



**OFFICE OF THE
PUBLIC ADVOCATE**

**Submission to the Review of the
*Mental Health Regulations 1998***

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About the Office of the Public Advocate

The Victorian Public Advocate is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act* 1986 (Vic).

The Office of the Public Advocate (the Office) provides advocacy, guardianship and investigation services to people with a cognitive disability. People with a cognitive disability include people with an intellectual disability, a mental illness, an acquired brain injury, dementia and people who are in a coma or otherwise lack the capacity for cognition or communication.

The Office coordinates the Community Guardianship Program and the Private Guardian Support Program, as well as the Community Visitors Program and the Independent Third Person Program. It also has a role in community education, the provision of advice and information and in undertaking research and policy projects.

The Office represents the interests of people with a disability in Victoria, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with a disability are exploited, neglected or abused. It is from this perspective that the Office makes comment and suggestions on the review of the *Equal Opportunity Act* 1995 (EOA).

Further material on the role of the Victorian Public Advocate can be obtained by consulting the Office's website: www.publicadvocate.vic.gov.au

Overview

This submission responds to the review of the *Mental Health Regulations* 1998. The Public Advocate makes a range of recommendations within this submission that will bring the Regulations into line with recent developments in a range of areas, including:

- The introduction of the *Charter of Human Rights and Responsibilities Act* 2006
- Developments in patient rights – both internationally and more locally
- Changes to processes that relate to community visitors

The Charter of Human Rights and Responsibilities Act 2006

The involuntary treatment provisions of the Mental Health Act are a serious curtailment of a person's human rights. It is important that a patient be aware of their human rights and reasons why a limitation has been placed on those rights.

The Public Advocate draws attention to the following Charter rights: -

1. The right to recognition and equality before the law (section 8);
2. The right to protection from medical treatment without full, free and informed consent (section 10);
3. The right to freedom of movement (section 12);
4. The right to freedom of thought, conscience, religion and belief (section 14);
5. The right to freedom of expression (section 15);
6. Cultural rights (section 19);
7. The right to liberty and security of the person (section 21);
8. The right to be treated humanely when deprived of liberty (section 22); and
9. The right to a fair hearing (section 24).

Section 7 of the Charter sets out the grounds upon which human rights may be limited. The Public Advocate considers that the rights of patients as set out in the schedules of the regulations should contain information regarding their rights under the Charter and, where these rights are limited, that the patient is entitled to an explanation of the limitation of those rights in terms consistent with section 7.

The alerting of the patient to their Charter rights should flow through the rights set out in the schedules. For example, the right to recognition and equality before the law would be relevant to the review of their involuntary treatment status and to the patient's right to appeal. The right to be treated humanely when deprived of liberty not only applies to their containment within a psychiatric facility but also if they were subject to mechanical restraint or seclusion. The right to liberty and security of the person would be relevant to the standard of care that the patient may expect in a psychiatric facility.

Part 3. Patient Rights

Statements to be provided to persons on becoming patients

The Public Advocate has considered the prescribed printed statements given to every person on becoming a patient. These comments pertain to information provided to patients under each schedule (Schedules 7 - 16).

The Public Advocate considers that a broad statement about fundamental freedoms and basic rights be included as an introduction to each schedule. That:

- ‘every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights’ as outlined in the UN General Assembly resolution 1991.
- ‘all persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person’.¹

Further to this, the Public Advocate believes that the principles of treatment and care outlined in the *Mental Health Act* 1989 in Section 6A provide the basis for understanding the intention of treatment of care under the Act. It is suggested that a summary of these principles should therefore be included in information provided to all patients.

Involuntary treatment orders (Schedule 7)

The Public Advocate would like to see more information provided for patients about the requirement for an involuntary treatment order to be made. The following suggestions are made:

- You cannot be placed on an involuntary treatment order without a request and a recommendation. The recommendation can only be made by a doctor after they have personally examined you.²
- A request and recommendation have effect for 72 hours following the examination of the person by the registered medical practitioner who made the recommendation.³

Treatment

Advance directives are documents created for people living with a mental illness when they are well. The document contains information outlining the person’s unique circumstances, personal preferences regarding treatment choices and information about practical life management arrangements in the event that they become unwell.

The Public Advocate supports the Victorian Mental Health Legal Service project pertaining to advance directives and believes these documents have the potential to

¹ Principles for the protection of persons with mental illness and the improvement of mental health care. Adopted by General Assembly resolution 46/119 of 17 December 1991.

² Victorian Legal Aid *Mental Health Laws and Me* December 2004.

³ Mental Health Act 1989 Part 3 – s.9 (4)

achieve and retain independence, self-determination and non-discrimination for people living with mental illness'⁴. The Public Advocate supports the inclusion of advance directives in treatment planning as they inform the patient's view about treatment choices in the case of involuntary treatment.

Section 19A of the Mental Health Act specifies that in preparing, reviewing and revising a treatment plan, (d) the authorised psychiatrist must take into account any beneficial alternative treatments available and (e) the nature and degree of any significant risks associated with the treatment. The Public Advocate believes the inclusion of these sections of the Act in patient rights information would be beneficial to patients.

Seclusion and restraint

The *National safety priorities in mental health: a national plan for reducing harm, endorsed by the Australian Health Ministers' Advisory Council (AHMAC)* in 2005, is Australia's first national statement about safety improvement activity in mental health.

One of the four National Safety Priorities for mental health services is reducing use of, and where possible eliminating, restraint and seclusion. The National Mental Health Seclusion and Restraint Project's recent forum held in Melbourne in May 2008 identified the need for a different approach to seclusion and restraint in mental health facilities⁵.

The importance of patient involvement in planning for the management of triggers of psychotic episodes or incidents that put patients or others at risk is acknowledged as a critical part of this work. Treatment planning inclusive of alternative management strategies for dealing with acute psychotic episodes are currently being utilised in demonstration mental health settings set up by the project.

The Public Advocate would like information provided to patients about behaviour management planning and alternative treatment options to reflect the intention of the National Safety Priorities.

Rights and conditions in mental health settings

The Public Advocate recommends that an additional heading be added for people residing in mental health settings titled *Rights and conditions in mental health facilities*. This section would incorporate the existing information about 'letters' and 'phone calls' as described in the applicable schedules (under 'freedom of communication').

The Public Advocate suggests that the following principles regarding the rights of people in mental health facilities as adopted by the UN General Assembly Resolution 1991 be included:

- Recognition everywhere as a person before the law

⁴ Mental Health Legal Service Advance Directives Project conference, Hotel Y, June 22 2006.

⁵ National Mental Health Seclusion and Restraint Project National Forum 2008
<http://www.nmhsrp.gov.au/c/mh>

- Privacy
- Freedom of communication
- Freedom of religious belief⁶

The Public Advocate is concerned about the risk of sexual exploitation for people in psychiatric facilities. The Public Advocate considers that information should be provided about the right to gender and culturally sensitive facilities to ensure safety and privacy.

Many people in psychiatric facilities are concerned about what is happening to their families, pets, and personal affairs whilst involuntarily detained. Consumers of mental health services seek to manage their circumstances through the use of advance directives. As mentioned, the Public Advocate supports this evolution of autonomy and considers that mental health services should facilitate patients to give effect to their advance directives wherever possible. A practical example of this would be to have access to a social worker to attend to these matters on behalf of the patient.

Part 8 – Community Visitors

Regulation 17 - record of visits by community visitors

The Public Advocate advises that the record of visits set out in schedule 24 of the regulations is no longer the format used by community visitors to record visits.

Please find enclosed a copy of the visit report now used by community visitors, and note that it uses a reference number system.

Regulation 18- Manner of electing Community (Psychiatric Services) Visitors Board

It is noted that section 116 of the Mental Health Act refers to the Board as the “Community (Psychiatric Services) Visitors Board”. This title is replicated in regulation 18. The Public Advocate advises, however, that in line with changed community standards, the board is known as the “Community Visitors (Mental Health) Board”.

Regulation 118 states that the procedure for election of the Board is to be determined by the Public Advocate. We advise that the procedure adopted by the Public Advocate is the same as set out in the Health Services (Residential Services) Visitors Board Election Regulations 2002.

The Public Advocate would like these Health Services Regulations adopted for the Mental Health Regulations with two amendments:

The first is that a Board member should be elected for a two-year period, rather than the one-year period currently in the regulations. Further, that the elections be staggered so that only one new member is elected each year.

⁶ Principles for the protection of persons with mental illness and the improvement of mental health care. Adopted by General Assembly resolution 46/119 of 17 December 1991.

The second change is that the names on the ballot paper should be chosen, not by alphabetical order, but by a random selection (such as the name being pulled out from a hat).

The Public Advocate requests that the Mental Health regulations set out the process of election of community visitors to the board, as it does in these Health Services regulations, with these two suggested changes.

Reference to Community Visitors in Schedules 7 to 16 (Important Contacts)

The important contacts information under each of the schedules relating to patient rights provides a list of organisations that can be contacted for assistance and information.

Notably, the Community Visitors are a program of the Office of the Public Advocate and not an organisation. In order to reflect this and to avoid confusion about where the Community Visitors are organisationally situated, the Public Advocate recommends that an additional sentence be added to the reference to community visitors:

- Community Visitors are people who visit mental health services at least once a month to inquire into the adequacy of services and facilities for the treatment and care of patients. They also investigate complaints and report on their inquiries and investigations. **Community Visitors are a program of the Office of the Public Advocate.**