



THE AUTHORISED MENTAL HEALTH PRACTITIONER

Newsletter

March 2004

Legal advice- Detention of persons under the Mental Health Act 1996 (MHA).

Summary of information provided by the Deputy Crown Solicitor.

The MHA gives medical practitioners and AMHPs the power to refer a person for examination by a psychiatrist at an authorised hospital or other place. Although this is a referral made without receiving the consent of the referred person the MHA is silent on how the process of referral should be undertaken.

It was assumed that because the referral was a function under the MHA it included a compulsory element, which enabled the referrer to detain the person while transport by the police was being organised.

However it appears that this assumption was unfounded so advice was sought and received from the Crown Solicitors Office, which clarifies the position and this will be reflected in the next edition of the Clinician's Guide. (Excuse the legal language)

Detaining a Referred Person

The *Mental Health Act 1996* does not make provision for a person referred under section 29 to be detained prior to the person being received in the authorised hospital or other place. The issuing of the Form 1 referral does not in itself grant a power to detain or transport the person.

In most cases, the transportation of the person to an authorised hospital or other place is conducted on a basis agreed by the referrer and person referred or their carer.

There may be occasions when agreement is not possible and the alternative of the making of a transport order and the involvement of the police is necessary. In those circumstances a Form 3 needs to be completed.

In circumstances where the referred person is unwilling to await the police arrival, the issue may arise whether it is desirable or necessary to detain the person until such time as the police arrive. Where the clinician or person having care or control of the person fall under a duty of care to take reasonable steps to ensure the referred person's welfare, that duty would oblige consideration of the detention options available.

The first matter the referrer needs to consider is whether the referred person suffers from a mental incapacity of such a nature or degree as precludes the referred person making reasonable judgements about his or her own welfare. If the person does suffer from such incapacity (a person exhibiting behaviour the result of a florid mental illness typically but not necessarily falls into this category), then the person may be detained in order to ensure that appropriate treatment is provided if that is assessed to be in the best interest of the referred person. No additional factors are required. Details of the basis on which it is assessed that the person lacks capacity to consent should be recorded.

If a person has the relevant capacity but has indicated an intention not to stay until police arrive, there may exist circumstances that would justify the person being detained against his or her will. Those circumstances are where there is an imminent threat to the health and safety of the person or others if the person is not detained. The mere fact, for example, that detention for the purposes of ensuring a prompt psychiatric assessment in hospital would be, or was indicated to be, to the person's benefit would not be sufficient justification for detention. The detention and manner of detention must not be out of proportion to the peril to be avoided.

To avoid the possibility of legal liability for detaining a person, who has the relevant capacity, the clinician must ensure that he or she only detains the person where there is clear evidence of significant risk. It is important to document the reasons for detaining of a person.

Risk factors that may justify detention of a referred person with capacity could include fresh threats made to physically harm him or herself or others and a previous history of such threats or actual harm. A referred person's history of risk-taking behaviour would be an important factor in deciding if a person should be detained. Behaviour such as spending money in a manic state, approaching strangers or being sexually permissive may not in itself be serious enough behaviour to justify detention, but will be relevant to an assessment of the risks of the referred person or others.

If you have any questions regarding this matter please feel free to contact me.

**JIGSAW
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The Way Forward Recommendations of the Review of the Mental Health Act 1996

On 12 December 2003, Professor Holman presented to the Minister for Health the Review of the Mental Health Act. In accepting the Review the Minister stated that a report of his response to the Review will be prepared within 3 months and laid before Parliament. At this stage it is difficult to know whether all the recommendations will be accepted.

In relation to AMHPs the recommendations are that the 3 year qualifying time for becoming a Mental Health Practitioner will be replaced with the alternative that a mental health service has designated the person as a mental health practitioner using criteria published by the Chief Psychiatrist and that nurses under Division 1 or 2 of the Nurses Act 1992 will be eligible to be mental health practitioners. This will allow Enrolled Nurses to carry out the functions of mental health practitioners in relation to seclusion, CTOs and returning involuntary patients absent without leave. However the Chief Psychiatrist will restrict AMHP status to nurses in Division 1 of the Register.

Changes have been recommended in the Referral for Examination process. When referring a person it is recommended that the referrer may detain if necessary the person for up to 6 hours. It is recommended that the term 'personally examined' under section 31 be changed to 'assessed'. Also if a patient on a CTO is referred under a Form 1 the operations of the CTO are automatically suspended.

There are recommendations for changes in relation to the referral of voluntary patients in authorised hospitals so that when a Mental Health Practitioner detains a voluntary patient, it is for the purpose of an assessment by a Medical Practitioner or AMHP.

There are recommendations in relation to referrals from rural and remote areas which allow longer periods of detention in non-authorised facilities.

There are many other recommendations covering some 57 pages. To access the report go to www.health.wa.gov.au/mhreview/index.html and follow the links to reports.

Professor Holman has recommended the development of a new Mental Health Act and at this stage we do not know firstly if this recommendation will be accepted and secondly if accepted when a new Act is likely to be passed.

Six Monthly Notifications

Thank you to those AMHPs who have sent in their notifications for 1 July to 31 December 2003. If you have not done so already please forward your notification forms as soon as possible.

If you no longer use your AMHP status please inform Tim so that the status can be revoked. At any time in the future if the status is required again, further training will not be required and it will be a matter of re-gazetting you.

OCP Annual Report

A copy of the Office of the Chief Psychiatrist's Annual Report is available on the OCP website.

AMHP Survey

I will be conducting a short survey in the near future with AMHPs who attended the Review of Skills Program in the last 2 years and I would be grateful for your cooperation