

Submission to the Review of the Forensic Provisions of the Mental Health Act 1990 and the Mental Health (Criminal Procedure) Act 1990



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About NCOSS

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation and is the peak body for the non-government human services sector in NSW. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales.

It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at Commonwealth level.

NCOSS membership is composed of community organisations and interested individuals. Affiliate members include local government councils, business organisations and Government agencies. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals.

Member organisations are diverse; including unfunded self-help groups, children's services, youth services emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, and a range of population-specific consumer advocacy agencies.

Background

NCOSS welcomes this opportunity to provide comment on the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedures) Act 1990*. NCOSS is committed to the review of the *Mental Health Act* and has (in consultation with key stakeholders) provided two previous submissions to the review of the *Mental Health Act*; Discussion Paper One Carers and Information Sharing (2003) and Discussion Paper Two the *Mental Health Act 1990* (2004). In the submission to Discussion Paper Two, NCOSS did make a number of recommendations in relation to forensic patients which will be reiterated in this submission.

This consultation provides an important opportunity to review the current provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedures) Act 1990*, to ensure it can meet the best possible standards. This review has attracted considerable media and community debate evidenced by the consultation NCOSS and The Mental Health Coordinating Council held in March 2007 where over 50 people attended including consumers, carers, health professionals, legal representatives and a range of non-government organisations.

NCOSS strongly believes *Mental Health Act 1990* and the *Mental Health (Criminal Procedures) Act 1990* should reflect the *National Statement of Principles for Forensic Mental Health*¹.

Section 4 Categories of Forensic Patient

▪ Definition of forensic patient

It is essential that definitions within the Act offer clarity and consistency to those who are implementing the provisions and those affected by them. The current definition of a forensic patient does outline the conditions under which a person becomes a forensic patient which is important for greater understanding for all involved in implementing the provisions. Maintaining consistency in the reference to forensic patient is essential.

When considering the definition 'forensic patient', this term may not be appropriate for a person with intellectual disability who is not unwell nor under medical care so in all respects is not a 'patient'. This complex area where people with an intellectual disability are confused with mental illness is discussed further in the section under Intellectual Disability. NCOSS's position is that legislation should not medicalise disability.

¹ National Statement of Principles for Forensic Mental Health 2002

Recommendation:

NCOSS recommends combining Option 1 and Option 2 (see below) where the definition remains but consistency in its use is implemented. Further options may also need to be considered or explored for people with intellectual disability who are not nor will be patients.

Option 1 - Retain the current definition of a 'forensic patient' in the Mental Health Act (NSW) and

Option 2 - Amend the legislation to provide a simplified definition of a 'forensic' patient and consistency in references to them

▪ Detention

To ensure transparency and accountability within the forensic system, it is essential that that provision for detention and release are explicitly stated and detailed for professionals, consumers and carers to understand.

Recommendation:

NCOSS recommends Option 2.

Option 2 - Amend the forensic mental health legislation to define expressly:

- I. The power to detain
- II. The power to release
- III. Commencement and termination of forensic status

▪ People with Intellectual Disability

People with intellectual disability represent only 2-3% of the general population but between 12%-13% of the prison population². As outlined in the consultation paper, the issues concerning people with intellectual disabilities in the criminal justice and forensic system have been the subject of numerous reports and inquiries including the NSW Law Reform Commission Report 80 (1996)³ and the Framework Report 20014.

What is evident from these reports is that people with an intellectual disability are caught in systems lacking expertise and understanding of intellectual disability.

Intellectual disability is generally lifelong, not a medical condition that can be treated or cured. In the current system, as people with intellectual disability can be diverted from the criminal justice system under the *Mental Health (Criminal Procedures) Act 1990*, intellectual disability can become confused with mental illness. This is evident both within the text and practical operation of the *Mental Health (Criminal Procedures) Act 1990*. The name and title of the Act only refers to mental illness, it is a Mental Health Review Tribunal that has the decision-making role, the fitness to plea within 12 months assumes recovery (which is not appropriate for an intellectual disability) and the only specified therapeutic detention option is hospital which again assumes a medical condition that may be treated or cured.

Due to a lack of services, people with intellectual disability diverted from the criminal justice system under the *Mental Health (Criminal Procedures) Act 1990* have two options for detention: hospital or gaol, neither of which is appropriate. The current lack of post release accommodation and support options also means there is a low likelihood of conditional release. The majority of people with intellectual disability are ultimately detained in gaol where they can be subject to harassment, abuse and subject to the controls and discipline of the correctional institution. If a person with intellectual disability is detained in hospital, there is the risk that they are channelled into a health

² Discussion Paper 35 (1994) - People with an intellectual disability and the criminal justice system: Courts and Sentencing Issues NSW Law Reform Commission

³ People with an Intellectual Disability and the Criminal Justice System; NSW Law Reform Commission Report 80 (1996)

⁴ The Framework Report; Intellectual Disability Rights Service and NSW Council for Intellectual Disability (2001)

system which might not provide the supervision, care and rehabilitation needs appropriate to a person with intellectual disability.

Some recent undertakings by the NSW Government have included a funding allocation to the Department of Ageing, Disability and Home Care for the Criminal Justice Program through the *Stronger Together* Program. This program aims to provide accommodation and related support for people with intellectual disability who are exiting adult and juvenile facilities. Evaluation is required of the Criminal Justice Program particularly as it only provides accommodation and support for people with intellectual disability on release from gaol. However, the NSW Council on Intellectual Disability also warns that if an option is created for people with intellectual disability to be detained in Criminal Justice Program accommodation, there is the risk that the balance of accommodation options will be skewed towards more institutional accommodation.

The options provided for this section provide little direction. Option 1 is inappropriate given the previous discussion. Option 2 is vague in detail as to which aspects of the legislation will be amended and how. Option 3 recommends a further inquiry into the need for specific provision. It is argued that such an inquiry is not required however since the current injustice has already been adequately researched and documented and any further inquiry will simply delay reform.

Given these limitations, Option 2 would be considered the most appropriate, with the aim of building into the current legislation a pathway that relates to people with intellectual disability.

This may provide for separate provisions within the Mental Health legislation and would tease out a system for people with intellectual disability including expanded mechanisms for diversion from the criminal justice system. There is also room to consider a re-labelling of the whole system away from mental health to better incorporate people with intellectual disability. One suggestion has been for the development of an Intellectual Disability Review Tribunal as an arm of the Mental Health Review Tribunal.

Recommendation:

NCOSS recommends Option 2.

Option 2 - Amend the legislation to make specific provision in relation to people with intellectual disability within the forensic mental health system

▪ **Children**

In order to acknowledge the diversity of people affected by mental illness who come into the criminal justice system, the forensic mental health legislation must recognize the differing needs and special circumstances of forensic patients under 18 years, consider any special developmental (and other) needs of young people in detention and be more appropriate to their circumstance.

*The NSW Young People in Custody Health Study 2003*⁵ by the Department of Juvenile Justice found that 83% of young people in custody reported high, moderate or severe symptoms consistent with a clinical mental health disorder. 19% of males and 24% of females had seriously considered attempting suicide in the past 12 months.

NCOSS noted in its submission to the Select Committee on Juvenile Offenders, that “there is a rising new group of forensic clients coming from amongst young people and recognition is needed within the Act of young people and their specific emotional and developmental needs. Facilities need to be established and run to meet these needs and must be based in the community of the young person. Special consideration must be given to the interface between gaol and the community for young people”.

⁵ NSW Young People in Custody Health Study; NSW Department of Juvenile Justice 2003

Any legislation directly impacting children and young people must also uphold a number of children's human rights principles. These include that the best interests of the child shall be a primary consideration in the actions of government, ⁶that every child deprived of liberty shall be treated in a manner which takes into account the needs of persons of his or her age, and to be separated from adult prisoners⁷ and 'the right of every child found to have infringed the law to be treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.'⁸

The *Select Committee on Juvenile Offenders 2005*⁹ recommended that the NSW Government examine appropriate strategies and services for young offenders with a mental illness and consider establishing specialist mental health units with juvenile justice centres or a purpose built facility for young people. The Select Committee expressively recommended that young people and adults should not be co-located.

In response, the Government seems to suggest that the establishment of the Long Bay Mental Health Hospital as their solution for specialist services for young people¹⁰. 15 adolescent beds will be co-located with the adult institution and some adolescents will be placed with adults e.g. young women over the age of 16 will be co-located within the women's unit. This does not support the recommendation of the Select Committees for specialist mental health units within juvenile justice centres or a purpose built facility for young people. Nor does it satisfy human rights standards. NCOSS would oppose this.

Concerns would also be raised if Long Bay Hospital will have appropriately skilled professionals who can provide the care and treatment for young people with a mental illness who have quite specific needs?

Recommendation:

There is an existing need for greater information, consultation and the development of appropriate age specific strategies and services for juveniles in the forensic system. A comprehensive and far reaching inquiry would seem necessary to inform any amendments to the legislation to recognise and make specific provision for forensic patients under 18 years.

A progress report on the actions the Government sought to undertake would need to form part of this inquiry including:

- o the development of a memorandum of understanding between Department of Juvenile Justice and Justice Health on the clinical and legal management of mentally disordered young offenders;
- o the establishment of mental health nurse practitioner clinics at Kariong; and
- o the expansion of psychology service to inmates.

If an inquiry was to happen further details are required as to when it would occur, the time frame, who would be consulted and how. As it is assumed that the review of the Act will continue, if any recommendations from an inquiry were made these would need to become amendments to the Act.

NCOSS recommends both Option 2 and Option 3.

- Option 2 - Amend the legislation to make specific provision for children within the forensic mental health system
- Option 3 - The NSW Government should conduct a further inquiry into the need for specific provision for children within forensic mental health legislation

⁶ Article 3, United Nations Convention on the Rights of the Child

⁷ Article 37[3], United Nations Convention on the Rights of the Child

⁸ Article 40, United Nations Convention on the Rights of the Child

⁹ Report on the Inquiry into Juvenile Offenders, Legislative Council Senate Select Committee 2005

¹⁰ NSW Government Response to the Report on the Inquiry into Juvenile Offenders 2006

▪ Federal Offenders

As outlined in the *National Statement of Principles for Forensic Mental Health 2002* “a prisoner whether remanded, sentenced or in police custody should have timely referral and access to specialist mental health services when appropriate”. Federal prisoners must have the same access and availability of mental health services as state prisoners.

Recommendation:

NCOSS recommends both Option 2 and Option 3 (see below), with the aim of the inquiry resulting in proposed legalisation amendments. Other states have already made provision and perhaps these could inform changes in NSW.

Option 2 - Amend the legislation to make specific provisions for people detained under federal legislation

Option 3 -The NSW Government should conduct a further inquiry into the need for specific provision for people detained under federal legislation within NSW forensic mental health system

▪ References to mental illness and mental condition

NCOSS previous submission to the *Mental Health Act 1990* recommended that the definition ‘person has developmental disability of mind’ should be re-worded. NCOSS also noted that the definitions of someone who is mentally disordered should be consistent with the definitions for mental illness.

Consistency of the use of definitions is also critical as how the terms are used can result in two quite different outcomes: a trial, conviction and sentence or diversion from the criminal justice system.

If a review is undertaken it should result in an agreement of the definitions amongst not only legal professionals but also consumers and the community.

Recommendation:

NCOSS recommends Option 2

Option 2 - Review the terminology used in forensic mental health legislation, including the terms ‘mental illness’ and ‘mental condition’.

Section 5 Decision-making for Forensic Patients

In principle 1 of the *UN Principles, Point 4* it states, “There shall be no discrimination on the grounds of mental illness. ‘Discrimination’ means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights”¹¹. Maintenance of the current process of Executive Discretion contravenes this principle in that no other person within the criminal justice system faces a similar process of Ministerial approval when they are to be released. It is also in direct conflict with the *National Statement of Principles for Forensic Mental Health*. NCOSS strongly opposes the current arrangements.

NCOSS and the organisations consulted for the previous submission to the review of the *Mental Health Act 1990* agree that the Executive is not qualified to judge a person’s readiness for release. Decisions made by the Executive run the risk of becoming -a process based on political expediency rather than an open and transparent decision. As stated in the consultation paper for

¹¹ Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care, Office of the High Commissioner for Human Rights, Adopted by the General Assembly of the United Nations, Resolution 46/119, 17 December 1991

the review of the *Mental Health Act 1990*, "In addition, practically every review of this issue since 1990 has recommended that the executive discretion be removed."¹²

NSW and WA are the only states in which the policy of Executive Discretion remains. The NSW Government has already committed to abolishing it by agreeing to the *National Statement of Principles for Forensic Mental Health*. Executive discretion breaches the *United Nations International Covenant on Civil and Political Rights; Article 14* which states, "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".¹³

Executive discretion is:

- inconsistent;
- not transparent;
- results in long delays;
- open to political abuse;
- unfair;
- breaches international conventions;
- breaches national understandings of the law;
- is in contradiction to the Objects of the Mental Health Act, and
- results in forensic patients being detained for much longer periods if they had not been a forensic patient.

The NSW Law Reform Commission Report 80 (1996) recommended that "the executive discretion be removed from all decisions regarding forensic patients".

NCOSS strongly recommends that Executive Discretion should be removed from the legislation and an alternate process put in place. The Mental Health Tribunal is the appropriate body to make the decisions around release for people within the forensic mental health/criminal justice system.

In previous NCOSS consultations, there was discussion on utilising the Supreme Court for this process, however this limits the options for appeal and would also involve training and education of Supreme Court Judges in the needs of and issues for people with a mental illness. Another possibility would be the utilisation of a judge with specific mental health skills who would make and sign off on decisions. This would remove the decision making process from the political process and still provide a right of appeal to the Supreme Court. Another alternative may be a mental health court like the current drug court.

It was agreed in the consultation that option 4 provides the best model available. Currently no model exists that matches this proposed option, the closest being in Queensland.

Recommendation:

NCOSS recommends Option 4

Option 4 - Amend the legislation to transfer all decision-making in relation to forensic patients to the Tribunal (subject to the Supreme Court)

▪ **Review of decisions**

Currently there is no recognition within the *Mental Health Act 1990* for the Attorney General or Minister for Health to appear before the Mental Health Review Tribunal. The Mental Health Review

¹³ United Nations International Covenant on Civil and Political Rights 1976

Tribunal can seek their views and the Minister can theoretically make their decision known to the Mental Health Review Tribunal by rejecting the Tribunals recommendations.

Option 2 recognises the existing right the Attorney General and Minister for Health already have to appear in any court at any time.

Recommendation:

NCOSS recommends Option 2 (see below) with the caveat that the Mental Health Review Tribunal, rather than the Attorney General and Minister for Health, should be empowered to make decisions taking into account public interest grounds.

Option 2 - A forensic patient has a right of appeal in relation to any decision of the determining body and the Minister for Health and the Attorney General have a right of appearance before the determining body and right of appeal on public interest ground.

▪ **The Tribunals Constitution**

To ensure forensic patients are given fair and expert hearing, the Mental Health Review Tribunal must maintain a certain composition of consumers, legal advisors, psychiatrists, psychologists as well as persons with expertise in intellectual disability. NCOSS would strongly oppose the proposal that the President could sit on their own and make a decision if a forensic division of the Mental Health Review Tribunal was established. This would result in the concentration of power and final decision-making into one person when a range of expertise is required in relation to forensic patients.

Recommendation:

NCOSS recommends Option 2 (see below) but would strongly oppose any proposal that the President or one legal member could make a determination on their own.

Option 2 - Amend the legislation to provide that The President may establish a division of the Tribunal for matters relating to forensic patients.

▪ **Notice of hearings**

Currently The Mental Health Review Tribunal does give notice of hearings which are public although a forensic patient can request for the hearing to be closed.

Recommendation:

NCOSS recommends Option 2

Option 2 - Amend the legislation to provide that the Mental Health Review Tribunal and the determining body must give a specified amount of time of any hearing in relation to forensic patient:

- I. The forensic patient (and his or her legal representative)
- II. The person responsible for the detention, care and treatment of the patient
- III. The Attorney General and Minister for Health
- IV. Registered victims and family members of the patient who have given notice of their desire to be informed

▪ **Reasons for decisions**

The Mental Health Review Tribunal, after reviewing information from treating teams, carers, families, victims and other appropriate documents, submits a detailed report to the Minister for Health with recommending treatment and release.

However, The Executive frequently does not give reasons for refusing Mental Health Review Tribunal recommendations and will often provide only brief, limited or one line responses. Major

decisions including community release or discharge have previously been rejected completely with no supporting reason given. This risks public confidence in the system and lacks transparency.

Recommendation:

NCOSS recommends Option 2 to ensure a transparent process where government is held accountable for all decisions made.

Option 2 - Amend the legislation to provide that the determining body must provide a copy of any decision (and reason for it) to the forensic patient concerned or his or her legal representative and the Mental Health Review Tribunal.

Section 6 Fitness to be Tried

▪ **Power to order an examination**

Recommendation

NCOSS recommends Option 2

Option 2- Amend the legislation 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**

The principle to apply is that release is determined fairly and that all sentencing alternatives are fully considered.

Recommendation:

NCOSS recommends Option 2

Option 2 - Amend the legislation to provide a non-exhaustive list of sentencing alternatives available to the court where a special hearing has resulted in a qualified finding that the person committed an offence

▪ **Limiting terms**

Most people receiving limiting terms are people with an intellectual disability and therefore rarely meet the criteria for release prior to expiration of the limiting term.

Recommendation:

NCOSS recommends that this area of law requires closer examination due to the complexities involved. The principle to apply is that release is determined fairly and that all sentencing alternatives are fully considered.

Section 7 Special Verdicts

▪ **The Mental Illness Defence**

Historically intellectual disability and mental illness have been combined in the same category. However intellectual disability is not a mental illness, cannot be "cured" or treated and is fairly constant throughout a persons life. As it stands, there is confusion in the forensic provisions of the *Mental Health Act 1990* between mental health and intellectual disability. This is compounded by the lack of an agreed definition of intellectual disability in NSW and the lack of a definition of intellectual disability in the *Mental Health (Criminal Procedures) Act 1990*.

The application of a mental illness defence applied to people with intellectual disability, where there is no dual diagnosis, again confuses intellectual disability with mental illness. Consequently, people with an intellectual disability are being assessed and treated as if they had a mental illness resulting in decisions that are neither appropriate nor effective.

The NSW Law Reform Commission Report 80 (1996) also noted, the inappropriateness and confusion caused by a defence of mental illness applied to people with intellectual disability. As recognised in relation to fitness to be tried, there are fundamental problems beyond those of terminology when intellectual disability is treated as a sub-set of mental illness. The channeling of a person with an intellectual disability in the criminal justice system into the mental health system (which occurs when the mental illness defence is applied) may not reflect or adequately address their complex needs in terms of supervision, support and care. Additionally, the detention consequences of the defence are more appropriate for people with a temporary and treatable impairment than for people with a permanent disability such as intellectual disability.

NCOSS as previously stated in this paper already believes that the need to reform the defence of mental illness is well documented through existing reports. The NSW Intellectual Disability Rights Service argues for “a defence which reflects how the difficulties that alleged offenders with intellectual disability have in learning and in understanding abstract concepts will impact on their ability to understand the nature and quality of their conduct or that their conduct was wrong”. (community consultation March 2007).

Recommendation:

NCOSS would recommend that reform of the system based on the existing reports, best practice and current case and legal experience from intellectual disability legal services.

▪ **Alternatives to detention**

The principle to apply is that release is determined fairly and that all sentencing alternatives are fully considered.

Recommendation:

NCOSS recommends Option 2

Option 2 - Amend the legislation 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

Section 8 Offenders and inmates

▪ **A new category**

Transferees need full access to treatment regimes in the forensic system and need to have the full protection of the Mental Health Review Tribunal. NCOSS in their previous submission argued that a person with a mental illness in gaol should not be treated any differently to a person with a mental illness living within the community, in terms of access to services and resources for their health.

The use of the term ‘security patient’ is not considered appropriate for inmates who have been identified as having a mental illness whilst in gaol as it invokes the idea that those patients who have been transferred from gaol are more dangerous than those that have entered through the forensic system. A person in the forensic mental health system may be no more or no less a security risk than a person with mental illness transferring from gaol. The term also creates a separate category of forensic patient within the hospital framework.

Recommendation:

NCOSS recommends Option 1

Option 1 - Retain the existing provisions that include transferees within the definition of a ‘forensic patient’.

▪ **Community Treatment order for prison inmates**

A person with a mental illness in gaol should not be treated any differently to a person with a mental illness living within the community, in terms of access to services and resources for their health

Recommendation:

NCOSS recommends Option 2

Option 2 - Amend the legislation to provide a framework for the making, implementing and monitoring of community treatment orders in the correctional centres

Section 9 Review of forensic patients

▪ **Notifying the Tribunal**

Recommendation:

NCOSS recommends Option 2 (see below) with an amendment that there is a maximum period of time within which the Mental Health Review Tribunal must be notified that it has acquired jurisdiction over a forensic patient.

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

▪ **Timing of Reviews**

NCOSS is opposed to extending the review period from six to 12 months for forensic patients. This is a backward step in the care and treatment of forensic patients and will weaken existing protections.

Recommendation:

NCOSS recommends Option 1

Option 1 - Retain current provisions regarding the frequency of reviews of forensic patients with the requirement that the reviews of the forensic patient must occur on a six monthly basis.

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

There has been great concern for a number of years in relation to the abuse of human rights when solitary confinement is used for people with a mental illness within the correctional system. People with a mental illness should not be put in solitary confinement. It is essential therefore that the Tribunal can review a patient's detention or care and make orders to ensure that the detention and care is the least restrictive and in compliance with the objects of the *Mental Health Act 1990*.

Recommendation:

NCOSS recommends Option 2

Option 2 - Amend the legislation 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

▪ **Informal reviews**

It is imperative that informal reviews by the Mental Health Review Tribunal are maintained to guarantee that forensic patients in the correctional system are not overlooked. Extending the powers of the Tribunal to make inquiries and representations where a person has not been transferred provides the forensic person with greater protection and also ensures further accountability regarding their care and treatment.

Recommendation:

NCOSS recommends combining Option 1 and Option 2

Option 1 - Retain the existing provisions requiring the Mental Health Review Tribunal to conduct informal reviews

Option 2- Amend the legislation to provide the Tribunal with greater powers to address these concerns

Section 10 Release of forensic patients**▪ Notification of release**

Notification of the Attorney General, Director of Public Prosecutions and Commissioner of Police is considered discriminatory and once again contravenes Principle 1 of the *UN Principles, Point 4* where it states; "There shall be no discrimination on the grounds of mental illness. Discrimination means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights".

Notification of the proposed release of other people from the criminal justice system is not required and this section of the Act continues the misconception that people with a mental illness are excessively violent.

Recommendation:

NCOSS recommends Option 3

Option 3 - Amend the legislation to remove all of the notification requirements regarding the possible or proposed release of a forensic patient

▪ Supervision of released patients

There a huge need for interagency work that reduces the ad hoc support system and works as a whole of government approach placing patient care at the centre. An interagency framework that recognises and acknowledges the role of all the agencies, including government and non government, in the care and support and treatment of people with mental illness will ensure there is a greater chance of preventing people from falling through the gaps and ending up back in the justice system.

Recommendation:

NCOSS recommends Option 2 with the recognition of the role non government agencies also play in providing support and care for of people with mental illness ad intellectual disability.

Option 2 - The Mental Health Review Tribunal should enter 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.

NCOSS also recommends Option 3

Option 3 - Amend the legislation to require relevant government agencies to cooperate with each other for the supervision, treatment and care of forensic patients who are subject to conditional release from detention.

▪ **Conditions placed on release**

The Law Reform Commission Report 80 (1996) recommended a non exhaustive list of release conditions that may be imposed by the Mental Health Review Tribunal. The Commission argued this list would be educative to the public, and ensure decisions were more openly structured.

Recommendation:

NCOSS recommends Option 2

Option 2 - Amend the legalisation to provide a non-exhaustive list of conditions that the determining body may place on a forensic patient's conditional release

▪ **Breach of conditional release**

NCOSS in its previous submission has recommended that The Mental Health Tribunal should handle the order, however follow up and support needs to be provided to the person to ensure that they succeed once they are back in the community and do not breach their release conditions. This may include the establishment of specific case management services for this group of people. However, such services need to be properly resourced.

Breach provisions should be revised to allow for alternate processes for less serious breaches. Determination of what constitutes 'less serious' should be made in consultation with people with mental illness and other relevant services.

Recommendation:

NCOSS recommends Option 2

Option 2 - Amend the legislation to provide a hierarchy of responses according to the seriousness of an alleged breach of conditional release and a clear mechanism for responding to deterioration in a person's condition.

Section 11 Victims of Crime

NCOSS recognises the importance of giving people the right to be heard. The current tension with victim-related issues suggests that the area of victims of crime should be a separate issue that requires attention. The consultation paper does not fully understand problems with victim's issues.

In the current system, the victim registry is maintained by the NSW Forensic Service. Victims can attend hearings if they wish and are encouraged to make written statements to the Mental Health Review Tribunal rather than oral statements.

It has been reported that many victims come to the Mental Health Review Tribunal feeling angry and frustrated and feel their views have not been heard within the criminal justice system. Many victims find it difficult to cope with the fact that the hearing is not a criminal justice hearing and the person has been acquitted of a crime. As a result, often victims will go direct to the Minister for Health with their concerns.

It has been suggested that what is needed for victims is not necessarily a greater say in the Mental Health Review Tribunal decisions but education and information about the process so there is a greater understanding about the insanity or mental illness defence. This is consistent with the UN basic principles of justice for victims of crime.

Recommendation:

In NCROSS' previous submission, NCROSS recommended that as the rights of victims of crime are addressed through Victims of Crime Legislation, and there was no need for something separate to be stated in the *Mental Health Act*. This option is not available in the current consultation paper.

Section 12 Other Issues

▪ Interaction between legislation

Retaining the current legislative framework will ensure the forensic mental health legislation stays in the *Mental Health Act*. This is important as the *Mental Health Act* has strong objects and has a focus and emphasis on the least restrictive treatment options. *The Criminal Procedures Act* has a tendency to be tougher, more punitive and intends to punish.

Recommendation:

NCOSS recommends Option 1

Option 1 - Retain the current legislative framework