



Comment on

***Review of the ACT Mental Health
(Treatment and Care) Act 1994
First Exposure Draft – Draft Amendment Bill***

October 2012

About ACTCOSS

ACTCOSS acknowledges Canberra has been built on the land of the Ngunnawal people. We pay respects to their Elders and recognise the strength and resilience of Aboriginal and Torres Strait Islander peoples. We celebrate Aboriginal and Torres Strait Islander cultures and ongoing contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage and low-income citizens of the Territory.

ACTCOSS is a member of the nationwide COSS network, made up of each of the state and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' vision is to live in a fair and equitable community that respects and values diversity and actively encourages collaborations that promote justice, equity and social inclusion.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS receives funding from the ACT Government - Community Services Directorate.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

Contact Details

Phone: 02 6202 7200
Fax: 02 6281 4192
Mail: PO Box 849, Mawson ACT 2607
Email: actcoss@actcoss.org.au
Web: www.actcoss.org.au
Location: Weston Community Hub, 1/6 Gritten St, Weston ACT 2611
Director: Roslyn Dundas
Policy Officers: Nadia Osman & Adele Olmsted

October 2012

© Copyright ACT Council of Social Service Incorporated

This publication is copyright, apart from use by those agencies for which it has been produced. Non-profit associations and groups have permission to reproduce parts of this publication as long as the original meaning is retained and proper credit is given to the ACT Council of Social Service Inc (ACTCOSS). All other individuals and Agencies seeking to reproduce material from this publication should obtain the permission of the Director of ACTCOSS.

Introduction

ACTCOSS welcomes the opportunity to provide comment on *The Review of the ACT Mental Health (Treatment and Care) Act 1994: First Exposure Draft – Draft Amendment Bill* ('the Bill').

ACTCOSS notes the submissions put forward by organisations such as the Mental Health Community Coalition (MHCC), the ACT Mental Health Consumers Network (MHCN), the ACT Human Rights Commission, and Women's Centre for Health Matters (WCHM). For this reason ACTCOSS will not seek to make comment on every new amendment of the Exposure Draft, but will focus on those particularly pertinent to the ACTCOSS purpose.

Changes to the Act

Human Rights considerations

In 2004 the ACT became the first, and only, jurisdiction in Australia to have a Human Rights Act ('the Act'). ACTCOSS welcomes the changes to the Mental Health Act to reflect this important influence. In particular, it is pleasing to note one of the guiding principles of the amended legislation, as agreed to by the Review Advisory Committee, is that it should be rights based. ACTCOSS acknowledges the heavy involvement of the ACT Human Rights Commission over a number of years in the drafting of the Act, including sitting on the Advisory Council.

There are a number of rights as laid out in the Human Rights Act which are specifically relevant to the Mental Health Act including, but not limited to:

- Section 8. Non-discrimination and equality before the law;
- Section 10. Protection from torture and cruel, inhuman or degrading treatment etc.
- Section 18. Right to liberty and security of person; and
- Section 19. Human treatment when deprived of liberty.¹

ACTCOSS is pleased to note the proposal to include decision making capacity as a criterion when the ACT Civil and Administrative Tribunal (ACAT) is considering applications for mental health orders as complimenting the Human Rights Act, giving mental health consumers the opportunity, when appropriate, to make their own decisions about their treatment and care.

However, there are a number of sections in the Bill which, when held up against the Human Rights Act, may require further consideration to ensure they are compliant with the Act. These are discussed in more detail further in this submission, under each relevant section.

¹ *Human Rights Act 2004, ACT*

Decision making capacity

ACTCOSS welcomes the inclusion of decision making capacity as a criterion when the ACAT is considering applications for mental health orders. Including decision making is a positive step toward acknowledging varying abilities and the importance of autonomy for individuals. Additionally, it is heartening where a lack of capacity is determined, individuals will be supported in the decision making process. This comes at a particularly relevant time as there has been a recent interest in supported decision making models in the ACT (in light of the proposed implementation of the National Disability Insurance Scheme (NDIS)).

However, in discussions with consumer organisations there have been some concerns raised around the need for clarity in the definition of the term 'capacity'. It is important capacity remain open with regard to assessment methods because assessors will need to use different processes for different situations, however specific criteria must be in place for assessors to consider. The Bill should also provide further clarity about the weight given to 'capacity' as it is currently ambiguous.

Furthermore, capacity should be clear with regard to age requirements. If there is a particular age at which capacity is determined, the Bill should reflect this.

To address the other side of the coin, ACTCOSS refers to the Parliament of Australia's Legislative Council Select Committee final report on Mental Health Legislative Measures which reminds us,

The rights of the individual with capacity to refuse treatment are vitally important but at times would seem to be inconsistent with the best interests of that person. It would appear that the 'right to protection' also needs to be observed and ensured.²

The rights argument should not swing too far to the other side where one's rights to decision making interfere with their right to life.

Recovery approach

ACTCOSS fully supports the informing of the changes to the Act by a recovery-based approach. As described by the National Mental Health Plan 2003-2008, recovery is

a deeply personal, unique process of changing one's attitudes, values, feelings, goals, skills, and or roles. It is a ways of living a satisfying, hopeful and contributing life. Recovery involves the development of new meaning and purpose in one's life as one grows beyond the catastrophic effects of psychiatric disability.³

² Parliament of Tasmania Legislative Council Select Committee, *Mental Health Legislative Matters*, No. 33, 2009.

³ Australian Health Ministers. *National Mental Health Plan 2003–2008*. Canberra: Australian Government, 2003.

The term 'recovery' is not wholly accepted in Australia as it carries with it contention for people who have experienced mental health problems for extended periods of time.⁴ However, the concept of recovery is one which encompasses the value of family and community involvement and the 'importance of hope and personal and social responsibility.'⁵ A recovery approach seeks to emphasise one's potential for recovery, but focuses on the journey and often involves empowering individuals and developing coping skills, supportive relationships and hope. Including a recovery-based approach in the Act is conducive to enhancing social inclusion and promoting better outcomes for affected people.

Ambulance paramedics – powers of emergency apprehension and transport to hospital

ACTCOSS welcomes extensions of powers of emergency apprehension and transport to hospital for assessment to ambulance paramedics. Currently in the ACT police officers are called upon to transport a person during an emergency or mental health episode. However consultations with mental health consumers and their advocates have indicated this is an inappropriate response, often adding stigma for the mental health consumer and their family. Wherever possible, transport in a police vehicle should be the very last option and only considered when all other transport options are considered unsuitable.⁶

There are, however, issues with the costs associated with ambulance paramedic treatment and/or transportation. As of 1 July 2012, ambulance fees and charges were:

- \$831 for emergency ambulance service (treatment and transport), plus \$11 per kilometre for every kilometre outside the ACT;
- \$577 for emergency ambulance service (treatment not including transport);
- \$594 for non-emergency ambulance service (treatment and transport) by Intensive Care Paramedic resource, plus \$11 per kilometre for every kilometre outside the ACT;
- \$216 for non-emergency ambulance service (treatment and transport) by Patient Transport Service resource, plus \$4.50 per kilometre for every kilometre outside the ACT.⁷

⁴ Rickwood, D, Recovery in Australia: Slowly but surely. Australia e-Journal for the Advancement of Mental Health 3(1) viewed 21 September 2012, <<http://pubs.e-contentmanagement.com/doi/abs/10.5172/jamh.3.1.8?journalCode=jamh>>.

⁵ O'Hagan, M, Recovery in New Zealand: Lessons for Australia? Australian e-Journal for the Advancement of Mental Health 3(1), viewed 21 September 2012, <<http://pubs.e-contentmanagement.com/doi/abs/10.5172/jamh.3.1.5?journalCode=jamh>>.

⁶ In 2004 the ACT Legislative Assembly considered this issue and agreed that when operationally possible, individuals requiring transport be escorted by plain clothed police, and un-marked cars. *Hansard*, 3 March 2004, p. 667

⁷ <http://esa.act.gov.au/actas/fees-and-charges/>

While Medicare does not cover the cost of the provision of ambulance services, ACT Pensioner Concession and Health Care Cardholders are entitled to free emergency ambulance services within the ACT. When interstate, ACT Pensioner Concession and Health Care Cardholders are entitled to free emergency ambulance services from an approved ambulance provider only if that state participates in reciprocal arrangements with the ACT. Individuals and families may also have ambulance cover if they have private health insurance, depending on the type of cover they choose.

ACTCOSS is concerned where an ambulance is used to transport a mental health consumer to the hospital, that individual may have to bear the costs associated with the transport should they not have a concession card or private health insurance. ACTCOSS understands ambulance paramedics will be consulted with more during the review process, and looks forward to hearing the results of this. It is not beneficial when the only choices appear to be a police escort or an unaffordable ambulance, as such a quandary may delay individuals accessing support.

Forensic Mental Health

ACTCOSS welcomes the new section in the Bill pertaining to forensic mental health orders. Individuals on such orders can often have very different requirements to people on civil mental health orders, and it pleasing to note this acknowledgement in the Bill.

However there are several issues with this new section which ACTCOSS would like to see investigated further prior to legislation being passed.

The Mental Health Review Act notes referrals to the ACAT for a forensic mental health order may be made for an alleged offender, the definition of whom includes:

(c) a person in relation to whom a police officer believes on reasonable grounds there are sufficient grounds on which to charge the person in connection with an offence.⁸

ACTCOSS is concerned there is no information stated in the Bill which clearly lays out how long a person, to whom the above definition applies, must wait until the ACAT decides whether a forensic mental health order is appropriate for their situation, and where they are held until that time.

Given the Human Rights Act states, under Section 22 that (1) *Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law*, and (2) (c) *to be tried without unreasonable delay*,⁹ there appears to be a gap between these rights and what is stated in the Bill. ACTCOSS recommends this be cleared up before legislation is passed.

8 The Review of the ACT Mental Health (Treatment and Care) Act 1994, First Exposure Draft – Draft Amendment Bill, August 2012, p.42

9 *Human Rights Act 2004*, ACT, p. 10

Sharing information

In the section on forensic mental health orders in the Bill, under Part 6.2 is a new part on 'sharing information'. While acknowledging the need to share consumer information between involved stakeholders to allow for continuity of care, seamless service provision, and people not having to 'tell their stories twice', there also remains a need for a person's privacy to remain protected. In particular, patients on forensic mental health orders, or correctional patients, may encounter additional stigma if information is misused or not shared appropriately. Given the right to privacy as in the Human Rights Act, ACTCOSS recommends this new section of the Bill be thoroughly monitored to prevent abuse of privacy occurring.

Correctional patients

Nationally, there is a higher incidence of mental health problems in the prison population than in the general population. The 2011 AIHW report, *The Health of Australia's prisoners 2010* noted Australia-wide, 31% of prison entrants reported having been told they have a mental health issue.¹⁰ ACT data was even more confronting, with 67% of ACT prison entrants self-reporting a history of mental health issues.¹¹ Given the high prevalence of mental health disorders amongst detainees, and the different support they may need, it is vital there is a dedicated section in the Mental Health Act for mental health consumers who are detainees, and ACTCOSS welcomes this.

It is important correctional patients have access to adequate and appropriate mental health services. ACTCOSS welcomes the new provisions in the Bill which streamline the transfer of correctional patients to a mental health facility or community care facility, to ensure detainees have access to appropriate mental health care which may not be available within the prison. However ACTCOSS would like to see more clarity around where detainees would be transferred to, given the announcement in the 2012-13 ACT Budget of funding to finalise the design of an Adult Secure Mental Health Unit.¹²

Remandees

Remandees are individuals who have been placed on remand, but not yet sentenced, by the Courts until their next court appearance, either because they are considered to pose an ongoing risk to themselves or the community, or because they are unable to post bail. As remandees are housed in the AMC, they fall under the *Corrections Management Act 2007* and as such, are entitled to an assessment of their mental health upon admission, and access to mental health services should they have the need. The *Corrections Management Act 2007* notes the Act applies to individuals considered detainees, which includes:

10 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2010*, Cat. No. PHE 149, Canberra: AIHW, 2011., p.27.

11 Ibid.

12 *ACT Budget 2012-13*

Section 6 (1) c – a person while the person is remanded in custody because of an order for remand for the Crimes (Sentence Administration) Act 2005, part 3.2.¹³

The new section in the Mental Health Act on correctional patients makes reference to detainees, but does not clarify if this includes remandees. ACTCOSS recommends further clarity around the definition of correctional patients in the Bill, and would like to see specific mention made of remandees, to ensure their rights as mental health patients are recognised.

Women

Women prison entrants are more likely to self-report a history of mental health problems (41% compared to 30% of males).¹⁴ In addition, recent data shows levels of psychological distress is higher among female than male prison entrants, with 42% of female entrants noting high or very high levels of distress, compared to 27% of males.¹⁵

Anecdotally ACTCOSS has become aware women in the AMC have less access to mental health programs and staff due to their being a minority, and operational issues. Given the higher likelihood of female detainees experiencing mental health issues and/or psychological distress, it is important this mental health legislation work in a way that both men and women can have equal access to appropriate treatment and care.

Inaccessibility

One notable issue with the Mental Health Act is the document's inaccessibility and lack of clear information on legal pathways, particularly in regards to forensic mental health orders and correctional patients. As a legal framework to be accessed day-by-day by individuals in potentially a 'fragile' state ACTCOSS recommends a collaboration between ACT Health Directorate, Corrections and consumer advocacy bodies such as the ACT Mental Health Consumers Network to develop a 'plain English' guide in order for people to have a clearer understanding of their rights and the step-by-step process in terms of forensic mental health.

13 *Corrections Management Act 2007*, ACT, p.4.

14 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2010*, op. cit., p.28

15 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2010*, op. cit., p.30.