

1. Thank you for the opportunity to make a submission to the Productivity Commission's (**the Commission**) inquiry into mental health.
2. Legal Aid ACT is an independent statutory authority established under the Legal Aid Act 1977. It is funded by the Territory and Commonwealth governments to provide legal assistance to disadvantaged people. The purpose of Legal Aid ACT is to promote a just society in the Australian Capital Territory by:
 - a. Ensuring that vulnerable and disadvantaged people receive the legal services they need to protect their rights and interests;
 - b. Developing an improved community understanding of the law; and
 - c. Seeking reform of laws that adversely affect those we assist.
3. The terms of reference for the inquiry and the questions posed in the issues paper with respect to mental health and the justice system are quite broad and wide ranging. The issues paper has already identified some aspects of mental health in the criminal justice system that could be improved.
4. One issue that was not identified in the issues paper, but which deserves consideration, is the definition of 'mental illness' in the relevant State and Territory mental impairment provisions. In particular, it is our experience that 'mental illness' is often construed narrowly by the Office of the Director of Public Prosecutions such that individuals are caught in the criminal justice system as opposed to being diverted to therapeutic interventions.
5. The relevant provisions in the Criminal Code 2002 (ACT) are:

Criminal Code 2002, section 27

- (1) **Mental impairment** includes senility, intellectual disability, mental illness, brain damage and severe personality disorder
- (2) *In this section:*

Mental illness is an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition ('a reactive condition') resulting from the reaction of a healthy mind to extraordinary external stimuli.

- (3) *However, a reactive condition may be evidence of mental illness if it involves some abnormality and is prone to recur.*

6. The difficulties arise where an individual's psychosis (for example) could be attributed to drug use or some combination of drug use and existing mental illness. It is well established that drug use can affect a person's mental state such that he or she could not know the nature or quality of his or her actions, could not know their conduct was wrong or could not control their conduct (see section 28, Criminal Code 2002). Further, it is also well established that prolonged drug use can give rise to certain mental illnesses such as schizophrenia or psychosis, that drug use can exacerbate existing mental illness and that having a mental illness is a risk factor for drug use (which, in turn, can exacerbate the illness, and so on). In short, is often 'not possible to

distinguish substance-induced psychosis from a first-episode psychosis in the context of a primary mental health disorder due to the very high level of comorbidity.¹

7. The New South Wales Law Reform Commission recommended in its report on mental impairment that 'the proposed definition of mental health impairment [in the Mental Health (Forensic Provisions) Act 1990]...include "substance induced mental disorders"...[defined as] ongoing mental health impairments such as drug induced psychoses, but excludes substance abuse disorders (addiction to substances) or the temporary effects of ingesting substances."² The recommendation has not been taken up in New South Wales. It was also noted in the NSWLRC report that this definition has the same effect as the definition in the ACT Criminal Code. However, in practice, this is often not the case in the ACT. Legal Aid ACT's experience is that offenders who have 'substance induced mental disorders' often have difficulty resolving matters by way of a mental impairment defence where 'dual diagnoses' are a possibility; the DPP's preference seems to be to take these matters to trial and to see the issue as one to be decided by the jury.
8. Legal Aid ACT accepts the breadth of prosecutorial discretion afforded to the DPP. However, it is suggested that the definition of mental illness should be amended. We suggest that an inclusive, functional definition that focuses on the *nature* rather than the *cause* of the mental impairment is most appropriate. Further, the definition should make clear that substance induced mental disorders fall within the definition of mental illness. This would result in earlier resolution of some mental impairment matters without the need for a full trial to the benefit of the offender, the prosecution, the courts and the wider community.
9. It is also noted that the various provisions relating to mental impairment differ to some degree across the States and Territories. Harmonization of the provisions would also be of some benefit.
10. If you require further information or clarification in relation to this submission, please contact Jane Campbell

¹ Dominique Bourget, 'Forensic Considerations of Substance-Induced Psychosis' (2013) 41 *The Journal of American Academy of Psychiatry and the Law* 168, 168

² New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Criminal responsibility and consequences*, Report No 138 (2013), 60.