Level 9, 299 Elizabeth St, Sydney NSW 2000 • DX 643 Sydney
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555
piac@piac.asn.au • www.piac.asn.au • ABN 77 002 773 524

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Issues Paper

Delays in inquiries under the Mental Health Act: A cause for concern

Background

When the NSW Parliament passed amendments to the *Mental Health Act 2007* in 2008 (*Courts and Crimes Legislation Further Amendment Act 2008,* Schedule 16), they were not seen as controversial. These amendments effectively replaced the role of visiting magistrates conducting initial inquiries under the *Mental Health Act 2007*, giving that role to the Mental Health Review Tribunal. There was also another amendment facilitating the conduct of Mental Health Review Tribunal hearings by AV technology, which was already being extensively used by the Tribunal in the conduct of hearings.

In February 2010, the Hon Greg James QC, President of the Mental Health Review Tribunal wrote to the NSW Area Directors of Mental Health advising that when the amendments came into effect mental health inquiries could be expected to take place during the 3rd or 4th week of detention of an individual.

Previous practice was that, since 1958, with very rare exceptions over the Christmas period, visiting magistrates held initial inquiries under the *Mental Health Act 2007*, all over NSW, at all psychiatric hospitals and units on one designated day per week. That effectively meant that a patient who was detained after they were 'scheduled' by two doctors, including one psychiatrist, was seen by a Magistrate within approximately one week. Since 1988 they have been entitled to free legal representation from the Mental Health Review Tribunal at this initial Inquiry.

The Attorney General, the Hon John Hatzistergos, in his second reading speech to the 2008 amendments said that:

> Consolidating the work of magistrates within the jurisdiction of the tribunal provides advantages, including increased accountability, by making it easier to track what happens to detained persons in the mental health care system and promoting greater consistency in approach to conduct of inquiries.[1]

If 'increased accountability' by 'making it easier to track what happens to detained persons in the mental health system' was one of the goals of the legislative amendments in 2008, the administrative changes by the Mental Health Review Tribunal have led to the opposite result. Now, a person detained in the system may not have his or

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[1] NSW, Parliamentary Debates. Legislative Council, 27 November 2008, The Hon. John Hatzistergos (Attorney General, Minister for Justice, and Minister for Industrial Relations) http://www.parliament.nsw.gov.au/Prod/parlment/nswbills.nsf/0/991B61DFF490D692CA25750D000395B1 at 3 November 2010

her detention reviewed by someone outside the system for two to four weeks as opposed to the previous practice of a maximum of one week's wait for an inquiry.

There is no mention in the second reading speech of the Government's intention to increase the waiting time for inquiries under the *Mental Health Act 2007*.

Principles involved

The 'right to health care' (including the right to mental health care) is generally recognised as a social and economic right. (see article 12 of the *International Covenant on Economic, Social and Cultural Rights*.) This right, however, is never expressed as a right of others to force adults to undergo particular health care or treatment. The right to informed consent to treatment has been recognised in Australian law. This is subject only to capacity considerations and the presumption that decisions about the health care of young children are generally made by parents or, in their absence, substitute decision makers.

The law in the vast majority of western countries, including Australia, makes the exception to these general rules when a person is acutely mentally ill and needs hospital treatment, often with the additional proviso, as in NSW, that they are at risk of harm to themselves or others.

Because the effect of such laws is usually both forced treatment and the deprivation of liberty by detaining a person behind locked hospital doors, the principle should be that any such compulsory detention and treatment should be according to laws which put the onus on those who want to compulsorily treat and detain to satisfy strict legal criteria. Another established principle is that persons should not be treated and detained against their will for any period in excess to that which is absolutely necessary.

Section 68 of the *Mental Health Act 2007* sets out principles that are 'as far as practicable, to be given effect to with respect to the care and treatment of people with a mental illness or mental disorder'.

Section 68(f) states:

> any restriction on the liberty of patients and other people with a mental illness or mental disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum necessary in the circumstances.

A final related important principle, which is enshrined in NSW Mental Health legislation, is the principle of least restriction.

The principle of least restriction is found in *The Principles for the protection of persons with mental illness and the improvement of mental health care* (adopted by United Nations General Assembly resolution 46/119 of 17 December 1991) that states:

> Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.

Section 68(a) of the *Mental Health Act 2007* reflects this principle by stating:

people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given

PIAC's concerns

The lack of prior consultation and public debate

PIAC is concerned that the administrative actions of the Mental Health Review Tribunal (MHRT) and NSW Health, in delaying the hearing of initial judicial inquiries under the *Mental Health Act 2007* for several weeks or more, has radically changed well established policy and practice in NSW without:

- prior public consultation;
- prior assessment of the impact on patients; or
- the consent of Parliament and therefore without proper public debate.

When the Parliament considered the amendments to the *Mental Health Act* in 2008 that transferred the power to conduct initial inquiries from visiting Magistrates to the MHRT, there was no mention by the NSW Government of any intention to change policy to greatly increase the time between the medical assessment leading to detention and the review of the decision to detain. The words 'as soon as practicable' were retained in the amendments.

PIAC believes that the problems here identified could be remedied without statutory amendment. PIAC believes that the 'as soon as practicable' rule can be applied with the MHRT carrying out timely inquiries under the *Mental Health Act 2007* and that the current NSW *Mental Health Act* represents the best practice and the best protection of patients' rights of all the equivalent Acts in other states and territories.

However, if this is proposed to be changed in any way, it should be the Parliament that changes law and practice through the legislative process and the making of regulations (which can also be scrutinised by Parliament). PIAC would, of course, welcome any amendment to the *Mental Health Act 2007* that also achieved the goal of returning the NSW practice to what occurred prior to June 2010.

The intention of the current law is not being followed

PIAC is very concerned that the clear intention of *Mental Health Act 2007* is not being followed, in that initial inquiries by the MHRT under that Act are now effectively not being heard 'as soon as practicable' after the medical/psychiatric assessments which lead to the involuntary detention of patients. PIAC express great disquiet that this has consequently severely eroded the well-established rights of patients in NSW to an early independent review of proposed involuntary detention by health authorities.

PIAC believes that the use of audio-visual technology could, and should, with the informed consent of the patient, actually reduce the time between assessment and the hearing of an independent inquiry under the *Mental Health Act 2007*.

PIAC notes the unreported 1970 decision of Justice Meares of the NSW Supreme Court in *Ex parte Allen v the Superintendant of Callan Park* which held that 'as soon as practicable' under a different but related section of the *Mental Health Act 1958* meant 'as soon as feasible' rather than 'as soon as reasonable'.

The diminution of consumer rights

Every person has the right to treatment only after he/she has given informed consent. Forced treatment is a trespass on the person which can result in criminal charges and individuals generally cannot be detained against their will for treatment.

The law in western countries is such that these rights can only be abrogated by statute (and in some limited cases by the law of necessity when urgent treatment is required in a life-saving situation). The *Mental Health Act 2007* is an example of the law taking away these rights for public interest reasons.

In NSW, since 1958, there has been in mental health legislation the safeguards that a person cannot be made an involuntary patient unless they meet the strict legal definition of mental illness or being a 'mentally ill person'. Recent legislation has also required that if he/she is assessed by doctors to be a mentally ill person, that their involuntary status is reviewed by an independent legally qualified person 'as soon as practicable ' after that assessment.

This represents the best practice in Australian law and practice in the balance between the rights and liberties of the consumer, their rights to protection and treatment and the rights of the community in terms of protection from potential harm. The early intervention of inquiries by Magistrates represented an investment by the NSW authorities in maintaining the proper balance of rights and responsibilities and community protection.

Now that the MHRT has greatly increased the time between psychiatric assessment and legal review, consumer and citizen rights in NSW have been substantially diminished. Alarmingly, since the introduction of the administrative changes in June 2010, individuals may not have been a 'mentally ill person' as defined by the law, and yet could have been detained for several weeks and then discharged. Discharge could occur just before they are due to go before the Tribunal.

All this could have occurred without any independent legal review of their status ever taking place. The questions whether, in their circumstances, there were less restrictive alternatives to involuntary care and treatment in hospital would have never been independently reviewed.

Under NSW law there is no practical way of having these situations reviewed in retrospect. Section 44 of the *Mental Health Act 2007* allows review requests to a medical officer for discharge by an involuntary patient and then an appeal to the MHRT if rejected by the medical officer. Appeals to the Supreme Court under the Act are appeals against a decision of the MHRT. The Supreme Court does have overriding powers of supervision in such matters, but in practical terms, they can only order a patient's release if they are currently unlawfully detained. There is no order that they could make if they were presented with evidence that a person was detained unlawfully and then discharged several weeks after admission.

This means that unless a person actively seeks a review of their detention, there are now no safeguards against unlawful detention in the weeks between admission and the MHRT review. This is the opposite of the Attorney General's express intention to be able to 'track' what happens to detained people within the mental health system.

The only effective and practical safeguard is an independent inquiry conducted 'as soon as practicable' after admission. This is why NSW law and previous practice was indeed 'best practice'.

The loss of the therapeutic benefit of independent and timely inquiries

The therapeutic benefit of a timely hearing on the question on whether someone is a 'mentally ill person' under the *Mental Health Act 2007* by a body that is seen both as independent and impartial, is now being lost.

One of the benefits of the early review is that it is possible, even with very psychiatrically unwell people, to reason with them and persuade them that although they and the doctors caring for them have a disagreement about whether or not hospitalisation is indicated, they may take solace in the fact that 'an independent umpire' visits the hospital every week, and this will provide an opportunity for them to have their say.

Anecdotal evidence from psychiatrists in the field was that, under the previous arrangements, most people were happy to accept treatment for the few days before that review. Anecdotal evidence also seems to suggest that if the Magistrate did agree with the doctor, most people, strongly socialised to obey the law, felt that they had had a fair hearing, and were happy to accept that they would just have to stay as they had been ordered to do so by an independent 'umpire'.

In summary, an early hearing gives patients confidence that their rights are being protected, they can have an opportunity to put their point of view, currently with the likely assistance of a free solicitor from the Mental Health Advocacy Service, and that everything was therefore 'above board.' This can be compared with the current arrangements where a review may not be available for several weeks. Patients, in contrast, do not see this, as fair.

What PIAC wants the government to do

PIAC believes that the application of the law and policy has changed without the consent of the Parliament and therefore without the appropriate consultation and public debate.

PIAC notes that the Mental Health Review Tribunal is committed to monitoring the effect on consumers with possible and diagnosed mental illnesses of Audio-Visual (AV) hearings by the Mental Health Review Tribunal and calls for the commencement of the monitoring process as soon as possible.

PIAC has no doubt that the Tribunal, appropriately resourced, has the capacity to conduct initial inquiries under the *Mental Health Act 2007* in the timeframe that the law now demands. Using existing technology, there is no reason why inquiries could not be conducted within a week of a person being first detained under the *Mental Health Act 2007*, however remote the location of the psychiatric hospital or unit.

However, PIAC believes that, wherever possible, inquiries should be held in person rather than using AV technology. PIAC notes that the Tribunal is currently travelling to Cumberland and Concord Hospitals to conduct inquiries.

PIAC seeks a return to the practice that has occurred since 1958 where the case to involuntary detain patients, with very few exceptions, was reviewed in an independent inquiry that took place within a week of admission

PIAC notes that the Minister Assisting the Minister for Health (Mental Health) has given private assurances that the controversial changes in practice are not part of a cost cutting exercise. We request that the Minister direct NSW Health and the Registrar of the Mental Health Tribunal, which are responsible, through the Area Health Services, for the execution of s 27 of the *Mental Health Act 2007* in the various psychiatric hospitals and units, to comply with the Act in this way.

This would return NSW to its prior place of having the fairest and most just mental health laws and practices in all Australian jurisdictions.

APPENDIX

PIAC's response to arguments in favour of the changed administrative arrangements

Arguments in favour of a delayed MHI	**Response**
S.27 of the Mental Health Act 2007 requires that a person who has been detained in hospital as a 'mentally ill' person "must be brought before the Tribunal as soon as practicable". Three to four weeks IS as soon as reasonably practicable for the MHRT.	There is a limit to how far the words "as soon as practicable" can stretch. It must, in any event, mean "soon". It is worth noting for example that in the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) s 99, the requirement that review of arrest should take place 'as soon as is reasonably practicable' is normally interpreted as being within 24 hours, 365 days of the year. A recent UK case found that a routine 8 week delay before hearing mental health appeals was 'bred of administrative convenience' and it was unlawful to make no effort to ensure that an application was heard 'as soon as reasonably practicable' C, R (on the application of) v Mental Health Review Tribunal London South & South West Region [2001] EWCA Civ 1110 The unreported 1970 decision of Justice Meares of the NSW Supreme Court in Ex parte Allen v the Superintendant of Callan Park which held that 'as soon as practicable' under a different but related section of the Mental Health Act 1958 meant 'as soon as feasible' rather than 'as soon as reasonable'.
Less than three to four weeks – and particularly one week – is too early for a hearing as patients are not ready.	There is no evidence that large numbers of patients are 'not ready' for an early review of detention within about a week of their admission. Importantly, consumer groups have not raised this as a concern. It is possible that some patients may be 'too unwell', but anecdotal evidence suggests this will be rare. Certainly all that is required for a review even of a very ill person is that an assessment has been made about symptoms, likelihood of harm and treatment alternatives. This can and should be made quickly. Also, it is not clear why even very ill patients should not have a right to review of their detention. The UK Mental Health Act Commission stated in its Biennial Report in 2008 that "The fact that a patient lacks the mental capacity to understand that they are deprived of liberty or the motivation to challenge that deprivation is absolutely no guarantee that the deprivation is justified or in their best interests". Consequently it is vitally important that ALL patients receive a timely review of detention.

Arguments in favour of a delayed MHI	Response
The high number of adjourned hearings show that early hearings were a waste of time.	The MHRT's annual reports show that 58 per cent of magistrate's hearings were adjourned in 2007–8. However the remainder — fully 5095 cases in the same period — were not adjourned. Were these hearings wasted? In any case, to claim that even the adjourned hearings are a waste overlooks a fundamental reason for judicial review. The magistrate's role is to ensure that proper process is being followed, that the patient's rights are protected and that the system is not being abused. This can be achieved as readily in an adjourned hearing as it can in a hearing where an order has been made.
Consumers prefer a later hearing.	There is no evidence for this and no consumer groups have made this argument. Also, since the new procedures have been employed, Legal Aid has waived its means and merits test for conducting appeals of detention under s 44 of the MHA and actively provided information about appeal rights. As a result, the number of appeals has more the doubled. This indicates that many patients would like to have their detention reviewed sooner rather than later and are taking active steps to make this happen. Not all consumers are willing or able to take such steps - research has shown that patient-initiated appeal rights tend only to be taken up by certain kinds of patients and is not the same as an automatic right of review. However many of these patients may also wish to receive a review as a matter of right, as early as possible.
Appeals can still be made under s44 of the Mental Health Act 2007, which if refused by an authorised medical officer, can be further appealed to the MHRT. NSW Legal Aid currently provides free legal representation for these appeals (this has not always been the case.)	A right of appeal is not the same thing as an automatic right of review. Quite simply, this is because an appeal must be initiated by the patient. There are various categories of persons who are unlikely to initiate an appeal, either by themselves or with the assistance of solicitors. Examples are people who do not have any English language skills or people with an intellectual disability. In such cases, it is all the more imperative to have a timely independent review of their involuntary status 'as soon as practicable' after their admission. Also, some patients might agree with or be indifferent towards their detention but should have their detention reviewed to ensure due process has been followed. This is really the purpose of the mental health inquiry. Further, a person could agree to hospital treatment but not be a 'mentally ill person' under the MHA (in this situation they should be assessed as a voluntary patient if it is deemed appropriate for them to stay in hospital). A person could be a 'mentally ill person', but could be in a situation where

Arguments in favour of a delayed MHI	Response
	they could receive care and treatment of a less restrictive nature than involuntary treatment in hospital. These are matters that should be reviewed at a timely inquiry, regardless of whether they are motivated to or have the capacity to initiate an appeal under s 44. The fact that in late 2010, Legal Aid has decided to actively assist people make s 44 appeals and to waive associated fees, does not mean that legal aid will be available in this area in perpetuity. Legal Aid guidelines regularly change, and historically, because of resource issues, legal aid has, from time to time, been forced to cease in certain areas. Patient rights and legislative safeguards should not be discarded or ignored because, at this time, legal aid provides funding for representation in a separate process in the MHA.
Consumers wait longer for initial hearings in other States and Territories.	NSW law and previous practice before June 2010 represents 'best practice' in line with Australia's human rights obligations Whilst in other states, assessed patients may wait up to six weeks before a review by the equivalent of the MHRT. Within that timeframe, in these states, the decision to compulsorily treat has been seen as a matter for medical autonomy. NSW has for a long time had a mechanism for early independent review. The ACT and the Northern Territory have adopted the basic NSW model of early independent review. In both the mental health area (for example strict regulation of the administration of ECT, the banning of psychosurgery and deep sleep therapy) and in the regulation of the health professionals generally by an independent complaints body, the Health Care Complaints Commission.NSW Governments have, for a considerable time, moved away from the concept of unmediated medical autonomy in such matters. The need to move away from the reliance on medical autonomy in the regulation of the medical profession, in particular the practice of psychiatry was reinforced in the 1980s by the findings of the Chelmsford Royal Commission. Decisions by the medical profession in NSW such as whether to administer ECT or whether to detain a person as a voluntary patient have therefore, for a considerable time, been subject to early independent review

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