Review of the operation of the Mental Health Review Tribunal in respect of forensic patients

Submission to NSW Health

October 2017
Submission to NSW Health in response to the discussion paper (August 2017)
1. **The Mental Health Commission of NSW**

The Mental Health Commission of NSW is an independent statutory agency responsible for monitoring, reviewing and improving the mental health system and the mental health and wellbeing of the people in NSW. It works with government agencies and the community to secure better mental health and wellbeing for everyone, to prevent mental illness, and to ensure the availability of appropriate supports in or close to home when people are unwell or at risk of becoming unwell. The Commission is guided in all of its work by the lived experience of people with a mental illness.

The Commission works in three main ways:

- Advocating, educating and advising about positive change to mental health policy, practice and systems in order to support better responses to people who experience mental illness, and their families and carers.
- Partnering with community-managed organisations, academic institutions, professional groups or government agencies to support the development of better approaches to the provision of mental health services and improved community wellbeing, and promote their wide adoption.
- Monitoring and reviewing the current system of mental health supports and progress towards achieving the actions in *Living Well: A Strategic Plan for Mental Health 2014 - 2024*, and providing this information to the community and the mental health sector in ways that encourage positive change.

In exercising its functions the Commission is to take into account issues related to the interaction between people who have a mental illness and the criminal justice system.

Should you wish to discuss any of the issues raised in this submission in more detail please contact Elizabeth Hewitt, A/Executive Officer, on 02 9859 5215 or at elizabeth.hewitt@mhc.nsw.gov.au.

2. **Leave and release decisions**

2.1 **Do the current legislative requirements for tribunal decisions regarding leave and release sufficiently protect the public, including the needs of victims, whilst balancing the rights of forensic patients?**

The current legislative requirements regarding Tribunal decisions for leave and release appropriately balance the needs of forensic patients while ensuring the safety of the community, including victims. The Commission notes that despite the pervasive stigma towards forensic patients, evidence has shown that forensic patients have low re-offending rates, with a 21-year retrospective study concluding that the care and treatment regime together with the decision making processes with respect to the release of forensic patients are effective in protecting community safety¹.

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In particular, the Commission notes that the presumption is for forensic patients to remain in detention, with the Tribunal having to be satisfied that the safety of the patient and the community would not be seriously endangered before leave or release may be granted. The needs of victims are specifically considered, with victims being able to apply for non-association and place restriction conditions to be associated with any leave or release. Further, the Minister for Health and the Attorney-General are also able to appear and make submissions where the Tribunal is considering leave or release applications, and are also able to appeal Tribunal decisions. Taken in combination these legislative mechanisms ensure that the Tribunal considers a range of perspectives when making decisions and balancing community safety and forensic patient needs.

The Commission does, however, continue to support the recommendation by the Law Reform Commission (LRC) in its 2013 report to remove the requirement under s74(e) of the Mental Health (Forensic Provisions) Act 1990 for the Tribunal to consider whether a forensic patient subject to a limiting term has spent ‘sufficient time in custody’ prior to ordering release. Rather, the Commission asserts that the same considerations and requirements should apply to all decisions with respect to the release of forensic patients.

The limited resources within the forensic mental health system also impede the ability of the Tribunal to fully occupy its legislative role. The Tribunal is frequently faced with the dilemma that while an order may be appropriate to make having regard to the legislative criteria, practically this order is unable to be implemented due to the limited number of placement options. This leads to the equally undesirable results of the Tribunal either making an order that is not followed, or crafting an order which fits the practical reality rather than best reflecting the care, treatment, and risk management needs of the individual forensic patient. The Tribunal has repeatedly flagged this concern, with its most recent Annual Report noting that there were 70 forensic patients in prisons, 45 of whom were waiting on a placement to become available in a mental health or other appropriate facility.

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2 Ss43 and 49 Mental Health (Forensic Provisions) Act 1990
3 S76 Mental Health (Forensic Provisions) Act 1990
4 S76A Mental Health (Forensic Provisions) Act 1990
5 S77A Mental Health (Forensic Provisions) Act 1990
7 Mental Health Review Tribunal Annual Report 2015/16, p3
The Commission notes that this concern was also raised in the LRC’s 2013 report which recommended the establishment of a Forensic Working Group to resolve this issue. This issue was further explored in the Commission’s recent report *Towards a Just System: Mental illness and cognitive impairment in the criminal justice system*. In that report, the Commission echoed the call to establish a cross-government working group to develop a comprehensive response to the needs of people with a mental or cognitive impairment who come into contact with the criminal justice system, noting in particular the need to ensure that sufficient placement options are available to support the therapeutic rehabilitation of forensic patients.

Concern regarding the treatment and placement of forensic patients is not limited to New South Wales, but is a national concern. This is reflected in the recent Commonwealth inquiry into indefinite detention and the ongoing work through the Law, Crime and Community Safety Council to develop national principles regarding indefinite detention of people with cognitive and psychiatric impairment. It will be important that ongoing work in NSW in relation to this issue has regard to the national conversation and efforts to create a consistent approach nationwide.

### 2.2 Are there any improvements that could be made to the information provided to the Tribunal and the Tribunal’s decision making processes?

The current legislation provides for a range of matters to be considered by the Tribunal when making an order, with specific additional considerations required in matters of leave and release. These requirements ensure that Tribunal decisions are guided at all time by considering community safety, as well as the forensic patient’s care and treatment needs.

The Commission does, however, note the concern that has previously been raised in the context of the LRC’s 2013 report that appropriate professionals are not always available to provide the necessary information in all cases. This prevents the Tribunal from considering matters in a timely way with the consequence that individual forensic patients spend more time in secure facilities than is appropriate based on both their clinical needs and safety considerations.

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12 S74 Mental Health (Forensic Provisions) Act 1990
13 S49 Mental Health (Forensic Provisions) Act 1990
14 S43 Mental Health (Forensic Provisions) Act 1990
As well as increasing the cost to the state of managing forensic patients, this also increases the risk of institutionalisation and may ultimately inhibit the successful recovery of the affected forensic patients. The Commission therefore continues to support the LRC’s recommendation for the establishment of a Forensic Working Group which would consider how to ensure information is provided to the Tribunal in a timely way\(^{16}\).

### 2.3 Is the current involvement of victims in the Tribunal decision making process appropriate?

It is appropriate for victims to be involved in forensic matters in the same way that they are involved in non-forensic matters. This is reflected in the current legislative regime with respect to Tribunal processes with victims provided the opportunity to make submissions when leave or release is being applied for, and to apply for non-association or place-restriction conditions to be attached to any leave or release\(^{17}\).

However, one significant way in which forensic processes vary from those for offenders is that the Tribunal reviews forensic matters at least once every six months with regard to care and treatment, regardless of whether there is an application for leave or release. As Tribunal hearings are open to the public, this means that victims can attend each hearing. The participation of victims in these routine hearings can have a re-traumatising effect for both victims and the forensic patients and can impede their recovery.

It is necessary and appropriate for the Tribunal to review the care and treatment of forensic patients every six months, and, as noted below, it is important for open and transparent justice for Tribunal hearings to be public. Consequently, there is a need to look at other mechanisms which can minimise the negative effect for both victims and forensic patients. Two key methods are described in more detail below in response to other questions:

1. Allowing victims to make victim impact statements which are then considered by the Tribunal at each hearing
2. Developing a dedicated support service for victims.

### 2.4 Are changes required to improve the supervision of forensic patients in the community in order to protect the public? If so, how could the Tribunal’s method for supervising forensic patients in the community be improved to increase community safety?

Supervision of forensic patients in the community is primarily the responsibility of NSW Health as the agency providing care and treatment for the majority of forensic patients in the community.

As noted in the LRC’s 2013 report, there are a range of practical issues relating to the availability of appropriate services in the community, and in particular a lack of clarity regarding the responsible agency for forensic patients without a mental illness\(^{18}\). This has

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\(^{17}\) S76 Mental Health (Forensic Provisions) Act 1990

the detrimental effect of individuals staying in facilities for longer than is appropriate from both a clinical and safety perspective. As noted above this has a dual negative impact by increasing the cost of managing forensic patients and the risk of institutionalisation for the individual concerned.

As previously noted, the LRC’s recommendation to establish a Forensic Working Group is supported by the Commission and offers a practical way forward to resolve this issue, through the working group developing ‘a framework for cross-agency supervision and support of forensic patients’\(^\text{19}\). The development of such a framework would clarify agency responsibilities as well as look to the range of needs of forensic patients and how these can best be supported to ensure the wellbeing and safety of forensic patients and the community.

3. Engagement of victims

3.1 Are there opportunities to improve the current practices and processes for engaging victims in Tribunal hearings? If so, how can they be improved?

As detailed in the responses to the following questions, the Commission generally is of the view that the current practices and processes for engaging victims in Tribunal hearings are appropriate. However, the experience of victims in relation to the forensic system starts at court and there is an opportunity to improve the engagement of victims in court processes.

A key limitation of the present legislative regime in relation to forensic patients is that victims are not provided with the opportunity to make a victim impact statement at court. As noted in the LRC’s 2013 report, while there is no prohibition on the court considering the view of victims, nor does the legislation specifically provide for their views to be sought and considered\(^\text{20}\). The Commission therefore supports the LRC’s recommendation that the legislation should be clarified so as to provide for victim impact statements to be made in forensic matters\(^\text{21}\).

Further, any victim impact statement should be made available to the Tribunal to consider at future hearings. Having a statement on record for the Tribunal to consider at each hearing may go some way to alleviate any concern by victims that their views will not otherwise be considered by the Tribunal unless they attend each hearing. As noted above, the participation in the routine six monthly hearings by victims can have a detrimental and re-traumatising impact on both the victim and the forensic patient.

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\(^{19}\) People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences (2013) New South Wales Law Reform Commission Report 138, Recommendation 9.6 (p268)


3.2 Are the mechanisms for victims to be heard by the Tribunal appropriate? If not, how could they be improved?

The mechanisms for victims to be heard by the Tribunal appear to be appropriate. The Tribunal offers a number of mechanisms for victims to be heard which allows for the varying wishes of victims about the level of engagement they want to have in a matter. This includes:

- Placing on record a submission relating to place-restriction and/or non-association conditions for the Tribunal to consider at any hearing where leave or release is considered
- Allowing submissions to be made in writing or verbally
- Use of video-link
- Allowing victims to be accompanied by a support person
- Allowing victims to nominate a support person, such as from a victim support service, to attend the hearing and make the submission on the victim's behalf.

Having these various mechanisms in place ensures that victims are able to select an option which best reflects their needs at the given time. This includes accommodating any concern as to appearing in a hearing where the forensic patient would be present, while still ensuring that the victims’ views and applications are heard and considered by the Tribunal.

3.3 Is the information available from the Tribunal to victims appropriate? If not, how could this be improved?

The information available from the Tribunal to victims appears to be appropriate.

As the determinative body, it is vital that the Tribunal remains independent so that it can fairly consider the varying needs and views of forensic patients, victims, and professionals appearing in hearings. It is therefore appropriate that the information provided by the Tribunal relates to: victims’ rights; the forensic legislation, including Tribunal hearings and processes; and details of hearings and findings.

The Commission further notes that the victim registration form provides victims with choices on when they wish to receive information from the Tribunal. This appears to be sensitive to the varying wishes of victims regarding the level of involvement they want to have in a matter.

3.4 Are support services available to victims appropriate? If not, how could they be improved?

Victims in forensic matters are able to access victim services in the same way as other victims. However, the Commission notes that there are a number of complexities arising in forensic matters which may require additional support over and above the standard services available. For example, there is a significant cohort of victims who also identify as carers of forensic patients (where as a carer the person may also have been the victim of traumatic events over a period of time prior to the index event) and the type of support needs these

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Victims Registration Form - 
victims have may vary greatly from those available through general victim services. More broadly, any support offered to victims needs to be cognisant of and responsive to the different court and Tribunal processes which are in place for forensic patients.

The model raised in the consultation paper of a dedicated support service available for victims of forensic patients through Queensland Health appears to be an appropriate starting point for considering the development of additional services for victims in NSW.

It is important that such support is provided by an entity other than the Tribunal which, as the determinative body, must remain independent in considering the needs and views of all parties appearing before it. Whichever entity provides the support, it will be critical that it delivers trauma-informed support both in relation to navigating the court and Tribunal processes, and in linking the victim with services they may need to support their own recovery.

4. **Prohibition on publication of names**

4.1 Does section 162 appropriately balance the interests of participants involved in Tribunal hearings with the need to ensuring transparency of decision making? If not, what legislative or policy amendments could be made?

The Commission supports the current requirements as set out in s162 of the *Mental Health Act 2007* in relation to the publication of names. The presumption against the publication of names is a necessary and appropriate balance of protecting individual privacy while allowing open and transparent Tribunal hearings in both the civil and forensic jurisdictions.

In the interest of open justice, Tribunal hearings are open to the public, affording a high level of transparency to the Tribunal process and decision making. However, by the very nature of the issues and evidence presented in Tribunal hearings, confidential medical and other information is routinely discussed. The presumption against the disclosure of names protects any individual appearing before the Tribunal (whether patient, carer, victim, or medical practitioner) from having their name published without there being a process for the Tribunal to consider whether or not it is appropriate to do so. This protective mechanism is crucial to give individuals appearing before the Tribunal the confidence to provide full and frank evidence without fear of what will end up in the public domain.

An additional factor relevant to hearings before the Tribunal is the fact that mental illness remains a highly stigmatised condition in society. The publication of an individual's name together with confidential information about their mental illness could have a long lasting detrimental impact on the individual's ability to find employment, form relationships, and more broadly engage in the community. Hope and the prospect of living a meaningful life are central to the recovery of people who experience mental illness and the stigmatising effect of such information entering the public domain could fundamentally limit the prospect of recovery for the individuals concerned.

The real risk of negative consequences without this protection is equally true for victims who appear before the Tribunal. In making submissions, victims may detail a range of personal information about their own mental health and wellbeing (and that of their family) as well as
specific details in support of non-association and place-restriction applications. As with the patient, a victim’s immediate wellbeing and their long term prospects for recovery may be jeopardised by this information being published in an identifiable way.

As noted in the discussion paper, s162 only applies to the use of names in connection with matters before the Tribunal, other than the publishing of an official report of the Tribunal. This does not prevent the publication of names of individuals appearing before the Tribunal in other contexts, and is another way in which the current provision appropriately balances the interests of people involved in hearings and the broader public interest.

The Commission further notes that s162 is consistent with approaches taken in similar areas of law. For example in Guardianship matters there is a similar need to canvass confidential medical and other personal matters in an open hearing. Section 65 of the Civil and Administrative Tribunal Act 2013 therefore similarly provides that the names of those appearing before the Guardianship Division of the Tribunal cannot be published without the consent of the Tribunal.

5. Appointment of Tribunal members

5.1 Does the make up of the Tribunal meet the needs of the public, victims and forensic patients? If not, how could it be changed?

The legislation currently provides that a Tribunal panel consists of a legal practitioner, psychiatrist, and another member with suitable qualifications or experience23.

In the case of forensic patients, the legal practitioner must be the President or a Deputy President24, and where release matters are considered the President or Deputy President must be a current or former judicial officer25.

These additional requirements in relation to the qualifications of the legal practitioner in the case of forensic hearings, and release decisions in particular, appropriately reflect the seriousness of the matters under consideration and provides an important additional safeguard in relation to meeting and balancing the needs of forensic patients, victims, and the community.

More broadly, the three member panel approach reflects the need for the Tribunal to consider legal, medical, and broader community views. In particular, the Commission notes that the breadth of skills and experience reflected in those appointed as ‘other suitably qualified’26. This category of Tribunal member draws on a rich range of perspectives including: other professional backgrounds (e.g. nurses, psychologists, social workers); consumers; carers; and those who have worked with victims.

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23 S141(2) Mental Health Act 2007
24 S73(2)(a) Mental Health (Forensic Provisions) Act 1990
25 S73(3) Mental Health (Forensic Provisions) Act 1990
26 Mental Health Review Tribunal Members as at 30 June 2016, Mental Health Review Tribunal Annual Report 2015/16, Appendix 3, p43
5.2 Are the current rules and processes for appointing members of the Tribunal appropriate?

The current rules and processes for appointing members of the Tribunal appear to be appropriate. As noted in the discussion paper, the Tribunal has a routine system for renewal of members including inviting applications through advertisement as well as accepting ad hoc expressions of interest from appropriately qualified individuals. This mixed method approach provides the maximum opportunity to identify the best available individuals to serve as members on the Tribunal.