



The peak organisation representing the non-government mental health sector in Tasmania at a state and national level

Submission

Mental Health Bill 2011
Exposure Draft
September 2011



The Mental Health Council of Tasmania has a vision for a vibrant and effective mental health sector in Tasmania.

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Submission

The Mental Health Council of Tasmania (MHCT) is the peak body representing the interests of consumer, carer and community mental health sector organisations, providing a public voice for people affected by mental illness and the organisations in the community sector that work with them.

The MHCT advocates for effective public policy on mental health for the benefit of the Tasmanian community as a whole and has a strong commitment to participating in processes that contribute to the effective provision of mental health services in Tasmania.

The MHCT has been an active member of the Mental Health Act Review Advisory Committee, therefore is well placed to provide an informed submission to the *Draft Mental Health Bill 2011*. The MHCT is pleased with the extension of the consultation period to September 19 2011, as this has allowed for a truly consultative process which includes time for consumers and families to participate. This timeframe has also allowed the MHCT to have a more thorough consultation process with their members.

The MHCT welcomes the changes to the structure of the new proposals, in particular the beginnings of a shift from a detention focus towards a focus on treatment and human rights. The Department of Health and Human Services 2007 discussion paper *Review of the Mental Health Act 1996*¹ reflects the need for this change. The MHCT believes that to ensure consumers, their families and carers receive the best care from mental health services within this proposed framework, additional resources are required.

The MHCT notes Part 4 (Involuntary Patients), Subsection 83 - 'Rights of involuntary patients' is located at the end of this section. For the *Draft Bill* to truly align with a human rights focus, the MHCT recommend this Subsection be outlined first in Part 4. The MHCT would also recommend that Schedule 1 – Mental Health Service Delivery Principles be located at the beginning of the document, as this will reinforce to service providers, consumers, carers and families the importance of the implementation of the Mental Health Act.

Regarding the *Draft Bill's* reference to the detention and treatment of a person, the MHCT proposes that this is determined solely on the basis of legal capacity. This analogy is currently missing from the current *Mental Act 1996*. Given this is such a significant shift, the MHCT recommends that the term 'legal capacity' be included in Part 1, Section 3 (Interpretation) of the *Draft Bill*. At present the definition of 'mental capacity' is difficult to locate in Part 1, Section 8 of the *Draft Bill*. The issue of 'legal capacity' can be contentious amongst the medical and legal professions. Having a definition is essential to ensure both health and legal practitioners using the Act are working from the same definition.

In line with the requirement for additional resourcing, the MHCT endorses Advocacy Tasmania's recommendation from their 2008 Submission to the Legislative Council Select Committee Mental Health Legislative Measures:

¹ Department of Health and Human Services, 2007, *Review of the Mental Health Act 1996*, DHHS Mental Health Services, Hobart.

“ATI believes that Tasmanian’s who lack capacity should have as a matter of right an Independent Mental Capacity Advocate and that the Government should examine implementing such a scheme in the state as a matter of high priority.”²

The MHCT recommends that resources and/or funding be allocated for additional mental health advocates, as called for in our Budget Priority Statement 2011-12.³

The MHCT wishes to highlight the importance of promoting individuals' wishes through supportive decision making, in lieu of supplementary decision making. This concept has been identified in the *Draft Bill* and the MHCT applauds this change. To ensure this concept can be put into practice, the MHCT recommends an increase in the number of mental health advocates facilitating increased support for mental health consumers across the State. As mentioned previously, this was a recommendation from the MHCT submission to the Tasmanian Government's 2011-12 State Budget.⁴ Given the current State Budget, the MHCT would like to know what other options the Government would consider if this recommendation was not achievable.

The MHCT represents a diverse range of member organisations and individuals, including Carer Organisations. The MHCT is pleased that the importance of the role which families and carers play has been acknowledged in the *Draft Mental Health Bill 2011* Schedule 1 – Mental Health Service Delivery Principles:

“(h) to recognise the difficulty, importance and value of the role played by families and support persons with mental illness;”

This aligns with the recently released Commonwealth Act - *Carer Recognition Act 2010*⁵ that provides for the recognition of carers in the public service. Schedule 1 of the Act entitled ‘The Statement for Australia’s Carers’ states:-

‘Carers should be considered as partners with other care providers in the provision of care, acknowledging the unique knowledge and experience of carers.’

The MHCT recommends the inclusion of this principle in the *Draft Bill* to encourage Health Care Professionals to include families and carers in the treatment of people with mental illness, with the insertion of ‘consult/liaise/involve family members (where appropriate)’ in the following Sections:-

- Part 4 (Involuntary patients), Division 1 (Assessment orders), Section 46. **Action to be taken by medical practitioner on making assessment order**
- Part 4 (Involuntary patients), Division 1 (Assessment orders), Section 50. **Action to be taken by medical practitioner on affirming assessment order**
- Part 4 (Involuntary patients), Subdivision 1 (Treatment plans), Section 74. **Preparation of treatment plan**
- Part 4 (Involuntary patients), Subdivision 1 (Treatment plans), Section 75. **Variation of treatment plan**

² Advocacy Tasmania Inc., October 2008, Legislative Council Select Committee Mental Health Legislative Measures, Submission, p.4.

³ www.mhct.org/documents/BPS2011-12.pdf

⁴ www.mhct.org/documents/BPS2011-12.pdf

⁵ Source: www.fahcsia.gov.au/sa/carers/pubs/carers_recognition_guidelines/Pages/default.aspx

- Part 4 (Involuntary patients), Subdivision 2 (Seclusion and restraint), Section 77. **Seclusion**
- Part 4 (Involuntary patients), Subdivision 2 (Seclusion and restraint), Section 78. **Restraint**
- Part 4 (Involuntary patients), Division 4 (Patient movements), Section 80. **Transfer of involuntary patients between approved hospitals**
- Part 5 (Forensic patients), Subdivision 2 (Involuntary patients), Section 90. **Admissions procedure**

In addressing the area of early intervention, the MHCT is pleased to see the expansion of the definition of Mental Health Officer (MHO) to include Ambulance Officers, who are qualified Paramedics. This will enable those people requiring mental health intervention receive it in a more timely and appropriate manner than currently transpires under the *Mental Health Act 1996*, whereby Police Officers, with minimum training in the area of mental health are required to provide assistance to people.

There are many proposed changes in the *Draft Mental Health Bill* which differ from the existing *Mental Health Act 1996*. To ensure the proposed mental health service delivery principles are understood and adhered to by Mental Health Officers and Police Officers, the MHCT recommends the provision of additional resources for training in the Mental Health Act 2011.

The MHCT is pleased with the proposed expansion of the Official Visitor role to incorporate visits to the community sector. It is essential that people living in the community have access to this important service. To ensure the effectiveness of the service and ability to meet the additional demands, the MHCT recommends an increase in resource allocation to the Official Visitor Program.

The MHCT notes the proposed expansion to the Mental Health Tribunal (MHT) functions and roles in the *Draft Bill*. The MHCT is pleased that consumers and families will only have one organisation to negotiate with in relation to Treatment Orders. Currently people have to negotiate with both the MHT and the Guardianship and Administration Board (GAB). The MHCT recommends an increase in resource allocation to the MHT to enable it to meet the increased workload and tight timeframes. If this resource allocation is not forthcoming, the MHCT would have concerns as to the effectiveness of the MHT.

The MHCT has concerns about Schedule 1 – Mental Health Service Delivery Principles, whereby it currently states:

(e) “to emphasise and value promotion, prevention and **early detention** and intervention;”

The MHCT would question if “early detention” is an error in the document. To align with the Statewide and Mental Health Services *Building the Foundations for Mental Health and Wellbeing* suite of documents⁶, the MHCT recommends this principle be re-worded as follows:

(e) “to emphasise and value promotion, prevention and early intervention;”

The MHCT has concerns from an operational perspective with the *Draft Bill*. When using the document one has to do numerous cross checks of sections. This does not allow the document to ‘flow’ easily, with the potential for misinterpretation.

⁶ www.dhhs.tas.gov.au/mentalhealth/publications/strategic_documents

An example is in reference to Treatment Orders. Under Part 4, Subsection 57 it states:

"The Tribunal member may make the interim treatment order on the basis of the application alone, without any hearing or further investigation."

Then later in Part 4, Subsection 58 it contradicts the above statement by stating:

"The President of the Tribunal is to ensure that a hearing for the purposes of this section is before a division of the Tribunal constituted by 3 members."

This example is of particular concern to the MHCT. Given that the MHT may have their resources stretched with the requirement to adhere to tight timeframes, there is a potential to resort to having one person making a decision regarding another person's treatment.

The *Draft Bill* refers to 'Authorised Officer' and 'Mental Health Officer' interchangeably throughout the document. This creates potential confusion interpreting the legislation. To alleviate this confusion the MHCT recommends that only one term be used in the document.

The MHCT is concerned the *Draft Bill* has still not addressed the following assessment criteria outlined in Subsection 33.

Power to take person into protective custody states:

- (1) *"An MHO or police officer may take a person into protective custody if the MHO or police officer reasonably believe that –
(c) the person's safety or the safety of other persons is likely to be at risk if the person is not taken into protective custody"*

The MHCT believes this criterion remains subjective in its interpretation. The MHCT recommends that a clear definition of the stated risk be included in the *Draft Bill*. This would ensure that the most vulnerable members of the community are not subject to unnecessary discrimination and/or exploitation.

The *Draft Bill* makes reference to obtaining consent on behalf of a child (aged below 14 years), stating that a person over the age of 14 years is able to give consent for the purposes of assessment and/or treatment. The Bill currently proposes that if consent is required for the purpose of assessment or treatment, one parent's consent is sufficient. The MHCT has concerns about this proposal, as in some circumstances there may be differing views held between the parents. To avoid the ramifications of such scenarios the MHCT recommends a clause/process be included in the Bill to give direction to the Mental Health Tribunal (MHT) on how to address any conflict of opinion between parents.

Another area of concern for the MHCT in relation to children is outlined in Part 1 (Preliminary), Section 9 '**Presumptions as to the "mental capacity" of children**' states:

- (2) *"The matters that may be taken into account by a medical practitioner to establish whether a child has the requisite intelligence and understanding for the purposes of subsection (1) include, but are not limited to, the following:*

Whether the child appreciates the practical implications and if applicable, moral implications of what is being proposed, including any such implications for the child's family"

The MHCT is concerned with the subjectivity of the word 'moral' is used in this context, and thus requests it be removed from the document.

The MHCT notes in Subsection 68. **Renewal of treatment order**, there is no opportunity for recipients of a treatment order to present their own report to the Mental Health Tribunal (MHT). As it currently reads the only people involved in the renewal of treatment orders are the treating medical practitioner and the MHT. To be consistent with the proposed Tasmanian charter of human rights principles⁷ the MHCT recommends the *Draft Bill* include the right of an individual to provide their own report to the MHT.

The MHCT notes under the proposed Assessment and Treatment Order pathway in the *Draft Bill* there is an additional step added from the current *Mental Health Act 1996*. The additional step involves a person being subjected to an application for an Assessment Order by a Medical Officer, to see if they are eligible to be taken into protective custody by an Authorised Officer, on an Initial Order.

Under the current *Mental Health Act* the following pathway is taken:

- If Protective Custody is deemed necessary an Authorised Officer applies for an Initial Order.
- An assessment is made by a Medical Officer within 4 hours of the Initial Order being made.
- An assessment is confirmed by a Psychiatrist within 24 hours.
- An assessment by two Psychiatrists is made to confirm a Continuing Care Order/Community Treatment Order within 72 hours.
- This can be a total of four days and four hours for a person to be involuntary detained.

The proposed Assessment and Treatment Order pathway in the *Draft Bill* includes:

- If Protective Custody is necessary an application for an Assessment Order is made.
- An examination by a Medical Practitioner needs to occur within 72 hours of receipt of the application. An Assessment Order is made if the Medical Practitioner is satisfied criteria are met.
- An Approved Medical Practitioner (AMP) needs to complete an assessment within 24 hours. If a decision is made by the AMP to apply for a Treatment Order an extension of 72 hours can be applied.
- This can be a total of seven days for a person to be involuntary detained.

The MHCT questions the rationale for the additional time outlined in the *Draft Bill*, as it transfers to additional time in which someone is subject to involuntary detention, thus impinging on their freedom of liberty.

The MHCT notes there is no reference to appropriate representation for an individual, when in receipt of a hearing at the MHT. This is of particular importance when the MHT is making and/or reviewing a Treatment Order. The MHCT recommends that this omission be addressed in the *Draft Bill*, to ensure it aligns with contemporary Human Rights law. Appropriate level of resourcing will also be required.

Information released by the Australian Bureau of Statistics (ABS)⁸ indicates 11.3% of Tasmanians were born overseas and 3.7% speak a language other than English at home. The Department of Immigration and Citizenship recently made a decision to house asylum seekers in and around

⁷ A charter of human rights & responsibilities for Tasmania, 2010, Department of Justice, www.justice.tas.gov.au

⁸ Australian Bureau of Statistics (2006), National Regional Profile of Tasmania, www.abs.gov.au

Hobart. The plan includes housing for up to 400 single men in a detention centre in Pontville, and housing women and children in the greater Hobart area.

Studies have found asylum seekers are survivors of torture and trauma, and associated with this are numerous and complex mental health disorders.⁹ Access to interpreters is vital to ensuring the mental health needs and rights of this population are met. The MHCT recommends that this issue be addressed in the *Draft Bill*,

In the *Draft Bill* the MHCT notes that penalties apply for those person(s) who breach Subsection 147 **Publication of sensitive information about patients**. For consistency the MHCT recommends penalties also be applied for those person(s) who breach the other areas of the Bill, for example in Part 6 Special psychiatric treatment (i.e. psychosurgery); seclusion and/or restraint; and timelines associated with the proposed Assessment and Treatment Order pathway and MHT timelines. Associated with this, the MHCT questions what processes would be put in place to ensure person(s) are not in breach of the Act. If the person(s) is found to have breached the Act, who would be responsible to prosecute the person(s).

The MHCT would like to reiterate the importance of the *Draft Mental Health Bill 2011*, as it will impact on the lives of Tasmanians' living with a mental illness, their families and carers. We look forward to the release of the new *Mental Health Act 2011* and we will be working with our membership to ensure they have a sound understanding of the Act.

⁹ Newman, L.K., Dudley, M., & Steel, Z, 2009, *Asylum, detention, and mental health in Australia*, *Refugee Survey Quarterly*, 27 (3) 110-127