



18 April 2019

Productivity Commission
GPO Box 1428
Canberra City ACT 2601

By email: mental.health@pc.gov.au

Dear Commission,

SUBMISSION TO THE MENTAL HEALTH INQUIRY

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into mental health.

About Kingsford Legal Centre

KLC is a community legal centre that has been providing legal advice and advocacy to people in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, and undertakes casework for clients, most of whom would be unable to afford a lawyer without our assistance. In 2017, KLC provided 1596 advices and provided minor or ongoing assistance in 295 matters.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. KLC regularly acts for clients in discrimination matters at the Australian Human Rights Commission (AHRC), Anti-Discrimination Board NSW (ADB) and the Fair Work Commission (FWC). In addition to this work, KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law can be improved.

Our clients

Of the clients that KLC advised in 2017, 25% of clients reported that they had a disability, 6.4% of our clients identified as being either Aboriginal or Torres Strait Islander and 57%

stated they had no income or were low income earners. 27% of clients advised that the main language spoken at home was not English, with many speaking little or no English.

The case studies in this submission are based on clients we have advised, de-identified to maintain confidentiality.

Our submission

The 2007 National Survey of Mental Health and Wellbeing found that 45% of Australians aged 16-85 years had experienced a mental disorder at some point in their life.¹ The survey also identified the intersecting and overlapping kinds of disadvantage that can affect mental health, including socioeconomic circumstances, employment, housing, incarceration and presence or absence of social networks.²

This submission focuses on issues that affect the people that we work with and our community. We have addressed the following points in response to the terms of reference for this inquiry:

1. The importance of a human rights based approach to law and policy making for people experiencing mental health illness;
2. Access to justice issues for people experiencing mental ill health;
3. The impact of discrimination on participation and productivity; and
4. Gaps in the provision of accessible healthcare, support services and income support for people experiencing mental ill health.

1. A human rights based approach

The Productivity Commission's issues paper raises questions about approaches to assessing mental health interventions³ as well as the adequacy of Australia's processes to assure compliance with international obligations.⁴

In KLC's view any assessment of mental health interventions and systems must incorporate a human rights based approach. The AHRC has noted that "for Australia to comply with its international responsibilities, all areas and levels of government in Australia have a responsibility to apply human rights based approaches."⁵

Australia has many legal obligations to people experiencing mental ill health under international treaty law. A non-exhaustive selection includes:

¹ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (Catalogue No 43256.0, 23 October 2008).

² Ibid.

³ Productivity Commission, *The Social and Economic Benefits of Improving Mental Health* (Issues Paper January 2019) 10.

⁴ Ibid, 37.

⁵ Australian Human Rights Commission, *Human Rights Based Approach* (Web Page) <<https://www.humanrights.gov.au/human-rights-based-approaches>>

1. **The right to non-discrimination and equality** – Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide the right to non-discrimination and equality.
2. **The right to health** – Article 12 of ICESCR establishes the right of individuals to the highest attainable standard of physical and mental health.
3. **Rights of people with disability** – Under the Convention on the Rights of Persons with Disabilities (CRPD), Australia has obligations to ensure and promote the full realization of all human rights for all people with disability without discrimination.⁶
4. **Rights to protection from other forms of discrimination** – Rights to be free from all forms of discrimination are also enshrined in other international instruments such as the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention relating to the Status of Refugees.

Many people experiencing mental ill health may also face discrimination and marginalisation due to the intersection of disability discrimination with other forms of discrimination on the basis of gender, race, or sexual orientation and gender identity. A human rights based approach recognises the intersecting barriers facing people experiencing mental ill health and emphasises their autonomy and agency. Such an approach would also ensure that laws and policies are created with the principles of non-discrimination and equality firmly in mind, and that the process is inclusive of those who are most vulnerable.

Recommendations

KLC recommends that:

1. The Productivity Commission incorporate a human rights based approach into its inquiry into current and potential interventions to improve mental health outcomes; and
2. Federal and state governments incorporate a human rights based approach when making mental health law and policy decisions.

2. Access to justice

Access to legal services and support

KLC and other community legal centres are often the first point of contact for people experiencing mental ill health who require legal advice and support. One of the main problem types that KLC provides advice on is disability discrimination. Of the advices we provided in 2017, 135 related to disability discrimination, which makes up over 50% of

⁶ CRPD, art 4.

our discrimination advice work. Much of this advice is provided to people with a psychological or mental health disability.

In our view, there is an urgent need for more support for people with mental ill health who are interacting with the legal system. The current lack of legal and other services impacts on the rights of people to equal treatment and a fair trial.⁷ It also leads to increased costs for courts and correctional services, as individual judges and magistrates try and manage complex cases taking considerable additional time and court resources.

Case study – Jessica

Jessica contacted KLC after being charged with criminal offences which she did not understand. She lives with psychological disability and receives the disability support pension. She does not have a caseworker who can help her with documents and appointments. Jessica was facing potential fines and imprisonment.

Jessica attended mentions at court with the assistance of Legal Aid duty lawyers but was not able to get ongoing legal assistance of any kind. Without comprehensive legal support, Jessica is having to navigate the process for applying under section 32 of the Mental Health (Forensic Provisions) Act 1990 (NSW). in court on her own.

At present, community legal centres are struggling to meet the demand for their services.⁸ Funding to Legal Aid NSW has been reduced leading to restrictions on who can access free representation in criminal cases. In NSW, ongoing Legal Aid representation (outside of the duty lawyer service) in criminal cases is limited to cases where there is a real possibility of imprisonment.⁹ This does not extend to all cases where a person would be able to make a section 32 application.

Most states and territories in Australia¹⁰ have a dedicated mental health community legal service that provides free assistance to people facing mental health tribunal proceedings and, in some cases, assist people in criminal and other matters. These services provide essential expert services to people who need it. They are also in the best position to engage in law reform and advocacy work to improve laws, policies and system to ensure that people experiencing mental ill health are able to fully participate in public life free from discrimination.

⁷ The right to a fair trial is enshrined in ICCPR art 14 and is a central principle of the Australian legal system – see, e.g. *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

⁸ National Association of Community Legal Centres Submission to Australian Government Federal Budget 2019-2020 <<http://www.naclc.org.au/resources/190211%20NACLCCFederalBudgetSubmissionFinal.pdf>>.

⁹ Legal Aid NSW, *Policies: Criminal Law Matters – When Legal Aid is Available* (Web Page) <<https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available/4.3.-local-court-criminal-law-matters>>

¹⁰ Existing specialist centres include the Mental Health Legal Service in Queensland, Mental Health Triage Service in South Australia, Mental Health Advocate (Advocacy Tasmania) in Tasmania, Mental Health Law Centre in Western Australia and the Mental Health Legal Centre in Victoria.

New South Wales, the Northern Territory and the Australian Capital Territory do not have specialist mental health legal services. Funding should be provided to establish a mental health legal service in NSW, including funding for law reform and advocacy work to ensure full participation and productivity for people experiencing mental ill health.

For many people experiencing mental health illness, legal issues are identified by non-legal professionals due to these issues impacting on or exacerbating their ill health. Research has shown that when people seek legal advice, they are more likely to speak with a non-legal advisor, such as a health professional.¹¹ There is an increasing movement for Health Justice Partnerships (HJPs), which embed legal services into healthcare settings, to be developed between legal service providers and healthcare providers including hospitals to ensure these vulnerable individuals can have both their mental health and legal issues addressed simultaneously. Positive outcomes from similar partnerships include ensuring people have stable housing and can access income support payments on discharge from hospital. More funding is required to support the establishment and expansion of HJPs, and to improve collaboration between legal and non-legal service providers.

More broadly, increased funding for the legal assistance sector is required to ensure that people experiencing mental ill health have access to legal services and get fair treatment in the legal system. In 2014 the Productivity Commission recommended an interim funding injection of an additional \$200 million per year to legal assistance services.¹²

Recommendations

KLC recommends that:

1. Funding to legal assistance services including community legal centres and Legal Aid services be increased, including through an interim funding injection of an additional \$200 million per year;
2. Expand existing programs that provide mental health services at courts to provide assessments and recommendations to magistrates about diversion to appropriate treatment;
3. Specific funding be provided to establish mental health community legal services for NSW, the Northern Territory and the Australian Capital Territory;
4. Funding to be provided for inter-disciplinary training to facilitate effective collaboration between workers in the healthcare, legal and support service sectors; and
5. Funding for the establishment and expansion of Health Justice Partnerships across Australia.

¹¹ Health Justice Australia, *The rationale for health justice partnership: why service collaboration makes sense* (Report, 2018) 2. <<https://www.healthjustice.org.au/wp-content/uploads/2018/12/Health-Justice-Australia-The-rationale-for-health-justice-partnership.pdf>>.

¹² Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report No 72), 5 September 2014, 738.

Criminalisation and incarceration

People who experience mental health illness are more likely to be criminalised and incarcerated than people who do not experience mental health illness. People with mental illness and cognitive disability are also more likely to be charged and more likely to be imprisoned than others.¹³ The 2007 National Survey of Mental Health and Wellbeing found a strong association between incarceration and mental illness, with people who have been incarcerated experiencing longer-term mental illness at 41%, more than twice the rate of people who have never been incarcerated (19%).¹⁴

Those with cognitive and psychosocial disability spend longer in custody, are less likely to be granted parole and have limited access to diversionary programs.¹⁵ Laws in Western Australia and the Northern Territory operate in ways that result in indefinite detention of people with psychiatric and cognitive disability if the person is found unfit to plead or is subject to a supervision order with an indefinite term.¹⁶ Women with cognitive and psychosocial disability are over-represented in the criminal justice system, especially Aboriginal and Torres Strait Islander women.¹⁷

The effects of prolonged and indefinite detention on mental health are also seen in immigration detention settings. For example, the AHRC reports that of the 53 people on Nauru, 88% suffered from depression, anxiety or post-traumatic stress disorder.¹⁸ Numerous reports establish the link between long-term, indefinite immigration detention and physical and mental harm.¹⁹

Australia has international obligations that are likely to be breached by indefinite detention, including under:

- Article 7 of the ICCPR, which provides that no one should be subjected to cruel, inhuman or degrading treatment or punishment;
- Article 9 of the ICCPR, which establishes the right of every person to freedom from arbitrary detention; and

¹³ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Mental Illness and Cognitive Disability in Aboriginal and Torres Strait Islander Prisoners – A Human Rights Approach' (Speech delivered at 22nd Annual TheMHS Conference – National Mental Health Services Conference: 'Recovering Citizenship', Cairns, 23 August 2012), citing information from the Aboriginal Disability Justice Campaign.

¹⁴ Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing: Summary of Results, 2007* (Catalogue No 43256.0, 23 October 2008).

¹⁵ Gooda, above n 13.

¹⁶ Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, (29 November 2016).

¹⁷ Eileen Baldry et al, 'A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System' (UNSW, October 2015); see also Eileen Baldry, Leanne Dowse and Melissa Clarence, 'People with Mental and Cognitive Disabilities: Pathways into Prison' (Background paper for the Outlaws to Inclusion Conference, February 2012) 2.

¹⁸ Australian Human Rights Commission, *Asylum Seekers, refugees and human right: Snapshot report (2nd edition) 2017*

<https://reliefweb.int/sites/reliefweb.int/files/resources/AHRC_Snapshot%20report_2nd%20edition_2017_WEB.pdf>.

¹⁹ Public Interest Advocacy Centre, *In Poor Health: Health Care in Australian immigration detention* (2018) 12.

- Article 10 of the ICCPR, which states that all people deprived of their liberty have the right to be treated with humanity and respect.

At a minimum, laws that result in indefinite detention should be repealed. There is also a need for legal and other support for people engaging with the criminal justice system. Holistic, integrated support for people with mental ill health would improve outcomes and also reduce the costs related to complex court processes and incarceration. Given the disparate impact of criminalisation and incarceration on women and Aboriginal and Torres Strait Islander people, Baldry et al have recommended that five principles should underpin policy review and implementation: self-determination, person-centred support, holistic and flexible approach, integrated services and culture, disability and gender-informed practice.²⁰

Recommendations

KLC recommends that:

1. Federal and state governments repeal laws that result in all forms of indefinite or arbitrary detention;
2. Federal and state government ensure that people in detention receive adequate health care to the same standard as people in the community; and
3. Funding is provided for implementation of community-led strategies for holistic integrated support of people with mental ill health in contact with the criminal justice system. Support must include culture, disability and gender-informed practice especially culturally appropriate support for Aboriginal and Torres Strait Islander people.

3. Impact of discrimination on participation and productivity

In KLC's work we constantly see the impacts of inequality and discrimination on members of our community. Many of the people we work with face multiple and intersecting disadvantage as a result of entrenched exclusion, unfair treatment and unequal distribution of resources.

Experiences of discrimination

Through KLC's NSW-wide discrimination legal service we are contacted by more than 250 people each year whose ability to participate fully in public life has been impacted by discriminatory conduct. In many cases the discrimination is severe and has a large impact on each individual's ability to engage in employment, education and/or public life. In our experience, the impact of having had mental ill health endures beyond recovery, with many people being discriminated against for having experienced periods of mental illness in the past.

²⁰ Eileen Baldry et al, 'A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System' (UNSW, October 2015), 161.

People who access our services report that discrimination causes them serious hurt, embarrassment and humiliation and worsens their mental health. These reports align with international research showing a clear relationship between discrimination and increased risk of mental ill health.²¹

The following section outlines the experiences of KLC clients in a number of areas of life where the current operation of the law has failed to adequately protect people with disability. At the end of this section, we recommend amendments to law and policy to achieve improved protection of people's rights to be treated equally and live free from discrimination. Our recommendations in section 4 are also relevant to improving the experience of people with mental ill health as they interact with education providers, employers, shops and other public service providers.

- *Education*

From KLC's work, we know that people experiencing mental ill health and mental health disabilities have unequal access to education throughout childhood and their adult lives. There are many different ways in which access to education is affected, from poor treatment in the classroom of a mainstream school through to a lack of support to engage with tertiary education courses.

Case study - Ana

Ana finished high school and was keen to undertake some further study. She was approached in a shopping centre by a private college who offered her a free laptop if she enrolled in a course. She was assured that the course would never cost her money, because she was unlikely to ever reach the income level at which you have to pay off a government education debt. Ana has a mental health disability and it was clear that she was a vulnerable young person at the time this occurred.

Ana started the course but could not continue due to a sudden family tragedy and change in her employment situation. Ana was initially charged nearly \$30,000 for the full course. KLC represented Ana at the Administrative Appeals Tribunal seeking a full refund and during that process the education provider agreed to waive the full debt.

- *Employment*

KLC's experience is that many people with mental ill health perform a range of jobs in the Australian workforce and have a significant ability and desire to participate. However, many face disability discrimination in employment. We hear from people who

²¹ American Psychological Association, 'Stress in America: The impact of discrimination' 10 March 2016, <https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf>; Dan Gordon, 'Discrimination can be harmful to your mental health: UCLA experts view mental health status of victims as a public health concern', UCLA Newsroom, 13 January 2016, <http://newsroom.ucla.edu/stories/discrimination-can-be-harmful-to-your-mental-health>.

have been denied work or are forced to leave their jobs due to discrimination by employers. In some cases, our clients struggle so hard to find work that they drop out of the workforce altogether.

There is economic evidence that broadly reflects our experience. Recent reports have estimated that impact of mental ill health on the Australian economy is close to \$60 billion per year.²² 2018 modelling shows that investing in mental health reform would generate significant short and long term savings as interventions that improve mental health have life-long impacts. Flow on benefits include reducing absenteeism and presenteeism which increases the productivity of the labour force.²³

Case study - Oliver

Oliver applied for a new job in the industry he had worked in for many years. Throughout the application process, the company was positive about Oliver's chances of getting the job. The interviewer told him that he was a good fit for the role. As part of a general disclosure form, Oliver told the interviewer that he had a mental health illness. The interviewer then told him that he could not have the job. Oliver was not given a chance to explain why his disability would not impact his ability to do the job well.

Case study – Bo

Bo was starting their first job out of university. Bo is from a migrant background and was entering an industry known for being traditional and conservative. At the beginning of the employment, they disclosed to their boss that they were experiencing depression and anxiety and needed to attend regular psychologist appointments. After a few months, Bo's health situation changed and they started taking some medication which improved their health but resulted in drowsiness in the mornings. Bo requested a change to their working hours to accommodate this.

This request was refused and Bo was demoted into another role where the hours were 'less demanding'. Bo felt humiliated and demeaned by this treatment and let down by the employer's lack of a clear process for handling requests for reasonable adjustments. Bo left their job and was unemployed for months afterwards as a result.

- *Housing*

Maintaining housing in private rental or social housing is a common issue for people experiencing mental ill health, due in part to discriminatory policies and conduct on the part of landlords.

²² Mental Health Australia and KPMG, 'Investing to Save: The Economic Benefits for Australia of Investment in Mental Health Reform' (2018) 17.

²³ Ibid, 76.

Case study - Wei

Wei was a long-term social housing resident with significant psychiatric illness. He lived alone with assistance from community-based mental health services. During his tenancy he was hospitalised for a period of almost 6 months. The social housing provider sent Wei an eviction notice for not occupying his premises in breach of their “allowable absences” policy. This was despite the hospital nursing staff telling the housing provider that more time was required, and that eviction would have a very serious negative impact on Wei’s health.

The eviction notice was not withdrawn until Kingsford Legal Centre assisted Wei to make a discrimination complaint, which was eventually resolved through conciliation.

- *Goods and services*

KLC receives many complaints about discrimination in the provision of goods and services. One key area of discrimination that has arisen in recent years is discrimination against people with psychiatric assistance animals. Despite psychiatric assistance animals being covered by Commonwealth anti-discrimination law, they are often not recognised by accommodation providers, airlines and public transport. These assistance animals are crucial in supporting individuals with mental health issues increase their social engagement and participation in public life.

Case Study – Ali and Max

Ali was formally diagnosed with anxiety and was aided by a psychiatric assistance dog, Max, every time Ali travelled or left his house. At the time of this incident, Ali took public transport to university, as he did not have a car.

One day Ali was refused entry to public transport with Max even though Max was certified as an assistance animal and B showed the driver Max’s licence. The driver yelled at Ali, “get off”, and other passengers mocked Ali. Representatives from Transport for NSW and the police dealt with the situation by forcing Ali to leave.

As a result of this incident, Ali did not wish to travel on public transport due to subsequent heightened anxiety symptoms. Ali’s emotional stress from the incident affected his relationships, physical health and education as Ali did not attend university for a week and his memory and ability to concentrate deteriorated from the trauma of the event.

Recommendations

KLC recommends that:

1. Employers and service providers be provided with education and training on the rights of people with mental health illness and obligations to provide reasonable adjustments; and
2. Funding be provided for community legal education for mental health support services to enable them to identify legal problems and link people with legal services as needed.

Current legal protections

Effective anti-discrimination legislation is essential to combating systemic discrimination and achieving substantive equality. Strengthening existing laws to protect people who have experiences like those in the case studies above is of strategic importance in shifting attitudes and prejudices against people experiencing mental health illness, which will support higher rates of participation in the workforces.

Discrimination occurs in many aspects of the lives of people experiencing/who have experienced mental health illness but is only unlawful under NSW and/or Commonwealth law in the following areas:

- Education;²⁴
- Employment;²⁵
- Access to goods and services;²⁶
- Accommodation;²⁷
- Dealings with interests in land;²⁸
- Clubs (registered clubs in NSW) and incorporated associations (Commonwealth law only);²⁹
- Sport;³⁰ and
- Administration of Commonwealth laws and programs.³¹

Current anti-discrimination laws in Australia are inadequate due to their inconsistency, limited scope, failure to address systemic or intersectional discrimination and broad exemptions. Plans to consolidate federal anti-discrimination law were abandoned in 2013. The retention of separate legislation dealing with different grounds of discrimination makes it difficult for complainants who experience intersectional discrimination.

²⁴ *Disability Discrimination Act 1992* (Cth) (DDA) s 22; *Anti-Discrimination Act 1977* (NSW) (ADA) s 49L.

²⁵ DDA pt 2 div 1; ADA pt 4A div 2.

²⁶ DDA s 24; ADA s 49M.

²⁷ DDA s 25; ADA s 49N.

²⁸ DDA s 26; no equivalent protection in the ADA.

²⁹ DDA s 27; ADA s 49O.

³⁰ DDA s 28; no equivalent protection in the ADA. Discrimination in sport is exempted from the protections in the ADA under s 49R, and broad exceptions are included in the DDA protection.

³¹ DDA s 29.

Recommendations

KLC recommends that a comprehensive Equality Act be enacted that addresses all the prohibited grounds of discrimination, promotes substantive equality and provides effective remedies, including against systemic and intersectional discrimination.

Exceptions from disability discrimination protections

NSW law contains a blanket exception if discrimination occurs against a person who is addicted to a prohibited drug at the time of the discrimination (section 49PA of the *Anti-Discrimination Act 1977 (NSW)*).³² There is no proper basis for this exception, and it does not exist in the Commonwealth legislation.

There are also unfair exceptions under NSW and Commonwealth law relating to the provision of insurance to people experiencing mental health illness.³³ In NSW, the Public Interest Advocacy Centre (PIAC) has found that this results in inequality and discrimination for people trying to access different types of insurance, in some cases preventing them from accessing insurance policies at all. This can occur even where there is no diagnosis of mental illness.³⁴

Discrimination in the insurance industry has been considered by a number of governmental inquiries, including the Royal Commission into Misconduct by the Banking, Superannuation and Financial Services Industry.³⁵ The AHRC has issued guidelines for providers of insurance and superannuation.³⁶ Detailed recommendations to prevent this kind of discrimination have been made by Mental Health Australia and PIAC in response to the Banking Royal Commission.³⁷

³² ADA s 49PA.

³³ ADA s 46; DDA s 49Q.

³⁴ Public Interest Advocacy Centre, *Mental Health and Insurance* (Web Page) <<https://www.piac.asn.au/project-highlight/mental-health-and-insurance/>>

³⁵ Mental Health Australia, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).

³⁶ Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation under the Disability Discrimination Act (2016)* (Guidelines, November 2016) <<https://www.humanrights.gov.au/our-work/disability-rights/guides/guidelines-providers-insurance-and-superannuation-under-disability>>

³⁷ Public Interest Advocacy Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (25 October 2018); see also Mental Health Australia, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (October 2018).

Recommendation

KLC recommends that:

1. The NSW government repeal section 49PA of the *Anti-Discrimination Act 1977* (NSW); and
2. The federal government adopt the recommendations made in submissions by PIAC and Mental Health Australia in relation to insurance provision, including:
 - a. Amendments to the *Disability Discrimination Act 1992* (Cth) to require insurers to provide written reasons and access to statistical and actuarial data when they reject insurance applications or claims; and
 - b. As discussed below, the AHRC be given the power to conduct own-motion investigations and take enforcement action in relation to insurance and superannuation discrimination.

Discrimination complaints processes

KLC supports people who have been discriminated against because of a mental illness to take their complaint through the formal complaint resolution mechanisms available. The main external complaint mechanisms are:

1. the Australian Human Rights Commission;
2. in NSW, the Anti-Discrimination Board; and
3. for matters involving employment, general protections complaints to the Fair Work Commission.

All of these processes feature alternative dispute resolution practices aimed at finalising a complaint before it progresses to a hearing in court.

In KLC's view, there are numerous problems within the current complaints mechanisms which weaken the level of protection against discrimination for people experiencing/who have experienced mental health illness. Problems include:

- Complainants bear the onus of proof and face severe power imbalances in complaint processes, which can exacerbate their mental ill health;
- Many complainants to the AHRC settle through confidential informal dispute resolution processes to avoid the risk of being ordered to pay the other side's legal costs in the federal courts. This limits the creation of new case law and a broader dialogue around systemic discrimination;
- Time limits for making a complaint in discrimination matters have been reduced in recent years. The time limit to complain to the AHRC has been reduced from 12 to 6 months.³⁸ The time limit to complain to the FWC if a person has been dismissed from employment is only 21 days, and extensions are only allowed in the most extreme circumstances. Most complainants in general protections dismissal matters would not know whether an extension would be granted by the FWC before they go to conciliation, putting pressure on them to settle their complaint.

³⁸ *Human Rights Legislation Amendment Act 2017* (Cth) s 39.

Case study - Sam

Sam had been working for his employer for around 5 months when he experienced a period of severe mental ill health. He was hospitalised for more than a week. He told his employer that he was being admitted to hospital and provided a medical certificate to his employer. The employer responded by text message advising that he was fired.

Sam left the hospital and spent a week recovering at home. After that time, he complained to the FWC under the general protections provisions. He fell outside of the 21 day time limit for making this kind of complaint.

Despite having a strong discrimination argument and good reasons for his delay in complaining, Sam felt pressured during the conciliation process to settle his claim due to the risk that the FWC would not allow him an extension of the 21 day time limit. He accepted a very small settlement offer rather than continue with the process.

We have listed below a selection of key recommendations that would strengthen people's rights to equality and freedom from discrimination. For a comprehensive review of discrimination complaints processes and detailed recommendations to improve the experience of vulnerable people engaging with those processes, please see KLC's 2018 report "Having my voice heard: Fair practices in discrimination conciliation."³⁹

Recommendations

KLC recommends that:

1. Federal and State governments should provide additional resourcing to anti-discrimination bodies including the AHRC, ADB and FWC to allow them to perform their functions and provide efficient conciliation processes with appropriate flexibility and support for people experiencing mental health illness;
2. Funding for free legal assistance services to assist applicants in discrimination matters should be increased;
3. The AHRC Discrimination Commissioners, ADB President (and equivalent positions in states other than NSW) and Fair Work Ombudsman should be given powers to investigate and initiate court proceedings in relation to discriminatory conduct that appears unlawful without an individual complaint. The FWC President should refer matters to the FWO as appropriate;
4. The role and powers of AHRC Discrimination Commissioners, ADB President and FWO should be expanded to increase the role of these bodies in addressing systemic discrimination. These powers should include monitoring of duty holders, commencing complaints, intervening in matters, and reporting annually to Commonwealth Parliament/State Parliament, and to the public, on discrimination matters;

³⁹ Kingsford Legal Centre, *Having my voice heard: Fair practices in discrimination conciliation* (Web Page) <http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/2870%20having%20my%20voice%20heard%20report_WEB.pdf>

5. The *Australian Human Rights Commission Act 1986* (Cth) be amended to reinstate the 12-month time limit to lodge a complaint of discrimination and to make the Federal Court and Federal Circuit Court no costs jurisdictions for discrimination complaints; and
6. The *Fair Work Act 2009* (Cth) be amended to allow at least 60 days for making a complaint relating to a dismissal from employment.

4. Need for comprehensive clinical and non-clinical support

Healthcare

As outlined in the Productivity Commission's issues paper, many past reviews have covered the issues in mental health healthcare in Australia, including a focus on acute services rather than early intervention and inequitable access to care.⁴⁰ While KLC is not involved in healthcare provision, we frequently observe and hear from the people we work with about the gaps in publicly funded psychological and psychiatric care.

Medicare rebates cover up to 10 appointments per year per individual for those who can access the Better Access initiative. This means that people who need a fortnightly appointment with a psychologist will only be covered for a period of 20 weeks (less than 6 months) per year. Those who require support from psychologists and psychiatrists in order to manage medications as well as other therapeutic care are faced with a difficult balancing act and the prospect of extensive further costs and/or gap payments. For people in rural and remote areas accessing this care can require even more extensive travel time and costs.

LGBTI people's health

LGBTI people is one group that have poorer mental health outcomes than the general population. This is evidenced by rates of suicide attempts, which are five times higher for LGBTI young people aged 16 to 27 years, six times higher for people over 16 with an intersex variation and eleven times higher for transgender adults.⁴¹ There is a need for training and specialist services to address these issues.

Non-clinical mental health support services

KLC works with a number of different support services in our area. Many of these services have been serving the community in South Eastern Sydney for many years. They were created pre-NDIS to provide support to people with a range of mental health illnesses including psychosocial disability. Services provide support such as assisting with access to other services, advocacy, social participation and recovery and rehabilitation.

⁴⁰ Productivity Commission, *The Social and Economic Benefits of Improving Mental Health* (Issues Paper January 2019) 12.

⁴¹ National LGBTI Health Alliance, 'Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People' (Report, July 2016) <[http://lgbtihealth.org.au/wpcontent/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for LGBTI-people-and-communities.pdf](http://lgbtihealth.org.au/wpcontent/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf)>.

We hold grave concerns that some of these services are struggling to continue operating following funding changes under the NDIS. While some people are able to access funding for psychosocial support under the NDIS, many were never intended to be covered by the NDIS scheme.⁴² The NDIS is designed to cover approximately 64,000 people with psychosocial disability. It is not designed to cover the estimated 690,000 Australians who live with severe mental health problems.⁴³ Mental health support services are reducing their services due to mental health funding being transferred to the NDIS, creating a funding shortfall.⁴⁴ The NDIS eligibility criteria requires applicants to prove their disability is permanent,⁴⁵ while people with mental health problems are generally treated with the goal of recovery.⁴⁶

In its 2014 inquiry into Access to Justice Arrangements, the Productivity Commission recommended that legal assistance and relevant non-legal service providers 'should be encouraged to coordinate their services in order to provide more outreach and holistic services where appropriate and need is greatest.'⁴⁷ Funding is urgently required to ensure that experienced mental health community and support workers are available to people with mental health illness.

Case study – Partners in Recovery

Eastern Sydney Partners in Recovery (PIR) is a government funded program which provides support facilitators to people with severe and persistent mental illness with complex needs, and their carers and families.⁴⁸ They can help people to connect with housing and income support, health services, social groups and culturally appropriate services.

ILC receives referrals from PIR when they identify a person as needing legal assistance. We are then able to work with the person and their PIR caseworker to resolve legal problems. In our experience, PIR enables access to our service for people who would

⁴² Stephen Easton, 'Case Study: mental health services still struggling in the NDIS era' *The Mandarin* (online, 26 February 2019) <https://www.themandarin.com.au/104542-case-study-mental-health-services-still-struggling-in-the-ndis-era/>.

⁴³ University of Sydney and Community Mental Health Australia, 'Mind the Gap: The National Disability Insurance Scheme and Psychosocial Disability' (Report, 30 January 2018) 4 <<https://www.theguardian.com/australia-news/2018/jan/29/ndis-failing-people-with-severe-mental-healthissues-new-report-warns>>.

⁴⁴ Liz Hobday, 'Patients Lives at Risk after NDIS Funding Redirected, Mental Health Victoria Says' ABC News (online, 7 May 2018) <<http://www.abc.net.au/news/2018-05-07/ndis-mental-health-funding-changes-puttinglives-at-risk/9732596>>.

⁴⁵ National Disability Insurance Scheme Act 2013 (Cth) s 24(b).

⁴⁶ Christopher Knaus, 'NDIS: People with Severe Mental health Problems being Denied Access on a Daily Basis' ABC News (online, 18 September 2017) <https://www.theguardian.com/australia-news/2017/sep/18/ndis-people-with-severe-mental-health-problems-being-denied-access-on-a-daily-basis>

⁴⁷ Productivity Commission, *Access to Justice Arrangements* (Productivity Commission Inquiry Report No 72), 5 September 2014, 42.

⁴⁸ Eastern Sydney Partners in Recovery, *About Us* (Web Page) <http://espir.com.au/about-us/>.

otherwise struggle to deal with the appointments, paperwork and process involved in legal matters.

We have worked with PIR on matters including discrimination complaints, social housing applications, Centrelink and debt, and know how much their involvement helps people who come to us for legal assistance.

Housing support

There is a well-established link between mental ill health and homelessness.⁴⁹ Despite this, there is still a significant lack of social housing available for those who are experiencing homelessness. Nationally there were approximately 200,000 people on the waitlist for social housing in 2016, resulting in wait times of two years or more. There is a general shortage of social housing as well as a particular shortage of specific supported housing for people experiencing mental ill health.⁵⁰ This is an unacceptable position when we know the harm that homelessness causes to health, and the benefits that can flow from housing stability.

Case study - Philippa

Philippa was homeless and had been living in her car for around 2 years when she first came to KLC. Her mental health illnesses made it impossible for her to access shared accommodation such as shelters or boarding houses. Philippa did not have any casework or other social supports. Philippa came to KLC for assistance with a number of unfair fines that she had been issued as a result of her homelessness, including a fine for failing to advise a government body of a change of address and fines relating to parking the car she was living out of.

KLC was concerned that Philippa's long-term homelessness was causing her mental and physical health to deteriorate. We were able to support Philippa's application for housing support through a social housing provider. After 2-3 months of advocacy work, Philippa was able to move into affordable social housing. Philippa told us that she was doing much better since moving into her new home.

Income support

Another key issue for people experiencing mental health illness is accessing income support. If a person is unable to work due to their mental health, they will apply for the Disability Support Pension (DSP) or try to subsist on the very low Newstart payment which may be accompanied by mutual obligations of looking for work, even if they

⁴⁹ Australian Housing and Urban Research Institute, *Housing, homelessness and mental health: towards systems change* (2018) 11.

⁵⁰ *Ibid*, 17.

cannot actually work.⁵¹ This means that the people who are least able to comply with mutual obligations requirements are most likely to have their payments suspended for non-compliance.

One problem that people with mental health disabilities face when applying for DSP payments is that sufficient medical evidence needs to be submitted with their claim. Obtaining this evidence can represent a substantial out-of-pocket cost, given gap payments associated with seeing clinical mental health professions can exceed \$100 per session.⁵² This is especially a barrier to those clients in vulnerable situations who may have limited funds to pay such cost, and/or may experience difficulties accessing community mental health services (as outlined above). Another barrier is that at the time of diagnosis it can be difficult to obtain medical evidence to prove the medical condition will be permanent, particularly for people experiencing fluctuating symptoms of mental ill health.

KLC is also concerned by the difficulties that people with mental health or psychosocial disability face once they are deemed eligible for DSP. Our clients often face additional costs related to their illnesses, including payments for ongoing sessions with clinical mental health professionals, out-of-pocket medicine costs, and costs of regular in-home support for regular domestic activities. The maximum basic single DSP rate of \$421.80 per week⁵³ is often insufficient for our clients with severe and ongoing mental illness to adequately meet their costs of living.

Recommendations

KLC recommends that:

1. Federal and state governments increase the availability and affordability of mental health healthcare, including for people experiencing temporary and ongoing mental health illness.
2. Federal and state governments ensure sustainable long-term funding for non-clinical support services for people experiencing mental health illness.
3. Health professionals and health service providers be provided with education and training to ensure non-discriminatory access to mental health services for LGBTI people;
4. Funding to be provided for targeted health promotion and suicide prevention initiatives to be developed in collaboration with LGBTI specific service providers and community organisations.
5. State governments urgently increase the availability and accessibility of social housing, including supported housing for people with complex needs.
6. The federal government make changes to DSP claims and assessments process to make it more accessible and appropriate for people experiencing

⁵¹ Social Security Guide, 3.2.11.10 *Mutual Obligation Requirements* [Web page] <http://guides.dss.gov.au/guide-social-security-law/3/2/11/10>.

⁵² Mental Health Council of Australia, 'Key issues brief: Mental illness and the income support system', available at https://mhaustralia.org/sites/default/files/docs/mental_illness_and_the_income_support_system_key_issues_paper.pdf, 3.

⁵³ Department of Human Services, 'Payment rates for Disability Support Pension' [Web page] <https://www.humanservices.gov.au/individuals/enablers/payment-rates-disability-support-pension/39881>.

- mental ill health, including the changes recommended by the National Social Security Resource Network's 2018 DSP Project;⁵⁴ and
7. The federal government urgently raise the rate of Newstart payments.

Conclusion

People experiencing mental health illness have the right to participate equally and freely in public and social life. Governments can increase people's ability to participate in Australian society and contribute to our economy by upholding their rights through elimination of discrimination and provision of essential clinical and non-clinical support.

We welcome this important inquiry and look forward to engaging further in the Productivity Commission process. If you wish to discuss our submission, please contact us at legal@unsw.edu.au or on (02) 9385 9566.

Yours faithfully,
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⁵⁴ National Social Security Rights Network, *Disability Support Pension (DSP) Project: A snapshot of DSP client experiences of claims and assessments since the 2015 changes* (January 2018) 6-8.