



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.

GENERAL & OVERARCHING ISSUES

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.”*

Legislation: *Mental Health Act 1996, Part 1*

COMMENTARY:

With the early drafting of previous mental health legislation, there was much discussion regarding the guiding philosophies that form the basis of this legislation. There has been no recent revisiting of these underlying principles and philosophies in relation to the basis for mental health legislation. The original philosophies were in relation to a 'rights protection' paradigm.

The legislation in place seems to be principle and aspirational based, however it is important that the legislation regarding rights is not watered down and preferably rights are given enhanced recognition.

The trend discernible in the:

- (i) adoption of the *Model Mental Health Legislation*; and
- (ii) adoption by the Australian Health Ministers Council (AHMAC) of the *National Statement of Rights and Responsibilities*; and
- (iii) endorsement by AHMAC National Mental Health Working Group in 1996 of the *National Standards for Mental Health Services*

is a steady progression toward protection of human rights while providing mental health treatment and balancing the necessity for protection of the community.

Although different jurisdictions have adopted varied approaches to mental health legislation the most recent enactment, that of the Northern Territory in 2002, when measured against a Rights Analysis Instrument, has a high level of compliance with United Nations Principles and Conventions.

The *Mental Health Act 1996* of Western Australia does not rate particularly well when assessed against the same Instrument. On this measurement tool there is obvious room for improvement in Western Australia's legislative practice.

Council adopts the Commentary of the Model Mental Health Legislation at paragraphs 3.3.2 to 3.3.4 inclusive being:

3.3.2 *"The objects and principles seek to emphasise the need for the introduction of provisions for the care, treatment and protection of people with mental illness which are consistent with the UN Principles and the National Statement of Rights and Responsibilities and which in turn are interpreted so that:*

- *persons with mental illness receive treatment of a high standards in the least restrictive and least intrusive environment;*
- *in providing care and treatment any interference with the rights of persons with mental illness is kept to a minimum;*
- *due consideration is given to the various age specific, gender specific, religious, cultural and language needs and other special needs of persons with mental illness; and*

- *persons with mental illness who need language or other interpreter services, advocacy services or other services to assist them in communicating have access to such services.*

3.3.3 *The objectives and principles seek to encourage the involvement of persons with mental illness in the development of ongoing treatment plans and in the review and development of the policies, procedures and services of a mental health facility or health care agency. The need for a wider range of options and greater choice for consumers and increased service sensitivity to the needs of their relatives and friends is also emphasised.*

3.3.4 *Though many of the statements in the Objects and Principles of the Model Mental Health Law do not give rise to legally enforceable rights, they importantly convey the spirit and intent of the model clauses. They also provide assistance with the interpretation and implementation of this Law. The statement of objects and principles may assist to move mental health services operating under mental health legislation toward the adoption of a new rights based paradigm of treatment and care. The challenge for the future is the progressive introduction into law of provisions which enable persons with mental illness to receive the very best standard of care and treatment whenever it is needed and which at the same time strike an appropriate balance between the human rights of a person with mental illness with the right of the community to protection.”*

Council has become aware from its operations that while there may well be a spirit and intent contained in the *Mental Health Act 1996*, often the practice adopted is for the convenience of others, be they carers, relatives or mental health practitioners, rather than consumers. While in Council’s experience most people support the *UN Conventions and Principles* and the *National Statement of Rights and Responsibilities* when specific terms are spelt out, these terms are not widely disseminated in the industry. Further, there is no requirement that the *Convention, Principles* and *National Statement of Rights and Responsibilities* are to be used as guides to the interpretation and application of the *Mental Health Act 1996* (the Act) and are also to be seen as fundamental in considering the policies and procedures developed to implement the Act.

Council is of the view that adoption of the *Conventions, Principles* and *National Statement of Rights and Responsibilities* as part of the objects of mental health legislation will clarify the spirit and intent of the legislation and provide guidance on its interpretation and application.

When the current Act is assessed under the Rights Analysis Instrument, the best score in any Indicator is 16 out of 20 and one as low as 8 out of 20. Some other jurisdictions scored significantly higher than WA, particularly the current Northern Territory legislation.

The Northern Territory *Mental Health Act 2002* Part 2 – Fundamental Principles, (sections 9 to 13 inclusive) sets out specific principles relating to:

- provision of treatment and care (section 9)
- involuntary admission and treatment (section 10);
- admission, care and treatment of Aborigines and Torres Strait Islanders (section 11);
- rights of carers (section 12); and

- rights and conditions in approved treatment facilities (section 13).

Consideration should be given to adopting legislation along the lines of the Model Mental Health Legislation or the Northern Territory legislation with some modification to suit WA conditions. It is a legislation model that strikes a balance which preserves human rights yet provides protection to the individual and the community.

Council has no doubt that there is now an opportunity to strike a better balance between the human rights of those with a mental illness and the need for protection of the community than the balance achieved by the present Act.

The *Mental Health Act 1996* is silent or almost silent on a number of areas, for example:

- voluntary admission to an authorised hospital;
- admission of children and adolescents to authorised hospitals;
- provision of services to groups such as Aboriginal and Torres Strait Islander people and those from other culturally and / or linguistically diverse backgrounds;
- the elderly and frail; and
- those the subject of a Guardianship Order.

All of these groups have special needs and generally comprise people who are vulnerable to exploitation or abuse. They are in need of special protection and there should be relevant specific legislative provisions for them.

CONCLUSION:

Request for legislative changes are often met with response that such change is not possible because of constraints on the resources available.

Best legislative practice should not be dependent on resource constraints. For example, clinicians would not argue that best clinical practice should not be the aim simply because the resources allocated are insufficient for its achievement. Resource deficiencies may prevent achievement of best clinical practice but should not result in a lowered aim. The same approach ought to apply to legislation and establishing best legislative practice.

Undoubtedly best legislative practice should be the aim of this review and not constrained by present resource allocations.

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*.

Legislation: *Mental Health Act 1996*, section 215

“215. (1) *The Minister is to carry out a review of the operation and effectiveness of this Act as soon as practicable after the expiration of 5 years from its commencement, and in the course of that review the Minister is to consider and have regard to --*

- (a) the effectiveness of the operations of the Board and the Council of Official Visitors;*
- (b) the need for the continuation of the functions of the Board and the Council of Official Visitors; and*
- (c) such other matters as appear to be relevant to the operation and effectiveness of this Act.*

(2) The Minister is to prepare a report based on the review and, as soon as is practicable after the report is prepared, cause it to be laid before each House of Parliament.”

COMMENTARY:

Whereas section 215 of the *Mental Health Act 1996* (the Act) provides for the review of the Act, its operations and effectiveness after the Act has been in operation for 5 years, there is no provision to have any further periodic review.

Council considers that the review process has proved useful to focus attention on the legislation and clinical practices with consequent potential for improvement in those areas.

Council is of the view that there should be a periodical review of the Act every 5 years in the same terms as the present review.

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

Legislation: *Mental Health Act 1996*, section 9

“9. (1) *The Chief Psychiatrist has responsibility for the medical care and welfare of all involuntary patients.*
(2) *In respect of other patients, the Chief Psychiatrist is required to monitor the standards of psychiatric care provided throughout the State.* “

COMMENTARY:

Section 9 prescribes the “**Responsibilities of Chief Psychiatrist for psychiatric care**”. The terms “medical care” and “psychiatric care” are subsequently used in this section, apparently interchangeably.

Throughout the Act a distinction is made between psychiatric treatment and medical treatment (refer sections 3, 109, 110). The current wording is such that, in relation to involuntary patients, the Chief Psychiatrist is responsible for their “medical care”. It is unclear whether this term is meant to include psychiatric care (which is not solely medical in nature). Given the distinctions made in other sections of the legislation between the two types of treatment Council is of the view that this should be clarified.

Similarly section 9(2) states that, in relation to “**other patients**” the Chief Psychiatrist is responsible for monitoring the standards of “psychiatric care”. Does this mean that the Chief Psychiatrist is not responsible for monitoring the standards of psychiatric care for involuntary patients? Council is of the view that this should be clarified.

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.

BIBLIOGRAPHY

REPORTS

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- 1994 ***MODEL MENTAL HEALTH LEGISLATION Report to the Australian Health Ministers' Advisory Council National Working Group on Mental Health Policy; Volume 1***; Commonwealth Department of Human Services and Health (Released 1995)
- 1997 ***National Standards for Mental Health Services***; Australian Health Ministers' Advisory Council's National Mental Health Working Group, Commonwealth of Australia.
- 1991 ***United Nations Principles For The Protection Of Persons With Mental Illness And For The Improvement Of Mental Health Care***; Adopted by General Assembly resolution 46/119 of 17 December 1991

LEGISLATION

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| <i>Mental Health Act 1996</i> | Western Australia |
| <i>Mental Health Act 2002</i> | Northern Territory |