

3. First principles: independent decision-making, the rule of law and least restrictive care

5. The current system of decision-making about forensic patients in NSW, whereby determinations about detention, leave privileges and release

¹ NSW Department of Health, Consultation Paper: Review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act 1990*, NSW Department of health, 2006, p i.

are made by the executive is inconsistent with international law,² the recommendation of a national inquiry into the human rights of patients receiving compulsory mental health care, as documented in the 'Burdekin Report',³ and one of the foundational principles of our democratic society: the rule of law.

6. The right to freedom from arbitrary detention is a peremptory norm of international law, which depends on the availability of independent, and effective judicial review of the detention of an individual for its realisation. This norm is an extension across the globe of the rule of law, which underpins Australia's common law system.

3.1 *least restrictive alternative principle*

7. The legal framework for decision-making about forensic patients should require decision-making processes to give effect to the *least restrictive alternative principle*, embodied in Article 9(1) of the United Nations 'Principles for the protection of persons with mental illness and the improvement of mental health care' (UN MI Principles):

Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.⁴

8. To this end, it is critical that there are appropriate services in both prisons and the community to facilitate gradual lessening of restrictions on the custody and care of forensic patients.⁵ CCL is concerned that the lack of a coordinated, state-wide forensic mental health service in NSW works to 'prevent patients being released *even when it is clinically warranted and legally appropriate that they no longer be detained*.'⁶

² Article 9(1) and (4) *International Covenant on Civil and Political Rights* (freedom from arbitrary detention and deprivation of liberty and right to judicial review of detention); Principle 17 of the United Nations 'Principles for the protection of persons with mental illness and the improvement of mental health care'; United Nations High Commissioner for Human Rights, Adopted by the First United National Congress on the Prevention of Crime and the Treatment of Offenders, Geneva 1955.

³ Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness*, Report of the National Inquiry into the Human Rights of People with a Mental Illness, the Commission, Australian Government Printing Service, 1993, Canberra.

⁴ Above, note 2, Article 9(1) and (4).

⁵ See the United Nations 'Standard Minimum Rules for the Treatment of Prisoners', Article 82(1) and (4).

⁶ Boyd-Caine, Tessa & Chappell, Duncan, 'The Forensic Patient Population in New South Wales' (2005) 17(1) *Current Issues in Criminal Justice* 5-29 at 26. [Emphasis added.]

4. Decision-making for forensic patients

9. CCL is strongly opposed to the current system which permits executive discretion to determine how long a forensic patient may be held, whether they should be transferred, when they should be released and when restrictions on their custody or care should be lessened. As pointed out in the Consultation Paper, this discretion has been discarded in the UK after it was found to breach the European Convention for the Protection of Human Rights and Fundamental Freedoms by the European Court of Human Rights.⁷ CCL is also opposed to the option of a system giving a right of veto for the executive.
10. The current system also breaches international and domestic legal standards in that there is no guarantee that a decision will be impartial and unaffected by politics. This breach of transparency and fairness is compounded by the lack of opportunity for the forensic patient to give their evidence directly to the decision-maker or to appeal to a court, and the fact that they may not have heard the evidence that the decision was based on. The current system thus contravenes the fundamental common law doctrine of procedural fairness.
11. Executive discretion should be discarded and in its place, CCL believes that the model best suited to NSW amongst the models described in the Consultation Paper is to transfer all decision-making powers to the Mental Health Review Tribunal (MHRT), while retaining the Supreme Court's power to review decisions. The New South Wales Law Reform Commission (NSWLRC) recommended that decision-making about forensic patients should be transferred from the executive to the MHRT in a 1996 report, considering that the MHRT was better suited to handling this sensitive task because of pre-existing expertise and experience.⁸
12. Option 4 in the Consultation Paper would also ensure a more informal, flexible and time efficient environment to review cases, while providing the safety net of judicial review. A court model (Option 2 in the Consultation Paper) would not provide these benefits.
13. The fact that detention, care and release treatment of forensic patients may be considered to raise 'sensitive' matters, or 'broader community issues'⁹ is no justification for retaining executive decision-making in this area. Independent decision-making, and judicial review, are essential safeguards when it comes to deprivation of individual liberty to ensure that civil rights are not displaced by considerations of political expediency.

⁷ *X v United Kingdom*, European Court of Human Rights, 5 November 1981.

⁸ New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80, 1996, the Commission, Sydney.

⁹ Above, note 1, p 18.

14. CCL acknowledges that one aspect of decision-making about forensic patients involves balancing the interests of the forensic patient (in being subject to minimal restrictions on their freedom) and the public interest (in ensuring that safety issues are taken into consideration in decisions about release). A tribunal model would be able to protect the relevant public interest by giving rights to appear and to appeal to the Attorney General, in line with the recommendation of the NSWLRC made in 1996.¹⁰
15. Regular six monthly review of the situation of forensic patients would be an important means of ensuring that the *least restrictive alternative principle*, stated above in 3.1, is given effect. Defendants with a mental illness, a mental condition and/or an intellectual disability are particularly vulnerable to abuse. There may be significant changes in a person's condition over a short period of time, depending on their medication and treatment plan. Mandatory six monthly review would achieve the two important goals of: scrutinising conditions of custody and care; and responding more effectively where a person's condition has either improved or deteriorated.

CCL recommends transferring all decision-making in relation to forensic patients to the MHRT, subject to appeal to the Supreme Court, and maintaining mandatory six monthly reviews.

4.1 constitution of the panel

16. CCL is of the view that decisions about forensic patients should be made by multi-disciplinary panels of the MHRT, comprising at least 3 members, to ensure that the decision-making body is possessed of the necessary experience, skills and knowledge. CCL notes that current proposals for reform of the *Mental Health Act 1990* (NSW) (MHA) include greater use of single member MHRT panels. Single member panels would only be appropriate in the MHRT's forensic jurisdiction for directions hearings dealing with straightforward procedural questions.

4.2 parties, appearances and representation

17. It is essential that people who are the subject of MHRT forensic proceedings have a right to appear and be represented at hearings. As is currently the case, they should be provided with free legal representation for these hearings.
18. The Attorney General should have a right to appear in person and make submissions relating to the public interest. In addition to appearances by clinicians responsible for providing treatment to a forensic patient, any person who has a substantial interest in protecting the interests of

¹⁰ Above, note 9, pp 184-188.

- the patient should be able to appear with the leave of the Tribunal.¹¹
19. In addition, the new framework should incorporate a statutory provision requiring notice of hearings to be given to the forensic patient and their representative, the Attorney General, family members of patients and registered victims, to ensure relevant interests are adequately represented at hearings.
 20. The MHRT should be required to provide a statement of reasons to the forensic patient and their representative and the Attorney General.
 21. CCL notes that current proposals for reform of the MHA include a regulation making power relating to appearances and representation, Key procedures regarding appearance and representation, such as basic rights to appear and be represented, should be incorporated into legislation and should not governed by regulations (which are subject to change by the executive without public scrutiny).

4.3 participation of victims

22. CCL wishes to repeat comments made in an earlier submission to the NSW Department of Health on the Mental Health Bill 2006 (NSW):

CCL notes that victims' rights principles were originally developed *without* forensic mental health proceedings in mind. There are important differences between criminal trials and Tribunal proceedings which indicate that great care is needed when developing procedures for the participation of victims which are appropriate in this unique jurisdiction.

The participation of victims in a criminal trial traditionally occurs at the point of sentencing and serves punitive purposes. In contrast, victims [generally] become involved in forensic proceedings under the Act after a person has been found not guilty by reason of mental illness, at a stage of the process which is not meant to achieve punitive purposes. Although analogies with the criminal justice system are not entirely appropriate, victim involvement at this stage is comparable to victim involvement in Executive decisions relating to parole. As such, it may effectively subject a person to double punishment for a crime of which they have been acquitted.

23. For the above reasons, the role of victims in the decision-making process should be confined to making a written submission to the MHRT. The legislation should include a provision to the effect that the MHRT should take into consideration such a submission to the extent that it is relevant to the decision-making criteria. The parties and their representatives should be provided with copies of such submissions as soon as practicable after they have been received by the MHRT, and in advance of the hearing.

¹¹ See Canadian *Criminal Code* R.S.C. 1985, c. C-46, 672.5.

24. The equivalent Canadian provision provides:

When a verdict of not criminally responsible on account of mental disorder has been rendered in respect of an accused, the court or Review Board shall ... take into consideration any statement filed in accordance with subsection 672.5(14) in determining the appropriate disposition or conditions ... to the extent that the statement is relevant to its consideration of the criteria ...¹²

25. The relevant interests of victims in proceedings (relating to public safety) would be represented in person by the Attorney General.

26. As stated in section 4.2 above, key procedures regarding appearance and representation, including the involvement of victims, should be incorporated into legislation and should not be governed by regulations.

4.4 appeal process

27. The forensic patient, the Attorney General, and any person having a substantial interest in protecting the interests of the patient with leave, should have a right of appeal to the Supreme Court on both points of facts and law. CCL is of the view that a specialist forensic mental health division of the Supreme Court should be established to conduct such appeals, as exists in Queensland.¹³ This would ensure that the court is possessed of the expertise needed to adjudicate in this specialist field of law, which is as much about treatment, rehabilitation and social needs as it is about legal issues. Such an approach is in line with recommendations of the NSWLRC made in 1996.¹⁴

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| CCL recommends that a specialist division of the Supreme Court be established to hear appeals against decisions of the Mental Health Review Tribunal about forensic patients on points of fact and law. |
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¹² Canadian *Criminal Code* R.S.C. 1985, c. C-46, 672.541.

¹³ See *Mental Health Act 2000* (Qld), Ch 11.

¹⁴ Above, note 9, pp 184-188.