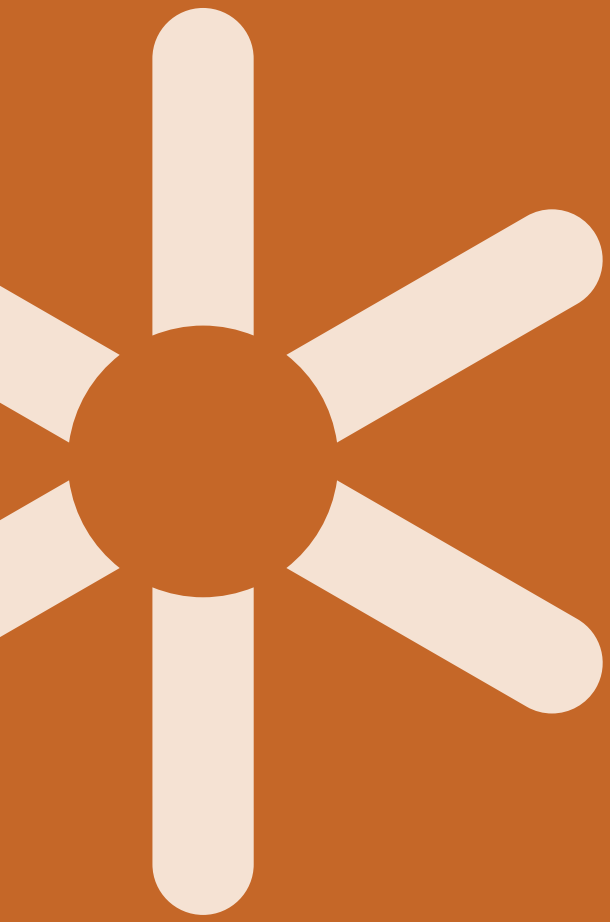
Chapter 4
Previously Proposed Amendments



> We all want better care, better rights, greater capacity for engagement for better outcomes. Our challenge is to create something that at its best, brings people together

Previously Proposed Amendments

In 2019, the Commission conducted limited consultation on a range of proposed amendments received since 2015. The Commission consulted those 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 Department of Health's Mental Health Unit, the Western Australia Police Force and the Mentally Impaired Accused Review Board were also consulted.

Over 60 proposals were consulted on and at the conclusion of these consultations, there were 45 proposed amendments which had the in-principle agreement of the stakeholders involved in the consultation.

The 45 Proposed Amendments will either correct an omission in the Act, clarify certain matters, improve administrative processes, or improve rights protections under the Act.

For example, there are:

- 10 amendments which seek to clarify matters or fix omissions in the Act.
- Four amendments which will either facilitate the rights protections of persons under the Act or the operation of the Mental Health Advocacy Service.
- 12 amendments which either facilitate the operation of the Tribunal or provide for statutory clarification of the administrative roles in the Tribunal.

At the conclusion of the 2019 consultations, the Commission intended to progress the Proposed Amendments. This did not go ahead due to the effect of COVID-19. The Proposed Amendments are therefore being progressed as part of this Review.

Comment on any of the Previously Proposed Amendments is welcomed

If you are responding to the Previously Proposed Amendments in this part:

Please indicate in your response (where possible):

- The amendment number;
- Your view on the issue;
- If you think the suggested amendment should be made, why or why not?

Part 2

Terms and Concepts

Amendment 1:
Definition of Psychiatrist

Section of the Act: Definitions Section 4

Background

The Chief Psychiatrist must be satisfied that a person is sufficiently qualified to practise as a psychiatrist under the Act. Currently, a 'psychiatrist' is a medical practitioner who is a Fellow of the RANZCP or has been prescribed by the Regulations. The process of regularly amending the table in Regulations to add psychiatrists is inefficient, creates red tape and can delay psychiatrists being able to perform functions under the Act (while they wait for the Regulations to be amended). This could potentially affect the provision of timely treatment and care. It is proposed to allow the Chief Psychiatrist, by order published in the WA Government Gazette, to designate a medical practitioner as a psychiatrist for the purposes of the Act, consistent with the Chief Psychiatrist's existing powers

Proposed Amendment

Provide that the Chief Psychiatrist, by order published in the WA Government Gazette, may designate a medical practitioner as a psychiatrist or revoke an order designating a person as a psychiatrist, subject

to consulting with the Medical Board of Australia established under the Health Practitioner Regulation National Law (Western Australia) and the RANZCP. The Chief Psychiatrist will be required to maintain a register of designated psychiatrists, like the current requirement to maintain a register of authorised mental health practitioners.

Amendment 2:
Definition of Child and Adolescent Psychiatrist for Tribunal hearings

Section of the Act: Definitions Section 4

Background

There are no specific requirements in the Act regarding the clinical qualifications for a Child and Adolescent Psychiatrist. However, where the Tribunal is reviewing a child patient, the Act requires the constitution of the Tribunal to include a child and adolescent psychiatrist. If there is no child and adolescent psychiatrist available, then the Tribunal must have regard to the views of a medical or mental health practitioner who has qualifications, training or experience relevant to children with a mental illness or is authorised by the Chief Psychiatrist for this purpose. To date, no practitioner has been so authorised. Without a definition in the Act, it has been problematic determining which psychiatrists may meet the necessary criteria.

Proposed Amendment

Provide for a definition of a Child and Adolescent Psychiatrist to include either:

- Completion of RANZCP's Certificate of Advanced Training in Child and Adolescent Psychiatry: OR
- Accredited Membership of RANZCP's Faculty of Child and Adolescent Psychiatry based on:
    - » completion of RANZCP's Certificate of Advanced Training in Child and Adolescent Psychiatry;
    - » completion of an approved training program in child and adolescent psychiatry and currently working in child and adolescent psychiatry or related field (e.g. perinatal or youth mental health).

Amendment 3:
Use of reasonable force with respect to a person on: a referral for examination by a psychiatrist, a transport order, or an apprehension and return order

Section of the Act: Section 28

Background

The Act currently authorises the use of reasonable force in certain limited circumstances, which includes when a person, on a referral for examination by a psychiatrist, is being transported to a place of examination or apprehended and under a transport order or apprehension and return order.

However, this does not extend to the situation where a person has been referred and detained but is waiting for a transport order to be acted on. This is a gap in the Act which creates uncertainty for clinicians and other staff, including concerns about increased risk to the person and staff.

An amendment to the Act is required to correct the omission.

Proposed Amendment

Amend the Act to allow that an authorised person may use reasonable force, in the circumstances described, and in accordance with the existing provisions in the Act which regulate the use of reasonable force. The Regulations also be amended to prescribe 'a staff member of a mental health service' or 'a health professional at the place'.

Amendment 4:
Revoking a Referral Made in Relation to a Person Who is Already on a Community Treatment Order

Section of the Act: Sections 30 and 31

Background

An involuntary patient on a Community Treatment Order who is referred for examination by a psychiatrist, if reviewed prior to that examination, can have the referral order revoked. However, as the patient was on a Community Treatment Order, the effect of this revocation prior to examination under the Act is that the suspended Community Treatment Order ceases applying to that person. As this is not the intended outcome,

an amendment is required to clarify that revoking a referral for such a person ceases the suspension of the Community Treatment Order and brings it back into force.

Proposed Amendment
Provide that where a Community Treatment Order was suspended because of a referral for examination and the referral is revoked prior to that examination, the Community Treatment Order is no longer suspended and resumes.

Amendment 5:
Provide for continuation of detention at a general hospital to allow for further examination by a psychiatrist

Section of the Act: Division 3

Background
Health service providers consider that the legislated 24-hour maximum time period allowed for an examination to be conducted after a person is received at a general hospital is insufficient as more time may be required to allow for thorough assessment and examination and may stop a person being placed on an involuntary treatment order prematurely. Health service providers seek to extend the period for examination by a psychiatrist in a general hospital to mirror the provisions that allow continuation of detention for this purpose when a person is being examined at an authorised hospital.

Proposed Amendment
Provide that the psychiatrist completing an examination in a general hospital can make an order authorising the person's continued detention to enable further examination, subject to the same times limits that currently apply under the Act when a person is at an authorised hospital.

Amendment 6:
Inability to revoke an Order authorising reception and detention in an authorised hospital for further examination

Section of the Act: Division 3

Background
There does not appear to be a mechanism in the Act for a psychiatrist to revoke an existing order authorising reception and detention in an authorised hospital for further examination. The order remains valid for 72 hours. The Chief Psychiatrist recommends that if a person is subsequently examined by any psychiatrist within the 72-hour period, prior to being received at an authorised hospital, and it is determined that they no longer require the order, there should be the capacity to revoke the order, in keeping with the Objects of the Act.

Proposed Amendment
Provide that an order authorising reception and detention in an authorised hospital for further examination can be revoked when the person is examined by a psychiatrist prior to being received at the authorised hospital, who determines that the order is no longer required.

Amendment 7:
Leave of Absence

Section of the Act: Division 6

Background
The Act currently provides for several variations of patient leave, but no definitions. The Act places onerous obligations on psychiatrists to fulfil a range of administrative requirements (consultation, recording, and notification if a patient does not return on time, etc.) for all types of leave. Currently this includes escorted leave for five (5) minutes to smoke a cigarette, through to long term unescorted leave.

Proposed Amendment
Limit the meaning of 'leave' to overnight leave. The other various kinds of day leave can be governed by the patient's treatment, support and discharge plan, prepared in collaboration with the patient and personal support persons, following ongoing risk assessment and use of clinical judgement.

Part 9
Notifiable Events

Amendment 8:
Notifying personal support person

Section of the Act: Various provisions

Background
The Act currently requires health service providers to notify a patient's personal support person of various notifiable events. Certain events which should have been included as notifiable events have been omitted, likely as an oversight.

Proposed Amendment
Insert additional notifiable events to ensure that a person must always notify a personal support person of orders regarding the continuation of detention, further examination at an authorised hospital, examination without referral and a Community Treatment Order is no longer in force.

Part 10

Transport Orders

Amendment 9:
Transport Orders

Section of the Act: New provisions

Background
Health service providers can extend a transport order or revoke it if it is no longer needed. However, there are constraints where changes in other circumstances require an amendment to the existing transport order. Such circumstances include a change to the risk level (affecting who should be responsible for the transport) or a change to the place of examination (affecting destination). Currently, transport orders cannot be varied in these ways. This can create unnecessary red tape and impact on time frames for transportation.

Proposed Amendment
Enable a transport order to be amended to allow for changes in circumstances such as:

- a change in assessed risk level which requires a change in who provides the transport, or
- where a change in destination is required.

Part 11

Apprehension, Search And Seizure Powers

Amendment 10:
Apprehension by police for assessment

Section of the Act: Part 11 Division 1

Background
The Act currently allows, in certain limited circumstances, for a police officer to apprehend a person and take them to a place where they can be assessed. The Act is silent as how handover, or reception of the person at hospital, should occur. This includes a lack of clarity around the ability of hospital staff to detain the person if necessary, and the obligations of police officers while the person is waiting to be assessed.

An amendment is required to authorise detention at the time of reception until such time as a person may be detained in accordance with the existing processes under the Act.

Proposed Amendment
Amend the Act to:

- define 'reception';
- enable hospital staff to detain a person apprehended and brought in by police until completion of an assessment by a clinician; and
- allow for a mandatory maximum time frame for detention of X hours (to be determined) between being detained and being assessed.

Note: there may be operational issues for police depending on when 'reception' of the person occurs. Timeframe for detention requires further consultation.

Amendment 11:
Gender of person conducting search

Section of the Act: Section 163 and new provisions

Background
A person conducting a search must, if practicable, be a person of the same gender as the person to be searched. The Sex Discrimination Act 1984 (Cth) aims to prevent discrimination on grounds of sexual orientation, gender identity and intersex status, and has been subject to recent amendments. The search provision in the Act may contravene this recent amending legislation.

Consistent with the Criminal Investigation Act 2006, WA Police recommends that the requirement to ask a person who they would prefer to conduct a search should be restricted to when the person conducting the search is uncertain of the person's gender. In addition to laws, the WA Police has an internal policy that complements this approach.

Proposed Amendment
Provide that if a person's gender is unclear, the person responsible for conducting the search must ask a person

whether a male or female should conduct the search and, where practicable, act in accordance with that response. In the absence of an answer, the person must be treated as if they are of the gender that they appear to be. This proposal is based on a corresponding provision in the Criminal Investigation Act 2006.

Note: most workable solution is to follow existing provisions in other legislation. Having different laws and processes risks causing confusion.

Part 12

Exercise of Certain Powers

Amendment 12:
Transport officers' use of mechanical restraints

Section of the Act: Section 172

Background

The Act enables transport officers to use reasonable force when performing their functions. St John Ambulance and other transport officers are concerned about the limits of their powers to use mechanical restraints, resulting in their reluctance at times to carry out certain patient transports. This can mean greater demand for police transport services.

The power to use reasonable force may authorise use of mechanical restraints, however concern remains, particularly for officers other than police, that the relevant provision is not expressly stated. Expressly state that the power to use reasonable force by relevant persons when apprehending, transporting and detaining a person may include power to use mechanical restraints subject to requirements that force is proportionate to the risk and individual circumstances, similar to principles in the Act around use of detention.

Proposed Amendment

Expressly state that the power to use reasonable force by relevant persons when apprehending, transporting and detaining a person may include power to use mechanical restraints subject to requirements that force is proportionate to the risk and individual circumstances, similar to principles in the Act around use of detention.

Part 14

Regulation of Certain Kinds of Treatment and Other Interventions

Amendment 13:
Emergency psychiatric treatment

Section of the Act: Sections 203, 204

Background

The Act currently authorises a medical practitioner to provide emergency psychiatric treatment. In practice, EPT is frequently provided by a nurse with a medical practitioner's authorisation.

Proposed Amendment

Amend the Act to formally provide for a nurse to provide EPT and complete the relevant documentation, upon such authorisation being given by a medical practitioner.

Amendment 14:
Definition of seclusion

Section of the Act: Section 212

Background

The definition of seclusion refers to the person being alone. There is a lack of clarity in the Act as to whether a person is in seclusion if there is a doctor or nurse in the seclusion room or area, given that the person is not technically alone, but it is not within the person's control to leave. However, practically, the person must be observed, examined on a regular basis and provided with food and other requirements.

Proposed Amendment

Insert in the definition of seclusion, words to the effect of 'a patient's seclusion is not taken to have been interrupted or terminated merely by reason of a scheduled observation or examination or the giving of necessary treatment or care'.

Amendment 15:
Informing treating psychiatrist of seclusion or bodily restraint

Section of the Act: Section 217

Background
Services must notify, within specified time frames, a patient's treating psychiatrist of the use of seclusion or restraint. However, the treating psychiatrist is not always on duty or on call. It is operationally more practical to require services to notify an 'on duty psychiatrist' rather than the patient's treating psychiatrist, supported by obligations to inform the treating psychiatrist in due course.

Proposed Amendment
Amend the Act to allow that when the treating psychiatrist is unavailable, services to notify an 'on duty psychiatrist', supported by an obligation to inform the treating psychiatrist in due course.

Part 16

Protection of Patients' Rights

Amendment 16:
Complaints to the Chief Psychiatrist

Section of the Act: Section 257

Background
Currently, under the Act a person who is refused voluntary admission to an authorised hospital may make a complaint to the person in charge of the hospital, HaDSCO or the Chief Psychiatrist. This is the only express occasion in the Act where complaints may be made to the Chief Psychiatrist. However, the Chief Psychiatrist is not a complaints body, whereas the services and HaDSCO are the appropriate organisations to receive such complaints.

Proposed Amendment
Amend section 257 to remove the option of making a complaint to the Chief Psychiatrist by a person refused voluntary admission to an authorised hospital. Retain the ability for a complaint to be made to either the person in charge of the authorised hospital or HaDSCO.

Amendment 17:
Voluntary Patients in locked inpatient mental health services

Section of the Act: New provision

Background
The Act provides for facilitating patients' rights, including the right to the least possible restriction of a person's freedom while receiving treatment and care. The Mental Health Advocacy Service has raised concerns about the freedom of movement for voluntary patients in 'open wards' that have locked doors, though some wards have put up signs informing voluntary patients of their rights in this regard. Mental Health Advocacy Service requests that a specific right to freedom of movement of such voluntary patients be stated in the Act and they be entitled to leave the ward unless treating professionals seek to review their status.

Proposed Amendment
Amend Act to expressly state that regardless of whether a voluntary inpatient is placed in a locked or unlocked ward, a voluntary patient has the right to leave the ward and/or hospital at any time without permission. The proposed amendment could be based on similar wording in the Mental Health Act 2009 (SA).

Part 19

Complaints About Mental Health Services

Amendment 18:
Removal of exemption from complaints review by HaDSCO for mental health services wholly funded by the Commonwealth

Section of the Act: Section 305

Background
HaDSCO deals with complaints about mental health services. However, HaDSCO's jurisdiction under the Act does not extend to complaints about mental health services which are wholly funded by the Commonwealth. This is because the definition of a 'mental health service' in the MH Act excludes such services from the complaints process. However, there is no express limitation of this kind on HaDSCO's jurisdiction under

the Health and Disability Services (Complaints) Act 1995 (HaDSC Act). To date there has been a reasonably sound argument that HaDSCO has jurisdiction under the HaDSC Act for the management of complaints about mental health services where such services are wholly funded by the Commonwealth.

Proposed Amendment
Amend the Act to remove the exclusion of Commonwealth funded mental health services from the complaints process to provide certainty and enable such complaints to be managed under the Act.

Part 20

Mental Health Advocacy Services

Amendment 19:
Mental Health Advocacy Service – Access to voluntary patients

Section of the Act: Section 348

Background
The Act enables the Mental Health Advocacy Service to provide advocacy services to certain limited classes of voluntary patients. The Mental Health Advocacy Service has previously requested that the classes of voluntary patients who can access advocacy services be expanded and obtained a Ministerial Direction which gave effect to this request (dated 1 January 2017). The Mental Health Advocacy Service requests that those voluntary patients the subject of a Ministerial Direction be included in the Act. (The Ministerial Direction could then be revoked). The Mental Health Advocacy Service also seeks further expansion of the classes of voluntary patients who can access the Mental Health Advocacy Service beyond those already referred to in the Act or listed in the Ministerial Direction.

All additional categories of voluntary patients would only be seen by the Mental Health Advocacy Service upon request from the voluntary patient. This means that there will be no requirement on health service providers to notify the Mental Health Advocacy Service other than when a request is received from a patient. Where a request is received, the Mental Health Advocacy Service would be required to contact the person within a set time frame after receiving the request, being 7 days for adults and 24 hours for children. These timeframes conform to existing timeframes in this part of the Act.

Proposed Amendment
Per the Ministerial Direction, prescribe the following classes of patients as identified persons:

a. children who are voluntary inpatients in an authorised hospital;

b. children who are voluntary inpatients in a public hospital;

c. children who have been assisted by the Mental Health Advocacy Service in the last 6 months, while either a voluntary patient or an involuntary inpatient, and who are being treated, or are proposed to be treated, by a community mental health service; and

d. a person, who while an identified person, was being assisted by the Mental Health Advocacy Service in relation to a complaint or issue that remains unresolved, and where some further action can reasonably be taken to resolve the complaint or issue.

Prescribe the following additional classes of voluntary inpatients as identified persons:

e. long term voluntary inpatients in authorised hospitals (6 months for adults, and 3 months for children);

f. persons on a Community Treatment Order admitted to an authorised hospital as a voluntary inpatient;

g. voluntary inpatients in an authorised hospital who are, or in the past 24 hours have been, subject to an order restricting their freedom of communication; and

h. voluntary inpatients in an authorised hospital who have been subject to seclusion or bodily restraint.

Amendment 20:
Timing of notifications to the Mental Health Advocacy Service

Section of the Act: Section 357

Background
The Mental Health Advocacy Service is required to contact every involuntary patient within seven (7) days of an involuntary treatment order being made, or within 24 hours for children. It is difficult for the Mental Health Advocacy Service to comply if health service providers do not provide timely notifications. In practice, an operational agreement has been reached with health

service providers to achieve the above time frames. The Mental Health Advocacy Service says this has been working to date but also seeks legislative prescribing.

Proposed Amendment
Require services to notify the Mental Health Advocacy Service within 48 hours of an involuntary treatment order being made or within X hours (to be determined) for children. Also requires amendment to section 145.

Note: consultation required regarding the time frame for notification about children.

Amendment 21:
Involuntary Child / MIA Child in Authorised Hospital -Request for Contact by the Mental Health Advocacy Service

Section of the Act: Section 357

Background
The Act requires children to be contacted by the Mental Health Advocacy Service within 24 hours in all situations, except in two (2) situations (which may be the result of an oversight when the Act was introduced).

These relate to a child under an involuntary treatment order who requests contact and a mentally impaired accused child detained in an authorised hospital who requests contact. This would be consistent with all provisions relating to the Mental Health Advocacy Service's requirements to contact children. The Mental Health Advocacy Service currently has a protocol to contact all children within 24 hours in any event so no practical implications from making this amendment.

Proposed Amendment
Provide that an identified person who is a child, either under an involuntary treatment order or is a mentally impaired accused, who requests contact by the Mental Health Advocacy Service must be visited or otherwise contacted by a mental health advocate within 24 hours of the request or notification being received by the Mental Health Advocacy Service.

Amendment 22:
Powers of Mental Health Advocates – Inquiry Power Regarding Discharge or Withdrawal of Care

Section of the Act: Section 359

Background
Advocates often deal with consumer complaints about a person's discharge from a service that involves the eviction from a hostel. Although arguably covered by the Act, the Act does not specifically refer to the powers of mental health advocates to make inquiries about discharge or withdrawal of care that results in eviction.

Proposed Amendment
Expressly provide that a Mental Health Advocate can make inquiries regarding the discharge of or withdrawal of care to a person by a mental health service or other place.

Part 21
Mental Health Tribunal

Amendment 23:
Application to Mental Health Tribunal for provision of electroconvulsive therapy

Section of the Act: Various

Background
Currently, under the Act, a psychiatrist may apply to the Tribunal for approval to provide electroconvulsive therapy. Clinical stakeholders state that the details in the Act requiring approval by the Tribunal are too prescriptive and may lead to delays in the provision of treatment, thus increasing the potential for negative outcomes for patients. The Tribunal should not determine clinical issues, but rather provide oversight of the provision of electroconvulsive therapy.

It is noted that, in comparison with other Australian jurisdictions and New Zealand, the Western Australian Act is more prescriptive in its requirements for approval of electroconvulsive therapy by a Tribunal.

Currently, the application to provide electroconvulsive therapy must include a treatment plan, including where the electroconvulsive therapy will be provided and the minimum period that it is proposed to elapse between

any two (2) treatments (amongst other things). Practical issues arise where the location may need to change or the minimum period between electroconvulsive therapy sessions is not fully complied with. For example, where a treatment plan refers to 'no less than two (2) days apart', but electroconvulsive therapy is provided 46 hours later. In any event, the Chief Psychiatrist's clinical standards regarding the provision of electroconvulsive therapy will continue to apply and provide necessary safeguards.

The Mental Health Advocacy Service sought an additional requirement that any application for electroconvulsive therapy be supported by a patient's treatment, support and discharge plan. This is supported by the Tribunal and Chief Psychiatrist.

Proposed Amendment
Amend the Act to remove the following electroconvulsive therapy specifications from Tribunal approval requirements:

- The mental health service where electroconvulsive therapy will be provided; and
- The minimum period proposed to elapse between any two (2) treatments.
- Retain the following electroconvulsive therapy specifications in Tribunal approval requirements:
- The maximum number of electroconvulsive therapy treatments to be performed; and
- The maximum period over which electroconvulsive therapy is to be performed.

Further amend the Act to require the Tribunal to have regard to the patient's treatment, support and discharge plan when considering an application for electroconvulsive therapy.

Further amend the Act to remove the requirement for the Tribunal to be satisfied that the electroconvulsive therapy will be performed at a mental health service approved for that purpose by the Chief Psychiatrist. Instead, add a requirement to the electroconvulsive therapy provisions in the Act that electroconvulsive therapy can only be performed at a mental health service approved for that purpose by the Chief Psychiatrist. Non-compliance with this requirement may then be included as an offence, along with non-compliance with other electroconvulsive therapy provisions in that Part of the Act.

Amendment 24:
Calculating the timing of periodic reviews by the Tribunal

Section of the Act: Section 387

Background
The Tribunal has raised concerns that, by strategic use of certain provisions, the Tribunal can be required to conduct monthly reviews rather than three (3) monthly periodic reviews, as per the definition of 'periodic review period'. This is contrary to the intention of the Act to facilitate balancing patient rights with administrative requirements. The Tribunal proposes an amendment to ensure that where the Tribunal conducts a review upon application by the person, or other person, it is included as a 'last review' in the calculation of the periodic review period.

Proposed Amendment
Provide that where the Tribunal conducts a review upon application by a person, or other person, it is included as a 'last review' in the calculation of the periodic review period.

Amendment 25:
Provide Tribunal Members with explicit power to administer an oath or affirmation

Section of the Act: New provision

Background
It is arguable that the Act does not provide Tribunal members with statutory power to take an oath or affirmation. However, the Tribunal seeks express power to take an oath or affirmation.

Proposed Amendment
Expressly provide that Tribunal members may administer an oath or take an affirmation.

Amendment 26:
Provide for a transcript of oral reasons delivered during a Tribunal hearing to suffice as compliance with a request for reasons

Section of the Act: New provision

Background

The Act provides for a party to request the Tribunal provide reasons for the Tribunal's decision. A transcript is a written or printed version of material originally presented in another medium. Tribunal members usually give the parties oral reasons for the decision at the conclusion of the hearing, complemented by the informal practice of providing reasons for decision in the transcript. This facilitates the applicant's understanding of the Tribunal's decision by getting clarity at the time of the hearing.

Allowing the transcript of the decision to suffice as reasons for decision means that Tribunal members are not required to write a formal decision, saving time and associated costs and ensuring speedier dispensing of the Tribunal's decision or reasons.

Proposed Amendment

Provide that, if a party requests reasons for decision by the Tribunal, a written transcript of the part of proceedings that contain the reasons for decision given orally may suffice. This would be subject to the requirement in the Act that any reasons must be in a language, form of communication and terms that the person is likely to understand.

Amendment 27:
Enable the Tribunal to correct any clerical mistakes, accidental errors, omissions, miscalculations or defects of form, contained in its decisions or reasons

Section of the Act: New provision

Background

In judicial and quasi-judicial matters, 'technical' or administrative mistakes, errors, omissions, miscalculations or defects of form can occur with judgments, reasons, orders or on certificates. Once a statutory right has been exercised a Tribunal member becomes functus officio. The effect of this is that having decided on the particular issues submitted, the Tribunal lacks power to re-examine the decision and thus correct any of the above. It is impractical and cost inefficient to require formal appeals to amend any such matters. Usually such occurrences are amended by laws providing that the judicial or quasi-judicial body, on the application of any party or of its own motion, may, at any time, correct the mistake, accidental error, omission, miscalculation or defect of form. This is colloquially called the 'slip rule'.

Proposed Amendment

Amend the Act to provide that the Tribunal may, at any time, correct a clerical mistake, accidental error, omission, miscalculation or defect of form in its reasons or decisions.

Amendment 28:
Clarify when a decision of the Tribunal takes effect

Section of the Act: New provision

Background

The Tribunal is aware that mental health services can be uncertain as to when a Tribunal decision takes effect, particularly regarding decisions changing a patient's status from involuntary to voluntary, when a patient is free to leave detention immediately. However, staff may be reluctant to permit them to leave until receipt of the Tribunal's written notice of decision, which may not occur on the day of the hearing. A practical amendment providing that the Tribunal's decision takes immediate effect, subject to any stated exceptions, would minimise confusion, save resources and ensure, where appropriate, patients can access their rights expeditiously, including that they are not detained unlawfully.

Proposed Amendment

Clarify that a decision of the Tribunal has immediate effect, subject to any terms otherwise stated in the order, and the enforceability of the decision is not dependent on a written notice of decision mailed or otherwise communicated to the parties.

President's Powers to Direct, Administer and Manage the Business of the Tribunal

The President is appointed by the Governor on recommendation of the Minister. The Act sets out limited responsibilities of the President. These include making Tribunal rules providing for anything required or permitted by the Act or that assist the efficient, economic and expeditious operation of the Tribunal, including organising and managing its business. The President is required to provide a report to the Minister for tabling. Otherwise, there is no specific legislative description of the President's position or formal statement of responsibilities. These proposed new provisions, below, are consistent with facilitating the decision-making function of the Tribunal.

Amendment 29:
Provide the President is responsible to the Minister for administering Tribunal business

Proposed Amendment
Provide that the Tribunal President is responsible to the Minister for administration of the Tribunal and for organising the business of the Tribunal.

Amendment 30:
Expressly enable the President to advise the Minister

Proposed Amendment
Provide that the President can advise the Minister on actions the President considers would lead to:

a. more convenient, economic, and efficient disposal of the business of the Tribunal; or
b. avoidance of delay in the conduct of proceedings; or
c. the Act and related laws including regulations being more effective.

Amendment 31:
Revocation of section 492 providing for meetings of the Tribunal

Proposed Amendment
Delete section 492 of the Act to remove the requirement regarding meetings of members.

Amendment 32:
Enable the President to create a code of conduct for members of the Tribunal

Proposed Amendment
Provide for the President of the Tribunal being able to make and maintain a code of conduct for members that must be complied with.

Amendment 33:
Enable the President to regulate the education, training and professional development of Tribunal members

Proposed Amendment
Provide the President is responsible for directing, and the Minister for ensuring appropriate provision is made for the education, training, and professional development of Tribunal members regarding performance of their functions.

Amendment 34:
Regulation of Members regarding conflicts of interest and engaging in other employment

Proposed Amendment
Enable the President to regulate members engaging in other employment and/or other activities that create a conflict or potential conflict of interest, or otherwise affect the ability of members to carry out their responsibilities professionally.

Part 23
Administration

Amendment 35:
Chief Psychiatrist's access to information regarding former patients

Section of Act: Division 2

Background
The Act currently limits the Chief Psychiatrist in the ability to access information regarding former patients, including those who have died or been discharged. If the Chief Psychiatrist is unable to access information, it could impact on the Chief Psychiatrist's capacity to investigate their experience or properly enforce standards for mental health services.

Proposed Amendment
Amend the Act to allow the Chief Psychiatrist to obtain information regarding former patients, including deceased patients, in order to facilitate investigation of their experience and enforce standards for mental health services based on that information.

Part 24

Interstate Arrangements

Amendment 36:
Interstate arrangements for mental health orders

Section of Act: Part 24 generally

Background
In 2018, the Commission commissioned a research project looking at interstate arrangements for mental health orders in order to identify best practice and inform the development of such arrangements under the Act. The research noted that arrangements between States/ Territories in Australia are particularly complex because each jurisdiction has its own mental health legislation using different terminology and criteria. There are also significant differences amongst jurisdictions as to frameworks for interstate movements of consumers. In addition, some jurisdictions, including Western Australia, do not currently have operational interstate arrangement provisions or they require an Intergovernmental (or Ministerial) agreements to be in place before any mutual recognition of interstate orders. formal interstate movements can take place. This has resulted in a patchy ineffective system nationwide. A best practice approach would require all states and territories to have mirror provisions allowing for mutual recognition of mental health orders.

There is currently work underway at a national level which is developing national draft model laws on mutual recognition. While awaiting the draft model laws (which can potentially progress as part of a future amendment bill to the Act), the Commission intends to remove the current statutory barriers to the recognition of interstate orders in the Act.

Proposed Amendments
1. Amend the definition of 'corresponding law' to include a descriptive definition. Currently the definition requires corresponding laws to be declared by the Regulations. This may cause delays when corresponding laws change.
2. Similarly, provide a descriptive definition of 'corresponding orders' from other jurisdictions.
3. Remove the requirement for an intergovernmental agreement as this creates an unnecessary and additional barrier.

Part 27

Miscellaneous Matters

Amendment 37:
Approved form of medical records

Section of Act: Section 582

Background
The Act requires medical records to be in a form approved by the Chief Psychiatrist. This requirement does not serve any useful purpose and is unworkable. Further, there is an Australian Standard (AS 2828) regarding both papers based and digital health medical records requirements.

Proposed Amendment
Delete the requirement that medical records be in an approved form.

Amendment 38:
Terms of Involuntary treatment orders

Section of the Act: Parts 6 & 7 various provisions

Background
Services completing involuntary treatment order forms do not always include the patient's contact details. This makes it difficult for Tribunal and the Mental Health Advocacy Service to contact the patient, particularly when the person is on a Community Treatment Order. The Mental Health Advocacy Service requests the inclusion of addresses, phone numbers and possibly emails on involuntary treatment orders.

Proposed Amendment
Amend the Act to require services to include the patient's current address and telephone number (if any) on the involuntary treatment order. Consideration will also be given to the inclusion of email addresses, where available and if appropriate.

Amendment 39:
General Hospital to General Hospital Transfer

Section of the Act: Parts 6 & 7 various provisions

Background

The Act provides for transfer of involuntary inpatients from a general hospital to an authorised hospital, and between authorised hospitals. However, there is no provision allowing for an involuntary inpatient to be transferred between general hospitals.

Proposed Amendment

Provide for transfer of an involuntary patient from one general hospital to another general hospital to be included in the transfer provisions.

Notifications to external bodies / entities

There is information that the Chief Psychiatrist, Tribunal, the Mental Health Advocacy Service or Mentally Impaired Accused Review Board may require to enable them to properly perform their functions. However, relevant services are not authorised to provide such information. This is likely due to an oversight but does create a gap in the Act which requires rectification. A number of amendments are required to enable the notification of certain decisions and provision of information, noting that this aligns with the objects of the Act.

Amendment 40:
Notifying certain decisions regarding CTOs

Proposed Amendment
Add a requirement to notify the Tribunal, the Mental Health Advocacy Service, Mentally Impaired Accused Review Board and Chief Psychiatrist where a Community Treatment Order has been made without referral and is since confirmed or is no longer in force.

Amendment 41:
Notifying Admission and Detention of mentally impaired accused

Proposed Amendment
Add a requirement to notify the Mental Health Advocacy Service within a certain timeframe regarding the admission into and detention of a mentally impaired accused person in an authorised hospital.

Amendment 42:
Providing a copy of Making or Revocation of Inpatient Treatment Orders in a general hospital

Proposed Amendment
General hospital to provide a copy of the order to the Chief Psychiatrist.

Amendment 43:
Providing a copy of Transfer Orders to the Mental Health Advocacy Service, Tribunal, Mentally Impaired Accused Review Board and Chief Psychiatrist

Proposed Amendment
Add a provision requiring a copy of Transfer Orders between hospitals to be provided to the Tribunal, the Mental Health Advocacy Service, Mentally Impaired Accused Review Board and Chief Psychiatrist.

Amendment 44:
Authorise recording, disclosure or use of information for Tribunal and Mentally Impaired Accused Review Board

Proposed Amendment
Amend the Act to authorise the recording of, disclosure to or use of information by the Tribunal and Mentally Impaired Accused Review Board.

Amendment 45:
Providing a copy of Continuation Orders to the Mental Health Advocacy Service, Tribunal, Mentally Impaired Accused Review Board and Chief Psychiatrist

Proposed Amendment
Add a provision requiring a copy of Continuation Orders to be provided to the Tribunal, Mental Health Advocacy Service, Mentally Impaired Accused Review Board and Chief Psychiatrist.