THE LAW SOCIETY
OF NEW SOUTH WALES

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Mental Health Seclusion Review
c/o Mental Health Branch
NSW Ministry of Health
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By email: MHSeclusionReview@moh.health.nsw.gov.au

Dear Dr Wright,

Review of seclusion, restraint and observation of consumers with a mental illness in NSW Health facilities

Thank you for the opportunity to participate in the review of seclusion, restraint and observation of consumers with a mental illness in NSW Health facilities. The Law Society's Children's Legal Issues Committee has contributed to this submission.

The Law Society endorses the following position statement from the National Mental Health Commission on seclusion and restraint in mental health:

> There is a lack of evidence internationally to support seclusion and restraint in mental health services. There is strong agreement that it is a human rights issue, that it has no therapeutic value, that it has resulted in emotional and physical harm, and that it can be a sign of a system under stress.[1]

To ensure consistency with national standards and international best practice, the Law Society recommends:

1. strengthening the legal safeguards in the *Mental Health Act 2007* (NSW) (**"MHA**"), with a particular emphasis on promoting the welfare of children;
2. inserting provisions in the MHA to improve accountability and transparency in relation to the use of restrictive practices; and
3. that NSW Health actively engage with the Australian Government's consultation process for the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**OPCAT**").

[1] Australian Government, National Mental Health Commission, 'A Case for Change: Position Paper on Seclusion, Restraint and Restrictive Practices in Mental Health Services' (May 2015).

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1. Background

The Law Society appreciates the Government's efforts to reduce and, where possible, eliminate the use of seclusion and restraint in mental health facilities. However, we are concerned about reports that children have been subject to high rates of seclusion and restraint at NSW psychiatric facilities.[2] The UN Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment has found that solitary confinement of any duration imposed on children constitutes cruel, inhuman or degrading treatment and violates article 7 of the *International Covenant on Civil and Political Rights* ("**ICCPR**") and article 16 of the *Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment* ("**CAT**").[3] He also found that the prolonged restraint or seclusion of people with disabilities can constitute torture.[4]

We are also concerned by reports that due to bed shortages children are being placed in adult mental health facilities.[5] Article 37 of the *Convention of the Rights of the Child* enshrines the right of children deprived of liberty to be separated from adults.[6]

Accordingly, the Law Society suggests that this review should seek to ensure that existing legislation, policies and practices pay sufficient attention to rights of the patient, especially children. As Human Rights Commissioner, Ed Santow, emphasises "[w]hen a person is detained in prison, a mental health facility, anywhere, they remain human ... Protecting their basic dignity is just as important as it was before their detention".[7]

2. Strengthening the legal safeguards against the use of seclusion and restraint in the *Mental Health Act 2007* (NSW)

The Law Society is concerned the legal safeguards against the use of restrictive practices, such as seclusion and mechanical and chemical restraint, do not adequately protect the rights of patients, including children.

We note that the MHA provides authorised officers with broad powers to "take any action that the officer thinks fit" to protect the patient or any other person in a mental health facility.[8] This includes the use of restrictive practices such as seclusion and restraint. However, the MHA does not contain any provisions which regulate the use of these practices. This is regulated

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[2] See, eg, Kate Aubusson and Inga Ting, 'Seclusion, restraint in NSW psychiatric units: Children kept in isolation for up to 38 hours on average', *The Sydney Morning Herald* (online) 17 May 2017 <http://www.smh.com.au/national/health/seclusion-restraint-in-nsw-psychiatric-units-children-kept-in-isolation-for-up-to-38-hours-20170516-gw5zqp.html>; Professor Ian Hickie, 'Seclusion and restraint in psychiatric hospitals must end today', *The Sydney Morning Herald* (online), 15 May 2017 <http://www.smh.com.au/comment/seclusion-and-restraint-in-psychiatric-hospitals-must-end-today-20170515-gw52nb.html>.

[3] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/66/268 (5 August 2011), [77]

[4] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/63/175 (28 July 2008), [55]-[56].

[5] One Door Mental Health, Submission to NSW Health, *Review of seclusion, restraint and observation of consumers with a mental illness in NSW Health Facilities*, 19 July 2017, 2 <http://www.onedoor.org.au/ArticleDocuments/459/19072017%20NSW%20Inquiry%20Seclusion%20and%20Restraint.pdf.aspx>.

[6] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC').

[7] Alexandra Beech, 'OPCAT: Australia makes long-awaited pledge to ratify international torture treaty', *ABC News* (online), 9 February 2017 <http://www.abc.net.au/news/2017-02-09/australia-pledges-to-ratify-opcat-torture-treaty/8255782>.

[8] *Mental Health Act 2007* (NSW) s 190. See also at s 81.

by a NSW Health Policy Directive on "Aggression, seclusion and restraint: Preventing, minimising and managing disturbed behaviour in mental health facilities in NSW" (**"the Policy Directive"**). The Law Society considers that the Policy Directive is a commendable statement of the safeguards that should apply in relation to the use of seclusion and restraint. However, we submit that these safeguards may be more effective if they are enshrined in the MHA.

The Law Society recommends strengthening section 68 of the MHA which contains principles for care and treatment of people with a mental illness or mental disorder. In particular, we recommend the insertion of the following mandatory considerations to protect the welfare of children in mental health facilities and to reflect Australia's obligations under international human rights law:

1. The best interests of the child must be the primary consideration in all decisions affecting the child;[9]
2. Children must not be subjected to torture or other cruel, inhuman or degrading treatment or punishment;[10]
3. Children must not be deprived of their liberty unlawfully or arbitrarily;[11]
4. The detention of a child shall be in conformity with the law and shall be used only as a measure of law resort and for the shortest appropriate period of time.[12]

The Law Society also considers that special legal safeguards may help to protect the welfare of high risk patients who are more susceptible to the risk of harm from the use of seclusion or restraint. In particular, for children, we recommend introducing:

1. a general prohibition on the use of seclusion and restraint with penalties for non-compliance;
2. an exception to the general prohibition which permits the use of seclusion and restraint only in exceptional circumstances and as a measure of last resort;
3. a set of guiding principles for the use of seclusion and restraint in exceptional circumstances. We suggest that the principles outlined under heading 4.3 of the Policy Directive be replicated in the MHA; and
4. provisions which acknowledge the special vulnerability of children and provide additional safeguards for the use of seclusion and restraint.

We note the Policy Directive refers to children being particularly prone to experiencing trauma as a result of coercive interventions.[13] We support additional training of mental health staff to increase their awareness of the special considerations for managing the behaviour of children and young patients.

The Law Society considers that these changes will help to ensure consistency with national standards and international best practice.

3. Transparency and oversight of seclusion and restraint practices in NSW Health

The Law Society is concerned about the adequacy of the oversight mechanisms in the MHA.

First, the MHA does not adequately protect patients or staff members from reprisals where they make a report or provide information to an Official Visitor or an officer authorised by the

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[9] CROC art 3(1).
[10] CROC art 37(a).
[11] CROC art 37(b).
[12] CROC art 37(b).
[13] Policy Directive, 4.

Secretary where it is not required by the MHA. We recommend inserting a provision similar to section 20 of the *Inspector of Custodial Services Act 2012* (NSW) (**"ICS Act"**) and sections 37(4) and 37(5) of the *Ombudsman Act 1974* (NSW).

Second, we are concerned that requests by a patient to see an Official Visitor are made through the medical superintendent or the director of the facility.[14] Further, there is no penalty where the medical superintendent or the director fails to inform an Official Visitor of such a request. We recommend that the section be amended and procedures be put in place to allow patients to contact an Official Visitor directly.

Third, the MHA does not provide penalties for failing to comply with the obligations for mental health facilities under section 132 to facilitate the functions by Official Visitors. We acknowledge that a maximum penalty of 50 penalty units applies for failing to comply with a requirement by an authorised officer under section 138. However, this penalty is significantly less than the penalty for obstructing the Inspector of Custodial Services. We recommend inserting a provision similar to section 19 of the ICS Act that applies to both Part 3 and Part 4 of the MHA.

The Law Society is also concerned about the lack of transparency in relation to the use of seclusion and restraint. We support the submission by One Door Mental Health that data on 'who, how long for, how many times, by whom and why any individual is secluded or restrained' should be collected and reported to NSW Health and the NSW Mental Health Commission.[15] This data should also be audited to determine whether each instance of seclusion or restraint is justified.[16] We also recommend making this a statutory requirement.

To improve transparency and accountability, the Law Society also recommends that NSW Health creates a centralised database for seclusion data and that this data be publicly available.

4. The implications of OPCAT and the need for NPM oversight

In February 2017, the Australian Government announced its intention to ratify OPCAT by December 2017.[17] This will have implications for NSW mental health inpatient facilities as facilities which contain people who have been deprived of their liberty will be subject to additional oversight mechanisms.[18] This includes inspections by an international body, the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("SPT") as well as by a domestic national preventive mechanism ("NPM") body.

The ratification of OPCAT and the introduction of a NPM will have significant benefits for NSW mental health facilities. Most importantly, it will assist in identifying and rectifying issues of concern before they lead to violations of human rights.

The Law Society has previously advocated for the creation of a single NPM reporting body for NSW which in turn reports to a federal body such as the Australian Human Rights Commission. We recommend that inspection teams have suitably trained mental health

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[14] MHA s 134.
[15] One Door Mental Health, Submission to NSW Health, *Review of seclusion, restraint and observation of consumers with a mental illness in NSW Health Facilities*, 19 July 2017, 8–10 <http://www.onedoor.org.au/ArticleDocuments/459/19072017%20NSW%20Inquiry%20Seclusion%20and%20Restraint.pdf.aspx>.
[16] Ibid.
[17] Opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006); the Australian Government has indicated it intends to ratify OPCAT by December 2017.
[18] Ibid art 4.

professionals so that the circumstances of each patient can be professionally and accurately assessed.[19] We also recommend that any NPM reporting body work cooperatively with the existing Official Visitor program under the MHA.

The Law Society encourages NSW Health to participate in the Australian Government's consultation process for the implementation of OPCAT with a view to improving oversight of NSW mental health facilities and reducing instances of seclusion and restraint, particularly on children and other vulnerable patients.

5. Role of Justice Health officers in Juvenile Justice facilities

While the Law Society notes the focus of the review is on seclusion and restraint in NSW Health Facilities, the Law Society would like to draw the review panel's attention to the treatment of juveniles in detention centres, and in particular the use of seclusion (also referred to as segregation).[20] We are of the view that this issue is relevant given that Justice Health is established as a statutory health corporation and is funded by NSW Health.[21]

We note that young people with mental health or cognitive impairments are overrepresented in the juvenile justice system.[22] Statistics indicate that 87 percent of young people in custody have a past or present psychological disorder, and rates are higher for Indigenous young people in custody.[23]

The Law Society has previously raised concerns about the treatment of children in detention within NSW and past practices in which children have been segregated and not permitted any peer interaction.[24] These concerns are heightened for children and young people with a mental health condition. The Children's Legal Issues Committee would be happy to provide further details about its knowledge of these practices if it would assist the review panel.

Justice Health & Forensic Mental Health Network ("**Justice Health**") delivers a range of health services in Juvenile Justice facilities.[25] In particular, Justice Health workers are involved in monitoring the mental health of juveniles, including those placed in segregation. The following legislative provisions facilitate the provisions of services by Justice Health to juveniles:

1. A detainee is to be examined by a Justice Health officer as soon as practicable after being received into a detention centre.[26]
2. As soon as practicable after forming an opinion that a detainee's mental state requires monitoring, a Justice Health officer must report to the centre manager that he or she has formed the opinion and the grounds for the opinion.[27]

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[19] The Law Society of NSW's submission is available here: https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1385445.pdf.
[20] Members of the Law Society note that "seclusion" has variously been referred to by Juvenile Justice as separation, segregation, seclusion and solitary confinement.
[21] *Health Services Act 1997* (NSW).
[22] Mental Health Commission, *Towards a just system: mental illness and cognitive impairment in the criminal justice system* (July 2017) <https://nswmentalhealthcommission.com.au/sites/default/files/documents/justice_paper_final_web.pdf>
[23] Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S., Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. (2011) 2009 NSW Young People in Custody Health Survey: Full Report. Justice Health and Juvenile Justice. Sydney.
[24] Law Society of NSW, *Royal Commission into abuse of children in detention* (29 July 2016) <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1188326.pdf>
[25] NSW Government, Juvenile Justice, Juvenile Justice Year in Review 2015-2016 <http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/publications/2015-16%20Year%20in%20Review.pdf>
[26] *Children (Detention Centres) Regulation 2015* (NSW) (**"Regulation"**), cl 130.

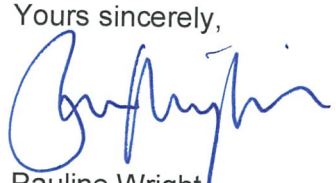
3. If a juvenile is to be segregated for more than 24 hours, the detainee must be visited daily by a Justice Health officer.[28]
4. Where a juvenile has been segregated for more than 24 hours and is at risk of harm, if advised by Justice Health that the detainee should be checked on by a Juvenile Justice officer more frequently than at least once in any 10 minute period, the centre manager must follow that recommendation.[29]

The Law Society considers that Justice Health officers play an important role in monitoring the mental health of children and young people who are incarcerated, and particularly those who are placed in segregation. The Law Society submits that it is incumbent on NSW Health to ensure that Justice Health workers are also properly trained to manage the behaviour of children and young patients and that these workers are made aware of the relevant human rights provisions relating to children, including the use of the least rights-restrictive methods.

Further, the Law Society reiterates its previous comments that, in practice, those who are most likely to come into contact with young people in detention centres are those who visit frequently; that is, lawyers, health visitors and doctors. These stakeholders are often the 'front line' in identifying inappropriate practices and should have access to a mechanism, such as a NPM body (as discussed above), which allows them to make a report directly to a monitor who has the power to take action.[30]

Thank you for considering this submission. Should you have any questions or require further information, please contact Amelia Jenner, Policy Lawyer on (02) 9926 0275 or email amelia.jenner@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

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[27] Regulation, cl 132(1).
[28] Regulation, cl 10(2)(c).
[29] Regulation, cl 10(2)(d).
[30] Law Society of NSW, *Option Protocol to the Convention against Torture (OPCAT) in the context of Youth Justice Detention Centres* (30 May 2016).<https://www.humanrights.gov.au/sites/default/files/11.%20The%20Law%20Society%20of%20New%20South%20Wales%2C%20Michael%20Tidball%20CEO%20-%2030%20May%202016.pdf>