The Over Representation of People with Mental Illness in the Criminal Justice System

May 2005

SUBMISSION ON BEHALF OF
THE LEGAL AID COMMISSION ON NEW SOUTH WALES
TO
THE SENATE SELECT COMMITTEE ON MENTAL HEALTH

The Legal Aid Commission of New South Wales (Legal Aid NSW) is established under the *Legal Aid Commission Act* 1979 (NSW) and is an independent statutory body. It provides legal services to socially and economically disadvantaged people in criminal law, family law and civil law matters. Legal services include representation in federal and state courts and tribunals. Legal Aid NSW also works in partnership with private lawyers in representing legally aided people.

Legal Aid NSW has a number of specialist services, including the Mental Health Advocacy Service (the MHAS), which provides legal representation for

- magistrates inquiries under the *Mental Health Act* 1990 *(NSW)*
- most proceedings before the Mental Health Review Tribunal
- representation of forensic patients
- *Guardianship Act* 1987 (NSW) matters
- *Protected Estates Act* 1983 (NSW) matters.

In 2003-2004 the MHAS made 69 case grants (41 clients represented by in-house solicitors; 28 assigned to private practitioners) and 17,484 duty appearances (9,701 provided by in-house solicitors; 7,783 provided by private

practitioners). The MHAS also provided 235 advice and minor assistance services and 500 information services.

The Senate Select Committee on Mental Health Inquiry has sixteen terms of reference. These are primarily concerned with issues of the adequacy of service delivery. The MHAS is staffed by solicitors who are expert in matters of mental health law, but not in the delivery of health services. Of the 16 terms of reference, only item "j" as set out below falls within our area of expertise:

j. the overrepresentation of people with a mental illness in the criminal justice system and in custody, the extent to which these environments give rise to mental illness, the adequacy of legislation and processes in protecting their human rights and the use of diversion programs for such people;

It is well known that people with mental illness are over represented in the criminal justice system, both in their appearances before the courts, and in prison. It is not surprising that people with mental illness come to attention, as serious mental illness can affect both their perceptions of reality and their judgement. It is what happens when such people do come to attention that reflects on how our society responds to those with mental illness.

As to the prevalence of people with mental illness in the Corrective System, and the extent to which that environment gives rise to mental illness, we refer to the report entitled "Mental Illness Among New South Wales Prisoners" by Tony Butler and Stephen Allnutt, August 2003, Corrections Health Service. That report noted:

> Overall, the majority of male and female reception prisoners were found to have had a psychiatric disorder in the twelve months prior to interview (78% *vs.* 90%).
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> ……..
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> ***Comment***
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> This data supports the view that inmates in New South Wales are an extremely psychologically disturbed group. The overall burden of mental illness that these

> findings suggest for both the Corrections Health Service and the Department of Corrective Services is staggering.[1]

As to the effect of the prison environment on people with mental illness, the report noted:

> Such an environment poses a challenge, particularly for those inmates with a mental illness who have a higher likelihood of cognitive disability, poor insight, and problem solving skills. Mentally ill inmates may experience increased feelings of paranoia, anxiety, and despair, which can exacerbate a mental illness. They may have difficulty accessing regular psychiatric follow-up due to frequent transfers, and in some cases, less likely to assert themselves to obtain treatment out of fear of -stigmatisation.[2]

It is vital that a system for diversion from the criminal justice system to the health system exists, and operates expeditiously and appropriately having regard to the seriousness of the offence committed.

Section 24 of the *Mental Health Act* 1990 (NSW) provides that a police officer may take a person to a psychiatric hospital for assessment following apprehension for committing an offence if it appears to that officer that the person may be "mentally disturbed". The person may then be admitted as if they had been taken to the hospital on the certificate of doctor. Depending on what other action the police officer takes, this may be the end of the matter.

Section 33 of the *Mental Health (Criminal Procedure) Act* 1990 (NSW) provides that a magistrate may refer a person who appears to be a mentally ill person to a hospital for assessment. Again, depending on the other orders made by the magistrate, this may be an effective end to the criminal proceedings.

Legal Aid NSW considers both of the above provisions to be appropriate to allow for the diversion of mentally ill people from the criminal justice system, although the power in respect of the magistrate is limited to summary

[1] Butler and Allnutt, p15-16
[2] ibid p50

offences. The police are also unlikely to exercise their discretion in this way where the alleged offence is serious. Legal Aid NSW is unable to provide researched evidence, but anecdotal reports indicate that the main deficiency with this system is reluctance on the part of psychiatric hospitals to admit patients referred in this way. Patients are often returned to the courts after being assessed by hospital staff as not being mentally ill or as being beyond the capacity of the hospital to manage them.

Over the last several years, a system of court liaison nurses has been established at metropolitan local courts and those in Wollongong and Newcastle. We understand that the evaluations of these projects have indicated that they have significantly reduced the number of referrals where the person has been denied admission. Evaluations should be available from the various court liaison schemes. It is our view that such a service should be available in the greatest possible number of local courts.

The mental illness defence is available in the superior courts. Where a person is found not guilty by reason of mental illness, they may, and generally are, detained in custody until released by due process of law[3]. Section 39 of the *Mental Health (Criminal Procedure) Act* 1990 (NSW) has recently been amended to allow the judge to make other orders including conditional and unconditional release. This amendment is most welcome and allows the court to respond to the fact that a person's mental state and risk of harm may have changed considerably since the time that the offence was committed. However, in most situations the person is ordered to remain in custody for a period following the verdict. This is in part due to the limited alternative services available, so it is generally not possible to put a viable alternative proposal to the judge.

It is the due process of law following verdict that impacts dramatically on forensic patients' human rights. The *Mental Health Act* 1990 (NSW) provides for a system of six monthly reviews by the Mental Health Review Tribunal.

[3] s39 of the *Mental Health (Criminal Procedure) Act* 1990 (NSW)

The Tribunal makes recommendations as to the person's release or continued detention as a forensic patient. While on the face of it, this is an appropriate system, the system falls down because the Tribunal may only make recommendations to the Minister, and is not empowered to make actual orders. The Minister is not required to respond to these recommendations within any specified time, and is not required to give reasons for the failure to approve recommendations. Recommendations are routinely not responded to by the time of the next six monthly review, and are frequently refused or approved only in part. Patients thus exist in a chronic state of uncertainty as to their future, a situation likely to exacerbate mental illness rather than promote mental health.

Recommendations may be approved by the New South Wales Minister for Health, but because of overlapping jurisdictions where those detained in New South Wales corrective services institutions are under the portfolio of the Minister for Justice, the Tribunal recommendations are often not implemented. This can, and does, lead to a complete impasse, where the Mental Health Review Tribunal is unable to make recommendations for a patient's further progress until the patient has had the opportunity to demonstrate the ability to remain well and compliant with a decreased level of security in the prison system. This is because the prison authorities refuse to provide that opportunity to the patient despite it having been recommended and approved. The effect of this is that a person who has been found not guilty and not sentenced to a specified time in custody remains there indefinitely because of the denial of the opportunity to demonstrate that he or she is ready to progress.

Prison discipline and security is not sufficiently flexible for optimal mental health treatment. Prisoners are given a security classification which takes into account the length of time remaining on their sentence, and determine such things as access to day or work release programs. This has obvious problems for a person without a determinate sentence, and is not responsive to the fact that the condition of a mentally ill person can change quickly. The result is that forensic patients are frequently denied the opportunity to participate in leave

programs although they may be clinically indicated, and that a short term deterioration in their condition can lead to an upgrading in classification that can take years to regain.

A process exists for the transfer of mentally ill prisoners from the general prison to the prison hospital for involuntary treatment where necessary. While not exactly mirroring the provisions that apply in the general community, the threshold definition for transfer and treatment is the same, and transfer back to the main prison is based on a finding that the person is no longer a mentally ill person. The system fails however at the point of release from gaol, as no proper system exists for the follow up of prisoners. The result of this is that prisoners who have mental health needs which have been addressed in gaol are likely to end treatment on release, often resulting in relapse, re-offending and further periods of incarceration.

New South Wales, in many respects, provides an enlightened legislative framework for the treatment of mentally ill people in the justice system, which is let down by its failure to provide independent decision making concerning forensic patients, and a lack of co-operation and co-ordination between the NSW Department of Corrective Services and NSW Health. While diversion systems are in place for less serious offenders, these are frequently let down by the inadequacy of NSW Health resources to care properly for the people who have been diverted. More serious offenders are often reluctant to avail themselves of the mental illness defence because the consequences, indefinite detention at the discretion of the Minister. This is rightly seen as a dangerous option, with the likelihood that it will result in a longer period in custody than if sentenced, with a much longer and more onerous period of post release supervision. The problems are at their most severe when forensic patients are detained in corrective services facilities.

Conclusion

Legal Aid NSW appreciates the opportunity to comment on this term of reference to the Senate Select Committee on Mental Health and would be pleased to elaborate on any of the points made in this submission.