The Law Society of Western Australia
The voice of the legal profession in Western Australia

8 March 2022

Jennifer McGrath
Commissioner
Mental Health Commission

By email: statutoryreview@mhc.wa.gov.au

Dear Commissioner

MENTAL HEALTH ACT STATUTORY REVIEW

I refer to the Statutory Review of the *Mental Health Act 2014.* Thank you for providing the Law Society of Western Australia an extension to the 31 January 2022 deadline.

Please find enclosed the Law Society's submission.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

Rebecca Lee
President

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STATUTORY REVIEW OF THE MENTAL HEALTH ACT 2014

To
Debora Colvin
Chair, Steering Group
Mental Health Act Statutory Review

Law Society Contact
Mary Woodford
General Manager Advocacy
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Date
FRIDAY, 25 FEBRUARY 2022

The Law Society OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

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Introduction

1.1 The Law Society of Western Australia is the peak professional association for lawyers in Western Australia. Established in 1927, the Law Society is a not-for-profit association dedicated to the representation of its members and the enhancement of the legal profession through being a respected leader and advocate on law reform, access to justice and the rule of law.

1.2 This submission is made in response to the discussion paper on the *Mental Health Act 2014* (the Act) released in late 2021.

1.3 The Law Society has had the opportunity to consider the comprehensive submission provided by the Mental Health Law Centre at Ruah and acknowledges the contribution of Ruah to mental health advocacy in Western Australia.

1.4 This submission addresses the proposed amendments found in the discussion paper and some ancillary issues. Some responses are brief. The Law Society's submission is primarily concerned with human rights issues, justice issues and the interaction of the legal profession with the regime established under the Act. The Law Society is unable to provide informed commentary on the operational and resourcing issues afflicting the provision of mental health services in the State.

1.5 Generally, this statutory review in an opportune moment to consider the operation of the Act and how the State of Western Australia treats some its most vulnerable citizens. It is important to reflect on the objects of the Act and whether the legislation and its practical application is achieving those objects. The Law Society's response will also have regard to the guiding principles found in Chapter 1 of the Discussion Paper.

2. Previously Identified Issues

Theme 1: Consumers

2.1 Identifying Aboriginal and Torres Strait Islander Status on Approved Forms

The Law Society supports a statutory requirement for this status to be included on the Acts approved forms, to ensure consistency and to ensure compliance with the additional protections for Aboriginal and Torres Strait Islander people in the Act. The Law Society notes the comment in the Mental Health Advocacy Service Annual Report that the 'statutory rights of Aboriginal and Torres Strait Islander people to culturally appropriate care is not improving'.

2.2 Inability to Transfer a patient on a Continuation Order

The rights of a person awaiting assessment are severely curtailed, and for this reason, the Law Society is of the view that assessments should occur as expeditiously as possible, to determine a person's status under the Act. Permitting transfers while a continuation order is in place may obfuscate and prolong the assessment process.

2.3 Apprehension and Return Orders

The Law Society is reluctant to form a view on this proposal without first understanding statistics on how often persons subject to the Act abscond and how they can travel great distances unassisted such that there are health concerns for a 'long journey' back to the specified place from which they departed.

Any amendment which would allow a police officer to take a person to the closest hospital for assessment should be accompanied by additional obligations that if revocation of the order is not appropriate, the person is ultimately returned to the specified place on the order.

2.4 Restriction of freedom on communication

The Law Society supports the suggestion that a copy of the form detailing the reasons for restriction be provided to the Mental Health Advocacy Service (MHAS). The form should also be available to other patient advocates, such as their legal practitioner, upon request.

2.5 Detention of voluntary patients

The detention of voluntary patients is prima facie inconsistent with the object of the Act that *people who have a mental illness are provided the best possible treatment and care with the least possible restriction of their freedom.*

The Law Society supports the suggestion that the Act is amended to state that voluntary patients have the express right to exit a locked ward or hospital at any time without permission and that elderly patients (65 years and older) by detention are 'identified persons'. This amendment should be accompanied by educational activities for ward and hospital staff.

Furthermore, consideration should be given to amendments to the *Guardianship and Administration Act* such that a guardian, administrator or next of kin cannot authorise a person in their care be detained in a locked facility without an express power to do so.[1]

2.6 Restraints in non-authorised hospital wards

The use of restraints and other restrictive practices should generally be discouraged; however the Society acknowledges there are circumstances where restrictive practices are unavoidable. If restrains or other restrictive practices are employed, there should be a sound legal basis for their use.

2.7 Private Psychiatric Hostel Definition

The Law Society does not oppose any definitional changes which will result in more persons able to access the Mental Health Advocacy Service.

2.8 Definition of Mental Health Service

Although the Law Society does not have expert knowledge of new and innovative mental health services, the Society generally supports substantive matters being addressed in primary rather than subsidiary legislation.

2.9 Back to Back referrals and detentions

The public health crisis in Western Australia is well known.[2]
However, shortcomings from inadequate resourcing are not a satisfactory reason to breach the Act by detaining persons beyond 72 hours. This is an operational issue which ought to

[1] For an interesting discussion on the questionable legal basis for restrictive practices in the guardianship system please see Kim Chandler, Ben White and Lindy Willmott, *What Role for Adult Guardianship In Authorising Restrictive Practices?*
https://www.monash.edu/__data/assets/pdf_file/0008/1416338/06_White.pdf

[2] https://www.abc.net.au/news/2021-09-28/doctors-victimised-low-morale-in-wa-hospitals-ama-finds/100496296
https://www.abc.net.au/news/2021-09-01/wa-hospital-record-covid-readiness-fears/100425846

be addressed by the Department of Health, to ensure that patients are assessed in compliance with the statutory time frames.
Potentially, a regulation could be introduced that hospitals must report, if they do not do so already, the number of consecutive Form 1A and Form 3's issued for each patient.

2.10 Further opinions

The issues identified in the discussion paper seem to be operational rather than related to the provisions in the Act. The Law Society suggests that further research is undertaken, and internal processes are reviewed, in consultation with the Chief Psychiatrist, to facilitate the patient's ability to receive an independent second opinion in a timely fashion.

2.11 Treatment Plans

The regular absence of treatment, support, and discharge plans (plans) for patient files and the dearth of compliance notices issued by the Mental Health Tribunal is a cause for concern.

This appears to be an educational issue for clinicians to be reminded of their obligations regarding the plans under the Act.

However, the Law Society supports the suggestion of the Mental Health Law Centre that advocates may apply for the Tribunal to issue compliance notices if plans have not been provided in a reasonable time. There should be some accountability for clinicians who are not providing plans and in turn impacting the work of the Tribunal and the rights of the patient.

Theme 2: Personal Support Persons

2.12 Decision not to notify personal support person

The Law Society takes no view on the timeframe for reasons to be provided to the Chief Mental Health Advocate.

Theme 3: Children

2.13 Mandatory notification to Mental Health Advocacy Service when child admitted as an inpatient to an adult ward

The Law Society supports the suggestion that the Act clarify that notification to MHAS is required for both voluntary and involuntary child patients.

Theme 4: Regulation of Certain Kinds of Treatment

2.14 Reporting of electroconvulsive therapy statistics

The Law Society has no objection to removing the duplicate reporting requirement.

2.15 Application to the Tribunal to use electroconvulsive therapy

The Law Society supports the suggestion that the Tribunal be obliged to consider whether an involuntary order remains appropriate at the same time as they consider the proposal for electroconvulsive therapy. The Law Society sees no need to alter the section 410 requirements in the Act, as one of the members who constitutes the tribunal is a clinician.

Theme 5: Mental Health Advocacy Service

2.16 The Law Society supports the suggestions to facilitate the operations of the Mental Health Advocacy Service.

Theme 6: Mental Health Tribunal

2.17 Written reports for hearings

The Law Society supports the requirement that reports be prepared for Tribunal hearings as an important procedural fairness protection. It is consistent with the objects of the Act. Providing reports in advance of the hearing affords those representing a patient the opportunity to review the reasons for a decision, conduct investigations, take instructions, and prepare to present the case. The Law Society notes the strong submission from the Mental Health Law Centre on this point.

Given that a hearing can determine whether a person remains deprived of their liberty, it is a crucial human rights issue that hearings are procedurally fair and all documents relating to the decision to detain a person are provided to their representative in good time in advance of a hearing so that they may be properly represented.

The Law Society notes the Queensland legislation provides that the treating psychiatrist report must be provided 7 days before the hearing.[3]

The Law Society also notes the ancillary issue raised by the Mental Health Law Centre that in the absence of medical evidence to support a detention order, or if a clinician is unavailable to attend a hearing, the hearings are adjourned. An adjourned hearing results in the continued deprivation of liberty for a person whilst they await their opportunity to present their case. This is an unsatisfactory situation given the restrictions on freedom for a person and the statutory time limits for the Tribunal to consider a matter.

2.18 [New Issue] Practice Directions

The Law Society notes the proposal by the Mental Health Centre for practice directions to be developed for the Tribunal, to support consistency in hearings. The Law Society supports the proposal for practice directions or notes analogous to the Tribunals in Victoria[4] and New South Wales.[5] The directions should be accessible for self-represented persons.

Theme 7: Interstate Arrangements

2.19 Mutual recognition of mental health orders and interstate arrangements

The Law Society looks forward to reviewing the model legislation once publicly available.

Theme 8: Audio Visual Communication

2.20 The Law Society supports the suggestion that technology be permitted for assessment and examinations when 'in person' is not practicable and it is clinically appropriate. This will be important to reduce delay, particularly in a COVID world.

Theme 9: Select Committee into Alternate Approaches to Reducing Illicit Drug Use and Its Effects on the Community

2.21 No comments. The Law Society would be interested in the findings of further research on the topic.

Theme 10: Clinical Governance Review

2.22 The Law Society has no comments on the recently implemented governance changes.

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[3] *Mental Health Act 2016* (Qld), s.738
[4] Vic: https://www.mht.vic.gov.au/rules-and-practice-notes
[5] NSW: https://www.mhrt.nsw.gov.au/the-tribunal/practice-directions.html

Theme 11: Culture and Spirit of the Act

2.23 Post Implementation Review Recommendation

The Law Society cannot comment on the administrative burden of clinicians. However, we note that the various forms and reporting obligations are important for accountability and protecting the rights of patients. For example, not providing a report on an involuntary patient decision prior to a Tribunal hearing or providing a report that is little more than formal ticked boxes with no substance, is against the spirit of the act as it is prejudicial to the patient. It is a matter for the Government to ensure there are adequate resources for clinicians to comply both with the letter and the spirit of the law.

3: Previously Proposed Amendments

3.1 Definition of Psychiatrist

The Law Society has no issue with designation of psychiatrist by gazettal rather than prescription in regulations and hopes that this change may increase the number of psychiatrists available to perform statutory functions.

3.2 Definition of Child and Adolescent Psychiatrist

The Law Society would be interested to understand the necessity of authorisations by the Chief Psychiatrist and the reasons why the Chief Psychiatrist has not authorised any suitable practitioners to be child and adolescent psychiatrists thus far.
The Law Society is concerned that if a narrow statutory definition is introduced an otherwise suitable practitioner may be precluded from sitting on the Tribunal, which in turn may cause delay in hearings for child patients, which would be undesirable and antithetical to spirit of the Act.

3.3 Use of Reasonable Force

The Law Society has no issue with correcting this omission in the Act.

3.4 Revocation of Referral for persons on Community Treatment Orders

The Law Society notes ambiguity in the Act as to whether the revocation of a referral also revokes a community treatment order. Clarification of this through express language may be helpful.

3.5 Continuation of Detention Orders at General Hospitals

The Law Society takes no issue with consistent timeframes for both general and authorised hospitals, particularly if this will result in less premature involuntary patient orders.

3.6 Inability to revoke reception and detention order

The Law Society supports the proposal that a psychiatrist may revoke an order prior to reception into hospital if it's no longer required.

3.7 Leave of Absence

The Law Society has no issues with the proposal. Lightening the administrative burden for leave is consistent with the objects of the Act if it allows clinicians more time to comply with other sections of the Act.

3.8 Notifying personal support person

The Law Society has no issue with the insertion of additional notifiable events.

3.9 Transport Orders

The Law Society has no issue with the proposal.

3.10 Apprehension for Police Assessment
The Law Society supports the proposal but takes no view on what the maximum time in detention should be and the other operational considerations.

3.11 Gender of Person conducting search
The Law Society favours consistent provisions in legislation and supports the proposal to match the definition in the *Criminal Investigation Act 2006* (WA)

3.12 Transport Officers Use of Mechanical Restraints

No comments.

3.13 Emergency Psychiatric Treatment
The Law Society has no issue with the proposal.

3.14 Seclusion
The Law Society has no issue with the proposal.

3.15 Informing treating psychiatrist of seclusion or restraint
The Law Society has no issue with the proposal.

3.16 Complaints to the Chief Psychiatrist
The Law Society has no issue with the proposal.

3.17 Voluntary patients in locked wards
The Law Society supports the proposal.

3.18 Removal of exemption for complaints review by Health and Disability Services Complaints Office for Commonwealth funded services
The Law Society has no issue with the proposal.

3.19 Mental Health Advocacy Service (MHAS) – Access to Voluntary Patients
The Law Society supports the proposed amendment.

3.20 Timing of notifications to MHAS
The Law Society cannot comment on operational arrangements, however, supports prescription of notification timeframes in the Act.

3.21 MHAS Contacting children
The Law Society has no issue with the proposal.

3.22 MHAS Inquiry Power regarding discharge
The Law Society has no issue with the proposal.

3.23 Application to the Tribunal for Electroconvulsive therapy
The Law Society has no issue with the proposal.

3.24 Periodic Reviews
The Law Society has no issue with the proposal.

3.25 Administration of Oaths and Affirmations by Tribunal
The Law Society has no issue with the proposal and agrees that the members should be empowered to administer oaths and affirmations.

3.26 Transcript of Oral Reasons

The Law Society concurs with the submission of the Mental Health Centre that, if there is no suggestion that a transcript is insufficient as written reasons, it may not be necessary to legislate on this point. However, if the amendment is adopted, it should not exclude the ability of the Tribunal to provide further written reasons if the oral reasons are lacking in detail.

3.27 Correction of formal and clerical errors

The law Society does not oppose the addition of a 'slip rule'.

3.28 When a decision takes effect

The Law Society supports this proposal as an important enhancement of the objects of the Act

3.29 Provide the President is responsible to the Minister

The Law Society has no issues with this proposal if it is necessary for this to be explicitly stated.

3.30 Enable the President to advise the Minister

The Law Society has no issues with the proposals provided that any advice is consistent with the Objects of the Act.

3.31 Revocation of section 492

The Law Society has no issue with the proposal to revoke s.492 however notes the limited commentary in the discussion paper on why this is necessary.

3.32 Code of Conduct

The Law Society has no issues with this proposal.

3.33 Education of Tribunal Members

The Law Society has no issues with this proposal.

3.34 Regulation of Members regarding conflicts of interest and other employment

The Law Society has no issues with this proposal.

3.35 Chief Psychiatrist Access to Information of Former Patients

The Law Society has no issues with this proposal.

3.36 Interstate arrangements for mental health orders

The Law Society has no issues with this proposal.

3.37 Approved Form of Medical Orders

The Law Society has no issues with this proposal.

3.38 Terms of Involuntary Treatment orders

The Law Society has no issues with this proposal.

3.39 General Hospital to General Hospital Transfer

The Law Society has no issues with this proposal.

3.40 Notification of CTO decisions

The Law Society considers that the requirement should also apply to notify a patient's legal representative or advocate, such as the Mental Health Law Centre or a private practitioner, if known.

3.41 Mentally Impaired Accused (MIA)

The Law Society considers that the requirement should also apply to notify a patient's legal representative, such as the Mental Health Law Centre or a private practitioner, if known.

3.42 Providing a Copy of Treatment Orders to the Chief Psychiatrist

The Law Society has no issues with this proposal.

3.43 Providing a Copy of Transfer Orders to the Mental Health Advocacy Service, Tribunal, MIA Review Board, Chief Psychiatrist

The Law Society considers that the requirement should also apply to provide a copy to patient's legal representative or advocate, such as the Mental Health Law Centre or a private practitioner, if known.

3.44 Authorise recording, disclosure and use of information for Tribunal and MIA Board

The Law Society has no issues with this proposal.

3.45 Providing a Copy of Continuation Orders to the Mental Health Advocacy Service, Tribunal, MIA Review Board, Chief Psychiatrist

The Law Society considers that the requirement should also apply to provide a copy to patient's legal representative or advocate, such as the Mental Health Law Centre or a private practitioner, if known.

Rebecca Lee
President