



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.

PROTECTION OF PATIENTS' RIGHTS

Term of Reference

"In regards to the operation and effectiveness of the Mental Health Act 1996, consider and have regard of the:

- 1. Effectiveness and need of Part 7, Divisions 1 and 2;*
- 2. Carer Rights; and*
- 3. The inclusion of a complaint process for patients and carers.*
- 4. Give consideration to alterations and possible additions to Part 7."*

UNITED NATIONS PRINCIPLES FOR THE PROTECTION OF PERSONS WITH MENTAL ILLNESS AND FOR THE IMPROVEMENT OF MENTAL HEALTH CARE (“UN PRINCIPLE”)

PRINCIPLE 12

“Notice of Rights

1. *A patient in a mental health facility shall be informed as soon as possible after admission, in a form and a language which the patient understands, of all his or her rights in accordance with the present Principles and under domestic law, and the information shall include an explanation of those rights and how to exercise them.*
2. *If and for so long as a patient is unable to understand such information, the rights of the patient shall be communicated to the personal representative, if any and if appropriate, and to the person or persons best able to represent the patient’s interests and willing to do so.*
3. *A patient who has the necessary capacity has the right to nominate a person who should be informed on his or her behalf, as well as a person to represent his or her interests to the authorities of the facility.”*

**Legislation: *Mental Health Act 1996, Part 7, sections 156 to 159 inclusive*
*Mental Health Regulations 1997, Regulation 18***

“Explanation of rights to be given

- 156.** (1) *Whenever –*
- (a) *a person is admitted to an authorized hospital for psychiatric treatment, whatever the person’s status under this Act;*
 - (b) *an order is made for a person to be detained at an authorized hospital as an involuntary patient;*
 - (c) *a person who is detained is given leave of absence; or*
 - (d) *a community treatment order is made in respect of a person,*

the person is to given an explanation as described in the regulations concerning the rights and entitlements of the person.

(2) *The explanation is to be given both orally and in writing in the language in which the person to whom it is given is used to communicating.*

(3) *Where the person to whom the explanation is to be given is sued to communicating in a form other than orally or in writing, as the case may be, the explanation is to be given in the form in which the person is used to communicating that, as nearly as is practicable, corresponds to the oral or written form.*

Copy of explanation to be given to another person

157. (1) *A person to whom an explanation is given is to be asked to specify a relative, guardian, friend, or other person to whom a copy of the explanation is to be given, and a copy of the explanation is to be given to the person specified.*

(2) *If no person is so specified or the person specified cannot be found, a copy of the explanation is to be given to such other person, if any, as appears to have or be assuming responsibility for the care of the person.*

Responsibility for giving explanation etc.

158. (1) *The person responsible for ensuring that sections 156 and 157 are complied with –*

- (a) *in relation to a person who is a patient at a hospital, is the treating psychiatrist;*
- (b) *in relation to a person who is the subject of a community treatment order, is the supervising psychiatrist; and*
- (c) *in relation to a mentally impaired defendant who is mentally ill and is detained at a place that is not an authorized hospital, the person in charge of that place.*

(2) *The person so responsible is to ensure that, whenever a person is given an explanation under subsection (1), a record of it is made in the case notes of the person to whom the explanation is given.*

Affected person to be given copy of order

159. (1) *A psychiatrist who makes –*

- (a) *an order for the detention of a person under section 37 (1) (b), 39 (1), 43 (2) (a), 49 (3) (a), 50 or 70 (1);*
- (b) *an order for the apprehension of a person under section 41;*
- (c) *a community treatment order;*
- (d) *an order varying or revoking a community treatment order; or*
- (e) *an order that a person is no longer an involuntary patient,*

is to give a copy of the order to the person concerned.

(2) *A senior mental health practitioner who makes an order for the detention of a person under section 30 (3) is to give a copy of the order to the person*

(3) *A person who makes an order for the apprehension of a person under section 34 is to give a copy of the order to the person.”*

COMMENTARY:

Sections 156 to 159 of the *Mental Health Act 1996* (the Act) require that a person have their rights explained to them and a copy of that explanation and any order made given to them.

In practice for admission of an involuntary patient a small pamphlet entitled “Patients Rights” is handed to the patient with some level of verbal explanation. Council is not aware of the practice on admission of “voluntary patients” as it has had no jurisdiction in that area.

Some 5 years after commencement of the Act, in Council's experience, there is not a comprehensive explanation given covering those items referred to in Regulation 18.

Regulation 18 is in the following terms:

“A person referred to in section 156 (1) is to receive an explanation of his or her rights and entitlements under the Act, as is relevant having regard to the particular situation of the person, with respect to –

- (a) legal status;*
- (b) detention;*
- (c) examination;*
- (d) the right to an examination or interview with a psychiatrist;*
- (e) receiving copies of, or inspecting, an order made concerning the person or any other relevant document;*
- (f) applying for a review;*
- (g) access to an official visitor or panel;*
- (h) the making of a complaint;*
- (i) contact with people outside the hospital whether by receiving visitors, by telephone or by correspondence by post or otherwise;*
- (j) storage and use of personal possessions at hospital; and*
- (k) appealing from a decision or order of the Mental Health Review Board.”*

The term “legal status” is not defined and it is unclear what rights of the patient are included in this term. Is it their status as a patient, their capacity to vote or enter into contracts, or their capacity to give or without consent to medical treatments?

Use of a pamphlet is not sufficiently comprehensive and each explanation should be in any event tailored to the individual patient’s circumstances.

The *National Mental Health Statement of Rights and Responsibilities* (1991) at paragraph 3.1.7 states:

“Consumers must be informed of their rights and reasons for admission, diagnosis and treatment prior to or as soon as practicable after admission to a mental health facility or community program. This should be in a form and language which he or she understands.”

In addition at paragraph 8.2(i) the service providers have a responsibility to:

“ensure the involvement of consumers, carers and advocates when planning, managing and evaluating mental health service provision”.

Issues with respect to the operation of these sections of the Act have arisen. Specifically there is no time frame in which the explanation is to be given and once given there is no requirement to have any follow up to ensure a reasonable understanding has been reached by the consumer. In the case where a consumer lacks the capacity to understand the explanation, then an explanation should be given when the consumer’s condition improves to the degree where they are likely to have reasonable comprehension.

In cases where comprehension may be an issue the facility should be obliged to engage accredited interpreters, advocates or other specialists with skills to accommodate special needs groups (e.g. cultural or ethnic).

Section 157 requires the explanation (oral and written) be provided to a representative, relative, guardian or friend. However, some consumers may not wish

any other person to be informed and should have the right to refuse the provision of information to others. In such cases and where no such person is either specified or found then the Council of Official Visitors should be notified.

It appears the purpose of informing another individual of the consumer's rights and status is to ensure someone who has an advocacy / protective interest role in relation to the consumer is aware of the consumer's position. In the absence of some nominated person and given the Council's advocacy role it would seem appropriate to inform Council that the consumer is receiving treatment and that no other advocate / person has been informed. Advice to the Council should be provided within 1 working day of the event triggering the requirement to give an explanation of patients' rights.

Council's experience is that it cannot be accurately determined that the detailed explanation required by section 157 was given without there being a record in the patient's notes of the content of the explanation. Regulation 18 requires specific information about rights and status be given in that explanation therefore the explanation needs to be tailored not only to the specific facility but also be tailored to the actual circumstances of the consumer.

As referred to above, written advice of rights is usually by way of a pamphlet. The pamphlets are a generic approach to an explanation and are something like the menu at a call centre where the person has to assess their position and needs, then select the explanation applicable to them. Often the consumer would not know sufficiently their status and position to be able to follow the alternatives in the pamphlet to determine the rights applicable to them.

In addition, no record is kept of the content of the explanation given notwithstanding the requirement for it to be given in writing. To ensure compliance and quality assurance Council is of the view that a copy of the written explanation given should be placed on the consumer's record.

Responsibility for the giving of the explanation as set out in section 158 is appropriate in the Council's view except when a Community Treatment Order is made while the consumer is in an authorised hospital. In that case, it should be the treating psychiatrist (i.e. the one issuing the CTO order) who has responsibility to inform the consumer.

Section 159 of the Act requires that a copy of various orders be given to the consumer the subject of these orders. It is Council's view that a copy of the referral under section 29 be provided to the consumer as well.

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.

UNITED NATIONS PRINCIPLES 18.4 and 19

Legislation: *Mental Health Act 1996, Part 7, sections 160 and 161*

“Access to personal records

160. (1) *In this Part –*

“relevant document”, in relation to a patient or former patient means any document that is in the possession of, or under the control of –

- (a) *the person in charge of the hospital; or*
- (b) *any person employed in the department, that relates to that patient or former patient.*

(2) *A person who is or has been –*

- (a) *a mentally impaired defendant detained in an authorized hospital; or*
- (b) *an involuntary patient, whether or not detained in an authorized hospital,*

has the right to inspect and be given an accurate reproduction of any relevant document.

(3) *Nothing in this section limits –*

- (a) *section 159; or*
- (b) *a right that a person may have under any other law to inspect or be given a reproduction of a document.”*

COMMENTARY:

The United Nations Principle 18 Item 4 deals with the provision of patient's records as part of ***“Procedural Safeguards”***:

“4. Copies of the patient's records and any reports and documents to be submitted shall be given to the patient and to the patient's counsel, except in special cases where it is determined that a specific disclosure to the patient would cause serious harm to the patient's health or put at risk the safety of others. As domestic law may provide, any document not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any part of a document is withheld from a patient, the patient or the patient's counsel, if any, shall receive notice of the withholding and the reasons for it and it shall be subject to judicial review.”

Principle 18 is also addressed in the Model Mental Health Legislation as Section 241:

“Access to Medical Records

241. (1) *A person the subject of a review must be given access to the person's medical records and reports which are before the Tribunal for the purposes of the review.*

(2) The Tribunal may order that a medical record or report or any part of a medical record or report must not be disclosed to a person where it is thinks (sic) that the disclosure would cause serious harm to the person's health or put the safety of another person at risk.

(3) The Tribunal may order that a medical record or report or any part of a medical record or report be disclosed to the person's representative and not to the person.

(4) The person refused access may apply to the Supreme Court for a review of any order refusing disclosure."

Principle 19 of the UN Principles is also relevant:

***"Principle 19
Access to Information***

- 1 A patient (which term in the present Principle includes a former patient) shall be entitled to have access to the information concerning the patient in his or her health and personal records maintained by a mental health facility. This right may be subject to restrictions in order to prevent serious harm to the patient's health and avoid putting at risk the safety of others. As domestic law may provide, any such information not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any of the information is withheld from a patient, the patient or the patient's counsel, if any, shall receive notice of the withholding and the reasons for it and it shall be subject to judicial review.*
- 2 Any written comments by the patient or the patient's personal representative or counsel shall, on request, be inserted in the patient's file."*

Section 160 of the Act sets out the conditions under which a patient has a qualified right to inspect and be given an accurate reproduction of a personal record. This section applies to more than the patient's medical record however, in practice, most requests relate to medical records and in many instances for use in the course of a review by the Mental Health Review Board.

Difficulty is still encountered with the timely provision of documents requested for the purposes of a Mental Health Review Board hearing, placing pressure on the patient and often increasing anxiety levels in the lead up to a Mental Health Review Board review.

Section 161 of the Act sets out exceptions to the provision of documents (i.e. it qualifies the documents which are the subject of section 160.

"Exceptions to section 160

- 161.** (1) *Section 160 does not apply if the person having possession or control of a relevant document is of the opinion that disclosure of the information in the document to the patient or former patient would-*
- (a) have a substantial adverse effect on the health or safety of the patient, the former patient or any other person;*
 - (b) reveal personal information about an individual, whether living or dead, not including the patient or former patient; or*
 - (c) reveal information of a confidential nature obtained in confidence.*

(2) *Subsection (1) (b) does not apply where the individual has consented to the disclosure.*

(3) *In the circumstances described in subsection (1) the patient or former patient may nominate a suitably qualified person to exercise the right given by section 160, and the person nominated is to be permitted to exercise the right to inspect, and be given a reproduction of, the document accordingly.*

(4) *Section 160 does not apply to records relating to a person who is or has been a mentally impaired defendant that came into existence under or for the purposes of the Prisons Act 1981."*

In Council's experience the exception provided by section 161(1)(a) is very often invoked preventing the patient from inspecting or obtaining a reproduction of a record relating to him/herself.

Under the provisions of section 161(3) the patient may nominate a "suitably qualified" person to exercise the right granted by section 160.

In August 1998 the Chief Psychiatrist issued an instruction that the only suitably qualified person is a "Consultant Psychiatrist". Clearly Parliament, when considering the provisions of the Act, did not intend that only Consultant Psychiatrists would be "*suitably qualified persons*". The implication from such a general term is that Parliament intended people from other occupational groups would or could be suitably qualified.

In Council's view such a limitation as imposed by the Chief Psychiatrist is an attempt to frustrate the thrust of the Act and can be clarified by addition of a definition.

In Council's view there should be a range of people who by employment, qualification, experience or relationship are "suitably qualified".

Council suggests that there may well be class approval in the legislation: for example, legal practitioners as defined in the Legal Practice Act, medical practitioners as defined in the Medical Act, mental health practitioners, members of the clergy, etc. Further there should be a case-by-case consideration if a person other than from the legislated class was nominated. Any refusal to provide information should be in writing with reasons and be the subject of an appeal to the Mental Health Review Board.

Principle 19 of the UN Principles provides a basis where a suitably qualified person may be provided the document in confidence thus preventing any 'personal' or 'difficult' material being transmitted to the patient.

The Model Mental Health Legislation allows for an order by a competent authority to prevent the suitably qualified person from passing on restricted information. At present a suitably qualified person either may, or in some cases must, pass all information to the patient.

Procedural fairness would appear to be the primary principle which must be accommodated and where a review, appeal or other court process is involved then it would be appropriate to have a qualified release to a legal representative under

either 'legislated' or 'ordered' conditions as to those parts of the record referred to in section 161(1).

However, that type of provision by its nature raises the question of legal representation, as there is no absolute right to such representation. The proposal as set out above does not address the position for a patient acting as their own advocate.

Western Australia did not rate well on the assessment of this area, scoring 4 out of a possible 7 for the provision of records in proceedings when assessed with the Rights Analysis Instrument.

A further concern with the present provisions is that there are no time limits on compliance (or refusal) of a request. Although the Freedom of Information Act requires compliance within 45 days, this period would be too great for a medical record required for a Mental Health Review Board hearing.

Council suggests that provision of a medical record or written advice of refusal with reasons (in writing) within 10 working days of receipt would not be unreasonable; an alternative would be at least 2 working days before a Mental Health Review Board hearing at which the record will be provided to the Board.

In practice it appears that the process for providing access to records under the *Mental Health Act 1996* has become a parallel system to that established for Freedom of Information. It is not and should not be operated as a parallel system as its purpose and client group are significantly different.

Overlapping with the procedures of the Mental Health Review Board the practice of medical practitioners submitting reports at the last minute for the Board's consideration is a serious breach of procedural fairness.

In the case of *EO v Mental Health Review Board & Others* WASC 1265 of 2000 Templeman J found that "*the appellant was not accorded procedural fairness because he did not have access to relevant material*". This was a case where the applicant was not provided with his full medical record prior to his hearing (at which the Board referred to the full record). Producing a report at the last minute effectively denies the patient access to that part of their record.

Under the Model Mental Health Legislation and in some other jurisdictions, for example Tasmania, the tribunal may order that all or any part of the record must not be disclosed to the patient even if given to their representative. Generally the practice is where clinicians wish to not disclose information then that information must be specified and reasons given. The reasons provide an accountability trail which has the potential to be subject to challenge.

Council is of the view that patients must be provided with, as a minimum, 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.

Other patient records, i.e. those not contained within the medical record, could have time limits similar to those provided under Freedom of Information legislation unless required for a Mental Health Review Board hearing or other court process.

An official record like those held by mental health treatment facilities may have material entered which the patient disputes. At present there is no procedure where such material may be corrected or the disputed material put in question with at least a rebuttal recorded.

There should be a right to add comments to a file and to correct misleading information and, where necessary, an opportunity to alter and amend records. Satisfactory cross-referencing between the original record and the added comments/corrections is essential.

Any refusal of a request to add comments, correct misleading information, and alter or amend the record should be then subject to review by the Mental Health Review Board with the consequent avenues of appeal.

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.

Legislation: *Mental Health Act 1996*, section 162

“162. A person having any responsibility towards a person as a patient who ill-treats or wilfully neglects the patient commits an offence.

Penalty: \$4 000 or imprisonment for 1 year”

COMMENTARY:

One of the principal purposes of mental health legislation is to protect patients from harm whether it be self-inflicted or inflicted by those charged with the responsibility to care for patients.

Notwithstanding the absence of any prosecuted cases of ill-treatment of a patient in the 5 years of the Act’s operation, there should be a significant deterrent to ill treating a patient.

Council considers the current penalty assigned to section 162 to be inadequate. The penalty values prescribed are the maximum thus any individual found guilty of such an offence may be penalised to a lesser degree.

Council considers that a substantial monetary penalty and a term of imprisonment would provide a deterrent for persons ill treating a patient. The penalty suggested would be \$20,000 or 2 years imprisonment or both.

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.

Legislation: *Mental Health Act 1996, Part 7, sections 163 to 171*

“163. *In this Division, unless the contrary intention appears –*

“patient” means a person who is admitted as a patient to an authorized hospital, whatever the person’s status under this Act.”

COMMENTARY:

The rights referred to in Part 7 Division 2 of the Act have equal application to not only those persons admitted as a patient but also to other persons who may be in the authorised hospital under authority of other provisions. For example, persons referred for examination by a psychiatrist, those who are mentally impaired defendants in an authorised hospital and those subject to a hospital order (*Criminal Law (Mentally Impaired Defendants) Act 1996*).

All of these people have similar if not identical issues in relation to personal possessions, communications, visitors and what happens should access be restricted.

Without legislative authority the hospital would appear to have limited powers to restrict the access of a person, who is not a patient as presently defined, to communications or visitors for example. Clearly, in relation to ‘patients’ as now defined in section 163 the hospital through the psychiatrist is given powers of control over certain articles, communication and visitors. Those powers should be set out in clear terms for all persons in an authorised hospital whatever their status and their rights should be protected by requirements to report and review any restrictions and for external review.

Council considers that the issues confronting both the hospital and the people in the hospital are identical whether they may be formally admitted or are there under other authority to detain them.

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.

Legislation: *Mental Health Act 1996, Part 7, sections 111 and 164(2)*

“Opinion of another psychiatrist may be requested

111. (1) *This section applies where a person being given psychiatric treatment under section 109 is dissatisfied with the treatment.*

(2) *The person may –*

- (a) *request that an opinion as to whether the treatment should be given be obtained from a psychiatrist who has not previously considered the matter; or*
- (b) *request the Chief Psychiatrist to arrange for the opinion of a psychiatrist to be obtained as to whether the treatment should be given.*

(3) *A psychiatrist may give an opinion for the purposes of subsection (1) after the psychiatrist and the person have been in communication with one another by audio-visual means and without having been in one another’s physical presence.”*

“Patient to be afforded interview

164. ...

(2) *The patient has the right to an interview with, and to be examined by, a psychiatrist who is not for the time being the treating psychiatrist.”*

COMMENTARY:

Case Study:

(Refer to Council of Official Visitors’ Annual Report 1998 –1999, pages 34-35)

Mr B, an involuntary consumer in a secure unit in an authorised hospital, approached the Council dissatisfied with the hospital’s approach to his request for a second opinion. Mr B said that he had asked for a second opinion and the hospital had arranged a psychiatrist from his treating team to provide this opinion. Mr B insisted that a doctor from the same team would be biased and asked that an outside psychiatrist see him. Inspection of the consumer’s notes indicated that, indeed, another doctor from the treating team had examined him. An approach was made to the hospital and the Official Visitor was informed that the consumer would have to arrange his own appointment with an outside consultant and that the hospital was not obliged to arrange this. The hospital believed that they had fulfilled their obligation under the Act by arranging for another psychiatrist within the hospital to furnish a second opinion. It was also noted that the hospital was not prepared to bear any costs involved with the second opinion.

The Official Visitor established that Mr B was able to afford the cost of the consultation but would be unable to arrange the appointment for himself without assistance. Hospital administration did not believe that their staff was obliged to

make the appointment. The situation was eventually resolved by appealing to the senior nurse who arranged for nurses in the ward to assist Mr B make the appointment. It took six weeks to achieve a satisfactory resolution and the situation remains unresolved as to who is responsible for arranging external second opinions for consumers who have no family and no resources to arrange it themselves.

Through its operations the Council has identified a number of issues associated with the providing of second opinions under the Act. Specifically:

- 1 Independence
- 2 Report on Interview
- 3 Time Frame
- 4 Purpose.

1 Independence

There is a perceived lack of independence where a second opinion is provided by someone employed, or with an appointment at the hospital to which the patient has been admitted.

Council is of the view that any second opinion must be provided by a psychiatrist who does not hold an appointment at the hospital to which the patient has been admitted.

2 Report on Interview

Further, there is no requirement that there be a written report of the interview prepared by the psychiatrist (the second opinion) nor that the patient be provided with a copy of the second opinion. In Council's view the patient should receive a copy of the second opinion or a copy be provided to a "suitably qualified person" as referred to in section 161(3).

3 Time Frame

At present there is no time frame in which a second opinion is to be provided. In the Councils' experience it is not uncommon for consumers to be advised that by the time their second opinion can / will be arranged their status is likely to have altered. The implication for consumers is that the obtaining of the opinion will be pointless. Irrespective of whether the individual's status may change the Act provides them with a specific right for this to occur and this should be arranged in a timely manner.

Time lines could be provided in the Act or by regulation, a suitable period being within 2 working days of the request.

Consideration was given to the difficulties that may be encountered in regional centres, however with the advent of "telepsychiatry" this difficulty is more

imagined than real. (Refer to section 164(4) where the interview can be by audio-visual means).

4 Purpose

The purpose for which a second opinion may be put will depend upon why it was requested. A second opinion, which is regarded as independent, could:

- i) allay the concerns of the consumers and carers if they had any; and
- ii) be available to the consumer as evidence to present to a review hearing and thereby be part of the information considered after being given appropriate weighting by the Review Board.

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.

UNITED NATIONS PRINCIPLE 13

“Rights and conditions in mental health facilities

1. *Every patient in a mental health facility shall, in particular, have the right to full respect for his or her:*
 - (a) *Recognition everywhere as a person before the law;*
 - (b) *Privacy;*
 - (c) *Freedom of communication, which includes freedom to communicate with other persons in the facility; freedom to send and receive uncensored private communications; freedom to receive, in private, visits from a counsel or personal representative and, at all reasonable times, from other visitors; and freedom of access to postal and telephone services and to newspapers, radio and television;*
 - (d) *Freedom of religion or belief.*

2. *The environment and living conditions in mental health facilities shall be as close as possible to those of the normal life of persons of similar age and in particular shall include:*
 - (a) *Facilities for recreational and leisure activities;*
 - (b) *Facilities for education;*
 - (c) *Facilities to purchase or receive items for daily living, recreation and communication;*
 - (d) *Facilities and encouragement to use such facilities, for a patient’s engagement in active occupation suited to his or her social and cultural background, and for appropriate vocational rehabilitation measures to promote reintegration in the community. These measures should include vocational guidance, vocational training and placement services to enable patient to secure or retain employment in the community.*

3. *In no circumstances shall a patient be subject to forced labour. Within the limits compatible with the needs of the patient and with the requirements of institutional administration, a patient shall be able to choose the type of work he or she wishes to perform.*

4. *The labour of a patient in a mental health facility shall not be exploited. Every such patient shall have the right to receive the same remuneration for any work which he or she does as would, according to domestic law or custom, be paid for such work to a non-patient. Every such patient shall, in any event, have the right to receive a fair share of any remuneration which is paid to the mental health facility for his or her work.”*

Legislation: *Mental Health Act 1996, Part 7, section 165*

“Personal possessions

- 165.** (1) *Subject to subsection (2), the treating psychiatrist is to ensure that a patient –*
- (a) *is, so far as reasonably practicable, given the facilities to store articles of person use, wear or ornament at the hospital; and*
 - (b) *is allowed to use such articles.*

(2) *Subsection (1) does not apply to any article which in the opinion of the treating psychiatrist it would not be appropriate to use or store in the hospital.*

(3) *Where any article belonging to a patient has been left at an authorized hospital for more than 6 months after that person ceased to be a patient, the person in charge of the hospital may dispose of it by sale or otherwise but only if –*

- (a) *at least one month's notice of the intention to do so has been given to the person; and*
- (b) *he or she has not claimed the article.”*

COMMENTARY:

Section 165 of the Act contains the right for a patient to use or store their personal possessions at an authorised hospital – for example to use their own clothes, their own spectacles and a range of other items. The right to use or store personal items may be restricted (section 165(2)) if in the opinion of the treating psychiatrist “... *it would not be appropriate to use or store at the hospital*”.

Council is aware that some items by their nature are inappropriate to have at an authorised hospital, however there is also a range of personal use items which are essential to a patient for everyday living, for example spectacles, prostheses, wheelchairs and hearing aids.

Where an item of personal use is integral to a patient's ability to function as an individual in their daily living then, in Council's opinion, there should be a different legislative regime to that now in place.

Case Study:

A consumer in a secure ward in an authorised hospital had her spectacles taken away. The consumer used her spectacles in everyday living and for reading. Removal of her spectacles caused the consumer a great deal of anxiety, raising possible questions of the effects on her well-being.

Spectacles being an item of personal use fall under the provisions of section 165. The only avenues of appeal / review are to the Mental Health Review Board via its general review process under section 142 which has a degree of delay in the system. There is no provision for a daily review for these personal use items to ensure the restriction is still necessary.

A solution to this problem is to provide for items used as aids or prosthesis in every day living to be subject to not only the Mental Health Review Board process but also a daily review by a psychiatrist as are at present a patient's rights to communications (telephone or letters) and visitors. Refer sections 166, 167, 168 and 169.

Council considers that such prosthesis and aids to daily living should be dealt with by way of review under legislation similar to section 169:

“Restriction or denial of entitlement

169. (1) *A psychiatrist may order that any right of a particular patient under section 166, 167 or 168 be restricted or denied if the psychiatrist considers it to be in the interest of the patient to do so.*

(2) *An order under this section is to be reviewed by a psychiatrist each day that it continues in effect, and on any such review may be varied or revoked.*

(3) *The order lapses at the end of a day on which it has not been reviewed.*

(4) *A record of the order and each review of it is to be made in the case notes of the patient that are kept at the hospital.”*

Section 169 has a requirement for a daily review by a psychiatrist and if not reviewed then the prohibition lapses. To ensure that restrictions on use of prosthesis and aids to daily living are the subject of external controls, the Council also considers that notice of the restriction be reported within 1 working day to the Mental Health Review Board and the Council of Official Visitors and further, that reasons for the restriction be recorded in the case notes.

At present, when a restriction on use or storage of personal items is imposed by virtue of section 165(2), there is no need to give reasons for not permitting that use or storage.

Council believes that wherever the use or storage of personal items is not permitted; or is restricted or denied; reasons are to be given and recorded in the patient's case notes. Giving and recording reasons in the case notes provides an accountability trail for the decision made, irrespective of the requirement for daily review.

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.

UNITED NATIONS PRINCIPLE 13

“Rights and conditions in mental health facilities

1. *Every patient in a mental health facility shall, in particular, have the right to full respect for his or her:*
 - (a) *Recognition everywhere as a person before the law;*
 - (b) *Privacy;*
 - (c) *Freedom of communication, which includes freedom to communicate with other persons in the facility; freedom to send and receive uncensored private communications; freedom to receive, in private, visits from a counsel or personal representative and, at all reasonable times, from other visitors; and freedom of access to postal and telephone services and to newspapers, radio and television;*
 - (d) *Freedom of religion or belief.*

2. *The environment and living conditions in mental health facilities shall be as close as possible to those of the normal life of persons of similar age and in particular shall include:*
 - (a) *Facilities for recreational and leisure activities;*
 - (b) *Facilities for education;*
 - (c) *Facilities to purchase or receive items for daily living, recreation and communication;*
 - (d) *Facilities and encouragement to use such facilities, for a patient’s engagement in active occupation suited to his or her social and cultural background, and for appropriate vocational rehabilitation measures to promote reintegration in the community. These measures should include vocational guidance, vocational training and placement services to enable patient to secure or retain employment in the community.*

3. *In no circumstances shall a patient be subject to forced labour. Within the limits compatible with the needs of the patient and with the requirements of institutional administration, a patient shall be able to choose the type of work he or she wishes to perform.”*

Legislation: *Mental Health Act 1996, Part 7, sections 169 to 171*

“Restriction or denial of entitlement

- 169.** (1) *A psychiatrist may order that any right of a particular patient under section 166, 167 or 168 be restricted or denied if the psychiatrist considers it to be in the interest of the patient to do so.*
- (2) *An order under this section is to be reviewed by a psychiatrist each day that it continues in effect, and on any such review may be varied or revoked.*
- (3) *The order lapses at the end of a day on which it has not been reviewed.*
- (4) *A record of the order and each review of it is to be made in the case notes of the patient that are kept at the hospital.*

Application to Board

170. (1) *This section applies only to –*

- (a) *an involuntary patient; and*
- (b) *a mentally impaired defendant who is a patient.*

(2) *An application may be made in writing to the Mental Health Review Board for a review of an order under section 169 (1).*

(3) *The application may be made by the patient or any other person who in the opinion of the Board has a proper interest in the matter.*

(4) *On application being made the Board may confirm, cancel or vary the order.*

Restriction or denial of right to be reported on review

171. *Any restriction or denial of a right that has not been considered by the Board on an application under Section 170 is to be reported to the Board on the next review carried out by it in respect of the patient.”*

COMMENTARY:

Embracing Technology

With changes in technology, use of the Internet as a communication medium is growing and the Council considers there should be provisions similar to those for letters, telephones and visitors.

Use of mobile telephones in facilities is another issue gaining prominence and Council recommends that mobile telephones be included as an item under the present provisions relating to telephone access, or a separate category in this Part. At present some hospitals have a blanket prohibition on mobile phones being available for owners to use while others have a more enlightened approach allowing use and providing a facility (usually with staff supervision available) for recharging of batteries. These facilities are to be commended.

Similarly, communication by Internet is another emerging technology and provision should be made for this communication medium.

Review

While section 170 makes provision for a review of a restriction:

“170 (2) An application may be made in writing to the Mental Health Review Board for a review of an order under section 169(1)”

the right of applying for a review of denial of entitlement is however at present limited to involuntary patients and mentally impaired defendants.

Council has suggested that the term “patient”, as used in sections 169 to 171 inclusive, includes any person admitted to or detained in an authorised hospital.

Council is of the view that the right of review should be given to all persons admitted to or detained in an authorised hospital, as even a voluntary patient may not be able to exercise all of their rights due to the nature of their illness. Those subject to detention such as referred person or those on Hospital Orders (*Criminal Law (Mentally Impaired Defendants) Act 1996*) are disadvantaged by that detention in being able to exercise their rights.

Council has suggested elsewhere that the definition of patients be amended to include all persons admitted or detained in the hospital whatever their status (refer to Council’s submission regarding Definition of Patient, *Mental Health Act 1996*, section 163).

Presently any restriction or denial of a right must be reported to the Mental Health Review Board on the next review carried out by it. The high proportion of people who are discharged prior to a review means that many restrictions are not brought to the attention of an independent body.

The Council of Official Visitors is in regular contact with patients. An order like this can have a significant effect on the patient. Council’s involvement can mitigate any detrimental effect on the patient. The Council may wish to apply on behalf of the patient for a review under section 170. In these circumstances reporting the restriction / denial to the Council within 1 working day of its imposition would allow for an independent body and potential advocate to be informed.

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.

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LEGISLATION

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