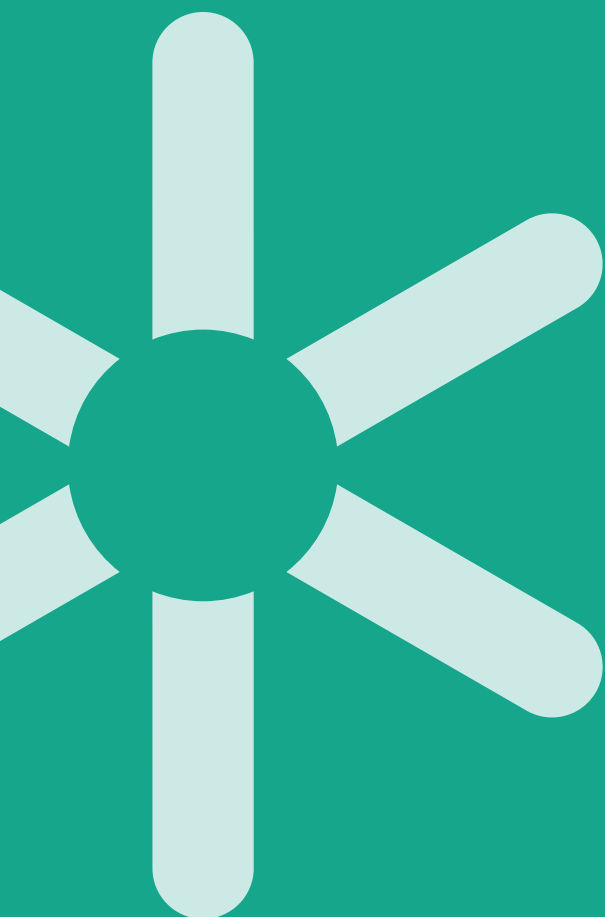

Chapter 2

The Mental Health Act (2014)



“

I feel very lucky to be a living example of recovery and am passionate about making sure my peers have the same opportunity to recover

”

The Mental Health Act (2014)

Background to the Act and its Operation

Development and Implementation of the Current Act (2003 – 2015)

Following an extensive consultation process and statutory review undertaken by Professor D'Arcy Holman (Holman Review), the Act repealed and replaced the *Mental Health Act 1996* (the 1996 Act) on 30 November 2015.

The Act embodies the Holman Review recommendation to advance the rights of persons with mental illness, their families and carers. After the Holman Review was completed, there were further rounds of significant consultation in relation to the draft Mental Health Bills; the first bill was drafted in 2007 with a redraft in 2011, and then a green bill in 2012.

As the agency responsible for administration and monitoring of the Act, the Commission developed and led the implementation planning process in collaboration with other relevant stakeholders and with input and oversight from a Mental Health Bill Implementation Reference Group. A series of working groups were established to inform and develop required processes and documentation to support implementation, that involved consumer and carer representatives, government agencies, clinicians and other mental health service staff.

A 12-month implementation period prior to the commencement of the Act, from November 2014 to November 2015, enabled the preparation of the Regulations, training of relevant stakeholders and implementation of other transitional arrangements. All individual projects and strategies were endorsed by the Mental Health Bill Implementation Reference Group.

Post-Implementation Review (2017)

Two years after the Act came into operation, the MHC carried out a post-implementation review. The purpose of the post-implementation review was to review the regulatory impact of the Act and whether the Objects of the Act are being achieved. The stakeholders described below were considered to be key stakeholders in the post-implementation review given their specific role and defined responsibilities under the Act:

- Mental Health Commission;
- Department of Health and Health Service Providers;
- Chief Psychiatrist;
- Mental Health Tribunal;
- Mental Health Advocacy Service; and
- Health and Disability Services Complaints Office.

The Commission also included consumers, families and carers as key stakeholders, in relation to their experience of the provision of mental health services under the Act.

The post-implementation review report was prepared across five broad focus areas:

- Rights for consumers;
- Rights for personal support persons;
- Recourse (for consumers);
- Other advancements; and
- Unintended consequences.

These focus areas highlight the key areas of change from the previous Act that are relevant to achieve the Objects of the Act.

One of the main concerns that came through the post-implementation review was a concern that the spirit of the Act was not being complied with. A common theme reported by some stakeholders, although not directly related to the Objects of the Act, was a perception that the Act had placed additional administrative workloads on clinicians. The concern was that this may impact on clinicians' ability to give effect to the spirit of the Act.

There was also a concern that the online training modules and other documentation was focussed on compliance, rather than on the spirit of the Act.

The post-implementation review resulted in a number of recommendations that aimed to enhance the effectiveness of the Act in meeting the Objects, identify opportunities for improvement, and also assist in preparing for the Review of the Act. Only three of the post-implementation review recommendations suggested that possible legislative amendments were required. These three issues are discussed in more detail later in this paper. The remaining recommendations of the post-implementation review were focused on operational, administrative and educational initiatives. The Commission continues to work with key stakeholders to progress these post-implementation review recommendations. A copy of the post-implementation review can be found on the Commissions website at the link set out in the footnote below⁸.

In addition to the issues identified through the post-implementation review process, there have been a number of other issues that have previously been brought to the attention of the Commission. These will be considered as part of this Review. These issues, which include the three issues arising out of the post-implementation review) are referred to as the '**previously identified issues**' and are set out in Chapter 3 for discussion and comment.

Previously Proposed Amendments (2019)

Since the Act commenced on 30 November 2015, the Commission has received a range of requests for possible amendments. During 2019, the Commission carried out limited consultations on the various suggested amendments⁹. By the conclusion of 2019, over

60 proposed amendments had been considered as part of the limited consultation. Those stakeholders consulted agreed in-principle that 45 out of the 60 amendments should progress. These 45 proposed amendments would either correct an omission in the Act, clarify various matters of the Act, or improve administrative processes. These 45 proposals are referred to as the '**previously proposed amendments**' and are set out in Chapter 4 for discussion and comment.

⁸ <https://www.mhc.wa.gov.au/media/2540/post-implementation-review-of-mental-health-act-2014-final.pdf>

⁹ The MHC consulted stakeholders with statutory responsibilities under the Act. This included the Chief Psychiatrist, the Mental Health Advocacy Service, the Mental Health Tribunal and the Health and Disability Services Complaints Office. The MHC also consulted with the Department of Health's Mental Health Unit, the Western Australia Police Force and the Mentally Impaired Accused Review Board. At the time, it was intended that consultation on the 45 amendments would occur with consumers and carers once the amendment bill had been drafted.

The Act and its Various Parts

The Act is divided into 29 parts and each part deals with a specific topic or area. A brief summary of each part is detailed below which you may like to refer to when preparing your feedback.

Useful questions to consider addressing in your submission:

- What is working well with the Act... Why do you think this is... How did this impact you?
- What is not working well with the Act... Why do you think this is... How did this impact you?
- If something is not working well, do you think a change to the Act will improve it?
 - » If yes, what change to the Act do you think is required?
 - Can you identify any problems with changing the Act in this way?
 - What experience, knowledge or information supports the changes to the Act that you suggest?
 - » If a change to the Act is not needed, how could change be achieved? policies, procedures, guidelines and/or education?
- Are your responses based on your perspective/experience as a consumer, family member or carer, clinician or another stakeholder?
- Any other feedback on the Act?

If you would like to access more detailed reference information, an electronic version of the Act is available on the Government of Western Australia, Department of Justice legislation website, www.bit.ly/MHACT2014

Additional supporting information about the Act is available at: www.mhc.wa.gov.au/mhactresources

Part 1

Preliminary Matters

Part 1 contains three provisions that set out the short title of the Act; its commencement dates; and that the Act binds the State, and to the extent permitted, the Crown. These are the provisions that establish the Act.

Part 2

Terms and Concepts

Part 2 sets out terms and concepts, as well as definitions. For example:

- Division 2 defines when a person has a mental illness;
- Division 3 sets out matters relevant to a person's best interests;
- Division 4 sets out matters relevant to a person's wishes; and
- Division 5 (section 9) defines what communication includes and how communication should be made.

Part 3

Objects

Part 3 sets out a list of Objects, to which a person or body performing a function under the Act must have regard. The Objects underpin how the Act should be interpreted and applied.

The Objects of the Act are:

- h. to ensure people who have a mental illness are provided the best possible treatment and care
 - i. with the least possible restriction of their freedom; and
 - ii. with the least possible interference with their rights; and
 - iii. with respect for their dignity;
- i. to recognise the role of carers and families in the treatment, care and support of people who have a mental illness;

- j. to recognise and facilitate the involvement of people who have a mental illness, their nominated persons, and their carers and families in the consideration of the options that are available for their treatment and care;
- k. to help minimise the effect of mental illness on family life;
- l. to ensure the protection of people who have or may have a mental illness;
- m. to ensure the protection of the community.

Part 4

Charter of Mental Health Care Principles

The Charter of Mental Health Care Principles is a set of principles that mental health services must make every effort to comply with in providing treatment, care and support to people experiencing mental illness (both voluntary and involuntary patients). The Charter aims to influence the interconnected factors that assist with a person's recovery from mental illness.

In summary, the 15 principles state that mental health services must treat people experiencing mental illness with dignity and respect; and that includes respecting their right to make decisions about their own lives. Mental health services and private psychiatric hostels must always consider these principles when they provide treatment, care and support to a person.

The Act requires that anyone performing a function under the Act must have regard to the Charter of Mental Health Care Principles (applies to both voluntary and involuntary patients). These are set out in Schedule 1 of the Act.

Further information can be found at Charter of Mental Health Principles (www.mhas.wa.gov.au)

Part 5

Decision Making Capacity and Informed Consent

Part 5 provides information on how decision making capacity and informed consent is referred to in the Act. For the purposes of the Act, capacity is the extent to which a person is able to make reasonable judgments about their admission to hospital, treatment, personal welfare and discharge. Capacity is one of the criteria

for making someone an involuntary patient, and the Act presumes:

- Adults (aged 18 years and over) have capacity to make treatment decisions for themselves, unless they demonstrate that they do not have capacity.
- Children (aged under 18 years) do not have the capacity to make treatment decisions, unless they demonstrate that they have the capacity.

Part 6

Involuntary Patients

Part 6 provides a framework for the process of how a person may be referred for an examination by a psychiatrist and sets out the requirements for conducting an assessment and examination under the Act. This includes:

- Setting out the requirements around detaining and transporting the person if that is required and sets out the strict criteria that must exist before an inpatient treatment order or community treatment order can be made.
- Setting out the special provisions which require that if the person is of Aboriginal or Torres Strait Islander descent, a practitioner who conducts their assessment or examination must, as much as possible, collaborate with an Aboriginal or Torres Strait Islander mental health worker, and significant members of the person's community (such as Elders and traditional healers).¹⁰

Part 6 also requires that if the person does not speak English as a first language, or has a hearing impairment, they are entitled to an interpreter.

Part 7

Detention for Examination or Treatment

Part 7 provides further details about the requirements before a person can be detained in order to carry out an assessment or examination under the Act. This includes time limits for detention.

The framework which allows for a person, who is either detained or subject to an involuntary treatment order under the Act, to be returned to the hospital or place that the person has left is also included in this Part. This is called an apprehension and return order.

Part 8

Community Treatment Orders

Part 8 sets out the processes around community treatment orders. It also outlines how long a community treatment order is in effect and the requirements for the order to be reviewed at regular intervals, as well as the requirements and process that will apply if a person on a community treatment order breaches the conditions of the order.

Part 9

Notifiable Events

Part 9 sets out the requirement that carers, close family members and other personal support persons of an individual who is under the Act, are to be notified of certain events. This Part imposes a duty on staff to inform these people of certain events including matters relating to the person's physical location and treatment status under the Act.

Part 10

Transport Orders

Part 10 sets out the requirements and framework for making and carrying out transport orders. In some limited circumstances, transport orders may be made to take a person to a hospital or other place for assessment, examination or treatment. For example, where there is no other safe way of transport, the practitioner may make a transport order to authorise a transport officer or police officer to transport the person. There are extensive procedural requirements around the making and carrying out of transport orders.

Part 11

Apprehension, Search and Seizure Powers

Part 11 provides a police officer with the power to apprehend a person and arrange for them to be assessed by a practitioner. A police officer can only exercise these powers when they reasonably suspect the person has a mental illness and needs to be apprehended to protect their own health or safety, or the health and safety of others. This part also sets out search and seizure powers and prescribes strict requirements around how these are to be carried out.

Part 12

Exercise of Certain Powers

Part 12 sets out the principles for detention under the Act. This includes that detention must be for as brief a period as practicable; with the minimum degree of force; and the detained person must be accorded the least restriction on freedom, with privacy, and with dignity and respect. This Part also sets out the prescribed provisions for the exercise of ancillary powers of reasonable assistance, force and directions.

Part 13

Provision of Treatment Generally

Part 13 prescribes the general matters on treatment for patients, including voluntary and involuntary patients and mentally impaired accused persons, and includes patient rights such as:

- Further opinions;
- Treatment, support and discharge planning;
- Requiring clinicians to collaborate with an Aboriginal and Torres Strait Islander mental health worker and significant members of the person's community (such as Elders and traditional healers) in relation to treatment of Aboriginal and Torres Strait Islander persons to the extent it is practicable and appropriate to do so; and
- Requiring clinicians to comply with the Chief Psychiatrist's standards and guidelines.

Part 14

Regulation of Certain Kinds of Treatment and Other Interventions

Part 14 details the regulation of types of treatment including electroconvulsive therapy, emergency psychiatric treatment, psychosurgery, deep sleep and insulin coma therapy, and strict regulation of other interventions including seclusion and bodily restraint.

Part 15

Health Care of People in Hospitals

Part 15 relates to ensuring that the physical condition of people treated under the Act are also addressed. This Part establishes a requirement that a person admitted into hospital must be examined by a medical practitioner within 12 hours of admission, unless the person is a voluntary inpatient and does not consent to the examination.

Part 16

Protection of Patients' Rights

Part 16 deals with the rights of inpatients; and with the role of a nominated person. For example, among other rights, an inpatient must have their rights explained to them, have access to medical records, have freedom of lawful communication, and contains a duty not to ill-treat or wilfully neglect patients for which there are penalties. This Part also provides that the nominated person for a patient is entitled to receive information and be involved in treatment decisions.

Part 17

Recognition of Rights of Carers and Families

Part 17 provides the rights and roles of carers and families in patients' treatment and care and sets out the processes for promoting their participation.

Part 18

Children who have a Mental Illness

Part 18 sets out some specific requirements regarding the treatment of children with mental illness (aged under 18 years). For example, it is a requirement that the best interests of the child is the primary consideration. In deciding what is in the child's best interests, the child's wishes, the child's parent or guardian views and the child's nominated person's views must be considered.

Part 19

Complaints about Mental Health Services

Part 19 describes the complaints processes available to a person. For example, if a person wishes to complain about how they have been treated, they may make a complaint through the internal process of the mental health service; or to the Health and Disability Services Complaints Office (HaDSCO).

More information is available at www.hadsco.wa.gov.au.

Part 20

Mental Health Advocacy Services

Part 20 creates the framework which establishes the Mental Health Advocacy Service and provides for the advocates who have specific statutory functions in relation to certain categories of persons who come under the Act. This includes those who are subject to an involuntary treatment order and some categories of voluntary patients.

More information is available at www.mhas.wa.gov.au.

Part 21

Mental Health Tribunal

Part 21 establishes the Mental Health Tribunal (Tribunal) which is an independent decision-making body. The Tribunal's primary role is to review every new involuntary treatment order made by psychiatrists in Western Australia within 35 days (10 days for children). The Tribunal reviews each order again regularly (every three months for adults and every 28 days for children). The purpose of the Tribunal's review is to determine whether the patient still needs the involuntary treatment order.

The Tribunal also decides a range of other questions under the Act on application by a relevant person. For example, psychiatrists may apply to the Tribunal for approval to perform electroconvulsive therapy or psychosurgery. Patients and other interested persons may apply for review of involuntary treatment orders outside the system of scheduled reviews. They may also ask the Tribunal to review restrictions imposed on freedom of communication or other decisions affecting patient's rights.

More information is available at www.mht.wa.gov.au.

Part 22

Review by State Administrative Tribunal

Part 22 provides for a process where a person who is dissatisfied with a decision of the Tribunal can apply to the State Administrative Tribunal for a review of the Tribunal's decision. There is no fee for the application to the State Administrative Tribunal, and a person may appear in person, or be represented by another person, such as a lawyer.

Part 23

Administration

Part 23 provides for the role description and duties of the Chief Psychiatrist:

- Has overall responsibility for the treatment and care of people experiencing mental illness who come within the scope of the Act;
- Publishes standards and guidelines for the treatment and care to be provided by mental health services;
- Deals with reports from services about serious matters such as possible staff misconduct, and any serious risks to the welfare of patients while they are in hospital;
- May visit an authorised hospital at any time; and
- May visit any other mental health service if it is suspected that proper standards of treatment and care are not being maintained.

More information is available at www.chiefpsychiatrist.wa.gov.au.

Part 24

Interstate Arrangements

Part 24 provides a framework which would allow Western Australia to enter into agreement with other states and territories in order to allow for the mutual recognition of mental health orders across state and territory boundaries.

Part 25

Ministerial Inquiries

Part 25 allows for the Minister to appoint a person to conduct an inquiry into, and report on, any matter relating to the treatment, care or other services provided to a person who has or may have a mental illness; or the administration or enforcement of the Act.

Part 26

Information

Part 26 provides for voluntary disclosure of information by public authorities and mental health services. This Part also provides for the confidentiality of patient information unless it is authorised.

Part 27

Miscellaneous Matters

Part 27 provides for various things including penalty provision for obstructing or hindering a person performing functions under the Act, protection from liability when performing a function and protection from liability when detaining a person with mental illness.

Parts 28 To 29

Parts 28 and 29 deals with repeals and transitional matters. These are provisions that relate to ensuring that the 1996 Act was repealed and that various things done under the old act could transition (and still have effect) when the Act commenced.