# Justice Action:

# Review of the Mental Health Review Tribunal - Whealy Inquiry


Trades Hall, Suite 204,
4 Goulburn Street,
Sydney NSW 2000, Australia

Tel: 612 9283 0123
Fax: 612 9283 0112

Email: ja@justiceaction.org.au
www.justiceaction.org.au

# JUSTICE ACTION REPORT OCTOBER 2017

## TABLE OF CONTENTS

## 1. EXECUTIVE SUMMARY

The review is designed to reconsider the release conditions of forensic patients, and reporting laws that currently ban the publication of their names.[1] Concern over these issues has been a cause of contentious debate due to recent media attention and attacks –labeling the system as "broken" and current protections for forensic patients as "disgusting".[2] NSW Supreme Court Judge Anthony Whealy Q.C will head the review. His current work with NSW ICAC and long history with the justice system proves that he is a strong advocate for transparency and fairness, and as such will be able to distinguish between the "hype" of media portrayals and the best outcome for our community.

The review focuses on whether current law and procedure appropriately balance community safety, the interests of victims and their families, and the care and treatment of forensic patients.[3]

A forensic patient is broadly defined as a person who has been found not guilty by reason of mental illness, someone unfit for trial, or a person given a limiting term and detained in a mental health facility.[4]

The media are largely responsible for negative portrayals of forensic patients, and their incitement of this fear in our community is detrimental to reform. The protections enacted by s 162 of the *Mental Health Act 2007* (NSW) are pivotal in achieving fairness for forensic patients appearing before the tribunal.[5] Publishing the names of forensic patients is not of any benefit to victims, and only serves the commercial interests of the media.[6] There is no public or ethical benefit in the name of disclosure.

Currently, the approach to treating mentally ill consumers is heavily skewed by a

[1] Sky News, 'Review of Mental Health Tribunal', *Sky News*, July 3 2017
[2] Daily Telegraph, April 1, 2017, http://www.dailytelegraph.com.au/news/nsw/victims-tales-of-mental-health-tribunals-indifference-to-safety/news-story/438fc4b50c4b9795fa1f9760dd1a8dca
[3] Health NSW, 'Whealy Report', Terms of Reference *NSW Health.*
[4] Legal Aid, '*Policy Online'* s 2.28 Forensic Patient.
[5] s 162 *Mental Health Act 2007* (NSW).
[6] Schachi Tiwari., Jorge Ignacio Camargo, Fear: How the media distorts public policy, http://www.justiceaction.org.au/images/Media_and_Crime/051216_Crime_and_media_report_Final.pdfp. 4.

community safety approach, oftentimes at the expense of individual autonomy. Traditional approaches to mental illness treatment have fostered misconceptions of forensic patients as violent and unable to be 'fixed' or 'controlled'. The perception of mentally ill patients as violent is false and damaging. Research has shown that the mentally ill are significantly more likely to be victims of abuse than to be violent perpetrators of it themselves.[7] The current review into this balance is positive but without action, is meaningless.

It is important to find a balance between the needs of the community and forensic patients. These needs are not necessarily conflicting. Protecting the rights of forensic patients ensures a smoother reintegration back into society, and become fully functioning and contributory members.

A mental health patient is entitled to the same and equal treatment as anyone accused of a crime. Justice Action (JA) has made a previous submission to the Department of Health on the conditions surrounding the horrific treatment and subsequent death of mental health consumer Miriam Merton at Lismore Base Hospital earlier this year.

The *Our Pick* Report is indicative of JA's focus on mental health, as it has become apparent mental health consumers are treated with significantly less respect and dignity.[8] There is a contrast in the way society regards prisoners; as people who have made mistakes versus the mentally ill, who are treated like dangerous children unable to be responsible for their own actions. This thinking has directly led to a culture of encouraging arbitrary control, contrary to the will of mental health consumers. Without reform mental health consumers will continue to be powerless and improperly supported.

*Mad in Australia* documents the history of abuse towards mental health patients worldwide and in Australia.[9] JA draws attention to the disconnect between an Australian approach that endorses involuntary forced medication due to a belief it promotes community safety against alternative methods that encourage respect of the

[7] Kings College London, Institute of Psychiatry, 2006, Risk of violence to other people.
[8] Justice Action, *Our Pick,* Justice Action, Sydney.
[9] Justice Action, *Mad in Australia: the state's assault on the mentally ill,* Justice Action, Sydney.

mentally ill and the fostering of social support, all which have proven to reduce rates of recidivism and relapse. Unfortunately, despite overwhelming evidence that the continuance of forced medication is untenable it remains ongoing.

Justice Action is of the position that the MHRT has been unnecessarily conservative in its past decisions to deny leave or release to forensic patients. This has resulted in forensic patients being held for longer than their mentally able counterparts, despite committing the same offence. It is believed that the stigmatisation by the media of mentally ill people as violent offenders has contributed to the unease of the community when release or leave of forensic patients is publicised. It is recommended that s 162 of the *Mental Health Act 2007* (NSW) remains unchanged, as the publication of forensic patients names will only allow the media to capitalise on this stigma. We urge that the Whealy Inquiry focus on a handling of forensic patients that is embedded firmly in a social framework – one based on rehabilitative, restorative justice and recovery models.

## 2. MEDIA AND DEMONISATION OF THE MENTALLY ILL

When a violent crime takes place, there is often a stereotyped perception that the perpetrator was mentally ill. This can be attributed to the pre-conceived notion that violent crimes and homicides cannot possibly be committed with the behaviour of someone 'thinking rationally'.

Additionally, the incidence of homicide committed by people diagnosed with mental health problems has stayed at a fairly constant level since the 1990s.[10] These statistics indicate that those who are mentally ill are more unlikely to commit a violent crime; there is still a prevalent fear of random unprovoked attacks on strangers from this group.

The media plays a major role in shaping this perception. There has been an ongoing debate in the media regarding the continuing anonymity of forensic patients. Victims

[10] Dean Burnett, *'Stop Blaming Mental Illness for Violent Crimes'* (21 June 2016) <https://www.theguardian.com/science/brain-flapping/2016/jun/21/stop-blaming-mental-illness-for-violent-crimes>.

and patients argue that the maintenance of their privacy protects and secures the possibility for just outcomes at the Mental Health Tribunal, the media has criticized this in demonstrated displays of sensationalism.[11] This can be viewed as moving away from the interests of victims, and essentially promoting vengeance and shaming in the legal system.

However, the reality of the average mentally ill person is significantly different to this portrayal. People with mental health problems are more likely to be the victim of a violent crime than the perpetrator. One study found that more than one in four people with a severe mental illness had been a victim of crime.[12]

The fear of random unprovoked attacks on strangers by people with mental health problems is unjustified given a number of secondary studies that prove the contrary. According to the British Crime Survey, almost half (47%) of the victims of violent crimes believed that their offender was under the influence of alcohol and about 17 percent believed that the offender was under the influence of drugs.[13] Another survey suggested that about 30 percent of victims believed that the offender attacked them because they were under the influence of drugs or alcohol. In contrast, only one percent of victims believed that the violent incident happened because the offender had a mental illness.[14]

The stigma of those with mental illness is connected to perceptions of excessive violence and an inability to be rehabilitated, which is a perception facilitated by the media. The media is demonizing the mentally ill, rather than promoting the best interests of victims and the community. This demonization is impacting public perception and pushing for shaming and vengeance in policy and administrative review. Therefore, we recommend the MHRT maintain the prohibition on the publication of forensic patients names, as per s 162 of the *Mental Health Act (NSW)*

---

11 Annabel Hennessy, Risky call on monsters: Victims slam flimsy system that covers killers and rapists', *The Daily Telegraph* (online), 15 April 2017 <http://www.dailytelegraph.com.au/news/nsw/risky-call-on-monsters-victims-slam-flimsy-system-that-covers-killers-and-rapists/news-story/e80a312612dafe60fd5b895da0ee8a2d>.

12 Teplin L, McClelland M, Abram K, Weiner D, 2005, 'Crime victimization in adults with severe mental illness', Archives of General Psychiatry, vol. 62, pp911-921.

13 Kings College London, Institute of Psychiatry, 2006, Risk of violence to other people

14 Coleman K, Hird C, Povey D. 2006, 'Violent Crime Overview, Homicide and Gun Crime 2004/2005', Homet Office Statistical Bulletin.

2007, as it will only further the stigmatization of forensic patients and potentially endanger the privacy of victims and rehabilitation of these individuals, which will be discussed in further detail later in the submission.

### 2.1 THE MEDIA AND BIOLOGICAL POSITIVISM

The media describe forensic patients in terms such as "sex monsters" and "killers".[15] This language creates an association between mental illness and criminality, and is a demonstration of a concept known as biological positivism.

As Cesare Lombroso introduced, biological positivism in criminology is the concept that there are certain biological traits that make up the 'criminal'.[16] To this consideration, people with these traits are seen as more likely to offend. Rehabilitation is seen as futile, simply because offenders of this nature maintain little free will in the decision to engage in criminal actions, only doing so from a forced reaction by their biological instinct.[17]

Considering the above, under this school of thought it is improbable to successfully re-educate and reintegrate 'criminals' as it is in their 'nature'. As such the suggested action is to segregate them and to wholly remove them from society. This theory is flawed as it neglects the effectiveness of various alternatives such as restorative justice or in cell computer based counselling. Restorative justice is an effective alternative, with success in diverting Indigenous and non-Indigenous youths from custody.[18] The Computers in Cells program has been operating in the ACT for several years, and it has facilitated the reduction in the domestic violence recidivism by up to 30%.[19]

---

[15] Annabel Hennessy and Anthony De Ceglia, 'Laws protecting identities of killers and sex offenders with mental illness to be reviewed', *The Daily Telegraph* (online), 3 July 2017 <http://www.dailytelegraph.com.au/news/nsw/laws-protecting-identities-of-killers-and-sex-offenders-with-mental-illness-to-be-reviewed/news-story/65f06cce6c4b722f56b64f4aaeca13b6>.

[16] Mary Gibson and Spencer m. Di Scala, 'Born to Crime: Cesara Lombroso and the origins of Biological Criminology' in Robert A. Nye (eds), *Italian and Italian American Studies* (Westport, 2004) 462.

[17] Ibid.

[18] Jacqueline Larsen, 'Restorative justice in the Australian criminal justice system' (report, Australian institute of Criminology, 2014).

[19] Community Justice Coalition, 'NSW needs computers in cells' (Media Release, 20 April 2017) <http://www.communityjusticecoalition.org/news/15-news/80-media-release-computers-in-cells>.

## 3. THE ROLE OF THE MENTAL HEALTH TRIBUNAL IN BALANCING MULTIPLE INTERESTS

### 3.1 LEAVE AND RELEASE DECISIONS OVERVIEW

The release of mentally ill patients has been historically unfair, and their freedom is often impinged upon to a greater degree than those charged with the same offence who are considered fit for trial. This was the basis for the Senate Inquiry into Indefinite Detention and the NSW Law Reform Commission Number 138. Furthermore, the Greg James inquiry into the 2007 Mental Health legislation amendments also concluded that the new legislation unfairly prevents patient's release.[20] All these inquiries came to the same conclusion that the media is creating a negative public perception of mental illness, which works against patients' rights to release. Justice Action in its many interactions with the Mental Health Review Tribunal believes it is much too conservative in the release of patients.

Striking a balance between the care of mentally ill patients and community safety is at the forefront of decision-making in regards to release of forensic patients by the Mental Health Review Tribunal. In deciding whether a forensic patient may be released, the Tribunal is to take into account:

- 'A report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release; and
- Whether or not the patient has spent sufficient time in custody.'[21]

Furthermore, criteria for release are also stipulated under s 43 of the *Mental Health (Forensic Provisions) Act* (NSW).[22] These include;

- '[Consideration that] the safety of the patient or any member of the public will not be seriously endangered by the patient's release; and
- Other care of a less restrictive kind, that is consistent with safe and effective

[20] Hon greg james QC, 'Review of the New South Wales Forensic mental health legislation' (Forensic Review, NSW Health Department, August 2007).
[21] John Feneley, *Applying the Amended Mental Health (Forensic Provisions) Act 1990 and Rethinking the Defence of Mental Illness* (July 2009) The Public Defenders <http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_applyingamended_mentalhealthrethinkingdefence.aspx>.
[22] s 43 *Mental Health (Forensic Provisions) Act 1990* (NSW).

care, is appropriate and reasonably available to the patient or that the patient does not require care'.

Other relevant considerations are contained in s 68 of the *Mental Health Act 2007* (NSW).[23] However, it is unclear how much weight is to be given to these.

**Legislative requirements for leave or release**

The Tribunal must comprise of the President or a Deputy President, a member who is a psychiatrist, registered psychologist or other mental health professional, and a member who has other suitable qualifications or experience, and at least one member must be a holder or former holder of a judicial office.[24] In order to apply for leave or release, the treatment team should consider if the patient:

- Has been compliant with his or her forensic order, including, where appropriate, having had successful periods of ground access and leave without any significant incidents;
- Has consistently demonstrated socially appropriate behaviour over a substantial period of time;
- Is assessed as being a low risk of harm to themselves or others in the context of the proposed conditions of release;
- Has been compliant with medication and the treating team's directions; and
- Has been abstinent from illicit substances, as evidenced by at least two negative urine samples in the preceding six months.[25]

**Issues in regard to leave or release**

There has been some concern in the community about a number of high profile cases where leave or release have been granted by the Tribunal. Questions have been raised about the 'transparency' of these decisions, and whether they strike the right balance between providing for community safety and the interests of victims and the treatment

[23] s 68 *Mental Health Act 2007 (NSW).*
[24] John McMillan, 'Administrative Tribunals in Australia - Future Directions' (2006), Commonwealth Ombudsman, 11. 12.
[25] Richard Cogswell, *MHRT Annual Report* (26 October 2016) Mental Health Review Tribunal <http://www.mhrt.nsw.gov.au/assets/files/mhrt/pdf/MHRT%20Annual%20Report%20Final%202015%2016.pdf>.

and rehabilitation of the patient. This balance is particularly important to public confidence in the forensic mental health system and to the peace of mind of victims, patients and the community.

In New South Wales, persons suffering from a mental illness who have committed an act, which would constitute a crime, can be subject to indefinite detention at the discretion of the government of the day.[26] In addition, persons suffering from any mental impairment which renders them unfit to be tried can be subject to detention for a longer period than an individual who commits an identical crime but who is fit to be tried. Additionally, this also applies to those who suffer mental illness after conviction.[27]

Incarceration results in the loss of many personal freedoms, which are taken for granted in the community, including social support, interpersonal relationships, employment, and social status. These losses are commonly associated with depressive disorder.

There is also a stringent release process under the current law as governed by the *Mental Health (Forensic Provisions) Act 1990* (NSW), which ensures the patient released has met certain requirements and is not a threat or danger to the community.[28] S 74 of the Act requires a forensic psychiatrist who is not involved in treating the patient to make a report as to the condition and state of the person and whether the safety of the person or any member o the public will be endangered.[29] Tests under s 43 include that the patient's own safety as well as the victim's and community's safety is not infringed upon and that care of a less restrictive kind is available and effective for the patient or that no further care is required at all.[30] The legislation in its current form, if anything, could be considered too conservative towards forensic patients but takes into account both the rights of patients, the victim and the community when considering leave or release of patients. Any changes to

[26] The New South Wales Bar Association, *Review of the Forensic Provisions of the Mental health Act 1990 and the Mental health (Criminal Procedure) Act 1990* (21 March 2007) NSW Bar Association, 2[8].
[27] Ibid.
[28] *Mental Health (Forensic Provisions) Act* 1990 (NSW).
[29] Ibid s 74.
[30] Ibid s 43.

legislation would erode patient rights and the precarious balance.

**Senate Inquiry on Limiting Terms**

Limiting terms is one option to prevent indefinite detention and ensure timely release of forensic patients. Currently, limiting terms for forensic patients are provided for in all Australian jurisdictions except the NT, WA and Victoria. It is the committee's view that limiting terms need to be adopted for forensic patients in these states. Limiting terms become a mechanism that forces government to accept greater responsibility for forensic patients in their care. The committee's support for limiting terms is based on the provision that appropriate therapeutic support services are provided to forensic patients in prison whilst noting that prison is not the most appropriate place to deliver those services. The committee is also strongly of the view that a limiting term should not become the default period, but rather the maximum period that forensic patients spend in prison.[31]

**Methods available for supervising forensic patients whilst on leave or release**

Consumer workers would be highly beneficial in supporting forensic patients whilst on leave or release. There are over 70 consumer or peer workers employed by the Health Department throughout the hospital system. The National Mental Health Commission has adopted this policy as necessary social support for forensic patients. These workers are trained, have personal experience with mental illness and are trusted by the patient's, as well as the health system. The MHRT President, Professor Daniel Howard also highlighted the importance of consumer workers, in a previous MHRT decision on 2 May 2014, regarding Saeed Dezfouli.[32] He stated that the treatment team of Saeed should facilitate access to a consumer worker, in order to assist with his recovery and rehabilitation. Despite this recommendation, the forensic hospital failed to provide a consumer worker. In response to this, Daniel Howard stated he was frustrated with these persistent failures and that "sometimes the system

[31] Senate Community Affairs References Committee, Parliament of Australia, *Senate Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, 2015.
[32] Justice Action, <http://www.justiceaction.org.au/index.php?option=com_content&view=article&id=752:4th-september2014-mhrt-hearing&catid=55&Itemid=1004&highlight=WzQsInNlcHRlbWJlciIsMjAxNCwiNCBzZXB0ZW1iZXIiLCI0IHNlcHRlbWJlciAyMDE0Iiwic2VwdGVtYmVyIDIwMTQiXQ>.

needs a kicking."[33] It is evident consumer workers should be integral to the support and treatment of forensic patients, and thus, would make the ideal supervisor of patients whilst they are on leave or release. There are many ways to provide safe and supervised leave and release for forensic patients that protect both the community and the freedoms and dignities of the patient.

## 3.2 IMPROVING THE ENGAGEMENT OF THE TRIBUNAL

### The need for victims to have an opportunity to participate

Derived from the United Nations Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power, the Charter of Victims describes how victims of crime will be treated and assisted by various government and non-government agencies.[34] While the Charter does not create enforceable legal rights for the victims or any sanctions for a failure to comply, it does provide some guidance and an internationally recognised standard as to how to better support victims affected by crime and how to go about criminal proceedings.[35]

Victims are currently able to personally interact with Tribunal hearings through written statements. Moreover, tribunal hearings are open to the public, and therefore, give victims an opportunity to attend the hearings and participate in the process, if permitted by the MHRT.

One of the main considerations of leave or release is victim safety. In order to best support the victim and the rehabilitation of offenders victims should take an active role in restorative justice. However, victims should not be able to use the information (i.e. names), to go to the media and commercially benefit from it, as this would unnecessarily damage the forensic patient's rehabilitation and recovery.

Furthermore, victims may be able to provide the Tribunal with relevant evidence or information, and even when victim input may provide little important information

---

[33] Ibid.
[34] United Nations Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power, UN General Assembly, 29 November 1985, 40th Session A/RES/40/34.
[35] NSW Code of the Practice for the Charter of Victims Rights, http://www.victimsservices.justice.nsw.gov.au/Documents/bk17_charter-code-practice.pdf.

there are still potentially significant therapeutic consequences linked to victim participation. The need for victims to feel safe and engaged in the process this should not be at the cost of the forensic patient's basic rights.

### 3.3 PUBLICATION OF NAMES

There is currently no public register regarding forensic patients, including their names and associated information. This leads to question on the benefits for victims to have names publicised other than the public shaming of offenders.

Under Section 162 of the *Mental Health Act* (NSW) 2007, it prohibits the publication or broadcasting of names of people who come before the tribunal.[36] This section includes anyone with a matter before the tribunal, witnesses or anyone mentioned in the proceedings. This also includes pictures or materials that can lead to identification, publication of names and whether or not a person consents to the publication as well as the publishment of information.

**Issues in relation to the publication of names**

As stated previously, section 162 ensures that patients, carers, victims and other witnesses can discuss all relevant matters without concern that their name or sensitive information will be published.[37] Publishing names makes participants less likely to appear or freely exchange information at a tribunal hearing, which hinders the Tribunal's ability to consider all the relevant information before making a decision.

It is imperative to balance public interest in the transparency of decision-making with the privacy of the participants. This can be achieved by having free hearings, similar to the Civil and Administrative Tribunal of NSW in relation to guardianship matters. In regard to offences involving children, the cases are closed off to the public and deny the publication of names. Furthermore, proceedings under the *Public Health Act*

[36] s 162 *Mental Health Act* (NSW) 2007.
[37] Ibid.

(NSW) 2010 involving persons with a sexually transmitted infection are also carried out in a closed court.[38]

Violation of a patient's right to privacy pervades the course of justice and refracts the victimhood back onto the patient. This is due to the fact that if a patient is fit to be released or gains leave, and the media is disseminating sensitive information, it may cause public outrage, in turn, placing pressure on the Minister or Tribunal to revoke such an order. Revocation can easily occur because the Tribunal makes non-binding decisions. This increases the patient's difficulty reintegrating into society and makes it more likely they will suffer depressive disorders in custody where they would otherwise have been released after stringent testing, thus, victimizing the patient. The 'Lifer's inquiry' is a relevant example where media pressure urged minister David Elliott to revoke the reclassification of Andrew Garforth as a response to a 30 000 signature petition. Therefore, the fate of a patient is placed in the hands of the biased public opinion as opposed to an appeal to an impartial judicial body, such as, the New South Wales Civil and Administrative Tribunal or the New South Wales Supreme Court.

### 3.4 MEDIA INFLUENCE

There has been ongoing debate in the media as to whether the anonymity of forensic patients should be lifted. The desire to release names of victims, or 'perpetrators' of violence comes from the perception that the Mental Health Review Tribunal, as a quasi-judicial body, is notorious for its secrecy.[39]

The media's request for the release of names of mentally ill patients is primarily to continue the perpetuation of myths about the patients and to add to the stigma of the mentally ill.[40]

[38] *Public Health Act* (NSW) 2010.
[39] 'Victims Tales of Mental Health Tribunal's Indifference to Safety' *The Daily Telegraph* (online) 1 April 2017 http://www.dailytelegraph.com.au/news/nsw/victims-tales-of- mental-health-tribunals-indifference-to-safety/news-story/ 438fc4b50c4b9795fa1f9760dd1a8dca.
[40] Ibid.

## 4. CONCLUSION

Justice Action is of the position that the MHRT has been unnecessarily conservative in its past decisions to deny leave or release to forensic patients. This has resulted in forensic patients being held for longer than their mentally able counterparts, despite committing the same offence. It is believed that the stigmatisation by the media of mentally ill people as violent offenders has contributed to the unease of the community when release or leave of forensic patients is publicised. It is recommended that s 162 of the *Mental Health Act 2007* (NSW) remains unchanged, as the publication of forensic patients names will only allow the media to capitalise on this stigma. We urge that the Whealy Inquiry focus on a handling of forensic patients that is embedded firmly in a social framework – one based on rehabilitative, restorative justice and recovery models.