

# Training Resource Material

## Mental Health Branch – October 2004

### Amendments to the Mental Health Act 1986: Overview

#### Mental Health (Amendment) Act 2003

1. The purpose of the *Mental Health (Amendment) Act 2003* ('the Amending Act') is to:
  - Improve the operation of the community treatment order (CTO) and confidentiality provisions within the *Mental Health Act 1986*.
  - Improve clinical practice with regard to people subject to CTOs.
  - Clarify and uphold the rights of involuntary patients.

#### Implementation

2. The Amending Act received Royal Assent on 21 October 2003 and became law on that date. Different parts of the Act will come into effect at different times.
3. Part 2 of the Amending Act, which makes changes to the Mental Health Act concerning involuntary admission and community treatment orders is proposed to come into effect on 6 December 2004. This time has been allowed to develop an implementation and communication strategy. Representatives of stakeholder groups have participated in reference groups to:
  - Contribute to revised documents, guidelines and procedures.
  - Provide advice on training and communication strategies.
4. Parts 3 and 4 of the Amending Act, which concern confidentiality and a change to the *Coroners Act 1985* came into operation immediately.

#### Background

5. The *Mental Health Act 1986* provides a regime for the care, treatment and protection of people with mental illness. The Mental Health Act also seeks to protect the rights of people with mental illness.
6. The Mental Health Act provides for community treatment orders (CTOs). CTOs permit involuntary treatment of some people with mental illness while they live in the community. It has become apparent over a period of time that central sections of the CTO provisions are not clear and do not provide sufficient guidance for clinicians or consumers. The Department of Human Services undertook a review of the CTO provisions and circulated a Discussion Paper for public consultation in February 2003. The amendments to the CTO provisions were informed by the submissions received in response to the Discussion Paper.
7. Section 120A of the Mental Health Act establishes a regime for the confidentiality of mental health information. Section 120A was amended by the *Health Records Act 2001* to regulate sharing of information between approved mental health services by means of an electronic records system established for the purpose of providing treatment to persons with a mental

disorder. There have been practical difficulties with the interpretation of some of the amendments. The Amending Act addresses these issues.

8. A number of miscellaneous amendments were made to improve the operation of the Mental Health Act.

## **Main Features of the Amending Act**

### *Detention*

9. Most people who require involuntary treatment under the Mental Health Act now receive that treatment while they remain living in the community subject to community treatment orders (CTOs). The Victorian Supreme Court examined the legislative scheme that establishes CTOs in *Wilson v Mental Health Review Board* [2000] VSC 404 and concluded that the deeming of a person on a CTO to be 'detained' under the Mental Health Act is the attribution of a 'fictitious' status. In a separate matter, the Coroner commented that the use of the words 'detained' and 'detention' in the Mental Health Act cause confusion. The Coroner recommended that the drafting of the Mental Health Act be examined to address this issue.
10. The Amending Act removes the requirement for 'admission and detention' from the involuntary treatment criteria in section 8 of the Mental Health Act. The criteria will instead focus on whether the person should be an involuntary patient for the purpose of providing treatment. The Amending Act does this by introducing the concept of an "involuntary treatment order" as the basis for involuntary treatment. The Amending Act provides that a registered medical practitioner making a recommendation is required to consider whether the person's mental illness requires immediate treatment and that treatment can be obtained by making the person subject to an involuntary treatment order.
11. The Amending Act clarifies the pathways by which a person requiring involuntary treatment is made subject to an Involuntary Treatment Order (ITO) and either taken to an approved mental health service (for detention) or made subject to a CTO (and allowed to live in the community). The decision about the CTO or inpatient treatment is made by the authorised psychiatrist within 24 hours. Consequential amendments have been made throughout the Mental Health Act.

### *Treatment Plans*

12. The Amending Act provides that each patient must have a treatment plan. For patients subject to a CTO, the treatment plan will give clear guidance about the person's obligations under the CTO and a clear statement of the treatment the person can expect. The authorised psychiatrist must follow a process in developing the treatment plan. This includes taking into account the wishes of the patients as far as they can be ascertained and unless the patient objects, the wishes of any guardian, family member or primary carer who is involved in providing ongoing care or support to the patient.
13. The Board is given the power to review the treatment plan for a patient. The Board must decide whether the authorised psychiatrist has complied with new section 19A in making the treatment plan and whether the plan is capable of being implemented by the approved mental health service. The role of the Board is to be satisfied that the authorised psychiatrist has followed proper process in developing the treatment plan.

### *Community Treatment Order and Restricted Community Treatment Order (RCTO)*

14. The Amending Act:
  - Clarifies that a person is automatically discharged from being an involuntary patient if their CTO expires without having been extended. This is consistent with the Supreme Court decision in *Wilson v Mental Health Review Board* [2000] VSC 404.

- Gives the Mental Health Review Board ('the Board') the power to direct that the authorised psychiatrist make a CTO for an inpatient. The Board is an independent review body. It is considered that the Board should have available a range of options when making a determination. This new power is consistent with the existing power of the Board to discharge a patient from involuntary status. The Board must specify a reasonable period within which the authorised psychiatrist should be able to make the CTO. If the patient's circumstances change during that period, for example if the person's mental state changes, the authorised psychiatrist may apply to the Board to have it reconsider the direction. The authorised psychiatrist will continue to apply clinical judgement in implementing the Board's decision.
- Requires the authorised psychiatrist to notify the case manager of a patient about a scheduled Mental Health Review Board hearing. Case managers work closely with patients and have a good knowledge of their mental condition, the relevant treatment plan and the patient's family and social circumstances. This change will ensure that case managers have the opportunity of providing relevant information at a Board hearing. The change also supports the broader role of the case manager to assist patients to prepare for a hearing.
- Requires the supervising medical practitioner to regularly assess whether a person subject to a CTO should remain on the order.
- Provides specific guidance about when the authorised psychiatrist may revoke a CTO where a person has failed to comply with the order. The provisions also give consumers clear guidance about their obligations under a CTO and a clear statement of when their CTO may be revoked for non-compliance.
- Clarifies that a CTO or RCTO is unenforceable while a person is in prison.
- Clarifies that it is not necessary to revoke a CTO or RCTO if a person requires a treatment that can only be given in an inpatient setting. This will enable patients to receive treatment in accordance with their treatment plan that can only be provided in an inpatient setting, for example electroconvulsive therapy.
- Amends the Coroners Act to clarify that the death of a person subject to a CTO or RCTO is a reportable death for the purposes of that Act.

### *Confidentiality*

#### 15. The Amending Act:

- Clarifies that Health Privacy Principle (HPP) 2 of the Health Records Act regulates the 'use' of information (including electronic information) within a relevant psychiatric service. This change mirrors a recent amendment to the confidentiality provisions in the *Health Services Act 1988*.
- Clarifies that the Secretary to the Department of Human Services may 'use' information in the statewide mental health client information system (RAPID) if it is necessary for the performance of the duties, powers or functions of the Secretary under the Mental Health Act (see section 6 of the Act) and the use is in accordance with HPP 2 of the Health Records Act.

The Secretary requires use of the information to enable the Secretary to fulfill the functions of the Secretary under the Mental Health Act, including funding, management, monitoring of standards and promotion of research into mental disorders. The Department imposes strict controls over access to the information through the use of limited authorization, passwords and audit trails.

The *Health Records Act 2001* introduced changes to section 120A to increase protections around the sharing of information through RAPID by mental health services. The provisions inadvertently confused the grounds on which the Secretary can use information in RAPID that the Secretary already holds and controls and has always used for the functions of the Secretary.

The amendments do not envisage unlimited use of information by the Secretary. They link the use to Health Privacy Principle 2 of the Health Records Act, which imposes strict limits on why and how an organisation can use information. It is an offence under the Mental Health Act to use information in RAPID except in accordance with the Act.

- Introduces a new term known as 'public sector mental health service' to clarify that all the service elements of the public mental health service system have access to information in RAPID for the purposes of providing treatment to public mental health clients.
- Amends the definition of 'relevant psychiatric service', to link it to organisations or legal entities.

#### *Miscellaneous Amendments*

16. The Amending Act makes a number of miscellaneous amendments to achieve the following outcomes:

- To require staff of the Mental Health Review Board and the Psychosurgery Review Board to comply with the secrecy provisions binding members of each board so as to address a gap in the confidentiality regime provided for by the Mental Health Act.
- To permit the Governor in Council to appoint members to the Mental Health Review Board and the Psychosurgery Review Board for a term of up to five years and thus provide sufficient flexibility for optimal timing of appointment processes.
- To broaden the range of persons who can be appointed as a legal member of a division of the Mental Health Review Board. Currently a person must be admitted to the Supreme Court of Victoria for eight years or more. The Amending Act provides that any person admitted to practice as a barrister or solicitor in any jurisdiction of Australia for 5 years or more will be eligible for appointment as a legal member. A similar amendment is made in relation to the eligibility criteria to be a legal member of the Psychosurgery Review Board.

The change to recognise legal experience in any Australian jurisdiction will expand the pool of people with relevant experience who would be eligible to be appointed as legal members of the Board. The change is also consistent with other Victorian legislation such as the Victorian *Mutual Recognition (Victoria) Act*.

The requirement of 5 rather than 8 years legal experience for eligibility for appointment is consistent with the Magistrates Court and the Victorian Civil and Administrative Tribunal (VCAT). A person is eligible to be appointed as a magistrate if they have been enrolled as a barrister or solicitor for 5 years or more. A person is eligible to be appointed as a Deputy President of VCAT if they have been admitted to legal practice in Victoria for 5 years or more. A similar level of legal experience is required for appointment as a Senior Member of VCAT, unless the person has other knowledge or experience that qualifies them for such appointment.

- To give the Secretary to the Department of Human Services the power to declare premises or a service as an approved mental health service in an emergency. This amendment will enable immediate action to be taken if it is necessary to evacuate patients from an approved mental health service to another place pending a proclamation by the Governor in Council in accordance with section 94 of the Mental Health Act.
- Health Legislation (Amendment) Act 2003

17. The *Health Legislation (Amendment) Act 2003* made amendments to improve the operation of a number of health-related Acts, including the *Mental Health Act 1986*. The Health Legislation (Amendment) Act received Royal Assent on 14 October 2003 and became law on that date.

#### *Section 10 – Apprehension by the Police*

18. Section 10(1) of the Mental Health Act provides that a member of the police force may apprehend a person who appears to be mentally ill and at serious risk. The police member must then arrange for an examination of the person by a 'registered medical practitioner'.

19. The Health Legislation (Amendment) Act has amended section 10 so that the police member now has another option to arrange for an assessment of the person by a 'mental health practitioner'. The definition of a mental health practitioner is found in the *Mental Health Regulations* 1998.
20. Following an assessment of an apprehended person, a mental health practitioner may:
- advise the member of the police force to take the person as soon as practicable to a registered medical practitioner for an examination under section 9 of the Act; or
  - complete an authority to transport in accordance with section 9A of the Act and arrange for the person to be transported to an approved mental health service for an examination by a registered medical practitioner under section 9 of the Act; or
  - advise the member of the police force that the person does not meet the criteria under section 8 of the Act and to release the person from apprehension under section 10. In these circumstances, Victoria Police must release the person unless the member of the police force decides to take the person to be examined by a registered medical practitioner for the purposes of section 9 of the Act.

#### *Confidentiality*

21. The Health Legislation (Amendment) Act amended section 120A of the Mental Health Act to:
- Create a new definition of 'relevant person'.
  - Clarify that consent to the disclosure of information by a client may be 'express' or 'implied'.
  - Increase consistency with the *Health Records Act* 2001. The changes permit the disclosure of information where:
    - The disclosure is directly related to the primary purpose for which the information was collected and the client would reasonably expect the mental health service to disclose the information for the secondary purpose.
    - The disclosure is necessary for the establishment, exercise or defence of a legal or equitable claim.
    - The disclosure is in prescribed (in the Health Records Regulations 2002) circumstances. There are currently no circumstances prescribed.
  - Establish that information relating to a notification, claim or potential claim may be given to an organisation providing insurance or indemnity.

#### **Further Information**

22. Electronic copies of the *Mental Health (Amendment) Act* 2003, the *Health Legislation (Amendment) Act* 2003 and the amended *Mental Health Act* 1986 are available at [www.dms.dpc.vic.gov.au](http://www.dms.dpc.vic.gov.au).