
Inquiry into Parklea Correctional Centre

Legal Aid NSW supplementary
submission to Portfolio Committee
No. 4 – Legal Affairs

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the

Court of Criminal Appeal as well as the High Court of Australia.

The Prisoners Legal Service (**PLS**) provides representation in hearings at the State Parole Authority, prison discipline offences before a Visiting Magistrate, reviews of segregation directions, and applications in the Supreme Court to determine a term for pre 'truth-in-sentencing' life sentences. The PLS also provide general legal advice and minor assistance to prisoners by way of a visiting advice service to most gaols and responding to letters and telephone calls from or on behalf of prisoners.

Legal Aid NSW welcomes the opportunity to provide further information to the Committee's Inquiry into Parklea Correctional Centre following evidence given to the Inquiry on behalf of Legal Aid NSW on 3 August 2018. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to respond to questions on notice arising from our evidence to the Legal Affairs Committee on 2 August 2018 and to provide further information relevant to the Inquiry into Parklea Correctional Centre (Parklea CC).

The following responses to the Questions on Notice relate to the following issues:

1. The role and effectiveness of oversight bodies in ensuring accountability in privately run prisons;
2. Whether there have been any complaints made to either the NSW Ombudsman or the Inspector of Custodial Services on behalf of prisoners;
3. Whether there should be a medical ombudsman or independent medical review panel to monitor health complaints of chronic, unmet need, and whether this could be achieved through Legal Aid NSW, one of the inspectors or the NSW Ombudsman;
4. Whether Legal Aid is aware of any instances in prisons which the HCCC has investigated?

We also provide some additional material to the Inquiry regarding barriers to accessing health care in custody.

Legal Aid NSW will respond separately to the Committee's request for a confidential detailed submission about the case study of 'Patrick' included in our written submission dated February 2018.

The role and effectiveness of oversight bodies in ensuring accountability in privately run prisons

Question on Notice¹

In your submission, No. 36, at page 11 you state that a number of institutions have oversight of private prisons. They include the Auditor-General, the Inspector of Custodial Services, Corrective Services NSW and the Ombudsman. You note that in the last decade they have written fewer than 50 pages. Is there a suggestion that these institutions have failed to fulfil their role of ensuring that these prisons are being accountable?

Response

The reference to the research of Professor Andrew et al in Legal Aid NSW's written submission dated February 2018 was not intended to suggest that current oversight bodies of private prisons in New South Wales have failed in their roles. In our view, each body provides an important public accountability function in respect of private prisons in

¹Transcript of Report on Proceedings, page 32

NSW. However, we consider that these oversight functions, and public accountability more broadly, could be enhanced, including through:

- Provision of greater detail of private correctional centres' performance in Corrective Services NSW annual reports, and
- publication of contracts between private prison operators and the NSW Government.

Complaints to oversight bodies

Question on Notice²

Have you ever made any complaints to the Inspector of Custodial Services about the operation of the prisons?... If you can take the question on notice and check whether there have been any complaints made to either the NSW Ombudsman or the Inspector of Custodial Services.

While there has been an open dialogue between the Inspector of Custodial Services and Prisoners Legal Service (PLS) for many years, a review of PLS's files in recent years reveals no formal complaints have been made on behalf of our clients to either the Ombudsman or the Inspector of Custodial Services (ICS). Based on our experience, this can be explained by two factors: first, a reluctance of inmates to lodge a formal complaint, even where grounds exist, due to potential adverse consequences while they remain in prison. Typically, an inmate will tell us "*I don't want anything formal done until I get out of gaol because I don't want to deal with the fall-out from staff if I complain*". In such cases, inmates are reminded by PLS staff that they have access to the Ombudsman on the CALD system³ if they change their minds or are advised to seek further legal advice upon their release from prison.

Second, in our experience, inmates may be confused about which body or mechanism to complain to with regards to unmet health needs.

Under the *Crimes (Administration of Sentences) Act 1999* (NSW) (the CAS Act), both Corrective Services NSW and the Justice Health & Forensic Mental Health Network (Justice Health) share responsibility for the delivery and management of health services in custody. Section 236A of the CAS Act sets out the functions of Justice Health, while Part 18 of the *Crimes (Administration of Sentences) Regulation 2014* (NSW) establishes the reporting obligations between prescribed health officers and prescribed correctional officers. Together, both the CAS Act and Regulation facilitate a close working relationship between the two agencies in respect of the delivery of health care.

² Transcript of Report on Proceedings, page 35

³ Common Auto Dial List

However, there is undoubtedly scope to more clearly demarcate and signpost the roles and functions of the various oversight bodies who have a role in NSW prisons. For example, psychology services are managed and delivered by Corrective Services NSW, while psychiatry services are managed and delivered by Justice Health. Issues relating to dietary needs are also managed by Corrective Services NSW, but our clients are often unaware of these distinctions and frequently make complaints to nursing staff in the hope that their complaint reaches the correct person or agency.

Prison Health Project

Since establishing the Prison Health Project with the Public Interest Advocacy Centre (PIAC), Legal Aid NSW has received 120 client inquiries about health complaints and we have assisted many of them in the form of advice, minor assistance, grants of aid or referral to private practitioners for personal injury advice. In some cases, clients had already made oral or written complaints about their health care before seeking advice from us. The Project has enabled Legal Aid NSW to identify complaints where clients may otherwise have been unaware of the pathways, or simply unable, to ventilate concerns as to the treatment. To date, the Project has operated within existing resources, but current demand for our advice and assistance concerning prisoners' complaints is outstripping our capacity.

While Legal Aid NSW is not in a position to furnish a comprehensive picture of health-related complaints by prisoners, the following two tables indicate the type of complaints lodged about health issues and the mechanism or oversight body contacted by the client or by Legal Aid NSW.

Inmate complaints by complaint mechanism (2013-2018)⁴

Complaint to Ombudsman	Complaint to Official Visitor (ICS)	Complaint to Justice Health	Complaint to HCCC
6	3	6	14

Complaints lodged by Legal Aid NSW for inmates by complaint mechanism 2017-2018

Complaint to Ombudsman	Complaint to Official Visitor (ICS)	Complaint to Justice Health	Complaint to HCCC
0	0	15	7

⁴ These figures reflect only those complaints referred to and recorded by the Human Rights Team in our Civil Division. Total number of inmates in the data set is 119. In some cases, the same client may have complained to more than one mechanism or oversight body.

As at the date of this submission, we are also drafting a number of additional complaints for clients to the NSW Health Care Complaints Commission (HCCC) and to the NSW Ombudsman.

Notably, all complaints drafted and lodged by Legal Aid NSW on behalf of clients to date have been directed to either Justice Health or the HCCC. This reflects the fact that both bodies have established complaints mechanisms and we have identified them as the correct agency or body to complain to. Justice Health can receive written complaints through a Client Liaison Officer - a complaint process which can be utilised for 'local resolution' of an issue. In an ordinary case, Legal Aid NSW corresponds with the officer setting out the client's health concerns or grievance, and the officer contacts health staff on the ground at the centre to find out information, pass on the client's concerns, arrange for nursing staff to interview the client and confirm appointments or treatment plans. In most cases, we receive a written reply to the complaint within 35 days, which may obviate the need to complain to the HCCC.

We address the functions of the HCCC below.

Inspector of Custodial Services

The Inspector of Custodial Services (ICS) is appointed by government to inspect adult correctional centres and juvenile justice centres, and report to Parliament on the findings of its inspections. The functions of the ICS are governed by the following pieces of legislation in NSW:

- *Inspector of Custodial Services Act 2012*
- *Children (Detention Centres) Act 1987*
- *Children (Detention Centres) Regulation 2015*
- *Crimes (Administration of Sentences) Act 1999*
- *Crimes (Administration of Sentences) Regulation 2014*
- *Government Information (Public Access) Act 2009*

Under section 6 of the *Inspector of Custodial Services Act 2012* (NSW), the Inspector has a statutory obligation to inspect and report to Parliament on each adult correctional facility at least once every five years. The Inspector may choose to report on an issue of public interest or she may be requested by the Minister to report on a particular issue.

According to its website, the Inspector cannot investigate individual complaints except insofar as they relate to systemic issues present in the correctional environment.⁵ Potential complainants are instead directed to the NSW Ombudsman.

The ICS also auspices the Official Visitor program, part of whose role is to resolve inquiries and complaints by inmates (or staff) and report on the condition of correctional centres. Every Official Visitor is assigned to specific centres and visits each once a fortnight. To speak to the Official Visitor, inmates must generally ask a correctional officer to book them into the Official Visitor book for the next scheduled visit.

Anecdotally, clients in custody are well aware of their right to complain to the Official Visitor, but have reported limited success in achieving favourable resolutions. That observation attests to the complexity of meeting health needs in the custodial environment more than it does the capacity of Official Visitors to intervene. However, it is arguable that inmates need to be better informed about where to lodge their complaints in order to ensure that they find their way to the correct body with the requisite power to investigate or take action. This also means that in due course the appropriate agency can collect data and report on systemic issues of public significance.

Independent Medical Review

Question on Notice⁶

Mr DAVID SHOEBRIDGE: Could Legal Aid extend the program with some additional resources so that it could get inmates' complaints to the HCCC? Is that one way of dealing with it? I am wondering whether or not it is the viable solution, through Legal Aid, one of the inspectors or the ombudsman?

Response

HCCC

The HCCC is empowered to receive complaints about health services and health service providers in NSW under the *Health Care Complaints Act 1993* (NSW). (HCC Act).⁷ Its functions are to:

- receive and assess complaints relating to health service providers in NSW
- resolve or assist in the resolution of complaints
- investigate serious complaints that raise questions of public health and safety
- prosecute serious complaints.

⁵ See: <http://www.custodialinspector.justice.nsw.gov.au/Pages/What-we-do.aspx>

⁶ Transcript of Report on Proceedings, page 35

⁷ More information about the HCCC's powers and functions are available on its website: <http://www.hccc.nsw.gov.au/>

We understand that in 2017, the HCCC received approximately 1,500 calls from inmates about health issues.⁸ Legal Aid NSW would welcome any additional support or funding which might enable our staff to assist more prisoners with health complaints. The growing prison population not only makes it likely that more prisoners will seek our services, but also creates tensions in the custodial environment which place inmates at greater risk of experiencing health problems. We note, for example, that NSW has the highest rate of prisoner on prisoner assaults in the country.⁹ Many of the most serious complaints which we have received about delay, inadequate pain management or lack of access to allied health care relate to incidents involving an assault in custody.

Conversely, according to the *Full House Report (2015)* by the Inspector of Custodial Services, “CSNSW has the lowest operating and capital cost per prisoner per day of any Australian correctional jurisdiction”.¹⁰ In practice, that means there are less staff available to receive a prisoner’s self-referral form, inmate request or general grievance. Even when staff are physically accessible, clients at Parklea report that they have been told “inquiries are closed” and sent away. The purely ‘notional’ availability of staff can also have deleterious effects on an inmate’s mental health: as their complaints are deferred, dismissed or even spurned, they feel increasingly despondent about the prospect of getting help.

In our view, the HCCC may be a suitable body to undertake the analysis of systemic health issues in custody, but its statutory objects and powers may require amendment to do so. Under the HCC Act, the HCCC performs a role akin to an independent medical ombudsman. The Commission’s current powers allow it to:

- receive and assess complaints about the standard of health care provided by an individual or a service¹¹;
- investigate a complaint where
 - it raises a significant issue of public health or safety, or
 - raises a significant question as to the appropriate care or treatment of a client by a health service provider, or
 - if substantiated, it would provide grounds for disciplinary action against a health practitioner, or
 - if substantiated, would involve gross negligence on the part of a health practitioner, or
 - if substantiated, would result in the health practitioner being found guilty of an offence under Division 1 or 3 of Part 7 of the *Public Health Act 2010*,¹²

⁸ This figure was given to Legal Aid NSW informally by HCCC staff; meeting held 22 March 2018.

⁹ Figures are reported for 2016-2017. See Table 8.2, *Report on Government Services*, 2018, Chapter 8 – Corrective Services.

¹⁰ *Full House: The growth of the inmate population in NSW* (Department of Justice, April 2015), page 5.

¹¹ Section 19

¹² Section 23

-
- receive expert assistance in order to form a view about the adequacy of clinical care and treatment.¹³

Part 2, Division 6 of the HCC Act sets out the powers, among other things, to refer the complaint to the relevant professional council for disciplinary action, while Division 7 allows the Commission to make recommendations or comments to a health organisation. The Commission also has own-motion powers to investigate the clinical care and management of a client by a health service provider where it appears “the matter raises a significant issue of public health or safety” (Part 3).

Legal Aid NSW is not aware of whether the HCCC has exercised its Part 3 powers in relation to either Justice Health or a prescribed health officer employed in a correctional centre. However, in our view, the health issues ventilated in both our written and oral evidence strongly suggest that unreasonable delay in accessing health care of any kind is widespread, systemic and therefore arguably meets the ‘significant issue’ threshold.

We understand that currently, the HCCC does not have a systemic reporting function in respect of health services in correctional environments. The most recent Annual Report (2016-2017) makes no mention of prison-related issues and there appears to be only one published case study about an inmate complaint. Instead, reporting responsibility for gaols sits with the Inspector of Custodial Services (ICS), whose statutory purview extends far beyond health issues. Although the Inspector is currently undertaking an inspection into ‘Provision of health services’ at seven correctional facilities in NSW,¹⁴ this is one of many inspections which will be undertaken in the coming year about various custodial issues.

Legal Aid NSW has a number of concerns about the split functions regarding oversight of prison health as between the ICS and HCCC:

- The ICS has a statutory obligation to inspect each gaol at least once every five years¹⁵. Both the number of facilities in NSW and the breadth of issues which might arise for inspection place a practical limitation on the ICS’s capacity to consistently and specifically report on health services in correctional centres on a periodic basis. For example, over the last three years the Inspector has reported on issues as diverse as inmate population growth, aged offenders, clothing and bedding, 24-hour court cells and radicalised inmates. Health care issues featured in only some of those reports, but they were evidently not in focus. Even if the ICS’s current inspection offers insights into the systemic issues with health services in custody, it will not have gathered information from the majority of gaols in NSW.
- Further, the ICS’s inspection occurs in isolation from the specific health complaint-handling functions of the HCCC which, ideally, should drive analysis on an ongoing

¹³ Section 30

¹⁴ A report is expected in 2019.

¹⁵ *Inspector of Custodial Services Act 2012* (NSW), section 6

basis. Without ground-level data on complaints by facility, issue type, demographic factors and outcome, on a year-by-year basis, it is difficult to see how any robust comparative analysis can take place. In turn, it is difficult to ensure the kind of systemic improvement which the HCCC aspires to achieve, or to measure whether forthcoming recommendations made by the Inspector have been implemented and engendered change.

The HCC Act and the *Inspector of Custodial Services Act 2012* (NSW) are both silent on the interrelationship between the two agencies when dealing with prisoners' health. By contrast, the *Law Enforcement Conduct Commission Act 2016* (NSW) provides:

- The Ombudsman is required to report certain matters, including possible officer misconduct or serious maladministration to the Law Enforcement Conduct Commission (LECC), and may refer other complaints to the LECC,¹⁶ and
- For the LECC and the Ombudsman to enter into information sharing arrangements regarding certain investigations and reports.¹⁷

This may provide a useful precedent in considering potential legislated guidance as to the respective roles of the HCCC and ICS in dealing with prison health complaints.

Recommendation

The NSW Government consider mechanisms for ensuring the respective responsibilities of, and the relationship between, the ICS and HCCC are clearly defined and supported so as to promote the systemic oversight of prison health in NSW.

Investigation of Justice Health or other custodial health practitioners

Question on Notice¹⁸

The Hon. SCOTT FARLOW: Mr Levin, you said that HCCC has the power to investigate. Are you aware of any instances within prisons where it has investigated in the past?

Response

Legal Aid NSW is aware of two HCCC assessment or investigation decisions concerning Justice Health staff at Parklea and Junee. In the Case Study of 'Chioke' (included in our written submission 36a), the client lodged a complaint to the HCCC, without assistance, which led to a two-stage assessment by the HCCC. At the first stage, the HCCC sought an Internal Medical Advice (IMA) which concluded that there was a failure to recognise

¹⁶ See sections 33 and 165.

¹⁷ Section 165(4)

¹⁸ Transcript of Report on Proceedings, page 36

and escalate symptoms of chest pain on the client's first attendance at the clinic at Parklea, and a failure to consider referral to hospital. The Commission subsequently identified two individual health care providers and sought responses from them. At the second stage of assessment, the Commission determined to take no further action because it agreed with the Medical Council of New South Wales that there was insufficient evidence to demonstrate that the practitioner's knowledge, skill, judgement or care represented a significant departure from what would be reasonably expected of a practitioner of an equivalent level of training or experience. Since that incident, the client instructs that he now has permanent heart damage.

In a second decision, the HCCC undertook a comprehensive investigation of the care and treatment afforded to our client, Patrick¹⁹ across seven facilities, including Parklea CC.

In a third case not involving Parklea or Junee, Legal Aid NSW lodged a complaint on behalf of a female prisoner who had suffered two traumatic medical episodes in three years. We represented her at an Assisted Resolution meeting facilitated by the HCCC after it declined to investigate. Our lawyers found that process illuminating from a procedural point of view. However, arguably, the chief shortcoming of the Resolution Service provided by the HCCC is that, unlike dispute resolution mechanisms in other sectors, the outcomes of an Assisted Resolution meeting are non-binding on the parties and do not allow scope for any form of reparation such as compensation. Despite the best intentions of both HCCC and Justice Health staff, our client left the conciliation feeling frustrated and dissatisfied.

Recommendation:

The *Health Care Complaints Act 1993 (NSW)* should be amended to allow binding agreements between the parties to a Conciliation, breach of which would be enforceable either through the HCCC or an ordinary common law claim.

Access to health care in custody

We refer to the Committee's request for any additional information that Legal Aid NSW wishes to provide to the Committee. By way of supplementary submission to our oral and written submissions, we draw the Inquiry's attention to some of the difficulties which inmates may face in accessing health care in custody.

During lock-in times, inmates must use their cell's internal buzzer or 'knock up' system if they have an urgent health issue and need to attend the clinic. To the extent that inmates spend significant time locked in their cells, they are therefore heavily reliant on correctional staff to listen to and action their request for assistance with health needs.²⁰

¹⁹ Patrick's experience is outlined in our Submission dated February 2018.

²⁰ According to a report by the Productivity Commission, NSW has the lowest number of hours of time out-of-cells per prisoner per day: see Figure 8.8, *Report on Government Services*, 2018, Chapter 8 – Corrective Services.

The following case study illustrates these difficulties. While this case concerns a client located at Junee Correctional Centre – and while concerns regarding the “knock up system” are by no means unique to private prisons²¹ - Tadhg’s experience reflects similar reports from clients at Parklea over recent years.

Case Study: Tadhg – Knocking up

Tadhg is a middle-aged man who was in custody at Junee Correctional Centre. Tadhg instructs that he was bitten by a venomous spider in his cell at Junee. He ‘buzzed up’ three times using the emergency intercom in his cell to ask officers to take him to the health clinic, including twice between 12am and 4am, and a third time at about 4am. None of these attempts resulted in Tadhg receiving medical attention.

During this time Tadhg became nauseous, his eyes were rolling back in his head and he was unable to walk.

At 7am, he was let out of his cell and staggered to the health clinic. He noticed a round circle on his leg the size of a 50 cent piece. It felt hot and was spreading. He waited approximately one hour to see a nurse, lying on the ground for some of that time due to lethargy. He was given antibiotics and an anti-nausea injection to stop him vomiting and he was returned to his wing. Thirty minutes later he vomited and passed out. His leg was very swollen and had blisters on the back.

Later in the afternoon, Tadhg was admitted to the local health service, where he was diagnosed with severe cellulitis and oedema in his right leg with sepsis. Due to the seriousness of Tadhg’s condition he was initially admitted to the ICU. He spent a total of 12 days in hospital.

Tadhg also states that officers repeatedly told him that he had to return to gaol because of the cost of keeping him in hospital.

Tadhg instructs that the infection persists and has left him with a large visible scar and discolouration on his leg. Two years later, he continues to receive treatment for an oedema and infection on his ankle and wears a compression bandage around his right calf. He reports having difficulty walking, an inability to run, constant pain and throbbing in his leg, numbness and circulation problems. Consequently, he has gained considerable weight due to physical inactivity.

²¹ See, for example, the recent Findings in the Inquest into the death of Fenika Junior Tautuliu Fenika (Junior Fenika) dated 13 July 2018, available at [http://www.coroners.justice.nsw.gov.au/Documents/Findings%20-%20Junior%20Fenika%2013%20July%202018%20\(2\).pdf](http://www.coroners.justice.nsw.gov.au/Documents/Findings%20-%20Junior%20Fenika%2013%20July%202018%20(2).pdf)

Legal Aid NSW would be pleased to appear before the Inquiry again to provide further information in relation to the issues in this supplementary submission.