Chapter Ten

Related legislation

The broader mental health care framework

There are a number of related pieces of legislation which also provide rights for people with mental illnesses.

This related legislation is:

- the *Health Complaints Act 1994*;
- the *Freedom of Information Act 1991*;
- the *Disability Discrimination Act 1992* and *Anti-Discrimination Act 1998*;
- the *Guardianship and Administration Act 1995*;
- the *Criminal Justice (Mental Impairment) Act 1999*; and
- the *Sentencing Act 1997*.

As this legislation may impact on staff, each Act is discussed in turn.

The *Health Complaints Act 1995*

The Office of the Health Complaints Commissioner has been established under the Tasmanian *Health Complaints Act 1995* to investigate health complaints. The Office is headed by an independent statutory commissioner whose officers assist users and providers to resolve and/or investigate their complaints.

The purpose of the Act is to:

- help people make their concerns known to health service providers;
- assess and clarify problems in health service provision;
- conciliate formally or informally between users and providers of services;
- investigate complex or serious complaints; and
- use the information obtained and lessons learned to recommend improvements to services.

Independence of the Commissioner

The Commissioner must act independently, impartially and in the public interest. The Commissioner does not act as an advocate for the user or the health service provider.

Who is a health service provider?

Under the *Health Complaints Act 1995*, health service provider has a wide definition. The Office can receive complaints about the public and private sectors; both individual practitioners such as doctors, nurses, dentists or podiatrists; and institutional providers such as hospitals and nursing homes.

The Act covers not only those traditionally recognised as being engaged in the provision of health related services but also those persons or bodies which provide alternative health care or diagnostic services such as naturopathy, massage or acupuncture.

The functions of the Commissioner

The major function of the Commissioner is to receive, assess and resolve complaints. With this responsibility comes numerous other important functions that include:

- to identify and review issues arising out of complaints and suggest improvements;
- to provide information, education and advice in relation to the Charter, health rights and responsibilities and procedures for resolving complaints. (The Office has recently released a Charter of Health Rights and Responsibilities, which is available from the Office);
- to encourage and assist health service users to resolve complaints directly with health service providers;
- to assist health service providers to develop procedures to resolve complaints;
- to inquire into and report on any matter relating to health services at the discretion or direction of the Health Minister;
- to advise and report to the Minister for Justice and the Health Minister on any matter relating to health services or the administration of the *Health Complaints Act*;
- to provide information, advice and reports to registration boards;
- to maintain links with health service providers generally, organisations that have an interest in the provision of health services, and organisations that represent the interests of the users of health services;
- to consult and co-operate with any public authority that has a function to protect the rights of individuals in Tasmania.

Who can make a complaint?

A wide range of people can make a complaint to the Health Complaints Commissioner.

A complaint may be made by:

- a user of a health service;
- a person appointed by the user;
- a person acting under a power of attorney;
- a person authorised by law;
- a parent or guardian of a child under the age of 14 years;
- another health service provider;
- a person approved by the Commissioner; or
- certain prescribed persons.

What can people complain about?

People can complain if a health service provider acts unreasonably or fails to provide adequate information. The following lists give an idea of the scope of complaints.

A complaint can be made if a health service provider acts unreasonably by:

- failing to provide a service;
- providing an unnecessary service;
- denying dignity or privacy;
- failing to provide access to information about own health care;
- failing to exercise due skill;

- failing to treat in a professional manner;
- disclosing information about a health service user;
- failing to provide an opportunity for a health service user to make an informed choice about their own health care; or
- failing to take action in relation to complaints.

A complaint can also be made if a provider fails to provide adequate information about:

- condition or prognosis;
- available treatment options; or
- available support services and groups.

Complaints handling procedure

The Commissioner will refer a complaint to a relevant registration or licensing board where professional standards of practice are involved.

In other cases, the Commissioner has 45 days to:

- encourage and/or assist with local resolution of a complaint – a direct response from provider to complainant; or
- assess the complaint and resolve it, dismiss it or recommend statutory action.

Statutory action includes:

- referring it to a conciliator; or
- investigating the complaint.

If complaints cannot be resolved through communication between the user and provider, with or without assistance from the Office of the Health Complaints Commissioner, a process of conciliation may be offered. Conciliation provides both parties with an opportunity to explore a grievance and work towards an outcome that is satisfactory to both parties. It offers a forum for exploration, explanation and resolution in an environment of minimal stress and low cost.

Conciliation

The key features of conciliation are:

- statutory privilege of all information exchanged which cannot be used outside the conciliation or subpoenaed for any subsequent court process;
- a voluntary process for both parties, either of whom may withdraw during the process;
- impartiality the conciliator's role is to be strictly impartial;
- an alternative to litigation;
- during the conciliation process the provider has recourse to his/her professional indemnity body for on-going advice and assistance; and
- allows outcomes to be negotiated with both parties having their say.

Any agreement reached between a complainant and a health service provider in the course of the conciliation process may be put in a form that is binding on them.

Investigation

The Commissioner has the authority to formally investigate complaint matters that:

- are especially complex or serious; or
- raise matters of public interest in that they have application to a broad group of users rather than just an individual.

Health service providers are required to co-operate with the investigation and respond to the Commissioner's findings and recommendations.

Dismissing a complaint

The Commissioner must dismiss a complaint if satisfied that:

- the person is not entitled to make a complaint;
- the complaint does not disclose a subject matter of complaint;
- the health service user became aware of the circumstances that gave rise to the complaint more than 2 years before the complaint was made (except in special circumstances);
- the complainant has failed, without good reason, to take reasonable steps to resolve with the health service provider, the grievance;
- all issues arising from the complaint have been adjudicated upon by a court, tribunal or board, or a court has commenced to hear a proceeding that relates to the subject matter of the complaint;
- the complaint lacks substance; is frivolous, vexatious or not made in good faith; or
- the complaint has been resolved.

For further information contact:

The Office of the Health Complaints Commissioner
Ground floor, Emily Dobson House
99 Bathurst Street, Hobart 7000
Telephone: (03)6233 6348
Fax: (03) 6233 8966
email: health.complaints@justice.tas.gov.au

The *Freedom of Information Act 1991*

The philosophy of the Tasmanian *Freedom of Information Act* (FOI) is to promote access to and the release of information affecting Government operations. For mental health service providers, it is particularly relevant concerning access to medical records, and requests to change alleged errors in the records of a person. The introduction of reviews by the Mental Health Tribunal, and periodic involvement of lawyers in the review process, may result in an increase in the number of requests for information, and formal FOI applications, received by mental health service staff. For this reason a detailed outline of the FOI process is given, however further assistance should be obtained from Portfolio Services, DHHS, before processing any requests. Staff are also reminded that it is the policy of the Department to allow patients access to their medical records (in accordance with the FOI guidelines).

Object of the Act

The object of the FOI Act is to improve democratic government in Tasmania:

- by increasing the accountability of the Executive to the people of Tasmania; and
- by increasing the ability of the people of Tasmania to participate in their governance.

Things to note:

When deciding how the Act should be interpreted, (and whether to release information) it is worth noting that:

- only necessary exemptions are to be applied;
- each person has a right to have any inaccurate, incomplete, out of date or misleading information relating to that person contained in an Agency's records amended;
- the Act is to be exercised to promote at the lowest reasonable cost, the provision of the maximum amount of official information.

The Act creates a presumption that information
will be released, and any request for information should be measured against this.

An applicant does not need to provide a reason for seeking information, and what the applicant may do with the information is not relevant in consideration of the request. Possible embarrassment to the Agency or Government are not grounds to exempt information.

Exempt information may be released, except where it relates to the personal affairs of another person. In that case you must consult that person before releasing the information.

Who can make a request?

Any person, anywhere. Also bodies corporate or un-incorporated associations. The next of kin of a deceased person can also make a request. Requests **must** be in writing.

The FOI guidelines

A set of Tasmanian specific FOI guidelines were produced by the FOI unit. The FOI unit is now at the Ombudsman's Office, 99 Bathurst Street, Hobart. The guidelines provide explanatory detail on a wide range of issues covered by the Act and are a worthwhile reference source.

The guidelines can be obtained from the Printing Authority of Tasmania at a cost of approximately $35 each, however, they will only photocopy a previous original. It may be better to photocopy your own, if you can find an original January 1993 edition.

How to process an FOI request

Irrespective of where an FOI request is received in the Agency, it is to be faxed to Portfolio Services, DHHS. The Portfolio Services will register the request, raise a separate file on it, and forward it to the relevant Divisional Director (or Hospital CEO).

An FOI request may be on a standard application form, or may take the form of a letter – so long as some reference is made somewhere in the correspondence to FOI. An FOI request cannot be verbal. If you are forwarding a request to Portfolio Services, and it is likely it will return to you via your Divisional Director, start seeking the information.

All FOI requests are initially forwarded to Divisional Directors due to the Secretary's policy on:

- single point accountability;
- the requirement of meeting legislative timelines; and
- the fact that FOI is a standing item on the Agenda of the Secretary's regular meetings with the Minister.

A Divisional Director will either deal with the request personally, or most likely refer it to a subordinate officer somewhere in the Division.

Any person can research the response to an FOI request, however the final determination must be signed off by an authorised officer in the Division (usually Directors and some managers). Once a determination has been completed, it is forwarded to an authorised officer for signature, and then onto Portfolio Services. Portfolio Services can advise of the names and designations of authorised officers under the Act.

Portfolio Services then checks all aspects of the determination, updates the Departmental FOI database and file, and then advises the applicant in writing of the outcome.

Transfer of requests

Section 14 of the Act requires that if a request is received in an Agency, and the information relates to the business of another Agency, then the request is to be transferred as soon as possible to that Agency, and the applicant notified in writing.

Preparing determinations on FOI requests

Remember that the FOI Act presumes disclosure of information, unless it is exempt.

Step 1

Note the date of the request, and the requirement to advise an applicant within 30 calendar days of the outcome.

Step 2

Identify all information relating to the request, including duplicated information held on other files etc. Number all pages relating to the request with a sequential number on the lower right hand corner. Disregard the file folio numbers as there may be more than one file and more than one page with the same folio number. This is now the master set of information relating to the request. (*Do not make double sided photocopies*).

Step 3

Make a second copy of the master set of information. This is now the working copy, and should be used for deleting information, if required.

Step 4

If appropriate, prepare a summary table of all pages relating to the request, and identify those pages that are to be released in full (ie non exempt information). On the same schedule identify whether a page is also either partly or fully exempt and the relative exemption.

Step 5

Answer the 9 standard questions on the memorandum that would have accompanied the request when it came to you:

- total number of pages relating to the request;
- total number of pages to be released in full;
- total number of pages to be released in part;
- total number of pages denied;
- details of exemptions claimed and statement of reasons supporting exemption;
- calculation of allowable charges under the Act;
- estimation of the actual cost to the Agency;
- name and title of the authorised officer who made the determination; and
- any aspects that the Secretary or Minister should be aware of relating to the request.

Step 6

Send off the determination along with the master set of information, and the second set (that will be provided to the applicant) to Portfolio Services.

Double check

- The pages are all identified with a number.
- The pages add up: ie all pages relating to the request = pages to be released in full + pages to be released in part + pages denied.
- That where information has been exempted it is recorded on the summary table, and on the documentation provided to the applicant ie: write on the documentation 'Exempt Section 30

(1)' (for example) so the applicant can see what has been taken out. As we are dealing with photocopies, this is not always obvious.
- That a statement of reasons to support the claimed exemptions is provided.
- That public interest issues are addressed where appropriate.
- Prior to the whole lot coming to the Portfolio Services, the final determination is signed off by an authorised officer.

Statement of reasons

Section 22 of the Act requires that the applicant be provided with certain mandatory details when a determination is made. One of these is a statement of reason supporting any claimed exemption. The statement of reason supporting the exemption is to:

'state the finding on any material question of fact, referring to the material on which the finding was based, and the reasons for the decision.'

It is not sufficient to just cite an exemption, without a supporting statement of reason. The statement of reason does not need to be overly complex, just address the main facts as to why the exemption has been claimed.

Exempting information which may be prejudicial to the mental health or well-being of the person

One exemption which should be considered by mental health staff relates to requests for information of a psychiatric or medical nature.

If:

- a request is made to an agency or Minister for information of a medical or psychiatric nature concerning the person making the request; and
- it appears to the principal officer of the agency or to that Minister that the provision of the information to that person might be prejudicial to the physical or mental health or well-being of that person; then

the principal officer or Minister may direct that the information should not be provided to the person who made the request but should instead be provided to a legally qualified medical practitioner nominated by that person and approved by the principal officer or Minister.

It is to be noted that the information must be of a medical or psychiatric nature, and it must still be released to the medical practitioner nominated by the person. Medical records should always be written bearing in mind that they may need to be disclosed to the person, the Tribunal or other involved parties (eg legal representatives).

Information about the personal affairs of another person

Information about the personal affairs of another person should not be released without the person's consent. This information will include the name and address of the person and similar information which you would not reasonably expect to be made available without their consent.

Public interest – what is it?

There are a range of other exemptions, and the following exemptions require a public interest test prior to their application:

Section 26 Information communicated by other States.

Section 27 Internal working information.

Section 31 Information relating to trade secrets and associated matters of undertakings.

Section 33 Information obtained in confidence.

Section 34 Information on procedures and criteria.

Section 35 Information likely to affect the State economy.

Public interest implies a balance argument between competing interests: public interest versus not in the public interest. There is no comprehensive list of public interest considerations, and there is no standard definition or application of the term – each case is different.

The older a document, the less likely it is in the public interest to withhold it.

Internal reviews

Should an applicant not agree with a determination, they have a right to apply within 28 days to the principal officer for an internal review of the original decision.

While the Act does not specify the process to be followed at internal review, the following practice has been adopted in this Agency:

- request for internal review acknowledged;
- request for internal review is referred to the Secretary with appropriate background information. Also included is a recommendation as to who should conduct the internal review on the Secretary's behalf. (Must be conducted by an authorised officer senior to that officer who made the original decision);
- the reviewing officer should:
  (a) familiarise themselves with the full background of the application;
  (b) confirm that all pages relating to the request were correctly identified;
  (c) check that information claimed as exempt was correctly classified, and that the supporting reason are valid;.
  (d) if necessary, amend the original determination;
  (e) prepare a finding in memorandum form to the Secretary.

Note: Internal reviews must be concluded within 14 calendar days.

External reviews

If an applicant is dissatisfied with the outcome of an internal review, they have 60 days to apply to the Ombudsman for an external review.

In cases such as this, the Ombudsman requests the entire Departmental FOI file, conducts his own investigation, and may order that exempt information be released.

Summary of Ombudsman's external reviews

Periodically, the Ombudsman releases copies of external reviews for information. This is done in order to guide Agencies in making determinations by providing details of requests that have been reviewed by the Ombudsman, and which may establish precedents as to how requests should be handled.

Advising members of the public

FOI should be used as a matter of last resort, not first attempt for information. Wherever possible, **the public should try to seek information outside the Act**, and through normal channels. This is usually cheaper and quicker.

If staff become aware that a person is seeking information but has not yet made a formal FOI request, they should provide any information that could be provided under the FOI Act. A person should only be encouraged to put in an FOI request if the release of information is refused, or if the person is not happy with what they are able to access through normal channels.

For further information contact:

Portfolio Services
Department of Health and Health Services
3/34 Davey Street
HOBART TAS 7000
Telephone: (03) 6233 3089
Facsimile: (03) 6233 4946

or

Freedom of Information Advisory Unit
Office of the Ombudsman
99 Bathurst Street
Hobart TAS 7000
Telephone: (03) 6233 6217
Facsimile: (03) 6233 8966

Anti-discrimination legislation

There is a range of anti-discrimination legislation in force in Tasmania. The *Disability Discrimination Act 1992* (DDA) is Commonwealth legislation and applies to the Commonwealth government services and the private sector. The *Anti-Discrimination Act 1998* covers State government services in Tasmania, and also applies to the private sector.

The Disability Discrimination Act 1992 *(DDA)*

The DDA makes it unlawful to discriminate against a person on the basis of their disability in the areas of:

- employment;
- education;
- access to premises;
- goods services and facilities;
- accommodation;
- buying and selling land;
- membership of clubs;
- sport; and
- the administration of Commonwealth laws and programmes.

The *Disability Discrimination Act* is a Commonwealth Act, so it applies across Australia.

Disability is broadly defined under the DDA and includes mental health illnesses and psychiatric disorders. It also covers disabilities which previously existed but no longer exist, future disabilities and disabilities which are imputed to a person.

The DDA prohibits both direct and indirect discrimination and contains various defences and exceptions to discrimination. It also prohibits harassment of people with disabilities in certain circumstances.

The DDA is administered by the Human Rights and Equal Opportunity Commission (HREOC) and an action under the DDA is commenced by a person lodging a complaint with the HREOC. The central office of HREOC is located in Sydney and enquiries can be directed to their complaints infoline on 1300 656 419. Enquiries about the DDA can also be directed to the Tasmanian Anti-Discrimination Commission on (03) 6233 4841.

The Anti-Discrimination Act 1998 *(ADA)*

The ADA is a Tasmanian piece of legislation which prohibits direct and indirect discrimination on the following grounds:

- race;
- age;
- sexual orientation;
- lawful sexual activity;
- gender;
- marital status;
- pregnancy;
- breastfeeding;
- parental status;
- family responsibilities;
- disability;
- industrial activity;
- political belief or affiliation;

- political activity;
- religious belief or affiliation;
- religious activity;
- irrelevant criminal record; and
- irrelevant medical record.

The *Anti-Discrimination Act* also prohibits inciting hatred on various grounds.

The *Anti-Discrimination Act* prohibits discrimination on the basis of disability in a number of areas including employment, education and training, the provision of goods services and facilities, accommodation and the membership and activities of clubs. The definition of disability under the *Anti-Discrimination Act* is similar to that under the *Disability Discrimination Act* and covers mental illnesses and psychiatric disorders.

A complaint under the *Anti-Discrimination Act* is commenced by lodging a complaints form with the Anti-Discrimination Commissioner. Enquiries about the operation of the ADA can be directed to the Tasmanian Anti-Discrimination Commissioner on (03) 6233 4841.

The *Guardianship and Administration Act 1995*

The *Guardianship and Administration Act* establishes a Board with judicial like powers to make important decisions affecting the lives and property of persons with decision making disabilities.

Why is the Guardianship and Administration Board necessary?

As children, our parents are our legal guardians and they have the power to make most decisions for us. As adults, we are legally entitled to make our own decisions. However, some adults are unable to make important decisions because of a disability. The Board provides a legal mechanism for the appointment of guardians and financial managers to make these decisions if the need arises.

What are the Board's major functions?

The Board can exercise authority for the benefit of persons who have a disability and are unable to make reasonable judgements about lifestyle and financial matters.

The functions of the Board are extensive and include the power to:

- appoint a guardian for a person who is over the age of 18 years;
- appoint an administrator (often called financial manager) of a person's finances and property;
- to consent to make medical or dental treatment decisions for persons with a disability who are incapable of giving an informed consent to the proposed treatment.;
- order the execution of a statutory will for a person who lacks testamentary capacity.

What is a guardian?

A guardian is a person who has been given the legal power to make important personal decisions on behalf of another adult – such as where that person should live or what care and services the person should have. The powers of the guardian may be all encompassing or limited depending on the terms of the order of the Board.

What is an administrator?

An administrator may either be a person or an organisation (eg The Public Trustee) who has been given the legal authority to manage some, or all, of the financial and legal affairs of a person with a disability. If the Board appoints a private administrator, it must be satisfied that the person has the appropriate qualifications and/or experience to carry out the duties of an administrator.

What type of medical or dental decisions?

The Board has unlimited power to consent to treatment but in most cases the consent of the Board will not be required. This is because the Act gives the person responsible who may be the person's spouse, or carer or close friend, the authority to provide a substitute consent. The Board however must consent to some types of treatments, e.g. sterilisations.

What is a statutory will?

A statutory will is a will made by an order of the Guardianship and Administration Board for a person who is incapable of making a valid will for himself or herself.

Other functions of the Board includes giving advice and directions to guardians and administrators, monitoring and occasionally revoking existing Enduring Powers of Attorney or Guardianship orders or in the case of unlawful detention of persons with a disability, order their removal to a safe place.

Who is on the Board?

The Guardianship Board comprises a number of members who are rostered to sit on the Board when it conducts its hearings. Hearings take place in each region of the State when appropriate and at locations convenient for participants. Members of the Board are appointed for their knowledge and experience in relevant areas. Each full Board has a panel of three members. A member of the panel may sit alone as a Board to hear certain types of matters coming before the Board.

Does every adult with a disability need a guardian and an administrator?

Most adults with disabilities do not need a guardian or a financial manager because their family, friends and service providers help them to make decisions and there is no need for a legal order. You only come to the Guardianship Board if there is a problem that cannot be solved without a legally appointed decision-maker.

Common reasons for coming to the Board

- A person with a disability is being neglected, exploited or abused.
- Disputes arise within a family (or between a family and service providers) about the kind of support a person with a disability needs and who should provide it.
- A person with a disability objects to a plan for his or her care that is supported by family, friends and service providers.

In these situations, it is sometimes necessary for the Board to appoint a guardian or an administrator or both to make the required decision.

Who can apply to the Board?

Anyone who has a genuine concern for the welfare of the person can apply to the Board. There is no charge for making an application to the Board. A special printed form is used, and is available from the Board. Advice is also available from the Board to help determine whether an application would be appropriate and it is recommended that the Board be contacted before an application is lodged.

Emergency orders

The Board has an emergency service. An emergency guardianship order can be made without a formal hearing and over the telephone if necessary. The order appoints the Public Guardian as the person's guardian and is effective for 28 days or may be renewed for a similar period.

For further information contact:

The Guardianship and Administration Board
Ground floor, 99 Bathurst Street
GPO Box 1307
HOBART TAS 7001
Telephone: (03) 6233 3085
Facsimile: (03) 6233 4509
Email: guardianship@justice.tas.gov.au
Internet: http://www.justice.tas.gov.au

The *Criminal Justice (Mental Impairment) Act 1999*

The purpose of the *Criminal Justice (Mental Impairment) Act*, which will come into operation at the same time as the *Mental Health Act 1996*, is to amend the criminal law concerning mentally disordered offenders in relation to fitness to stand trial; to provide disposition options for persons found unfit to stand trial or found not guilty by reason of insanity; and deal with their release. It is the third part of a package of legislative reforms which have resulted from a review of the *Mental Health Act 1963*. The first stage was the enactment of the *Guardianship and Administration Act*. The second stage was the enactment of the *Mental Health Act*. The *Criminal Justice (Mental Impairment) Act* is the final part of that package which covers the issue of mentally disordered persons in the criminal justice process after the existence of mental impairment is determined in the usual way. The new procedures are designed to

ensure that mentally disordered offenders are treated in the most appropriate and humane way so that the proper balance is struck between punishment and treatment.

The 'old' law – prior to this Act

Prior to the new Mental Health Act and the Criminal Justice (Mental Impairment) Act commencing, the procedural law on the insanity defence, fitness to plead, and disposition of mentally disordered offenders was contained in the Criminal Code and the Mental Health Act 1963.

There were two issues that arose for consideration in the development of the *Criminal Justice (Mental Impairment) Act 1999*. First, what should be the process for determining the appropriate disposition order for persons found unfit to stand trial or not guilty by reason of insanity. Secondly, who should make release decisions in respect of persons subject to a restriction order.

In relation to the first issue, persons found not guilty by reason of insanity or who have been found unfit to stand trial were, by operation of the 'old' law, automatically subject to a restriction order which resulted in them being detained indefinitely in the special institution at Risdon Prison. This occurred notwithstanding the fact that these persons had not been convicted of any offence and irrespective of both the seriousness of the mental illness, and whether or not they were a danger to the public.

Determining the appropriate disposition order for people not fit to stand trial or not guilty by reason of insanity.

The Government considered that the courts, after having heard all the evidence at a trial, are best placed to make the determination as to what is the appropriate disposition order in respect of these persons. Under the *Criminal Justice (Mental Impairment) Act* the disposition options available to the courts range from releasing the person unconditionally through to the making of a restriction order. The Courts will be able to make the appropriate disposition order commensurate with the protection of the public and the capacity of mental health services to provide appropriate treatment.

Decisions to release people on restriction orders

In relation to the second issue, the Government considered that it was no longer appropriate for the Executive (ie Cabinet) to make release decisions in respect of persons who have been made the subject of a restriction order. It was agreed that it is preferable that decisions involving the liberty of the subject should be made by the Supreme Court.

The Act provides that where a defendant is found unfit to plead or not guilty by reason of insanity then the court must declare that the defendant is liable to supervision. Upon that declaration, the court has a number of disposition options: It can:

- release the person unconditionally;
- release the person on supervision subject to conditions;
- place the person on a community treatment order or a continuing care order within the meaning of the *Mental Health Act 1996*;
- make, in the case of the Supreme Court, a restriction order under which a person is to be detained in a special facility.

In determining the appropriate disposition, a court must have regard to the following:

- the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community;
- the nature of the defendant's mental impairment;
- whether the person constitutes a danger to members of the public;
- whether there are adequate resources available for the treatment and support of the defendant in the community;
- whether the defendant is likely to comply with the conditions of a supervision order.

Where a defendant is made subject to a community treatment order or continuing care order then the defendant will come under the *Mental Health Act 1996* in respect of review, release or discharge of that order. Where a defendant is subject to a restriction order then the release of that person will be determined by the Supreme Court. Applications for release will be able to be made to the Court by the person subject to a restriction order two years after the order was made and every two years thereafter.

However all persons under restriction must have their cases reviewed every twelve months by the Mental Health Tribunal. If, after one of those automatic reviews, the Tribunal is of the view that the detention of the person is no longer warranted then the Tribunal can issue a certificate and that enables that person to make an application to the Supreme Court at that time.

Release hearings before the Supreme Court may include evidence from medical experts, forensic mental health experts, the patient's next-of-kin, the Crown and victims. Where the Supreme Court discharges a restriction order the court has the same powers as it originally had in relation to the range of disposition orders.

People found unfit to plead

The other major aspect of the Act relates to new procedures for dealing with persons who have been found unfit to plead. As stated previously, at the present time such persons are automatically detained under a restriction order in the special institution, notwithstanding the fact that the prosecution case has not been tested. It may well be that the physical elements constituting the offence do not exist.

Special hearings

The Act provides for a special hearing where offenders have been found unfit to stand trial. Where the court finds that an offender is unlikely to become fit to stand trial within twelve months, a special hearing must take place forthwith. In any other case, the special hearing must take place within twelve months of the finding that the person is unfit to stand trial.

The purpose of the special hearing is to determine the external facts of the case – excluding the question of intent – to ascertain whether the basic prosecution case can be proved beyond reasonable doubt. This will safeguard against the possibility of mentally disordered offenders becoming innocently entangled in the process. At a special hearing the following findings are available:

- not guilty of the offence charged or of any offence available as an alternative – where it finds that the prosecution has failed to establish the external elements of the offence beyond reasonable doubt, the effect is the same as an acquittal at trial;

- not guilty of the offence charged or of any offence available as an alternative, but a finding cannot be made that the defendant is not guilty of a specified offence or specified offences available as an alternative – in which case the person remains unfit to stand trial and the court can make a disposition order;
- not guilty of the offence charged on the ground of insanity or a finding to the same effect – in which case the finding shall be taken as the equivalent of a finding of not guilty on the grounds of insanity at trial and the court has the same disposition options as follow upon such a verdict;
- a finding cannot be made if the defendant is not guilty of the offence charged or any offence available as an alternative – in which case the person remains unfit to stand trial and the court can make a disposition order.

There are provisions in the Act enabling such a person to be brought back to court for trial once the person is no longer unfit to plead.

Transitional provisions

At the time of publication, there were only a limited number of people detained in the special institution in Risdon Prison under a restriction order. The consideration of the future detention or release of those persons will come under the new procedures in the *Criminal Justice (Mental Impairment) Act*. The Mental Health Tribunal will be required to review their detention immediately after the commencement of the legislation. If the Tribunal determines that detention under the restriction order is no longer warranted then the person can apply to the Supreme Court for a discharge of the order.

The *Sentencing Act 1997*

The *Sentencing Act*, which commenced operation on the 1st August 1998, was enacted to consolidate and modernise existing law in relation to the sentencing of offenders. As the central aim was to consolidate, rather than amend, existing law the *Sentencing Act* reflects and formalises current practice, with few changes that affect Mental Health Services. The major change in the legislation lies in formalisation of assessment procedures. The *Sentencing Act* allows for involuntary detention in an approved hospital for up to 72 hours for assessment prior to a sentence being imposed by the Court. This is combined with a clear statement that an approved medical practitioner from the hospital must advise that the hospital has the facilities to assess the person.

Application of the Act

The *Sentencing Act* applies to people who are found guilty of offences in the Court of Petty Sessions or the Supreme Court.

The *Sentencing Act* only makes changes to the sections that relate to people found guilty of offences. It does not apply to people who are found not guilty by reason of insanity or who are unfit to plead. The disposition and release of these people is now governed by the *Criminal Justice (Mental Impairment) Act 1999*.

The following areas may be relevant to Mental Health Services:

- providing pre-sentence information to the court;
- pre-sentence reports;
- assessment orders;
- continuing care orders;
- restriction orders;
- medical or psychiatric treatment while on probation.

Providing pre-sentence information to the court

Section 81 allows a court to receive oral or written information prior to passing a sentence. The type of information covered may include records and assessments that were in existence prior to the offence, but does not include pre-sentence reports requested by the court. This would allow a person's medical history to be placed before the court. As a general rule, the court will allow the offender to have access to, and challenge, the information placed before the court. The court may, however, deny the offender access to the information and the opportunity to challenge if the it considers that it is not in the interests of the offender to have access to the information (section 81(3)).

This is the same as the situation in the past, as the court has always had the power to inform itself as it sees fit.

Pre-sentence reports

The court may order a pre-sentence report (section 82), and can order the offender to submit to medical, psychological or psychiatric assessment for the purpose of preparing the report.

In preparing a report, the author must conduct any particular investigation that the court directs, and may conduct any other necessary or appropriate investigations (section 82(4)). The contents of a pre-sentence reports are set out in section 83.

The court can make any orders regarding the distribution or security that are necessary or appropriate (section 87(2)). If practitioners have particular concerns about the information being available to the offender, this should be brought to the attention of the court. A pre-sentencing report must be provided to the prosecutor and the legal practitioner representing the offender, or the offender if he/she is unrepresented, unless the court orders otherwise (section 87). The Magistrates Court has issued a practice direction about the distribution, copying and retention of reports, a copy of which can be obtained by telephoning the Administrator of Courts on (03) 6233 7912.

The prosecutor or the offender may challenge the findings of the report, and if the findings are challenged, the court cannot take the report into consideration unless an opportunity has been given to provide contrary evidence and to cross-examine the author of the report (section 88).

These provisions reflect what was the practice in obtaining reports, however the use of these reports and the access to these reports by the offender (which has always been available under common law principles) has now been specified in legislation.

Assessment orders (sections 72 – 74)

While assessment is obviously required in considering whether the offender requires hospitalisation for a mental illness, an assessment order did not exist under the previous legislation. The *Sentencing Act* explicitly allows time for the offender to be hospitalised and assessed before sentencing is considered. This requires advice from an approved medical practitioner that the institution has the facilities to conduct an assessment.

If the approved medical practitioner is of the opinion that hospitalisation is not required for the assessment, for instance if the person is a patient who has recently been under the care of the medical practitioner or an approved hospital, evidence of the person's medical history can be produced under section 81, or a pre-sentencing report can be sought under section 82.

An assessment order allows a person who has been found guilty of an offence to be detained in an institution up to 72 hours for assessment before a sentence or an order is made. An institution is defined as an approved hospital under the *Mental Health Act* or a special facility under the C*riminal Justice* (*Mental Impairment*) *Act*) (ie a place approved by the Attorney-General where persons on restriction orders may be detained).

To make an assessment order, the court must be satisfied that:

- the person appears to be suffering from a mental disorder (as defined in the *Mental Health Act 1996*) that may require treatment;
- treatment can be obtained by admission to and detention in an institution;
- the person should be admitted for their own health and safety or for the protection of the members of the public; and
- an approved medical practitioner has advised in writing that the institution has the facilities to perform an assessment of whether the person should be placed on a continuing care order (with or without a restriction order).

The approved medical practitioner must complete a report on the person. The assessment order can be terminated before the end of 72 hours if the approved medical practitioner applies to the court for the matter to proceed.

On considering the report the court can, in addition to or instead of any other sentence make a continuing care order. In addition to a continuing care order, the Supreme Court can make a restriction order.

Continuing care orders

A continuing care order authorises the detention of a person in an institution specified in the order.

A continuing care order can be made if:

- the person is found guilty; and
- the court is satisfied, on the report of a psychiatrist and any other evidence that:
  (a) the person appears to be suffering from a mental illness that requires treatment; and
  (b) treatment can be obtained by admission to an detention in an institution; and

(c) the person should be admitted for their own health or safety or for the protection of members of the public; and

(d) the court has received a report in writing from an approved medical practitioner of the institution in which it is proposed to admit the person recommending the admission.

These criteria replace those that were in section 51 of the *Mental Health Act 1963,* which required evidence from an approved medical practitioner plus one other medical practitioner. The 1963 Act included 'subnormality and severe subnormality.' The *Sentencing Act* also only requires one approved medical practitioner, and this section only applies to a person with a mental illness as defined in the *Mental Health Act 1996.*

Restriction orders

A restriction order under the *Sentencing Act* has the same effect as a restriction order under the *Criminal Justice* (*Mental Impairment*) *Act 1999*. A restriction order can only be made by the Supreme Court. If a magistrate considers that a restriction order should be made, the matter will be referred to the Supreme Court.

Medical and psychiatric treatment while on probation

A probation order may be subject to the condition that the person submits to medical, psychological or psychiatric assessment or treatment as directed by a probation officer (section 37(2)(d)).

Summary

The *Sentencing Act* consolidates and specifies existing law in relation to adult offenders. There is additional protection for Mental Health staff in that the approved medical practitioner must recommend that an assessment order, continuing care order or restriction order is made. Provisions relating to reports and medical files remain the same as occurred under the old system.