



Law Council
OF AUSTRALIA

Draft Report on Mental Health

Productivity Commission

7 February 2020

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction	5
Justice system	5
Criminal justice system.....	5
Pre-court responses	5
Court responses and support.....	6
Mental healthcare in correctional facilities and forensic services.....	6
Aboriginal and Torres Strait Islander people.....	7
Family law matters	8
Access to justice	8
Health justice partnerships.....	8
Participating in the justice system	8
Legal representation in mental health tribunals.....	9
Non-legal support and advocacy persons	10
Reducing mental ill-health stigma and discrimination in insurance sector	10
Mentally healthy workplaces	10
Wellbeing of lawyers	10
Workplace compensation schemes	11

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the contributions of the following Constituent Bodies, Law Council Sections and Law Council Advisory Committees in the preparation of this submission:

- Law Society of Western Australia;
- Queensland Law Society (**QLS**);
- Law Firms Australia;
- Family Law Section;
- Access to Justice Committee;
- Indigenous Legal Issues Committee; and
- Equal Opportunity Committee.

Introduction

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide a submission to the Productivity Commission (**the Commission**) regarding its Draft Report on Mental Health (**Draft Report**).
2. In April 2018, the Law Council provided a submission on the Issues Paper, *The Social and Economic Benefits of Improving Mental Health (Issues Paper)*.¹ In addition to reiterating the points raised in this earlier submission, the Law Council makes the following comments in relation to the Draft Report's draft findings and recommendations on the justice system and access to justice, as well as the mental health and wellbeing of lawyers.

Justice system

3. The Law Council endorses the view of the Commission that people living with mental ill-health are more likely to find themselves dealing with legal issues than the general population and will often face barriers to participating in the justice system.²
4. The Draft Report highlights the significant crossover between the justice system and the mental health system and produces numerous proposals designed to improve the lives of people with mental ill-health who interact with the legal system.

Criminal justice system

5. Regarding the criminal justice system, the Law Council considers that the emphasis in the Draft Report on the issue of people with mental illness in the criminal justice system is appropriate. The Law Council supports the Commission's reform objective of increased importance at each stage of the justice system on identifying people at higher risk of mental illness, enabling early care intervention and ensuring effective links back into the community for continuity of care on release.³

Pre-court responses

6. The Law Council's submission on the Issues Paper expressed strong support for prevention and early intervention, including community-based mental health and disability services, to reduce contact with, and divert people away from, the criminal justice system and to break cycles of disadvantage.⁴ The Law Council agrees with the draft finding that prevention and early intervention is a strategy that can reduce offending and is supportive of further research and evaluation to improve and refine initiatives.⁵ On this point, the Law Council notes that while there needs to be improved collaboration, coordination, responsibility and accountability between services, adequate attention must also be paid to protecting patient privacy both in terms of information sharing and respect for patient's wishes.
7. A key concern highlighted in the Law Council's submission was the acute lack of prevention, early intervention, rehabilitation and support services, particularly in

¹ Law Council of Australia, Submission to the Productivity Commission, *Issues Paper – The Social and Economic Benefits of Improving Mental Health* (Issues Paper, January 2019) ('*Issues Paper submission*').

² Productivity Commission, Mental Health (Draft Report, October 2019) vol 1 591–5 ('*Mental Health Draft Report*').

³ *Ibid* 77.

⁴ Law Council of Australia, *Issues Paper submission*, 12 [31], 17 [56], 18 [61].

⁵ Productivity Commission, Mental Health Draft Report, vol 1 603 (Draft Finding 16.1).

regional, rural and remote areas.⁶ Thus, the Draft Report's recognition of the link between the gaps in mental health services in the community and repeated contact with police and the criminal justice system is welcome.⁷

8. The Law Council's submission on the Issues Paper noted that better recognition by the police of disability and consequent provision of supports is crucial given that police officers are frequently the first responders to situations of crisis involving people with disability, whether as victims, witnesses or defendants.⁸ It further noted the value of collaborative responses to mental health related calls for assistance and intervention within the policing environment.⁹ Therefore, the Law Council welcomes the draft recommendation that a systematic approach should be implemented to support police to respond to mental health crisis situations and that, in the short term, all State and Territory Governments should implement initiatives that enable police, health and ambulance services to collectively respond to mental health crisis situations.¹⁰

Court responses and support

9. The Law Council's submission on the Issues Paper expressed support for diversionary programs and courts that are established and appropriately tailored to address particular health and socio-economic conditions.¹¹ It noted several specialist court programs that attempt to address mental ill-health across various Australian jurisdictions,¹² some of which are noted in the Draft Report.¹³ The Law Council supports the draft finding that diversionary court programs, including court liaison services, mental health courts and integrated support services, reduce recidivism rates and some have improved mental health.¹⁴ The Law Council supports additional research and evaluation of how the coordination with relevant agencies, particularly health and housing, impacts the success of programs.¹⁵ The Law Council adds that culturally appropriate specialised courts and support services must be readily available for Aboriginal and Torres Strait Islander people.

Mental healthcare in correctional facilities and forensic services

10. The Law Council submitted that in correctional contexts, there is scope for better screening for disability, disability-informed protocols and policy, in addition to training for prison staff, which would help address some of these systemic issues related to prisoners with disability.¹⁶ The Draft Report notes the inconsistencies across jurisdictions regarding the nature of screening and assessment processes for mental illness,¹⁷ as well as the inadequacy of some processes, such as lack of standardised protocols.¹⁸ The Law Council supports the Commission's view that formalised screening and assessment processes are necessary and these processes need to be culturally appropriate, especially given the high rates of incarceration for Aboriginal and Torres Strait Islander people.¹⁹ The Law Council supports the draft recommendation that mental health screening and assessment occur for all individuals, sentenced or

⁶ Law Council of Australia, Issues Paper submission, 11 [28], 18 [62].

⁷ Productivity Commission, Mental Health Draft Report, vol 1 610 (Draft Finding 16.2).

⁸ Law Council of Australia, Issues Paper submission, 8–9 [17]–[18].

⁹ Ibid 20–1 [72].

¹⁰ Productivity Commission, Mental Health Draft Report, vol 1 609 (Draft Recommendation 16.1).

¹¹ Law Council of Australia, Issues Paper submission, 22 [79].

¹² Ibid 22–9 [81]–[103].

¹³ Productivity Commission, Mental Health Draft Report, vol 1 613 (Box 16.7); 614 (Box 16.8).

¹⁴ Ibid 615 (Draft Finding 16.3).

¹⁵ Ibid 613.

¹⁶ Law Council of Australia, Issues Paper submission, 9 [21].

¹⁷ Productivity Commission, Mental Health Draft Report, vol 1 616.

¹⁸ Ibid 617.

¹⁹ Ibid 618.

unsentenced, on admission to correctional facilities and on an on-going basis where mental ill-health is identified.²⁰

11. The Law Council submitted that detainees should receive the same level of health care that the general public would receive under the public health system.²¹ Therefore, the Law Council agrees with the Commission that national mental health service standards should apply to mental healthcare service provision in correctional facilities to the same level as that upheld in the community.²²
12. The Law Council endorses the recommendation that the information obtained from mental health screening and assessment should be comprehensive enough to inform resourcing of mental health services within correctional facilities, as well as being shared with community-based mental health services so that individuals with mental illness can receive continuity of care on release.²³ Access to adequate health care, recovery and rehabilitation in correctional facilities and in the community post-release is critical to reduce recidivism.
13. In addition, the lack in the availability of and access to forensic mental health facilities was a key issue raised in the Law Council's submission on the Issues Paper,²⁴ which has been recognised in the Draft Report and constitutes an area on which the Commission is seeking further information.²⁵

Aboriginal and Torres Strait Islander people

14. The Draft Report identifies the significant and complex mental health issues which disproportionately impact Aboriginal and Torres Strait Islander people. The Law Council supports the draft recommendation that seeks to ensure improved provision of culturally appropriate and trauma-informed mental health services for Aboriginal and Torres Strait Islander people in correctional facilities as well as in the community upon release.²⁶
15. The Law Council submits that in relation to the draft recommendation for State and Territory Governments to work with Aboriginal and Torres Strait Islander organisations to ensure Aboriginal and Torres Strait Islander people with mental illness are connected to culturally appropriate mental healthcare in the community upon release from correctional facilities,²⁷ consideration ought to be given to whether:
 - (a) a budget and appropriate level of resourcing has been allocated to properly explore mental health from an Aboriginal and Torres Strait Islander perspective and experience;
 - (b) these inquiries, subsequent processes and advisory panels include Aboriginal and Torres Strait Islander professionals;
 - (c) consultation with Aboriginal and Torres Strait Islander people on these issues is culturally appropriate, including with timeframes which reflect Aboriginal and Torres Strait Islander peoples' ways of decision-making;

²⁰ Ibid 626 (Draft Recommendation 16.3).

²¹ Law Council of Australia, Issues Paper submission, 14 [45].

²² Productivity Commission, Mental Health Draft Report, vol 1 622 (Draft Recommendation 16.2).

²³ Ibid 626 (Draft Recommendation 16.3).

²⁴ Law Council of Australia, Issues Paper submission, 12–3 [31]–[39].

²⁵ Productivity Commission, Mental Health Draft Report, vol 1 618, 628 (Information Request 16.2).

²⁶ Ibid 632 (Draft Recommendation 16.4).

²⁷ Ibid.

- (d) there is recognition of Aboriginal and Torres Strait Islander peoples' perspectives and experiences; and
- (e) there is cultural intelligence across workplaces with Aboriginal and Torres Strait Islander clients and employees to ensure the scope of the issues are appropriately and authoritatively regarded and culturally addressed.

Family law matters

16. While the Law Council recognises the need for a focus on the interface between mental health and the criminal justice system due to the overrepresentation of people with mental illness in the criminal justice system, the Law Council submits that further facets of the justice system that have an interface with mental ill-health should also be acknowledged, including family law and care and protection matters.
17. Family and domestic violence can be a significant factor in mental health issues for parents and children, including acute post-traumatic stress. The process of recounting events for the purposes of giving instructions to a legal representative can surface the trauma and trigger mental illness crisis, thereby presenting challenges for legal representatives in taking client instructions and representation.

Access to justice

Health justice partnerships

18. The Law Council agrees with the draft finding that health justice partnerships have been shown to be effective in promoting access to justice for people with mental illness by helping people access legal support early and reducing risks to mental health.²⁸ The Law Council supports the view of the Commission that health justice partnerships could be an area prioritised for further evaluation and research and that the Australian, State and Territory Governments could coordinate and fund evaluations of health justice partnerships to improve the evidence base for these programs.²⁹

Participating in the justice system

19. The Law Council's submission on the Issues Paper highlighted the barriers that people with mental health issues and mental illness face when participating in the justice system.
20. In relation to the initiation of legal proceedings, the Draft Report notes that many people with mental illness are reliant on the legal assistance sector.³⁰ The Law Council reiterates that the legal assistance sector generally, as well as specialist disability legal services, are facing severe resource constraints and, as a consequence, are struggling to meet the growing demand and are having to turn large numbers of vulnerable people away.³¹ These concerns have been noted in the Draft Report.³² A related point is the lack of support for and recognition of families, as there are limited legal services for people who are caring for a family members with a mental illness, including advice on their options if a family member becomes unwell.

²⁸ Ibid 638 (Draft Finding 16.4).

²⁹ Ibid.

³⁰ Ibid 638–9.

³¹ Law Council of Australia, Issues Paper submission, 14–5 [47]–[49].

³² Productivity Commission, Mental Health Draft Report, vol 1 638–9.

21. In relation to participating in legal proceedings, the Law Council considers that greater emphasis could be given to ensuring that primary and proper consideration is given to patients' views, wishes and preferences regarding their mental health treatment and care. The supported decision-making model should always be the starting point, with substituted decision-making a last resort. The Law Council notes that supported decision-making receives only brief mention in the Draft Report in the context of non-legal supports and involuntary treatment orders and is not otherwise mentioned.³³
22. To this end, improved training for individuals and organisations delivering legal services to people with mental illness could assist in creating more clarity around a lawyer's role in representing a person with mental illness in the criminal justice system and whether necessary instructions can or need to come from a substitute decision-maker.
23. The Law Council noted in its submission to the Issues Paper that given that many people with disability often have limited knowledge of their legal rights, including their entitlement to disability-related supports, and therefore may not request supports or appropriate adjustments, it is important that disability-related needs are recognised and provided by those working within the justice system.³⁴ The Law Council supports the draft recommendation that all State and Territory Governments should continue to develop and implement disability justice strategies to ensure the rights of people with mental illness are protected and promoted in their interactions with the justice system, which should consider how people with mental illness can be better supported to initiate legal proceedings, participate in the justice system and access other appropriate support in the community, where required.³⁵

Legal representation in mental health tribunals

24. The Draft Report notes the finding of the Law Council's *Justice Project* that, in some jurisdictions, people with disability who are subject to proceedings under Guardianship and Administration and Mental Health legislation often do not have access to free legal assistance.³⁶ It noted that the lack of legal aid can be a key reason why people with mental illness cannot access legal representation in mental health tribunals and that due to low levels of resourcing, community legal centres face difficulties in providing assistance to individuals most in need, including those appearing before mental health tribunals.³⁷
25. The Law Council supports the draft recommendation that State and Territory Governments should adequately resource legal aid services to assist people appearing before mental health tribunals and other tribunals that hear matters arising from mental health legislation, through broader legal aid funding or providing a specific legal aid grant.³⁸
26. To this end, the Law Council reiterates the recommendation from its submission to the Treasury's pre-Budget consultation that the Australian Government invest \$390 million per annum in the legal assistance sector to address critical civil and criminal legal assistance service gaps, comprising \$270 million per annum for legal aid commissions

³³ Ibid 642.

³⁴ Law Council of Australia, Issues Paper submission, 8 [16].

³⁵ Productivity Commission, Mental Health Draft Report, vol 1 641 (Draft Finding 16.5).

³⁶ Ibid 641; Law Council of Australia, Issues Paper submission, 15–7 [50]–[55].

³⁷ Productivity Commission, Mental Health Draft Report, vol 1 642.

³⁸ Ibid (Draft Recommendation 16.6).

in order to return the Australian Government to a 50 per cent share of total funding with the states and territories.³⁹

Non-legal support and advocacy persons

27. The critical value of non-legal individual advocacy persons and services in facilitating access to justice for people with disability at all stages of the justice system was also noted in the Law Council's submission on the Issues Paper.⁴⁰ The Draft Report discusses the value attributed to these services by the those who are subject to compulsory treatment and the concern that these services are unable to meet demand due to under-resourcing.⁴¹ While the Law Council supports the draft recommendation that State and Territory Governments should ensure that non-legal individual advocacy services are available for all individuals subject to involuntary treatment under mental health legislation,⁴² the Law Council reiterates that the Australian Government ought to share the responsibility of adequately funding these critical support services.

Reducing mental ill-health stigma and discrimination in insurance sector

28. Additionally, the Law Council notes the discussion in the Draft Report relating to the issues in accessing insurance which covers mental ill-health.⁴³ The Law Council's *Justice Project* found that 'people with [mental and physical] disability continue to face negative stigma, prejudice and discrimination, which creates significant barriers to accessing justice'.⁴⁴ The Law Council endorses efforts to reduce stigma and discrimination in the insurance sector toward people with mental ill-health.⁴⁵ In particular, the Law Council submits that barriers to obtaining future insurance as a result of previously seeking mental, and the financial and credit impacts of defaults resulting from inability to meet repayment obligations as a result of mental illness, require more attention and investigation.

Mentally healthy workplaces

Wellbeing of lawyers

29. Regarding the mental health of lawyers, the Draft Report acknowledges the issue of workplace bullying within the legal profession and the prevalence of poor mental health among law students as raised by the Law Council in its submission to the Issues Paper.⁴⁶

30. Further, as noted in the Law Council's submission on the Issues Paper, research has raised concerns over the impact of vicarious trauma on those in the legal profession who are exposed to trauma in their day-to-day work.⁴⁷ This can extend to the representation of clients with mental health issues. In comparison to other professionals

³⁹ Law Council of Australia, Submission to the Treasury, 2020-21 Pre-Budget Submission (20 December 2019). See also Law Council of Australia, *The Justice Project: Final Report – Part 2: Legal Services* (August 2018) 11 recommendation 2.1.

⁴⁰ Law Council of Australia, Issues Paper submission, 10 [24]–[25].

⁴¹ Productivity Commission, Mental Health Draft Report, vol 1 643.

⁴² *Ibid* 645 (Draft Recommendation 16.7).

⁴³ *Ibid* vol 2 808–14.

⁴⁴ Law Council of Australia, *The Justice Project: Final Report – Part 1: People with Disability* (August 2018) 39.

⁴⁵ See, eg, Productivity Commission, Mental Health Draft Report, vol 2 814 (Draft Recommendation 20.2).

⁴⁶ *Ibid* 709, 1120.

⁴⁷ Law Council of Australia, Issues Paper submission, 30 [108], citing Grace Maguire and Mitchell K Byrne, 'The Law Is Not as Blind as It Seems: Relative Rates of Vicarious Trauma among Lawyers and Mental Health Professionals' (2017) 24 *Psychology, Psychiatry and Law* 233.

who engage with individuals with mental illness, such as therapists and psychologists, the required emotional support and supervision within the legal practice may not always be present for lawyers to debrief. Further, those within the practice may not have undertaken the suitable training, and therefore do not possess the required skillset, to debrief staff in such matters.

31. The Law Council suggests that referrals to support services and resources, such as the Law Care Programme and the Minds Count Foundation, may need to be encouraged to a greater extent. Additionally, there is a cost to lawyers, and their employer practices, of dealing with such matters, which can particularly impact small to medium-sized firms. The Law Council suggests that funding could be made available for small to medium sized firms and their employees to assist with the costs related to obtaining mental health and counselling services.

Workplace compensation schemes

32. The Law Council notes the discussion in the Draft Report regarding workers compensation arrangements and workplace mental health.⁴⁸ Draft Recommendation 19.4 states:

*Workers compensation schemes should be amended to provide clinical treatment for all mental health related workers compensation claims, regardless of liability, until the injured worker returns to work or up to a period of six months following lodgement of the claim. Similar provisions should be required of self-insurers.*⁴⁹

33. Regarding that draft recommendation, the QLS submitted to the Law Council that the Queensland Workers Compensation scheme (**the QLD scheme**) has undergone two recent independent reviews that have culminated in amendments.⁵⁰ The QLS considered that these amendments fairly balance the need for treatment of injured workers and employers' interests.
34. The QLS noted that in late 2019, the *Workers Compensation and Rehabilitation Act 2003* (Qld) was amended to oblige treatment be provided from the time a psychiatric or psychological injury claim is lodged, that is, prior to claim determination up until claim determination.⁵¹ The QLS noted that the purpose of this change has been stated to be to provide early intervention which is expected to 'reduce the severity, duration and recurrence of mental illness'.⁵² The QLS further noted that the definition of 'psychological injury' has also been enlarged, however employment still needs to be a significant contributing factor to the injury.⁵³ The QLS also pointed out that there remains the exception that 'injury' does not include a psychiatric or psychological disorder arising out of, or in the course of: reasonable management action taken in a reasonable way; the worker's expectation or perception of reasonable management action being taken;

⁴⁸ Productivity Commission, Mental Health Draft Report, vol 2 747–68.

⁴⁹ Ibid 767.

⁵⁰ David Peetz, *The Operation of the Queensland Workers' Compensation Scheme Education* (Report of the Second Five-Yearly Review of the Scheme, 27 May 2018); Employment and Small Business Committee, Parliament of Queensland, Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (22 August 2019).

⁵¹ Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (Qld).

⁵² Explanatory Notes, Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (Qld) 11.

⁵³ Workers' Compensation and Rehabilitation and Other Legislation Amendment Bill 2019 (Qld) cl 34.

and action by the Regulator or an insurer in connection with the worker's application for compensation.⁵⁴

35. In the view of the QLS, to labour the QLD scheme with the treatment costs for non-work related illnesses risks the ongoing viability of the scheme, is contrary to the scheme's objectives and represents a shift in responsibility from government to provide employers which is an unnecessary and unjustified cost shift.⁵⁵
36. Additionally, the QLD scheme already applies 'regardless of liability'. The QLS is of the view that the psychiatric or psychological injury should still be able to be rejected if it is not within the definition of 'injury', that is, where there is no sufficient causal nexus to employment. The QLS submitted that any changes to the current system are likely to put undue pressure on an existing effective and functioning scheme.

⁵⁴ *Workers Compensation and Rehabilitation Act 2003* (Qld) s 32(5).

⁵⁵ See Productivity Commission, *Mental Health Draft Report*, vol 2 763–4.