Inquiry into the forensic division of the NSW Mental Health Review Tribunal

Submission to the Committee on Law & Safety

MENTAL HEALTH COORDINATING COUNCIL

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1 INTRODUCTION

WHO WE ARE

Mental Health Coordinating Council (MHCC) is the peak body predominately for community-managed mental health organisations (CMOs) in NSW and is a Registered Training Organisation (RTO). We mostly represent community-based, non-government organisations that support people living with mental health challenges. MHCC's 150 plus members assist people to live well in the community by delivering mental health and psychosocial supports including social inclusion, rehabilitation, and clinical services. Our purpose is to promote a strong and sustainable community-managed mental health sector with the investment, resources, and workforce it needs to provide effective psychosocial, health and wellbeing programs and services to the people of NSW.

MHCC provides policy leadership, promotes legislative reform and systemic change, and develops resources to assist community-based organisations build their capacity to deliver quality services informed by a human rights-based, trauma-informed, recovery-oriented practice approach. MHCC works closely with Mental Health Australia on matters of national interest to the sector, including cross-governmental collaboration, bilateral agreements, and the NDIS. We also collaborate with other peak bodies across a diversity of human service contexts, and are members of the Mental Health Alliance, a partnership of state-based peak bodies and professional associations, on matters of mutual interest in NSW.

The RTO delivers accredited and non-accredited programs, that support organisations and individuals to deliver high quality mental health and related psychosocial and rehabilitation services. We also deliver training and professional development more broadly across human service sectors including housing and homelessness, alcohol and other drugs and disability.

MHCC thanks the NSW Committee on Law & Safety for the invitation to contribute to discussions in relation to the Inquiry into the forensic division of the NSW Mental Health Review Tribunal and provide commentary on these important topics. We hope that this review will lead to improved outcomes for people living with mental health challenges under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW), whilst appropriately balancing the safety of victims and the community.

Our submission will address the four elements in relation to the operation of the forensic division of the Mental Health Review Tribunal (MHRT), listed in the Terms of Reference, as well as some other related matters:

a) recent amendments to the Mental Health Act 2007 and the Mental Health and Cognitive Impairment Forensic Provisions Act 2020
b) the implementation of the recommendations of the 2018 NSW Government review of the Mental Health Review Tribunal in respect of forensic patients
c) the MHRT's approach to case management of forensic patients, including its effectiveness in balancing patient treatment needs, victim support, and community safety
d) any other related matters.

Commentary on Terms of Reference

a) recent amendments to the Mental Health Act 2007 and the Mental Health and Cognitive Impairment Forensic Provisions Act 2020

The Mental Health Legislation Amendment Act 2025 No 5, introduced as the Mental Health Legislation Amendment Bill 2024 and assented to on 2 March 2025, amended both the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (the Act) and the Mental Health Act 2007.

The most recent reforms relevant to the Forensic Division made by the Mental Health Legislation Amendment Act 2025 strengthened judicial oversight of forensic leave and release decisions by requiring a current or former judicial officer to sit on Tribunal panels determining release or unescorted leave. They also expressly enabled the Tribunal to impose conditions restricting social media or other online communication and amended the Mental Health Act 2007 to allow Magistrates to be appointed as President or Deputy President of the Tribunal, while preserving their judicial status. While these amendments were presented as strengthening oversight and responding to victim and community concerns, they also raised important questions about consultation, proportionality, therapeutic decision-making and the continued role of multidisciplinary expertise in the forensic jurisdiction.

In December 2024, MHCC expressed concerns in relation to these amendments to the Act in a letter to the Attorney General, the Hon Michael Daley, which were introduced without broad-based consultation with the mental health sector. Given the significance of these changes, this departure from established collaborative law reform processes was deeply troubling. We were particularly concerned that the amendments were advanced without public discussion and input from organisations with expertise in mental health, lived experience, family and carer perspectives, victims' groups, and people with experience of the criminal justice system, until a complaint was made. A brief one-week timeline for feedback was then provided. We are pleased that this inquiry provides an opportunity for broader-based discussion.

MHCC still question the rationale for the restriction on social media use by forensic patients, noting the absence of evidence or explanation as to why the change was necessary. We are similarly concerned by the suggestion that until recently forensic leave decisions were made without adequate legal expertise, when those decisions were being made by three-member panels chaired by legally qualified Deputy Presidents with decades of mental health and forensic experience. In our view, the amendments risk undermining confidence in a Tribunal model that has long balanced patient rights, victim interests and community safety through a therapeutic, expert and rights-based approach.

b) the implementation of the recommendations of the 2018 NSW Government review of the Mental Health Review Tribunal in respect of forensic patients

In its submission to the review conducted by the Hon. Anthony Whealy QC in 2018, MHCC wrote that were supportive of balanced, implementation-focused reform, but cautious about reforms that would likely make the forensic system more punitive or less recovery-oriented[1]. Our position in support of those recommendations in 2018 remains the same in 2026.

We also said at the time that, while the community may favour a more conservative approach to leave and release, the existing approach already balanced the rights of all interested parties. We are concerned that several tragic events over the intervening years have led towards more ill-informed news reporting and commentary on social media, offering less than balanced responses and arguing for more punitive decision-making in the interpretation of the law[2].

Also in 2018, the NSW Government Review of the Mental Health Review Tribunal in respect of forensic patients found that the legislative test for forensic patient leave and release was appropriate, but that the system was weighted too heavily towards patients without sufficient consideration of victims' safety and interests. The review recommended reforms to improve transparency, support victims, expand opportunities for victims to be heard, improve Tribunal communication and access, update language, and strengthen supervision of forensic patients on leave or conditional release.

In its submission on the Mental Health and Cognitive Impairment Forensic Provisions Bill 2018, MHCC welcomed the incorporation of many NSW Law Reform Commission recommendations and supported clearer recognition of mental health impairment and cognitive impairment as distinct categories, while noting discomfort with terminology that did not sit neatly in alignment with recovery-oriented practice[3].

c) the MHRT's approach to case management of forensic patients, including its effectiveness in balancing patient treatment needs, victim support, and community safety

In its submission to the review on the Mental Health (Forensic) Provision Amendment (Victims) Bill 2018, MHCC supported broader recognition of victims' rights, but raised concerns that some proposed victim participation rights went beyond those available to victims of sentenced prisoners and could lead to repeated, potentially traumatic encounters at six-monthly reviews [4].

MHCC has consistently supported a forensic mental health framework that balances community safety, victims' interests and the care, treatment and rights of forensic patients. In responding to the 2018 reform process, MHCC acknowledged the importance of improving transparency, communication and victim engagement, and supported aspects of the proposed reforms, including clearer recognition of mental health and cognitive impairment. However, MHCC continues to caution that implementation must not become punitive or disproportionate. Victim participation rights extending beyond those available in comparable criminal justice contexts, and the potential for repeated traumatic encounters during reviews, imprecise or stigmatising language, and the need to preserve rights-based and therapeutic decision-making[5] is of ongoing concern.

MHCC considers that the Tribunal's "case management" role as critically important and most effective when it remains therapeutic, multidisciplinary and recovery-oriented, while also giving proper weight to victim support and community safety. The Tribunal's ongoing inquiry into a person's treatment progress, rehabilitation needs, community supports and prospects for safe reintegration is not inconsistent with community protection; rather, it is one of the key mechanisms through which community safety is achieved. A shift toward a narrower risk-management model would risk overlooking the very factors that reduce future risk, including stable housing, psychosocial support, therapeutic relationships, meaningful activity, family and carer involvement, and gradual, supported re-entry into community life.

We would be concerned by any reframing of the Tribunal's case management role that treated recovery and rehabilitation as competing with victim support or community safety.

A therapeutic recovery-oriented approach does not minimise harm or ignore risk. It requires the Tribunal to consider risk in context and to ask what clinical, psychosocial, cultural, housing and community supports are required to reduce risk over time. Maintaining this broader case management function is essential if the forensic system is to support individual rehabilitation, uphold rights, respond appropriately to victims, and contribute to sustainable community safety.

Any proposal to reduce regular forensic patient reviews from six-monthly to annual reviews, would run counter to a rights-based, rehabilitative approach, by reducing opportunities for independent oversight of a person's progress, treatment needs and pathways toward safe reintegration. Regular Tribunal reviews play an important role in ensuring that restrictions remain proportionate, that rehabilitation and recovery goals are actively considered, and that the person's progression through the forensic system remains subject to ongoing scrutiny and accountability.

d) any other related matters

A rights-based approach

MHCC propose decision-making that recognises people with mental health challenges as rights-holders, not merely as risks to be managed. In the forensic context, that means the MHRT should balance community safety and victim interests with the person's treatment, rehabilitation, autonomy, dignity and pathway back to community life. This approach does not ignore risk; rather, it manages risk through evidence-based, proportionate and therapeutic responses that support gradual reintegration, stability and wellbeing. Decision-making in a forensic context must involve:

- **Rights-based practice** — recognising the person's legal and human rights, including procedural fairness, participation in decisions, least restrictive care and non-discrimination.
- **Therapeutic and rehabilitative focus** — ensuring decisions about leave, conditions and release support treatment, recovery, family and social connection and community participation, rather than operating as punishment.
- **Individualised assessment** — considering the person's circumstances, strengths, progress, supports, housing, cultural needs, disability-related needs, trauma history and relapse-prevention planning.
- **Proportionality** — ensuring any restrictions are no more onerous than necessary to manage identified risks.
- **Lived experience and carer perspectives** — recognising the importance of the person's own voice and, where appropriate, family, kin, carers and supporters.
- **Clear pathways and accountability** — ensuring people understand what is required to progress, how decisions are made, and what supports are available to help them move safely through the forensic system.

Objects of the Act

The Tribunal's Annual Report 2024–25 states that: *"its vision is to protect the civil and human rights of people living with mental health and cognitive conditions, and that it observes principles of least-restrictive care".* Yet the Forensic Division is presented largely through the lens and language of detention, risk, community safety, victim rights and a protective jurisdiction. MHCC is concerned that this framing gives insufficient visibility to the rights, voice, recovery and reintegration of forensic patients.

The Committee should consider how the forensic division can be required to demonstrate, in both decision-making and public reporting, that it is actively promoting, rights-based and least-restrictive pathways, alongside its responsibilities in relation to victims' concerns and community safety.

Human Rights alignment

MHCC asks the Committee to consider the implications that passage of a proposed Human Rights Bill in NSW would have for the Act, and the operation of the Forensic Division of the MHRT. Any future amendments to the Act should be framed consistently with the protections that would be afforded under a Human Rights Act, including rights to security, equality before the law, humane treatment when deprived of liberty, procedural fairness, privacy, family life, health, and non-discrimination. This is especially important for people living with complex mental health conditions who have received a finding of *"act proven but not criminally responsible because of mental health impairment "*(s30) and who are subject to significant restrictions despite not having been convicted of a criminal offence.

A rights-based forensic framework must ensure that restrictions are lawful, necessary, proportionate, time-limited, regularly reviewed, and directed toward treatment, rehabilitation, recovery and safe reintegration. In this context, MHCC considers it essential that the Forensic Division retain robust powers of independent review, including the capacity to scrutinise progress, test whether ongoing restrictions remain justified, and ensure that people are supported to move through the forensic system in a way that protects both their civil rights and community safety.

Treatment, care and detention of patients covered in s70 of the Act states that *"the principles set out in section 68 of the Mental Health Act 2007 apply to the administration of this Act with respect to forensic patients and correctional patients".* In our view the Act, must contain an expressly articulated clause, ensuring the Forensic Division of the MHRT operates consistently informed by therapeutic, rights-based principles. MHCC considers that forensic decision-making should recognise people with mental health and cognitive impairment as rights-holders, and not only as risks to be managed.

Summary

MHCC supports a forensic mental health framework that appropriately balances community safety, victim interests, and the care, treatment and rights of forensic patients. Section 69 of the Act has an object clause which, in contrast to the Objects in the Mental Health Act 2007, fails to refer to the recovery of, or the protection of civil rights of forensic patients: and their express involvement in their care and treatment. Rather, it is couched in punitive, stigmatising language, specifically in the use of the word "control", which it uses several times.

Recent amendments to the Mental Health Act 2007 and the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 have increased judicial oversight of leave and release decisions, enabled restrictions on social media and online communication, and allowed an increasing number of Magistrates to be appointed to the Tribunal. These amendments presented as strengthening oversight and responding to victim and community concerns were not supported by an evidentiary basis. There is a risk that these reforms may have shifted the forensic jurisdiction toward more restrictive and punishing decision-making in NSW, especially since the move to a more judicial style hearing environment for forensic hearings in 2026.

This appears inconsistent with the principles of therapeutic justice that many practitioners, services and people with lived experience regard as fundamental to effective forensic mental health practice in NSW.

We recognise that victims and their families may experience profound and enduring harm, grief, fear and distress, and that the forensic system must respond to those impacts with seriousness, sensitivity and respect. A rights-based approach does not diminish victims' experiences or the importance of community safety; rather, it requires decision-making processes that are transparent, trauma-informed and fair to all parties affected, as well as leading to rehabilitating outcomes.

MHCC's position remains that reforms should improve transparency, communication, victim support and public confidence without undermining the Tribunal's therapeutic and multidisciplinary role. Rights-based decision-making does not ignore risk; it manages risk through proportionate, individualised and evidence-based responses that support treatment, rehabilitation, continuity of care and safe reintegration into the community. This approach is most likely to protect both individual rights and long-term community safety.

MHCC expresses its willingness to be contacted and further engaged in discussions as the review progresses. For further information about this submission please contact Corinne Henderson, Director, Policy & Systems Reform at corinne@mhcc.org.au

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