



SUBMISSION MADE BY THE COUNCIL OF OFFICIAL VISITORS

to the

Review of the *Mental Health Act 1996* and *Criminal Law (Mentally Impaired Defendants) Act 1996*

in accordance with the *Mental Health Act 1996*, section 215.

SUMMARY OF RECOMMENDATIONS

Terms of Reference

“To review the operation and effectiveness of the Mental Health Act 1996 and in the course of that review consider and have regard to:

- 1 the effectiveness of the operations of the Mental Health Review Board and the Council of Official Visitors;*
- 2 the need for the continuation of the functions of the Mental Health Review Board and the Council of Official Visitors; and*
- 3 such other matters as appear to be relevant to the operation and effectiveness of the Mental Health Act 1996.”*

GENERAL & OVERARCHING ISSUES

Issue: FUNDAMENTAL PRINCIPLES & UNDERPINNING OF THE ACT

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be reviewed and remodelled to achieve best legislative practice, similar to the Northern Territory *Mental Health Act 2002*.

Issue: REVIEW OF THE MENTAL HEALTH ACT 1996

RECOMMENDATION:

It is recommended that *Mental Health Act 1996*, section 215 be amended to include a 5-yearly periodical review, the next commencing after the Act has been in operation for 10 years.

Issue: RESPONSIBILITIES OF CHIEF PSYCHIATRIST FOR PSYCHIATRIC CARE

RECOMMENDATION:

It is recommended that *Mental Health Act 1996*, section 9 be amended to reflect the responsibility of the Chief Psychiatrist for:

- 1 the medical and **psychiatric** care, and welfare of all involuntary patients; and
- 2 monitoring the standards of psychiatric care provided throughout the State for **all** patients.

INVOLUNTARY STATUS AND COMMUNITY TREATMENT ORDERS

Issue: DETENTION OF VOLUNTARY PATIENTS

RECOMMENDATION:

The *Mental Health Act 1996* be amended to include a clear statement that a person is not to be detained in an authorised hospital other than in an emergency unless that detention is authorised by this Act (or another nominated Act).

Issue: CRITERIA FOR INVOLUNTARY STATUS

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* section 26 be amended such that:

- 1 the matters which must be considered in the provision of consent are specified (as per Northern Territory *Mental Health Act 2002* section 7);
- 2 section 26(1)(b) require protection to be from “*imminent risk of harm*”; and
- 3 section 26(1)(c) include “*unreasonably refuse*”.

Issue: ORDER TO BE RELEASED

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* sections 37 and 40(1)(b) be amended to require an “*Order to release from detention*” be issued if the decision is made to not make an involuntary patient order or order an extension of detention.

Issue: REVIEW BY PSYCHIATRIST

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*:

- 1 section 48 provisions be amended to provide a maximum initial period of detention of 14 days; and
- 2 section 49(4) provisions be amended to provide a maximum subsequent period of detention of 3 months.

Issue: ABSENCE WITHOUT LEAVE & ABSCONDING RECEIVED PERSONS

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, sections 57 and 58 be amended by deleting the term '*as an involuntary patient*' so that the provisions will apply to any person subject of an order for detention, no matter their status.

Issue: COMMUNITY TREATMENT ORDERS (CTO)

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* section 26 be amended to provide a set of criteria applicable to treatment in the community.

It is recommended that the *Mental Health Act 1996* be amended to include a new provision prohibiting Community Treatment Orders from including an order to reside in a particular place.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* sections 70 and 80 be amended to require that:

- (i) a Breach of CTO is not of itself grounds for revocation;
- (ii) the provisions governing the grounds for revocation mirror the current provision for Breaches of CTOs, that is, there is a significant risk of deterioration of the person's condition, all reasonable steps have been taken to ensure compliance, in addition to the patient's failure to comply; and
- (iii) for both breaches and revocations the specifics of the deterioration risk be identified on the documentation giving notice of the breach or in the order of revocation.

It is recommended that the *Mental Health Act 1996* sections 82(3) and 84(1) be amended to specify:

- (i) the person responsible for providing a copy of the order/s;
- (ii) the time span in which this must occur.

It is recommended that the *Mental Health Act 1996* section 84(3)(c) be amended to provide a maximum time limit on the detention authorised by that section, specifically 6 hours being a significant portion of an ordinary working day.

It is recommended that the *Mental Health Act 1996* sections 82 and 84 be amended to specify the time limit on the life of orders under these sections.

It is recommended that an extension of CTO under *Mental Health Act 1996*, section 76 should not be available if a section 82 or section 84 order has been made and treatment has not been given when the current CTO lapses.

TREATMENT OF PATIENTS

Issue: DIVISION 5 - ELECTROCONVULSIVE THERAPY

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended by removing sections 104(2) and 107(2).

It is recommended that the *Mental Health Act 1996*, section 113 be amended such that electroconvulsive therapy is prohibited as an *emergency psychiatric treatment*.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, sections 105 be amended such that:

- 1 if an involuntary patient or mentally impaired defendant in an authorised hospital is deemed to have capacity to consent to ECT and reasonably refuses such consent
 - (a) their status should be reviewed; and
 - (b) the treatment must not be given
- 2 if an involuntary patient or mentally impaired defendant in an authorised hospital is deemed to lack capacity to consent or unreasonably withholds consent the decision to provide ECT be subject to review by an external review body.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* provisions governing the use of electroconvulsive therapy be amended to include the provisions that an external body has responsibility to review and report on:

- 1 compliance with the Act's provisions governing electroconvulsive therapy;
- 2 frequency of use electroconvulsive therapy; and
- 3 appropriateness of the intervention.

Issue: CONSENT NOT REQUIRED FOR PSYCHIATRIC TREATMENT

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, section 109 be amended to reflect the provisions and requirements of the Northern Territory *Mental Health Act 2002*, sections 55(4) and 56.

Issue: USE OF REASONABLE FORCE

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, section 109 be amended so that:

- 1 where involuntary treatment is authorised, reasonable force may be used to give that treatment; and
- 2 documentation of the use of force, including the reason, staff involved, other strategies utilised, be included in the patient's case notes.

Issue: TREATMENT AND DETENTION - THE ORDER TO DETAIN SHOULD NOT BE AUTHORITY TO TREAT A PERSON WITHOUT CONSENT

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended such that there be a separation of orders relating to involuntary detention and treatment into two:

- 1 for involuntary status and detention; and
- 2 for involuntary treatment if informed consent to treatment cannot be given or is unreasonably withheld.

Issue: TREATMENT OF REFERRED PERSONS

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* specify that treatment cannot be given to a referred person without informed consent.

It is recommended that where any treatment is provided to a person referred for assessment there should be a requirement to report such treatment to either the Mental Health Review Board or the Council of Official Visitors or both bodies.

It is recommended that the appropriate complementary amendments elsewhere in the Act be made to provide for the above (eg Section 175's definition of 'affected person').

Issue: MEDICAL TREATMENT MAY BE APPROVED BY THE CHIEF PSYCHIATRIST

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended by deleting section 110 given the provisions of the *Guardianship and Administration Act 1990*.

RECOMMENDATION:

It is recommended that if the *Mental Health Act 1996*, section 110 provision is retained it be amended to clarify its intent. It is Council's view that the 'intent' should be to the effect that the power of the Chief Psychiatrist to approve medical treatment is limited to those who lack capacity to consent and do not have a Guardian appointed who may consent in their stead.

It is recommended that the *Mental Health Act 1996* be amended to set out the elements which would show the capacity to consent and the essential elements of consent and such provisions already exist in Sections 95 to 98 inclusive.

RECOMMENDATION:

It is recommended that if the *Mental Health Act 1996* section 110 provision is retained that it be amended to include a definition of "medical treatment".

RECOMMENDATION:

It is recommended that sterilisation be specifically prohibited in the *Mental Health Act 1996* as a treatment for mental illness.

It is recommended that if the *Mental Health Act 1996* section 110 provision is retained that sterilisation be specifically prohibited as a medical treatment which may be authorised under the provisions of that section. If sterilisation is necessary this should be progressed via an application under the *Guardianship and Administration Act 1990*.

RECOMMENDATION:

It is recommended that **if** the *Mental Health Act 1996* section 110 provision is retained that guidelines be developed and / or restrictions put in place governing the approval of contraception under section 110 to ensure an adequate degree of separation between the prescribing doctor and the authorising psychiatrist.

It is recommended that **if** the power of the Chief Psychiatrist to approve contraception is to be retained it should be limited to those consumers who lack capacity to consent **and** do not have a Guardian appointed who may consent in their stead and is limited to no more than 3 months in which time application can be made for a Guardianship Order.

RECOMMENDATION:

It is recommended that **if** the *Mental Health Act 1996* section 110 provision is retained that guidelines be developed and / or restrictions put in place, governing the types of medical treatments that can be approved under the **delegated** authority of the Chief Psychiatrist to ensure an adequate degree of separation between the prescribing doctor and the authorising psychiatrist.

It is recommended that decisions related to medical treatment involving 'lifestyle issues' (e.g. prescribing of contraception to prevent pregnancy rather than treatment for a medical condition) be the sole responsibility of the patient who has capacity to consent. In cases where the patient lacks capacity that the decisions, other than in an emergency, can only be made by a Guardian appointed with appropriate powers.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* in relation to medical treatment of minors have provisions:

- 1 which ensure mature minors aged 14 to 17 years with capacity to consent have the right to consent to medical treatment; and
- 2 where any decisions to provide medical treatment to a minor without that minor's consent be subject to review by an external body on the request of the minor or their advocate.

Issue: SECLUSION

RECOMMENDATION:

It is recommended that the definition of seclusion (*Mental Health Act 1996*, section 116) be amended to include any time there is a deliberate act or omission on the part

of hospital staff which creates the belief of sole confinement of the patient, at any time of the day or night, alone in a room or area from which they are not free to leave.

RECOMMENDATION:

It is recommended that the recording requirements associated with the use of seclusion, Regulation 12, be amended to include recording of duties performed as required by sections 120(a) and 120(b) of the *Mental Health Act 1996*.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* provisions governing the notification of use of seclusion to an external body be retained and amended to include provisions which specify the responsibilities of that body, including to review and report on:

- 1 compliance with the Act's provisions;
- 2 frequency of use; and
- 3 appropriateness of the intervention.

Issue: BODILY RESTRAINTS - MECHANICAL BODILY RESTRAINTS

RECOMMENDATION:

It is recommended that the need to comply with the *Mental Health Act 1996* be clarified.

It is recommended that the *Mental Health Act 1996* section 123 be amended to delete the grounds of "*persistently destroying property*".

It is recommended that the *Mental Health Act 1996* be amended such that a bed with cot sides, a chair with attached table and a recliner-rocker ("tub chair") be excluded from the definition of mechanical bodily restraint where used to prevent unintended injury to a frail patient.

It is recommended that where mechanical bodily restraint is applied in an emergency there be a requirement for a mental health practitioner to physically attend and monitor the patient until attendance of a medical practitioner, as soon as is practicable.

It is recommended that unless a medical practitioner is in personal attendance restraint must be for no more than one three-hour period in a day (24 hours).

It is recommended that all instances of restraint be recorded in the patient's case notes as well as in a register.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* provisions governing the notification of use of mechanical bodily restraint to an external body be retained and amended to include provisions which specify the responsibilities of that body, including to review and report on:

- 1 compliance with the Act's provisions;
- 2 frequency of use; and
- 3 appropriateness of the intervention.

Issue: BODILY RESTRAINTS - CHEMICAL RESTRAINT

RECOMMENDATION:

It is recommended consideration be given to inclusion of "chemical" restraint in the provisions of the *Mental Health Act 1996*.

PROTECTION OF PATIENTS' RIGHTS

Issue: EXPLANATION AND DOCUMENTATION OF PATIENT RIGHTS

RECOMMENDATION:

It is recommended that:

1. the *Mental Health Act 1996* be amended such that the term 'legal status' in Regulation 18(a) be given a clear definition;
2. the *Mental Health Act 1996* be amended such that a time be prescribed for giving the explanation required under section 156 of the Act;
3. there be follow-up to ensure a reasonable understanding is reached by the consumer of their rights;
4. the explanation be given through accredited interpreters, advocates or other specialists, where necessary for persons with special needs;
5. generic, multiple choice documents cease being used in the giving of explanations as they do not give adequate explanations;
6. the *Mental Health Act 1996* be amended such that it clearly identify that the responsibility to inform a consumer on a CTO rests with the person making the CTO; and
7. consumers have a right to receive a copy of the referral for assessment.

Issue: ACCESS TO PERSONAL RECORDS

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* (the Act) sections 160 and 161 be amended such that:

1. the definition of 'suitably qualified' person be clarified and extended;
2. if necessary, provision be made to prevent passing on of restricted information to the patient;
3. reasons for restricting release of information under the Act be given in writing;
4. there be a time limit of 10 working days from request for provision of records under the Act;
5. where the record is requested for a Mental Health Review Board hearing, it is to be provided at least 2 working days before the hearing;
6. there is a right to correct or rebut comments made in the records relating to a patient; and
7. refusal to permit correction/ rebuttal of comments be subject to review and appeal processes.

It is recommended that the *Mental Health Act 1996* be amended such that patients are automatically provided with a copy of the medical or other reports provided to the Mental Health Review Board for a hearing before that Board, prior to the hearing. Applications by clinical staff to have any of that information withheld from the patient should be made to the Board, who should have the power to determine whether it will be withheld.

Issue: OFFENCE OF ILL-TREATMENT

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, section 162 provisions be amended to provide a substantial monetary penalty and a term of imprisonment for ill treating a patient, for example \$20,000 or 2 years imprisonment or both.

Issue: DEFINITION OF PATIENT

RECOMMENDATION:

It is recommended that the definition of '*patient*' for the purposes of *Mental Health Act 1996* Part 7 Division 2 be amended to include all persons who are:

- a) admitted as a patient; or

b) otherwise detained

in authorised hospital whatever their status.

Issue: **SECOND OPINION**

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended such that:

1. second opinions may only be provided by a psychiatrist who is independent of the facility in which the patient is being treated;
2. the second opinion be in the form of a written report and that a copy be provided to the patient or a 'suitably qualified' person as referred to in section 161(3);
3. second opinions be provided within 2 working days of the request; and
4. examination of a patient for the purpose of a second opinion may be by audio-visual means.

Issue: **PERSONAL POSSESSIONS**

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* section 165 be amended such that:

1. articles of personal use that are used as prosthetics or are aids to daily living be defined;
2. use of such articles be permitted as a right;
3. reasons be given for every restriction or denial on the use of any personal use items and the reasons be recorded in the patient's case notes;
4. every restriction or denial on the use of a prosthesis or aids to daily living be reviewed by a psychiatrist daily or lapse;
5. **every** restriction or denial on the use of personal items be subject to a Mental Health Review Board review and also subject to an appropriate external appeals process; and
6. notice of every restriction or denial of use / storage of personal use items be reported to the Mental Health Review Board and Council of Official Visitors within 1 working day.

Issue: RESTRICTION OR DENIAL OF RIGHTS

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, sections 165 to 171 inclusive be amended such that:

1. articles of personal use that are used as prosthetics or are essential aids to daily living be defined;
2. use of such articles be permitted as a right;
3. reasons be given for every restriction or denial on the use of any personal use items and the reasons be recorded in the patient's case notes;
4. every restriction or denial on the use of a prosthesis or aids to daily living be reviewed by a psychiatrist daily or lapse;
5. **every** restriction or denial on the use of personal items be subject to a Mental Health Review Board review and also subject to an appropriate external appeals process;
6. notice of every restriction or denial of use / storage of personal use items be reported to the Mental Health Review Board and Council of Official Visitors within 24 hours.
7. emerging technologies such as Internet and mobile phone use be included in communication medium for right of access; and
8. all persons admitted to or detained in an authorised hospital have access to the appeal process for restriction of use / storage of personal use items or restriction / denial of rights to communications or visitors.

MENTAL HEALTH REVIEW BOARD

Issue: INITIAL AND PERIODIC REVIEWS

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, section 138 be amended to require the initial review by the Mental Health Review Board to be not later than 14 days.

It is recommended that the *Mental Health Act 1996*, section 139 be amended to require subsequent periodic reviews to occur at not later than 3 months.

Issue: PATIENT ACCESS TO REPORTS MADE TO MENTAL HEALTH REVIEW BOARD

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended such that patients are automatically provided with a copy of the medical or other reports provided to the Mental Health Review Board for a hearing before that Board, prior to the hearing. Applications by clinical staff to have any of that information withheld from the patient should be made to the Board, who should have the power to determine whether it will be withheld.

Issue: POWERS ON ENQUIRY INTO COMPLAINT

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, section 146 be amended to allow the Mental Health Review Board to carry out a review at its own initiative where an enquiry into a complaint finds the complaint substantiated.

Issue: NOTE TAKING DURING PROCEEDINGS

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, Schedule 2 Item 2 be amended to include "*the reasonable opportunity to make notes*".

Issue: RIGHT TO LEGAL REPRESENTATION

RECOMMENDATION:

It is recommended the *Mental Health Act 1996* be amended to require patients attending before the Mental Health Review Board to have legal representation without payment by that person, unless declined by them.

It is recommended that a review of the method and process by which consumers are advised of the right to access the Council and/or the Mental Health Law Centre be undertaken to ensure this occurs in a meaningful way.

It is recommended that the provisions of the *Mental Health Act 1996* relating to the Mental Health Review Board be amended to provide for automatic referral of

involuntary patients to the Council of Official Visitors when a Mental Health Review Board hearing is scheduled for them. (Refer Recommendation 14 Council of Official Visitors' submission regarding the Review of the Council)

**Issue: TRANSCRIPTS OF MENTAL HEALTH REVIEW BOARD
 PROCEEDINGS**

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended to provide:

- 1 a right for any party to Mental Health Review Board proceedings to obtain a transcript of those proceedings at a reasonable cost;
- 2 with any person the subject of those proceedings being able to obtain a transcript for a nominal fee of say \$10; and
- 3 that the transcript should be provided in a timely manner, say within 10 working days.

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