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Subject: Definitions of Mental Health Impairment and Cognitive Impairment: Consultation Paper

The Mental Health Coordinating Council (MHCC) thanks NSW Department of Justice for inviting us to comment on the issue of defining Mental Health Impairment and Cognitive Impairment as will be used in the amended *Mental Health (Forensic Provisions) Act 1990*. We were unable to attend the consultation held in February and we welcome the opportunity to provide a few comments.

In principal we agree with the recommendations as described, and particularly with the position that the Act should not specifically refer to personality disorders as either in or out. Since there are vastly diverging views amongst professionals as to whether personality disorders are treatable, especially in relation to severe disorders which may have developed as a consequence of experiences of childhood trauma, our view is that if you commit the legislation to a fixed point it becomes not only difficult to change, but it would be easy to exclude people from genuinely needed opportunities to be diverted or to receive a NGMI finding.

The issue of people living with Borderline Personality Disorder, with histories of trauma is very much under review, and it may be a possibility in the future that a person in those circumstances receives a NGMI finding. This is not unlike when a person with Bipolar experiences overwhelming distress which can lead to highly reactive relationships and 'moments' of out of control behaviour. The question is whether in one of those times, if they hurt someone, should they be held criminally responsible. Diagnosis is not an exact science, and Bipolar Disorder can sometimes be later re-diagnosed as Borderline Personality Disorder (BPD). By Personality Disorders remaining silent in the Act (neither in nor out) allows people living with those conditions to be brought within the Act where appropriate. The other side of the argument is that if you talk about Personality Disorders without differentiating, this could then include Anti-social Personality Disorder which could end up including a large percentage of people in the criminal justice system. Therefore, we propose that a judge takes a view on a case-by-case basis. This allows for flexibility but does not necessarily mean that a person will automatically receive a NGMI, because they still have to show that they are unable to control thinking a behaviour because of the disorder. NGMI and diversion have two-step processes through which a person has to meet the criteria that either they didn't know what they were doing and couldn't control themselves, or for diversion that there is an implementable plan. Just ticking the diagnostic definition does not get the court outcome a person might be seeking. Moreover, our view is that it is useful to keep the diagnostic definition broader because this allows for an opportunity to assess more appropriately who might get either of those two decisions.

We also think it worth flagging that discussions did not really clearly address the issue of people with Acquired Brain Injury (ABI) who have developed personality changes as a consequence of their injuries, and what outcomes they may expect when they have harmed someone or something when they were unable to control their behaviours.

The consultation papers also discussed whether dual-diagnosis should be recognised or silent in the Act. Whilst we assume the term to mean mental illness and substance misuse it is unclear what is actually meant by dual-diagnosis. MHCC considers this an outdated term and use in preference 'co-existing condition' so as to encompass a wide range of co-occurring difficulties that people living with mental health conditions may also experience. If the term is recognised in the Act - what is meant by dual-diagnosis needs to be defined, e.g. co-existing mental illness together with substance misuse. However, we would prefer the Act stay silent, and in our view, defining things we need not define, will likely bring about a less flexible outcome.

MHCC also recommends that when the Act describes 'cognitive impairment' that it mention the issue of fluctuating or episodic impairment, which many people living with mental illness experience as a consequence of the illness itself as well as the medication prescribed.

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



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