

3 July 2019



Paul Knight  
Executive Director  
Policy & Reform Branch  
NSW Department of Justice  
E: [bobbie.wan@justice.nsw.gov.au](mailto:bobbie.wan@justice.nsw.gov.au)

### **Subject: Defences and Partial Defences: Consultation Paper**

The Mental Health Coordinating Council (MHCC) thank the NSW Department of Justice for inviting us to comment on the questions raised in the *Defences and Partial Defences: Consultation Paper*, which is part of the ongoing review of the NSW Mental Health Forensic Provisions Act. We have only answered those questions that we feel able to comment on - those remaining are better answered by those with more direct experience of the court processes and issues arising.

- 1.a. A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or cognitive impairment that had the effect that the person:
  - (a) did not know the nature and quality of the act, or
  - (b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong).

MHCC agree that the wording should be amended to read as suggested above.

- As raised in MHCC's submission in March 2019, surrounding *Definitions of Mental Health Impairment and Cognitive Impairment*, we propose that the use of the term 'dual diagnosis' is outdated and misleading. The term dual diagnosis is generally understood in the sectors to refer to mental illness and substance misuse, although this language is generally avoided. In the Forensic Provisions the term is intended to refer to mental health impairment and cognitive impairment, this is confusing. In this context our preference is that the definition used is 'co-existing conditions' and to make clear that it refers to mental health and cognitive impairment when used as a statutory defence.
- The definition of Mental Health Impairment (MHI) describes the impairment as a clinically significant, temporary or ongoing disturbance of mood, memory or volition or perception etc. The use of the word 'volition' is unclear in this context. We assume this to refer to command hallucinations that impair judgement or behaviour. We suggest that alternative language be used.
- The definition of 'cognitive impairment' (CI) could be further clarified by adding to the last sentence that 'A CI may arise from intellectual disability; dementia; acquired brain injury or a developmental disability such as foetal alcohol syndrome disorder or autism. As with MHI, this list is not exhaustive.
- 1.b As limiting terms were not adopted for people found NGMI (which was a concomitant recommendation of the LRC), does prescribing that the prosecution may raise the defence of MHI/CI with leave of the court still strike the right balance?

We agree that this does strike the right balance.

- 2.a. Should 'conduct proven but not criminally responsible because of mental health impairment or cognitive impairment' be amended to read: 'act proven but not criminally responsible by reason of mental health impairment or cognitive impairment'?

Along with most stakeholders our preference is to use the term 'act proven' as an amendment to 'conduct proven'. This is because we believe it represents a more neutral and accurate representation of the findings.

- 2.c. Should clause 12 of the Draft Bill be revised so that the special verdict can be entered and dealt with by consent at any time in the proceedings?

We see this revision as pragmatic and cost saving. Nevertheless, we acknowledge that some victims may feel they wish to have the matter heard irrespective of whether the defence and/or prosecution accept the defence of MHI/CI. We suggest that even if this were in the Act, judges would still be able to assess the matter on a case-by-case basis, if they assess this more appropriately meets the needs of all parties concerned.

- 2.d. Should clause 13 of the Draft Bill: 'special verdict not available for additional alternative offence' be clarified so that, where a special verdict is entered for the principal offence, the court can dismiss the charges in the alternative and is not required to consider or enter the same verdict for alternative offences?

We agree that this amendment be made to avoid the potential for a person to have the verdict applied to all charges on the indictment for the same offence, which is likely to impact assessment of risk.

- 2.e. Should clause 15 of the Draft Bill: 'referral of defendant to Tribunal' be amended to remove the requirement that the court must notify the Tribunal if it makes an order that the defendant be detained in a mental health facility?

Referral to the Tribunal is adequate, and we agree with others that notification in addition to the referral will lead to confusion.

- With regards to item 52 (p.14) which suggests that some stakeholders believe evidential requirements for the court to release a defendant on the return of a 'special verdict' as too onerous in the event that the subject person has cognitive impairment - we propose that despite the fact that no government agency exists to provide such reports, that legal aid could request an independent report from an Occupational Therapist or Psychologist with appropriate skills to access the person.
- 2.f. Are there likely to be any unintended consequences – including those that may arise when dealing with a person with mental health impairment who may not have insight into their illness – with providing a right of appeal against a special verdict regardless of who set up the defence?

MHCC agree that this is appropriate from a human rights perspective, e.g. the defendant has not chosen to use NGMI as a defence, but the prosecutor or judge has, and the defendant wants to appeal the special verdict.

- 3.a. Should section 23A(1)(a) of the Crimes Act 1900 (NSW) replace 'abnormality of the mind arising from an underlying condition' with 'mental health impairment or cognitive impairment' as the specified mental state? 'Mental health impairment' and 'cognitive impairment' will have the same meaning as the Draft Bill.

MHCC propose that the phrase 'abnormality of the mind' is outdated, unclear and derogatory. We agree that the suggested language be used in preference.

- 3.b. Should section 22A of the Crimes Act 1900 (NSW) be amended pursuant to the recommendations of the LRC?

In relation to the draft provision based on the LRC's recommendation, we agree that a provision of 'guilty of infanticide' and not murder should be included. Our only reservation is the somewhat arbitrary 'within 12 months of giving birth to the child'. We suggest that assessment of the defendant be taken into account on a case-by-case basis since a strict cut-off period might well result in a finding of guilty of murder when the woman continues to experience MHI/CI as a consequence of childbirth beyond that timeframe.

- We are pleased to note that the draft bill has dropped the terminology of 'suffering from a mental health and cognitive impairment' following widespread support of stakeholders to that effect.

For any further information regarding this consultation or our comments please contact:  
Corinne Henderson, Principal Advisor/ Policy and Legislative Reform. T: 02 9555 8388 #101 E:  
[corinne@mhcc.org.au](mailto:corinne@mhcc.org.au)

Carmel Tebbutt  
Chief Executive Officer | Mental Health Coordinating Council  
E: [carmel@mhcc.org.au](mailto:carmel@mhcc.org.au)