



20 December 2011

Matthew McKillop
Mental Health Protection
Office of the Director of Mental Health
Clinical Leadership, Protection & Regulation
Ministry of Health
PO Box 5013
Wellington 6145

By email: Matthew_McKillop@moh.govt.nz

Dear Mr McKillop

Draft Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Draft Guidelines to the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Guidelines).

Overall, the Law Society commends the drafters on a well-conceived, accurate and succinct document. There is useful reference to relevant case law and interpretation of definitions such as 'mental disorder' which will be helpful to lawyers as well as health professionals working under the Act.

This submission is concerned with some aspects of the Guidelines that may require clarification, and, in particular, as to the interpretation of the Act as it applies to the Guidelines. These are:

1. The source of officials' legal powers to deal with patients and potential patients (Introduction, paragraph 4).
2. Consultation with family/whanau (clauses 3.1.1 and 4.1).
3. Duly authorised officers (DAOs) being able to seek approval of another doctor when the first refuses (clause 7.3).
4. The provisions regarding the Tribunal (clauses 12.2 to 12.4).

1. Source of Legal Powers

Introduction to the Guidelines (paragraph 4)

The Introduction to the Guidelines says that officials who exercise powers over patients and proposed patients need to be able to justify their actions in terms of the powers conferred by the Mental Health (Compulsory Assessment and Treatment) Act 1992 (Act).

However, the source of officials' legal powers to deal with the 'mentally disordered' are not limited to the provisions of the Act. Such powers can be derived from many other legal sources, especially in emergency situations, for example, justifications for acting in self-defence, defence of property, preventing suicide, 'citizens' powers of arrest', 'detox' powers under the Policing Act 2008 and normal powers of arrest.¹

It would be unfortunate if mental health professionals refused to intervene in emergency situations where the Act is not applicable but another legal source gives them the power to do so.

Recommendation

The Law Society recommends:

- That paragraph 4 of the Introduction be amended to indicate that officials should be able to justify their actions in terms of powers conferred by the Act or some other legal justification or authority (where that applies).

2. Consultation with whanau/family

Clauses 3.1.1 and 4

Clause 3.1.1 of the Guidelines states that s 5(2)(a) of the Act "...requires that family/whanau relationships be recognised as integral to the patient's wellbeing." This position may be stated too strongly.

The Act requires that there be "proper recognition" of the importance and significance to a patient of his or her ties with his or her family/whanau (s 5(2)(a)). Section 7A(3)(b) makes it clear that a practitioner must take into account the patient's best interests in deciding whether or not to consult with family/whanau.

Some patients are victims of violence and abuse within their families or are estranged from them. Consultation and sharing private information with family or whanau is not mandatory where it is not in the best interests of a proposed patient or patient. This is more correctly expressed in the introductory paragraph of clause 4 and in clause 4.7.

The Guidelines indicate that, wherever possible, a patient's consent should be obtained to consult with family/whanau (clause 4.1). They go on to say that if such consent is not given, it is up to the mental health practitioner to decide whether consultation with family/whanau would be "in the best interests of the patient" (clause 4.4.2).

¹ See: J Dawson, 'The law of emergency psychiatric detention' [1999] *New Zealand Law Review* 275-303.

If a patient is competent, they have a right to consent to or refuse having their family/whanau involved and consulted. Generally, patients' wishes in this regard are to be respected and not over-ruled by a mental health practitioner. There may be circumstances when a patient is competent but disordered and subject to a compulsory treatment order, in which case a mental health practitioner may over-rule a patient's consent or refusal. Such cases would, however, be the exception rather than the rule.

Recommendations

The Law Society recommends:

- That clause 3.1.1 be modified to reflect, as per clause 4.7, that there may be cases in which consultation with a patient's family is not in the patient's best interests.
- That the opening sentence of clause 4.1 be modified to include a concluding phrase such as 'but patient consent is not invariably required: for example, if the patient is acutely unwell or lacks capacity to consent'.

3. Duly authorised officers approaching a second doctor

Clause 7.3

We agree with the statement in clause 7.3 of the Guidelines that a DAO is entitled to seek another medical opinion if the first doctor does not believe the patient to be mentally disordered. This is especially relevant where a DAO has more experience of acute mental illness than the medical practitioner in question. Section 38 of the Act does not preclude involving another doctor, and that could be the right course.

However, we would be concerned if this led to DAOs involving a series of other doctors, in effect 'shopping around' for a practitioner who was willing to support their view.

Recommendation

The Law Society recommends:

- That additional wording be inserted in clause 7.3 indicating that there should be a reasonable limit to the number of alternative medical opinions a DAO may seek if the weight of advice is contrary to his or her own view.

4. The Tribunal and its processes

Clauses 12.2 to 12.4

It would be helpful for the clauses covering the processes and powers of the Mental Health Review Tribunal (Tribunal) to provide more detail about the Tribunal and its proceedings, especially the role of the psychiatrist member in examining patients before the Tribunal.

We also note that decisions of the Tribunal are not made public in a regular, consistent way. Parties to proceedings under the Act are entitled to know the law and have the case law of the Tribunal available to them.

Recommendations

The Law Society recommends:

- That the clauses regarding the Tribunal be expanded, and, in particular, to cover the role of the psychiatrist member in examining patients before the Tribunal and the procedural provisions relating to the Tribunal set out in Schedule 1 of the Act.
- That the Ministry clarify the publication policy in relation to Tribunal decisions.

Conclusion

This submission was prepared by the Law Society's Health Law Committee. If you wish to discuss this submission further please contact the committee convener, Alison Douglass, through the committee secretary, Clare Needham: phone (04) 463 2967 or email clare.needham@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jonathan Temm', written in a cursive style.

Jonathan Temm
President