Sub # 16.

11.1.11

The following submission is made on behalf of a number of forensic psychologists (listed below) currently practising in Queensland. Correspondence in regards to this submission can be forwarded to Rebekah Doley at rdoley@bond.edu.au or on (07) 55951344.

On November 27, the Queensland Mental Health Commission Bill was tabled in parliament. While primarily serving as the mechanism to establish the Mental Health Commission, the Bill also contains proposed amendments to the Mental Health Act (2000). This submission addressed two key amendments to the Mental Health Act (2000) namely:

1. Changes to the powers of the Director of Mental Health
   "The creation of a power for the Director of Mental Health to initiate a number of actions including suspension of limited community treatment for a relevant patient or relevant patients; require the review of all treatment plans and the planned implementation of limited community treatment; and require Administrators of authorised mental health services to review procedures and protocols in relation to the authorisation of limited community treatment" (Page 7 QMHC Bill Explanatory Notes) and;
2. Introduction of new monitoring conditions
   "Requiring that a relevant patient in certain circumstances, be subject to a monitoring condition while they are undertaking limited community treatment." (Page 7 QMHC Bill Explanatory Notes).

It is noted that the first page of the Explanatory Notes, introducing the need for the Mental Health Commission, acknowledges the challenges of stigma and discrimination for those with mental illness, while in effect this same document serves to enhance stigma and discrimination via the aforementioned proposed changes to the Mental Health Act (2000). The impact of the proposed changes to these two key aspects is discussed below and considered in the context of current principles of forensic mental health and human rights.

Key Amendment Issue 1: Changes to the powers of the Director of Mental Health

The proposed changes to the decision making powers of the Director of Mental Health (DMH) regarding patient Limited Community Treatment (LCT) (493AC – E) are concerning for a number of reasons. The first of which is the potential erosion of the separation of powers.

1. Potential Erosion of the Separation of Powers

   Currently leave for patients on a Forensic Order is approved by an independent tribunal, namely the Mental Health Review Tribunal (MHRT). Enabling the DMH to review and potentially suspend LCT granted by the tribunal at the very least blurs the boundaries between political and judicial processes. While in theory the DMH position is an independent statutory one, the fact that such review can be requested by the Minister; that this statutory body is part of a Queensland Health Branch; and has recently been shown to respond to political pressure by suspending leave (even prior to these provisions), all make this independence questionable.

   At a National and International level, the importance of judicial decision making that is informed by mental health professionals has been recognised. For example,

Principle 12 of the National Statement of Principles for Forensic Mental Health (NSPFMH) proposes:

"Decisions to detain, release or transfer mentally ill individuals found not guilty or unfit for trial because of a mental illness or intellectual impairment should be made by courts or independent statutory bodies of competent jurisdiction, not by a political process or the Governor/Administrator in Council."

"These decisions should only be made in accordance with the applicable legislation and legal principles, on the advice of suitably qualified mental health practitioners and in accordance with best practice principles contained in this statement".

Similarly, Principle 17 of The United Nations Principles for the Protection Of Persons with a Mental Illness (UNPPPMI) recognises:
"The review body shall be a judicial or other independent and impartial body established by domestic law and functioning in accordance with procedures laid down by domestic law. It shall, in formulating its decisions, have the assistance of one or more qualified independent mental health practitioners and take their advice into account."

2. Failure to Recognise Individual Rights and Individual Treatment Needs

Secondly, the fact that the proposed powers for review and suspension can also be applied to a class of patients (493AE(2)) is of even greater concern. This proposal implies that individuals, with individual treatment needs, individual risk considerations, and individual rights can be responded to as a collective, homogeneous group. It is considered that this proposal fails to recognise a core principle of sound mental health treatment: namely that it is individualised and responsive to needs. Further it potentially violates a number of principles pertinent to the rights of the individual. For example:

"Forensic mental health services should meet the changing needs of an individual, taking into account the entirety of their biological, psychological, social, cultural and spiritual context."

"Individualised care implies facilitated access, comprehensive assessment, unimpeded treatment, regular review and recognition of the humanity of the person...."
NSPFMH Principle 9

"The right of all clients to respect for individual human worth, dignity and privacy is not waived by any circumstance, regardless of an individual's history of offending or their status as a forensic mental health client or a prisoner/young offender."

"All persons accessing mental health services.... Are entitled to the protection of their civil and human rights and freedom from abuse consistent with the United Nations Principles on the Protection of People with a Mental Illness...."
NSPFMH Principle 7

"The treatment and care of every patient shall be based on an individually prescribed plan, discussed with the patient, reviewed regularly, revised as necessary and provided by qualified professional staff."
Principle 9 (2) UNPPMI

"The treatment of every patient shall be directed towards preserving and enhancing personal autonomy."
Principle 9 (4) UNPPMI

"Every patient in a mental health facility shall, in particular, have the right to full respect for his or her:
(a) Recognition everywhere as a person before the law;..."
Principle 13 (1) UNPPMI

3. Treatment should be provided in the least restrictive environment

Additionally, the principle of the least restrictive environment (which is also enshrined in Queensland's own Mental Health Act) is placed at risk by the implementation of group-based decision making which does not consider individual needs and risks.

"Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others."
Principle 9 (1) UNPPMI

It is acknowledges that page 12 of the Explanatory Notes defends this approach by referencing the need to balance the needs of an individual with mental illness with the need to protect that individual and the community. However, this appears to be a catch-all justification that is potentially disproportionate to any real and identifiable risk. It also allows for a blunt and unsophisticated approach to what could be achieved via more individualised and balanced means.

It is suggested that the proposed amendments allow for such decisions by the DMH to be appealed (on an individual basis) to the MHRT and that this mechanism serves to protect patient rights. However, given the current frequency of MHRT hearings and the number of referrals, it is likely that even if a patient were to request an early hearing they would be waiting at least a month for this to occur (potentially more longer if a large 'class' of patients have been impacted by a DMH decision). This relatively long waiting period is more than enough for patients who may have been doing very well, have been compliant with treatment, and living as functional members of the community to lose jobs, lose housing, and more importantly lose their sense of progress, hope and self esteem. Such discouraging outcomes for patients may in the longer term serve to increase risk due to decreased trust in the mental health system that is meant to support them.

4. Limited consultation

It is contended that such measures would be implemented with 'due consideration' and consultation and thus preserve patient rights. However, it is of concern that the explanatory notes and introductory speech in parliament suggest

that these amendments provide for 'immediate action' (page 2 Explanatory Notes). The conflicting nature of due consideration against immediacy, in addition to the dearth of process information around such decisions, does not serve to reassure that the rights of patients are, in fact protected.

5. Question of discrimination

It is also of note that these proposed amendments have been put forward in direct response to two instances of Absent Without Permission (AWOP) from unescorted leave from a secure mental health facility. During the past three years, there have been only rare AWOP instances from the facility in question, while at the same time there have been thousands of successful unescorted leaves. This brings in to question the proportion of, and necessity for, the legislative changes suggested.

Further, the question of discrimination arises when similar correctional data (such as breach of parole) is considered. The Queensland Corrective Services Annual Report 2011 – 2012 indicates that 73% of parole orders were completed, 71% of probation orders were completed and 68% of Intensive Correction Orders were completed. Therefore, comparatively, there is a much greater chance that an offender without a Forensic Order will breach supervision conditions. However, the legislative response to impose additional controls appears to be much greater for those with mental illness.

In summary the key concerns raised in regards to the proposed amendment to the powers of the Director of Mental Health include:

- The potential erosion of the separation of powers with the blurring of the political and judicial process as a result of increased powers given to the Director of Mental Health (DMH);
- The failure to recognise individual rights and individual treatment needs as a result of changes that can be applied to a 'class' of patients;
- The potential breach of the principle of least restrictive environment again as a result of changes that can be applied to a 'class' of patients.

Key Amendment Issue 2: Introduction of new monitoring conditions

There are additional concerns specific to the increased monitoring provisions proposed in 131A(3). Whilst the majority of examples provided in this amendment are of little concern and, in fact do not add anything to existing practice, example 3 "that the patient wear a device for monitoring the patient's location while on limited community treatment" has both large and worrying implications.

1. Stigmatising mental illness

Currently such monitoring devices are only used in QLD for offenders under the Dangerous Prisoner (Sexual Offenders Act (2003) (DPSOA). Those under the DPSOA legislation are considered to be dangerous sex offenders who repeatedly offend. The suggestion of a similar level of risk for those with mental illness is stigmatising, and does not recognise reduction of risk with effective treatment, or the essential principle of recovery. Nor does it recognise that many patients placed on Forensic Orders have not committed offences of a serious violent nature. Rather it suggests to the general public that mental illness is something to be scared of. Further, being made to wear such a device renders patients potentially

identifiable as 'dangerous' by members of the public. Individuals under the DPSOA legislation have been through a stringent process to assess their risk and eligibility criteria. The proposed process for patients is not at all comparable and as such may impinge on patient rights.

> *"Mentally ill offenders must have the same standard of protection that the justice system offers everyone else."*
> NSPFMH Principle 13

The potentially negative impact for patients also begs the question as to whether the proposed benefits are of sufficient magnitude to justify such action. 131A(3) outlines a number of examples as to when monitoring conditions may be imposed (e.g., a forensic patient who is undertaking limited community treatment for the first time). Surely, if a patient wears a monitoring device at this time, the initial point of risk is simply postponed – to their first instance of leave without such a device. Unless it is proposed that patients wear monitoring devices indefinitely (an untenable contention), then use of such devices simply acts to create another later risk point, bringing into question their functional utility or benefit.

2. Lack of evidence base

Another essential aspect of Forensic Mental Health Systems is that practice within these systems is evidence based.

> *"These services (FMH services) should provide evidence based, multidisciplinary, continuous care, consistent with those of general mental health services."*
> NSPFMH Principle 5

An initial literature review reveals a dearth of information regarding the use of monitoring devices in health settings and its potential impact in mental health settings in particular. In September 2012, Canada's Department of Health & Wellness & Department of Justice, Capital District Health Authority, Nova Scotia completed a Joint Review of the East Coast Forensic Hospital's Community Access Privileges. An independent review of community-access policies and practices at this Canadian forensic hospital was conducted after a patient killed a member of the community while on unescorted leave. Among other issues, patient surveillance (in the broad sense) was considered at length. The reviewers supported the hospital's current policies (which included the setting of itineraries, maintenance of logs by patients, daily telephone contacts and home visits). In addition, it was recommended that there be expanded use of technology such as mobile phones and pagers. However, the reviewers did not recommend introduction of GPS tracking for the following reasons:

- GPS tracking is "novel in the mental health field" and has not yet been adopted by any Canadian forensic facilities;
- it is unclear what effect the use of such technology may have on a patient's treatment and progress and additional research is needed to determine if it is effective in forensic populations;

- concerns have been expressed about whether this could be an unreasonable and discriminatory infringement on the rights of people found not criminally responsible due to mental illness; further consideration surrounding the ethics of its use in this population is needed before good policy decisions can be made.

The existing electronic monitoring literature focuses on corrections populations rather than mental health settings. Demichele, Payne & Button (2008) indicate that even within the corrections population group there is limited robust evidence on the effectiveness of the intervention. Furthermore, they warn that in developing legislation in relation to the use of these devices there is often a failure to consider the potential adverse consequences of this intervention. They cite Renzema and Mayo-Wilson's 2005 review of available research and identified only three published studies that met their criteria for inclusion in their study (i.e. the studies had appropriate comparison group and collected data on multiple outcome indicators). Of those three studies, two found that there was little to no effect of monitoring devices on reducing criminal behaviour. Demichele, Payne & Button (2008) argue that any possible benefits of utilising these monitoring devices must be considered in light of potential adverse negative consequences.

It is considered that, at this stage, the evidence for use of electronic monitoring with mental health populations (both in regard to its potential benefits and potential hazards) is lacking. As such, its implementation can not be considered to be evidence based.

3. Inconsistency with legislation in other jurisdictions

In regard to consistency with legislation of other jurisdictions (page 16 of the Explanatory Notes) there is broad reference to 'security conditions' used in other states, with the implication being that the proposals in question are not out of keeping with other jurisdictions. However, no other forensic mental health service in Australia requires patients to wear monitoring devices. Therefore, not only is such an implication misleading, but the proposal itself is out of step with contemporary practice around the country.

4. Risk of Breach of Confidentiality

While 131 B suggests that monitoring information would be considered confidential information under the Hospital and Health Boards Act (2011) and that patients would be monitored by the treating health service, there is limited information as to how this information would be collected, stored, communicated, or used for evaluation purposes. As page 10 of the explanatory notes refers to minimal costs associated with the implementation of such a system, it suggests that existing mechanisms may be relied upon. Further, in other forums it has been suggested that this mechanism is the existing system used by Queensland Corrective Services (QCS) for the monitoring of DPSOA offenders. If this is the case, it would be essential that patient monitoring information not be handled by QCS directly due to the blurring of boundaries between corrective and treatment services that may arise. Additionally, it is important to maintain a patient's right to privacy wherever possible.

"Confidentiality of information: sharing of information between correctional and health providers will only occur to the extent necessary for treatment or care or with the consent of the client."
NSPFMH Principle 7

"The right of confidentiality of information concerning all persons to whom the present Principles apply shall be respected."
Principle 6 UNPPMI

"Every patient in a mental health facility shall, in particular, have the right to full respect for his or her:
(b) Privacy... etc"
Principle 13 (1) UNPPMI

In summary the key concerns raised in regards to the proposed amendment to the monitoring conditions of forensic patients include:

- Risk of further stigmatisation of mental health patients;
- The lack of evidence base for the proposed introduction of monitoring devices with forensic patients;
- The possible adverse consequences to a patient's recovery and mental health as a result of implementing new risk management interventions that have no evidence base with this population;
- Inconsistency of the proposed amendments with legislation in other jurisdictions;
- Risk of breaching patient confidentiality

Finally, there are also a number of questions raised by this proposed action;

1. The potential harmful impact on the psychological health of an already stigmatised and vulnerable population must be considered – has this been researched and considered in proposing these amendments?
2. Have cultural issues and potential harm to specific groups been considered?
3. The QMHC Bill espouses the importance of consumer and carer involvement and consultation – have consumer and carer groups been consulted in proposing these amendments?
4. Why is it necessary to implement such amendments prior to the establishment of the QMH Commission, a body which would surely have an interest in and be able to inform legislative developments?

Conclusion

In conclusion, the above issues of concern specifically addressed in this submission include:

- The potential erosion of the separation of powers with the blurring of the political and judicial process as a result of increased powers given to the Director of Mental Health (DMH);
- The failure to recognise individual rights and individual treatment needs as a result of changes that can be applied to a 'class' of patients;
- The potential breach of the principle of least restrictive environment again as a result of changes that can be applied to a 'class' of patients;
- Risk of further stigmatisation of mental health patients;

- The lack of evidence base for the proposed introduction of monitoring devices with forensic patients;
- The possible adverse consequences to a patient's recovery and mental health as a result of implementing new risk management interventions that have no evidence base with this population;
- Inconsistency of the proposed amendments with legislation in other jurisdictions;
- Risk of breaching patient confidentiality.

Given the risk of the potential for inappropriate decision making processes that undermine the rights and effective treatment of patients, the risk that proposed actions may further stigmatise and disadvantage this group, and the potential harm arising from the use of monitoring devices without a sufficient evidence base to the contrary, it is suggested that the proposed amendments be reconsidered. Or at the very least, a much more thorough consultation process is required in order to meet the stated objectives of the amendments. In fact, without such consultation and the expertise this may bring to the issue, it is errant to conclude (on page 8 of the Explanatory Notes) that there are no non-legislative alternatives to achieving the policy objective, or indeed that the proposed amendments are the specific legislative changes required.

References

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National Statement of Principles for Forensic Mental Health

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