

**The International Society for the Reform of the  
Criminal Law  
22<sup>nd</sup> International Conference**

**Codifying the Criminal Law:  
Modern Initiatives**

**Workshop B2**

**Sunday 13<sup>th</sup> July 2008**

**Mental Disorder**

**Legislative Initiatives in New South Wales in the  
Criminal Justice System  
For the Mentally Disordered**

Hon Greg James QC  
President  
New South Wales Mental Health Review Tribunal

## **ACKNOWLEDGEMENTS**

This workshop presentation is drawn from many sources including the work of many skilled professionals in many inquiries on this and related topics. In particular, I acknowledge the extremely valuable and extensive assistance, particularly in the preparation of the Consultation Paper and the Report, of Ms Gaby Carney, then Principal Policy Office NSW Department of the Premier and Cabinet; of Ms Alison Merridew of the NSW Law Reform Commission as well for her skill and dedication as well as her preparation of the Law Reform Commission material used in this presentation; Ms Sarah Hanson, Forensic Team Leader who was primarily responsible for the Power Point presentation on the work of the Tribunal; and my Executive Assistant Ms Margaret Lawrence, the Registrar and staff of the Tribunal all of whose contributions I gratefully acknowledge.

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## INTRODUCTION

The codifying or at least legislatively collating and declaring, so much of the law as relates to the justice system, the mentally ill and the intellectually disabled has long been attractive to Governments. This presentation examines recent attempts to do this.

Recently Australian governments have been focusing on issues of mental health in the gaol population and the wider community. There has also been a focus of attention on mentally ill and disordered persons coming into the correctional or justice system. In New South Wales following extensive inquiries, new legislation has been proposed for a Tribunal to order detention or involuntary mental health treatment in gaol and in the community, and to order release or leave. Other States have adopted different approaches.

The New South Wales government has had the Hon Greg James QC, the President of the New South Wales Mental Health Review Tribunal, conduct an enquiry (The Forensic Review) into proposals for the treatment, detention and release of persons found unfit for trial or not guilty by reason of mental illness, or requiring involuntary mental health treatment in correctional facilities, and is currently considering legislation to provide for a specialist panel of the Mental Health Review Tribunal, rather than an exercise of executive discretion, to determine such matters.

The New South Wales Attorney-General has also referred to the New South Wales Law Reform Commission an enquiry into the law and the criminal court processes regarding such persons. That enquiry will examine different procedures, the underlying concepts of the mental illness defence, the concept of unfitness for trial and the role of mental illness and intellectual disability in sentencing. Mr James is one of the Law Reform Commissioners undertaking that reference.

This workshop presentation shortly summarises what has been done and what solutions New South Wales is considering for the care, treatment, detention and release of forensic patients and seeks assistance from the participants on the major questions of procedure and principle confronting health and criminal justice systems concerned with responsibility of dealing with criminal behaviour, but also with providing appropriate clinical treatment for those suffering from intellectual impairment or from mental illness or disorder.

It is not intended to examine in this workshop issues relating to civil involuntary detention and treatment, nor issues relating to automatism and intention, except insofar as they arise from mental disorder or intellectual disability, nor, because of the diversity of local views, will the presentation deal with the provision made in New South Wales and elsewhere for treatment or punishment of inebriates, drug users or minor offenders, except that reference is made to the diversion mechanism presently provided in New South Wales for local courts to divert mentally ill or intellectually disabled persons from the justice system to the health system, which might usefully be extended to such persons charged with more serious crimes.

## **CODIFICATION**

There have been many attempts in the criminal law generally to provide codes capable of covering exhaustively the field of substance and procedure. These have only had a degree of acceptance. The theme of this conference is to examine the prospects of codification and modern initiatives toward it. The enquiries and legislative process examined in this workshop show how difficult it is to achieve, but how the attempt can produce useful and rewarding initiatives, sometimes in parallel with similar attempts and outcomes elsewhere.

In New South Wales in recent times there have been such attempts to provide legislation for the concepts of the criminal law relating to mental health and the intellectually disabled and for the treatment of such persons in the justice and health systems. No doubt coincidentally, the solutions that are presently being examined approximate those to which Ireland came in its *Mental Health Act 2001* and the *Criminal Law (Insanity) Act 2006*, the provisions of which are exhaustively examined with footnotes by Professor Harry Kennedy in the annotated *Mental Health Acts*, Blackhall Publishing 2007. There have been many similar enquiries throughout the world and within the common law system as to the appropriate approach to such matters.

## **DIVERSITY OF AUSTRALIAN APPROACHES.**

Australia is a federation comprising the governments of States and Territories and the Commonwealth government. Two states, Queensland and Western Australia, have adopted what is referred to as the Griffith Code; the Northern Territory has adopted its own Code, Tasmania has adopted the Stevens Code; the Commonwealth has enacted for mental health matters in the Federal Criminal Law provisions in the *Crimes Act 1914*, and, more recently, in the Model Criminal Code. New South Wales, Victoria and South Australia have all legislated differently on the topic, but derive their legislations from a common UK inheritance from the *Criminal Lunatics Act 1800* and the *Trial of Lunatics Act 1883* (however those States did not accept the verdict of “guilty but insane”, as it involves the necessity to be able to determine a rational intent, where that is an element of the crime, in the mind of a person who is irrational, alternatively to impose upon such persons criminal responsibility notwithstanding the possible absence of the necessary criminal intent) .

It is in the context of that general background that it is sought in the present workshop to acquaint you with the background and the work of the present New South Wales enquiries into the disposition of those suffering from mental health concerns in the justice system and the New South Wales Law Reform Commission's present enquiry into the concepts presently employed in that system and to raise with you the proposals for reform and legislative change in the hope of obtaining your insights and assistance.

## **PRESENT AND PREVIOUS NEW SOUTH WALES LEGISLATION**

Prior to 16<sup>th</sup> November 2007 the *Mental Health Act 1990* dealt with the care detention and treatment of civil and forensic patients, the *Mental Health (Criminal Procedure) Act 1990* dealt with court process in relation to forensic patients, the *Criminal Procedure Act 1986* dealing with court process at trial, the *Crimes Act 1900* dealt with the substantive content of offences and defences (including the defence of diminished responsibility/substantial impairment) and the *Crimes (Sentencing Procedure) Act 1999* dealing with specific provisions in relation to sentencing law.

All of this legislation proceeded on the basis of underlying common law concepts including the power to detain persons found unfit for trial or not guilty by reason of mental illness in places of strict security under the context of the Executive and as involving, if necessary, involuntary treatment.

The legislative provisions relating to sentencing as adopted into the law relating to the treatment of persons found unfit, whilst based upon the exercise of discretion by the Judge, were much affected by specifically enunciated sentencing criteria set out in the *Crimes (Sentencing Procedure) Act 1999*. It was all so involved that it was not surprising that there had been many inquiries to try to rationalise the complexity.

## **PREVIOUS INQUIRIES**

There have been many inquiries throughout Australia and in New South Wales into the present system. New South Wales' mental health laws alone have been subjected to a number of reviews over the past two centuries. Early inquiries included that of the Legislative Council Select Committee on the Lunatic Asylum, Tarban Creek (1846), the Commission of Inquiry on the Lunatic Asylums of NSW (1855), and two Royal Commissions in 1923 and 1961. More recent reviews have included the Inquiry into the Provision of Mental Health Services for the Psychiatrically Ill and the Developmentally Disabled (chaired by David Richmond) (1983); the Ministerial Implementation Committee on Mental Health and Development Disability (chaired by Dr William Barclay) (1988); the Mental Health Act Implementation Monitoring Committee's statutory review of the *Mental Health Act (1992)*; the NSW Law Reform Commission's report on people with an intellectual disability in the criminal justice system (1996); and the NSW Legislative Council Select Committee on Mental Health's inquiry into mental health services in NSW (2002).

In addition, several reviews have considered mental health laws and systems at the federal and national level. These include the Human Rights and Equal Opportunity Commission's national inquiry into the human rights of people with mental illness (1993); the Mental Health Council of Australia and the Brain and Mind Research Institute's report, *Not For Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2005); the Australian Law Reform Commission's inquiry into the sentencing of federal offenders, which considered offenders with a mental illness or intellectual disability (2006); and, most recently, the Senate Select Committee on Mental Health's inquiry into mental health (2006) (a further inquiry by the Senate into Mental Health Services is presently underway.)

In Victoria, an inquiry by Professor Bernadette McSherry of Monash University has been commenced under the auspices of the Australian Research Council, over five years into the development of model mental health legislation. Further, there have been many inquiries by Australian and State Law Reform Commissions into sentencing, including as affects those suffering from mental health difficulties or intellectual disabilities. A record of those inquiries can be found in Report No 103 of the Australian Law Reform Commission of April 2006 "Same Crime Same Time" at page 662 footnote 7, where the most recent inquiries are listed. That report provides invaluable examination of the principles relating to sentencing of such persons.

### **RECENT NEW SOUTH WALES INQUIRIES**

More recently there has been a ten year consultation process into reform of the *Mental Health Act 1990* (which produced the *Mental Health Act 2007*). The most recent inquiry in New South Wales arose as a result of the government declining to proceed further with changes to the forensic regime under the *Mental Health Act 1990* when considering the results of that ten year consultation process. It was determined that I should embark on a review of the forensic provisions and the *Mental Health Act 2007* would be passed, amending the *Mental Health (Criminal Procedure) Act 1990* to insert into that Act the existing forensic provisions pending the results of my review.

There had been some ten years earlier a report, following an inquiry by the New South Wales Law Reform Commission on People With an Intellectual Disability in the Criminal Justice System (1996). Since that report there has been continued re-examination of the issues.

The Review I undertook for the State Government required production of a Consultation Paper available on line at the New South Wales Department of Health website dated 13<sup>th</sup> December 2006. The consultation process required me to consult widely as well as with of some twenty five individual members of a taskforce and numerous government agencies and other stakeholders. The Review itself was provided to the Government on 1<sup>st</sup> August 2007 and may be accessed on line at [www.health.nsw.gov.au/pubs/2007/forensic\\_review](http://www.health.nsw.gov.au/pubs/2007/forensic_review).

The terms of reference of my Review were to:

1. Review and make recommendations in relation to the legislative provisions of Chapter 5 of the *Mental Health Act 1990* (NSW) relating to forensic patients, and in particular, to consider:
  - The appropriate authority or person to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients;
  - Mechanisms for ensuring issues of public safety are properly considered and addressed in reviews of forensic patients;
  - The role of victims of crime, and in particular means by which their views and concerns can be addressed in the forensic review process;
  - The appropriate structure for review and decision making process, having regard to the 4 Options;
  - The current definition of forensic patient, and in particular whether there should be two categories of patients, namely 'forensic patients' and 'security patients', the latter to cover persons who are transferees from a correctional centre;
  - The ability of the Mental Health Review Tribunal to make Community Treatment Orders for people who are in prison and who are mentally ill;
  - How those recommendations relate to the work of the review of the Mental Health Review Tribunal administrative practices and procedures and its role within the forensic system;

2. Review and make recommendations on the provisions of the *Mental Health (Criminal Procedure) Act 1990* (NSW) as may arise out of clause 1; and
3. Report to the Minister for Health and Attorney General within 12 months.

My recommendations are summarised below following the discussion of the New South Wales law present system and the role of the Tribunal. (The full text of the recommendations appears in Appendix 2). They have been accepted almost entirely by Government. Legislation to implement them is expected in the present Parliamentary session.

At this point it should be noted that I made two principal recommendations. The first was that a number of major issues concerning the content of the concept of unfitness for trial, the nature of the defence of not guilty by reason of mental illness and its consequences and other issues particularly affecting the operation of the higher courts in this area should be referred to the New South Wales Law Reform Commission to examine as part of its then reference, which was initially confined to the sentencing of persons with intellectual deficits and cognitive disabilities and the second that the Executive discretion should be replaced by a determinative role of a specialist panel of the Mental Health Review Tribunal.

## **SUMMARY OF REVIEW RECOMMENDATIONS**

### **Overview of the Report**

The core issue for the Review was whether the existing system requiring executive decision for the care, detention, treatment, leave and release of prisoners transferred into hospital as mentally ill and of persons found not guilty by reason of mental illness or unfit for trial should be replaced. The Review was also asked to examine the appropriateness of structures for the determination of such matters and for appeals from those determinations. In particular, the Review was to consider public safety and the role of victims in the forensic review process.

### **Executive Discretion**

The present system of exercise of Executive discretion for decisions on the care, detention, treatment, leave of absence and release of forensic patients:

- Results in the detention of unconvicted patients in gaol so long that in many cases that detention extends longer than public safety would require and also longer than any sentence which would have been imposed had the patient been convicted and sentenced.
- Such detention often extends longer than required by any clinical necessity for treatment which can often be safely and effectively given by existing Health Department agencies in the community.
- The system is cumbersome, lengthy, overly bureaucratic, resource intensive, operates without transparency or accountability, without conformity to the general principles of mental health legislation, and is liable to administrative challenge. It has been the subject of widespread criticism. It is out of accord with other systems for care and treatment of forensic patients in Australia and elsewhere.
- It is counterproductive to appropriate detection and treatment of those with mental illness coming into the justice system.
- The system presents difficulties for patients, families, carers and victims who need a formal transparent process in which to express their views and concerns. The present process can be anti therapeutic for patients and distressing for other affected persons.

### **The appropriate authority**

Consistently with the amendments to the Mental Health (Criminal Procedure) Act 2005, which conferred power on the courts to release forensic patients and to ensure safety and public accountability, the Executive discretion should be replaced by a specially constituted division of the Mental Health Review Tribunal holding public hearings, presided over by a judge or former judge, and including members with particular qualifications in forensic mental health.

That Division of the Tribunal should conduct regular reviews and monitor forensic patients in detention and in the community. It should determine care, detention, treatment, leave and release according to clinical requirements and public safety considerations. It should have wide powers to obtain information and should be

required to have regard to independent risk assessments as well as specified statutory criteria when determining release. It should have power to call up patients for non-compliance with conditions of release and be provided with wide powers to impose conditions requiring treatment or hospitalisation. It should be able to release patients on condition that they are treated in the civil mental health system.

### **Criteria for Release**

The Review also recommends a more formal framework for making decisions to conditionally or unconditionally release of forensic patients, which would more comprehensively address the public safety and other issues concerned. This includes an expanded legislative test that would require the Forensic Division to be satisfied, on the available evidence, that:

- The safety of the patient or any members of the public will not be seriously endangered by the person's release;
- Effective care and treatment of a less restrictive kind (if any is needed) is reasonably available to the patient within the community; and
- Reasonable arrangements have been made to ensure that any necessary care and treatment will be given within the community.

The legislation should also include a list of matters to which the Forensic Division must have regard when making these decisions, including the report of at least one qualified forensic psychiatrist or psychologist (as appropriate) who is independent of the treating team and has recently examined the forensic patient to determine as to whether the safety of the patient or that of any members of the public will be seriously endangered by the persons release.

### **Appeal**

Having regard to the public interest, the Attorney-General and the Minister for Health should have the right to appear and make submissions to the Tribunal and to appeal its decisions to the Supreme Court.

### **The Law Reform Commission**

The Review noted the discriminatory and adverse treatment in the criminal law of those suffering from mental illness and other conditions not justified by clinical or safety considerations. The application of laws and procedures which may have drastic effects on liberty, but no value for treatment, presently turn on classifications

of mental states derived from nineteenth century jurisprudence, long criticised and widely thought to be completely outmoded.

The Law Reform Commission is already concerned with inquiring into part of the relevant law. It should be given a reference or expanded reference to consider the concepts of mental illness, mental condition, intellectual disability and unfitness as they impact on the Court process, to review the subsequent treatment of persons in the justice system, and to conduct a comprehensive review of the criminal law and procedure applying to those with cognitive and mental health impairments.

The Review concluded that the present system of indefinite detention of those found not guilty by reason of mental illness and the quasi-trial and quasi-sentencing of those found unfit, but found on limited evidence to have committed the acts in question, is entirely unsatisfactory, and makes indicative reform proposals to the Commission.

### **Intellectual Disability, Women and Children**

Certain special needs patients, including persons with intellectual disability, women and children, clearly require their specific needs addressed by appropriate legislative and administrative programs which should be developed by the Human Services and Criminal Justice Chief Executive Officers.

### **The Legislation**

The present legislation is unclear, complicated, difficult to apply and contains flaws and inconsistencies. In consequence, agencies frequently fail to comply with it and forensic patients are adversely, sometimes wrongly, treated under it. Under the present legislative processes there is a disconformity between the treatment of forensic patients in the courts and in the Tribunal and their treatment in correctional facilities.

The drafting of the legislation and of the definitions, particularly that of “forensic patient” should be improved. Consistently, the legislation dealing with forensic patients should include the general principles expressed in the *Mental Health Act 2007* applicable to other mental illness patients. The legislation should clearly define how a person becomes a forensic patient and how that status terminates. The legislation should specify the power to detain, treat, make Community Treatment

Orders and supervise patients in the community and when detained. The legislation should provide for prisoners transferred to a hospital as mentally ill to remain subject to their sentences, but unconvicted patients should be subject to medical treatment and not treated as prisoners. When a prisoner requires treatment, both the correctional facilities and treatment regimes should apply.

Under the present legislation, although provision has been made for agreements for inter-jurisdictional transfers and inter-jurisdictional implementation of orders, the requisite mechanisms are ineffective for forensic patients to be returned to their state or territory of origin or to allow for out-of-state treatment in most cases. Usually many years go by before release on conditions that permit travel or return, nor is there an ability to ensure that patients are treated in accordance with New South Wales orders outside New South Wales. The legislation should provide for effective inter-jurisdictional arrangements and recognition of and compliance with Tribunal orders in other jurisdictions.

### **Victims**

Victims have a clearly recognisable interest in issues of release and conditions of release so far as their own safety and welfare are concerned, and should be entitled to put their concerns before the Tribunal. The Tribunal should have power to make orders as little as possible restrictive of the liberty of the patient, but which allow safe and effective care in the community.

The Tribunal should maintain the Victims' Register and victims should be allowed to choose to be placed on the register. They should have the option of deciding whether to be notified or not to be notified of the Tribunal's proceedings. The Tribunal should have a process to notify those victims that wish of its hearings and to receive submissions from victims, who should be entitled to attend hearings if they wish. There should be power to include non-contact and place restriction orders in conditions of release.

### **The Administrative Review**

In conjunction with this Report, an additional report examining the present administration of the Tribunal and the probable impact on that administration of the recommendations made here for reform has been prepared and will be provided with this report to the Minister Assisting the Minister for Health (Mental Health).

## **NEW SOUTH WALES LAW REFORM COMMISSION**

In consequence of my recommendation, the Attorney-General gave an expanded reference to the New South Wales Law Reform Commission.

A more detailed summary of the Law Reform Commission's approach to the reference and the proposals it is presently concerned to examine are set out in Appendices 4 and 5.

The issues for the Law Reform Commission include:

1. Fitness for Trial
  - (a) Who should consider it? Why?
  - (b) Consequences.
2. Mental Illness.
  - (a) When should it exculpate?
  - (b) Consequences.
3. Diversion.
  - (a) From Justice System to Health?
  - (b) When?
4. Sentencing
  - (a) What Principles?
5. Preventative Detention
  - (a) Detention for Treatment or community safety?
  - (b) In Gaol or Hospital?

The Commission is currently examining the more detailed questions in the following:

*The first Power Point presentation*

## **NEW SOUTH WALES PRESENT SYSTEM**

The present complex of common law and diverse interacting legislation needs explanation to set the context for the new reform.

In summary the New South Wales present system involves

1. Court findings of unfitness or not guilty by reason of mental illness on the basis of common law concepts. E.g. McNaghten's case.
2. Referral of such persons to the Mental Health Review Tribunal and a determination by that Tribunal of mental illness on the civil test prescribed by the *Mental Health Act 2007* as appropriate for patients in the general

community and for prisoners who are transferred to a mental health hospital.  
(The roles and functions of the Tribunal are set out in Appendix 1)

3. The recommendations made by the Tribunal to the Executive Government as to a patients care, detention and release into the community and the determination of those matters (by the Minister for Health or the Governor on the advice of the Executive Council).
4. A detailed examination of the present New South Wales system subject to the recent changes to the *Mental Health Act 2007* and the *Mental Health (Criminal Procedure) Act 1990* can be found in “Crime and Mental Health Law in New South Wales. A Practical Guide for Lawyers and Health Care Professionals” by Dan Howard SC and Dr Bruce Westmore, Lexisnexis Butterworths Australia 2005.

#### **THE ROLE OF THE TRIBUNAL**

The role of the Tribunal in relation to forensic patients provides for their treatment in courts and before the Tribunal and is set out in the following:

*The second Power Point presentation*

## **CONCLUSION**

The complexity of that system attracts reform. Implementation of the review recommendations in the new legislation will remove an entire tier or complexity and enable quicker more efficient and more easily understood administration. It will enable the Tribunal to focus on continued monitoring rather than cyclic reviews, the continued state of patients' mental health rather than six monthly snapshots of each individuals circumstances and should provide for better treatment and medical care rather than a high degree of clerical and bureaucratic involvement.

We all hope the new legislation will work well and that the Law Reform Commission recommendations will shed light on the difficult area with which the law Reform Commission is concerned.

All suggestions, contributions and assistance on these matters will be gratefully received at;

The Mental Health Review Tribunal [www.mhrt.nsw.gov.au](http://www.mhrt.nsw.gov.au).

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And by the New South Wales Law Reform Commission at:

[nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)

[www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc)

## APPENDIX 1

### <sup>1</sup>THE MENTAL HEALTH REVIEW TRIBUNAL

The Mental Health Review Tribunal is an independent specialist quasi-judicial body constituted under the *Mental Health Act 2007*. (The Act) It has a wide range of powers that enable it to make and review orders, and to hear some appeals, about the treatment and care of people with a mental illness.

The Tribunal has a President, two full-time and four part-time Deputy Presidents, a Registrar and approximately one hundred part time Members. Each Tribunal panel consists of three Members: a lawyer who chairs the hearing, a psychiatrist, and another suitably qualified Member. All Tribunal Members have extensive experience in mental health, and some have personal experience with a mental illness or caring for a person with mental illness.

1.1 The membership of the Tribunal reflects not only professional skills and experience (for example, legal, medical, social work and nursing), but also the skills and experience of consumers and carers, and the knowledge and experience of people from Aboriginal and non English speaking backgrounds. The Tribunal is committed to ensuring that its practice and procedures are non discriminatory and contribute to achieving equal employment opportunity outcomes.

1.2 The Tribunal conducts hearings in hospitals and community health centres throughout the Sydney, Wollongong, and Newcastle metropolitan regions, and also in Goulburn and Orange. The Tribunal conducts hearings for people living outside these areas either by video conference or by telephone.

The Tribunal has a wide jurisdiction, and conducts both civil and forensic hearings. More complete details of the Tribunal's jurisdiction appear later in this manual.

The Tribunal's decisions can involve the consideration of quite complex issues, and can impact directly on people's lives, health and liberty. In making its decisions, the Tribunal seeks to balance several sets of often competing rights - the individual's right to liberty and safety and to freedom from unnecessary intervention, the individual's right to treatment, protection and care, and the right of the community to safety and protection. Given the importance of these decisions, it is essential that the Tribunal receives the very best evidence available when hearing applications and making its decisions.

The Tribunal actively seeks to pursue the objects of the Act (s3). These are:

- to provide for the care, treatment and control of persons who are mentally ill or mentally disordered
- to facilitate the care, treatment and control of those persons through community care facilities
- to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis

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<sup>1</sup> NSW MHRT Members Manual, Version 3- Updated November 2007

- while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care
- to facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care, treatment and control.
- The Act (s68) also establishes principles for care and treatment as follows:
- people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given
- people with a mental illness or mental disorder should be provided with timely and high quality treatment and care in accordance with professionally accepted standards
- the provision of care and treatment should be designed to assist people with a mental illness or mental disorder, wherever possible, to live, work and participate in the community
- the prescription of medicine to a person with a mental illness or mental disorder should meet the health needs of the person and should be given only for therapeutic or diagnostic needs and not as a punishment or for the convenience of others
- people with a mental illness or mental disorder should be provided with appropriate information about treatment, treatment alternatives and the effects of treatment
- any restriction on the liberty of patients and other people with a mental illness or mental disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum necessary in the circumstances
- the age-related, gender-related, religious, cultural, language and other special needs of people with a mental illness or mental disorder should be recognised
- every effort that is reasonably practicable should be made to involve persons with a mental illness or mental disorder in the development of treatment plans and plans for ongoing care
- people with a mental illness or mental disorder should be informed of their legal rights and other entitlements under this Act and all reasonable efforts should be made to ensure the information is given in the language, mode of communication or terms that they are most likely to understand
- the role of carers for people with a mental illness or mental disorder and their rights to be kept informed should be given effect

The Tribunal also takes into account where appropriate the requirements of the United Nations *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*. The Act itself reflects these requirements, and should be interpreted in the light of these principles, which were adopted in late 1991 by the General Assembly of the United Nations. The principles are set out in Appendix 3. The Tribunal is also cognisant of the National Mental Health Service Standards.

The Tribunal conducts each hearing in an informal way. Nevertheless, each hearing still remains part of a legal process. The Tribunal follows the rules of procedural fairness and natural justice, but it is not bound by the formal rules of evidence. During a hearing, the Members of the Tribunal will ask questions, so as to gather the information needed to make sure that all legal requirements have been met before the Tribunal makes an order.

Most Tribunal hearings are completed in about 30 minutes. However, sometimes they take longer to complete, depending on what may be needed to make sure that each person receives a full and fair hearing.

### **Establishment of the Tribunal**

The Mental Health Review Tribunal is an independent specialist quasi-judicial body constituted under the Act.

The Tribunal comes within the portfolio of the NSW Minister for Health. It is funded by the NSW Department of Health, but is independent of the Department.

### **Role of the Tribunal**

The Tribunal has powers to review decisions, make orders and hear appeals about the care, treatment and control of people with a mental illness. It discharges its functions by constituting review panels.

The Tribunal makes decisions about:

- a person's care and treatment, both in hospital and in the community
- specific treatment for patients
- decisions about the management of a patient's money

The Tribunal also makes recommendations to the Minister for Health in relation to the care, treatment and detention of forensic patients.

### **Objectives of the Tribunal**

In performing its role the Tribunal actively seeks to pursue the principles for care and treatment and the objectives of the Act by ensuring that, as far as practicable, the people who come before the Tribunal:

- receive the best possible care and treatment in the least restrictive environment enabling that care and treatment to be effectively given
- have the least restriction on their liberty, and that any interference with their rights, dignity and self respect are kept to the minimum necessary in the circumstances
- have the opportunity to put their views regarding the application, and any other relevant information, to the Tribunal either personally or through their legal representative
- have involvement, along with those persons caring for them, in decisions about their appropriate care, treatment and control
- have proceedings conducted with as little formality and technicality as the circumstances permit
- have their cultural and linguistic backgrounds taken into account and the relevance of cultural factors to the question of mental illness considered

- have their right to confidentiality recognised and respected. It is an offence for a member of the Tribunal to disclose information acquired about a person in the course of exercising the jurisdiction of the Tribunal except in the circumstances provided for under section 189 of the Act

### **Major Features of the Tribunal**

- The Tribunal is a single, statewide body headed by a full time President.
- The President is the head of the Tribunal and must be a lawyer who has practised for at least seven years or has held judicial or legal office in the two years before appointment.
- There are **two** full time and four part time Deputy Presidents who must have qualifications similar to that of the President.
- The Governor in Council appoints the President, Deputy Presidents and Members.
- Part-time Members are appointed across the State to enable panels to be constituted in a number of different locations.
- Panels consist of three members:
  - one must be a lawyer;
  - one must be a psychiatrist; and
  - one must be a person with other suitable qualifications or experience (for example, a mental health professional or mental health consumer).

### **Functions and powers of the Tribunal**

The Tribunal has specific functions conferred on it by the Mental Health Act and other legislation. The functions give the Tribunal authority or power to do certain things.

The relevant statutes are:

- ***Mental Health Act 2007.***
- *Mental Health (Criminal Procedure) Act 1990.*
- *Protected Estates Act 1983.*
- *Administrative Decisions Tribunal Act 1997.*

In its civil jurisdiction, the Tribunal has powers to:

- Make or refuse Involuntary Patient Orders and thereby authorise the continued involuntary detention of persons made involuntary patients by a Magistrate, or to make an order for the person's discharge.
- Review involuntary patients in mental health facilities, usually every three or six months, and in appropriate cases every 12 months.
- Review voluntary patients in mental health facilities, at least every twelve months.

- Determine appeals against an authorised medical officer's refusal to discharge an involuntary patient or a detained patient.
- Make, vary and revoke Community Treatment Orders.
- Hear appeals against a Magistrate's decision to make a community treatment order.
- Give or refuse approval for the use of ECT for involuntary patients.
- Determine if voluntary patients have consented to ECT.
- Provide or refuse consent for surgery and special medical treatment (sterilisation) or prescribed special medical treatment on patients detained in a mental health facility.
- Make and revoke orders under the Protected Estates Act, 1983.

The Tribunal has the power in its forensic jurisdiction to:

- Make recommendations to the Minister for Health in relation to the care, detention and treatment of persons who have become forensic patients on the basis of being found not guilty of criminal charges on the grounds of mental illness, or mentally ill prisoners transferred to a mental health facility. The Tribunal may also make recommendations as to whether conditional or unconditional release is appropriate.
- Make recommendations to the Minister in relation to the care, detention and treatment of persons who have been found unfit to be tried and are either awaiting a special hearing, or have received a limiting terms following a special hearing by a court.
- Determine if a person is fit to plead to a criminal charge within 12 months of a court's finding that the person is unfit to be tried.

### **Tribunal's Forensic Jurisdiction**

Members who sit in the Forensic jurisdiction should refer to the Tribunal's Forensic Members Manual however the following is a summary of the Tribunal's functions in the forensic jurisdiction.

The Tribunal has a number of responsibilities under both the Mental Health Act 2007 and the Mental Health (Criminal Procedure) Act 1990 in the forensic area. However, following the enactment of the Mental Health Act 2007 the main provisions relating to the review of forensic patients are now contained in the *Mental Health (Criminal Procedure) Act 1990*.

**Where a person is found "unfit to be tried" for an offence**, the Tribunal must review the case as soon as practicable, and determine whether the person is likely to become fit to be tried within the next 12 months. The Tribunal may also be required to consider whether the person is suffering from a mental illness, or from a mental condition for which treatment is available in a mental health facility.

***In the case of a person found unfit to be tried and subsequently found to be guilty on the limited evidence available at a Special Hearing and ordered to be detained,*** the Tribunal must review the case as soon as practicable and inform the Court as to whether the person is suffering from a mental illness, or from a mental condition for which treatment is available in a hospital. If the Court then makes a further order for detention in a correctional centre, mental health facility, or other place, the Tribunal must review the person as soon as practicable and make recommendations to the Minister concerning the person's care, treatment, and detention.

***In the case of persons found to be “not guilty by reason of mental illness”,*** the Tribunal must review the case as soon as practicable, and make recommendations to the Minister concerning the person's detention, care and treatment, and whether it is appropriate to release the person either conditionally or unconditionally.

***In the case of persons transferred under authorization of the Director General of the Department of Health from prison to a mental health facility as a “mentally ill person”, for appropriate treatment and care,*** the Tribunal must review the case and make recommendations concerning the person's detention, care and treatment. The tribunal is to determine whether the person is a mentally ill person who should be detained in a mental health facility.

***The Tribunal must also informally review each month those inmates for whom an order has been made by the Director-General for their transfer from a correctional centre to a hospital for treatment of a mental illness or mental condition.*** Following these informal reviews the Tribunal must make a recommendation to the Director-General as to whether or not the transfer should occur, and may make recommendations to the Minister regarding the inmates' care, treatment, and detention.

The Tribunal must review the case of a forensic patient at least once every six months and make a recommendation to the Minister for Health concerning the person's continued detention, care and treatment, or the appropriateness of their release. That recommendation may stipulate where the patient is to be detained, under what kind of security, the range and kinds of leave (if any) which can be enjoyed, and, if the patient is on conditional release, the range and kinds of conditions which apply in order to allow the patient's continuing presence in the community.

The Tribunal must also consider and determine appeals by forensic patients against a failure or refusal by the Director-General to grant a patient leave of absence.

The Tribunal can make a Community Treatment Order for a forensic patient recommended for conditional release or transfer to a correctional centre or other place. (Any such order has effect only if the Minister for Health confirms it in writing). It can also classify a forensic patient as an Involuntary Patient if the patient would cease to be a forensic patient within six months after the date of the review.

The Tribunal must also carry out an informal review each month of those forensic patients awaiting trial or a Special Hearing and take such action as the Tribunal sees fit if any delay in the proceedings occurs.

## APPENDIX 2

### List of Recommendations<sup>2</sup>

#### General Principles and Powers

1. Amend the forensic mental health legislation to insert the objects and principles set out in the *Mental Health Act 2007* (NSW) suitably drafted to ensure that these provisions continue to apply to forensic patients and accommodate their special needs and public safety principles.
2. Amend the legislation to provide a narrative definition of a 'forensic patient' that expressly and comprehensively defines the circumstances in which a person becomes a forensic patient.
3. Amend the legislation to define expressly and specifically the powers to detain, treat, and release a forensic patient, as well as the termination of forensic patient status.

#### Special Needs Patients

The NSW Government should:

- Refer to the Human Services and Criminal Justice Chief Executive Officers the development of specific legislative and administrative proposals dealing with, care, treatment, release and co-ordinated community support of forensic patients and transferees with intellectual disability or who are women or children;
  - Request that they provide a report to the Premier on these legislative and administrative proposals within 12 months of this report; and
  - Implement approved reforms arising out of this process within 12 months of the Human Services and Criminal Justice Chief Executive Officers' report.

#### Jurisdictional Issues

5. The NSW Government should consider the need for specific provisions in relation to forensic patients (including transferees) detained in NSW on behalf of other jurisdictions, and liaise with relevant jurisdictions to develop and implement such provisions.
6. The Minister for Health should take the legislative and administrative action necessary to ensure an effective framework for the inter-jurisdictional transfer of forensic patients (including those conditionally released into the community) and the inter-jurisdictional application of the legislative provisions, and consider the need for arrangements in relation to forensic patients who may wish to move overseas.

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<sup>2</sup> Review of the NSW Forensic Mental Health Legislation - August 2007

## **Concepts of Mental Illness**

7. The NSW Law Reform Commission should review the concepts of mental illness, mental condition, intellectual disability and unfitness for trial used in the law generally and in forensic mental health legislation.

## **Transferee Patients**

8. Amend the legislation to create a new category of patient known as 'transferee patients', which includes people who are on remand or serving a sentence of imprisonment and transferred to a mental health facility for treatment, and provide:

- To the extent possible, that transferee patients should be subject to the civil provisions of the *Mental Health Act 2007* (NSW) in relation to their admission to a mental health facility, and their care and treatment while accommodated in the facility; and
- Specific provisions for transferee patients in relation to the commencement and termination of their transferee status, their management in terms of security, access to leave and release arrangements, initial and periodic reviews by the Tribunal, and provisions for transfer to other jurisdictions. These provisions should reflect the existing legislative provisions for this category of patient, subject to the reforms outlined in this report.

9. Amend the legislation to include specific provisions for forensic patients including those detained in Corrective Services facilities that reflect the existing legislative provisions for this category (subject to the reforms outlined in this report), and provide that they override any administrative arrangements that apply by virtue of the patient's detention in the prison system.

## **Community Treatment Orders**

10. Amend the legislation to:

- Provide a detailed legislative framework for the making and implementation of Community Treatment Orders in the correctional context; and
- Require the Tribunal to review the case of any person who is subject to a Community Treatment Order and detained in a correctional centre, at least once every three months.

## **Transferee's Sentences**

11. Amend the legislation to provide that a transferee patient is detained pursuant to his or her sentence of imprisonment, rather than the order transferring him or her to a mental health facility for mental health treatment, and, that the Tribunal should retain the power to make a forensic patient a Continued Treatment Patient but that power should be capable of being exercised within six months prior to the expiry of the minimum term or non parole period or thereafter.

## **Executive Discretion**

12. Replace the present system of executive decision-making in relation to forensic patients with a legislative framework in which a special Forensic Division

of the Mental Health Review Tribunal is responsible for decision-making in relation to the detention, care, treatment, leave and release of forensic and transferee patients.

### **Forensic Division of the Mental Health Review Tribunal**

**13.** Amend the legislation to:

- Establish a Forensic Division of the Mental Health Review Tribunal to conduct reviews and make decisions in relation to forensic and transferee patients and provide that the President should have power to make Rules and give Practice Directions for the conduct of its business.
- Provide that a Panel of the Forensic Division will be constituted by three members, being:
  - a legal member (being the President or a Deputy President and who, in the case of any hearing involving the possibility of a forensic patient's release, is a current or former judge);
  - a current practising psychiatrist (for patients with a mental illness) or a current practising psychologist or other relevant expert (for patients with an intellectual disability); and
  - a member with qualifications or experience in the mental health or intellectual disability field (as appropriate).
- Require the Forensic Division to give notice of each forensic hearing to the forensic or transferee patient, his or her treating team and legal representative, any registered victims or family members who may wish to make submissions, and (for hearings involving the possibility of release) the Attorney General and Minister for Health. The relevant notice periods should be 14 days for release hearings, and 7 days for any other hearings, subject to exceptional circumstances, and the form of notice should be prescribed in the regulations.
- Require the Forensic Division to consider specified reports and other information when reviewing a patient, and give it the power to order the making and production of these reports and the supply of other information (powers and requirement may be set out in Practice Directions or regulations).
- Require the Forensic Division to give written reasons for all decisions involving the question of release, and for other decisions upon request by any person with a direct interest in the proceedings.

**14.** Amend the legislation to give the Minister for Health and Attorney General the right to make submissions at any hearing relating to the possible release of a forensic or transferee patient.

### **Appeals**

**15.** Amend the legislation to provide for the following appeals framework in relation to Tribunal determinations:

- All decisions other than those involving conditional or unconditional release should be subject to appeal to a single judge of the Common Law Division of the NSW Supreme Court, while release decisions should be subject to appeal to the Court of Appeal.

- Appeals should be heard by way of rehearing for error of law or fact, determined on the evidence used in the Tribunal together with any additional evidence the Court thinks fit to receive. It should also be open to the Court hearing the appeal to have the benefit of assessors if it considers it appropriate generally, or in the particular case.
- Given the public interest involved in such decisions, the Minister for Health and Attorney General should have the right to make submissions at any hearing dealing with the possible grant of conditional or unconditional release, and a right of appeal in relation to such decisions on the grounds of error of law or fact.

## **Compliance**

**16.** Amend the legislation to provide that:

- If any public sector agency or official is not able to comply with a Tribunal order in relation to the detention, care, treatment and release of a forensic or transferee patient within one month of it being made (or the date specified in the order), the agency must forward a written report to the President of the Tribunal providing reasons for such non-compliance;
- If the President is satisfied that the non-compliance was not justified in the circumstances, he or she may report the matter to the Supreme Court; and the Supreme Court may deal with the matter as if it were a contempt of the Court, subject to a defence of reasonable excuse.

## **Law Reform Commission**

**17.** In the inquiries it is already undertaking or in a further reference in addition to the review recommended in Recommendation 7 the NSW Law Reform Commission should conduct a comprehensive inquiry into the criminal law and procedure applying to people with cognitive and mental health impairments. This inquiry should cover the matters outlined in Chapter 6 of this report, and should give consideration to the indicative reform recommendations contained in it.

## **Notification of Jurisdiction**

**18.** The Attorney General, Minister for Health, Minister for Justice and the Tribunal should develop a formal protocol for the Tribunal to be notified that it has acquired jurisdiction over a forensic patient within seven days of that event occurring.

## **Reviews**

**19.** Amend the legislation to provide that:

- The Forensic Division of the Tribunal must review the case of each forensic patient and transferee patient at least once every six months but may, on a case-by-case basis, extend the period for a specific review to a maximum of 12 months from the conduct of the last review.
- The Forensic Division may only do so where:

- The patient has made a written request for an extension and a panel of the Forensic Division is satisfied that there are reasonable grounds for granting the extension; or
- A panel of the Forensic Division is satisfied on reasonable grounds that: (i) there has been no substantial change in the patient's condition; (ii) there is no reasonable basis for changing the patient's conditions of detention, care and treatment; and (iii) to hold a review at that time would be anti-therapeutic for the patient; and the patient (and legal representative) has been given a reasonable opportunity to make submissions in relation to its proposed extension, and the panel has considered any submissions made; and
- The Forensic Division's decision is subject to the same avenue of appeal as exist in relation to other decisions.

**20** Amend the legislation to provide that, where a prison inmate has not been transferred to a mental health facility within a specified period:

- Justice Health and the Department of Corrective Services must provide the Tribunal with monthly written reports as to the person's condition and the reasons for the delay;
- A panel of the Forensic Division of the Tribunal must conduct a review on the papers, and may make such orders regarding the
  - Detention, care and treatment of the person that are considered appropriate; and
  - The Forensic Division must, in any case, conduct a review in the person's presence at least once in every three-month period.

**21.** Amend the legislation to provide that, where a forensic patient has not had a special hearing, or a transferee patient is on remand, the President (or a nominated member) must informally review the person's case every three months to determine whether the legal proceedings have been delayed, and if so, take such action as it considers appropriate.

### **Leave and Release**

**22.** Forensic patients who are detained in correctional centres should be subject to a new classification system applying in lieu of the prisoner classification system contained in the *Crimes (Administration of Sentences) Act 1999* (NSW). The Minister for Health should develop the new classification system in consultation with the Attorney General, the Ministers for Justice and Juvenile Justice, and the Mental Health Review Tribunal.

**23.** The new classification system should include a protocol that addresses therapeutic and security matters such as a forensic patient's security conditions, and access to programs and courses, and leave and release arrangements, while detained in a correctional centre. In particular, the protocol should ensure that there is no impediment to a forensic patient's eligibility for leave, or for release once his or her detention is no longer justified on public safety grounds, and it should be given formal, enforceable status.

**24.** Amend the legislation to provide that:

- Forensic patients retain access to leaves of absence authorised directly by NSW Health (for mental health facilities), and the

Department of Corrective Services (for correctional centres) in accordance with the protocol outlined in Rec 23; and

- The Forensic Division of the Tribunal should also have a statutory power to grant leaves of absence if satisfied, on the available evidence, that neither the safety of the patient nor that of any member of the public will be seriously endangered by the person's release. This power should apply to all forensic patients, whether detained in a mental health facility, correctional centre or other place of detention.

**25.** Amend the legislation to provide that an order for the conditional or unconditional release of a forensic patient is not to be made unless the Forensic Division is satisfied, on the available evidence, that:

- The safety of the patient or any members of the public will not be seriously endangered by the person's release;
- Effective care and treatment of a less restrictive kind (if any is needed) is reasonably available to the patient within the community; and
- Reasonable arrangements have been made to ensure that any necessary care and treatment will be given within the community.

**26.** Amend the legislation to provide that, for the purpose of making this determination, the Forensic Division must have regard to the following matters:

- The nature of the person's condition
- The likelihood of a relapse or deterioration in the person's condition once released into the community and whether serious public safety concerns are likely to arise as a result of this;
- The need to ensure that the person receives the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given;
- The need to ensure that any restriction on the liberty of person and any interference with his or her rights, dignity and self-respect are kept to the minimum necessary in the circumstances; and
- The report of at least one qualified forensic psychiatrist or psychologist (as appropriate) who is independent of the treating team and has recently examined the forensic patient to determine as to whether the safety of the patient or that of any members of the public will be seriously endangered by the persons release.

**27.** Amend the legislation to:

- provide a non-exhaustive list of conditions that may be applied when granting release back into the community.

**28.** Amend the legislation to:

- Remove the present limited Attorney General's power to object to the release of a forensic patient, and the requirement to notify the Minister for Police of a patient's release.

### **Agency Compliance**

**29.** Amend the legislation to empower the Tribunal to require the agencies specified in a forensic or transferee patient's release plan to comply with their obligations under that plan in relation to the supervision, treatment and care of the patient, and to co-operate with other relevant agencies specified in the plan.

**30.** The Minister for Health should develop an agreement with each other Minister responsible for the agencies involved in the supervision, treatment and care of forensic patients, and the Mental Health Review Tribunal, to provide an administrative framework to facilitate agency and patient compliance with the conditions of release, and the release plan.

**31.** Amend the legislation to provide:

- That the President of the Tribunal has the power to call up a conditionally released forensic patient or transferee patient for an alleged breach of a release condition, or serious deterioration in the patient's condition, and refer the matter to a panel of the Forensic Division of the Tribunal;
- A hierarchy of options available to the Tribunal in determining an appropriate response, depending on safety and therapeutic considerations; and
- Any decision by the Forensic Division is subject to appeal.

### **Victim's Participation Process**

**32.** Retain the recently introduced administrative arrangements as recently revised and supplemented by the Tribunal in relation to victims' involvement in Tribunal hearings.

**33.** Amend the legislation to provide that the Tribunal must keep and maintain the Victims Register, and provide that the Tribunal must notify those registered victims who wish to be notified of:

- Tribunal hearings (see also Rec 13);
- Tribunal decisions in relation to the granting of leave or release;
- Appeal proceedings in relation to a Tribunal decision;
- The proposed release of a forensic patient; and
- The termination of a person's forensic patient status.

**34.** Amend the legislation to provide a framework for the Forensic Division of the Tribunal to make notification, non-contact and place restriction orders in relation to a forensic patient. This should include a framework for a registered victim, immediately family member of a deceased victim, and/or immediate family member of the forensic patient to make applications for such orders; and an enforcement framework.

## APPENDIX 3

### The NSW Law Reform Commission's approach to the Mental Health Reference

The New South Wales Law Reform Commission is currently examining certain aspects of the criminal law as they apply to people with cognitive and mental health impairments. Our terms of reference are as follows:

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the Law Reform Commission is to undertake a general review of the criminal law and procedure applying to people with cognitive and mental health impairments, with particular regard to:

- (1) Sections 32 and 33 of the Mental Health (Criminal Procedure) Act 1990;
- (2) Fitness to be tried;
- (3) The defence of "mental illness"; and
- (4) Sentencing.

The Commission has adopted the phrase "cognitive and mental health impairments" as a catch-all term, so it covers the major mental illnesses, as well as intellectual disability, autistic disorders, acquired brain injury, dementias, attention deficit and behavioural disorders, personality disorders and so on.

The Commission has examined existing approaches in other jurisdictions – all Australian jurisdictions, New Zealand, England & Wales, Canada and the United States of America. Most other jurisdictions have substantially reformed this area of law in the past 10-15 years.

A number of problems with the existing law and procedure in New South Wales have been identified.

#### 1.3 Criminal justice system approaches

The criminal justice system categorises people with cognitive and mental health impairments according to four broad categories:

- those suitable for diversion, usually because their treatment needs outweigh the seriousness of the offending;
- those who are not fit to be tried;
- those who cannot be held responsible for their actions (not guilty by reason of mental illness); and
- those who can be held responsible for their actions, but to a lesser extent than someone who did not have a cognitive or mental health impairment (including "diminished responsibility" cases) – sentencing.

Problem #1: the categories arose and developed along separate historical pathways. Consequently, they were not designed to be, and are not now, consistent with each other.

A question also arises as to whether the categories are in fact validly defined. The Commission's Consultation Paper will propose solutions arising in relation to each of

the existing categories – if they are to be retained – and will also propose a model or models for broader reform that is less reliant on the existing categories.

#### **1.4 Relevant policy considerations**

The following policy considerations underlie the criminal justice response to defendants with cognitive and mental health impairments:

- Protecting the community – historically, by indefinite incarceration of people who were unfit or not guilty by reason of mental illness; now, by managing the person’s cognitive or mental health impairment.
- Treating the defendant – not only a means of protecting the community but also a compassionate response to benefit the defendant and give effect to his or her human rights.
- Moral culpability – whether a person is punished, and if so to what extent, should reflect the degree of moral culpability for the wrong committed.
- Deterrence – if a person’s conduct did not result from choice, there is little to be gained from punishing the person because punishment is unlikely to prevent recurrence of the conduct.
- The right to a fair trial, or rather the right not to be unfairly tried, underpins the common law concept of fitness to be tried.

**Problem #2: existing approaches in New South Wales are not uniformly directed to or capable of achieving those policy goals.**

There are currently no treatment-focussed sentencing options in New South Wales. Disposition of a person who is unfit to be tried and not acquitted is determined on the basis of the sentence that would have been imposed if the person had been convicted of the offence. Unless the person is committed to custody (commonly in prison), there is no oversight by the Mental Health Review Tribunal. The time for which a person may be committed to custody is limited according to the term of imprisonment that would have been imposed following an ordinary trial, rather than by reference to safety criteria.

In contrast, the court has a broad discretion in respect of a person found not guilty by reason of mental illness, to commit him or her to custody or to release him or her on such conditions as the court thinks fit. However, the legislation provides little guidance as to the principles to be applied, nor as to the types of conditions that can or should be imposed.

**Problem #3: the powers of the Local Court (magistrates’ court) are quite different from the powers of the District and Supreme Courts, leading to large disparities in the range of possible outcomes for similar cases.**

Magistrates have no specific powers in respect of unfit defendants or persons found not guilty by reason of mental illness, but only limited diversionary measures that are not appropriate in all cases (particularly serious matters). There are cases where magistrates acknowledge that the defendant before them is probably unfit and/or NGMI but is nevertheless convicted and sentenced because diversion is not appropriate.<sup>3</sup>

<sup>3</sup>. *R v Goodworth* [2007] NSWLC 2; see also *Mantell v Molyneux* (2006) 165 A Crim R 83 and *Smith v The Queen* [2007] NSWCCA 39.

This lack of powers appears to be largely an historical accident – the jurisdiction of the Local Court has been substantially expanded in the past decade, with an increased range of indictable offences that can be tried summarily and an increase in the maximum sentences that can be imposed. Consequently, the Local Court now deals with increasing numbers of serious matters. However, its powers in respect of defendants with cognitive and mental health impairments – established at a time when the jurisdiction of the Court was much more circumscribed – have not been correspondingly increased.

The powers of the District and Supreme Courts are broader. However, the procedures – particularly in relation to fitness – are cumbersome and time-consuming. There is scope for better integration of the roles of the court and the Mental Health Review Tribunal.

#### 1.4.1 Young people

Young offenders have an even higher incidence of cognitive or mental health impairment than adults. Until quite recently, this issue has not been addressed by the criminal justice system, either in New South Wales or elsewhere. In general, there are provisions for “offenders with cognitive and mental health impairments”, meaning adult offenders, or there are provisions for “young offenders”. There are few provisions that relate specifically to “young offenders with cognitive and mental health impairments”.

#### 1.5 Possible solutions

The Commission’s approach to reform is based on the following considerations:

- **Key policy considerations are the protection of the community, and the protection of the rights of the defendant (in terms of both criminal justice procedure and eventual outcomes).**
- **Underlying principles should, as far as possible, be consistent across the various categories.** Similar principles apply in respect of all categories of persons not convicted of an offence (diversion, unfit and not acquitted, and not guilty by reason of mental illness). Some different considerations apply in respect of convicted offenders. However, there is scope for the sentencing of offenders with cognitive and mental health impairments to also reflect similar principles.
- **Similar defendants should receive similar outcomes.**
  - All courts should have the same, or similar, powers.
  - The same range of disposition options, focussed on treatment and re-integration into the community (not punishment), should be available in respect of persons unfit to be tried or not guilty by reason of mental illness. Similar options should be available in respect of defendants diverted from the criminal justice system.
  - Treatment-oriented sentencing options should be available in appropriate cases.
- **Criminal justice processes should be efficient, while still ensuring that defendants’ rights are protected.**

## NSW LAW REFORM COMMISSION MENTA HEALTH REFERENCE

### List of Proposals as at 12 June 2008

#### 2. Diversion

*[chapter to be re-written]*

#### 3. Fitness to be tried

1.5.1.1 **Proposal 3.1** *The test for fitness to stand trial should be amended by legislation to incorporate an assessment of the ability of the accused to make rational decisions concerning the proceedings.*

Issue 3.1 Should Proposal 3.1 be implemented by the addition of a new standard to the *Presser* formulation or by amendment of relevant standards in the existing formulation?

Issue 3.2 As an alternative to Proposal 3.1, should legislation identify the ability of the accused to participate effectively in the trial as the general principle underlying fitness determinations, the *Presser* standards being listed as the minimum standards that the accused must meet?

Issue 3.3 Should the minimum standards identified in *Presser* be altered other than as suggested in Proposal 3.1?

Issue 3.4 Should determinations of fitness be made solely by the court or by the Mental Health Review Tribunal? Alternatively, should the overlap in function between the court and the Tribunal in making fitness determinations be minimised? If so, how?

Issue 3.5 Should provision be made for the defence and prosecution to consent to a finding of unfitness?

Issue 3.6 Should the court be granted broader powers to order reports, examinations and treatments before a fitness hearing? If so, what powers?

**Proposal 3.2** *A person who is found unfit to stand trial should be diverted from the court system.*

Issue 3.7 If Proposal 3.2 is implemented, how should a person found unfit be diverted from the court system?

Issue 3.8 If the Supreme and District Courts are given diversionary powers following a finding of unfitness, should the same diversionary regime apply in the Local Court?

Issue 3.9 If not, what fitness procedures should apply in the Local Court?

Issue 3.10 Is it appropriate to apply the same standards for fitness to young people as are applied to adults? If not, what modifications are required?

Issue 3.11 Is it appropriate to apply the same procedures to young people who are unfit to be tried as are applied to unfit adult defendants?

Issue 3.12 What procedures and powers should be provided for the Children's Court to deal with unfit defendants?

#### 4. Defence of mental illness

Issue 4.1 Should a defence of not guilty by reason of mental illness based on the M'Naghten Rules be retained?

Issue 4.2 If so:

4.2.1 What should the defence be called?

4.2.2 Should the term "disease of the mind" be used and defined? How should it be defined?

4.2.3 Should the requirement for knowledge of the "nature and quality of the act" be retained and/or redefined?

4.2.4 How should the requirement for knowledge of wrongdoing be defined?

4.2.5 Should the defence of mental illness be expanded to include lack of capacity for self-control?

Issue 4.3 Should the defence be replaced with a new formulation? If so, how should the law determine the circumstances in which a person should not be held criminally responsible for his or her actions due to an impaired mental state?

Issue 4.4 Should there be a separate defence for cognitive impairments?

Issue 4.5 Should a defence of mental illness be available in respect of personality disorder?

Issue 4.6 How should the law determine the circumstances in which a young person should not be held criminally responsible for his or her actions due to an impaired mental state? In particular, should the circumstances be differently defined for young people than they are for adults?

Issue 4.7 Should substance-induced mental states in young people be regarded differently than for adults for the purposes of determining criminal liability?

Issue 4.8 How should the overlap between *doli incapax* and the defence of mental illness be addressed?

Issue 4.9 Should the defence of automatism be retained, modified or abolished?

Issue 4.10 The Commission invites comment on the relationship between the defences of intoxication and mental illness.

Issue 4.11 Should the *Mental Health (Criminal Procedure) Act* be amended to provide for the prosecution, or the court, to be able to raise the defence of mental illness, with or without the defendant's consent?

Issue 4.12 Should the *Mental Health (Criminal Procedure) Act* be amended to provide for a finding of "not guilty by reason of mental illness" to be entered by consent of both parties?

Issue 4.13 Should a process other than an ordinary trial be used to determine whether a defendant is not guilty by reason of mental illness?

Issue 4.14 Should the court have the power to order an assessment of the defendant for the purpose of determining whether he or she is entitled to a defence of mental illness?

## **5. Defence of substantial impairment by abnormality of mind**

Issue 4.1 Is the phrase “underlying condition” adequate for the purposes of the defence?

Issue 4.2 Should the requirement that the impairment be “so substantial as to warrant liability for murder being reduced to manslaughter” be omitted or modified? If modified, in what way?

Issue 4.3 Should the defence of substantial impairment be retained or abolished?

Issue 4.4 If it should be abolished, would there be a consequential need to reform other laws, such as the defence of mental illness? If so, in what way?

## **6. Sentencing**

Issue 9.1 Should the range of cognitive and mental health impairments that attracts special sentencing principles be defined in legislation? If so, what cognitive and mental health impairments should, or should not, be included?

Issue 9.2 How should the co-existence of a cognitive and/or mental health impairment and substance abuse be taken into account when sentencing adult offenders?

Issue 9.3 How should the co-existence of a cognitive and/or mental health impairment and substance abuse be taken into account when sentencing young offenders?

Issue 9.4 Should the *Crimes (Sentencing Procedure) Act 1999* (NSW) be amended to provide for court-ordered psychological, psychiatric or other assessments prior to sentencing?

Issue 9.5 If so, are there any circumstances in which a pre-sentence assessment should be mandatory?

Issue 9.6 The Commission invites comment on the application of the principles of “specific deterrence” and “dangerousness” in sentencing offenders with cognitive and mental health impairments.

Issue 9.7 The Commission invites comment on the use of the prior criminal record when sentencing offenders with cognitive and mental health impairments.

Issue 9.8 The Commission invites comment on issues arising from the use of victim impact statements in cases involving offenders with cognitive and mental health impairments.

Issue 9.9 Are the sentencing principles that apply to offenders with cognitive and mental health impairments comprehensive and appropriate?

Issue 9.10 Should existing or additional sentencing principles be supported by legislation?

## **7. Treatment-focussed orders for persons not convicted of an offence**

Issue 9.1 Which, if any, of the following frameworks for disposition orders is to be preferred?

- A. The court makes such order as it thinks fit, including conditional or unconditional release into the community or an order for custody;
- B. The court selects from a range of structured orders, including community-based and custodial options;
- C. The court refers the person to the Mental Health Review Tribunal, which makes the appropriate order(s); or
- D. The court confers civil or forensic patient status on the person, who is then dealt with under the mental health or disability care system.

Issue 9.2 Should the same range of orders be available in the Local, District and Supreme Courts? If not, which orders should be available in which courts? Should there be a procedure for referring a person to a different court if the appropriate order is not available in the trial court?

Issue 9.3 Should the same range of orders be available in respect of young people? If not, what types of orders should be available in respect of young people? Should the Children's, District and Supreme Courts have the same, or a different range of orders available?

Issue 9.4 Should proceedings for breach of conditions, review, variation and revocation of orders be dealt with by:

- (i) the court?
- (ii) the Mental Health Review Tribunal? or
- (iii) the Tribunal, with a power to refer the person back to court in appropriate cases?

Issue 9.5 Should specific orders be provided for people who have cognitive impairments and who are found not guilty by reason of mental illness or who are unfit to be tried and not acquitted? If so, what should be provided?

Issue 9.6 Should the court have the power to order an assessment for the purposes of determining the appropriate order to be made in respect of a person found not guilty by reason of mental illness or who is unfit and is not acquitted at the special hearing?

Issue 9.7 Should a special procedure be provided for determining the appropriate order to be made in cases where the person is found not guilty by reason of mental illness or is unfit and is not acquitted at the special hearing? If so, what should that special procedure be?

Issue 9.8 What provision, if any, should be made for the situation where a court is unable to make the appropriate order because necessary service(s) are not available?

Issue 9.9 What principles should apply to determining the appropriate order to be made in respect of a person who is found not guilty by reason of mental illness or who is unfit to be tried and is not acquitted at a special hearing?

Issue 9.10 What provision, if any, should be made regarding the person's consent to (i) a treatment-focussed order being made and/or (ii) administration of treatment to the person?

Issue 9.11 Should legislation provide for victim statements to be tendered in proceedings in relation to persons found not guilty by reason of mental illness or unfit to be tried and not acquitted?

Issue 9.12 If so, should the legislation limit the content of the statement to certain matters? If so, what should be the content of such statements?

Issue 9.13 What standard of proof, if any, should apply to matters raised in a victim statement tendered for the purposes of determining the appropriate order and conditions to be imposed?

Issue 9.14 Should the legislation make express provision in regard to limitations on admissibility of victim statements and/or examination and cross-examination of victims who tender such statements? If so, what should be provided?

Issue 9.15 Should legislation provide for notification of (i) the person's carer and/or (ii) the person's family members? Should legislation provide for notification of any other persons?

Issue 9.16 Should legislation provide for the court to receive a statement from any or all of the following: (i) the person's carer, (ii) the person's family members, or (iii) any person who, in the court's opinion, is able to provide information relevant to the court's decision?

Issue 9.17 If the court should have the power to receive such a statement, , should the legislation limit its content to certain matters? If so, what should be the content of such statements?

Issue 9.18 What standard of proof, if any, should apply to matters raised in such a statement?

Issue 9.19 Should the legislation make express provision in regard to limitations on admissibility of statements and/or examination and cross-examination of persons who tender such statements? If so, what should be provided?

## **8. Treatment-focussed sentencing options**

Issue 9.1 For community-based sentences incorporating a treatment focus, which of the following model/s is/are preferable:

- A. Ordinary community-based sentence, with treatment conditions?
- B. Community-based treatment orders made by the court?
- C. Community-based treatment orders made by the Tribunal?
- D. Court confers 'civil' involuntary patient status on the person?

Issue 9.2 Should the court retain a power to also impose a punitive sentence on the offender?

Issue 9.3 What type(s) of custodial treatment order should be available in New South Wales?

Issue 9.4 What should happen if the order is for a fixed term and the person recovers during the term of the order?

Issue 9.5 How can the identification of offenders with cognitive and mental health impairments (i) in the community and (ii) in custody be improved?

Issue 9.6 How can information that is provided to the sentencing court, regarding an offender's cognitive or mental health impairment and related needs, be more effectively transferred to Justice Health and other relevant corrections-based service providers?

Issue 9.7 Should a risk management planning framework be established in New South Wales in respect of offenders with cognitive and mental health impairments?

Issue 9.8 If so, how, and to what extent, should the scheme be enforceable against relevant agencies?