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Mr Ian Holland
Committee Secretary
Select Committee on Mental Health
Parliament House
CANBERRA ACT 2601

Dear Mr Holland

Inquiry into Mental Health Issues

The Law Society of South Australia thanks you for the opportunity to provide a submission to the Select Committee on Mental Health.

The attached submission has been prepared by the Society's Justice Access Committee. It specifically addresses a number of legal issues in the South Australian jurisdiction arising out of Item (k) of the Terms Of Reference for the Select Committee.

Item (k) of the Terms of Reference is expressed as follows

> *The practice of detention and seclusion within mental health facilities and the extent to which it is compatible with human rights instruments, humane treatment and care standards, and proven practice in promoting engagement and minimising treatment refusal and coercion.*

This submission references the "Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care", (United Nations Resolution 113, 46th Session 1992 A-Res 46/119) hereinafter referred to as the International Principles..

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This submission details a number of legal and practical aspects of the South Australian legislation, The Mental Health Act 1993, (hereinafter referred to as the Act) and the Guardianship and Administration Act 1993, case law in the District Court of South Australia and certain practices of the Guardianship Board and the mental health institutions in South Australia which do not reflect the protections afforded detained persons by the International Principles.

1 Consent to Treatment

The issue of consent to treatment is raised in this submission as, despite the fact that it is technically outside the Terms of Reference, orders permitting non-consensual treatment abrogate basic human rights and civil liberties. In addition, the Act provides for the police to apprehend and detain for treatment persons who fail to comply with these orders.[1]

International Principle 11(8)

Except as provided in paragraphs 12 ,13, 14, & 15 treatment may also be given to any patient without the patient's informed consent if a qualified mental health practitioner authorised by law determines that it is urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons. Such treatment shall not be prolonged beyond the period which is strictly necessary for this purpose. (emphasis added)

(i) The Act

Section 20(1) (c) of the Act allows for orders to be made authorising non-consensual treatment for a period of up to 12 months if it is

"... in the interests of his or her (the patient's) own health and safety or for the protection of others."

The Act makes no reference to urgency, immediacy or imminence of harm as required by the International Principles. In this regard, section 20 (1) (c) of the Act is inconsistent with International Principle 11(8).

(ii) The Guardianship Board

In practice, the Guardianship Board regularly makes orders for non-consensual treatment, in reliance upon past conduct by the patient

[1] Section 23(4)

which may have occurred many years ago and which has no aspect of urgency, immediacy or imminence of harm. Case examples can be provided.

International Principle 11(8) also requires that

"..such treatment shall not be prolonged beyond the period which is strictly necessary ..."

The Guardianship Board is frequently asked to review and reimpose orders in respect of patients who have been receiving non-consensual treatment pursuant to previous orders.

In many cases the patient is well and the condition is stable yet the order for non-consensual treatment to continue will be made based upon a perceived need for prophylactic treatment.[2] Case examples of decisions can be provided.

(iii) District Court Decisions

In South Australia, the District Court hears appeals against orders of the Guardianship Board. In the decision of Reciuga v the Guardianship Board [3] the words *"protection of others"* were held to include behaviour which was *"annoying"* or amounted to *"a nuisance"* and that it could include *'something less than physical harm."*

In the case Luppino v Guardianship Board [4] the word *"safety"* was held to *"not necessarily (be) restricted to the status of being safe from*

[2] The case of Hanrahan v Guardianship Board (District Court DCAAT-98-495 21 January 1999) clearly illustrates the issue. In this case the Guardianship Board had made an order for non-consensual treatment despite the fact that the doctor seeking the order had told the Guardianship Board that the patient's condition had stabilised. On appeal Judge Lee and Assessors found that *"however medically desirable prophylactic treatment might be the Act protects the appellant's right to refuse medication during periods of wellness and stability if during those periods she is able to care for herself and other persons are not at risk."*

[3] District Court Judgment no. D3395 29 February 1996
[4] District Court No.241/99 30 August 1999

physical harm or injury" and that it could mean *"any prospect of significant loss including financial loss."*

A recent decision in the same jurisdiction, Key v Guardianship Board[5] the Court declined to follow the reasoning of the previous decision and found that in every day speech, the word "*safety"* means "*safe from physical injury or harm."*

There are now two conflicting decisions in this jurisdiction regarding the definition of the word "safety".

The term *"protection of others"* has not been considered recently by the appeal court.

Summary

Section 20 (1) (c) of the Mental Health Act 1993 (SA) is inconsistent with International Principle 11(8) in that it does not require urgency, immediacy or imminence of harm to be established before for an order for non consensual treatment is made.

The practice of the Guardianship Board in imposing treatment orders when there is no aspect of urgency, immediacy or imminence of harm is inconsistent with International Principle 11(8).

The practice of the Guardianship Board in imposing treatment orders for prophylactic reasons is inconsistent with International Principle 11(8).

Decisions of the District Court of South Australia which are relied upon by the Guardianship Board to substantiate the making of orders for non-consensual treatment are inconsistent with International Principle 11(8).

2 Involuntary Admission

2.1 International Principle 16

[5] District Court No ADD 43/2005 14 March 2005

A person may (a) be admitted to a mental health facility as a patient....if and only if a qualified mental health practitioner authorised by law for that purpose determines, in accordance with principle 4, that the person has a mental illness and considers:

(i) That, because of that illness there is a serious likelihood of immediate or imminent harm to that person or other persons; ...(emphasis added)

The Act allows for involuntary admission and detention
"...in the interests of (the person's) own health and safety or for the protection of others".[6]

The submission above in section 1 regarding immediacy and imminence of harm and the definition of "health and safety" and "the protection of others" is repeated here.

The District Court decisions of Reciuga and Luppino are frequently relied upon by the Guardianship Board hearing appeals against orders for detention, to dismiss the appeal and affirm these orders.

Case examples, some with written reasons from the Guardianship Board, can be provided in respect of patients whose appeals have been dismissed for reasons much less than the risk of immediate or imminent harm to the person or other persons.

Summary
Section 12(1)(c) of the Mental Health Act 1993 is inconsistent with International Principle 16 in that it does not require urgency, immediacy or imminence of harm to be established before involuntary admission and detention.

The practice of the Guardianship Board in affirming detention orders when there is no aspect of urgency, immediacy or imminence of harm is inconsistent with International Principle 16.

Decisions of the District Court of South Australia which are relied upon by the Guardianship Board to affirm orders for involuntary admission and detention are inconsistent with International Principle 16.

2.2 International Principle 16(2)

Involuntary admission or retention shall initially be for a short period as specified by domestic law for observation and preliminary treatment pending review of the admission or retention by the review body. (emphasis added)

The Act does not provide for automatic right of review of admission or detention by the review body (the Guardianship Board).

Patients only have their detention formally reviewed if they lodge an appeal to the appeal division of the Guardianship Board.

Appeals against detention are listed for hearing on only two days per week and delays in getting a hearing are common. In practice, not infrequently the person will have spent the majority of the 21 days in detention before an appeal is heard.

The only automatic review of detention orders is contained in Section 24 of the Act which provides for an automatic review of all detentions which occur within 7 days of the patient being discharged pursuant to the expiry or revocation of a previous order for detention. The section requires the review to take place *as soon as practicable* after the order is made.

In practice these reviews can take place weeks later, often when the person has been discharged and therefore the limited review process provided by the Act does not assist detained persons.

Summary
The Mental Health Act 1993 is inconsistent with International Principle 16(2) in that it does not provide for an automatic right of review by the Guardianship Board of all involuntary admissions and detentions.

Guardianship Board practice causes delays in appeals against detention reaching hearing.

3 Review Body

3.1 International Principle 17(1)

The Review Body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions have the assistance of one or more qualified and independent mental health practitioners and take their advice into account. (emphasis added)

The Guardianship Board regularly sits in both divisions without a mental health practitioner on the panel and it is not uncommon for the Guardianship Board to be constituted of one person with no legal or medical qualifications

Summary
In sitting without a mental health practitioner the Guardianship Board as the Review Body, is in contravention of International Principle 17(1).

3.2 International Principle 17 (7)

A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or retained, in a mental health facility. (emphasis added)

The delay in appeals against detention reaching hearing by the Guardianship Board at first instance effectively means that appeals to the District Court from decisions of the Guardianship Board affirming an order for detention are unlikely to be heard.

Appeals to the District Court are first listed for directions at which time transcript and reasons for the decision of the Guardianship Board are ordered. A two-week delay between the lodgment of the appeal and listing in the court for directions is not uncommon.

Because appeals to the District Court are only heard once a week on a Monday morning it would be unusual to get a hearing date within a month. By

this time the order of detention will most likely have expired and the person have been discharged.

In reality, given the delays in obtaining appeal hearings both at the first instance and in the District Court, there is no appeal from an order of the Guardianship Board affirming a detention order and consequently, decisions of the Board in this regard are rarely reviewed by the higher court.

A basic protection afforded by domestic law is therefore unavailable to the mentally ill in respect of detention orders despite the fact that there may have been strong grounds for the appeal.

In practice this means is that a wrongful detention which could have been successfully challenged remains on the person's hospital record and may well be used to substantiate further detentions. The person has no legal means of expunging it. Case examples can be provided.

Summary
For administrative reasons, appeals to the higher court against a decision of the Review Body that the person be admitted to or retained in a mental health facility rarely take place and the patient is effectively denied the protection afforded by International Principle 17(7).

4 Procedural safeguards

4.1 International Principle 18(1)

The patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint or appeal. If the patient does not secure such services, a counsel shall be made available without payment to the patient to the extent that the patient lacks sufficient means to pay.

Whilst legal representation is provided free of charge for appeals against detention there is no provision for legal representation for hearings before the

Guardianship Board. For current purposes this means applications for orders authorising non-consensual treatment pursuant to the Act.

Because the appeal process is limited to a review of the decision, if the person who is the subject of the order has for whatever reason been unable to present evidence competently at the initial hearing before the Guardianship Board then it is likely that any injustice occurring at the initial hearing will be perpetuated through the appeal process.

4.2 International Principle 18(3)

The patient and the patient's counsel may request and produce at any hearing an independent mental health report and any other reports and oral, written and other evidence that are relevant and admissible.

The Guardianship and Administration Act [7] requires the Guardianship Board to allow the person to whom the proceedings relate an opportunity to call expert evidence.

However, the scheme which provides for the person to whom the proceedings relates to receive free legal representation does not extend to the provision of funding for disbursements to cover the cost of an expert report or oral evidence by an expert.

In practice therefore the majority of patients are unable to call their own evidence and are therefore unable to challenge the evidence of the medical practitioner who had detained them.

Summary.
In practice, lack of funding for the patient to obtain independent expert evidence means that the patient is denied the protection afforded by International Principle 18(3).

4.3 International Principle 18(4)

[7] Section 14(6)

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. ...

Glenside Hospital, the largest mental health facility in South Australia has in place and enforces a formal written Practice Direction preventing patients from viewing their case notes and restricting access by legal practitioners representing patients on appeal.

Other psychiatric institutions enforce similar policies preventing access to case notes by patients and restricting access by legal practitioners representing patients who have lodged appeals against detention.

The Glenside Hospital Practice Direction restricts the information which the legal representative is allowed to provide to the client to that which is available under the Freedom of Information Act 1991.

In this regard, not infrequently, family members and others will have contacted the hospital with what is called 'collateral information' about the patient. This information may be used by the treating team to help establish a diagnosis and/or establish the existence of risk and will frequently be put before the Guardianship Board at the hearing and relied upon to substantiate the detention.

It is understandable that the treating team may want to keep some of this material confidential. However, if this material is to going to be put to the Guardianship Board in the appeal hearing then the patient has the right to know the detail of the information and its origin to enable them to meet the allegations.

The Glenside Hospital Practice Direction prevents legal representatives from having access to case notes whilst interviewing clients. Effective legal

representation is compromised as it is impossible to take comprehensive instructions from clients without the case notes present at the interview. Case notes can be voluminous. Even relatively short admissions can result in case notes of many pages with numerous entries for each day the patient is in hospital.

As a result of concerns expressed by legal practitioners regarding the issue of access to patient case notes it is understood that the Public Advocate has sought an opinion from the Crown.

Summary.
Hospital policy and practice in South Australia regarding access by patients to their case notes pending an appeal hearing is inconsistent with International Principle 18(4).

4.4 International Principle 18(8)

The decision arising out of the hearing and the reasons for it shall be expressed in writing....

The Guardianship and Administration Act [8] provides for written reasons for decision to be provided upon request, within three months of the hearing, of the person to whom the proceedings relate or any person who satisfies the Registrar that they have a proper interest in the matter. These reasons are provided free of charge.

Written reasons for decision are also provided free of charge upon appeal. However, it is the practice of the Guardianship Board to prepare these reasons from transcript only once an appeal has been filed. It is submitted that this practice raises serious questions of fairness.

[8] Section 14(13)j

The Guardianship Board usually provides brief ex tempore reasons at the time of the hearing but the patient is required to pay transcription fees of $11.50 per page for a written copy of these reasons.

It is submitted that written reasons, incorporating ex tempore reasons should be provided automatically without charge to all appellants.

Summary.
Section 14(13) of the Guardianship and Administration Act 1993 and the practice of the Guardianship Board with respect to the provision of reasons for decision are inconsistent with International Principle 18(8).

I trust that these comments are of assistance to the Committee.

Yours Sincerely

Alexander Ward
PRESIDENT