Mental Health Act – detention and duty of care

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Background - Involuntary Detention

- **General Principle** = Competent adults have right to self determination including a right to control one’s own body and make decisions as to what, if any, medical or dental treatment should be administered.

- Limited provisions to allow a person to be treated and/or detained without consent.

- Most common provisions = **Mental Health Act 2007**
Mental Health Act

- Mental Health Act allows a person to be involuntarily detained and / treated.

- However, as involuntary detention and treatment involves infringement on a person’s right to self determination, the Act contains:
  - Strict legal requirements that must be complied with when a person is detained; and
  - Safeguards to ensure there is appropriate review and oversight of decisions relating to involuntary detention or treatment.
When can a person be detained under the Mental Health Act?

- Section 18 – Circumstances in which a person can be taken to and detained in a mental health facility:
  - ‘scheduled’ (medical practitioner or accredited person has written a mental health certificate) (s19). See also now S19A – use of AV
  - Person is brought to the facility by ambulance (s20) or apprehended by Police (s22)

- A person cannot be involuntarily admitted to, detained or continue to be detained in a mental health facility unless an AMO is of the opinion that:
  - The person is a mentally ill or mentally disordered person; and
  - No other care of a less restrictive kind, that is consistent with safe and effective care is appropriate and reasonably available to the person.
When can a person be detained under the Mental Health Act?

- **Mentally ill person** = A person suffering from a mental illness and care, treatment or control is necessary for person’s own protection or protection of other from serious harm.

- **Mental illness** a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person. Characterised by presence of symptoms – delusions, hallucinations, serious disorder of thought form, a severe disturbance of mood or sustained or repeated irrational behaviour indicating presence of any one or more of these symptoms.
When can a person be detained under the Mental Health Act?

- A **Mentally Disordered Person** is a person (whether or not the person is suffering from mental illness) whose behaviour for the time being is so irrational that temporary care, treatment or control is necessary for the person’s own protection or for the protection of others from serious physical harm.
Examination Procedures under s27 Mental Health Act 2007

Prior to undertaking a medical examination under s27, the authorised medical officer needs to ensure that the person has been detained under one of the mechanisms outlined in s18, and needs to ensure that any relevant documentation relating to their detention has been completed. For more information on mechanisms for detaining persons under the Act see Section 6.1 of the Guidebook.

1st examination

- neither mentally ill nor mentally disordered
  - discharge or offer voluntary admission

- mentally disordered

- mentally ill

2nd examination

- neither mentally ill nor mentally disordered
  - review daily, detain for no longer than 3 working days
  - mental health inquiry

- mentally disordered

- mentally ill

3rd examination

- neither mentally ill nor mentally disordered
  - discharge or offer voluntary admission

- mentally disordered
  - review daily, detain for no longer than 3 working days
  - mental health inquiry

- mentally ill
  - mental health inquiry

- mentally disordered
  - mental health inquiry

- mentally ill
  - mental health inquiry
Section 27A

- Where *not reasonably practicable* for examinations in section 27 to be conducted by AMO, a person may be examined:
  - By a medical practitioner at another place using an audio visual link
  - **In person** by an accredited person authorised by the medical superintendent of the mental health facility.

- Must obtain advice of psychiatrist before making determination if practitioner is not a psychiatrist.
After section 27 examinations

● Mentally disordered = can be detained for up to 3 working days and must be examined by the AMO at least every 24 hours.

● Mentally ill = must be brought before MHRT for an inquiry as soon as possibly (usually 2 weeks).

● Non-surgical treatment can be provided without consent while detained, though efforts should be made to obtain consent.
Information obligations

- AMO must give patient oral explanation and a written statement of rights and entitlements (Schedule 3).

- AMO must notify the patient’s designated carer and principal care provider within 24 hours after patient is first detained.

- General right to information = transfer, discharge, admissions as voluntary patient, fails to return from leave.
Discharge planning

- AMO must take all reasonable steps to involve patient, designated carer and principal care provider in discharge planning and provide information regarding follow up care.

- AMO must take all reasonable steps to consult with agencies involved in providing services – eg: provide discharge plan to GP, psychiatrist, psychologist, community mental health.
Duty of care

- **General principle** = owe a duty of care to patients and those seeking treatment to take reasonable steps to prevent foreseeable harm to patients.

- **However**, in the context of detention, duty of care does not give you power to detain without authorisation under the Act.

- **BUT** – if you fail to exercise powers under the Act where required (eg: meets criteria for detention and patient discharged) you could be found to have breached your duty of care.
Relevant case law

- *Hunter & New England Local Health District v McKenna / Simon* [2014] HCA 44.

- Considered whether health authorities owe a duty of care to third parties in exercise of statutory powers to detain and discharge mentally ill patients (damage claimed was for psychiatric injury after the murder of their relative by a mentally ill patient who was released by a doctor at Taree Hospital).

- It held that the Hospital and Dr Coombes did not owe the relatives a duty of care. The determinative issue was statutory power in the Mental Health Act, which required the minimum interference with the liberty of the mentally ill person. The provisions of the relevant legislation were inconsistent with the common law duty of care argued for by the relatives.
McKenna – on point of inconsistency between the statutory provisions and a duty of care

“Particularly relevant was the obligation imposed by s 20 not to detain or continue to detain a person unless the medical superintendent was of the opinion that no other care of a less restrictive kind was appropriate and reasonably available to the person. Performance of that obligation would not be consistent with a common law duty of care requiring regard to be had to the interests of those, or some of those, with whom the mentally ill person may come in contact when not detained.”
Further case law

*Smith v Pennington* [2015] NSWSC 1168

- Considered a claim by brought by the plaintiff for brain damage which he suffered from attempted suicide after his discharge (for a period of four days leave) from the Campbelltown Hospital, where he was an involuntary patient.

- Good example of how the duty of care cases turn on their own facts.

- The Court found that the decision to grant leave to the plaintiff was reasonable, that the length of leave was reasonable, and that adequate assessment of the plaintiff prior to leave being granted had taken place. The Court further accepted that the granting of leave could not be criticised given it was a well-recognised and appropriate therapeutic measure to assist in the plaintiff’s recovery.
Smith v Pennington

- Garling J did find that the SWSLHD breached its duty of care to the plaintiff in failing to provide the plaintiff and his parents with clear and concise advice regarding the avoidance of known stressors to the plaintiff, including the use of alcohol and contact with his former girlfriend, during the period of leave.

- The Court found that although the South Western Sydney Local Health District breached its duty of care to provide advice to the plaintiff and his parents, the failure was not the cause of the catastrophic injuries he sustained when he attempted suicide.
The judge said at the time leave was granted to the plaintiff, his parents were aware:

- Particular triggers for the plaintiff’s previous suicide attempts were alcohol and contact with his former girlfriend
- The plaintiff required close monitoring and supervision by his parents
- Of contact details for various mental health support and the fact the plaintiff could be returned to the SWSLHD at any time
- The SWSLHD could not guarantee that the plaintiff would not attempt suicide again.

He said that even if the plaintiff and his parents had received different information and warnings from the SWSLHD, there was nothing more his parents could have done to prevent the plaintiff’s suicide attempt.