Amendments to the Mental Health Act 2007 and the Mental Health (Forensic Provisions) Act 1990

Summary

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AMENDMENTS TO THE MENTAL HEALTH ACT 2007 AND THE MENTAL HEALTH (FORENSIC PROVISIONS) ACT 1990

PURPOSE
The Mental Health Act 2007 and the Mental Health (Forensic Provisions) Act 1990 have recently been amended as part of the Health Legislation Amendment Bill 2017 that passed parliament in February 2018. This Information Bulletin sets out the amendments to the Mental Health Act 2007 and the Mental Health (Forensic Provisions) Act 1990. These legislation changes commence on 1 July 2018.

KEY INFORMATION
The key changes to the Mental Health Act 2007 are outlined below:

**Mental Health Review Tribunal hearings in the absence of patients (Sections 37, 63 and 96):**
The Mental Health Review Tribunal (the Tribunal) can now conduct a review of an involuntary patient, a detained affected person, or an application for electro-convulsive therapy (ECT), in the absence of a patient, if:

- the authorised medical officer applies to have the review or ECT application carried out in the absence of the patient because the patient is too unwell to attend or because the patient has refused to attend, and
- the Tribunal is satisfied that the person has refused to attend or is (or will likely be) too unwell to attend within a reasonable period, and
- the person’s representative (being an Australian legal practitioner or other person approved by the Tribunal to represent the person at the hearing) has been notified, and
- the Tribunal has considered the views (if known) of the person, the person’s representative, the designated carer of the person and the principal care provider of the person (see changes below to s78 in respect of notifying carers of hearings before the Tribunal), and
- the Tribunal is of the opinion that conducting the hearing in the absence of the person is desirable for the safety or welfare of the person.

In the case of an ECT inquiry the Tribunal is not required to be satisfied that the person’s representative has been notified if the Tribunal is satisfied that reasonable steps have been taken to notify the representative.

Every reasonable effort should be made to bring the patient before the Tribunal for all such hearings. The applications to hold a hearing in the absence of the patient should only be made where there is no other viable and safe alternative (such as seeking an adjournment). The authorised medical officer must comply with any practice direction issued by the Tribunal.
Apprehension of person not permitted to be absent from a facility (Section 48):

A person who apprehends someone who is absent from a mental health facility does not have to take that person directly to the mental health facility from which they have been absent from. Instead they can be taken to another mental health facility first, and then transported back to the mental health facility they were originally absent from.

Notifications to carers of Tribunal matters (Section 78):

The authorised medical officer must notify the designated carer and principal care provider of a person of matters before the Tribunal involving the person. A State approved form is being created to ensure the designated carer/principal care provider is notified. This form will be available on the StreamDirect online catalogue for access by mental health facilities. In the interim, the designated carer must be notified in person or by phone, and a note of that fact must be recorded in the patient’s medical records. Reasonable steps should be taken to notify carers within a reasonable period to allow the carer to attend the hearing of the Tribunal if they wish. This is particularly important if a hearing is to be held in the absence of the patient.

The key changes to the Mental Health (Forensic Provisions) Act 1990 are outlined below:

Review of forensic Community Treatment Orders (CTOs) (Section 61):

A forensic CTO is an order for compulsory mental health treatment for a person in a correctional centre. The Tribunal will now be required to review a forensic CTO every 6 months, following an initial review at 3 months.

Apprehension of forensic patients who do not return from leave (Section 68A):

If a forensic patient does not return from leave or fails to comply with a condition of their leave, the authorised medical officer may apprehend the patient, or direct the patient to be apprehended by:

- A suitably qualified person employed at the mental health facility
- A police officer
- A person authorised by the Secretary or the authorised medical officer (any such authorisation should be in writing)
- A person assisting any of the above.

If the authorised medical officer directs a person above to apprehend the patient, a written record of the direction should be made. If a direction is made to a police officer, the officer may apprehend the patient or make arrangements for another police officer to do so. The NSW Health – NSW Police Force Memorandum of Understanding 2018 outlines steps that should be taken to determine whether a police officer may be required to apprehend a patient.

The power of the Authorised Medical Officer to apprehend, or direct the apprehension, of a forensic patient who fails to return from leave or breaches a condition of the leave under Section 68A is in addition to the power of the Tribunal to make an Order for the person's apprehension under Section 68 of the MHFPA. Section 68A may be relevant when it has been identified that action can be taken immediately to apprehend the
patient without the need for an Order for Apprehension from the Tribunal. This is to
minimise delays in apprehension.

If the powers under Section 68A are relied upon, the Authorised Medical Officer should
ensure that any person authorised to apprehend the patient has the necessary skills,
training and qualifications to do so and have considered if the patient can be safely
apprehended. They must also consider if an Order for Apprehension should be issued
by the Tribunal under Section 68.

The Authorised Medical Officer must notify the Tribunal as soon as possible when they
have directed a patient to be apprehended under this section, and again when the
patient has been apprehended.

These notifications must be by phone or by email, and must be noted in the patients’
medical records.

**Training (on the changes to the Acts)**

The *Mental Health Act 2007 Guidebook* which provides practical information to mental
health practitioners, as well as those who provide support and advice to persons and
carers is being updated to incorporate the changes to legislations detailed above. Once
completed, the Guidebook will be available through the NSW Ministry of Health website.

The policy directives PD2011_003 *Electroconvulsive Therapy: ECT Minimum Standard
of Practice in NSW* and PD2012_050 *Forensic Mental Health Service* are currently in
the process of being amended to reflect the changes in procedures as a result of the
legislation amendments.

The Mental Health Review Tribunal is releasing a Practice Direction that addresses the
legislation changes related to the Tribunal functions. The Practice Direction can be