Submission to NSW Law Reform Commission review of 'People with cognitive and mental health impairments in the criminal justice system'

July 2010

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30th July 2010

Mr. P McKnight
Executive Director
NSW Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Mr. McKnight,

Re: NSW Law Reform Commission (NSWLRC) review of 'People with cognitive and mental health impairments in the criminal justice system'

The NSW Consumer Advisory Group – Mental Health Inc. (NSW CAG) is the independent, statewide organisation representing the views of mental health consumers at a policy level, working to achieve and support systemic change. Our vision is for all mental health consumers to experience fair access to quality services which reflect their needs.

NSW CAG welcomes the NSW Law Reform Commission's review of criminal law and procedures applying to people with cognitive and mental health impairments. As the peak body representing people who use mental health services in NSW, we are aware of the over representation of people who experience mental illness in the criminal justice system, and look forward to legislative change which will work towards addressing this.

NSW CAG notes that the structure and complexity of the current review is such that many people with mental illness are unable to participate and have their views put forward. We encourage the Law Reform Commission to provide mechanisms for face-to-face consultation with people with mental illness to enhance their opportunity for representation and participation in this review.

NSW CAG would also like to acknowledge that the potential for positive legislative reform in NSW should be considered in unison with systemic improvements needed to adequately resource the public and community mental health system to ensure legislation operates effectively in practice.

Yours sincerely,

Karen Oakley
Executive Officer

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Abbreviated terms

BOCSAR	Bureau of Crime Statistics and Research
HREOC	Human Rights and Equal Opportunity Commission
MHA	*NSW Mental Health Act 2007*
MHFPA	*NSW Mental Health (Forensic Provisions) Act 1990*
MHRT	Mental Health Review Tribunal
NCOSS	Council of Social Service NSW
NGMI	Not guilty due to mental illness
NSW CAG	NSW Consumer Advisory Group – Mental Health Inc.
NSWLRC	NSW Law Reform Commission
UN	United Nations
UNA	Untried and not acquitted

Basis of this advice

The NSW Consumer Advisory Group – Mental Health Inc. (NSW CAG) exists to ensure that policy makers hear the perspectives of mental health consumers across NSW. Mental health consumers are people who use, or have used mental health services. To enable our representation of mental health consumers and to advocate for systemic change, NSW CAG regularly conducts consultations with people who experience mental illness throughout NSW.

In preparation for this submission, NSW CAG conducted three face to face consultations to obtain information from mental health consumers who have experience of the criminal justice system. These included consultations with forensic consumers at Morisset and Cumberland Hospitals, and a public consultation held at St. Vincent's Hospital in Darlinghurst. A total of 48 people attended these consultations.

NSW CAG also disseminated a questionnaire to our network of over 1000 people to inform this submission. Our network comprises consumers, carers, service providers and other key stakeholders. NSW CAG received 16 responses to the questionnaire, which were used in conjunction with data collected from the face to face consultations to formulate this response.

Consultations focused on what consumers thought about:

- Diversion, including factors that should be considered in diversion, supervision and breaches while on orders, and what diversion should look like in practice;
- Court proceedings, including current hearing procedures, mental health assessments, the defence of mental illness;
- The forensic system, including treatment and support, and the Mental Health Review Tribunal; and
- Gaps in the system and practical problems with the current legislation, and how these might be resolved.

NSW CAG's comments and recommendations regarding the NSW Law Reform Commission Consultation Papers are based on the above consultations and our core work involving regular interaction with mental health consumers in NSW.

Structure of this response

NSW CAG's response begins with an introduction that outlines six principles that underpin this response, and are needed to drive legislative reform. Following this is a section that outlines systemic issues that must be addressed at the same time as any legislative change in order to promote an effective system. NSW CAG's responses and recommendations to segments of Consultation Papers 5,6,7 and 8 are then presented.

Introduction

It is well documented that people who experience mental illness are over represented in the criminal justice system (Chappell, 2008; Ogloff, 2007; Senate Select Committee on Mental Health 2006). Not only are people with mental health problems more likely than the general population to come into contact with the criminal justice system, but offenders also tend to have more mental health problems than people in the general community (Smith & Trimboli, 2010). The increased prevalence of people with mental illness in the criminal justice system is largely attributed to the failure of the system to provide appropriate support in the community following deinstitutionalisation from the early 1960s to today (White & Whiteford, 2006).

In consulting with consumers and formulating our response, NSW CAG found that there were six key principles which underpin the legislative change required for people who experience mental illness and come into contact with the criminal justice system. They include:

1. The need for a stronger health response;
2. A system underpinned by the philosophy of recovery;
3. Improved knowledge about mental illness;
4. Prevention and early intervention;
5. Least restrictive care; and
6. Consumer participation

1. The need for a stronger health focus

In NSW CAG's view, the legislation must adopt a stronger health response to the needs of people with mental illness by preventing punitive measures being applied where a person's behaviour is the result of being mentally ill at the time of committing an offence. This needs to be considered at every level of the criminal justice system. A system which responds punitively is not meeting the underlying needs of the individual nor the community, and will only further exacerbate the criminalisation of people with mental illness. In NSW CAG view, this applies to:

- People who commit less serious crimes with mental illness or impairment, either at the time of the alleged commission of the offence, or at any time during the course of their hearing; and
- People who commit more serious crimes, if mentally unwell at the time of the alleged commission of the offence.

> *"People with mental illness are not criminal because when they commit the crime they are not themselves"*
>
> Consumer, NSW CAG Consultation June 23rd 2010.

NSW CAG found that the need for a stronger health focus was consistent throughout many of the issues raised by the NSW Law Reform Commission, including:

- The current provision which permits the detention of forensic consumers in correctional facilities (Issue 6.90);
- Victim participation in Mental Health Review Tribunals for forensic consumers (Issue 6.80);

- Length of time forensic consumers are held within the system (Issue 6.101); and
- Alternatives to the ordinary trial process (Issue 6.39).

2. A system underpinned by the philosophy of recovery

In order to achieve a stronger health focus which meets the needs of people who experience mental illness, NSW CAG advocates that there needs to be a stronger focus on recovery. Concepts that underpin recovery are based on each individual's subjective experience of mental illness, and may include having hope for the future, choice in treatment and care, living a meaningful and dignified life, safety, stable accommodation, participation in the community, engaging in meaningful social activities, employment, physical health, self-defined goals, healing, wellbeing, and management of symptoms (Deegan, 2003; NSW CAG consumer consultations, 2009). Recovery is not about "curing" a condition, it is about integrating, managing and accepting the experience of one's illness, and living a meaningful life.

With the personal view of mental illness in mind, the language of law needs to be explicit that treatment and support is not limited to services aimed at "curing" a condition, as this, based on the consumer experience of mental illness, is not the nature or concept of the experience of their recovery. Rather, recovery is about maximising every opportunity for a consumer to experience recovery, including:

- through the mechanism of diversion from the criminal justice system into the community for appropriate treatment and follow up support; and
- in a forensic setting, where opportunities are given to each individual to progress through the system and live a meaningful life. Opportunities for recovery must be available in the forensic setting, including the option to participate in activities and groups that contribute to living a meaningful life.

The type of intervention by the criminal justice system can have a significant impact on a persons well being and journey of recovery.

3. Improved knowledge about mental illness

Mental health literacy is the knowledge and beliefs about mental disorders which aid in their recognition, treatment and prevention (Jorm, 2006, p.40). NSW CAG hears in our day to day interactions with consumers that there is much work that needs to be done to increase knowledge about mental illness amongst magistrates, judges, legal professionals, correctional services, healthcare professionals, police and the community. Consumers regularly report a lack of understanding of the effects of mental illness within the system, resulting in them experiencing stigma and discrimination (NSW CAG consumer consultations, 2009).

4. Prevention and early intervention

NSW CAG recognises that the criminal justice system needs to be oriented towards prevention and early intervention, through a strengthening of diversion practices for minor offences. Although the legislation provides mechanisms for diversion, more effort needs to be applied to ensure that people who experience mental illness are provided with appropriate treatment and care which meets their needs. Greater efforts

need to be focused on the identification of mental illness throughout the court process through mental health assessments (Issue 5.6) and improvements to diversionary practices (Issues 7.8, 7.20, 7.32).

5. Least restrictive care

NSW CAG advocates that the principle of least restrictive care should guide the treatment of people with mental illness who come in contact with the criminal justice system. The United Nations *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (1992) outlines in Principle 9 that:

> *Every patient shall have the right to the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.*
>
> *(United Nations,1992).*

This principle in practice requires that legislation supports least restrictive care through:

- The equal opportunity for diversion for less serious crimes for all people who come into contact with the criminal justice system; and
- The regular review of people in the forensic setting to ensure that there is the opportunity for people to re-enter the community when people become well enough.

6. Consumer participation

NSW CAG promotes that consumer participation is an essential principle that must underpin consumer interactions with the criminal justice system. Consumers need to have the opportunity to participate in all decisions regarding their legal representation and plea, and decisions around their treatment, support, and assessment processes. It must be recognised that each person is unique, and will therefore have different responses and needs regarding how they would like to participate.

Participation is also very relevant in the context of involuntary treatment. Where many choices are removed from a person regarding their treatment it is essential that there is still an opportunity for people to have a say and be involved in the decisions made about their treatment.

We hear regularly that consumers want the opportunity to participate in all situations relating to their treatment and care (NSW CAG consumer consultations, 2009). Indeed, participation is a key human right. The World Health Organisation's *Declaration of Alma-Ata* states that "people have the right and duty to participate individually and collectively in the planning and implementation of their health care" (1978, p.1). NSW CAG advocates that this is also relevant to the criminal justice setting.

Comments relating to the systems involved in implementing the legislation

NSW CAG acknowledges that the NSW Law Reform Commission's review specifically targets legislative changes which address the way people with mental illness come into contact with the criminal justice system. However, NSW CAG strongly advocates that the legislation cannot be reviewed in isolation from the systemic issues which play an important role in how people with mental illness are processed throughout the system. What is needed is a whole of government approach; otherwise legislative change will do little to improve how the system operates in practice.

From NSW CAG's experience, the over-representation of people with mental illness in the criminal justice system is largely a result of endemic systemic issues, which include:

- Resource shortages in both the community and the forensic mental health system;
- Inadequate legal representation and individual advocacy; and
- Poor provision of information and education for consumers engaging in the criminal justice process.

Resource shortages in the forensic system.
Consultations with consumers in forensic facilities indicated that that the movement of consumers through and out of forensic system is limited, creating a demand for beds that exceeds supply. As a result, people with a mental illness waiting for these beds to become available are either kept in correctional facilities, or held in more restrictive care than is necessary. This fails to meet the consumer's needs and aid their movement through the system. It further fails to meet the principle of least restrictive care.

The use of correctional facilities for holding people with mental illness is inappropriate for many reasons – including:

- that this is a criminal response to a health matter;
- mental health care needs such as case management and plans are not available;
- recovery and rehabilitation programs are limited; and
- stigma and discrimination towards people living with mental illness is prevalent in prisons (see Issue 6.10).

NSW CAG recommends that funding be provided to increase the number of minimum security beds and to provide community recovery and rehabilitation places for forensic mental health consumers to support their movement through the system and to facilitate the transition from the forensic system to the community.

Resource shortages in the public mental health system
NSW CAG hears regularly that resource shortages in the public mental health system contribute to the high prevalence of people with mental illness in the

criminal justice system. Crisis-orientation, lack of community mental health services (particularly in rural and remote areas), high case loads for staff, under-staffing and inadequate discharge planning processes combined, create gaps in continuity of care in follow up and share care arrangements. The lack of resources also mean that many consumers who recognise that they are becoming unwell are turned away from services, and fail to receive early intervention support to avert potential offending behaviour. This is also an issue when consumers are placed on diversionary orders where services lack the capacity to provide the care, treatment and support required.

> *"I went to the hospital shortly before my time, told them I was suicidal, but they wouldn't listen. Then I called up Lifeline, then they got the cops out – but I was released. Had they kept me in a bit longer I wouldn't be here today. I think they should have said 'since you're suicidal we'll keep you here for a bit longer against your will'. Not to keep you for three days and kick you out when you're unwell".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

NSW CAG recommends that investment be made to increase community mental health services and staff across NSW as a way to increase the system's capacity to provide adequate early intervention and to prevent people from entering the forensic system. Such investment will further support the capacity for post-discharge support.

<u>Inadequate legal representation and individual advocacy</u>

NSW CAG hears that there is both inadequate access to legal representation and individual advocacy services for people who experience mental illness in NSW. The lack of access to quality legal representation that is truly representative of consumer views presents the opportunity for inadequacies in legislation to be exacerbated for those already marginalised. We hear through our constituents that:

- There is a need for greater awareness and education around mental illness among legal professionals, including Magistrates, judges and those representing people with mental illness;
- Legal representatives do not always communicate important information to consumers, which may impact on their decisions relating to pleas;
- Legal representatives do not always advocate for consumers' points of view, or have adequate time to represent a consumer effectively; and
- Legal representation is hard to attain, and many people are not aware of the avenues to seek legal assistance, particularly if mental health problems are not identified.

NSW CAG is also aware that there is a lack of individual advocacy services in NSW. For consumers who require support in advocating for their rights and navigating a complex system, there is a gap in services of this nature.

NSW CAG's consultations with forensic consumers also indicate that due to inadequate advocacy and legal support many forensic consumers have to become pseudo lawyers and self-advocates to be able to navigate the system. In NSW CAG's view this is unacceptable.

NSW CAG recommends that there are increased individual advocacy services and options for legal representation for people who experience mental illness in NSW.

Information and education

We hear from consumers that information about the criminal justice system and its processes needs to be better communicated so that all consumers with the capacity to understand and make informed decisions are provided with the opportunity to do so. NSW CAG advocates that consumers need to be provided with information about the consequences of pleas, their legal rights including access to legal representation, review processes, treatment and therapy options.

NSW CAG recommends that programs are developed to ensure that mental health consumers have adequate information about the criminal justice system and its processes. This includes information about the consequences of pleas, legal rights to access legal representation, review process, and treatment and therapy options.

Consultation Paper 5

Identifying the existence of a cognitive or mental impairment

Issue 5.6

Should the MHFPA be amended to create a general power of the court to order an assessment of an offender at any stage during proceedings?
If so,
(a) Who should conduct the assessment?
(b) What should an assessment report contain?
(c) Should any restrictions be placed on how the information contained in an assessment report should be used?

Power to order a mental health assessment

In the consultations held by NSW CAG, there was division among consumers as to whether the MHFPA should be amended to give the court the power to order a mental health assessment, at any stage of the court proceedings.

For some consumers, there was concern that people who experience mental illness are entering the criminal justice system without being detected and/or receiving appropriate treatment and support. Some people also expressed that when they are unwell they are unable to have insight into being unwell and would prefer for the system to intervene. It was believed that giving the court the power to make an assessment at any stage would ensure that there are safeguards within the system which is constantly monitoring the health of that person:

> *"If the assessment is not made, then you have the mentally ill falling through the cracks and they could be going to prison and not getting the help they need".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

> *"It would be a good thing if they could do that. Mental illness is very unpredictable. It* [a mental health assessment] *can stop you getting into bad trouble. Regardless of whether it is invading on your privacy, it can divert a tragedy".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

> *"When you are manic you think you are Queen of Sheba. But the thing is I am unwell and I stole something from the milk bar".*
>
> Consumer, NSW CAG Consultation, June 23rd 2010

> *"It is probably in the individual's best interests to be evaluated if they have a history of mental ill health. The reason I argue 'yes' is that the individual may be too unwell to recognise they need a psychiatric assessment".*
>
> Consumer, NSW CAG Questionnaire, 2010

"If the person feels that they weren't well then they should be able to request it".

Consumer, NSW CAG Consultation, June 23rd 2010

However for others, they expressed that they would rather have choice about having a mental health assessment due to the consequences that would result. Societal stigma as well as the response of the current forensic system prevents many from wanting to take this option:

"If giving the courts the power to order a mental health assessment is about making a person go forensic then that is not a good thing. You should be able to discuss it with the lawyer. There should be choice regarding having a mental health assessment – and you should have information and education about it, and what it means."

Forensic Consumer, NSW CAG Consultation June 16th 2010

Should all people have a mental health assessment?
"No – only if it is requested".

Consumer, NSW CAG Consultation, June 23rd 2010

"There should be choice regarding a mental health assessment – and you should have information and education about it".

Forensic Consumer, NSW CAG Consultation, June 16th 2010

Due to the concerns about the forensic mental health system, many forensic consumers advocated for a choice in whether or not they chose the path of forensic or custodial detention, rather than having a mental health assessment to determine a court's response.

NSW CAG therefore considers that the court should be allowed to order a mental health assessment, however, the outcome of this assessment should not determine a person's plea.

<u>Who should conduct the assessment?</u>

Most consumers felt that a multidisciplinary team of a psychiatrist, a social worker and a person with the experience of mental illness should conduct these assessments, rather than it falling on the shoulders of a single clinician. Should a mental health assessment be required, consumers expressed a strong need for it to be conducted by a multidisciplinary team external to the court. Many people felt that a mental health assessment conducted in relation to the criminal justice system would result in impacting their life circumstances and therefore required more than one professional involved.

"The assessment should be multidisciplinary – an advocate, psychiatrist and psychologist like in the UK".

Consumer, NSW CAG Consultation, June 23rd 2010

Culturally appropriate mental health assessments

Consumers also raised the importance of ensuring that mental health assessments are conducted in a culturally appropriate manner. There was concern that adequate safeguards need to be put in place to ensure that a person receives the right diagnosis which takes into consideration person's ethnic, religious, cultural and spiritual beliefs:

> *"If someone is Hindu, Buddhist, Christian, that person should be able to choose a psychiatrist that fits with their belief system – that has their cultural knowledge. For example, a Koori woman in the Northern Territory was considered psychotic, but when they went to the nation (which is her tribe) her behaviours were culturally appropriate."*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

Overall, NSW CAG supports the creation of a general power for the court to order a mental health assessment of an alleged offender during any stage of the court proceedings. Too many people who experience mental illness are slipping into the criminal justice system, either without detection that a mental illness exists or without diversion into more appropriate care. An increased use of mental health assessments in the court will strengthen appropriate criminal justice responses for people who experience mental illness, by encouraging judges and magistrates to consider whether mental illness was a factor contributing to the alleged offence. In turn, NSW CAG hopes that such a power will increase and encourage diversion to exist in practice.

NSW CAG supports an amendment of the MHFPA to create a general power of the court to order an assessment of an offender at any stage during the proceedings. We recommend that this assessment is conducted by a multidisciplinary team including a psychiatrist, a social worker, and a person with the experience of mental illness. NSW CAG recommends that the culturally appropriateness of these mental health assessments are considered. NSW CAG further recommends that the outcome of the assessment does not determine a person's plea, but that the individual is still able to instruct their solicitor as to the plea they wish to make.

Consultation Paper 6

Fitness for trial

Issue 6.1

Should the MHFPA expressly require the court to consider the issue of fitness whenever it appears that the accused person may be unfit to be tried?

NSW CAG believes that the issue of fitness should always be considered by the court when it appears that a person is unfit to be tried. It is unjust for the court to proceed if it is believed that the defendant could not have a fair trial and to have the opportunity participate meaningfully.

NSW CAG supports amendments to the MHFPA to expressly require the court to consider the issue of fitness, when it appears that an accused person may be unfit to be tried.

Issue 6.11

Should fitness procedures apply in Local Courts? If so, how should they be framed?

NSW CAG strongly advocates that any person who is unfit to be tried is not receiving a fair trial, regardless of whether they have allegedly committed a minor or serious offence. The NSW Law Reform Commission (2010b, p.22) indicates that in 2006 the Local Court dealt with 91.7% cases, in comparison with the District and Supreme Courts which finalised only 2% of cases. In our view, this amounts to a large number of cases that are being presented before the Local Court, where fitness procedures are not being applied. In this regard, NSW CAG supports fitness procedures also applying in the local courts to ensure that people who experience mental illness and commit minor crimes are receiving a fair trial.

However, NSW CAG is concerned that the availability of fitness in local courts may result in an increase of forensic patients in the system. Due to the indefinite nature of detention for forensic patients, NSW CAG is concerned that this could lead to the re-institutionalisation of mental illness. NSW CAG strongly believes that no forensic consumer should be held in a correctional facility, nor should a person be held in the forensic system for committing a minor offence. The forensic system works on the principle of harm and danger, and is an environment that has more restriction than appropriate for someone who commits a minor infringement. In this case, NSW CAG advocates that people who commit minor crimes and experience mental illness should be diverted to receive appropriate support in the community or an inpatient facility in the civil mental health system. Psychosocial needs also need to be considered in making such diversions.

NSW CAG supports the application of fitness procedures to the Local Courts, with a mechanism which ensures that these people are diverted into the community for mental health treatment and/or support.

The defence of mental illness

Issue 6.20

Should the defence of mental illness be replaced with an alternative way of excusing defendants from criminal responsibility and directing them into compulsory treatment for mental health problems (where necessary)? For example, should it be replaced with a power to divert a defendant out of criminal proceedings and into treatment?

In NSW CAG's view, the defence of mental illness must continue, as it is still as relevant today as it was when it was first introduced. NSW CAG believes that the removal of the defence of mental illness altogether would create an injustice for people who experience the illness, because that person would never be considered "not guilty" of the crime committed. It is important that people with mental illness are recognised by the law as not guilty to reflect the lack of intention within the process, and therefore lack of criminal responsibility. The court process remains appropriate over diversion to ensure that the person did commit the crime, and that mental illness was a critical factor in the crime.

Although NSW CAG supports the continuation of the defence of mental illness, there needs to be improvements on how the defence of mental illness operates in practice. Please see NSW CAG's responses to Issue 6.35.

NSW CAG recommends that the defence of mental illness continue, with improvements made around how it operates in practice (see issue 6.35).

Issue 6.23

Should the defence of mental illness be available to defendants who lack the capacity to control their actions?

NSW CAG regularly hears that many consumers frequently attempt to access support in the community before reaching an acute stage of their illness, but are turned away due to the current acute orientation of the NSW mental health system. While this is a systemic rather than legislative issue, NSW CAG advocates that the NSW Law Reform Commission consider that many consumers take numerous steps to get help when they recognise they are becoming unwell, but fail to receive the treatment, support and care they need to prevent potential harm to themselves or others. The case of Heatley discussed by the NSW Law Reform Commission (2010b, p.61) is a prime example of this, where Heatley's request to not have another person in his cell, based on his knowledge of his illness and risk of harm to others, was ignored. Therefore NSW CAG considers that amendments need to be made to the system and peoples' access to appropriate services rather than a legislative change to the availability of the defence of mental illness.

NSW CAG recommends that the defence of mental illness be available to those that lack the capacity to control their actions due to mental illness.

Issue 6.32

Should the MHFPA be amended to allow the prosecution, or the court, to raise the defence of mental illness, with or without the defendant's consent?

Many consumers believe that people should have a choice in whether the defence of mental illness is raised in their case, to ensure they experience equality before the law. This was particularly evident for forensic consumers, who had the experience of being in both the correctional and forensic systems. Consumers explained:

> *'I believe that you should have a say in it whether you go that way* [pleading not guilty due to mental illness]".
>
> Forensic consumer, NSW CAG Consultation, June 16th 2010

> *"I don't think the lawyer should be able to* [raise the defence of mental illness] *without your consent".*
>
> Consumer, NSW CAG Consultation, June 23rd 2010

Some forensic consumers also indicated to NSW CAG that their own legal counsel raised the defence of mental illness without their consent. Consumers are often the most disadvantaged when it comes to having a representative that is supporting them and representing their views, which is mainly a result of an under resourced and under funded Legal Aid system and a lack of understanding about mental illness. NSW CAG believes that people who experience mental illness should have the power and freedom to direct their lawyer according to the way they want their case to be represented. This includes having the freedom of choice to put forward a certain plea, whether it is guilty or not guilty by reason of mental illness. This makes it inappropriate for the counsel to raise the defence of mental illness without the defendant's consent.

Having said this, many consumers also expressed the view that the defence of mental illness should be raised without the person's consent if it is evident that the person lacks insight into their illness. They believed that there should be safeguards in place for those that become unwell and commit a criminal offence to ensure that diversion from criminal sanction happens for people who are unable recognise that they are unwell. For these consumers, it is about ensuring that the system is responding to the health needs of the person appropriately if the person is not in a position to do this for themselves. For example, consumers explained:

> *"You might not be able to make the call at the time so if your QC or legal representative who liaises with the court – they make the call."*
>
> Forensic consumer, NSW CAG Consultation, June 16th 2010

"Yes, they should be able to raise the defence of mental illness without your consent. You might not be of sound mind at the time, so you might not be able to make the decision"

Forensic consumer, NSW CAG Consultation, June 16th 2010

In NSW CAG's view, any person who is considered to have little or no insight into the condition of their illness should be deemed unfit for trial. Only the person charged with an offence should be able to instruct their lawyer to their plea, and if it is determined that the person does not have insight into their illness, then the trial should be postponed until that person becomes fit for trial again. A mental health assessment should not determine a person's plea, or the removal of their consent to the plea process.

NSW CAG recommends that only the defendant should be able to raise the defence of mental illness or instruct their lawyer to do so. If a person is considered to not have insight into their illness, they should be considered unable to give informed instruction to their lawyer and therefore be found unfit to plea.

A Mental Health Court?

Alternatively, it might be more appropriate to divert all cases which appear to be mental health related to a Mental Health Court similar to that currently operating in Queensland. A mental health court of similar style could ensure that both legal and health elements are addressed by the court process, and resolve some of the problems experienced with the ordinary trial process for consumers (see NSW CAG's response to issue 6.35).

NSW CAG recommends that any consumer considered to have little or no insight into their illness is deemed unfit for trial. NSW CAG does not support the MHFPA being amended to allow the court to raise the defence of mental illness without a person's consent.

NSW CAG also recommends that the NSW Law Reform Commission explore the effectiveness of the Mental Health Court system operating in Queensland.

Issue 6.34

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?

NSW CAG does not support the court having the power to order a mental health assessment to determine whether someone is entitled to raise the defence of mental illness. To ensure due process, people who experience mental illness should have the freedom to raise their plea to an alleged offence before a court of law like all other citizens, with the court then following due process to decide if that plea is accepted.

Where it is to be determined if a person had a mental illness at the time of the alleged offence, a comprehensive mental health assessment needs to be conducted rather than a standard mental health assessment. This would need to involve a multidisciplinary team to ensure the outcome of the assessment is thorough and accurate, and not placed on the decision of one clinician. The mental health professionals doing the assessment must be highly trained to improve the accuracy, with recognition of the implications of the assessment's outcome – that the person found to be well will be held criminally liable for their actions. Consumers would also like to see a person with the lived experience of mental illness on the assessment team.

The mental health assessment when used for this purpose must also be focused on determining the existence of mental illness and the impact that had on the person at the time of the alleged offence. It is noted that some people may be well a the time of pleading and at the time of the mental health assessment, but that is not a sound indicator as to whether or not they were impacted by a mental illness at the time of the alleged offence.

NSW CAG does not support the provision of a power to the court which orders a person to have a mental health assessment to ascertain whether a person is entitled to raise the defence of mental illness.

Issue 6.35

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

For many consumers, the ordinary trial process can be particularly stressful, and in some cases, trigger the onset of symptoms and/or further deterioration of mental and physical health. Forensic consumers largely attributed the deterioration of health to the length of time it takes for a case to be heard, and the settings in which trials take place:

> *"It* [the trial] *should have been in the public hospital, not the jail setting. With a tribunal, it would be better if the medical experts from the beginning are assessing you, and over within 6 months which allows you to get on with your life and rehabilitation. Not waiting for 3 years, living with fear and stress, and staying unwell. The longer you stay unwell the less chances there are of getting well. It is inhumane. In one hand they* [the court] *are saying you are not well, but the system is not treating you that way".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

> *"The whole ordeal brought on my illness – I could only get to a certain level of wellness because of the whole process".*
>
> Forensic Consumer, NSW CAG Consultation, 16th June 2010

> *"The process* [trial] *should be while you are in hospital and it should be very quick – not 3 years down the track. It impacted on my mental*

health. I had anxiety, was put on heavy medication and now as a result of that I have diabetes which affects my physical health. They saw it as a drug resistant mental illness but it wasn't, it was the stress of the whole process".

Forensic Consumer, NSW CAG Consultation, 16th June 2010

Another factor consumers identified as problematic with the ordinary trial process is the uncertainty about what the future holds; whether it is punishment served in a correctional centre or treatment and care in a forensic facility. One consumer explained how this situation affected him:

"I was freaking out about going into jail. I had blokes who were sympathetic to me who would make sure I would be okay. I was on anti-depressant medication the whole time – but that was due to the stress of the trial - I didn't want to have a clinical depression".

Forensic Consumer, NSW CAG Consultation, 16th June 2010

NSW CAG advocates that there needs to be an alternative way in which the court processes cases where it is believed that a crime was committed due to mental illness. In asking consumers what this might look like in practice, one consumer compared the current trial process to how the Mental Health Review Tribunal (MHRT) is conducted:

"The Tribunals [MHRT] *are excellent. They have three judges - a psychiatrist, a legal person and someone from the community, and they are fantastic. The court house is a scary place, and it is frightening. The tribunal is better".*

Consumer, NSW CAG Consultation, 23rd June 2010

"The individual could be assessed by a panel of people, e.g. consumer advocates/representatives, psychiatrists, psychologists, lawyers and so on in a normal setting i.e. not a court room, but rather just a normal room and preferably a room that is not intimidating".

Consumer, NSW CAG Questionnaire, 2010

The process for assessing if a person is not guilty due to mental illness could look similar to that of a Mental Health Court, similar to that in Queensland, raised by NSW CAG in Issue 6.32. Such a court could hear criminal cases where the state of a person's mind at the time of the crime is in question. This would ensure that the court has the right expertise to be able to make appropriate decisions regarding a person's future.

Consumers have also expressed that they would like to have support through the legal process of a multidisciplinary team, which would consist of a consumer for peer support, as well as a legal counsel and a mental health professional. Having access to Legal Aid alone is insufficient for explaining the process and helping a person deal with the emotional impact of the process.

"Consumers, they need an advocate. I am not a forensic consumer, but when they [Legal Aid] *come to see me, they don't listen to me. They work with a formula. We need a consumer advocate in there".*

Consumer, NSW CAG Consultation, 23rd June 2010

NSW CAG recommends that an alternative to the ordinary trial process is required. An extensive consultation with consumers is recommended, as well as an exploration into the appropriateness of a specific mental health court, similar to that operating in Queensland. The process also needs to ensure that consumers are linked into legal, peer and advocacy support during this time.

The defence of substantial impairment

Issue 6.40

Should the defence of substantial impairment be retained or abolished? Why or why not?

NSW CAG does not support the abolition of the partial defence of substantial impairment. If this defence is removed, people who should only be held partially responsible for a crime would be held liable to the same extent as those that were deemed in complete control of their actions. It would also mean that people who commit offences due to mental illness have no defence if they fail to meet the full requirements of the *M'Naghten Rules.*

At NSW CAG, we hear that many consumers are deterred from raising the full defence of mental illness due to the implications of becoming a forensic patient, including indeterminate detention, compulsory treatment, and restrictions to conditions of release. If the partial defence of substantial impairment is abolished, NSW CAG concurs with concerns raised by the NSW Law Reform Commission (2010b, p. 112-113) that consumers may choose to plead guilty to a crime (for which they are currently excused from criminal responsibility) and would fail to receive the appropriate care and treatment needed. NSW CAG strongly believes that this is neglecting the health and wellbeing needs for many consumers and is contributing to the criminalisation of mental illness.

NSW CAG advocates that an amendment to the current defence of substantial impairment occurs instead of complete abolishment of the defence. This would include revisiting and clearly outlining the definition of "abnormality of the mind".

NSW CAG recommends that the partial defence of substantial impairment continues.

Powers of the court following a qualified finding of guilt at a special hearing or a verdict of not guilty by reason of mental illness

Issue 6.53

To what extent (if any) should the court take into account a risk of harm to the person him- or herself, as distinct from the risk (if any) to other members of the community?

In deciding what principle and factors that the court should consider before making a forensic order, NSW CAG advocates that the court must make a distinction between a risk of harm to the self and risk of harm to others. In line with the notion of least restrictive care, NSW CAG believes that care in an inpatient facility in the civil mental health system is more appropriate for someone who is only at risk of harm to self, and is of no danger to the community. NSW CAG supports the Canadian view, which maintains that "public safety is the only basis for the exercise of criminal power" (NSW Law Reform Commission 2010b, p. 159). In this regard, it is inappropriate to involve the criminal justice system for the purpose of preventing an offender from harming him or herself, as this leads to the criminalisation of self harm.

NSW CAG recommends that the court distinguishes difference between risk of harm to self and risk of harm to the community. For those who are considered only to be a risk of harm to self, criminal sanction is inappropriate, and care should be provided within an inpatient setting within the civil mental health system.

Issue 6.54

Should the court be provided with a power to refer a person to the civil jurisdiction of the MHRT, or to another appropriate agency, if the person poses a risk of harm to no-one but him or herself?

NSW CAG supports provisions for the court to have power to refer a person to a civil jurisdiction of the MHRT, or another appropriate agency, if a person is only at risk of harm to themselves. NSW CAG advocates that care in a forensic facility is more restrictive than necessary for someone who is of no danger to the community.

NSW CAG recommends that the court be provided with the power to refer a person to the civil jurisdiction of the MHRT if the person is at risk of harm to him or herself, but not to the community.

Issue 6.60

In relation to court proceedings involving people who are UNA or NGMI, are the current provisions concerning notification to, and participation by:
(a) victims; and
(b) carers
adequate and appropriate?

Please refer to NSW CAG's response to issues 6.80 and 6.81.

Management of forensic patients following court proceedings

Issue 6.74

Should the MHFPA provide for a forensic patient to apply for a review of his or her case?

NSW CAG is aware that there are no provisions for a forensic patient to apply for a review by the MHRT in between the six monthly scheduled reviews, and we are concerned that the right to initiate judicial review regarding the lawfulness of detention is not being met. NSW CAG concurs with the view of the NSW Law Reform Commission (2010b, p.186) that this is a breach of the International Covenant on Civil and Political Rights (1976), Article 9 (4), which states:

> *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

NSW CAG therefore supports the provision within the MHFPA for a forensic consumer to apply for a review of their case.

NSW CAG also hears from forensic consumers that they feel there is no point asking for a review as it takes so long to put together their case and get a response from the MHRT that it is just as quick to wait for their next six month review. Forensic consumers also indicated that reliance on treating staff to participate in the review process is also problematic as they are concerned that it may impact their relationship with the treating team. In NSW CAG's view the barriers placed on consumers in requesting such a review is a failure of the current system.

In understanding that an appeal would most likely take longer than six months to process, many consumers feel that it is more effective to wait until the next MHRT review than to challenge its current decision and risk compromising their relationship with the treating team.

In addition to the issues outlined in the above sections relating to the MHRT, consultation identified that consumers would like to see an opportunity to appeal decisions made by the MHRT without their treating team being informed. For example:

> *"Regarding opportunities to appeal, it is not a good idea to let doctors know. There should be a secret way of appealing that has nothing to do with the staff."*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

These issues demonstrate the need for education about the system as well as a review of system processes to enable reviews to occur in between the six monthly scheduled reviews.

NSW CAG recommends that the MHFPA recognise the right of forensic consumers to apply for a review of his or her case, and to recognise that such reviews need to be conducted as soon as practicable.

NSW CAG recommends that more broadly the system needs review to support the need for an expedient review processes.

Issue 6.76

Should the MHFPA be amended to abolish the requirement for the MHRT to notify

- The Minister for Police;
- The Minister for Health; and/or
- The Attorney General

of an order of release?

NSW CAG is concerned that the current provisions which require the MHRT to notify the Minister of Police regarding the release of a forensic patient may be further contributing to the stigma already experienced by consumers, particularly those who have the experience of being a forensic consumer. In our view, once the MHRT has determined that a person is no longer dangerous or a risk to society, and in doing so grants their unconditional release into the community, then the continued monitoring of them in the community by police is inappropriate.

NSW CAG is assuming that the Minister for Health and the Attorney General are currently notified because they have the right to appeal against decisions made by the MHRT. NSW CAG questions the capacity of both of these bodies to have the knowledge to make a fair appeal when they are not involved in the direct care and treatment of these individuals. We therefore recommend further consideration of the right to appeal against MHRT decisions sitting with the Minister for Health and the Attorney General as well as the requirement for the MHRT to notify them of an order of release.

NSW CAG recommends that the MHFPA abolish the requirement to notify the Minister for Police of an order of release.

Issue 6.78

Are there any legislative changes that should be made in relation to the making and implementation of orders for:

- leave; and/or
- conditional release

of forensic patients?

In consulting with forensic consumers regarding the making and implementation of orders for leave and/or conditional release of forensic patients, NSW CAG found no issues with the current legislative requirements.

However, NSW CAG is concerned about the revocation of leave and conditional release for consumers who breach their conditions. Through our consultations with forensic consumers, NSW CAG has heard that a breach of leave of conditional release conditions may result in a return to a custodial rather than a forensic setting. We have heard that the threat of being sent back to prison is used by staff to ensure that consumers comply with conditions, and NSW CAG questions how this promotes rehabilitation and recovery. NSW CAG advocates that the NSW Law Reform Commission explore the need to legislate the conditions in which leave and/or conditional release can result in a return to prison.

NSW CAG recommends that the MHFPA ensures that person who has been found NGMI or UNA cannot be sent to a correctional centre for breaching their leave and/or conditional release.

Issue 6.80

Are the current provisions concerning notification to, and participation by victims in proceedings of the MHRT adequate and appropriate? If not, what else should be provided?

While many consumers acknowledge that victims have a right and need to have mechanisms for participation, they find the current provisions inappropriate, inadequate and unfair. Consumers report a number of problems with the current provisions, including the punishment orientation of victim participation in all aspects including the MHRT reviews, and the consequent breaches to consumer privacy. They also state that the current provisions cause inequality among consumers who have committed similar offences, based on whether or not they have an active victim. This can significantly impact on their progress and movement through the system. NSW CAG strongly questions the therapeutic benefits for both forensic consumers and victims, of continual victim participation as currently occurs through the MHRT, and strongly recommends that this is reviewed by the NSW Law Reform Commission.

Current Issues

1. Punishment orientation

From the consumer perspective, many victims are using the MHRT as an outlet to vent anger and frustration. This is supported by literature, which indicates the lack of victim participation in the criminal justice process causes anger and frustration amongst victims who feel that their voices have not been heard (Chappell 2010, p.39; NCOSS 2007, P.13).

NSW CAG is concerned that victim participation in this process shifts the focus back to the index offence, instead of focusing on the care and treatment of the individual. In our view, this reinforces an orientation around punishment, rather than adopting a treatment and care approach which is required by the forensic system. In consulting with consumers, they explained:

> *"The victims are fixated on something that happened 10 years ago, crime crime crime. My victim said that I was a counsellor, and that I therefore knew how I could get away with it. Yet after 8 years, I'm still sitting here. How did I get away with it?"*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

> *"It becomes a nightmare for us when the victim keeps being involved in the MHRT hearings. Victims can be yelling and screaming at you. It is wrong that they keep you in the system because you have a*[n active] *victim".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

For some forensic consumers, this significantly impacts their ability to look forward to a time of recovery, when they are being held back by a system which is continually looking at the past.

2. Continuous participation of victims

Consumers indicate that some victims choose to participate at each and every six month review by the MHRT, while other victims choose not to participate in the process at all. Consumers feel that the active participation of a victim at each hearing can have significant implications on their movement through the forensic system. NSW CAG has observed that people who have active victims appear to move much slower through the forensic system than those who have no victim participation at all. This can unnecessarily add many years to a person's detention within the forensic system.

> *"The victims go and they always say 'keep the bastard locked up forever'. I have heard from other forensic consumers that if victims don't participate, they move a lot quicker. But when the victim participates, they get stuck, the MHRT takes it on board, and it determines your outcome".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

> "[Victims should participate] *once only, or the same as if the person was in the criminal system, or optionally only if the forensic patient requests. Because it does not allow closure or healing for either the victim or the forensic patient. If the victim supports the forensic patient's release rather than opposing it, a written statement to that effect should be able to be represented by the forensic patient multiple times and considered by the MHRT".*
>
> Consumer[1], NSW CAG Questionnaire, 2010

When considering that a forensic consumer is considered not guilty for the index offence, it appears that victims receive an inordinate level of participation with no apparent limit. This is particularly in comparison to the situation where a person is found guilty of an offence where the victim participates once at the offenders sentencing hearing. However, for a forensic consumer, where they have been found not guilty, a victim can participate continuously every six months until the forensic consumer is released (which is an indefinite period). This is gross inequality in the system, where people with mental illness are being disadvantaged because of their illness.

3. Beach of privacy/ confidentiality

Forensic consumers have also expressed concern that the participation of victims impacts on their right to privacy, particularly relating to their mental health care and treatment. While many consumers acknowledge that the victims have a right to avenues of participation, they find that access to private information regarding their health and treatment inappropriate and unnecessary. Principle 7 of the *National Statement of Principles for Forensic Mental Health* (2002) acknowledges that an individual's right to privacy should not be waived by their status as a forensic consumer:

> *The right of all clients to respect for individual human worth, dignity and privacy is not waived by any circumstance, regardless of an individual's history of offending, or their status as a forensic mental health client or prisoner.*

In NSW CAG's view, the continuous participation of victims under the current provisions is not only creating a punishment orientation to treatment and care, but also discriminating against forensic mental health consumers and creating inequality in the system. Alternative avenues that recognise the right of victims to participate need to be implemented.

[1] This respondent identified themselves as a 'recovered psychiatric survivor'. To create consistency within this report, NSW CAG has recognised this person as a consumer.

Solutions

1. Need for a stronger health focus

NSW CAG strongly advocates that the MHRT process be about determining (a) the current health status of the patient, (b) whether the person is a danger to the community and (c) whether they are receiving the least restrictive form of care. To ensure that this occurs, the system needs to move away from looking back to the index offence, and rather needs to look at the individual's current health status and progress. Attention must be on improving the health of the person, and their responsiveness to treatment, over and above the past event. To determine release on anything but a person's current mental health state contradicts the principles of least restrictive care and human rights and is promoting punishment of those who have been found not guilty due to mental illness.

2. Victim support

Systemically, NSW CAG strongly believes that victims need to be provided with support in understanding mental illness and to move forward. This is supported by many consumers, who acknowledge that support to the victim is therapeutic for both the victim themselves, and the consumer:

> *"I threatened someone's life. I would do the same* [be upset] *if someone threatened my relative. I can see why they resent me and want me to do life. I think they need to be respected and given their right to say what they want…But the main thing I think they should have is counselling. I used to be a counsellor and had a Master in Counselling. It doesn't matter what philosophy you go on, you're chained to that individual. Even if you are Darwinian, if you can't forgive that person, you are going to have a grudge, you are never going to heal. There needs to be something for them".*
>
> Forensic Consumer, NSW CAG Consultation, 16th June 2010

NSW CAG also advocates that improvement to the knowledge and understanding about mental illness of the community will significantly contribute to addressing this systemic issue.

3. Mediation

Some consumers feel that a mediation process with a consenting victim may assist the both parties in coping with an offence that has been committed. Such a process would need to be made optional to cater for the needs of both parties involved.

Consumers have indicated that a mediation option with victims is not currently available to them because they have been found 'not guilty' because of their mental illness. NSW CAG feels that this is an oversight of the system, which needs to be reviewed.

"My victim said she wanted that [mediation]*, I agreed. And the head psychiatrist in the State said no way. He said that if I am not guilty, then we can't have mediation".*

Forensic Consumer, NSW CAG Consultation, June 16th 2010

NSW CAG recommends that the NSW Law Reform Commission explore a more appropriate way in which victims have their voices heard in cases where the defendant is found NGMI. NSW CAG further recommends that victims not be able to participate in subsequent MHRT hearings after the verdict of not guilty by reason of mental illness is given.

NSW CAG also recommends that victims be provided with greater support and education around mental illness, and have the opportunity to participate in mediation with the forensic consumer, if both parties consent.

Issue 6.82

Are the current provisions relating to people who are UNA who become fit to be tried adequate and appropriate?

NSW CAG is concerned that currently a person only ceases to be a forensic patient when they become fit and the DPP determines that there are no further proceedings. If the DPP determines that there is not enough evidence to continue with charges and a person remains unfit, such a person should be discharged immediately to an inpatient facility within the civil mental health system. It is unnecessary to keep such a person in care which is more restrictive than necessary if there is not enough evidence to warrant protection of the community.

NSW CAG recommends that the legislation be adjusted so that if the DPP determines there is not enough evidence to continue charges, a person who is UNA is released.

Issue 6.83

Should a person cease to be a forensic patient if he or she becomes fit to be tried and the Director of Public Prosecutions decides that no further proceedings are to be taken?

NSW CAG strongly advocates that a person who becomes fit to be tried should be released immediately if the DPP decides that no further proceedings are to be taken. Such a person is being held in a forensic facility because they are 'unfit for trial' which is based on legal and not clinical issues, and once there is no impending trial, there is no reason for such a person to continue to be held in a custodial or forensic facility.

NSW CAG advocates that provisions be made to reclassify a consumer as an involuntary patient if it is believed that the person is at risk of harm to themselves. This would involve a transfer into an inpatient setting in the civil mental health system.

NSW CAG recommends that someone found unfit to be tried is released if the DPP decides that no further proceedings are to be taken. If this person remains unwell, then the legislation must recognise provisions to transfer this person into an inpatient setting in the civil mental health system.

Issue 6.85

Should the requirement that the MHRT have regard to whether a forensic patient who was UNA has spent "sufficient" time in custody be abrogated?

NSW CAG would like to note that, in using the language of "custody", NSW CAG has understood this issue to be referring to incarceration in a correctional facility. In this regard, NSW CAG does not support a requirement of the MHRT to consider whether someone has spent "sufficient time" in custody, as we do not support forensic patients being held in correctional facilities under any circumstance. Correctional centres are punitive in nature, and should only be used to hold people who have received a conviction of guilty following a fair trial (see NSW CAG's response to issue 6.90).

Further, provisions which require a person who is UNA to be held for a "sufficient time" is imposing a minimum term, which is focused on punishment rather than health. This must be revoked to ensure that the legislation is continually looking at the current health status of the person in determining whether they should remain in the forensic system.

If this provision of "sufficient time in custody" is to continue, NSW CAG strongly advocates that MHFPA stipulates what is meant by "sufficient" time in custody, as the lack of guidance in this context is causing much confusion in the system.

NSW CAG does not support a requirement of the MHRT to consider if a person who is UNA has spent "sufficient time" in custody.

Issue 6.86

Are the provisions of the MHFPA which define the circumstances in which a person ceases to be a forensic patient sufficient and appropriate? If not, are there any additional circumstances in which a person should cease to be a forensic patient?

See NSW CAG's response to Issue 6.101

Issue 6.89

Are the provisions for appeals against decisions by the MHRT adequate and appropriate? If not, how should they be modified?

See NSW CAG's response to Issue 6.74

Issue 6.90

Should the MHFPA be amended to exclude the detention of forensic patients in correctional centres?

The detention of forensic consumers in correctional centres contradicts international (Table 1) and national principles (Table 2):

Table 1: United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)

Principle 8 Every patient shall have the right to receive such health and social care as is appropriate to his or her health needs, and is entitled to care and treatment in accordance with the same standards as other ill persons. Principle 9 The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff

Table 2: National Statement of Principles for Forensic Mental Health (2002)

Principle 2 Treatment and care will be provided in an appropriate environment compatible with the treatment and rehabilitation needs of the individual and the community's need for safety.

NSW CAG strongly advocates that the MHFPA be amended to exclude forensic patients from being detained in correctional facilities. It is morally wrong to subject a person to punishment for a crime if that person does not have the capacity to form the necessary intention that the definition of crime requires. Further, when a person has limited or no control over their actions, punishment as a deterrent or retribution is ineffective and is contributing to the criminalisation of mental illness. Further, detention in correctional settings does not provide a suitable environment for treatment, care and recovery.

NSW is one of only a few jurisdictions in the western world that places forensic patients in correctional facilities, and under the authority of

correctional staff (NSW Legislative Council Select Committee on Mental Health 2002). Correctional facilities are punitive by nature, and NSW CAG advocates that such environments are unethical and inappropriate for housing people who have been found to be NGMI or UNA. Where mental illness has been a mitigating factor in the offence, the person must be placed in a therapeutic environment which is conducive to their recovery, and must not be punitive in nature. There also needs to be a distinction between people who have been found to be NGMI or UNA and those that have been found to be fully responsible for a crime they have committed. Through consulting with forensic consumers NSW CAG has heard that correctional facilities can often further exacerbate a person's mental ill health. NSW CAG recommends that under no conditions should a person who is NGMI or UNA be held in a correctional facility.

Implications for consumers in correctional centres

Not only does the detention of forensic consumers in correctional centres contradict the national and international principles, but it has numerous implications for the consumer's mental health and recovery.

Of concern to NSW CAG is the lack of appropriate care and treatment options for consumers in these settings. We hear that custodial staff are not adequately trained to work with people who experience mental illness. We have also heard that the punitive nature of correctional facilities does not provide opportunities for rehabilitation and recovery.

NSW CAG is aware that forensic patients are placed in correctional facilities either while waiting for their trial to commence, or while waiting for a bed to become available in a forensic facility. In our view, this should not be occurring as it is inconsistent with the notion of least restrictive care.

It can be particularly difficult for forensic patients to maintain hope for the future and work towards being released when their ability to move through the system is being stalled by "resource constraints" (NSW Law Reform Commission 2010b, p.200). For example, one forensic consumer explained:

> *"You are told you're not guilty because you were not well but you are kept in jail until there is a bed available in the forensic system. You are in a situation where you are trying to get better and progress through the system but you are not able to in jail. In Silverwater we were in lock down for 18 hours".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

The lockdowns occurring within the prison system in NSW (some up to 18 hours per day) also adversely affect people who experience mental illness on a greater scale than the other inmates. This experience can often trigger symptoms or underlying illnesses, and undo rehabilitation progress if a person is moved from a forensic facility to a correctional facility. There are significant risks for this group when they are detained in isolation, particularly when there is no one, including staff, to monitor any changes in behaviour or mental state,

and intervene to avert crisis. Forensic consumers described to NSW CAG the implications of being in prison, similar to that described in Consultation Paper 6 of the NSW Law Reform Commission (2010b, p. 201) which includes:

- Stigma experienced by other inmates who label them as “spinners”;
- Experience of sharing facilities with inmates likened to school yard bullying;
- Higher security classifications than comparable convicted inmates, often in protective custody or segregation;
- Restriction of freedom, in some cases more than necessary (which contradicts least restrictive care principles);
- Lack of access to rehabilitation and recovery programs which focus on mental health;
- Subject to the punishment regime of that facility, including prison lockdowns of up to 18 hours per day; and
- Limitations on the MHRT to progress a consumer with forensic status through different levels of restriction.

NSW CAG’s recommendation

NSW CAG recommends that under no conditions should a person who is NGMI or UNA be held in a correctional facility. NSW CAG advocates that the MHFPA is amended to ensure that legislation protects forensic patients from being held in correctional facilities. Forensic patients must be held in environments which are therapeutic and conducive to their recovery, with avenues for moving through the system. Forensic mental health facilities are more appropriate settings than prisons to provide therapeutic environments which can respond appropriately to the diagnosis, treatment and rehabilitation needs of consumers. The legislation must protect this least restrictive care option.

NSW CAG recommends that the MHFPA is amended to ensure that no forensic patient is held within correctional facilities at any time.

Issue 6.91

If detaining forensic patients in correctional centres is to continue, are legislative measures needed to improve the way in which forensic patients are managed within the correctional system?

As aforementioned, NSW CAG advocates that forensic consumers are not held in correctional centres at any time or for any reason, as there is inadequate access to individual case management and planning, and activities and support that foster rehabilitation and recovery.

NSW CAG maintains that no forensic patient should be held within a correctional facility at any time or for any reason.

Issue 6.92

Under what circumstances, if any, should forensic patients be subject to compulsory treatment?

NSW CAG does not support the imposition of compulsory treatment on all forensic patients by virtue of their status as a forensic patient. In our view, the provision of compulsory treatment for all forensic patients is not therapeutic, does not promote personal autonomy and conflicts with the notion of least restrictive care. It further contradicts the provision of individualised treatment that meets the individual's needs.

The United Nations (UN) '*Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care'* (1991) states:

Principle 8
Every patient shall have the right to receive such health and social care as is appropriate to his or her health needs, and is entitled to care and treatment in accordance with the same standards as other ill persons.

Principle 9
The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff.

Principle 9 (1)
Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others; and,

Principle 9 (4)
The treatment of every patient shall be directed towards preserving an enhancing personal autonomy.

Many forensic consumers fall across a vast spectrum in regards to risk to society, responsiveness to treatment, and progress through rehabilitation. Individual recovery from any illness will vary between different individuals. NSW CAG is aware that some consumers in the forensic system have no symptoms of mental illness and are therefore receiving no medication, which makes this provision of compulsory treatment by virtue of being a forensic patient inappropriate. In our view, this is imposing treatment in an environment which is more restrictive than necessary, and inappropriate for all forensic consumers.

NSW CAG advocates that consumers are able to participate in decision making around their treatment and care. Whilst it is acknowledged that some treatment may need to be provided involuntarily, this needs to be determined

on a case by case basis. In consulting with forensic consumers, NSW CAG has heard that many have limited participation in discussions about treatment, including what or how this treatment is received. In our view, this is not in line with Principle 9(4) with regard to 'enhancing personal autonomy' (UN Principles, above). In order for forensic patients to regain and/or develop the skills to manage their illness, they need to be given the opportunity to become a key participant, and eventually responsible for, their treatment.

In discussing alternative approaches to the current provisions regarding compulsory treatment, many forensic consumers advocated for treatment to be determined on a case by case basis. One consumer explained:

> *"Compulsory treatment for all is just wrong. It should be done on a case by case basis and not just a blanket rule for everyone. Have to do what the doctor says or go back [to prison]".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

In conjunction with being determined on a case by case basis, NSW CAG advocates that compulsory treatment is based on whether someone is found to be "mentally ill" or "mentally disordered" as defined by the NSW *Mental Health Act 2007*. This ensures that treatment is only given to those who are considered to be extremely unwell and unable to consent to treatment.

NSW CAG recommends that compulsory treatment for forensic patients is determined on a case by case basis. In each case, it should be based on whether the person is considered "mentally ill" or "mentally disordered".

Issue 6.93

Should different criteria apply to:
different types of treatment; and/or
forensic patients with different types of impairment?

For NSW CAG, the different types of impairment and treatment are irrelevant. No forensic patient should be subject to compulsory treatment unless they are considered "mentally ill" or "mentally disordered" under the NSW *Mental Health Act 2007*.

NSW CAG recommends that compulsory treatment is determined on a case by case basis, and is not determined on different types of treatment or impairment.

Issue 6.98

In what circumstances, and to what extent should the Forensic Division of the MHRT be required to have regard to a risk of harm only to the person concerned, in the absence of any risk to others?

NSW CAG maintains that the Forensic Division of the MHRT should distinguish a risk of harm to self from a risk of harm to the community. In the case where a consumer is considered by the MHRT to no longer be a danger to the community, but still at risk of self-harm, the person should be transferred to appropriate treatment and support in the civil mental health system.

NSW CAG recommends that the Forensic Division of the MHRT distinguish between a risk of harm to self and the community. Where an individual remains to be a risk of harm to self, but is no longer a risk to society, transfer to the civil mental health system is appropriate.

Issue 6.99

Should a requirement to impose only the "least restriction" apply to all decisions regarding forensic patients?

NSW CAG strongly advocates that s43 of the MHFPA is changed to ensure that the "least restriction" principle is applicable to all decisions made by the Forensic Division of the Mental Health Review Tribunal regarding forensic patients. Such a measure supports the United Nations *Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care* (1991) which speaks directly to least restrictive care. Principle 9 states:

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

The provision of care which is more restrictive than necessary is a significant barrier to ensuring effective treatment and recovery of forensic consumers. Care which is more restrictive than necessary will prolong the ill health of that individual, and can potentially undo achievements made in other settings.

NSW CAG recommends that the principle of least restrictive care underpins the legislation, in order to promote recovery and rehabilitation.

NSW CAG recommends a requirement to impose the "least restrictive care" for all decisions regarding forensic consumers.

Issue 6.101

Should a limit apply to the length of time for which people who are UNA and/or people who are NGMI remain subject to the forensic mental health system?

Legislative issues

Overall, NSW CAG does not support the introduction of a time limit on the length of time a person can be held in the forensic system. To maintain a health focus, there can be no time placed on how long it takes for someone to be in recovery from mental illness. The forensic system needs to be designed to allow for individual patient needs, and individual factors such as diagnosis, responsiveness to treatment and success of rehabilitation as the determining factors of a person's release. NSW CAG advocates that these decisions be made on a case by case basis.

This view is supported by forensic consumers consulted with by NSW CAG. Many indicated that they would not want to be released from the forensic system if it was believed that they were still of harm to themselves or others:

> *"I believe it should not be a fixed term because if you are not well enough you should not be back in the community".*
> Forensic Consumer, NSW CAG Consultation June 16th 2010

Systemic issues

There are, however, multiple inequalities caused by the indefinite nature of detention of forensic consumers that NSW CAG would like to take this opportunity to explore. In doing so, NSW CAG is aware that systemic change in the forensic system needs to occur to resolve these issues as opposed to legislative change.

Implications for recovery
Many forensic consumers indicated that in hindsight, they would have preferred to plead guilty to their index offence and be serving a sentence in prison, so they would have an idea of when their release date might be. One forensic consumer explained:

"I think you should just go for a sentence – just be in D, C and A ward in the old prison hospital – then you can make mistakes but forensics stuff around and then you can't get out. People may want a sentence instead because they want to get out because they don't want to go to the forensic system".

Forensic Consumer, NSW CAG Consultation 16th June 2010

In our view, the central issue surrounding indefinite detention is the length of stay, which appears at times to be inordinate and not based on a person's level of wellness. Forensic consumers need to have treatment and care that is centralised around hope for the future, and where people are able to see progression through the system. This would involve structured and clearly articulated processes for consumers to go through within the system in progressing towards release. Consumers need to be informed so as to have a clear understanding of the pathways involved and need to be equipped with the resources to guide this progress.

NSW CAG advocates that problems around this issue could be addressed systemically by providing stronger step up, step down services for forensic consumers with clear avenues for progression through the system. This would provide a recovery focus to treatment and care where consumers can develop goals and maintain hope for the future.

System blockages

NSW CAG also hears that bed blockages and staff shortages are a barrier to people moving through the system. Therefore many forensic consumers are being held in care which is far more restrictive than necessary due to having no alternative place to go. This also results in forensic consumers not having opportunities to demonstrate responsibility, insight into their illness and general progress of their rehabilitation. As leave privileges are gradual steps towards greater liberty, any restriction on their movement through the system results in detention in a facility longer than necessary. For those who have been in the system for a lengthy period of time, NSW CAG recommends that a clinical review by an independent body is undertaken to determine why treatment has been ineffective. This review should be submitted to the MHRT to inform their decisions about the future treatment of the person concerned.

Consumers are concerned that these issues in combination with the indefinite nature of their detention contributes to their slow movement through the system and a prolonged period before they return to the community.

NSW CAG advocates that considerable steps need to be taken to ensure that forensic consumers are in care which is appropriate to their needs and adequately provided. This may involve an expansion of the forensic mental health system, and an increase in forensic mental health funding.

NSW CAG does not support a time limit placed on those that are UNA or NGMI who are within the forensic mental health system. However, an independent body should clinically review those who have been in the system for a considerable length of time. There also needs to be

stronger step up and step down services to enable forensic consumers to progress through the system.

Issue 6.108

Should the CSPA be amended to give courts the power to order that offenders with cognitive or mental health impairments be detained in facilities other than prison?
If so, how should such a power be framed?

See NSW CAG's response to issue 6.91.

NSW CAG supports amendments to the CSPA which give courts the power to order offenders with cognitive or mental health impairments to be held in facilities other than prison. Prison is a non-therapeutic environment for people who experience mental illness, and people with a mental illness should be treated in a facility which promotes rehabilitation and recovery, instead of punishment.

NSW CAG recommends the CSPA be amended to provide courts with the power to order that people with mental health impairments are detained in facilities other than prison.

Consultation Paper 7

Diversion

Issue 7.1

(1) Should a legislative scheme be established for police to deal with offenders with a cognitive impairment or mental illness by way of a caution or a warning, in certain circumstances?
(2) If so, what circumstances should attract the application of a scheme like this? For example, should the scheme only apply to certain types of offences or only to offenders with certain defined forms of mental illness or cognitive impairment?

Issue 7.2

Could a formalised scheme for cautions and warnings to deal with offenders with a cognitive impairment or mental illness operate effectively in practice? For example, how would the police identify whether an offender was eligible for the scheme?

Police are the gateway to the criminal justice system for people in the community, and have many interactions with people who experience mental illness. It is clear from what NSW CAG hears from consumers that police are inadequately trained to understand and appropriately respond to someone with mental illness. In practice this can mean that police:

1. Treat alleged offenders as criminals, even if the person's actions are influenced by their illness;

2. Use greater levels of force than people with mental illness perceive is necessary; and

   "It is my unfortunate experience as a non-offender [someone who was scheduled under the Mental Health Act] that police are too willing to be rough-handling and employ restraint when it is just not necessary".
   Consumer, NSW CAG Questionnaire, 2010

3. Are not able to provide an accurate on the spot assessment about a person's mental state, and therefore may not be able to discern whether a person has a mental illness or mental health problems.

   "Police aren't qualified to make a mental health assessment so police can't operationalise the diversion".
   Forensic Consumer, NSW CAG Consultation, 2010

   "Police should be educated… [about] *how to deal with the mentally ill… If you have a knife and don't drop it you'll get shot".*
   Forensic Consumer, NSW CAG Consultation, June 16th 2010

"Police need to be educated more around mental health".
Forensic Consumer, NSW CAG Consultation, June 16th 2010

"Police have little respect for people because they know they can be rude and get away with it. They are effectively unaccountable".
Consumer, NSW CAG Questionnaire, 2010

While all new NSW police officers now receive basic mental health training, in late 2009 only 166 officers had received the more intensive training in how to de-escalate situations involving people who experience mental illness (McDermott, 2009). While NSW Health and the NSW Police Force have set an aim to have 10 percent of all frontline officers receiving the intensive training over the next five years, (NSW Police, 2010) in our view this is inadequate, particularly as there are currently 12,646 field operation officers in NSW (NSW Police, 2009).

In the absence of adequate training and education for *all* frontline police to assess and detect mental illness, a cautioning and warning scheme will not be effective. A scheme of this nature could only be effective if addressing the cause of the problem by both cautioning and warning, *and* linking or referring people with mental illness into appropriate services for treatment and support.

"… Don't just give [a person] *a caution, who knows what will happen to that person".*
Consumer, NSW CAG Forensic Consultation, June 16th 2010

NSW CAG recommends that a caution and warning scheme is not implemented as front line police are not the appropriate people to be making a determination about whether or not a person is mentally unwell.

Issue 7.5

Do the existing practices and policies of the Police and the DPP give enough emphasis to the importance of diverting people with a mental illness or cognitive impairment away from the criminal justice system when exercising the discretion to prosecute or charge an alleged offender?

Issue 7.8

What education and training would assist the police in using their powers to divert offenders with a mental illness or cognitive impairment away from the criminal justice system?

The need for a greater emphasis on diversion from the criminal justice system

NSW CAG views that diversion is an important tool that can be used as a therapeutic rather than punitive approach for people with mental health problems who commit less serious crimes.

We hear that consumers who have the experience of being in the criminal justice system view that if there was greater opportunity for support, treatment and linking in with the appropriate services in the early stages and seriousness of offending activity, interaction with the criminal justice system may have been averted. Given the high rates of mental illness within the prison system, it is essential that the system is focused on supporting and treating people with mental illness in the community, where it is assessed that a person is not a risk to themselves or to the community, before a person reaches crisis point,.

Consumers in the forensic system indicated that diversion offers the potential to link people into services that could assist in reorienting people towards mental wellbeing:

> *"They put more money into building gaols than putting money into rehab. Prevention is better than cure. If you can prevent this then everyone is happy".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

> *"I believe there should be more prevention – if they do that right none of us would be in this place".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

> *"Would diversion have helped earlier? It is about directing you away from police charging you, to having to go to court. There are different places where a decision is made where this person is clearly unwell and needs a different response".*
>
> Forensic Consumer, NSW CAG Consultation, July 9th 2010

> *"For minor crimes, the offender needs rehabilitation, counselling and education. These could be provided within a community setting, with the offender given the opportunity to live a normal life".*
>
> Consumer, NSW CAG Questionnaire, 2010

Literature indicates that only a small fraction of those eligible for diversion are actually diverted (Chappell, 2008, p.113), and in 2006, of more than 240,000 criminal charges dealt with in the lower courts, fewer than 4000 were diverted away (BOCSAR in Chappell, 2008). It is clear that there may be opportunities for diverting people with mental illness that are not happening in practice, and greater emphasis needs to be placed on identifying all instances where diversion is possible.

<u>The need for comprehensive mental health training for all front line police</u>
We also hear that many interactions that consumers have with police demonstrate the overuse of force, treatment as if the person is a criminal, public shaming, a lack of respect and human dignity, and a lack of understanding that the mental illness can contribute to a person's behaviour. It is evident that much more needs to be done so that police are equipped to understand and identify a person who is experiencing mental health problems, and therefore identify the opportunity for diversion into treatment and

appropriate care before a matter reaches the court system. Police need to have appropriate education and training around mental health issues, including de-escalation skills, as a tool to interact with consumers involved in the criminal justice system.

We hear that mandatory training for police around mental illness for all front line staff, including de-escalation techniques and knowledge of local services is essential:

> *"[Police need to have] de-escalation skills, training in crisis resolution, respectful communication…knowledge of available local services towards which diversion may take place other than inpatient admission to hospital, cultural awareness training, anti-stigma training".*
>
> Consumer, NSW CAG Questionnaire, 2010

> *"Mental Health First Aid should be a prerequisite for any police officer".*
>
> Consumer, NSW CAG Questionnaire, 2010

> *"[Police need] basic education in how to calm a situation without force or restraint; and training in dealing with aggressive and/or anger motivated behaviour, by way of communication alone with the mentally unwell person".*
>
> Consumer, NSW CAG Questionnaire, 2010

NSW CAG views that there is a need for greater training and awareness of mental illness for all front line police. Training and education should not only target the graduate program, but also regular training for all front line police. As police are regularly in contact with people who are experiencing mental health crises, NSW CAG believes that increased access to trainers and educators who have the lived experience of mental illness who are now living well within the community would be beneficial in balancing views about mental illness.

NSW CAG views that such comprehensive training and education of local services for all front line police *must* come before any caution and warning scheme is considered.

NSW CAG recommends that there needs to be a greater emphasis among the Police and the DPP in diverting people with mental illness for less serious offences. Greater training and education around mental illness, and referral and support services are needed for Police and DPP if opportunities for pre-court diversion are to be maximised.

Issue 7.13

(1) Should the requirement in s 32(1)(a)(iii) of the MHFPA for a mental condition "for which treatment is available in a mental health facility" be changed to "for which treatment is available in the community" or alternatively, "for which treatment is available"?

(2) Should the legislation make it clear that treatment is not limited to services aimed at curing a condition, but can include social services programs aimed at providing various life skills and support?

Section 32 of the *Mental Health Forensic Provision Act* in its current state is a strong representation of the biomedical model view of mental illness. From this view, which has endured through the historical context of institutionalisation of people with mental illness, the outcome of recovery is defined by the clinician, is objective and places emphasis on the absence of symptoms (Slade, 2009).

However, from the consumer perspective, recovery is not about "curing" a condition, it is about integrating, managing and accepting the experience of one's illness, and living a meaningful life. The concepts of recovery are based on subjective experiences of mental illness, and may include having hope for the future, choice in treatment and care, living a meaningful and dignified life, safety, stable accommodation, participating in the community, engaging in meaningful social activities, employment, physical health, self-defined goals, healing, wellbeing and management of symptoms (NSW CAG, 2010).

With the consumer perspective in mind, the language of the section needs to be explicit that treatment and support is not limited to services aimed at "curing" a condition, as this, based on the consumer experience of mental illness, is not solely the nature or concept of recovery. Rather, as recovery is different for every person, it may include but is not limited to:

- treatment in a mental health facility;
- access to a range of social services in the community;
- being in an environment that is conducive to recovery;
- participation in the community;
- life skills, education and training;
- psychosocial supports; and
- peer support.

NSW CAG hears from consumers regularly that services most conducive to recovery and rehabilitation are in the community (for less serious crimes), rather than in custodial settings:

> *"The concept of diversion as opposed to going through the criminal justice system appears to be very worthwhile to pursue. However, I only agree with this concept in relation to minor crimes".*
>
> Consumer, NSW CAG Questionnaire, 2010

"Concentrate the focus on treatment and prevention. Sending people to prison does not solve any problems and it makes mental illness worse".
Consumer, NSW CAG Questionnaire, 2010

Each person has a variety of needs when the person is viewed holistically, hence a person may need a broad range of supports and services that improve their mental health. This may include mental health, allied health, physical health, dental health, and psychosocial support including education and training, employment, housing and access to peers and support networks:

"I would like people with mental illness to be out in the community part of society having normal lives, working".
Forensic Consumer, NSW CAG Consultation, June 16th 2010

"Treatment [when in diversion] *must include more than just medication, including restitution, counselling, rehabilitation and recovery action planning, and supports for addressing the environmental and societal triggers leading up to the incident or crime".*
Consumer, NSW CAG Questionnaire, 2010

NSW CAG recommends that the requirement in s 32(1)(a)(iii) of the MHFPA for a mental condition "for which treatment is available in a mental health facility" be changed to "for which treatment is available in a mental health facility and/or the community". We view it is important to reference the community, as many services integral to treatment and support are found beyond the inpatient setting.

NSW CAG recommends that the legislation makes it clear that treatment is not limited to services aimed at curing a condition, but can include social services programs aimed at providing various life skills, support, and opportunities for participation.

Issue 7.17

Should a magistrate take account of the seriousness of the offence when deciding whether or not to divert a defendant according to s 32 of the MHFPA? Why or why not?

In consultation with consumers, the vast majority indicated that the seriousness of the offence should be considered by a Magistrate when deciding whether or not to divert a person from local courts in NSW.

"The judge should consider the offence"
Forensic Consumer, NSW CAG Consultation, June 16th 2010

"[Magistrates should consider] *the severity of the crime, including injury to other persons and/or property".*
Consumer, NSW CAG Questionnaire, 2010

Many consumers expressed that less serious crimes should be diverted away from the criminal justice system:

> *"… sending people to gaol for drink driving? Why not give them a chance first with a s32 order which requires alcohol treatment. This is used at the moment but needs to be used more widely".*
>
> Consumer, NSW CAG Questionnaire, 2010

> *"[For people that commit small crimes] why would you put them in gaol? They are not going to get the support that they need".*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

In line with the diversion of less serious offences, some people thought that the forensic setting is the appropriate treatment and support for people who commit more serious offences:

> *"People that have committed a serious crime should not go through the criminal justice system, but through justice health"*
>
> Forensic Consumer, NSW CAG Consultation, June 16th 2010

NSW CAG recommends that that the seriousness of the offence should be considered when a Magistrate is deciding to divert someone under s32 of the Mental Health Forensic Provisions Act. NSW CAG further recommends that less serious crimes should result in diversion.

Issue 7.18

Should the decision to divert a defendant according to s 32 of the MHFPA depend upon a direct causal connection between the offence and the defendant's developmental disability, mental illness, or mental condition?

While it is acknowledged that some people may present and not have a causal connection between the alleged commission of an offence and mental illness, it is recommended that legislation reflect that if people are:

(i) suffering from mental illness, or
(ii) suffering from a mental condition for which treatment is available through a mental health service (either an inpatient facility or a community mental health service),

the decision to divert takes into account the context of a person's life circumstances that may have impacted on conduct. This includes previous history, social factors and psychosocial stressors.

NSW CAG hears from our constituents regularly that viewing a person's whole life situation holistically is instrumental in identifying the appropriate treatments and supports that a person may need to link into to support their recovery.

NSW CAG recommends that the decision to divert does not depend solely on a direct causal relationship between the offence and mental illness or condition. Rather, the whole context of a person's life is

considered if it is determined that the person is suffering from mental illness or a mental condition.

Issue 7.20

(1) Should s 32(1)(b) of the MHFPA include a list of factors that the court must or can take into account when deciding whether it is appropriate to make a diversionary order?

(2) If s 32(1)(b) were to include a list of factors to guide the exercise of the court's discretion, are there any factors other than those discussed in paragraphs 3.28-3.41 that should be included in the list? Are there any factors that should be expressly identified as irrelevant to the exercise of the discretion?

In NSW CAG's consultations, people with experience of the criminal justice system were asked what factors should be taken into account when deciding whether it is appropriate to make a diversionary order.

Respondents indicated that a person's health and history may be factors that are intimately connected to mental health, and should not be overlooked in diversion. Factors which people considered important, with the agreement of the person involved, include:

- A person's history, including psychosocial stressors, and previous episodes of mental illness. Consideration of previous episodes may assist in identifying supports and actions that helped to reduce the impact of the episode, and therefore may contain information relevant to care planning in the future, and services to be delivered as part of a diversionary order.

  "I think the seriousness of the illness and how long it's been ongoing should be taken into account – your illness and mental illness history".
  Forensic Consumer, NSW CAG Consultation, June 16th 2010

  "[Diversionary orders] should consider not just how you are at the time, but how you are now"
  Forensic Consumer, NSW CAG Consultation, June 16th 2010

  "Yes, like they reckon 35% of the population in gaol now have mental illness – the seriousness of the illness is important".
  Forensic Consumer, NSW CAG Consultation, June 16th 2010

  "The nature of their mental illness, psychiatric reports and the contribution of their mental illness to the crime in question".
  Consumer, NSW CAG Questionnaire, 2010

- A person's whole life situation, including home environment and whether stable accommodation is available. This may identify stressors that exacerbate mental health problems and require interventions as part of a diversionary order.

"The Magistrate should consider past history, the person's support networks, family and social environment, home environment".

Consumer, NSW CAG Questionnaire, 2010

"[Diversion] should take into account what the person is doing to overcome behavioural problems, and also what supports and networks are currently in place, also environmental factors need to be of concern as to reduce potential re-offending".

Consumer, NSW CAG Questionnaire, 2010

- Previous diversionary orders, to identify if sources of treatment and support that were useful, and if additional services need to be identified in subsequent diversionary orders.

  When discussing whether previous diversionary orders should be considered, a consumer commented:

  "Yes it should matter – they are mentally unwell again. The consideration should be why has that person been allowed to become unwell again? What has the community team done? They become unwell because no one has been helping them. If they are relapsing – most likely because they have stopped medication – but why have they stopped medication?"

  Forensic Consumer, NSW CAG Consultation, June 16th 2010

- Case plans, psychiatric and psychological reports.

  In consultation some consumers viewed that presenting these reports would be beneficial as it would allow the Magistrate to have an accurate overview of the person's mental state.

  "I think Queensland have a pre-sentencing report. Before you go to the trial, they evaluate you [probation and parole] and make recommendations"

  Forensic Consumer, NSW CAG Consultation, July 9th 2010

  Other consumers expressed that stigma and discrimination may be a deterrent in choosing to disclose mental illness or impairment in or before the court process. The right to choose whether mental illness is disclosed in the court process was highlighted to be an important choice that some consumers want:

"Stigma is a really big thing… you can't just go into the court and say I have mental illness".

Consumer, NSW CAG Consultation, June 23rd 2010

"If you have a history of mental illness and you have a criminal record the stigma is so big".

Consumer, NSW CAG Consultation, June 23rd 2010

It was also raised that having to present case plans, psychiatric and or/ psychological reports may present a barrier for some consumers, due to expense and the need for legal representation to have knowledge around these plans.

NSW CAG views that psychiatric and psychological reports should be provided with a person's consent, where the person has the capacity to make informed decisions.

NSW CAG recommends that there are factors that the court must take into consideration, where consent is provided by the person, including:

- ***A person's history***
- ***Nature and history of illness***
- ***A person's whole life situation, including their home environment***
- ***Previous diversionary orders***
- ***Case plans***
- ***Psychiatric and psychological reports***

Where the person lacks the capacity to provide consent, substitute decision-making may be appropriate in deciding whether these factors should be presented to the court for consideration.

Issue 7.25

Should s 32(3) of the MHFPA include a requirement for the court to consider the person or agency that is to implement the proposed order and whether that person or agency is capable of implementing it? Should the legislation provide for any means of compelling a person or agency to implement an order that it has committed to implementing?

An identified barrier of implementation of s 32(3) of the MHFPA is that there is a lack of responsibility and accountability of orders that may affect the incidence that Magistrates use these orders. A survey of Section 32 of the MHFPA of Magistrates conducted by the Judicial Commission of NSW found that:

The concerns expressed by Magistrates in the survey – particularly those about insufficient mental health, care services, inadequate feedback on treatment outcomes and breaches, may be making some reluctant to use the section. Put simply, a lack of resources will undermine the policy objectives expressed by the Parliament in s 32".

(Gotsis & Donnelly, 2008, p.31).

Responsibility for continuity of care is essential both for consumers receiving treatment and support that reflects their needs, and Magistrates' confidence in using the section. It is also important in outlining the roles and responsibilities of service providers if there are shared care arrangements in place.

NSW CAG recommends that it is outlined in legislation that the capability of an organisation in implementing a diversion be considered prior to making a diversionary order. It is also recommended that information about an organisation's capability is available to the Mental Health Review Tribunal should any breaches or alterations to conditions of the order take place in future reviews.

Issue 7.26

Should s 32 of the MHFPA specify a maximum time limit for the duration of a final order made under s 32(3) and/or an interlocutory order made under s 32(2)? If so, what should these maximum time limits be?

NSW CAG recognises that there is a need for orders and treatment to reflect that recovery and rehabilitation are not time limited, and will vary depending on each individual's circumstance. Currently orders are only supervised by the court for six months, which may contribute to hesitancy in using the order. A report published by the Judicial Commission of NSW outlines that there is evidence that a Magistrate's discretion to divert may be shaped by the limited period of six months that conditional orders are enforceable by the court (Gotsis, 2008, p.VII).

A consumer made the following comment about the current six month review period not being flexible to each individual's needs:

> *"I suppose it could be quite individual. Sometimes they are not consistent with their follow up. With the young person, the home environment needs to be considered and followed up. The case worker needs to go and see how this person is living. You really don't know".*
>
> Consumer, NSW CAG Consultation, June 23rd 2010

We view that a timeframe of six months may not be adequate to support recovery and rehabilitation, and that the Magistrate's power to supervise the defendants compliance with the order should be ongoing until the person has a risk and mental health assessment that reflects wellbeing. NSW CAG recommends that this process sit with the Mental Health Review Tribunal, as they are best placed to review the needs, treatment and supports required by people living with mental illness.

NSW CAG recommends that ongoing review is available beyond the current six month period, as a means to provide adequate treatment, support and follow up in the community. We recommend that the Mental Health Review Tribunal are responsible for this continued review process.

Issue 7.27

Should the Mental Health Review Tribunal have power to consider breaches of orders made under s 32(3) of the MHFPA, either instead of or in addition to the Local Court?

Issue 7.28

Should there be provision in s 32 of the MHFPA for the Local Court or the Mental Health Review Tribunal to adjust conditions attached to a s 32(3) order if a defendant has failed to comply with the order?

NSW CAG views that the Mental Health Review Tribunal (MHRT) should have the power to consider breaches of orders made under s 32(3), rather than breaches being the purview of the court, as is the current system.

We hear from consumers with experience of the criminal justice system that there is a preference for the MHRT to:

- Consider breaches of orders made under s 32(3) of the MHFPA instead of the Local Court; and
- Adjust conditions attached to a s 32(3) order if a defendant has failed to comply with the order.

"It should be the MHRT [Mental Health Review Tribunal]. Once you go to court and you are in the system, then it should be the MHRT".

Forensic Consumer, NSW CAG Consultation, June 16th 2010.

"It should be the MHRT [Mental Health Review Tribunal] to supervise you until you are well, and then you are supported on a CTO [Community Treatment Order] – get further support and supervision if you need".

Forensic Consumer, NSW CAG Consultation, June 16th 2010

"The MHRT [Mental Health Review Tribunal] are good to talk to – easy, laid back, good to talk to".

Forensic Consumer, NSW CAG Consultation, June 16th 2010

"The court house is a scary place. The Tribunals [Mental Health Review Tribunal] are excellent… the court house is frightening. The Tribunal is better".

Consumer, NSW CAG Consultation, June 23rd 2010

"Depending on the situation – if it is minor and can be appropriately dealt with by the Tribunal or treating team. It would be more cost and time effective and less traumatising for the client. If it is of a more serious nature then the court would be necessary".

Consumer, NSW CAG Questionnaire, 2010

"The MHRT would be more professional and be seen as independent, rather than just rubber-stamping the opinion of medical professionals".
Consumer, NSW CAG Questionnaire, 2010

"I agree – it is less stressful on the person and the system".
Consumer, NSW CAG Questionnaire, 2010

"I agree – I am greatly in favour of a panel of people assessing the situation and the Tribunal has very experienced consumer representatives on it. The contribution of consumer representatives on the Tribunal is a strong point in favour of a Tribunal. I have been advised that the Tribunal is working at a much more satisfactory level than one magistrate, who may not be too aware of mental health conditions. Whereas the Tribunal offers continuity of care and a consistent response, the Magistrate may not be significantly concerned with mental health conditions".
Consumer, NSW CAG Questionnaire, 2010

The MHRT is well placed to assess breaches and adjust condition of orders, given that Tribunal members have extensive experience, including the personal experience of mental illness, the mental health system, mental health law and psychiatry.

NSW CAG concurs with the view of the Public Interest Advocacy Centre in Discussion Paper 7, which suggests that it is desirable to ensure some form of accountability through the use of breach provisions (2010c, p.46). The consideration of adjustments to orders and breaches by the MHRT may indeed increase the use of this section by Magistrates with these accountability and enforceability mechanisms in place.

NSW CAG recommends that the Mental Health Review Tribunal have the power to consider breaches and adjust conditions attached to the s 32(3) order, as a way to increase accountability and enforceability of this section and ensure that the mental health needs of the individual are adequately considered.

Issue 7.29

Should s 32 of the MHFPA authorise action to be taken against a defendant to enforce compliance with a s 32(3) order, without requiring the defendant to be brought before the Local Court?

Following from NSW CAG's previous recommendation that the MHRT consider breaches and the adjustment of conditions attached to a s 32(3) order, is it implicit in this recommendation that the MHRT will be the setting where further reviews relating to compliance take place.

However, NSW CAG considers that consumers must be able to be present at the MHRT for such hearings. NSW CAG hears that consumers want to be

involved in all aspects relating to their treatment and support, and this includes decision making at court. People with mental illness should have every opportunity available to participate in decision making that relates to their individual circumstance.

NSW CAG recommends that people with mental illness and mental health problems are given the opportunity to participate in all aspects of court and compliance processes.

NSW CAG recommends that the MHRT and not the Local Court manage issues relating to compliance with a S 32(3) order.

Issue 7.32

Is there a need for centralised systems within the Local Court and the NSW Police for assessing defendants for cognitive impairment or mental illness at the outset of criminal proceedings against them?

As noted in Discussion Paper 7, "to derive the potential benefits offered by s 32, a defendant must first be identified as being possibly eligible to apply for diversion" (2010c, p.48). Therefore for diversion to be an option that is equitably applied in all cases it is imperative that all people with mental health problems are equally able to access an assessment, regardless of their level of legal representation.

NSW CAG advocates that a mental health assessment should occur at the time that a charge is made as a way of ensuring that people receive adequate treatment and support while being in custody, or on bail pending their hearing.

We view that assessments at the outset of criminal proceedings should be available when a person provides consent – in the situation where the person has the capacity to make informed decisions, as outlined in Section 5.6.

Through our core work we also hear that stigma and discrimination are barriers to people accessing treatment for mental health issues, as outlined in Issue 7.20. Some consumers acknowledged in consultation that the stigma of mental illness may prevent some people from wanting to participate in a mental health assessment.

Although beyond the scope of this review, it needs to be raised that the lack of knowledge and understanding about mental illness and the resultant negative perceptions and attitudes about mental illness in the community contribute to stigma and discrimination. Stigma and discrimination must be challenged at the systems level at the same time as reviewing legislation to have a positive impact on legislation in practice.

NSW CAG recommends that mental health assessments are conducted prior to the commencement of criminal proceedings, and that the choice to participate in an assessment is presented to each individual beforehand where a person has the capacity to make informed

decisions. Comprehensive information about this process needs to be accessible to all involved prior to assessment.

Issue 7.34

Should the MHFPA allow a defendant to apply for a magistrate to disqualify himself or herself from hearing a charge against the defendant if the same magistrate has previously refused an application for an order under s 32 in respect of the same charge?

We often hear from consumers that stigma and discrimination is pervasive in the community, and also in service delivery (NSW CAG consultations, 2009). NSW CAG also hears that some Magistrates have discriminatory views towards people who experience mental illness. NSW CAG therefore recommends that it is important that the option for a defendant to apply for a magistrate to disqualify themselves if they have previously refused an application is made available.

NSW CAG recommends that there is an option for a defendant with a mental illness or mental health problem to apply for a Magistrate to disqualify him/herself from a hearing where the Magistrate has previously refused an application for an order under s 32 in respect of the same charge.

Issue 7.35

(1) Should there be alternative ways of hearing s 32 applications under the MHFPA rather than through the traditional, adversarial court procedures? For example, should there be opportunity to use a conferencing-based system either to replace or to enhance the current court procedures?

(2) If so, should these alternative models be provided for in the legislation or should they be left to administrative arrangement?

NSW CAG is aware that the court setting can lead to anxiety and fear for some consumers. Some consumers have also expressed that the court setting and length of time it takes to conduct hearings can further exacerbate a person's mental illness. NSW CAG therefore recommends that an alternative model is explored and implemented for people who experience mental illness. The MHRT and the Mental Health Court in Queensland present alternative models to court procedures and NSW CAG recommends that these be further explored. Any new model that is recommended needs to undergo broad consultation with people who experience mental illness prior to implementation.

> *"[It should be] in a meeting room, less formal. Presence of independent advocate or carer in addition to legal representation".*
>
> Consumer, NSW CAG Questionnaire, 2010

NSW CAG recommends that alternative models for hearings be further explored. We recommend that this exploration include review of the Mental Health Court in Queensland, and broad consultation with people with mental illness.

Issue 7.42

(1) Should there be a statement of principles included in legislation to assist in the interpretation and application of diversionary powers concerning offenders with a mental illness or cognitive impairment?
(2) If so, what should this statement of principles include?

NSW CAG views that a broad statement of principles included in legislation would be of great benefit in educating legal professionals about the nature of mental illness. We recommend that the principles used by NSW CAG to guide this submission are included in legislation. These principles are:

1. The need for a stronger health response;
2. A system underpinned by the philosophy of recovery;
3. Improved knowledge about mental illness;
4. Prevention and early intervention;
5. Least restrictive care; and
6. Consumer participation

Please see the introduction for greater delineation of these areas. A broad and transparent consultation with consumers around these principles must take place before legislative changes are made.

Consultation Paper 8

Forensic samples

Issue 8.3

Should the Crimes (Forensic Procedures) Act 2000 (NSW) be amended to require the destruction as soon as practicable of forensic material taken from a suspect following:

(a) a decision by the Director of Public Prosecutions not to continue with the proceedings, or

(b) a finding at a special hearing that, on the limited evidence available, the defendant has committed an offence?

If so, in what way?

DNA should only ever be added to the database once the court has decided that the person actually committed the offence, and is criminally responsible for doing so. Further, any forensic material should not be retained unless the court has determined that the person actually committed the offence, and is criminally responsible for doing so.

If the DPP decides not to continue with proceedings, whether it be based on lack of evidence or any other reason, then this person must be considered innocent. In this regard, NSW CAG strongly advocates that forensic material including DNA is destroyed.

NSW CAG recommends that forensic material, including DNA is not added to the database unless a criminal charge is laid against a person and they are found guilty and responsible for the crime. Forensic material should be destroyed as soon as practicable when the DPP decides not to continue with proceedings.

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