

Australian Law Reform Commission  
GPO Box 3708  
Sydney  
NSW 2001.

Attention: Alan Kirkland  
Executive Director.

April 27<sup>th</sup> 2005.

Dear Mr. Kirkland,

We would like to thank the Australian Law Reform Commission for providing the Mental Health Co-ordinating Council (MHCC) with the opportunity to make a submission regarding the Review of Part 1B of the Crimes Act 1914.

MHCC is the state peak body for non-government organisations working for mental health throughout NSW. MHCC represents the views and interests of over 150 NGOs in the formation of policy, and acts as a liaison between the government and non-government sectors. Our member organisations specialise in the provision of services and support for people with a disability due to mental illness. MHCC is a Board member of the Mental Health Council of Australia.

Due to considerable time constraints, we have been unable to consult widely for this Review of Part 1B, therefore our comments are based on consultations and submissions made in relation to the Senate Inquiry into Mental Health Services in NSW – 2002, and in response to several discussion papers on the Review of the Mental Health Act in 2004.

- Of great concern to MHCC and its members is provision of appropriate alternatives to imprisonment for mentally ill and intellectually disabled federal offenders, when they come into contact with the criminal justice system. The law does not adequately differentiate between mental illness and intellectual disability, nor does it acknowledge the impact of comorbidity (dual diagnosis of both mental illness and intellectual disability, or dual diagnosis of mental illness and/or intellectual disability and substance abuse.) Further, the law does not differentiate between these disabilities.<sup>1</sup>
  - **Recommendation 1** – *That the Act defines and differentiates between mental illness and intellectual disability and acknowledges the impact of comorbidity.*
  - **Recommendation 2** – *That the basis on which mental illness, intellectual disability and/or comorbidity is assessed for the purposes of establishing criminality, is restructured in more appropriate and less restrictive terms.*

<sup>1</sup> ALRC (1988) *Report 4 Sentencing Report 7*- Special categories of offenders. Mental Illness and Intellectual Disability.



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*MHCC is the peak  
Body for mental health  
Organisations in NSW  
Funded by NSW Health*

- In NSW, some of the most vulnerable people in the community with a mental illness frequently encounter the criminal justice system as a result of an inability of access mental health services, either through absence of services or barriers to access, rather than because of inherent criminality.<sup>2</sup> <sup>3</sup> Many of these people have not received treatment for their mental illness prior to being imprisoned, and would benefit greatly from treatment.<sup>4</sup> Unfortunately this treatment is not available or appropriately provided for within the criminal justice system. The problem is exacerbated by high prevalence of co-existing substance disorder with mental illness which exists, depending on the population sample, in 30% to 80% of people with a mental illness in the community<sup>5</sup>
- MHCC strongly believe that it is inappropriate for this group to be held within the criminal justice system and that people suffering mental illness and/or, intellectual disability, with or without a co-existing substance abuse problem, be diverted into protective, community services that reflect ‘world best practice’ and support the concept of “*the best treatment in the least restrictive environment.*”<sup>6</sup>
  - **Recommendation 3** - *That the Act categorise and determine how people with a mental illness and / or intellectual disability, with or without a co-existing substance abuse problem, who interact with the criminal justice system, be treated in terms of diversionary alternatives, such as community services that will protect and support their specific needs.*
  - **Recommendation 4** - *That those needs are identified by evidence based ‘best practice’ models embodied into National Standards.*
  - **Recommendation 5** – *That services be made accessible within the prison system that meet the needs of people with mental illness and/or intellectual disability with or without a co-existing substance abuse problem, if detention is considered appropriate.*
  - **Recommendation 6** – *That where a determination as ‘unfit to be tried’ is handed down, that immediate diversion to appropriate community services is initiated.*
  - **Recommendation 7** – *That conditions determined on persons ‘unfit to be tried’ (who are diverted to appropriate community services) are reasonable expectations in view of their mental illness, intellectual disability and / or comorbidity.*

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<sup>2</sup> Henderson, S. (2003). *Mental Illness and the Criminal Justice System*. Sydney: Mental Health Coordinating Council.

<sup>3</sup> New South Wales Parliament. (2002). Select Committee on Mental Health. *Inquiry into mental health services in NSW*. Final Report, Chap. 14.

<sup>4</sup> NSW Mental Health Sentinel Events Review Committee (2003). *Tracking Tragedy*. First Report of the Committee (December 2003). NSW Health: Australia. Available: [http://www.health.nsw.gov.au/pubs/t/serc\\_contents.html](http://www.health.nsw.gov.au/pubs/t/serc_contents.html) (Accessed : April 12<sup>th</sup>, 2005).

<sup>5</sup> NSW Health (2000). *The Management of People with co-existing Mental Health and Substance Use Disorder – Service Delivery Guidelines*, NSW Health Department: Australia,p.2.

<sup>6</sup> NSW Mental Health Sentinel Events Review Committee (2003). *Tracking Tragedy*. First Report of the Committee (December 2003). NSW Health: Australia. Available: [http://www.health.nsw.gov.au/pubs/t/serc\\_contents.html](http://www.health.nsw.gov.au/pubs/t/serc_contents.html) (Accessed : April 12<sup>th</sup>, 2005)

- **Recommendations 8** - *That the least onerous conditions should be imposed, measured against risk assessment in the least restrictive circumstances.*
- MHCC understand that federal offenders may be dealt with differently for the same offence, according to the particular State or Territory in which they are apprehended. Accordingly, the result is that appropriateness of treatment, in each case, is entirely dependent on individual State or Territory mental health legislation.
  - **Recommendation 9** – *That the Commonwealth institute a model of ‘best practice’ to address the inequalities that arise when federal offenders are apprehended in different States and Territories.*
  - **Recommendation 10** – *That the Commonwealth enact a Federal law embodying ‘best practice’ and that they support and encourage States and Territories to bring their own legislation into line with the Commonwealth.*
- MHCC contend that services in NSW are inadequately resourced. Those working with people with mental illness, intellectual disability and / or comorbidity within the criminal justice system, including the courts, lawyers, the police and judiciary, have inadequate access to training and education in relation to mental health, intellectual disability and substance abuse issues. Consequently the skills utilised to deal with people with these complex problems during their interactions with the system are inconsistent, and frequently cause additional problems, difficulties and in some cases cause tragedies to occur.
  - **Recommendation 11** – *That funding be allocated for education and workforce development for staff of the criminal justice system who work with people with mental illness and / or intellectual disability, with or without a co-existing substance abuse problem. This would include lawyers, police, judiciary and staff working in courts and prisons.*
- MHCC advocate that the Inquiry refer to the *United Nations, General Assembly Resolution A/Res/46/119 – The protection of persons with mental illness and improvement of mental health*. MHCC believe that the 25 principles in the resolution should be embodied in all the Mental Health State and Territory Mental Health Acts.<sup>7</sup>
- When a person is determined as unfit to be tried, whilst the degree of risk they may be to themselves or the community must be assessed, their human rights as a person with a mental illness and/or intellectual disability must be acknowledged. Where possible, diversion into the community must be initiated.
- Situations where a person might remain in custody for longer periods than the length of a sentence, (had they been determined guilty) are of grave concern, since a person dealt with under 20BC “*will not receive non-custodial options, a non parole period less than the head sentence, or a guilty plea sentence discount*”.<sup>8</sup>
  - **Recommendation 12** - *That the appropriateness of detention for a person with mental illness and/or intellectual disability, with or without a co-existing substance abuse problem, who is in custody, should be reviewed every three to six months.*

<sup>7</sup> United Nations General Assembly. Resolution 46/119. Available: <http://www.un.org/documents/ga/res/46/a46r119.htm>

<sup>8</sup> ALRC (2005). *Intellectual Disability and Mental Illness* - Issue Paper 5.

- **Recommendation 13** - *That this determination is made by a Clinical Review Board with professional and clinical experience as to the nature of mental illness, intellectual disability and comorbid substance abuse, and not by the Attorney General's Department under 20BC of the Act.*

## Summary.

MHCC concur with the NCOSS submission to this Inquiry in that a primary issue for consideration in the review of Part 1B of the Crimes Act 1914 is that mental illness and intellectual disability are defined and differentiated within the Act.

The key difference between the two is that mental illness can be treated, may be episodic and with community support a person may be able to maintain a life within the community. It must also be understood that a person with a mental illness may develop psychiatric disability, making it problematic for them to function in society.<sup>9</sup>

On the other hand, intellectual disability is permanent, not treatable, but similarly, with support it may be possible to integrate a person into the community. Currently there is no definition as to intellectual disability and the legislation does not offer appropriate diversionary options that take into consideration criminal conduct as a result of disability.<sup>10</sup>

Of equal importance is that the Act also define and acknowledge the impact of comorbidity on these individuals, and highlight that responding either to mental illness and / or intellectual disability in isolation may leave substance dependency unaddressed, leading to further interactions with the criminal justice system.<sup>11</sup>

MHCC would like to express their support for the Review of Part 1B of the Crimes Act 1914, and have welcomed being a part of this consultative process. We see this as an opportunity for the Commonwealth to lead the States and Territories by initiating changes in the Act that meet with World 'best practice,' - treating people with mental illness, intellectual disability and / or comorbidity in their interactions with the criminal justice system with humanity and offering appropriate diversionary support in the community leading to satisfactory outcomes for both the individual and society.

Please direct any questions with regard to this submission to Corinne Henderson at [corinne@mhcc.org.au](mailto:corinne@mhcc.org.au) or Ann MacLochlainn at [ann@mhcc.org.au](mailto:ann@mhcc.org.au) . Phone contact is (02) 9555 8388.

Yours sincerely,

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Executive Officer.

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<sup>9</sup> NCOSS (2005). *Submission to the ALRC Inquiry Review of Part 1B of the Crimes Act 1914.*

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

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