

Amendments to the NSW Mental Health Act (2007)

FACT SHEET: Clinicians

The Mental Health Act 2007 (the Act) was amended on 31 August 2015 following a major review of the legislation. Information is provided in this fact sheet to assist Clinicians to understand changes to their responsibilities under the Act and is to be read in conjunction with the [Mental Health Act 2007 No. 8](#) and the [Mental Health Act Regulation 2013](#).

For further information about the specific responsibilities of Accredited Persons, please see the Accredited Persons' Fact Sheet, available at: www.mha.nswiop.nsw.edu.au

This fact sheet also restates other important provisions of the Act.

About the Act

Under the Act, a person who is mentally ill or mentally disordered may be detained to enable appropriate care and treatment to be provided, subject to certain conditions.

Use of the term 'serious harm' in the Act?

A mentally ill person is someone who has a mental illness and, because of that illness, there are reasonable grounds for believing the person requires care and treatment in a mental health facility in order to protect them and/or others from *serious harm* (s14).

A Communique from the NSW Chief Psychiatrist was provided to Local Health Districts and Speciality Networks in 2014. It provides guidance to clinicians making involuntary treatment decisions, regarding the 'serious harm' criterion in the Act. The Communique states that, whilst *serious harm* is not defined in the Act, it is intended to be a broad concept that may include:

- Physical harm
- Emotional/psychological harm
- Financial harm
- Self-harm and suicide
- Violence and aggression, including sexual assault or abuse
- Stalking or predatory intent
- Harm to reputation or relationships
- Neglect of self
- Neglect of others (including children).

The Communique also states that, when making involuntary treatment decisions under the Act, clinicians should undertake a comprehensive assessment of the person, including review of the history of mental and physical illness, family history, psychosocial factors impacting on

the presentation, and evaluation of the risk of self-harm and harm to others. The assessment should include consideration of the harm that may arise should an illness not be treated.

Who is a mentally disordered person under the Act?

A mentally disordered person is someone whose behaviour is so irrational that there are reasonable grounds for believing the person requires care and treatment in a mental health facility to protect them and/or others from serious physical harm.

Changes to the Act place a greater focus on consumer recovery

The term 'control' has been removed from the objects of the Act, and greater emphasis has now been placed on promoting a consumer's recovery, including by encouraging clinicians to facilitate the involvement of consumers and carers in decisions about care and treatment (s3).

The principles for care and treatment in the Act have been amended so there is a greater focus on the recovery of consumers through, as far as practicable:

- Supporting consumers to pursue their own recovery;
- Considering any special needs related to the disability or sexuality of a person;
- Providing developmentally appropriate services to consumers aged under 18 years;
- Recognising the cultural and spiritual beliefs and practices of Aboriginal and Torres Strait Islander people;
- Making every reasonably practicable effort to consider the views and expressed wishes of consumers when developing treatment and recovery plans; and
- Making every reasonably practicable effort to obtain consumers' consent when developing treatment and recovery plans, to monitor their capacity to consent, and to support those who lack the capacity to understand their plans.

Changes regarding voluntary patients

A voluntary patient in a mental health facility can now be detained for up to two hours to allow an authorised medical officer to carry out an assessment to determine if the person is mentally ill or mentally disordered (s10). A new form, Detention of Voluntary Patient for up to Two (2) Hours has been developed to support this process.

A voluntary patient must now be given an explanation and Statement of Rights outlining their legal rights and entitlements under the Act (s74A). A new form has been developed, Schedule 3A Statement of Rights for Voluntary Patients.

Voluntary patients must now be reviewed by the Mental Health Review Tribunal (the Tribunal) at least once every 12 months of continuous residence in a mental health facility (s9). When undertaking this review, the Tribunal must consider if a consumer is likely to benefit from further care or treatment as a voluntary patient (s9(2)).

Changes to the initial detention of a person - Scheduling

The Act has been amended to explicitly state that an accredited person or a medical practitioner may examine or observe a person via an audio visual link for the purposes of writing Part 1 of Schedule 1 (s19A).

The use of an audio visual link for these assessments is subject to the following conditions:

- It may only occur where it is not reasonably practicable to personally examine or observe the person (s19A(1));
- The accredited person or the medical practitioner must be satisfied that they are able to examine or observe the person with sufficient skill and care so as to form the required opinion about the person (s19A(2)).

Changes to the ongoing detention of a person in a mental health facility

Section 27A allows an accredited person who has been authorised by the medical superintendent of the mental health facility, to personally observe and examine a person where an authorised medical officer or other medical practitioner is unavailable.

This section also allows a medical practitioner to conduct an examination via audio visual link, subject to the conditions outlined in the section above on initial detention. Where an examination is conducted under S27A, the amended Form 1 - Clinical report as to state of a detained person.

See: <http://www.health.nsw.gov.au/mentalhealth/Pages/legislation.aspx>

If reasonably practicable, an accredited person or medical practitioner who is not a psychiatrist must seek the advice of a psychiatrist before making a determination as to whether the person is a mentally ill or mentally disordered person (s27A(4)). The psychiatrist is not required to examine or observe the person.

The Act now also requires assessing clinicians to seek and consider the views of carers, relatives, treating health professionals and relevant emergency services personnel, where practicable, when making determinations about a person's potential need for ongoing involuntary treatment and when considering the person's discharge (s72B).

Involuntary Patients' rights have been improved

The involuntary patient Schedule 3 - Statement of Rights for Persons Detained In Mental Health Facility has been amended to recognise that involuntary patients have the right to: see an Official Visitor; seek discharge from a mental health facility; and appeal to the Tribunal against any refusal to discharge them.

A detained person who has been transferred to a non-mental health facility to receive treatment for a non-mental health condition has the right to notify the medical superintendent of the health facility that they wish to see an Official Visitor. The consumer's designated carer(s) and principal care provider are also able to request to see an Official Visitor. The medical superintendent must notify the Principal Official Visitor of such a request (s134A).

If an involuntary patient has the capacity to consent to a proposed surgical operation but decides not to consent, the Secretary of the NSW Ministry of Health can no longer override that decision.

Primary carers and designated carers

The term 'primary carer' in the Act has been changed to 'designated carer' (s71). There has been no change to the definition. Any primary carer nominations that were current as at 31 August 2015 remain in force, although they are now known as designated carer nominations.

Consumers can now nominate up to 2 designated carers.

Treating clinicians should take all reasonably practical steps to ensure that consumers who are eligible and who already have a designated carer, are offered the opportunity to nominate an additional designated carer under s72. The new form Nomination of Designated Carer(s) should be used. See: <http://www.health.nsw.gov.au/mhdao/Pages/legislation.aspx>

Principal care provider

A new type of carer has been added to the Act, the 'principal care provider' (s72A). The principal care provider is the individual who is primarily responsible for providing support or care to a consumer (other than wholly or substantially on a commercial basis). The principal care provider may also be the designated carer of the person.

The principal care provider has a similar right to notice and information about a consumer as designated carers.

An Authorised Medical Officer or the Director of Community Treatment may determine who is the principal care provider of a consumer (s72A(2)) and should use the new form: Identification of Principal Care Provider. See: <http://www.health.nsw.gov.au/mhdao/Pages/legislation>

A person cannot be the principal care provider if they have been excluded by the consumer from being given notice or information (s72A(3)).

However treating clinicians are not required to give or withhold notice or information to the principal care provider, or to appoint or exclude a person as the principal care provider if they reasonably believe that to do so may put the consumer or the principal care provider at risk of serious harm (s72A(4)).

Changes in relation to young persons

A young person under 16 years of age must now be provided with legal representation for all Tribunal hearings unless the Tribunal determines it would be in the young person's best interests to proceed without representation (s154(4)).

Where Electroconvulsive Therapy (ECT) is proposed for a voluntary or involuntary patient who is under 16 years of age, an assessment by a psychiatrist with expertise in child and adolescent development is now required (s94(2A)). The approval of the Tribunal must be obtained in all such cases, even where the young person has capacity and has consented to ECT (s96(3A)).

Community Treatment Orders (CTOs)

The changes to the Act remove the requirement for a 14 day notification period for an application for a CTO if the Tribunal decides that it is in the best interests of the affected person that the CTO application be heard earlier (s52(4)(b)).

The Tribunal now has the authority to make a CTO at an appeal hearing against a refusal to discharge a detained person, and to defer discharge for up to 14 days (s44(6), s51(6)).

The treating team is now required to consult with the consumer, and if reasonably practicable to do so, with their designated carer(s) and their principal care provider, before revoking a CTO (s66(2)).

The Director of Community Treatment must now notify the Tribunal in writing if they revoke a CTO or decide not to apply to the Tribunal for a further CTO (s66(3)). A form has been prepared to assist Directors of Community Treatment in meeting this new requirement: [Notice to Mental Health Review Tribunal of Decision to Revoke or Not Apply for a Further Community Treatment Order](#).

The Director of Community Treatment must now take all reasonably practicable steps to notify a consumer's designated carer(s) and principal care provider, in writing, if:

- A CTO is varied or revoked by the mental health service or the Tribunal;
- An application is made for a further CTO; or
- The treating team decides not to apply for a further CTO.

Changes to provisions for detaining a person pending apprehension by a police officer

An authorised medical officer can now detain a person pending apprehension by a police officer for up to two hours (s32(4)(a)). This section however, only relates to situations where a person has been detained on the order of a Magistrate or bail officer pursuant to s32 and are not required to be brought back before a Court under section 33 of the Mental Health (Forensic Provisions) Act 1990.

Mental Health Forms

Some Mental Health Act forms have been updated and new forms have been developed (some of which relate to the Mental Health Regulation 2013).

All current Mental Health Act forms and relevant documents are available and can be downloaded for printing from the NSW Ministry of Health website:

www.health.nsw.gov.au/mhdao/Pages/legislation.aspx

Training on Amendments to the Act

Online and face-to-face training is being provided throughout NSW by the NSW Institute of Psychiatry. It is anticipated that online training will be available in 2016. For further information, contact the Institute on 02 9840 3833 or at www.nswiop.nsw.edu.au

Relevant links

- Information on the Mental Health Review Tribunal can be found at: www.mhrt.nsw.gov.au/the-tribunal
- The Memorandum of Understanding-Mental Health Emergency Response 2007 between NSW Health, Ambulance Service of NSW and between NSW Police Force can be found at: www.health.nsw.gov.au/mhdao/Pages/partnerships-gd.aspx
- The Mental Health Act 2007 Guidebook, which provides practical information to mental health practitioners, carers, and those who provide support and advice to consumers, is being updated. Once completed, the Guidebook will be available on the NSW Ministry of Health website: www.health.nsw.gov.au/mhdao/Pages/legislation.aspx