



## **Time for Change**

**Response to the Consultation Paper: Review of the Forensic Provisions  
of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure)  
Act 1990***

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**Carol Berry, Solicitor – Health Policy and Advocacy**

**Robin Banks, Chief Executive Officer**



# Introduction

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's focus on health rights and mental illness

Since its establishment, PIAC has undertaken work on a range of consumer health issues. On the specific issue of mental illness treatment and care, PIAC played a central role in the Royal Commission of Inquiry into the use of Deep Sleep Therapy at Chelmsford Private Hospital, representing families of patients and nursing staff from the hospital. Since early in 2006, PIAC has been broadly engaged in considering the rights of people with a mental illness in NSW. It made a submission to the review of the *Mental Health Act 1990* and commented on the exposure draft of the Mental Health Bill 2006.

As part of its focus on the rights of people with a mental illness in NSW, PIAC has been considering the disproportionate number of people with mental illness in the State's prisons. PIAC has particularly considered the status of forensic patients within the corrections system, and has developed and co-ordinated a network of organisations and individuals with a particular interest in the situation of people with mental illness in prisons.

In 2006, PIAC represented the family of Mr Scott Simpson at the Coronial Inquest into his death in custody whilst awaiting mental health treatment at Long Bay Prison Hospital in June 2004. Mr Simpson was a forensic patient at the time of his death. Deputy State Coroner Dorelle Pinch found that Justice Health had failed to prevent the ongoing deterioration of Mr Simpson's mental health over an extended period whilst he was held in custody. Coroner Pinch also made broad recommendations about forensic patients, and the treatment of prison inmates with mental illnesses more broadly. These recommendations are referred to below as relevant.

## **The current review**

PIAC congratulates the NSW Government for undertaking a review of the forensic provisions of the *Mental Health Act 1990* and *Mental Health (Criminal Procedure) Act 1990* (the review). In particular, PIAC congratulates the Government on recognising the need to review the arrangement of executive in relation to forensic patients. This is a welcome development in the NSW response to this important human rights issue.

PIAC congratulates the Hon Greg James QC for the Consultation Paper that is a core feature of the public consultation process in the current review. The Consultation Paper is thorough and deals with relevant issues with sensitivity, objectivity and rigor. PIAC also thanks the NSW Department of Health for the opportunity to comment on what law reform is required in this area.

As outlined in the Consultation Paper, the review to be conducted by the Hon Greg James QC of the administrative practices and procedures of the Mental Health Review Tribunal (the Tribunal) is ongoing, and it seems that this issue will be addressed when final reform recommendations are developed. As this is the case, PIAC does not make any comments on this particular aspect of the broader review in this submission.

The review of the Tribunal's administrative practices and procedures will have important implications for the way in which forensic patients are cared for and treated at a more practical level, PIAC looks forward to further reforms in this area to improve communication and interaction between agencies responsible for providing care and treatment for forensic patients.

## Section 1 – Introduction

The Terms of Reference for the review are set out in the Consultation Paper:

1. Review and make recommendations in relation to the legislative provisions of Chapter 5 of the *Mental Health Act 1990* (NSW) relating to forensic patients, and in particular, to consider:
  - the appropriate authority or person to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients
  - mechanisms for ensuring issues of public safety are properly considered and addressed in reviews of forensic patients
  - the role of victims of crime, and in particular, means by which their views and concerns can be addressed in the forensic review process
  - the appropriate structure for review and decision-making process, having regard to the four Options
  - the current definition of forensic patient, and in particular whether there should be two categories of patients, namely ‘forensic patients’ and ‘security patients’, the latter to cover persons who are transferees from a correctional centre
  - the ability of the Mental Health Review Tribunal to make Community Treatment Orders for people who are in prison and who are mentally ill

how those recommendations relate to the work of the review of the Mental Health Review Tribunal administrative practices and procedures and its role within the forensic system.

2. Review and make recommendations on the provisions of *the Mental Health (Criminal Procedure) Act 1990* (NSW) as may arise out of clause 1.<sup>1</sup>

In this submission, PIAC provides its comment on the Consultation Paper and the relevant Acts, but also examines and comments on other options for law reform around the status and treatment of forensic patients in the NSW system.

As the Consultation Paper outlines, the principal issue to be considered in the review is what individual or body should be empowered to make decisions in relation to the terms and conditions of detention, release and conditional release of forensic patients. As such, this submission similarly focuses primarily on this issue.

This submission follows the structure of the Consultation Paper, and addresses the various sections and options provided in the Consultation paper accordingly.

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1 The Hon Greg James QC, *Consultation Paper: Review of the forensic provisions of the Mental Health Act 1990 and the Mental Health (Criminal Procedure) Act 1990* (2006) 3.

## Section 2 – Context of the Review

The current State, national and international context, with the renewed focus on the rights and needs of people with disabilities and, in particular, people with mental illness, and also on the impact of detention and segregation on the mental health of those detained or segregated provides a perhaps unique opportunity to achieve world's best practice.<sup>2</sup> At the same time, the sharpening focus in the developed world on fairness and the importance of the presumption of innocence in the criminal justice system is an important reminder of the importance of being vigilant in protecting core principles of the rule of law. These principles must be applied to ensure the protection of all.

It is important that only those who are found to meet the stringent tests of criminal liability are found guilty of a criminal offence—no matter how serious—and that only those found guilty are detained in correctional facilities. Further, the use of indefinite or preventive detention must not be allowed to become a feature of our society, whether in the criminal justice or mental health care system.

### International obligations

PIAC acknowledges that the Consultation Paper expressly recognises Australia's obligations under international law in relation to mental health law, care and detention arrangements and that New South Wales should comply with these obligations .

As the Consultation Paper has identified, Australia has obligations in regard to the treatment of people with a mental illness under the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Similarly, Australia has obligations under the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment*, and the *Principles for the Protection of Persons with a Mental Illness and the Improvement of Mental Health Care*. It has also, at the end of March 2007, signed the most recent UN Convention, the *Convention on the Rights of Persons with Disabilities*.<sup>3</sup>

The Standard Minimum Rules for the Treatment of Prisoners make particular provision for the treatment of mentally ill persons within the criminal justice system as follows:

- 82(1) Persons who are found to be insane shall not be detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.
- (2) Prisoners who suffer from other mental diseases or abnormalities shall be observed and treated in specialised institutions under medical management.
- (3) During their stay in prison, such prisoners shall be placed under the special supervision of a medical officer.
- (4) The medical or psychiatric service of the penal institution shall provide for the psychiatric treatment of all other prisoners who are in need of such treatment.<sup>4</sup>

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2 These issues have been highlighted by coverage of the impact on mental health of immigration detention, and of detention at offshore military facilities by the USA.

3 The Australian Government was one of the 80 nations that signed the Convention when it was opened for signature at midnight (Australian EST) on 31 March 2007.

4 *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by

PIAC is concerned that the present arrangements in NSW are not consistent with international obligations. Indeed, the current arrangements fail to some extent in respect of all of the requirements set out in standard 82 set out above.

Australia's obligations in regard to the treatment of persons with a mental illness who are in prison were raised by the Human Rights & Equal Opportunity Commission (HREOC) at the coronial inquest into the death in custody of Scott Simpson, who was a forensic patient at the time of his death.

At present, pursuant to Sections 10(1) and 10(2) *Crimes (Administration of Sentences) Act 1999* (NSW), the governor of a correctional centre may direct that an inmate be held in segregated custody if the governor is of the opinion that the inmate's association with other inmates constitutes, or is likely to constitute, a threat to the security of the correctional centre, or good order and discipline within the centre.

In its submissions to the inquest into Scott Simpson's death, HREOC highlighted that the UN Human Rights Committee has expressed concern about the use of solitary confinement. HREOC cited the Committee in its submissions:

The Committee is of the view that solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant.<sup>5</sup>

For the final two years of his life, Scott Simpson was kept in solitary confinement, otherwise known as 'segregation'. Mr Simpson committed suicide in a segregation cell in Long Bay Area 2 on the 7 June 2004. From the time of Mr Simpson's arrival at Long Bay Area 2 on 22 March 2004 until his suicide, he was held in segregation. As the Coroner observed, this meant that Mr Simpson spent some 10 weeks alone in a cell for up to 22 hours a day. He was allowed access to a 'day yard' for around two hours a day. This caged area had a shower but no facilities for exercise. Mr Simpson was detained in these conditions despite the fact that Justice Health and the Department of Corrective Services were aware of how acutely mentally unwell he was. Mr Simpson was awaiting urgent admission into Long Bay Prison Hospital for treatment of paranoid schizophrenia.

As the Coroner observed, all of the psychiatrists who saw Scott Simpson and treated him over the final period of his incarceration agreed that prolonged periods in solitary confinement would most likely exacerbate a person's mental illness, particularly if the person has a paranoid condition.

As Scott Simpson's treating psychiatrist at the time of his death, Dr Robert Lewin, observed:

Solitary confinement is not a medical treatment. There is no circumstance in which that is appropriate in the care of a mentally ill person... I regard it as fundamentally inappropriate for someone as disturbed as this man (Simpson) to be in solitary confinement outside hospital.<sup>6</sup>

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the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977

5 Concluding Observations of the Human Rights Committee: Denmark, 31/10/2000 CCPR/CO/70/DNK at [12].

6 Magistrate D Pinch, Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson*, 17 July 2006, 16

The former President of the Mental Health Review Tribunal, Professor Duncan Chappell, stated on a number of occasions while President, that the use of prolonged segregation as a management tool of people with mental illness is an abuse of human rights, and that the practice should cease.

Reviewing the case of a schizophrenic man left in solitary confinement nine months after he was found unfit to stand trial, the tribunal noted "serious systemic failures" in the treatment of such patients in NSW jails.

The tribunal's president, Duncan Chappell, described the isolation of 24-year-old 'MA' as part of 'an appalling situation' which began long before he was declared unfit to face trial.

'Basic principles of human rights law preclude the use of custodial segregation and isolation for persons suffering from a mental illness except in limited and carefully monitored circumstances to prevent self-harm or harm to others.'

'Mr MA's case also demonstrates serious systemic failures in the way in which forensic patients are ... managed and treated within the correctional system,' Professor Chappell found.<sup>7</sup>

At the inquest into Scott Simpson's death, the Deputy State Coroner recommended that the Department of Corrective Services develop a policy that inmates diagnosed with a mental illness only be placed in segregation in exceptional circumstances and for a limited period.<sup>8</sup> As far as PIAC is aware, this policy has not as yet been developed.

As a measure to prevent this situation arising in future, PIAC strongly recommends that the current review consider including a recommendation that segregation of forensic patients be limited by legislation to the period specified in international law dealing with the treatment of people with a mental illness, ie, in exceptional circumstances and for limited periods.

As the draft National Statement of Principles for Forensic Mental Health outlines:

Legislation must recognise the special needs of people with a mental illness involved in the criminal justice system and comply with the International Covenant on Civil and Political Rights, the United Nations Principles on the Protection of People with a Mental Illness and the Improvement of Mental Health Care.<sup>9</sup>

PIAC submits that any changes to legislation and decision-making procedures in regard to forensic patients must be consistent with Australia's international obligations.

**Position:** PIAC recommends that the NSW legislation be amended to expressly limit the use of segregation in respect of forensic patients to exceptional circumstances and for limited periods, with a maximum period of segregation of 24 hours.

PIAC recommends that the NSW legislation and decision-making processes dealing with people with a mental illness be amended to ensure consistency with Australian's international obligations.

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7 Stephen Gibbs, 'Mentally ill kept in solitary despite warnings', *Sydney Morning Herald*, (Sydney) 16 May 2006, <http://www.smh.com.au/am/2005/05/16/index.html> at 17 August 2006

8 Magistrate D Pinch, Deputy State Coroner, *Inquest into the Death of Scott Ashley Simpson*, 17 July 2006, 21

9 *Draft National Statement of Principles for Forensic Mental Health* (2002).

## Section 3 - The forensic mental health system

### Who are forensic patients in NSW?

As the executive summary of the Consultation Paper outlines, a person becomes a forensic patient if he or she is:

- a) found unfit to be tried or subject to a limiting term after a qualified finding of guilt, and detained in a hospital, prison or other place, or granted conditional release
- b) subject to a special verdict of not guilty due to mental illness, and detained in a hospital, prison or other place, or granted conditional release
- c) detained in a hospital for mental health treatment while on remand
- d) transferred to hospital for mental health treatment while serving a sentence of imprisonment or
- e) granted bail after being found unfit to be tried.<sup>10</sup>

This effectively means there are two pathways into the forensic system in NSW:

1. through being a person with a mental illness or other condition affecting their capacity who is charged with a criminal offence, whether affected by that condition at the time the offence was allegedly committed or (in the case of mental illness) developing it prior to trial; and
2. through having been sentenced to a term of imprisonment in respect of a serious criminal offence and, while being held in custody, developing a mental illness.

As at June 2006, there were 310 forensic patients in NSW, of whom 203 had been found not guilty by reason of mental illness; 33 had been found unfit to be tried; 15 were subject to limiting terms; and 59 were transferees from the general prison population.<sup>11</sup>

On these figures, the vast majority of forensic patients in NSW—approximately 80%—follow the first of the two pathways into the forensic system. The figures indicate that a significant percentage—approximately 65% of the total number of forensic patients—were seriously mentally ill or lacked capacity at the time of the offence. It is vital that NSW develop a much more appropriate way of dealing with people who have not and cannot by the very nature of their condition be held to meet the requisite tests of criminal liability.

### Needs of forensic patients

Some forensic patients in NSW are kept in the general correctional environment because there are not enough beds in the prison hospital, or in community settings. The incarceration of forensic patients in the general prison population is of considerable concern to PIAC.

As is reflected in international law, people with serious mental illnesses should not be kept in prison, but should be transferred to mental health care and treatment facilities. As such, forensic patients should be placed in secure forensic units in the community under the jurisdiction of the Department

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10 James, above n1 9.

11 Ibid.

of Health, rather than the Department of Corrective Services. It seems obvious that the proper rehabilitation of people with serious mental illness cannot occur in a correctional context.<sup>12</sup> The focus of correctional services is on ensuring security and management of those convicted of criminal offences. This focus is not consistent with the need for care and treatment for those with mental illness or other conditions affecting their capacity. As well as this, it is fundamentally inappropriate to house someone who has been found not guilty of an offence in a correctional environment.

Any focus on punishment is incoherent with an understanding of the nature of the disabilities concerned. The use of punishment as a deterrent from future misconduct is doomed to fail if the person being punished is unable to either understand the nature of the act they are said to have committed, or was effectively unable to control their behaviour at the relevant time.

In respect of mental illness, the best outcome of care and treatment is either significantly improved mental health (with a commensurate significant reduction in risk of the alleged misconduct being repeated) or insight into the nature of the condition and acceptance of the need for continuing care and treatment (again, with a resulting reduction in risk). In respect of intellectual disability, the best outcome of care and support is that the person is able to better manage their own behaviour and to understand community expectations.

There are plans in place to expand the number of mental health beds available in NSW by building another hospital at Long Bay Prison. This hospital will come under the jurisdiction of the Department of Health, rather than the Department of Corrective Services. PIAC sees this as a positive step forward but still holds concerns that there simply will not be enough beds to meet the level of demand. Further, such beds are not the appropriate response in respect of people with intellectual disabilities.

The expansion of diversionary options in the higher courts would present a positive reform in NSW. At present, the law is a blunt instrument when dealing with the complex issues associated with mental illness and intellectual disability. Some of the measures proposed in the Consultation Paper to address these matters represent potential for positive change. However, PIAC is of the view that some areas of the law need a fundamental rethink, given that many areas currently simply represent an evolution of common law principles as they relate to capacity. PIAC looks forward to further material from the review in this regard, and hopes that this area of law reform will be given the focus that is required.

The concept of the limiting term, for example, is one that causes concern to PIAC. Limiting terms are intended to limit the period of a person's detention. However, it seems that the practical outcome is that many individuals are incarcerated for longer periods when given limiting terms. The impact and effectiveness of this tool needs greater examination, perhaps in light of the removal of executive discretion (if the Government chooses to go down this path).

Similarly, the concept of the special hearing is problematic. Why does our legal system require that a person go through a hearing process when they are not fit to be tried? For those individuals that are subjected to this process, it can be enormously distressing and confusing. The law requires more creative options than making individuals go through a hearing process where this may not be appropriate, or necessary. For example, in the Queensland model of decision-making, where there is no factual dispute issues of mental illness and fitness are dealt with outside the trial process. PIAC believes that mechanisms such as this require further consideration for their potential application in NSW.

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12 D Howard & B Westmore, *Crime and Mental Health Law in New South Wales* (2005) 392.

## Section 4 - Categories of forensic patient

Section 4 of the Consultation Paper proposes a range of options for reforms to law and systems in relation to:

- the definition of forensic patient;
- detention;
- intellectual disability;
- children;
- Federal offenders; and
- references to mental illness and mental condition.

### The definition of forensic patient

PIAC shares the concern that the current definition of forensic patient in the *Mental Health Act 1990* (NSW) may hinder understanding of those involved in the system, and that the inconsistent use of language is unhelpful in what is already a complex system.

Whilst PIAC broadly supports the development of a simplified definition of a forensic patient in the legislation, it seeks to ensure that it and other consumer and community organisations have an opportunity to review the wording of the proposed change before providing final support.

**Position:** PIAC gives qualified support to Option 2, that the legislation be amended to provide a simplified definition of a 'forensic patient', and consistency in the references to such patients.

PIAC recommends that the Department of Health work with key stakeholders to develop a clearer and simpler definition of 'forensic patient'.

### Detention

As outlined in the response on the options for defining 'forensic patient', PIAC is unable to fully support a change to the legislation without having an opportunity to consider the proposed wording. However, PIAC supports the change in principle.

**Position:** PIAC gives qualified support to Option 2, that the forensic mental health provisions be amended to define expressly:

- i. the power to detain;
- ii. the power to release;
- iii. commencement and termination of forensic status.

PIAC recommends that the Department of Health work with key stakeholders to develop these amendments consistent with Australia's obligations under international law.

### Intellectual Disability

It has become clear to PIAC that amendment to the law is urgently required in regard to how people with intellectual disabilities are treated within the criminal justice system. To deal with people with intellectual disabilities under mental health legislation is inappropriate and unjust. PIAC strongly supports the review proposal to further consider the status of people with an intellectual disability within the justice system, and that changes ought to be proposed as a consequence of such a review. Such a review must be informed by people with expertise in the nature and effect of intellectual disability and by the principles underpinning the criminal justice system, particularly the general requirement of intention.

**Position:** PIAC supports Option 3, that the NSW Government conduct a further inquiry into the need for specific provision for people with an intellectual disability within the forensic mental health system.

## Children

Children occupy a special position within the justice system, due to their often-reduced capacity to understand the criminal nature of and to take responsibility for their actions. PIAC submits that children who fall into a forensic category occupy an even more special and potentially disadvantaged position. PIAC is strongly in favour of the NSW Government engaging in further review of the law in this area.

**Position:** PIAC supports Option 3, that the NSW Government conduct a further inquiry into the need for specific provision for children within the forensic system.

## Federal Offenders

The lack of clarity in respect of the status and the management of treatment, care and detention of federal offenders who would otherwise meet the definition of forensic patients is a significant problem. It is not appropriate to have dual systems operating within the same state, particularly where the line of distinction is set by whether the offence was a state or federal offence.

It is vital that a person in need of mental health care and treatment, whether a federal offender or not, have access to the necessary level of that care and treatment. Further consideration should be given to the experience in Victoria since its recent amendment to ensure coverage of federal offenders under state mental health provisions.

**Position:** PIAC supports Option 3, that the NSW Government conduct a further inquiry into the need for specific provision for people detained under federal legislation within the NSW forensic mental health system.

PIAC recommends that such a review consider mechanisms adopted in other states and territories, as well as in other countries with federal systems of government.

## References to mental illness and mental condition

The use of undefined terms, such as 'mental condition' is of serious concern to PIAC. It appears to be used in the *Mental Health Criminal Procedures Act 1990* as an exclusive term to permit people to be dealt with differently from people with mental illnesses or intellectual disabilities. The current system gives rise to the potential for a person to be excluded from appropriate care and treatment and rehabilitation mechanism simply because they fit into a particular definition. One purpose of the system being reviewed ought to be to ensure that people receive care, treatment and rehabilitation appropriate to the circumstances and needs, irrespective of a label attached to them.

It is important that the NSW Government take the current opportunity to achieve a legislative framework that is coherent in its use of language and is consistent with international law. PIAC therefore supports the further consideration of the terms 'mental illness' and 'mental condition' in forensic mental health legislation.

**Position:** PIAC supports Option 2, that the NSW Government conduct a review of the terminology used in forensic mental health legislation including the terms 'mental illness' and 'mental condition'.

PIAC recommends that the review involve direct input from people with expertise in the nature and affects of the full range of conditions that are currently caught by

the terms 'mental illness', 'mental condition', developmental disability' and 'intellectual disability', and focus on care, treatment, support and rehabilitation needs.

## Section 5 – Decision-making for forensic patients

### The status of forensic patients: a human rights issue

The status of forensic patients and the discretionary nature of the decision making in respect of these patients in the NSW justice system has been and continues to be the focus of attention of human rights advocates in Australia. Increasingly this issue is also gaining media attention, and attracting the scrutiny of those who are concerned more broadly with human rights and criminal justice issues.

### The Executive Discretion

The regime of executive discretion in NSW creates a number of problems, most markedly the fact that people become trapped within the system well beyond any period that could be considered reasonable, or necessary. PIAC is aware of numerous examples of forensic patients who have been (and remain) mentally healthy without recourse to medication for a number of years, and for whom the Tribunal may have recommended release many times, and yet their release is not authorised by the Executive. The result is inevitably unjust.

At the inquest into the death of Scott Simpson, the number of forensic patients remaining in correctional detention due to executive discretion was brought to the attention of the Coroner. One of the reasons that was given by Justice Health as to why Scott Simpson did not receive the urgent mental health care he required was because there were not enough beds in Long Bay Prison Hospital. One of the reasons there were not enough beds was because beds in the less-acute wards were occupied by those forensic patients waiting to be released through the exercise of executive discretion.

In response to this evidence, the Deputy State Coroner made the following recommendation to the Minister for Health:

Given that decisions about placement within Correctional Centres and the release of forensic patients are made in other States by either an independent Tribunal such as the Mental Health Review Tribunal or by superior courts, a review should be conducted as to whether the present system of Executive responsibility is best suited to ensure the placement and movement of inmates on clinical grounds. The review should specifically assess whether, under the present system, the decision-making process about the movement of forensic patients ensures the best use is made of the limited available hospital beds.<sup>13</sup>

PIAC is strongly of the view that executive discretion over recommendations of the Mental Health Review Tribunal should be removed. PIAC submits that this arrangement is outdated, unjust; it results in inconsistent treatment, allows for inappropriate influences on decisions, and is undemocratic.

The Consultation Paper proposes the five options for reform in NSW in regard to decision-making about forensic patients, including retention of the current system.

For the reasons outlined above, PIAC is of the view that retaining the current system of executive discretion in regard to forensic decision-making is unacceptable. Therefore, PIAC rejects Option 1. The retention of any form of executive control over such decision-making is also unacceptable and, as such, PIAC also rejects option 5 with its proposal for an executive right of veto.

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13 Pinch, above n8 20.

PIAC submits that the key outcome of this review should be to remove decision-making in relation to forensic patients from the executive and vest it in a judicial, or quasi-judicial authority.

On this basis, the remaining options: 2, 3 and 4; all have some merit:

Option 2

Amend the legislation to transfer all decision-making in relation to forensic patients to a court, such as the Supreme Court.

Option 3

Amend the legislation to transfer decision-making regarding the release of forensic patients to a court, and all other decision making to the Mental Health Review Tribunal (subject to appeal to the Supreme Court).

Option 4

Amend the legislation to transfer decision-making regarding the release of forensic patients to the Tribunal (subject to appeal to the Supreme Court).

PIAC submits that the Mental Health Review Tribunal is the body with the most expertise relevant to making decisions about forensic patients in NSW. PIAC also acknowledges the benefit of having a right of appeal to the Supreme Court, to provide judicial oversight of decisions, where appropriate.

In terms of other options, PIAC also considers there are some benefits that flow from the Queensland model of decision-making in this area of the law. This model consists of a mix of decision-making by the Mental Health Court, which has Supreme Court status, and by the Mental Health Review Tribunal.

However, in the absence of immediate or mid-term plans by the NSW Government to introduce a Mental Health Court, PIAC can see the benefit in transferring all decision-making power to the Mental Health Review Tribunal, with appeal available to the Supreme Court.

A Tribunal empowered to make decisions in the mental health jurisdiction should be constituted by a three-member panel that has judicial or quasi-judicial standing. The members of the Tribunal should include a lawyer, a medical member (ideally a consultant psychiatrist of several years standing), and another suitably qualified person. There should be a medical member, a legal member and a lay member appointed for each hearing. This three-member model with a legal member, a medical member and another suitably qualified person is the composition recommended in international law. Consistent with this model, PIAC would strongly oppose any attempts to change the composition of the Tribunal in NSW, for example, to allow the President to sit alone in making determinations. A three-member panel enables the most balanced and informed approach to decision-making.

The role of the legal member of the Tribunal should be to preside, or chair, proceedings. The role of the legal member is to ensure that proceedings are conducted in a fair and judicial manner and to advise on questions of law that may arise in the course of the proceedings. The legal member should also be responsible for consulting on, and then drafting the decision that is reached, and signing the record of the decision. In NSW, the most appropriate approach is to ensure that the legal member of the Tribunal be either a sitting, or a retired, Supreme Court Judge. This would serve to give the Tribunal's deliberations and determinations an appropriate legal standing.

All the members of the Tribunal should participate in decision-making and although the legal member is responsible for drafting the decision, he or she must take into account the contributions of the other members. A decision of the majority of members of the Tribunal is the decision recorded. This model is also the current model in NSW, where a decision of the majority is the decision of the Tribunal, and the Chair has the casting vote.

PIAC believes that certain other features of the Tribunal are beneficial and should be retained if the Tribunal is granted the power to make decisions. In NSW, for example, Tribunal hearings are to be conducted with as little formality and technicality as possible. PIAC submits that this approach should be retained.

Many of the other jurisdictions in Australia have established decision-making processes similar to those outlined above. Once the NSW Government has decided on a model of decision-making in broad terms, PIAC would welcome the opportunity to participate in the process of developing that model. PIAC hopes that the NSW Government will provide stakeholders with the opportunity to provide their views on the more detailed mechanics of decision-making once they have been developed.

**Position:** PIAC supports Option 4, that the legislation be amended to transfer decision-making regarding the release of forensic patients to a court, and all other decision making to the Mental Health Review Tribunal (subject to appeal to the Supreme Court).

PIAC recommends that the Mental Health Review Tribunal be vested with the first-instance decision-making power.

PIAC recommends that the NSW Government undertake further consultation with key stakeholders once more detailed mechanics of the reformed decision-making model are developed.

## **Practical matters arising from any change in decision-making**

The Consultation Paper observes that a change to executive decision-making requires further consideration in terms of its impact on the existing structures and framework.

PIAC believes that the body—whether it be judicial or quasi-judicial—vested with decision-making powers in respect of forensic patients should be empowered to take into account relevant public interest and public safety concerns in regard to decisions relating to forensic patients. PIAC observes that providing the NSW Attorney-General with a right to be heard and a right of appeal in this context provides an important protection of public safety concerns. It will be important to ensure that the focus of the inquiry not simply be on ‘public interest’ and public safety. There must also be an express obligation to take account of relevant human rights such as freedom of movement, and the prohibition of preventive and indefinite detention, as well as the rights to appropriate health care and participation in community, and the centrality of the principle of adopting the least restrictive alternative.

**Position:** PIAC gives qualified support to Option 2, that the legislation be amended to provide a forensic patient with the right of appeal in relation to any decision of the determining body, and the NSW Attorney-General have the right of appearance before a determining body, and a right of appeal on public interest grounds

PIAC recommends that the determining body be required to consider not simply the issues of public safety, but that it also be required (expressly) to consider the human rights of the forensic patient and the importance of least restrictive alternatives in provision of care, treatment, support and rehabilitation.

PIAC recommends that the right of appeal granted to the NSW Attorney-General be limited to appeals from decisions in proceedings in which the NSW Attorney-General has exercised the right to be heard.

## The Tribunal's Constitution

Again, a decision to make the Mental Health Review Tribunal the first-instance determining body has implications for the constitution of the Tribunal. The Consultation Paper identifies two options: the status quo, or provision for the President to establish a forensic division. While it may not be necessary to establish such a division, there is clear merit in providing the President with the authority to respond to the particular demands of decision-making in a relatively specialised area.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that the President of the Mental Health Review Tribunal may establish a division of the Tribunal for matters relating to forensic patients.

PIAC recommends that the third member of any such division be a person with expertise in human rights of people with mental illness.

## Notice of hearings

PIAC is broadly supportive of the introduction of a statutory requirement to give notice of hearings. It notes, however, that it is important to be clear about who should have a statutory right of notice: the forensic patient and the NSW Attorney-General, and what other notice may be given as a matter of discretion exercised by the determining body on a case-by-case basis. While it is clear that there may be third parties—be they victims, family members of victims, or others—who have an interest in the proceedings, it is important that this not be deemed to be a sufficient interest to give rise to standing in the hearing. Rather, those third parties should be provided with notice of the mechanism whereby they are able to make a request for non-contact orders from the determining body.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that the Mental Health Review Tribunal and the determining body must give a specified amount of notice of any hearing in relation to:

- the forensic patient (and his or her legal representative);
- the person responsible for the detention, care and treatment of the patient;
- the NSW Attorney-General;
- registered victims and family members of the patient who have given notice of their desire to be informed.

PIAC recommends that standing as of right be limited to the forensic patient and the NSW Attorney-General.

## Production of reports

The production of reports from relevant sources is crucial to ensuring that the best possible decisions are made by the decision-making body. However, it is important to ensure that those required to produce reports do so in a timely manner so as not to delay the decision-making process. A failure to produce reports should not become the basis for a person remaining in detention. Further, the process of decision-making should not be delayed by a failure by third parties, such as registered victims, or by the NSW Attorney-General to provide any requests or submissions.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that the review and determining body may only make a recommendation or determination after considering certain prescribed information, and may require the production of reports and other information from any relevant person or public official involved in the detention, care, treatment, or supervision of a forensic patient.

PIAC recommends that further consultation be undertaken with key stakeholders, including mental health consumer representatives about what information provision should be prescribed and how other information that may assist the decision-making body should be dealt with.

## Reason for decisions

PIAC believes that the determining body should be required to provide reasons for its decisions to the forensic patient (or his or her representative). There should be no cost to the forensic patient for the provision of such reasons. The legislation should retain the protection against publication or broadcast of the name of any forensic patient appearing before the Tribunal or determining body.

There is no rationale for providing a copy of the reasons to any other person, other than a person who has a right of appeal. As such, PIAC submits that, if the NSW Attorney-General has a right of appeal, then a copy of the reasons should be provided to the NSW Attorney-General in those proceedings in which she or he has exercised the right to be heard.

**Position:** PIAC gives qualified support to Option 2, that the legislation be amended to provide that the determining body must provide a copy of any decision (and reasons for it) to the forensic patient concerned or his or her representative and may provide a copy to any other person with sufficient legal interest in the proceedings.

PIAC recommends that the provision of reasons to the person who is the subject of the decision should be at no cost to that person.

PIAC recommends that the legislative power to provide reasons to others be limited to the provision of reasons to a person who has exercised the right to be heard at first instance.

## Compliance with orders

PIAC considers that there should be a duty to comply with decisions made by the determining body in regard to forensic patients, and appropriate penalties in place for non-compliance. It is also important that, where there is a failure by a named entity to comply due (for example) to insufficiency of places, the entity have a duty to report the failure and reasons for the failure to the Tribunal or determining body within a specified time. This will ensure that a person will not end up facing further uncertainty for an indeterminate period.

**Position:** PIAC supports Option 2, that the legislation be amended to provide a duty to comply with the orders of the determining body, and provide a sanction for non-compliance without reasonable excuse.

PIAC recommends that the legislation also require any entity that is unable to comply with an order to report that to the determining body within a specified period that reflects the importance of compliance.

## Section 6 – Fitness to be tried

Section 6 of the Consultation Paper proposes options for reforms in relation to the following matters:

- the status of persons between the time of the Tribunal’s determination and the setting of a limiting term;
- delays and duplication in the fitness framework;
- absence of power to order assessments and require production of evidence;
- the range of orders available where there is a qualified finding of guilt;
- limiting terms.

### **The current law: status between determination and ‘sentencing’**

PIAC is supportive of an amendment to the law in this area to provide greater certainty in regard to a person’s status once the Tribunal has made its determination, and before a judge sets a limiting term.

**Position:** PIAC supports Option 2, that the legislation be amended to declare that the forensic status continues after the Tribunal has made its determination and until the Court has made its order.

### **The fitness framework: delays and duplication**

PIAC considers that the Mental Health Review Tribunal is the body best placed to make the determinations referred to in the options provided in the Consultation Paper. While there may be concerns about ensuring that the term set (in the case of a limiting term) reflect the current approach of the criminal justice system, such concerns could be dealt with in the Tribunal process through requiring the Crown to make submissions on this issue. The Tribunal’s special expertise in the area of mental illness means that it is best placed to understand the nature of a person’s condition and the suitability of various care, treatment, support and rehabilitation options and to consider those factors in reaching its determination.

This change to the current arrangements would be consistent with the general principle that people with mental illnesses should be dealt with outside the criminal justice system. The Consultation Paper notes that the process ‘involves quasi-judicial determinations as to guilt and sentencing’. PIAC remains concerned about framing this process within notions of guilt and sentencing, given the fact that the person being dealt with has limited capacity and, as such, should not be dealt with in the same way as a person who can be expected to understand the nature and wrongness of the act they are alleged to have committed.

**Position:** PIAC supports Option 3, that the legislation be amended to provide that the Mental Health Review Tribunal is responsible for making all determinations regarding an accused’s fitness to be tried and mental condition, holding special hearings, imposing limiting terms, and (where detained) determining whether the person should be detained in a hospital or other place.

### **Power to order an examination: absence of express statutory power**

PIAC supports the proposition that the body responsible for determining fitness should have the power to order that a medical assessment be conducted and expert evidence be presented to facilitate informed determinations. It will, however, be important to ensure that any such assessment is culturally appropriate. There has been significant work done in recent years to identify cultural factors in mental illness. The process of assessment should reflect best practice in these

areas to ensure that particularly marginalised or disadvantaged groups are not further disadvantaged through this process.

As discussed above, it will be important to ensure that the process is not unduly delayed through this requirement.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that the body responsible for determining fitness may order the conduct of a medical or other assessment to assist in determining the person's fitness to be tried for an offence.

## Alternative orders

Given the particular circumstances of a person who, as a result of a special hearing, receives a qualified finding of guilt, it is vital that the determining body have a range of additional sentencing options available to it that reflect those circumstances. The usual range of options available to a sentencing judge is often not suitable for a person with a mental illness or intellectual disability. As a result, the likelihood of a non-custodial sentence being imposed where there is a qualified finding of guilt is much reduced. Therefore, PIAC is broadly supportive of the determining body having a range of additional options available to it as alternatives to sentencing in forensic mental health legislation. These alternatives need to reflect the fact that the people being dealt with have either mental illnesses or intellectual disabilities, and that non-custodial options should be as available to them as to any person dealt with in the criminal justice system.

**Position:** PIAC supports Option 2, that the legislation be amended to provide a non-exhaustive list of sentencing alternatives available to the sentencing authority where a special hearing has resulted in a qualified finding that the person committed an offence.

PIAC recommends that the non-exhaustive list be developed through consultation with key stakeholders.

## Limiting terms

PIAC submits that there must be a new mechanism established to properly safeguard a person's rights when a limiting term is set. None of the Options set out in the Consultation Paper provided a perfect solution as each circumstance probably requires a different approach, however, the standard should be set at the minimum sentence applicable had the person pleaded guilty at the earliest opportunity.

**Position:** PIAC gives qualified support to Option 2 and proposes the following amalgamation of Option 2 with Option 3: That the legislation be amended to provide that a limiting term represents the minimum sentence the court would have imposed if the person had pleaded guilty and shown remorse at the earliest opportunity and been convicted of the offence.

## Section 7 – Special verdicts

Section 7 of the Consultation Paper proposes options for reforms in relation to the following matters:

- the mental illness defence;
- alternatives to detention;
- length of detention.

### The mental illness defence

As outlined elsewhere in this submission, PIAC is strongly of the view that the application of the defence of mental illness to people with intellectual disability is inappropriate. This aspect of the current law needs to be considered in its own right as an area of the law that requires review and significant amendment.

The issue of capacity is central to the workings of the criminal justice system, indeed, to the workings of the law. To date there has been a consistent failure by law makers and administrators in all jurisdictions to come to terms with how this centrality affects the rights and needs of people with intellectual disabilities in the legal system and society more broadly. The failure affects not only people with intellectual disabilities as potential offenders, but also as victims of crime. PIAC urges the NSW Government to take the current opportunity afforded to it to work towards the development of legal system mechanisms that ensure that people with intellectual disabilities are recognised appropriately and as equal in rights and dignity to all others.

The fact that a person with an intellectual disability can and will often be found not guilty by reason of mental illness in the current system despite not having a mental illness is a serious manifestation of the continuing failure. It must be addressed as a matter of urgency.

For consistency of language use, in developing a more appropriate approach to a defence reflecting intellectual disability it is not appropriate to use the term 'mental impairment'. Rather, the terms used should reflect the common usage of the term 'intellectual' to describe the nature of the impairment.

**Position:** PIAC supports Option 2, that the NSW Government conduct a further inquiry into the need to reform the defence of mental illness to better address intellectual disability.

PIAC recommends that the approach to be taken should separate the concepts of mental illness from intellectual disability. PIAC further recommends that such an inquiry should also consider what range of responses are most appropriate where a person is found not guilty by reason of intellectual impairment to reflect the particular needs that arise in respect of support, supervision and care.

### Alternatives to detention

PIAC is strongly supportive of the court or any other relevant decision-making body having a broader range of options in regard to a person's ongoing care and treatment where a person is subject to a special verdict. As noted above in respect of intellectual disability (and by the NSW Law Reform Commission in its report: *People with an Intellectual Disability and the Criminal Justice System: Report 80*) there is an urgent need to properly consider how the nature of a person's condition should be addressed in any findings and orders. Similar, but different, considerations are relevant in respect of people with mental illnesses.

**Position:** PIAC supports Option 2, that the legislation be amended to provide a non-exhaustive list of alternative orders available to the court where a person is subject to a special verdict of not guilty due to mental illness.

PIAC recommends that the non-exhaustive list be developed through consultation with key stakeholders.

## **Length of detention**

PIAC believes that given the problems associated with indefinite detention—both in terms of inconsistency with human rights, and the inequities that result for forensic patients—amendments are required to give persons detained as forensic patients a sense of when their detention will come to an end. PIAC submits that Option 2 presents the best balance of a range of competing objectives in regard to community safety and a need to protect the rights of forensic patients.

However, it is important that appropriate mechanisms are put into place to ensure that all reasonable efforts are made to progress the person toward release at the end of specified period and that any preconditions for release are carefully tailored to reflect the capacity of the person. It is vital that a person not face a requirement that they could never meet because of the nature of their disability.

To this end, it will be necessary for the determining body to have before it expert evidence on what might be achievable and how it may be achieved, and for the determining body to have the power to make orders that require specific entities to implement appropriate programs to assist the person to meet the release preconditions. Such orders may need to be reviewed to ensure that any new and proven interventions can be implemented to support the person.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that the person must be released at the end of a specified period unless it is satisfied that the release criteria have not been met; provide that reasonable efforts be made to progress the person toward release at that time; and set a maximum period of detention if the person is not released at this time.

PIAC recommends that the determining body be given power to order assessment and expert evidence to inform its decision-making in respect of the imposition on any preconditions for release. PIAC further recommends that the determining body be given power to order that specified programs or other interventions be implemented by named entities and that such programs or interventions be reviewed in light of new developments relevant to the person's particular disability.

## Section 8 – Offenders and inmates

Section 8 of the Consultation Paper proposes options for reforms in respect of the following matters:

- the lack of distinction between the two paths into the forensic system;
- application of non-parole periods;
- bases for transfer of inmates into mental health treatment facilities;
- continuing treatment orders;
- community treatment orders.

PIAC notes the observations made in the Consultation Paper under the heading ‘Dual patient care’ and urges the NSW Government to give the further consideration suggested in that paper.<sup>14</sup>

### Categories of forensic patients

PIAC is supportive of a new category of patients being created to be described as ‘security patients’. PIAC understands the potential benefits in making separate provision for forensic and security patients in matters such as security conditions, transfer to other hospitals, leaves of absence and discharge.

**Position:** PIAC supports Option 2, that the legislation be amended to provide for ‘security patients’, being convicted offenders who are transferred from a correctional centre to a hospital for treatment, and make provision for their treatment, security, leave, release and inter-jurisdictional transfer.

### Expiry of non-parole period

PIAC is of the view that the justification for a change to ensure that forensic patients are not disadvantaged in relation to parole by comparison with prisoners in respect of classification or treatment, and that this should be provided for in this legislation. However, the principle underpinning such a change should be that any continuing treatment should be in a secure non-correctional mental health care and treatment facility rather than in a prison hospital.

**Position:** PIAC gives qualified support for Option 2, that the legislation be amended to expressly provide in relation to a forensic patient whose non-parole period has expired:

- i. That if they are mentally ill they may be detained in an appropriate correctional facility (whether a gaol or hospital) notwithstanding that their non-parole period has expired or
- ii. That they may be transferred to and detained in a suitable hospital or other facility outside the corrections system or treated as would be a civil patient.

PIAC recommends that any such amendment include a presumption that a person will be transferred and detained in a suitable hospital or other facility outside the corrections system or treated as would be a civil patient.

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14 See ‘Dual patient care’ in James, above n1 37.

## Grounds for transfer

PIAC is of the view that having the same criteria for treatment of prisoners as exists in the community is an appropriate way forward. If a person in a correctional facility is to be treated involuntarily, for example, the same criteria should apply as applies in the broader community.

**Position:** PIAC supports Option 3, that the legislation be amended to provide for the transfer of a person from a correctional centre to a hospital on the same grounds as apply under the civil provisions of the *Mental Health Act*.

## Transferees and continued treatment orders

PIAC is persuaded by the argument in favour of change to the law in this area, namely, that there appears to be no good reason why the option of continuing treatment orders should not be available at, or immediately before, the expiry of the non-parole period in the same way as they are available within six months of the term of imprisonment expiring.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that a transferee may also be classified as a continuing treatment patient immediately before or at the expiry of the non-parole period.

## Community treatment orders for prison inmates

Whilst PIAC broadly supports the concept that community treatment orders should be available for inmates in a correctional context, PIAC is concerned that they could become a replacement for treatment in hospital. In light of this, it is important to require that a person must first be treated in hospital before being placed on a treatment order, and that a treatment order only be imposed once the person's condition has stabilised.

**Position:** PIAC gives qualified support to Option 2, that the legislation be amended to provide a framework for the making, implementing and monitoring of community treatment orders in the correctional context.

PIAC recommends that the framework include a requirement that a community treatment order not be imposed until the person has received initial mental health assessment, care and treatment in hospital and their condition has stabilised.

## Section 9 – Review of forensic patients

Section 9 of the Consultation Paper proposes options for reforms in respect of the following matters:

- notification to the Tribunal of acquisition of jurisdiction;
- review of forensic patients;
- timing of the reviews;
- review of conditions of care, treatment and detention;
- informal reviews.

### Notifying the Tribunal

As outlined in the Consultation Paper, the Deputy State Coroner at the inquest into the death of Scott Simpson suggested the development of protocol for notification of the Tribunal when a person becomes a forensic patient. The Deputy State Coroner observed:

One of the functions of the Mental Health Tribunal is to review the placement of forensic patients... Simpson became a forensic patient on 31 March 2004 yet the Tribunal was notified officially only shortly before his death, over two months later. If the Tribunal is to play an effective role, then it needs to be notified in a timely manner. I would have considered it appropriate for the court order to be sent by facsimile to the Tribunal within days rather than weeks. In any event, there ought to be a protocol between the Tribunal and the relevant courts setting out the maximum time-frame within which notification is to occur.<sup>15</sup>

**Position:** PIAC supports Option 2, that the NSW Attorney-General, Minister for Health, Minister for Justice and the Tribunal develop a protocol to ensure that the Tribunal is notified that it has acquired jurisdiction over a forensic patient within a specified period.

PIAC recommends that, consistent with the sentiments of Deputy State Coroner Pinch SM, the specified period be no more than seven days.

### The review provisions

PIAC supports a change in this area to simplify and consolidate the provisions for initial and ongoing reviews. However, PIAC is strongly supportive of the continuation of the practice that the Mental Health Review Tribunal review forensic patients once every six months. PIAC understands that this time frame is not always strictly adhered to, however, PIAC submits that the six-month review should be the aim, and would not support the time frame for reviews being expanded to 12 months, for example.

**Position:** PIAC gives qualified support for Option 2, that the legislation be amended to simplify and consolidate the provisions for initial and ongoing reviews of forensic patients.

PIAC recommends that the reviews be undertaken on a six-monthly basis.

PIAC recommends that the process of consolidation and simplification be undertaken in consultation with key stakeholders.

### Timing of reviews

As above, PIAC does not support extending the time frame for the frequency of reviews to 12 months. PIAC submits that this could result in considerable injustices, given that incarceration

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15 Pinch, above n8 16

without review for 12 months is a very considerable time period indeed. A person could make considerable progress in this period but be left languishing in a correctional or health facility. Whilst this proposal includes an allowance for a person to be reviewed sooner than the 12-month requirement, PIAC is concerned that some persons detained may slip through the cracks.

**Position:** PIAC supports Option 1, that the current provisions regarding frequency of reviews of forensic patients be retained.

## **Review of conditions of detention, care and treatment**

As outlined elsewhere in this submission, PIAC is concerned about the fact that forensic patients can be detained for long periods in segregation, and this is referred to in this section of the Consultation Paper. In this respect, PIAC is supportive of the Tribunal itself, or the determining body (whatever that may be), having the power to make orders in regard to the conditions of a person's detention, care or treatment consistent with best practice standards and international human rights protections.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that the Tribunal may review, and the determining body may make orders, in relation to any matter it considers appropriate in relation to the detention, care or treatment of a forensic patient, including the conditions of a patient's detention, care or treatment.

PIAC recommends that the legislation expressly require the Tribunal and determining body to make such orders consistent with international human rights standards and laws with respect to detention, care and treatment of people with mental illness.

## **Informal reviews**

In PIAC's view, informal reviews provide a valuable safeguard for an accused person who is detained in a correctional setting. However, PIAC is supportive of the Tribunal being provided with greater powers to raise relevant issues.

**Position:** PIAC gives support for an amalgamation of Option 1 and Option 2, that the legislation be redrafted to retain the requirement that the Tribunal conduct informal reviews and to provide the Tribunal with greater powers to address concerns about delays in transfer to a hospital, and delays in legal proceedings.

## Section 10 – Release of forensic patients

Section 10 of the Consultation Paper proposes options for reforms in respect of the following matters:

- leave of absence for forensic patients;
- criteria for decision making in respect of release and leave;
- conditional release;
- notification of release;
- supervision of released persons;
- breach of conditional release;
- termination of forensic patient status;
- bail.

### Leaves of absence

While PIAC does not support the incarceration of forensic patients in the correctional system, it is persuaded by the argument that those forensic patients who continue to be held within the corrections system should have a specific security classification category to better facilitate access to leave and release privileges. Similarly, PIAC supports the Tribunal having powers to grant access to leave privileges.

**Position:** PIAC supports Option 3, that the legislation be amended to provide for leaves of absence for forensic patients, to be granted by the Tribunal in lieu of the Minister or the Governor and to provide criteria for such grants and that a new security classification category be established for forensic patients held in correctional centres that better facilitates access to leave and release arrangements.

PIAC recommends that the criteria be developed through further consultation with key stakeholders.

### Broader criteria for decision making

The predominant pattern with forensic patients in recent times in NSW has been that they have become unjustly caught within the system even when they are well enough to be released. PIAC is concerned with moves to expand the criteria to be met before release is ordered as this approach may result in the continuation of unnecessary and ultimately unjustifiable detention of people past a point that is reasonable or necessary in light of concerns around community safety. Historic and continuing failures by governments to establish appropriate care and treatment options in the community cannot continue to justify indefinite detention of people simply by reason of their continuing mental illness.

The approach taken in Victoria, with the application of the principle that ‘restrictions on a person’s freedom and personal autonomy must be kept to the minimum consistent with the safety of the community’, is to be applauded and should be a principle underpinning the whole mental health and forensic system in NSW. It is important that community safety not become an overriding concern that presumes continuing risk because of mental illness.

PIAC considers that Option 3 goes too far in establishing criteria upon which to base release decisions. PIAC is of the view that Option 2 achieves the appropriate balance in terms of the kind of criteria that should be considered, without having too many categories of consideration. Under Option 3, PIAC is particularly concerned with the inclusion of the criteria ‘the prospect of relapse or deterioration in the person’s condition once released into the community’.

**Position:** PIAC supports Option 2, that the legislation be amended to provide that the determining body must order the leave or release of a forensic patient at any time if it is satisfied, on the available evidence, that:

- care or treatment of a less restrictive kind (where necessary) is reasonably available to the patient within the community
- reasonable arrangements have been made to ensure the person's continued care or treatment (where necessary) within the community
- the safety of the patient, or members of the public, will not be seriously endangered by the person's release.

## Conditions placed on release

PIAC is persuaded by the arguments put by the NSW Law Reform Commission, which are referred to in the Consultation Paper.<sup>16</sup> As outlined, the NSW Law Reform Commission recommended a non-exhaustive list of release conditions be inserted into the legislation so that decisions would be more openly structured. PIAC sees that this would be a positive change to this aspect of the law and decision-making.

**Position:** PIAC supports Option 2, that the legislation be amended to provide a non-exhaustive list of conditions that the determining body may place on a forensic patient's conditional release.

PIAC recommends that the development of that list reflect the objectives identified by the NSW Law Reform Commission in its report and that, to the extent possible, the legislation include those objectives as guidance to the Tribunal on the use of such conditions.

## Notification of release

PIAC supports a change in the law for the reasons outlined in the Consultation Paper, namely, that the NSW Attorney-General's power of objection to release is outdated and ultimately misplaced when it comes to forensic patients found not guilty on the grounds of mental illness, as they lack criminal responsibility for their actions.

**Position:** PIAC supports Option 3, that the legislation be amended to remove all of the notification requirements regarding the possible or proposed release of a forensic patient.

## Supervision of released patients

PIAC supports the implementation of mechanisms that ensure greater co-ordination between a range of agencies to ensure appropriate treatment, care and support for a forensic patient subject to conditional release. The strength of Option 3 is that it proposed enshrining in legislation the obligations owed by relevant government agencies to take responsibility for the supervision, care and treatment of forensic patients. This option, in conjunction with a requirement that the Tribunal establish formal agreements could significantly improve outcomes for forensic patients.

**Position:** PIAC supports both Options 2 and 3, that the legislation be amended to require relevant government agencies to co-operate with each other for the supervision, treatment and care of forensic patients who are subject to conditional release from detention.

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16 James, above n1 47.

And that the Mental Health Review Tribunal enter into a formal agreement with relevant government agencies to ensure that there is a consistent and complementary framework for the supervision, treatment and care of forensic patients who are subject to conditional release from detention.

## **Breach of conditional release**

PIAC submits that a hierarchy of responses is required to avoid a person attracting a harsh penalty for a minor breach of any conditions imposed on their release. PIAC has heard anecdotal evidence that people are attracting such harsh penalties for relatively minor breaches. PIAC is concerned by the approach suggested in Option 3 as it does not seem to be justified by the discussion in the Consultation Paper. Further, this Option goes much further in terms of giving the Tribunal to broad a power to detain people on the basis of an alleged breach. Option 2 presents a more tempered response to the issue.

**Position:** PIAC supports Option 2, that the legislation be amended to provide a hierarchy of responses according to the seriousness of an alleged breach of conditional release, and a clear mechanism for responding to a deterioration in a person's condition.

PIAC recommends that the hierarchy be developed in further consultation with key stakeholders.

## **Termination of forensic patient status**

PIAC is concerned to ensure that the status of forensic patient be terminated at the earliest time and that the provisions to be modified to remove any complexity and inconsistency that unnecessarily delays the termination of this status.

**Position:** PIAC supports Option 2, that the legislation be amended to consolidate the provisions dealing with termination of forensic patient status, and provide that it terminates upon the earlier of:

- a. the expiry of a limiting term
- b. unconditional release
- c. the expiry of any conditions of release
- d. in the case of transferees, release on parole or the expiry of the term of imprisonment.

PIAC recommends that further consultation be undertaken on the proposed amendments.

## **Bail**

The Consultation Paper properly identifies as a problem the lack of clarity as to the Tribunal's powers when bail is granted.

**Position:** PIAC supports Option 2, that the legislation be amended to clarify the powers of the Tribunal to make recommendations and orders concerning a person who is granted bail after being found unfit to stand trial.

## Section 11 – Victims of crime

PIAC has broad concerns about the role that victims<sup>17</sup> are playing in the current process of decision-making in regard to forensic patients. In PIAC's view, the influence of victims in the decision-making process around forensic patients has, at times, proven to be problematic. The end result has been inconsistent treatment of patients, depending on how forceful and influential victims have been on decision makers. PIAC considers this highlights one of the key problems with executive decision-making in regard to forensic patients.

In PIAC's view, allowing victims to play a similar role in addressing decision-makers in the forensic context compared with the criminal context is not an appropriate way forward. The purpose of allowing victims to address the court in a sentencing context, for example, is (among other things) to emphasise the responsibility that an offender should take for their actions. In the forensic context, the same emphasis on responsibility is not appropriate, as the majority of forensic patients have been found not guilty on the grounds of mental illness. An emphasis on the person taking responsibility could well be counter-productive and is incoherent with an understanding of the nature of the psychiatric, psychological or cognitive impairments affecting many forensic patients at the time of commission of the alleged act.

The purpose of the forensic process is to allow a person to progress through a therapeutic treatment regime, rather than emphasising punishment and criminal responsibility. Given the lack of emphasis on criminal responsibility, and the recognition of the need for medical treatment for people with psychiatric illnesses, victims should not have a right to directly make submissions to the decision makers in the same way as is permitted in the criminal justice system.

**Position:** PIAC supports Option 3, that the legislation be amended to provide that registered victims may apply to the determining body for notification and non-contact orders in relation to a forensic patient.

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17 PIAC has adopted this term to reflect its common usage, that is to describe a person who is negatively affected by an act or incident. It does not use the term 'victim of crime' as this is not consistent with the position that the intention generally required in law to find that a criminal offence has been committed is absent in relation to a significant percentage of forensic patients. PIAC does not seek to deny that people are negatively affected by actions of people affected by mental illness or other psychological or cognitive disorders or disabilities.

## Section 12 – Other issues

Section 12 of the Consultation Paper proposes options for reforms in respect of the following matters:

- inter-judicial arrangements;
- interaction between the range of relevant legislation.

### Inter-judicial arrangements

PIAC considers that it is important that the Minister for Health take the action necessary to ensure the possibility of inter-jurisdictional transfer where that is appropriate.

PIAC is aware of one case in particular where a forensic patient is keen to move overseas, and at present is being prevented from doing so. PIAC does not see why NSW cannot implement arrangements whereby a forensic patient may return to their homeland, for example, if they no longer wish to remain in Australia.

**Position:** PIAC supports Option 2, that the Minister for Health take the legislative and administrative action necessary to ensure an effective framework for the inter-jurisdictional transfer of forensic patients, and the inter-jurisdictional application of the legislative provisions, and also consider the need for arrangements in relation to forensic patients who may wish to move overseas.

### Interaction between the legislation

PIAC does not believe that forensic patients should be subject to a separate, stand-alone legislative arrangement. PIAC believes that NSW should either retain the current legislative framework, or better integrate the relevant provisions into the *Mental Health Act 1990*. Separating forensic arrangements from the main mental health legislation sends the wrong public policy message. Forensic patients should, as far as possible, be treated in a similar fashion to any other individual who may be cared for under the *Mental Health Act 1990*. PIAC believes that it is important that NSW make the intellectual leap from criminalising forensic patients to treating them as patients requiring appropriate health care.

**Position:** PIAC does not support any of the Options set out in the Consultation Paper.

PIAC recommends that all provisions dealing with the care and treatment of people with mental illness be consolidated into the *Mental Health Act*.

## Conclusion

PIAC believes that change in NSW around the issue of forensic patients is urgently needed. In the strongest possible terms, PIAC would like to encourage the taskforce to propose progressive change in this State, to ensure that NSW can have the best and fairest arrangement possible for decision making in its jurisdiction.

While changes within the system are occurring, such as the construction of the new hospital at Long Bay, which will come under the jurisdiction of Justice Health, NSW has for a long time fallen short of the mark in terms of respecting the rights of forensic patients. There are many instances of forensic patients being trapped in the system far beyond the time that is necessary and appropriate. This has resulted in considerable injustice. The deprivation of liberty is a serious human rights issue, and people should not be locked up for indefinite periods and beyond what is considered absolutely necessary.

Beyond the need to remove executive discretion, PIAC sees the need for reform in the recognition that those individuals who have been found not guilty on the grounds of mental illness should face no criminal penalty, and should come under the jurisdiction of the Department of Health. It is completely unacceptable that those found not guilty on the grounds of mental illness are incarcerated within the general prison population, even for brief periods. In terms of its overarching position, this is an issue of considerable concern to PIAC.

PIAC seeks to maintain an ongoing dialogue with the NSW Government around these issues, and in particular with the Hon Greg James QC. The current review shows the very real potential for very positive reforms in this State, and PIAC is keen to be part of that process of progressive reform.