

A submission to the
Senate Select Committee on Mental Health

(April 2005)

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1. In relation the adequacy of mental health legislation (term of reference [j]) and the use of seclusion (and restraints) (term of reference [k]) and the protection of human rights, this submission calls for a review of the National Model Mental Health Legislation, the Rights Analysis Instrument and the overall network of State and Territory based legislation to increase harmony and national consistency.
2. The current legislation and instruments are based on the 1991 United Nations' Principles and the *National Mental Health Statement of Rights and Responsibilities*. However, inconsistencies between States and Territories' provisions, the introduction of bilateral agreements to address inter-jurisdictional issues and variations in procedures and definitions adds to the uncertainty within the system and the undermining of people's human rights.
3. The differences in the levels of regulation the various mental health acts offer can be evident by comparing the legislation of South Australia (approximate 37 sections) with that of Queensland's approximate 588 sections. Whilst the level of regulation may not automatically determine the quality of care or observance of people's human rights, it does add certainty around the provision of mental health care.
4. Of particular concern is the variation in the mental health statutes' seclusion and restraint regulations. Whilst most of the mental health acts based their seclusion and restraint provisions on those found in the Model Mental Health Legislation, New South Wales and South Australia have chosen not to include such protections in their statutes. Although it concerns people with an intellectual disability rather than people with a mental illness, the Victorian Law Reform Commission's report is particularly informative. The Commission's Final Report on a legal framework for compulsory care for people with an intellectual disability who pose a risk to themselves or other people, was tabled in Parliament on 20 November 2003. The Commission's recommendations argue for a more comprehensive and systematic approach to regulation involving reporting, monitoring and independent audits. The Report recommends the establishment of an independent Office of Senior Clinician that would be responsible for overseeing the system. It is also proposed that the Office would work cooperatively with the Department of Human Services to promote systematic improvements in the use of restrictive care practices. The Report also proposes a system for responding to the needs of a small number of individuals with an intellectual disability whose conduct poses a serious risk of harm to others. It recommends that in certain circumstances a person should be able to be required to participate in a program designed to help them modify their behaviour.

<http://www.lawreform.vic.gov.au/CA256A25002C7735/All/756C30D0E19FEA51CA256EE400115176?OpenDocument&1=31-Past+projects~&2=12-Intellectual+Disability~&3=50-Final+Report~>
5. It should be noted, however, that a few of the States, including NSW, are currently reviewing their mental health legislation.

6. The following discussion looks at some of the various characteristics and differences between the mental health statutes.

Current status and principles of the mental health act

7. The majority of current State and Territory mental health statutes have been enacted over the last 19 years.
8. The underpinning basic principles of the mental health Acts are enshrined within the legislation and drawn upon the United Nations' Principles. The legislation generally requires that the best treatment and care be provided in the least restrictive environment, respecting rights, privacy, dignity, and self-respect, whilst mindful of safety issues.

Definitions of “Mental Disorder”

9. Generally "mental disorders" / "mental illness" are defined in the States and Territories' mental health legislation, with some variation, as:

"For the purposes of this Act a person has a mental illness if the person suffers from a disturbance of thought, mood, volition, perception, orientation or memory that impairs judgment or behaviour to a significant extent."

10. The definitions of "mental disorders" / "mental illness" exclude social lifestyle choices, sexual preferences, and political views, and are silent on the issue of learning disabilities.
11. In addition to the mental health legislation that applies to people with a mental illness, the States and Territories also have guardianship legislation, which applies to everyone who is incapable of making their own decisions.

Patients' rights and safeguards

12. Generally, State and Territory mental health legislation do not provide for a patient to put on record what sort of treatment s/he would prefer if their mental disorder deteriorates. In some jurisdictions, however, programmes require the use of non-legally binding individual treatment plans.
13. The States and Territories have differences in patients' rights to have access to advocacy services, to have their capacity to make decisions about their treatment considered, and at what stage of the assessment of a patient for possible imposition of compulsory powers do any safeguards come into play. For some jurisdictions, safeguards come into play on the initial consultation with the medical practitioner (WA), or with the requirement that two adults (ie over 18 years of age) must agree that a person is likely to have a mental illness (Victoria). Other jurisdictions, state that safeguard come into play on admission to an authorised hospital with the need for the patient to be seen by a medical practitioner within 12 hours (NSW).
14. Most jurisdictions' mental health legislation uses the patient's capacity to make decisions a factor in deciding whether a person should be admitted as an involuntary patient and whether their consent is required.
15. The frequency of review by a specialist independent review authorities various between jurisdictions from 28 days to 12 months. Mental health patients and a right in all

jurisdictions to appeal against their "involuntary patient" status, but not against their treatment (except in so far that they can request a second opinion (Victoria)). Reviews are usually to a superior court.

16. Only Western Australia has arrangements in place to provide free legal representation to mental health patients. Western Australia Health Department has a funding agreement with that jurisdiction's mental health legal centre to fund representation. New South Wales notes that mental health patients may apply for free legal representation through its legal aide programme.

Authorisation of compulsory powers

17. The people or bodies needed to give consent or approval before a person can be treated under compulsion varies between jurisdictions. New South Wales sits at one end of the spectrum, allowing a range of different individuals and authorities to have a person detained on the grounds of a perceived mental illness. At the other end of the spectrum, Tasmania has that approval from its Guardianship and Administration Board is required.
18. It is understood that in all jurisdictions (except for NSW) the patient's capacity or decision-making ability is a consideration in whether or not compulsory powers can be used.
19. With respect to the criteria need to be satisfied for statutory powers to be used, except for Western Australia, a person who appears to have a mental illness may be brought to an authorised mental health facility for assessment and, if required, admission. The Western Australian mental health legislation requires the person to have a mental illness.

Compulsory Treatment in the Community

20. Mental health patients, treated under mental health legislation, do not have to be resident in hospital if they meet the statutory requirements. Generally, patients may be treated under a community treatment order except where there are concerns for health/safety, availability of care, and the availability and willingness of a medical practitioner to supervise. There is no age limit on who can be the subject of such an order.

Children

21. Generally, state and territory mental health legislation has no age limits/criteria and do not provide extra safeguards for children. However, some jurisdictions run separate programmes for different age groups, and that some have other specific legislation.

Care and Treatment

22. Except in Victoria, "medical treatment" or "treatment" is not generally defined in the State and Territory mental health legislation. Some jurisdictions have chosen to specify interventions, which are not to be classified as treatment. All mental health statutes explicitly regulate the administration of ECT.

Patients with criminal convictions

23. In all jurisdictions patients who have committed crimes are dealt with under their mental health legislation, but that special provisions apply. These include the patient having the

status of a "secured patient" and being returned to the correctional centre on they release. In New South Wales, the criminal justice system has its mental health facility located within one of its metropolitan correctional centres. Within New South Wales, also, mental health patients within the criminal justice system can be held indefinitely, and are released at the Governor's or Minister's pleasure.

Further resources on the Internet

24. The following Internet websites are interesting discussions on mental health and the law:

- Out of Sight - Out of Mind, Sunday 20 March 2005, Former Liberal Senator Chris Puplick takes a critical look at how we deal with the mentally ill in our society. People with mental illnesses are often incarcerated instead of given proper mental health treatment. As one example he cites the Cornelia Rau case.
<http://www.abc.net.au/rn/science/ockham/stories/s1325679.htm>
- Out of Work: Out of Sight, Sunday 13 February 2005, Unemployment in Australia is at its lowest since 1976. The official national rate is about 5%, but that statistic means there are still half a million people who are on the dole and looking for work.
<http://www.abc.net.au/rn/talks/bbing/stories/s1303359.htm>
- Unacceptable Risk, 9 November 2004, How do we predict that a prisoner will be a permanent danger to society and decide to throw away the key? The simple answer is we ask the psychiatrists, like the one who profiled Ivan Milat. But are they getting it right? <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1236821.htm>
- Mental Illness and the US Courts, 25 May 2004, A look at Mental Health and the Criminal Justice system in the USA. How well do courts cope with seriously ill defendants? <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1114398.htm>
- Crime, Conditions of Care and Convalescence, Tuesday 03/06/2003, The story of a young man who's never committed a violent offence – but who's spent the last 2 years in a maximum security hospital ward in Sydney's Long Bay jail. It's a case which raises important questions about how NSW - processes the mentally ill - through both its health system and its justice system.
<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s869570.htm>