



Submission from the New South Wales Mental Health Review Tribunal to the Senate inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia

The New South Wales Mental Health Review Tribunal is an independent statutory Tribunal, with the responsibility for making decisions in relation to forensic patients. In broad terms, forensic patients in NSW are those who are unfit to stand trial, have had a special hearing and a limiting term was imposed or been found not guilty of a serious offence by reason of mental illness.

Once a person is a forensic patient, the Tribunal has the power to determine: the place of that person's detention; their care and treatment; to grant leave; to release a person to live in the community subject to conditions; or to end their forensic patient status by unconditionally releasing the person.

Who is subject to indefinite detention in NSW?

In NSW there are two ways in which a person might be subject to indefinite detention because of a cognitive or psychiatric impairment. Both are governed by the *Mental Health (Forensic Provisions) Act 1990* (NSW). They would be subject to ongoing review and oversight by the Mental Health Review Tribunal.

Limiting term imposed after a special hearing

A person who is unfit to stand trial by reason of a cognitive or psychiatric impairment, has the right to a special hearing. If, following a special hearing the person is found on the limited evidence to have committed the offence and if a custodial term would have been imposed had the matter proceeded to an ordinary trial, then the Court must set a limiting term. The length of the limiting term is determined using ordinary sentencing principles.

The process of holding a special hearing avoids the possibility of a person being indefinitely detained because they are unfit to be tried. Instead the special hearing process offers a chance to test the charges, for a person to be found not guilty of those charges, and if the person is found to have committed the offence on the limited evidence, for an appropriate punishment to be decided by the Court.

Since November 2013, a person's status as a forensic patient may be extended by the Supreme Court at the end of the limiting term. This can only be done if the Court is satisfied that the person poses an unacceptable risk of causing serious harm to others if she or he ceases being a forensic patient, and that risk cannot be managed by less restrictive means. There are currently 29 people in NSW who are subject to limiting terms and to date 5 orders extending a person's limiting term have been made.

Not Guilty by Reason of Mental Illness

A person who has been found not guilty of a serious crime by reason of mental illness, following either a special hearing or an ordinary trial can also be subject to indefinite detention. Once a finding of “not guilty by reason of mental illness is made” the person will remain a forensic patient unless and until the Mental Health Review Tribunal orders their unconditional release.

Until that time, the Tribunal makes orders in relation to the person’s place of detention, when they might have leave from that place of detention, when they might be released into the community on conditions and what those conditions will require. The Tribunal can also make orders in relation to a person’s care and treatment, but usually leaves these issues to the daily discretion of the treating team.

During any period of community release, the Tribunal may also issue an order detaining the person again, if the person breaches their conditions of release. A person may also be unconditionally released by the Tribunal, but only if the Tribunal is satisfied that they do not pose serious risk of endangering themselves or others. At that point, the person stops being “indefinitely detained”, as the Senate Inquiry has defined that term.

There are currently 357 people in NSW falling into this category.

Experiences and pathways out of detention for those with cognitive and psychiatric impairment

The pathways out of indefinite detention in NSW vary considerably depending upon a person’s diagnosis.

Mental illness

Over many years, a well developed therapeutic pathway has developed in NSW for those who have a principal diagnosis of a psychiatric impairment. Mental health care is generally overseen by one government agency, the Justice Health and Forensic Mental Health Network. Generally speaking, the current arrangements for the mental health care for forensic patients with a psychiatric diagnosis is of a very high standard, particularly when delivered in a mental health facility.

The therapeutic programs are not perfect, and further investment in infrastructure and services is needed. The Tribunal has consistently noted its concerns at the length of time that forensic patients with a psychiatric impairment spend in custody, waiting for a bed in a mental health facility. There is also a significant shortage of low secure accommodation and appropriate affordable housing options which delay people’s progress into the community, even where that person is clinically ready to move to a less secure environment. More information on the shortages in infrastructure and services is available from the Justice Health and Forensic Mental Health Network.

However, the care and treatment available does enable many people (approximately 140 at present) with a psychiatric impairment to return to living in the community and to leading productive and fulfilling lives.

Cognitive impairment

The pathway out of detention is far more difficult for those who have a cognitive impairment and no mental illness.

Many people with cognitive impairments spend much or all of their limiting terms in custody. There are some custodial treatment programs which are adapted for those with cognitive impairments. But often there is little or nothing available in the way of treatment or rehabilitation options which effectively limit a person's risk of reoffending or assist them to return to meaningful lives in the community. There is also a shortage of accommodation in the community which offers the support, structure and supervision that allows people to live safely in the community. Without the treatment programs in custody and the opportunities to find fulfilling activities and appropriate accommodation outside of custody, these people with cognitive impairments face a very real prospect that their limiting term will be extended by the Supreme Court.

The situation is complicated by the fact there is no one government agency who is responsible for providing care and treatment.

For those who have an intellectual disability which can be identified before the age of 18, Family and Community Services will take responsibility for offering support and assistance. This is usually in the form of drop in support. However, for those with high criminogenic needs, accommodation as well as support may be available. However there are a finite number of beds within this service and the available accommodation is at capacity. If accommodation is required for a new client, those who pose the least risk of harm are moved out. But that does not mean that those moved out pose an acceptable risk of harm to themselves or others.

This situation is likely to be compounded with the transfer of disability specific services and programs currently being provided by Family and Community Services NSW to the NDIA by 2018. The Tribunal is concerned that this will leave gaps in service provision, particularly for those with significant criminogenic needs, as some of those services and programs (including accommodation) which will not be funded up by the NDIA.

For those whose cognitive impairment is associated with old age or significant physical disabilities, there may be scope to release a person to a nursing home, either on conditions whilst still on a limiting term, or at the expiration of the limiting term. However, nursing homes are often reluctant to accommodate those with sexual offences, even if their risk is now significantly mitigated by old age and physical frailty.

Those whose cognitive impairments are related to an acquired brain injury, substance abuse, foetal alcohol syndrome, epilepsy or some other cause have no designated service providers. There is no government agency that is responsible for offering support, accommodation, therapeutic programs or even for supervising their release on conditional release orders.

It is difficult for the Tribunal to make an order granting conditional release without any support or supervision available in the community. At present, most people with impairments of this kind spend the whole of their limiting term in custody. If they are considered to pose an unacceptable risk of harm at the end of their limiting term, that term may be extended.

Mental illness and cognitive impairment

A proportion of people who have been found not guilty of an offence by reason of mental illness also experience a number of cognitive impairments, which are sometimes attributable to the impact of the mental illness itself, and sometimes to co-existing conditions.

People living with complex needs pose additional challenges to ensure that they are able to live safely and well in the community. The programs and services in place to assist those with cognitive

impairment and mental illness in NSW are in their infancy. Too often, people with complex needs spend a very long time in a secure environment, be it custody or a mental health facility, because the kinds of services required for them to live safely in the community are not available.

As an example, one NSW forensic patient with both an intellectual disability and a cognitive impairment, has a history of sexual offending, generally in the context of misunderstanding the social norms around consent. He is currently detained in a high secure facility, but is very cooperative in that environment and could live safely in a less restrictive environment, provided that he continued to have close supervision. However, in NSW there are very limited options available to provide long term and intensive care and treatment in a less secure mental health facility. Nor is there a community service provider that will provide this kind of accommodation. Consequently this man remains in a high secure environment with limited access to the outside world and very little prospect of release from involuntary detention.

It is pleasing to see that the National Disability Insurance Agency (NDIA) has now agreed to fund some supports that go beyond strict functional disability, but will provide support to assist people to live in accordance with a community based order and to manage risks that person may pose to the individual or the community. The NDIS principles all offer supports needed to assist people with a disability to transition from custodial settings to the community. (See COAG *NDIS - Principles to Determine the Responsibilities of the NDIS and Other Service Systems* November 2015) . Hopefully these funding options will improve the pathway for people with cognitive impairments who currently have few options open to them in NSW.

However, it remains to be seen if the NDIS will fund secure accommodation which is needed to manage risk, rather than assist with functional impairments. It would appear that currently the NDIS will not fund accommodation of this kind.

Specialist services

Given the high levels of intergenerational trauma amongst Aboriginal and Torres Strait Islander peoples, one would expect that there would be a significant rate of mental illness. Given the high incarceration rate of ATSI people, one would also expect a high rate of ATSI people seeking mental health treatment. However, the Justice Health and Forensic Mental Health Network survey suggests that proportionally few ATSI people seek mental health treatment in custody or are forensic patients. Professor Eileen Baldry, has great expertise in this area, and reference should be made to her submission.

Similarly, those from culturally and linguistically diverse communities would benefit from care and treatment provided by someone who understands their cultural background. Experiences of hearing voices, seeing visions and having a powerful sense of being commanded by an outside being are viewed very differently in cultures. An understanding of the cultural basis of a belief can be critical to helping someone to live safely with mental health experiences. Similarly, care which is provided only through an interpreter service can miss many of the nuances essential to proper mental health treatment. Misunderstandings can lead to a longer period in indefinite detention.

In a special category of concern are the forensic patients who are not Australian citizens and have no right of residence in Australia. Their offences were often committed whilst on some form of temporary visa. Whilst in secure detention, that visa has expired. Often, these forensic patients are struggling to recover in a foreign language and culture, with little contact with family. In addition, their discharge from a secure setting is hampered by the fact that they have no entitlement to a Commonwealth pension or Medicare payments, and no right to access housing or services. Their

pathway back to their own country can be difficult, either because they are at risk of persecution, or because the appropriate mental health care is difficult to identify or does not exist. The role of the Department of Immigration and Border Protection in assisting with the repatriation of these forensic patients is very uncertain.

Further comment

The Tribunal would be happy to comment further if requested.

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