MENTAL HEALTH LEGISLATION

AND

HUMAN RIGHTS

An Analysis of Australian State and Territory Mental Health Legislation in terms of The United Nations Principles for the Protection of Persons with Mental Illness

A Background Paper for the National Inquiry Concerning the Human Rights of People with Mental Illness

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EXECUTIVE SUMMARY

This paper presents an indicative analysis of the mental health legislation in each State and Territory in terms of recently agreed international standards - the *UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care.* (See Appendix IV.)

The legislation in every Australian jurisdiction breaches the standards prescribed in the UN Principles in a number of ways. In some jurisdictions these breaches constitute fundamental violations of basic human rights.

Fundamental Freedoms and Basic Rights (UN Principle 1)

There are few express provisions safeguarding patients' rights in States and Territories other than NSW and Victoria, and little emphasis on ensuring that treatment is carried out in the least restrictive environment. In fact, significant areas are simply not covered by legislation in many jurisdictions. This applies particularly to complaints handling, monitoring mechanisms and review procedures.

In some States - South Australia, Queensland and the Northern Territory, for example - the police are given very wide powers which are inconsistent with a number of basic rights recognised in the Principles.

There is a general lack of clarity in the various definitions of mental illness - and in some jurisdictions a total absence of any statutory definition. The result is that in every Australian State and Territory different definitions of mental illness apply.

Guardianship provisions exist in most jurisdictions, complementing mental health legislation. (In South Australia and Tasmania, the Guardianship Boards are presently established under mental health statutes rather than separate guardianship legislation.) South Australia has given its Guardianship Board wide powers to order involuntary detention and make determinations consenting to medical and other treatment. In NSW, Victoria, South Australia, Western Australia and the Australian Capital Territory there are independent guardianship bodies with power not only to appoint guardians for people with mental illness who are incapable of looking after their personal affairs but also to appoint managers for those who are incapable of managing their property.

In the Northern Territory and Queensland there are similar bodies but they do not cover people with mental illness. In the Northern Territory the Chief Medical Officer has powers of guardianship in relation to the person (but not the property) of a

voluntary or involuntary patient who is considered to be incapable of managing "himself or his own affairs".

There are no legislative provisions covering guardianship of people with mental illness in Queensland. The Public Trustee may, under the Queensland *Mental Health Services Act,* manage the estate of any person admitted to a psychiatric hospital following notification that the doctor in charge of the patient's treatment considers they are incapable of managing their own property.

Discrimination on the ground of mental illness is covered by State anti-discrimination legislation in Victoria, Western Australia, Queensland and the ACT. The NSW law extends only to "physical" and "intellectual" disability - which leaves people with mental illness in a difficult position. South Australian law specifically excludes mental illness from the definition of disability for the purposes of discrimination. Tasmania and the Northern Territory still do not have anti-discrimination legislation.

Admissions

Voluntary Admissions (UN Principle 15)

The provisions governing voluntary admission to psychiatric hospitals place a variety of restrictions on access to hospitalisation and on discharge.

Involuntary Admissions (UN Principle 16)

Criteria

The criteria for involuntary admission and detention in several jurisdictions are less rigorous than those specified in the UN Principles. This is particularly the case in Queensland and South Australia. In Queensland the decision to detain is based on a broad, subjective discretion. In South Australia the Guardianship Board has power to order the involuntary detention of a protected person (who has been received into guardianship because of mental illness) without reference to any statutory criteria.

Procedures

Procedures for admission and detention in most jurisdictions meet the threshold standards set by the Principles. However, in most jurisdictions extensive powers are given to police, with or without warrants, in relation to individuals they believe are suffering from mental illness.

In South Australia police are empowered to forcibly enter premises and apprehend individuals believed to be suffering from mental illness and believed to be a danger to

themselves, to others or to property. Similar provisions exist in a number of other jurisdictions.

Treatment

Community Treatment (UN Principles 3,7 and 9)

Not all jurisdictions expressly recognise the principle of the least restrictive form of treatment - either in statements of statutory objectives or as a criterion for treatment.

NSW and Victoria are the only States where people who meet the criteria for involuntary detention have the alternative of Community Treatment Orders instead of in-patient treatment. Mental health legislation in the other States and Territories does not provide for involuntary treatment without hospitalisation.

Standards of Care and Allocation of Resources (UN Principles 8,10 and 14)

There are some limited legislative provisions for equity of access to treatment for mental illness (as compared to physical illness) and for maintenance of standards in mental health facilities.

However, the requirements in Principles 8 and 10 that every patient be protected from harm, including unjustified medication and abuse by other patients or staff, are not adequately covered by legislative provisions in most States. In NSW the *Mental Health Act* does contain safeguards in relation to the administration of medication as well as sanctions against abuse or neglect by staff. While all jurisdictions make some attempt to proscribe abuse and neglect, their provisions take little account of the special vulnerability of mental health patients. Indeed, in Tasmania the *Mental Health Act* requires that leave of the Supreme Court be obtained before proceedings are instituted for ill-treatment or wilful neglect of a patient under the Act.

Informed Consent (UN Principle 11)

The emphasis in the Principles on the need for appropriate disclosure of information to a patient and the need to obtain properly informed consent is generally not reflected in our mental health legislation. (However, the administration of two forms of treatment - psychosurgery and elect° convulsive therapy - is subject to detailed requirements relating to informed consent in NSW, Victoria, South Australia and the ACT.)

Rights and Conditions in Mental Health Facilities
(UN Principles 12 and 13)

In general, the only recognition of the rights of patients to information and to privacy, religious freedom, educational and recreational opportunities is in the statutory statements of principle to be found in more recent mental health legislation (particularly in NSW and Victoria, and to a lesser extent in Queensland and South Australia). However, these statements do not give rise to enforceable rights.

Most jurisdictions now have a requirement that patients be given information regarding their rights. NSW is the only jurisdiction which makes specific provision for those appearing before magistrates for review of involuntary detention orders to be dressed in normal clothes.

Review and Procedural Safeguards **(UN Principles 17 and 18)**

While several States and Territories have established Mental Health Review Boards or Tribunals to hear appeals against involuntary detention and related matters, review mechanisms in other jurisdictions are non-existent or inadequate. (The Northern Territory has no independent review body, and Western Australia has relegated this vital role to its Boards of Visitors - which were basically established to monitor standards of care in hospitals and provide a basic complaint-handling service.)

Complaints and Monitoring Mechanisms **(UN Principles 21 and 22)**

Only two States (Victoria and Queensland) have independent, statutory complaint-handling bodies. Legislation to establish independent agencies is under consideration in NSW and Western Australia, and the role of the SA Health Commission's Health Advice and Complaint Service is under review.

Tasmania and the Northern Territory have no specialised complaint-investigation mechanisms in the health area.

In some jurisdictions authorised hospital visitors (usually known as Community Visitors or Official Visitors) are appointed to inspect hospital facilities, interview those patients who wish to see them and make recommendations to the Minister concerning the welfare of patients or the management of a hospital.

There are no provisions in mental health legislation in South Australia, Tasmania, the ACT or the Northern Territory to appoint Official Visitors or establish any other mechanisms specifically for monitoring standards of patient care.

Victoria has a separate Public Advocate's Office established under the *Guardianship and Administration Board Act* 1986. The Office employs specialist mental health advocates whose functions include enabling people with disabilities to act independently; minimising restrictions on their rights; and maximising the utilisation of services and facilities. The Community Advocate in the ACT has only limited powers in relation to people with mental illness (confined primarily to forensic patients).

Forensic Patients (UN Principle 20)

According to Principle 20, those charged with or convicted of criminal offences should have access to the best available mental health *care* and should, "to the fullest extent possible", receive the same protections and safeguards as other patients.

In most Australian jurisdictions, however, provisions relating to the rights of forensic patients are clearly inferior to those for other psychiatric patients. For example, in NSW the *Mental Health Act* allows the Chief Health Officer to transfer a prisoner from prison to psychiatric hospital without referring to the same criteria (or, indeed, any specific criteria) as would apply to civilian detention.

In Queensland, where the criteria for admission are the same for forensic and for civilian patients, the former have significantly fewer rights, even in relation to matters such as receiving mail

In the ACT the *Mental Health Act* contains no provisions relating to forensic patients and Part V of the *Lunacy Act* (NSW) 1895 and Section 20B of the *Crimes Act* (Commonwealth) 1914, both of which are otherwise repealed, are still invoked to allow detention of those acquitted on the grounds of "insanity" and found unfit to be tried.

With the exception of Victoria, the rights of forensic patients to review of detention are limited, with specialist review bodies lacking the power to discharge.

Minors (UN Principle 2)

Principle 2 requires legal protection of the rights of minors including, where necessary, the appointment of a personal representative other than a family member.

There are few specific provisions protecting children and young people in State or Territory mental health legislation. Those that do exist generally relate to requirements for admission as voluntary or involuntary patients.

The ACT *Mental Health Act* is the only one to specifically provide for the appointment of a separate representative for a child or young person in the context of court proceedings under the Act - where it appears to the court that such representation is appropriate.

The Victorian *Mental Health Act* as amended in 1990 is the only State legislation which provides a statutory basis for the establishment of child and adolescent psychiatric services.

INTRODUCTION

In December 1991 the United Nations General Assembly passed a Resolution adopting the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care put forward by the United Nations Human Rights Commission. The Australian Human Rights and Equal Opportunity Commission, together with the Australian Government, played a major role in drafting these Principles. It is reasonable to anticipate that Australia will take a leading role in their implementation.

The Human Rights and Equal Opportunity Commission is currently conducting a National Inquiry concerning the Human Rights of People with Mental Illness, chaired by the Federal Human Rights Commissioner, Mr Brian Burdekin, assisted by Dame Margaret Guilfoyle and Mr David Hall. The Inquiry is being conducted pursuant to functions and powers conferred on the Commission by Federal law [1]. The Commission has the responsibility to promote public discussion, understanding and acceptance of human rights and to report on the action that needs to be taken by Australia to comply with relevant international instruments. These instruments include the International Covenant on Civil and Political Rights and the Declaration on the Rights of Disabled People - as well as the United Nations Principles on Mental Illness.

The Australian Health Ministers, at their National Conference in March 1991, adopted the National Mental Health Statement of Rights and Responsibilities, based in part on the UN Principles adopted last year. In the National Mental Health Policy, launched in May 1992 by the Australian Health Ministers, both the 1991 Statement and the UN Principles were referred to as charters for the legislative strategies outlined in the National Mental Health Plan. Under this Plan, the States and Territories undertook to develop mental health legislation consistent with the UN Principles and the National Statement of Rights and Responsibilities by 1 January 1998.

This timetable gives Australia five years to achieve substantial changes in eight jurisdictions, affecting a variety of laws in each. Many State and Territory governments have told the National Inquiry that they are reviewing their mental health legislation. South Australia introduced a Mental Health Bill and Guardianship and Administration (Mental Capacity) Bill into Parliament in the last week of its Autumn Session this year. Other jurisdictions have legislation ready to introduce or in draft form.

However, the history of mental health law reform clearly demonstrates that laws to protect the mentally ill often lack priority on parliamentary agendas. Not only have legislative reforms been slow, in some cases they have been frustrated even after passage of a Bill. (Western Australia, for example, passed a new *Mental Health Act* in 1981 but has never proclaimed it and New South Wales did not proclaim significant portions of its 1983 Act before replacing it in 1990.)

In the course of the National Inquiry, we have prepared an analysis of the mental health legislation in each State and Territory - in terms of its compliance the UN Principles. Publication of this analysis and the format in which we have prepared it is designed to assist governments with the legislative reform process which is essential if the rights of the mentally ill are to be properly protected.

The legislation analysed includes the current Mental Health Act (or equivalent) in each State and Territory, together with other provisions such as guardianship or discrimination laws where these exist and to the extent that they are relevant to the UN Principles. (A systematic analysis of prospective legislation is not possible since the review processes are at different stages in each jurisdiction and it is impossible to predict which proposals will proceed and at what pace.)

Our analysis does not extend to the implementation of existing mental health legislation. This will be dealt with in the Report of the National Inquiry - based on the extensive evidence examined by the Inquiry. There are many instances of inconsistency between the UN Principles and the legislation itself, mitigated in some circumstances by the way the system in place actually operates. There are also many instances in which existing legislation protects certain rights in theory - but the absence of adequate resources means they are regularly breached in practice. The focus in this report, however, is on the law as it is.

1. **In particular, the *Human Rights and Equal Opportunity Commission Act* 1986.**

AUSTRALIAN CAPITAL TERRITORY MENTAL HEALTH LEGISLATION

INTRODUCTION

Legislative provisions covering people with mental illness in the ACT are a patchwork of some of the oldest provisions in force in Australia and the most recent. The ACT *Mental Health Act* 1983 only extends to the basics of administration, detention and treatment. It is supplemented by the ACT *Mental Health Act* 1962, the ACT *Insane Persons and Inebriates (Committal and Detention) Act 1936* and by arrangements with the State of NSW under these two Acts. The effect of these is to apply in the ACT provisions of the NSW *Lunacy Act* 1898 (long since repealed in NSW). In 1991 the ACT added to its legislative framework the *Guardianship and Management of Property Act* and the *Community Advocate Act,* implementing certain recommendations made by the ACT Mental Health Review Committee that reported to the Minister for Health in 1990. Most of the recommendations of this Committee, however, have not yet resulted in legislative reform. There are still significant areas not covered by legislation.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. (These instruments include, in particular, the International Covenant on Civil and Political Rights, ratified by Australia in 1980.) This Principle also deals with rights associated with lack of legal capacity, including the right to have a determination of incapacity made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

The ACT *Mental Health Act'* does not contain statements of statutory or Departmental objectives. Nor does it contain definitions of mental illness or mental health, although "mental dysfunction" is defined. This definition, discussed in more detail under Principle 4 below, does not contain any exclusionary provisions for religious, cultural, political or other beliefs or conduct.

Under the "Miscellaneous" provisions in the last Part of the Act, there is a statement of principle, balancing the basic rights of persons suffering from "mental dysfunction" with those of the general public'. This requires that those who exercise powers or perform functions conferred under the *Mental Health Act, "* ensure that the restrictions on the freedom of the person are minimal and that his dignity and self respect are subject to derogation only to the extent necessary for the proper care and protection of the person and the protection of the public." There is no remedy for breach of this provision (nor does its location in the legislation suggest that it is accorded emphasis or prominence).

The *Mental Health Act* requires the Director of Mental Health Services to appoint a "prescribed representative ... as soon as practicable after a person is detained" under the emergency procedures' or "as soon as practicable" after application has been made for a treatment order in respect of a person'. The Act does not contain any provision defining the powers or responsibilities of such representatives (nor does any such definition exist in regulations or other legislation). The provisions for prescribed representatives certainly do not extend to guardianship or to management of estates as these functions are now provided for in the *Guardianship and Management of Property Act* and were previously covered by the application in the ACT of Part VII of the NSW *Lunacy Act* 1898.

The *Mental Health Act* does not require any finding of incapacity before a prescribed representative is appointed. An appointment of a prescribed representative ceases to have effect if the detained person notifies the Director that he or she does not want the person appointed to be his or her prescribed representative or, alternatively, if the person appointed declines to act in that role'. There is also provision for the Magistrate's Court or the Supreme Court to terminate the appointment on the grounds that the prescribed representative is not a fit and proper person or has failed to perform the (undefined) functions of the prescribed representative'. If an appointment fails or is terminated for any of these reasons, the Director is required to appoint another person as a prescribed representative'.

The *Guardianship and Management of Property Act* provides for a Guardianship and Management of Property Tribunal to be established' with the power to appoint a guardian where a person is "unable, because of a physical, mental, psychological, or intellectual condition:

> **(i) to make reasonable judgements about matters relating to his or her health or welfare; or**
>
> **to do any thing necessary for his or her health or welfare;**

and, as a result, the person's health or welfare is, or is likely to be, substantially at risk."'

Powers that may be conferred on a guardian are set out in the Act, although not exhaustively, and include decisions as to where and with whom a person is to live,

whether and for whom a person may work, as well as the power to consent to medical procedures or treatment'. The Act also expressly excludes certain powers such as voting, making testamentary dispositions and consenting to prescribed medical procedures, defined in the Act and including sterilisation, abortion and contraceptive procedures".

The *Guardianship and Management of Property Act* also gives the Tribunal power to make an order for the appointment of a Manager for all or part of a person's property if satisfied that the person is, because of a physical, mental, intellectual or psychological condition, legally incompetent to enter into a transaction in relation to the property and there is a need for decisions to be made regarding such transactions'. The Act provides that either a natural person or the Community Advocate may be appointed as Guardian and a natural person, the Community Advocate, a trustee company or the Public Trustee may be appointed as Manager'.

Apart from being available as a Guardian or Manager, the role of the Community Advocate in relation to people with mental illness is limited. The only specific function relating to mental health is the representation of forensic patients before any court or tribunal. The *Community Advocate Act* gives the Advocate broad functions in relation to people with disabilities in general. These functions include promoting the provision of services and facilities for persons who have a disability; supporting the establishment of organisations which assist such persons; encouraging the development of programs for their benefit; promoting their protection from abuse and exploitation; protecting their rights and investigating, reporting and making recommendations to the Minister on any matter relating to the operation of the *Community Advocate Act,* as referred by the Minister'. The Act also provides that the Community Advocate is only to be Guardian or Manager as a matter of "last resort" and must apply to the Guardianship Tribunal for appointment of a suitable alternative person where one can be found.

The ACT now has a *Discrimination Act* 1991 proscribing discrimination in employment, qualifying bodies, education, access to premises, goods, services and facilities, accommodation and clubs on grounds including impairment. The definition of impairment specifically includes "an illness or condition which impairs a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour"[s].

PRINCIPLE 2: MINORS

UN Principle 2 requires legal protection of the rights of minors including, where necessary, the appointment of a personal representative other than a family member.

The ACT *Mental Health Act* is unusual in making provision for the appointment of a separate representative for a minor in the context of court proceedings under the Act where the young person is not separately represented and where it appears to the

court that such representation is appropriate". The court is empowered to make whatever orders are necessary to secure separate representation of its own motion or on the application of any person including the minor. Provision is also made for the court, if it considers it in the interests of the minor to do so, to appoint a person to be their "next friend" for the purposes of bringing any application or other proceedings in a court or for the purpose of defending any proceedings brought under the Act'.

There is also provision in the *Children's Services Act* 1986, as amended in 1991, for the Community Advocate to assume an innovative role for young people in need of care under that Act. This role, originally that of Youth Advocate whose functions were transferred to the Community Advocate's office, includes the monitoring of children identified as being in need of care under the *Children's Services Act;* initiation of and participation in proceedings for detention and care orders under that Act; and a power to direct the immediate release of a child detained under provisions for urgent intervention under that Act".

PRINCIPLES 3 AND 7: LIVING, WORKING AND BEING TREATED IN THE COMMUNITY

UN Principle 3 requires that persons with mental illness have the right to live and work, as far as possible, in the community. Principle 7 provides that every patient has the right to be cared for, as far as possible, in the community (in both geographic and cultural senses) in which he or she lives. Where treatment does take place in a mental health facility, Principle 7 requires that this should be close to home, relatives and friends and that the person be returned as quickly as possible to the community.

The ACT *Mental Health Act* contains no provision for voluntary admission to a psychiatric hospital. Residents of the ACT may be admitted voluntarily to psychiatric institutions in NSW under the agreement between the ACT and NSW contained in Schedules to the *Insane Persons and Inebriates Act* and the *Mental Health Act* 1962. (In practice, voluntary patients are also admitted to facilities in the ACT.)

The form of treatment orders available under the ACT *Mental Health Act* is broad enough to allow for treatment in the community - either as an alternative to hospitalisation or following inpatient treatment".

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that a determination of mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status or membership of a cultural, racial, or religious group. Similarly,

family or professional conflict or non-conformity with prevailing values should not be determining factors.

As mentioned above, there are no exclusionary provisions in relation to the definition of mental illness under the ACT mental health legislation. The only statutory definition is of "mental dysfunction" which includes intellectual handicap. Mental dysfunction is defined as "a disturbance or defect, to a severely disabling *degree*, of perceptual interpretation, comprehension, reasoning, learning, judgement, memory, motivation or emotion."'

PRINCIPLE 6: CONFIDENTIALITY

There are no provisions in the ACT *Mental Health Act* protecting the confidentiality of those subject to the legislation. Both the *Guardianship* and *Community Advocate Acts* have prohibitions on unauthorised disclosure of information and penalties for breach'.

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards commensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication; abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

There are no provisions in the ACT mental health legislation guaranteeing equity in the provision of mental health care (compared to health care generally). Nor does the legislation provide any specific civil or criminal liability for abusive treatment or wilful neglect of patients. The Community Advocate now has a general responsibility for the protection of the rights of people with disabilities, as outlined above. It is not yet clear to what extent this will involve intervention in relation to inpatients. Other than the provisions outlined above for the appointment of "prescribed representatives", the *Mental Health Act* makes no provision for patient advocates or other safeguards from harm or neglect in psychiatric facilities.

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's needs. It also

requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

Treatment orders under the ACT *Mental Health Act* may be made only by the Magistrate's Court or by the Supreme Court. Applications to the Magistrate's Court are for treatment orders for a period of up to 28 days and are to be made jointly by a medical practitioner and a mental health officer'. Applications to the Supreme Court are for orders for further treatment, either three months or 12 months at a time'. Applications to the Supreme Court must be made by a psychiatrist and a mental health officer'. The criteria for the imposition of treatment orders are the same in both the Magistrate's and the Supreme Court. They are that by reason of mental dysfunction:

> **"(i) the person has engaged, and is continuing to engage, in behaviour that has resulted, or is likely to result, in actual bodily harm to himself or to another person;**
>
> **(ii) the person is likely to engage in behaviour that is likely to result in actual bodily harm to himself or to another person; or**
>
> **(iii) the person is in a condition of social breakdown; and**
>
> **the person has refused adequate treatment for that mental dysfunction or has refused to accept such treatment within a reasonable time after it is offered him or is, in the opinion of the Court, incapable of weighing for himself the considerations involved in making a decision whether to accept such treatment"**

As noted above, a treatment order may either involve hospitalisation or treatment in the community. A person may be directed to remain in the custody of the Director of Mental Health Services at such premises as the Director determines from time to time throughout the period of the order. Alternatively, the order may direct the person to attend such place as the Director determines from time to time for the purpose of undergoing treatment'. These provisions are broad enough to allow individualised treatment plans. In relation to both custodial and non-custodial treatment orders, the Director is authorised "to administer, or cause to be administered to [the person] such treatment for the mental dysfunction suffered by that person as the Director thinks necessary other than:

> **(a) treatment that produces or is likely to produce an irreversible physical lesion;**
>
> **(b) convulsive therapy;**
>
> **(c) treatment that has, or is likely to have the effect of subjecting the person to whom it is administered to undue stress or deprivation having**

regard to the benefit likely to result from the administration of the treatment.'

The Director is also prohibited from administering "treatment for the purposes of conducting a clinical experiment or any treatment the effects of which are not known or the beneficial effects of which have not been demonstrated clinically.""

The ACT *Mental Health Act* does not use the term "least restrictive environment," although it does contain the provision noted above, requiring the Director, police officers, doctors, and mental health officers in the exercise or performance of functions under the Act to ensure that restrictions on the freedom of the person suffering from mental dysfunction are minimal and that dignity and self-respect are subject to derogation "only to the extent necessary for the proper care and protection of the person and the protection of the public.' This provision does not extend to the exercise of powers by the courts in relation to treatment orders. Nor does it provide sanctions for breach.

The *Mental Health Act* contains specific provisions in relation to "convulsive therapy" (Ed) and psychosurgery. The administration of ECT requires authorisation by the Magistrate's Court on the application of the Director of Mental Health Services or a medical practitioner, supported by evidence of an independent psychiatrist'. The Court may only approve ECT if satisfied of all the following:-

"(a) that the therapy will result in a substantial benefit to the person;

(b) that there is no other form of treatment reasonably available that is Rely to result in the same degree of benefit to the person, and

(c) that the person is either capable of weighing for himself the considerations involved in whether to consent to the therapy and has done so in writing, witnessed by an independent person or, alternatively, is by reason of mental dysfunction incapable of weighing these considerations."'

A penalty of $1000 is provided in the Act for unauthorised administration of ECT[m].

The Act requires that psychosurgery be performed only with the approval of the Director of Mental Health Services'[s]. Approval may only be granted on application made by the medical practitioner proposing to perform the surgery, accompanied either by a statement in writing that the person on whom the surgery is to be performed understands the nature and effects of the surgery and consents to it, or by an order made by the Supreme Court consenting on that person's behalf'. Before making such an order, the Supreme Court must be satisfied that the person concerned is suffering from mental dysfunction; that the person has not refused, orally or in writing, to consent to the performance of psychosurgery; that there are grounds for believing that the person may benefit from the psychosurgery; and that all alternative forms of treatment reasonably available have failed or are likely to fail to

benefit the person'. The Director's approval of an application may only be given on the recommendation of a committee consisting of a psychiatrist, a neurosurgeon, a barrister and solicitor, a clinical psychologist and a social worker, appointed by the Board of Health to consider such applications[s]. The Act provides a penalty of $5000 or 12 months imprisormaentfor unauthorised psy&osurgery"[-].

PRINCIPLE 10: MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given for diagnostic or therapeutic purposes only, never as a punishment or for the convenience of others. All medication prescribed must be recorded in the patient's records.

The ACT mental health legislation contains no provisions relating to medication or to the recording of medication.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that case, an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances. Principle 11 specifically requires that physical restraint and involuntary seclusion be employed only if necessary to prevent immediate or imminent harm to the patient or others.

The provisions of the ACT *Mental Health Act* in relation to consent for ECT or psychosurgery are outlined under Principle 9 above. There are no exceptions allowed in relation to either ECT or psychosurgery for cases of urgent necessity. Consent to other forms of treatment under the *Mental Health Act* is not dealt with in express terms. To the extent that a form of treatment is specified in a court order in relation to an individual, that person's rights at common law to refuse such treatment would be effectively overridden. Where, however, treatment orders made by the court do not set out the forms of treatment to be administered in detail, there is at least scope for argument that common law rights survive.

As in other States, the legislation fails to clarify these important questions in relation to informed consent. The position may be capable of being clarified on a case by case basis under the ACT legislation, according to the terms of the individual court order. On the other hand, specification of individualised treatment plans by the Director would neither provide a legal basis for dispensing with the common law right

of informed consent nor would it satisfy the requirement of Principle 11 for an individualised treatment plan to be prescribed by an independent authority.

Seclusion or "confinement" and restraint under the ACT *Mental Health Act* may be used in relation to those subject to custodial treatment orders where such confinement is "reasonable and necessary to prevent the person doing harm to himself or any other person". Confinement is also permitted under the Act "to ensure that the person remains in custody and restraint is permitted "to permit treatment to be administered'. These provisions go beyond the scope of seclusion and restraint permitted by Principle 11.

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and language.

In the course of making an application for a treatment order under the ACT *Mental Health Act,* the Director of Mental Health Services is required to ensure that a written statement is given to the person concerned and to his or her prescribed representative setting out the following particulars:-

> **"(a) the nature of the application;**
>
> **(b) the nature and effects of the order sought;**
>
> **(c) the powers and duties of the Director in relation to persons who are subject to treatment orders; and**
>
> **(d) the right of the person and his prescribed representative to appeal against the making of any treatment order or to apply for the variation or discharge of such an order."'**

Provision is also made for the Director to take "all reasonable steps to ensure that an oral explanation, in similar terms, is given to the person, or to his prescribed representative as the case requires, where the person is unable to understand a written statement.'

PRINCIPLE 13: PATIENTS' RIGHTS IN MENTAL HEALTH FACILITIES

Principle 13 guarantees patients' rights to recognition before the law; privacy; freedom of communication; freedom of religion; and conditions of living as close as

possible to everyday life.

There is a provision, referred to under Principle 1 above, in the ACT *Mental Health Act* designed to protect patients' human rights and basic freedoms in general terms, requiring police officers, medical practitioners, the Director of Mental Health Services and mental health officers to ensure minimal restrictions on freedom and derogation of dignity and self respect "only to the extent necessary for the proper care and protection of the person and the protection of the public.'

In relation to emergency detention, the Act expressly entitles the detained person "to be provided with facilities for preparing a written communication and for enclosing that written communication in a sealed envelope"' and to "reasonable opportunities to communicate with other persons, other than by means of a written communication'. Moreover, the Act imposes a duty on the Director or other persons performing duties in connection with the detention, to forward any sealed envelope from the detained person to the addressee without delay". In relation to longer term detention under the *Mental Health Act,* the Director is entitled to impose restrictions on communications between the detainee and other persons "to avoid prejudicing the effectiveness" of treatment where "there are reasonable grounds for believing that it is desirable, in the interests of the effective treatment of the person, that communication between that person and other persons be restricted"'.

The are no other specific guarantees under the legislation of privacy, freedom of religion, access to recreational, educational and other facilities, except in relation to the standards set for private facilities licensed under the *Mental Health Act* and discussed under Principle 14.

PRINCIPLE 14: RESOURCES IN MENTAL HEALTH FACILITIES

This Principle requires that mental health facilities have access to the same level of resources as other health establishments, particularly in relation to staffing, equipment, care and treatment. It also requires that mental health facilities be inspected by the competent authorities at regular intervals to ensure compliance with the Principles.

The ACT *Mental Health Act* provides for the licensing of private hospitals, nursing homes, hostels and other private institutions ordinarily providing treatment and/or accommodation for people suffering from mental dysfunction". Requirements are laid down for the standards of accommodation and' physical conditions in such facilities as well as for staffing levels, the qualifications to be possessed by staff, the treatment to be provided and even recreational and educational facilities available at the licensed premises'. A licence is granted for a period of 12 months, renewable for 12 month periods". Inspectors are empowered to enter and inspect facilities and the equipment used in connection with them, including the records, books and other documents[51].

The ACT *Mental Health Act* does not, however, contain similar provisions relating to public mental health facilities. Nor are there statutory provisions, even by way of statement of principle, for equity of resources as between psychiatric and other health facilities.

PRINCIPLE 15: ADMISSION

Principle 15 requires that a person who needs treatment in a mental health facility should have access to it on a voluntary basis in the same way as for any other illness and that wherever possible admission should be on a voluntary basis.

As noted above, the only statutory provision for voluntary admission is to NSW psychiatric institutions under the arrangement between the ACT and NSW under the *Insane Persons and Inebriates (Committal and Detention) Act* and the *Mental Health Act* 1962. This arrangement also provides for a person to be conveyed or assisted to a NSW admission centre where the person has been independently examined by two medical practitioners who have each formed the opinion that he or she is mentally ill and a suitable case for admission to a NSW centre and that "the assistance of the Police Force of the Territory is desirable in conveying the person to the admission centre"[52].

PRINCIPLE 16: INVOLUNTARY ADMISSION

Principle 16 sets out the criteria for involuntary admission. It requires that a qualified mental health practitioner determine that the person has a mental illness and either that as a consequence:

> **there is a serious likelihood of immediate or imminent harm to that person or to others, or**
>
> **that failure to admit that person is likely to lead to a serious deterioration in the condition which will preclude further treatment; and that admission is necessary to provide treatment.**

Principle 16 also requires that involuntary detention be for only a short initial period pending review and that notice be given of this review to the patient, to the patient's family and to the patient's personal representative.

The ACT *Mental Health Act* contains relatively broad provisions for detention under "emergency procedures" as well as for continuing detention and for community treatment. A person may be detained for up to 72 hours by a medical practitioner or

a mental health officer who has reasonable grounds for believing that:-

(a) the person is suffering from mental dysfunction;

(b) the condition of the person gives rise to an immediate and substantial risk of actual bodily harm to the person or to another person;

(c) the person will not accept treatment which the medical practitioner or mental health officer reasonably believes is necessary to avert that risk"

Similar powers are given to a police officer who has reasonable grounds for believing that a person is suffering from mental dysfunction and that their condition gives rise to an immediate and substantial risk of actual bodily harm to that person or to another person[s]. In the course of detaining a person under these provisions, the use of "such force and assistance" as is considered necessary in the circumstances is authorised by the Act'. The Act requires that the person be detained under these provisions at "premises of the Board" (i.e. the Board of Health of the ACT) but leaves the Director of Mental Health Services the discretion to decide which premises are appropriate in the circumstances'.

During the emergency detention the person must be examined by a medical practitioner and the Director of Mental Health Services may apply to the court for a treatment order". Alternatively, if the Director is satisfied that there are no reasonable grounds for believing that the person detained meets the criteria (as listed above) for emergency detention, or if the Magistrate's Court refuses to make a treatment order or orders release from detention, the detainee must be released" The maximum period for emergency detention is 72 hours. Detention beyond 72 hours requires a custodial treatment order made by a court on application made jointly by a medical practitioner and a mental health officer[s]'.

According to the ACT *Mental Health Act*, notice of the application for a treatment order must not only be given to the person in relation to whom the order is sought, and to his or her prescribed representative, but also to any other person whose notification is considered by the court to be desirable for the proper protection of the interests of the person in question[°].

In cases of involuntary admission under the emergency procedures, the consideration by the court of the application for a treatment order constitutes an initial review process. Involuntary detention may also, however, be initiated by a custodial treatment order made by the Magistrate's Court for up to 28 days". During this period, application may be made to the Supreme Court for a further treatment order for a period up to three months and thereafter the Supreme Court may make further orders for periods of not more than 12 months at a time'. Rights of review in relation to these orders are discussed under Principle 17 below.

PRINCIPLE 17: REVIEW

Principle 17 requires that involuntary detention be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an involuntary patient and should take place as soon as possible after admission. The principle also requires that the review body's procedures be simple and expeditious and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.

The ACT *Mental Health Act* provides that the court which has made a treatment order has the power to vary or to discharge the order[$]. The Act does not confer any express powers upon the Director of Mental Health Services or on a medical practitioner to discharge a person from involuntary detention before the expiration of the term of the court order. However, courts may accommodate this by making orders which are not specific as to term, rather than setting the maximum possible, thus leaving the date of discharge to the discretion of the Director or medical practitioner.

There is also provision under the *Mental Health Act* for an appeal to the Supreme Court from an order made by the Magistrate's Court under the Act".

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that a patient be entitled, in relation to any complaint procedure or appeal, to an interpreter and to legal representation - neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative. The decision should only be distributed further after consideration of the wishes and interests of the patient as well as the interests of the public.

The ACT *Mental Health Act* makes certain limited provision for procedural safeguards in relation to applications for treatment orders. These include the provisions referred to under Principle 16 above, for service of notice of the application on the person concerned and his or her prescribed representative as well as on any other person that the court considers it desirable to notify[°]. The Act also specifies the method of service. As mentioned under Principle 12 above, there is a statutory requirement for a written or oral explanation to be given to the applicant setting out particulars of the nature of the application, the nature and effects of the

order sought, the powers and duties of the Director in relation to persons subject to treatment orders and the rights of the person and his or her prescribed representative to appeal or to apply for variation or discharge of an order°. There is a statutory right for the person in respect of whom a treatment order is sought to be present during the hearing of the application unless the court is satisfied that in the circumstances the presence of the person "would not be practicable'.

No requirement is specified in the ACT *Mental Health Act* for legal representation, nor for access to interpreters. The Act requires applications for treatment orders to be heard in chambers both in the Magistrate's Court and in the Supreme Court". Apart from court officers and parties to the application, those entitled to be present are representatives, including prescribed representatives; prescribed relatives of parties to the application if their presence is requested by the party; witnesses and persons nominated by the Human Rights Commissioner of the Human Rights and Equal Opportunity Commission". The court may give leave for other persons to be present'.

The common law would require full compliance with the rules of natural justice by either the Magistrate's or the Supreme Court, even for applications heard in private session. This would allow rights of access to information and rights to call witnesses to the hearing of an application. There are no statutory provisions, however, under the ACT mental health legislation to assist a person in the preparation of his or her case.

PRINCIPLE 19: ACCESS TO INFORMATION

Principle 19 requires that a patient or a former patient be given access to information from his or her medical and personal records. It also provides the right to have personal records amended.

There are no provisions in the ACT mental health legislation for a patient or former patient to gain access to information from his or her health or personal records held by a mental health facility, although there is a *Freedom of Information Act* 1991.

PRINCIPLE 20: FORENSIC PATIENTS

Principle 20 requires that forensic patients, or any person detained in the course of criminal proceedings or investigations who is believed or determined to have a mental illness, receive the best available mental health care, as provided in Principle 1. It also requires that the other Principles apply to such persons "to the fullest extent possible with only such limited modifications and exceptions as are necessary in the circumstances". Specifically, Principle 20 envisages that a court or tribunal may, on appropriate medical advice, admit these persons to a mental health facility.

There is no provision in the ACT *Mental Health Act* for forensic patients. The only processes by which a person may be diverted from the criminal justice system to psychiatric care are under the provisions of the NSW *Lunacy Act* 1898 and the corresponding provision in the Commonwealth *Crimes Act* 1914, otherwise repealed, which are still in force in the ACT. These provide for persons charged with offences and found to be "insane" or those acquitted "on the ground of insanity"' to be held "in strict custody". A person acquitted on this ground must be held "during the Governor's pleasure'". There are no statutory procedures for review of such detention.

A person found unfit to be tried must also be held in strict custody'. Under the ACT *Mental Health Act* 1962 there are procedures by which a person detained in a NSW institution who has been committed for trial for an offence against ACT law may be returned to the ACT for the purpose of having the court in the Territory determine the person's fitness to plead and then, if found unfit to plead, returned to the NSW institution in which he or she had been detained previously'.

The provision in the *Community Advocate Act* for representation of forensic patients by the Community Advocate' extends to a person who has been apprehended by police if the police believe that the person "may be suffering from a mental dysfunction". It also applies to those found by a court to be unfit to be tried by reason of mental dysfunction; to those acquitted on the ground of insanity and to those found guilty of an offence and who are mentally ill or become so while serving a prison sentence'. However, the Community Advocate is responsible only for representing forensic patients before the Guardianship and Management of Property Tribunal and courts'[s]. The function does not specifically require the Advocate to be present during police interrogation. Moreover, in practice, the Community Advocate's resources are limited to the representation of forensic patients in cases involving serious offences.

PRINCIPLES 21 AND 22: COMPLAINTS AND MONITORING

Principle 21 stipulates that every patient and former patient has the right to make a complaint through procedures provided by statute. Principle 22 requires appropriate mechanisms: to promote compliance with the Principles; for inspection of mental health facilities; and for investigation and resolution of complaints.

The ACT mental health legislation makes no provision for processing complaints or for monitoring standards or compliance with the Principles other than the provisions referred to above, under Principle 14, for the licensing and inspection of private psychiatric facilities. There is no equivalent of the Victorian Health Services Commissioner or the Queensland Health Rights Commissioner. There is no provision for Official or Community Visitors or an equivalent watchdog of institutional standards and conditions.

As noted above, the Office of the Community Advocate has, among other functions, responsibility for promoting the provision of services and facilities for people with disabilities and protecting them from abuse and exploitation'. The Advocate is given the power to do "all things necessary or convenient to be done in connection with the performance of his or her functions'. However, there is also a specific power to investigate complaints concerning the administration of the *Community Advocate Act* and to investigate complaints concerning the actions of a Guardian or Manager acting or purporting to act under an enduring power of attorney'. These express provisions would limit the scope of the Community Advocate's power in relation to complaint handling to the matters specified.

1. Unless otherwise specified, references to the *Mental Health Act are* to the Act of 1983.
2. *Mental Health Act,* section 80.
3. ibid, section 22.
4. ibid, section 31.
5. ibid, sections 21(2) and 31(2).
6. ibid, sections 22A and 31A.
7. ibid, sections 22(3) and 31(3).
8. *Guardianship and Management of Property Ac4* section 57.
9. ibid, section 7(1).
10. ibid, section 7(2).
11. ibid, section 7(3).
12. ibid, section 8.
13. ibid, section 9.
14. *Community Advocate Act,* section 1.3.
15. *Discrimination Act, section* 4.
16. ibid, section 77.
17. ibid, section 76.
18. *Children's Services Act* 1986, sections 70 - 106.
19. ibid, section 35.
20. ibid, section 4.
21. *Community Advocate Ac4* sections 19 and 20; *Guardianship and Management of Property Ac4* sections 49 and 66.
22. *Mental Health Act* sections 28 and 36(1).
23. The term Mental Health Officer is defined in section 12 of *the Mental Health Act* as a mental health nurse, psychologist or social worker appointed by the Board of Health.
24. ibid, section 36 (2) and (3).
25. ibid, section 28 (4).

26. ibid, section 34.
27. ibid, section 35(1)(a).
28. ibid, section 35(1)(b).
29. ibid, section 37.
30. i d .
31. ibid, section 80.
32. ibid, section 45.
33. i d .
34. i d .
35. ibid. section 49.
36. ibid. section 50.
37. ibid, section 57.
38. ibid. sections 51-53.
39. ibid. section 49.
40. ibid. section 38.
41. ibid. section 32(1).
42. ibid. section 32(2).
43. ibid. section 80.
44. ibid. section 26(1).
45. ibid. section 26(3).
46. ibid. section 26(3).
47. ibid. sections 41 and 42.
48. ibid. section 60.
49. ibid. sections 61 and 62.
50. ibid. section 62.
51. ibid. sections 71 and 72.
52. *Mental Health Act* 1962, section 4.
53. ibid. section 21(1).
54. ibid. section 21(2).
55. ibid. section 21(1) and (2).
56. ibid., section 21(4).
57. ibid. section 28.
58. ibid. section 24.
59. ibid. sections 23 and 24.
60. ibid. section 29.
61. ibid., section 36(1).
62. ibid. section 36(2) and (3).

63. ibid, section 43.

64. ibid, section 44.

65. ibid, section 29.

66. ibid, section 29.

67. ibid, section 32.

68. ibid, section 33.

69. ibid, section 74.

70. ibid. section 75.

71. i d .

72. Part V of the NSW *Lunacy Act* and section 20B of the Commonwealth *Crimes Act.*

72. *Lunacy Act* section 65; *Crimes Ac4* section 20B(2).

74. *Lunacy Ac4* section 66; *Crimes Act,* section 20B(1) and (2).

75. *Mental Health Act* 1962, section 5.

76. *Community Advocate Ac4* section 13(m).

77. ibid. section 3.

78. ibid. section 1.3(m).

79. ibid. section 13.

80. i d .

81. ibid. section 14.

NSW MENTAL HEALTH LEGISLATION

INTRODUCTION

The NSW *Mental Health Act* 1990 is the product of a protracted process of review and follows the passage of the *Mental Health Act* 1983, which contained a number of provisions considered by many to be too legalistic and "civil libertarian". The most controversial provisions of the 1983 legislation were never proclaimed. The 1990 Act was designed to provide an improved balance in relation to contentious matters such as the criteria for involuntary admission and the appropriate standard of proof required for a finding that a person is mentally ill. (The 1983 Act required that this standard be a "very high probability")

The *Mental Health Act* 1990 is complemented by the NSW *Disability Services and Guardianship Act* 1987 and the NSW *Mental Health (Criminal Procedure) Act* 1990, which are referred to where relevant.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. It also deals with rights associated with lack of legal capacity, including the right to have a determination made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

Many of the civil, political, economic and social rights referred to in UN Principle 1 are discussed below in relation to more specific Principles such as those concerning the right to live in the community and the safeguards relating to involuntary admission.

The *Mental Health Act* 1990 contains a clear and detailed statement' of the statutory objects and objectives of the Department of Health. The statutory objects include the protection of the civil rights of persons who are mentally ill or mentally disordered. They make the provision of "the best possible care in the least restrictive environment" - a consideration relevant to every function, jurisdiction or discretion performed or exercised under the Act. A further statutory object requires that in the

provision of care and treatment, "any restriction on the liberty of patients and other persons who are mentally ill or mentally disordered and any interference with their rights, dignity and self respect are kept to the minimum necessary in the circumstances."

Departmental objectives include development, as far as practicable, of standards and conditions of care and treatment which are "in all possible respects at least as beneficial as those provided for persons suffering from other forms of illness"; "support [for] the patient and the community"; and ensuring that "patients and other persons who are mentally ill or mentally disordered are informed of their legal rights and other entitlements under this Act ... in the language, mode of communication or terms that they are most likely to understand."

While the statement of these objects and objectives does not in itself create enforceable rights, it does serve as an aid to the interpretation of other sections of the legislation and as a guide to those responsible for implementing the legislation.

The Act contains other specific provisions dealing with certain aspects of care or treatment, notably a duty to ensure "so far as is reasonably practicable" that a person appearing before a Magistrate for an inquiry to determine whether he or she should be detained as an involuntary patient is dressed in street clothee; and a penalty provision for the wilful striking, wounding, ill-treatment or neglect of a patient or person detained in a hospital'.

Among the most important of these provisions is the continued emphasis on care and treatment in the least restrictive environment. This is made a specific consideration of each level of decision making from first admission through all levels of review. The Act also introduces as alternatives to hospital admission, community treatment orders and community counselling orders which may be made by Magistrates or by the Mental Health Review Tribunal.

There are no automatic consequences of involuntary admission for a person's rights in relation to his or her control of property or personal affairs. Where, on the other hand, a person has been determined after inquiry by a Magistrate, the Supreme Court, the Mental Health Review Tribunal or the Guardianship Board under the *Protected Estates Act* 1983 to be incapable of managing their own affairs, the administration of their property may be vested in another person who may be a private individual or the Protective Commissioner. If someone is incapacitated by disability and in need of a guardian for the conduct of their personal affairs then, under the *Disability Services and Guardianship Act* 1986, the

Guardianship Board or the Supreme Court can appoint either an individual as guardian or the Public Guardian.

A further reflection of the recognition given to civil, political, social and cultural rights is the express exclusion in the *Mental Health Act* of certain beliefs, activities, or forms of behaviour from consideration as sufficient for a determination of mental illness or disorder. The list of matters includes political or religious opinions, beliefs or activities, "immoral conduct", and "anti-social behaviour". There is no express reference to ethnic

or cultural differences. There is, however, a requirement in relation to magisterial inquiriess and in relation to inquiries by the Mental Health Review Tribunal' to give due regard to "any cultural factors relating to the person which may be relevant to the determination" of whether or not the person is a mentally ill or mentally disordered person. There is also provision for decisions to take account of expert evidence concerning the person's cultural background and its relevance to mental illness.

Freedom from discrimination on the ground of mental illness is not dealt with in the *Mental Health Act,* except to the extent that the Departmental objectives require the development of standards and conditions of care and treatment for persons who are mentally ill or mentally disordered which are in all possible respects as least as beneficial as those provided for persons suffering from other forms of illness. Discrimination in other areas of life would more properly be dealt with by the anti-discrimination legislation. However, it is a matter of some controversy whether the NSW *Anti-Discrimination Act* 1977 covers mental illness and, if so, to what extent. The definitions of physical and intellectual disability contained in that Act concerning prescribed grounds of discrimination may be wide enough to cover those forms of mental illness with a physiological aetiology. However, other forms of mental illness (and there are many) are almost certainly not covered by the NSW anti-discrimination legislation in its present form.

PRINCIPLE 2: MINORS

UN Principle 2 requires legal protection of the rights of minors including, where necessary, the appointment of a personal representative other than a family member.

The only specific protections provided by the *Mental Health Act* to children and young people are the provisions' relating to admission as an informal patient. These require notification of the parents or guardian of a person under the age of 16 admitted to a hospital as an informal patient; discharge of an informal patient of 14 or 15 years of age if a parent or guardian objects to the admission unless the patient elects to continue with the voluntary admission; a right of a parent of a person under the age of 14 to object in advance to the young person's admission as a voluntary patient; and a right to have a voluntary patient under the age of 14 discharged.

PRINCIPLES 3 AND 7: LIVING, WORKING AND BEING TREATED IN TUE COMMUNITY

UN Principle 3 requires that persons with mental illness have the right to live and work, as far as possible, in the community. Principle 7 provides that every patient has the right to be cared for, as far as possible, in the community (in both geographic and cultural

senses) in which he or she lives. Where treatment does take place in a mental health facility, Principle 7 requires that this should be close to home, relatives and friends and that the person be returned as quickly as possible to the community.

An important statutory theme of the *Mental Health Act,* as stated in the objects and reiterated in relation to each determination leading to involuntary admission, is the promotion of "the least restrictive alternative" with provision for ongoing psychiatric treatment in the community, including drug therapy and counselling. However, the Act contains a significant qualification of this principle in relation to reviews by Magistrates or by the Mental Health Review Tribunal. Under a provision for deferred discharge, a person may be detained for a further 14 days after a finding that he or she must be discharged because he or she is not a mentally ill persons.

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that the determination that a person has a mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status or membership of a cultural, racial, or religious group. Similarly, family or professional conflict or non-conformity with prevailing values should not be determining factors.

The definition of mental illness is contained in the Dictionary of Terms in Schedule 1 to the Act. It is defined as a condition "which seriously impairs ... the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

(a) delusions;
(b) hallucinations;
(c) serious disorder of thought form;
(d) a severe disturbance of mood.
(e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs a) to d)".

The device of defining mental illness by reference to symptoms avoids many of the pitfalls of other legislative definitions. The requirement of the presence of at least one of the specified symptoms ensures that the scope of the definition is relatively liznitecr. A person suffering from senile or another form of dementia who does not also display one of the symptoms specified in the statutory definition of mental illness could not be found to be mentally ill.

On the other hand, the Act also provides for the brief involuntary admission of persons who are "mentally disordered", a condition which may or may not coincide with mental illness, where "the person's behaviour for the time being is so irrational as to justify a

conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:

(a) for the person's own protec-tion from serious physical harm; or

(b) for the protection of others from serious physical harm."°

The category of mentally disordered person is a legislative shortcut to involuntary admission, bypassing the definition of mental illness. A person detained as mentally disordered must be examined every 24 hours by a medical officer and released if a less restrictive alternative is available". The detention must not exceed three working days". Moreover, a person may not be detained in this way on more than three occasions per month'. These safeguards attempt to balance the individual's right to treatment and the community's right to protection against harm which could be occasioned by the exercise of individual rights such as liberty and freedom from arbitrary detention. An analysis of the findings of the Implementation Monitoring Committee (established in 1990) and the evidence to the National Inquiry concerning the Human Rights of People with Mental Illness may indicate whether the appropriate balance has been achieved.

PRINCIPLE 6: CONFIDENTIALITY

Principle 6 guarantees the right to confidentiality in respect of information concerning persons with mental illness.

There is a general guarantee of confidentiality contained in the *Mental Health Act'* which prohibits a person from disclosing any information obtained in the course of the Act's administration or execution unless the disclosure is made:

with the consent of the person concerned;

in connection with the administration or execution of the Act;

for the purpose of any legal proceeding arising out of the Act, in connection with an Inquiry under the *Ombudsman Act* or with any "other lawful excuse".

There are, in addition, specific provisions in relation to both Magistrates' inquiries and inquiries by the Mental Health Review Tribunal' allowing for an order prohibiting the publication of a person's name or of any information which would identify or lead to the identification of any such person.

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards co mmensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication; abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

In addition to the general statements in the objects and objectives'[6], there are specific provisions of the Act providing for access to hospital or community based treatment with certain qualifications; making it an offence for any person employed in a hospital to wilfully strike, wound, ill-treat or wilfully neglect a patient or person detained in a hospital;" and providing safeguards in relation to the administration of medication. These are discussed in detail under Principle 10, below.

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's needs. It also requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

The provisions in the *Mental Health Act* for admission and detention of involuntary patients require that the Medical Superintendent, the Magistrate or the Mental Health Review Tribunal respectively's not detain or continue to detain where a less restrictive alternative is available, subject to the power to defer discharge for up to 14 days.

The Act contains certain ethical safeguards in relation to doctors' certification of individuals as mentally ill or mentally disordered. Medical practitioners must personally conduct examinations of the persons concerned: it is prohibited for the examination to be conducted by a doctor on whose certificate or request a person has been admitted to a hospital". Moreover, a person may not be admitted to a hospital on the certificate of a medical practitioner who is a near relative of the person detained"; and a doctor who has a direct or indirect pecuniary interest in any authorised hospital must disclose that fact, with particulars of the interest, when providing an opinion to a Superintendent that an individual is a "mentally ill" or "mentally disordered person."

A broad discretion is conferred by the *Mental Health Act* on the Medical Superintendent (and therefore on the medical officer nominated by the Superintendent) to give or authorise "such treatment (including any medication) as the Medical Superintendent thinks fit to a person detained" under the Act. However, there is no express statutory provision for individualised treatment plans, other than under community treatment orders or community counselling orders.

The provisions in the Act for community counselling orders and community treatment orders" allow treatment and care outside the hospital setting, either without hospitalisation or following it. They also provide for the consequences of breach of community counselling or treatment orders, including apprehension by the police who are empowered to enter premises using reasonable force alvd to apprehend the person without a warrant. The purpose of such apprehension is to take the person to the appropriate health care agency. In the case of a community treatment order, this may include a hospital. In the case of a community counselling order, a person can not be forced to take medication. A non-compliant person could, however, be subject to involuntary admission procedures where these are appropriate.

The *Mental Health Act* makes special provision in relation to specific forms of treatment for mental illness, particularly psychosurgery and electro convulsive therapy (ECI), both of which are the subject of elaborate safeguards. Certain forms of treatment, including deep sleep and insulin coma therapy, are prohibited. These provisions of the Act apply not only to patients in public hospitals but also to private psychiatric patients or patients in general hospitals'.

Safeguards concerning ECT include the mandatory administration of anaesthesia"; a requirement that at least two medical practitioners be present during the therapy's; and the requirement that ECT be administered only at a hospital or a place approved by the Director-Genera1[25]. There are also detailed requirements for obtaining informed consent prior to the administration of ECT, including the provision of "a fair explanation ... of the techniques or procedures to be followed"; "a full description ... of possible attendant discomforts and risks"; and "a full disclosure ... of appropriate alternative treatments, if any.[26]

Where a person is considered incapable of giving informed consent or has refused and is in a life threatening emergency, two medical practitioners, one of whom must be a psychiatrist, must certify that ECT therapy is reasonable and proper and necessary immediately to save the patient's life. This must be followed up by a written report to the Mental Health Review Tribunal. If the patient still does not consent, the Mental Health Review Tribunal can determine whether ECT therapy is necessary or desirable for the safety or welfare of the patient".

Psychosurgery cannot be performed unless the Psychosurgery Review Board consents, regardless of whether the person concerned consents. The Psychosurgery Review Board consists of seven part-time members, including a legally qualified President, a neuro-surgeon, a neurologist or neuro-scientist, a clinical psychologist, a person nominated by the Council for Civil Liberties and two psychiatrists'. Before consenting to psychosurgery, the Board must conduct a public hearing at which the would-be patient may be legally represented. The Board must be satisfied that the patient is capable of giving informed consent; that the psychosurgery proposed has clinical merit; that the doctors are properly qualified; and that the hospital is a proper place at which to perform it. Where the Board is not satisfied that a patient is capable of giving consent but is satisfied of the other matters set out above, the Board must state a case for the Supreme Court which may determine whether a patient is capable of giving informed consent and, if not, whether it should give consent on the person's behalf.

PRINCIPLE 10. MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given- for -diagnostic or therapeutic purposes only, never as a punishment or for the convenience of others. All medication prescribed must be recorded in the patient's records.

In addition to the prohibited treatments referred to above (deep sleep, insulin coma or any proscribed by regulation in the future)", there are several statutory safeguards in relation to medication. The most general of these, applicable to the administration of medication to someone who "is or is suspected to be suffering" any mental illness or "any mental condition", requires that the dosage or dosages of any drug administered is not "excessive or inappropriate" according to "proper professional standards"[31]. There are also requirements that in administering or authorising the administration of a drug, "due regard" be given to the possible effects of the medication and that the doctor prescribe only the "minimum medication consistent with proper care to ensure that the person is not prevented from communicating adequately with any other person who may be engaged to represent that person at an inquiry"[32].

The Act requires the Medical Superintendent of a hospital to establish and maintain an internal review system to monitor and review the prescription and utilisation of drugs in use within the hospital, including information as to frequency of administration, dosage and intended and unintended effects and appropriateness of use[33]. The Act also places a general responsibility on the "Director of a health care agency" in relation to the treatment of persons under community counselling orders and community treatment orders "to keep under review the prescription and use of drugs" in connection with such orders'. The Director is required to provide information regarding the particulars of the "kind and dosages of medication" administered to each individual.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that case, an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances. Principle 11 specifically requires that physical restraint and involuntary seclusion be employed only if necessary to prevent imminent or immediate harm to the patient or others.

There are certain rights to informed consent and to refuse treatment recognised at common lavv[35]. In addition, the *Disability Services and Guardianship Act affirms, as* two of its fundamental principles, the need to restrict as little as possible the freedom of decision and freedom of action of people with disabilities; and the need to take into

consideration the views of such persons in the exercise of functions under the Act. Part 5 of this Act contains detailed provisions for consent to medical or dental treatment for those who are over 16 and incapable of giving consent on their own behalf. These include the statement that in the event of inconsistency with the provisions of the *Mental Health Act,* the latter shall prevail. The *Disability Services and Guardianship Act* also affirms the right of medical practitioners to carry out treatment that is " necessary, as a matter of urgency, ... in order to save the patient's life or to prevent serious damage to the patient's health". [36]

The *Mental Health Act* does not contain any provision for informed consent in relation to general psychiatric treatment. It does have such a provision in relation to general surgical operations to be carried out on involuntary patients in psychiatric hospitals. It also contains elaborate provisions in relation to psychosurgery and ECT (discussed above) for informed consent to be obtained or for alternative safeguards where a person is incapable of consenting or where circumstances make it impracticable to obtain such consent. In contrast, the *Mental Health Act* confers on the Medical Superintendent (or his or her nominated medical officer) the power to "give or authorise the giving of such treatment (including any medication) as he or she thinks fit" to patients detained under the Act'. The exercise of this power is not limited to those incapable of consenting for themselves. It appears to abrogate the common law right of informed consent as far as involuntary patients (including forensic patients) are concerned'.

The position of voluntary patients under the Act is less clear. The power conferred on the Medical Superintendent does not extend to them and they are, at least in theory, free to leave at any time. However, short of exercising this right, they may effectively waive their right to informed consent and to refuse specific forms of treatment.

The *Mental Health Act* does not lay down any statutory principle or guideline for the use of physical restraint or involuntary seclusion - other than the general prohibition, referred to above, of wilful striking, wounding, ill-treatment or neglect of a patient".

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and language.

One of the objectives in the NSW legislation is "to ensure that patients and other persons who are mentally ill or mentally disordered are, in accordance with this Act, informed of their legal rights and other entitlements under this Act ... in the language, mode of communication or terms that they are most likely to understand'. This is translated into a specific requirement that before a person is certified as mentally ill or mentally disordered, the Medical Superintendent must give him or her an oral explanation and a written statement, in a prescribed form, of his or her rights and other entitlements under the Act". Moreover, after a Magistrate makes an order for someone to be admitted as a temporary patient, the Medical Superintendent must ensure that person is given a

statement, in the prescribed form, of rights of appeal 42. The Superintendent is also responsible for ensuring that someone being discharged is provided with "appropriate information as to such follow-up care as may be available'.

PRINCIPLE 13: PATIENTS' RIGHTS IN MENTAL HEALTH FACILITIES

Principle 13 guarantees patients' rights to recognition before the law; privacy; freedom of communication; freedom of religion; and conditions of living as close as possible to everyday life.

The objects of the NSW Act make reference to dignity and self respect and, more specifically, to the religious, cultural and language needs of people who are mentally ill or mentally disordered. There is an express provision in the Act which states that the fact that someone is suffering from mental illness or some other mental condition is presumed not to be an impediment to the legal representation of the person before the Mental Health Review Tribunal, a Magistrate's inquiry under the Act, a Court or the Psychosurgery Review Board".

Protection of patients' rights to confidentiality is discussed above under Principle 6. The right to privacy is not, however, specifically protected except in relation to the receipt or dispatch of mail. The only exception to this is where an addressee has given written notice requesting that communications by the patient to that person be withheld".

No provision is made in the Act for educational, recreational or similar facilities to be made available to patients in mental health facilities.

PRINCIPLE 14: RESOURCES IN MENTAL HEALTH FACILITIES

This Principle requires that mental health facilities have access to the same level of resources as other health establishments, particularly in relation to staffing, equipment, care and treatment. It also requires that mental health facilities be inspected by the competent authorities at regular intervals to ensure compliance with the Principles.

While equity in the standards and conditions of care and treatment for people with mental illness as compared with those with other illnesses receives recognition as an objective of the Department", it is a matter largely beyond the scope of the Act to procure.

The Act contains detailed provisions for the gazetta1[47] and licensing of hospitals - including provisions allowing terms and conditions to be attached to a licence" and for cancellation or variation of a licence". These provisions include the requirement that any private hospital at which a person is being treated primarily for mental illness must be licensed.

The Act provides for the appointment of Official Visitors to inspect hospitals and other health care agencies and to report to the Minister". It also provides for inspection of hospitals by other authorised officers who must undertake inspections, investigations and inquiries with respect to the care, treatment or control of patients and with respect to the management of the hospital'. These provisions will be considered in more detail under Principles 21 and 22 below.

PRINCIPLE 15: ADMISSION

Principle 15 requires that a person who needs treatment in a mental health facility should have access to it on a voluntary basis, in the same way as for any other illness, and that wherever possible admission should be on a voluntary basis.

Provision is made in the *Mental Health Act* for a person to be admitted to a hospital as an informal (voluntary) patient on an application to the Medical Superintendent made by the person concerned or, in the case of a person under guardianship within the meaning of the *Disability Services and Guardianship Act*, by the person's guardian'. The Act allows the Superintendent to refuse to admit a person as a voluntary patient if he or she is not satisfied that the person is likely to benefit from care or treatment as an informal patient". There are special provisions for the admission of young persons (under 16, between 14 and 15 and under 14) as informal patients as discussed under Principle 2, above. A person refused admission as an informal patient may apply to the Superintendent for review of the refusa1[55].

The Superintendent is also given the discretion to take steps to have an informal patient detained as an involuntary patient if he or she thinks it appropriate[56].

PRINCIPLE 16: INVOLUNTARY ADMISSION

Principle 16 sets out the criteria for involuntary admission. It requires that a qualified mental health practitioner determine that the person has a mental illness and that either as a consequence:

> **there is a serious likelihood of immediate or imminent harm to that person or to others; or**
>
> **that failure to admit that person is likely to lead to a serious deterioration in the condition which will preclude further treatment and that admission is necessary to provide treatment.**

Principle 16 also requires that involuntary detention be for only a short initial period pending review and that notice be given of this review to the patient, to the patient's family and to the patient's personal representative.

Involuntary admission for mental illness under the NSW *Mental Health Act* requires certification by at least two medical practitioners, one of whom must be a psychiatrist. The practitioners must certify that, in their opinion, a person not only suffers from a mental illness but also fulfils the statutory criteria for a "mentally ill person'. This category-is narrower than- required by Principle -16 in that it involves a finding that treatment or control is necessary to protect the person concerned or others from serious physical harm, or necessary to protect the person's reputation or financial situation. The latter two criteria apply only in the case of a mental illness characterised by sustained or repeated irrational behaviour indicating severe disturbance of mood". A person can only be detained as a mentally disordered person on a finding that care, treatment or control is necessary to the protect the person concerned or others from serious physical harm".

The Act requires that a person detained in a hospital must be examined by the Medical Superintendent not more than four hours after arrival and must not be detained unless the Superintendent considers the person to be a mentally ill or mentally disordered person'. The only exception to this is for a person detained after apprehension by police on suspicion of committing an offence or attempting to kill or otherwise harm themselves. Subject to a series of safeguards set out in the Act', such persons may be detained in hospital for a period not exceeding one hour after a determination not to detain them as mentally ill or mentally disordered. Following a determination that a person should be detained as a mentally ill or mentally disordered person, that person must, as soon as practicable, be examined by another medical practitioner who must be a psychiatrist if the Medical Superintendent was not". In the case of a difference of opinion between the doctors conducting the two examinations, a third examination must be performed by a psychiatrist'. If a second medical practitioner is also of the opinion that a person is neither a mentally ill person nor a mentally disordered person, the Act requires that he or she not be further detained".

PRINCIPLE 17: REVIEW

Principle 17 requires that involuntary detention be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an involuntary patient and should take place as soon as possible after admission. The principle also requires that the review body's procedures be simple and expeditious and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.

The first level of review provided by the NSW Act is by a Magistrate, before whom the Act requires a person to be brought "as soon as possible" after certification as a mentally ill person'. Provision is made for notice of the Magistrate's inquiry to be given to the person detained, together with information regarding his or her rights, and to the person's relatives. Provisions are made for legal representation of the person at the inquiry and for access by the person and the legal representative to relevant medical records'.

If a Magistrate finds that a person is not mentally ill, that person must either be released or held in a hospital for a period not exceeding 14 days on a "deferred discharge"".

The Act also establishes the Mental Health Review Tribunal, with membership drawn from barristers or solicitors, psychiatrists and persons with other suitable qualifications or experience. Where a patient has been detained by order of a Magistrate and it appears before the expiration of this period of detention that it will be necessary to continue to detain that person in hospital for a longer period, the Act requires the Medical Superintendent to ensure that the patient be reviewed by the Tribunal'. The Tribunal may discharge the patient; detain him or her for a further period of observation or treatment as a temporary patient (ie. for a period not exceeding three months); or classify the person as a "continued treatment patient"".

The Act provides for further review of temporary patients still detained at the end of the further three month period'. Continued treatment patients must be reviewed by the Tribunal at least every six months'. Informal patients must be reviewed by the Tribunal at least every 12 months where such patients have been in hospital for a continuous period in excess of 12 months". The Tribunal also has powers of review in relation to forensic patients, although its powers are limited to recommendations to the Minister in respect of leave or discharge.

Where a patient has applied to the Medical Superintendent for discharge and that application has been refused or not determined within three working days, the patient or relatives may appeal to the Tribunal against the refusal or failure to decide'.

Any person dissatisfied with a determination of the Tribunal made in respect of the person or a failure or a refusal of the Tribunal to make a determination has a right of appeal to the Supreme Court".

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that a patient be entitled, in relation to any complaint procedure or appeal, to an interpreter and to legal representation, neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative. The decision should only be further distributed after consideration of the wishes and interests of the patient as well as the interests of the public.

The *Mental Health Act* expressly states that mental illness or another "mental condition" is not an impediment to representation of the person by a lawyer at an inquiry before a

Magistrate, before a Court, or before the Psychosurgery Review Board'. Specific provision is also made in the Act for individuals to have legal or other representation at an inquiry before a Magistrate', before the Mental Health Review Tribunal', or before the Psychosurgery Review Board'". At each hearing a personal appearance by the patient is also naqu.ixek -with-the proviso-in respect of The -Psychosurgew Review Board and the Tribunal that these bodies may excuse someone from personal attendance at their discretion'.

The right of access for a patient's legal representative to any relevant medical records is guaranteed in the Act, both in respect of inquiries before a Magistrate[s]" and in respect of Tribunal proceedings'. The right is qualified only by a provision giving the legal representative the right to withhold from the client information from the medical records where the representative is warned by a medical practitioner that communication of the information might be harmful. "Harmful" is not specifically qualified in terms of harm to the patient's health, or risk to the safety of others. Nor is there any requirement that the legal representative do more than "have full and proper regard" to the warning. There is, however, a power given both to the Magistrate and to the Mental Health Review Tribunal, without any specific criteria to guide their discretion, to determine that access should not be given to any medical record. The provisions in relation to the Psychosurgery Review Board are identical.

Both inquiries before a Magistrate and hearings of the Mental Health Review Tribunal are, prima facie, public - with the proviso that if the patient objects the Magistrate or Tribunal may order a private hearing'. There is also provision for orders to be made prohibiting the publication of the names of people involved in the hearings[TM].

The Act requires a Magistrate to record in writing any order or direction made following an inquiry, together with the reasons for this order or direction". The Act also requires a written record of the decision of the Mental Health Review Tribunal and provides for written reasons to be given at the request of the patient". The Psychosurgery Review Board, like a Magistrate, is required to record its decisions in writing along with its reasons for each decision".

PRINCIPLE 19: ACCESS TO INFORMATION

Principle 19 requires that a patient or a former patient be given access to information from his or her medical and personal records. It also provides the right to have personal records amended.

Although there is a right of access to records for the purposes of proceedings before a Magistrate, the Mental Health Review Tribunal or the Psychosurgery Review Board, the NSW *Mental Health Act* does not provide a patient with general access to information contained in his or her medical records. There is a right to obtain details of medication, including the nature and quantities currently or previously administered to the patient in

hospital[n] or to a person treated at a health care agency under a community treatment or community counselling order".

For more general information from medical records, a patient could make application under the *Freedom of Information Act* 1989. Additions or amendments to information on a person's medical records could also be achieved through the *Freedom of Information Act.*

PRINCIPLE 20: FORENSIC PATIENTS

Principle 20 requires that forensic patients, or any person detained in the course of criminal proceedings or investigations who is believed or determined to have a mental illness, receive the best available mental health care, as provided in Principle 1. It also requires that the other Principles apply to such persons "to the fullest extent possible with only such limited modifications and exceptions as are necessary in the circumstances". Specifically, Principle 20 envisages that a court or tribunal may, on appropriate medical advice, admit these persons to a mental health facility.

The *Mental Health (Criminal Procedure) Act* 1990 contains provisions allowing persons involved in criminal proceedings to be found unfit to be tried and ordered to be detained in a hospital or other place". It also provides for the detention in strict custody in a hospital or other place of those found not guilty by reason of mental illness'.

A person serving a sentence of imprisonment who appears to the Chief Officer of the Department of Health to be mentally ill may be transferred to hospital under the *Mental Health Act'*. This determination must be made on the basis of a certificate signed by two doctors, including a psychiatrist, who have examined the prisoner. However, the provision for this in the *Mental Health Act* leaves the criteria for determining whether or not a prisoner appears to be mentally ill to the discretion of the Chief Health Officer, unfettered by the statutory definition of mental illness".

The *Mental Health Act* contains a number of detailed provisions for such forensic patients, particularly for the review of their status by the Mental Health Review Tribunal and for such matters as security and transfer between prison and hospital. General provisions in relation to review, transfer, leave and discharge do not apply to forensic patients. Special provision is made for each of these. The Mental Health Review Tribunal is required, at intervals of not more than six months, to review the case of every forensic patient" and to make recommendations to the Minister for Health as to the patient's continued detention, care or treatment[s]; the patient's release, either conditionally or unconditionally"; and, in the case of a person found unfit to be tried, as to the fitness of the person to be tried". In contrast to the Tribunal's powers in relation to civil patients, the Tribunal has no power to make final determinations in relation to forensic patients.

Apart from these special provisions, general rights conferred on mentally ill persons apply equally to forensic patients. These include the following:

the right to freedom from wilful assault, ill treatment or neglect by hospital staff;

the right to legal representation and to an interpreter in review hearings;

other procedural rights in relation to review proceedings including confidentiality;

the right to information about medication;

rights in relation to specific forms of treatment such as psychosurgery, ECT and proscribed treatments.

PRINCIPLES 21 AND 22: COMPLAINTS AND MONITORING

Principle 21 stipulates that every patient and former patient has the right to make a complaint through procedures provided by statute. Principle 22 requires appropriate mechanisms: to promote compliance with the Principles; for inspection of mental health facilities; and for investigation and resolution of complaints.

As discussed under Principle 1, above, criminal sanctions are provided by the *Mental Health Act* for wilful assault, ill treatment or neglect of a patient by a member of staff. Disclosure of information gained in the course of administration of the Act also attracts criminal penalties. However, initiating and successfully pursuing criminal proceedings is difficult or impossible for those receiving treatment under the Act, or even after discharge.

The NSW *Mental Health Act* provides for two or more Official Visitors to visit and inspect each psychiatric hospital and health care agency at least once a month". These are medical practitioners, lawyers and other suitably qualified or interested persons" who are appointed by the Minister and given statutory powers to inspect the premises and the records of facilities and to visit and interview patients or any person receiving treatment or care under a community treatment or community counselling order at an agency'. The Official Visitors may report to the Minister".

The Health Department has established a Complaints Unit which is active in investigating consumer complaints about health services generally. Unlike Victoria and Queensland, this unit has no statutory basis. Legislation has, however, been introduced into the NSW Parliament to establish a statutory body to handle complaints about health services.

There are provisions in the *Mental Health Act* for public hospitals to be designated hospitals for the purpose of the Act by declaration of the Director-General of Health, published in the Government Gazette". Private hospitals may operate as psychiatric facilities under the Act if they are "authorised", which involves obtaining a licence from

the Director-General and making annual statements concerning the conduct of the licensed premises and the admission, *care* and treatment of patients'. There are also statutory standards as to the ratio of patients to medical practitioners at authorised hospitale, although no such provisions are made for public hospitals under the Act.

The *Mental Health Act* provides for the appointment by the Director-General of authorised officers who are subject to his or her direction and control and responsible for making inspections without notice of every psychiatric hospital'". These inspectors have statutory powers to require the production of written material and to require the provision of oral evidence, and duties to investigate the care, treatment and control of patients detained in hospitals and the hospitals' management.

1. NSW *Mental Health Act* 1990, sections 4,5 and 6.
2. ibid, section 39.
3. ibid, section 298.
4. ibid. section 11.
5. ibid, section 50(3).
6. ibid. section 268(2).
7. ibid, sections 13-15.
8. ibid, sections 52(2) and 63(2).
9. ibid, section 11. The scope is further limited by the matters stated not to be sufficient to found a determination of mental illness or mental disorder.
10. ibid, section 10.
11. ibid, section 35.
12. i d .
13. i d .
14. ibid, section 289.
15. ibid. sections 44 and 272, respectively.
16. ibid, sections 4,5 and 6.
17. ibid, section 298.
18. ibid, sections 20, 51, 57 and 66.
19. ibid, section 32(4).
20. ibid. section 21(2).
21. ibid, sections 118-143.

22. *Mental Health Act,* chapter 7.

23. ibid, section 181.

24. i d .

25. ibid, section 182.

26. ibid, section 183.

27. ibid. section 186.

28. ibid, section 189.

29. ibid, schedule 4.

30. ibid, section 197.

31. ibid, section 198.

32. ibid, sections 31, 50(2), 57(2) and 59(2).

33. ibid. section 199.

34. ibid. section 147.

35. The scope of informed consent in Australian caselaw is not clearly defined. It is, however, clearly recognised as an aspect of the law relating to medical negligence: see for example Ellis v Wallsend District Hospital (1989) 17 NSWLR 553.

36. NSW *Disability Services and Guardianship Act* 1987, section 36 (special medical treatment); section 37 (major medical treatment); section 38 (minor medical treatment).

37. *Mental Health Act,* section 31(2).

38. Although the law requires clear, express words in a statute to abrogate a right conferred at common law and it is arguable that the provision in s.31(2) does not meet this test.

39. *Mental Health Act,* section 298.

40. ibid, section 7(2).

41. ibid, section 30.

42. ibid, section 55.

43. ibid, section 293.

44. ibid, section 288.

45. ibid. section 290.

46. ibid, section 6.

47. ibid, section 208.

48. ibid, section 212.

49. ibid, sections 216-218.

50. ibid, sections 226-233.

51. ibid, sections 235-238.

52. *Disability and Guardianship Act,* section 12.

53. *Mental Health Act,* section 17.

54. ibid, sections 15 and 14, respectively.

55. ibid. section 19.

56. ibid, section 18(b).

57. See discussion of these criteria under Principle 4.

58. ibid, section 9.

59. i d .

60. ibid, section 29.

61. ibid, sections 36 and 37.

62. ibid, section 32.

63. i d .

64. ibid, section 33.

65. ibid, section 37.

66. ibid, section 38.

67. ibid, section 45.

68. ibid, section 52.

69. ibid, section 56.

70. ibid, sections 57 and 66.

71. ibid, section 58.

72. ibid, section 62.

73. ibid, section 63.

74. ibid, section 69.

75. ibid, section 281.

76. ibid, section 288.

77. ibid. section 43.

78. ibid, section 274.

79. ibid, section 159.

80. ibid, sections 274 and 159.

81. ibid, section 45.

82. ibid, section 276.

83. ibid, sections 41(1) and 272.

84. ibid, sections 44 and 273.

85. ibid, section 53.

86. ibid, section 280.

87. ibid, section 168.

88. ibid, section 300.

89. ibid, section 147.

90. NSW *Mental Health (Criminal Procedure) Act* 1990, section 17.

91. ibid, section 39.

92. *Mental Health Act,* section 97.

93. i d .

94. ibid. sections 80-82.

95. ibid, sections 85 and 89.

96. ibid, sections 84 and 101.

97. ibid. section 80.

98. ibid, sections 228 and 230.

99. ibid, section 226.

100. ibid, section 231.

101. ibid, section 233.

102. ibid, section 208.

103. ibid, section 214.

104. ibid, section 219.

105. ibid, sections 236 and 237.

VICTORIAN MENTAL HEALTH LEGISLATION

INTRODUCTION

The Victorian *Mental Health Act* 1986 and related legislation constitute a comprehensive scheme offering substantial recognition of important human rights. Victorian provisions for a Public Advocate and Health Services Commissioner have been adapted as models in recent reforms in the ACT and Queensland. However, there are also significant deficiencies - such as the failure to provide a statutory definition of mental illness and the absence of express guarantees for a number of important patient rights. Recent legislation arising from the issues raised by the case of Mr Garry David contains controversial provisions relating to the rights of certain people with mental illness or with a history of detention in a psychiatric facility.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. It also deals with rights associated with lack of legal capacity, including the right to have a determination made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

The Victorian *Mental Health Act* contains statements of statutory objects', Departmental objectives' and functions of the Chief General Manager for the Department of Health'. The statutory objects include treatment of persons who are mentally ill "in the least restrictive environment enabling the care and treatment to be effectively given" with the requirement that this care and treatment be "the best possible". The statutory objects also require that "any restriction upon the liberty of patients and other persons who are mentally ill and any interference with their rights, dignity and self respect is kept to the minimum necessary in the circumstances."

Departmental objectives include the provision of standards and conditions of care and treatment "which are in all possible respects at least equal to those provided for

persons suffering from other forms of illness" and requirements to take account of "the various religious, cultural and language needs of persons who are mentally ill" and to minimise the adverse effects of mental illness on family life. The functions of the General Manager reflect the Departmental objectives and include the promotion of informed public opinion on matters of mental health.

The criteria for admission and detention as an involuntary patient under the Victorian *Mental Health Act* specify a long list of matters which are, in themselves, insufficient grounds for considering a person to be mentally ill[4]. The list explicitly includes political, religious and philosophical opinion or belief; sexual preference or sexual orientation; political or religious activities; sexual promiscuity or immoral or illegal conduct; intellectual disability; the taking of drugs or alcohol; and having "an antisocial personality".

There are provisions in the Victorian *Mental Health Act* for apprehension by a police officer, with or without a warrant, of a person who appears to be mentally ill. A police officer, using a warrant and accompanied by a medical practitioner, may enter any premises where there are reasonable grounds for believing there is a person "who appears to be mentally ill and is because of mental illness incapable of caring for herself or himself' and may use "such force as may be reasonably necessary to enable the medical practitioner to examine that person'.

The police power to apprehend without a warrant may only be exercised if the officer has reasonable grounds for believing that:

(a) the person has recently attempted to commit suicide or attempted to cause serious bodily harm to herself or himself or to some other person; or

(b) the person is likely by act or neglect to attempt suicide or to cause serious bodily harm to herself or himself or to some other person.'

The Victorian *Mental Health Act* does not contain provisions creating civil or criminal liability for abuse, ill treatment or neglect of patients. The Victorian *Crimes Act,* as amended in 1991, creates a specific offence for employees of psychiatric services who take part or attempt to take part in indecent assaults on persons who are mentally ill and under their care, treatment or control'. Consent is no defence to such a charge. Simultaneous amendments to the *Evidence Act* 1958 dispensed with requirements for corroboration of the evidence of the mentally ill person and made other changes to facilitate the giving of evidence by witnesses with "impaired mental functioning".

Provision is made in the Act for letters written to or by patients in psychiatric facilities, other than security patients, to be forwarded to the persons to whom they are addressed without being opened'. In the case of security patients the right to send or receive correspondence without interference is subject to "such security conditions as the authorised psychiatrist considers necess

Determinations concerning lack of legal capacity and the appointment of guardians or administrators to the estates of people with mental illness who lack capacity are made in Victoria under the *Guardianship and Administration Board Act* 1986. This establishes the Guardianship Board, an independent body constituted by a legally qualified member and other members as art necessary from, time to time". Before making such a guardianship order, the Board must be satisfied that a person has a disability; that by reason of this disability the person is unable to make reasonable judgements in respect of all or any of the matters relating to his or her person or circumstances; and that the person is in need of a guardian, either plenary or

The proceedings of the Board are in public unless the Board decides otherwise'. The Board's determinations are not published unless the Board considers that it would be in the public interest to do so, in which case identifying particulars are deleted'. The Board conducts its hearings informally, in accordance with equity and good conscience but without regard to technicalities or legal forms'[s]. It is bound by the rules of natural justice'. Representation of the applicant and of the person in respect of whom the application is made is permitted but is not required.

The Board may appoint either the Public Advocate or a private individual as guardian. A plenary guardianship order confers on that guardian "all the powers and duties which the plenary guardian would have if he or she were a parent and the represented person his or her child.' Specifically the Act provides for a plenary guardian to have the power to decide where the represented person is to live and with whom; whether the represented person should be permitted to work and if so the nature of such work and the employer; and to consent to any health care that is in the best interests of the represented person". An order appointing a limited guardian may specify one or more of the powers and duties that may be conferred on a plenary guardian".

The Guardianship and Administration Board may appoint an administrator if satisfied that the person in respect of whom an application is made has a disability; is by reason of that disability unable to make reasonable judgements in respect of matters relating to all or any part of his or her estate and is in need of an administrator of his or her estate'. The administrator may be the State Trust, the Public Advocate or any other person who satisfies statutory requirements as a suitable administrator'. The administrator has the powers and duties conferred on the State Trust by the *State Trust Corporation of Victoria Act* 1987[22].

The Victorian *Equal Opportunity Act* 1984 covers discrimination on the ground of "impairment", including an impairment which has ceased to exist or an impairment which is imputed to a person. The definition of impairment in the Act expressly includes (within the scope of "malfunction of a part of the body"), "a mental or psychological disease or disorder".

PRINCIPLE 2: MINORS

UN Principle 2 requires legal protection of the rights of minors including, where necessary, the appointment of a personal representative other than a family member.

Prior to 1990, the only reference to children or young people in the Victorian *Mental Health Act* was under the functions of the Chief General Manager, the first of which was to ensure provision for "care, protection, treatment and rehabilitation of persons (including children) suffering from mental illness and its effects"'. Under the *Mental Health (General Amendment) Act* 1990 a new section was added to the principal Act, providing for the establishment of child and adolescent psychiatric services'. There are no other specific provisions for minors under the Victorian mental health legislation.

PRINCIPLES 3 AND 7: LIVING, WORKING AND BEING TREATED IN THE COMMUNITY

UN Principle 3 requires that persons with mental illness have the right to live and work, as far as possible, in the community. Principle 7 provides that every patient has the right to be cared for, as far as possible, in the community (in both geographic and cultural senses) in which he or she lives. Where treatment does take place in a mental health facility, Principle 7 requires that this should be close to home, relatives and friends and that the person be returned as quickly as possible to the community.

As discussed above, the statutory objects and Departmental objectives under the Victorian *Mental Health Act* include the statement that the provisions of the Act are to be interpreted so as to provide care and treatment in the least restrictive environment and in such a way as to minimise restriction on the liberty of patients and other persons who are mentally il. Similarly, mental health services are, according to the Departmental objectives, to take account of various religious, cultural and language needs or persons who are mentally ill and to *minimise* the adverse effects of mental illness on family life'. Moreover the Department is required to "support the patient in the community and co-ordinate with other community services". The functions conferred by the Act on the Chief General Manager lay considerable emphasis on the provision of "family care services" and the establishment of community mental health services for the purposes of facilitating treatment in the community of those who are mentally ill or suffering from the effects of mental illness wherever possible'. The Chief General Manager is also required to "consult with appropriate ethnic groups and to employ and train ethnic persons in the provision of mental health services"".

As noted above also, the admission criteria for involuntary detention exclude religious opinion, belief or activity as a sole ground for identifying a person as mentally ill". In order to admit a person as a psychiatric inpatient on an involuntary basis it is also

necessary to determine that the person cannot receive adequate treatment or *care* for mental illness "in a manner less restrictive of that person's freedom of decision and action".

***The-Mental-Health Act* provides for community treatment orders as an alternative -to inpatient treatment where a person meets the criteria for involuntary detentionm. Such community treatment orders must specify a medical practitioner to supervise the treatment and care of the patient, the place where the patient is to receive the treatment or care and the manner in which the medical practitioner is to report on the patient's progress'. The initial order must not exceed 12 months but may be renewed an indefinite number of times for periods of 12 months, during which time the person subject to the order is deemed to be an involuntary patient'.**

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that a determination of mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status or membership of a cultural, racial, or religious group Family or professional conflict or non-conformity with prevailing values should not be determining factors.

The Victorian *Mental Health Act* con sins no definition of mental illness, other than to exclude certain criteria, as discussed above, from consideration as sole grounds for a determination of mental illness. The matter is therefore left to medical professionals and, ultimately, to the Mental Health Review Board and to the courts.

Until the 1990 amendments, the Victorian *Mental Health Act* required that the medical practitioner signing any recommendation or certificate for the admission of a person as a psychiatric inpatient must have personally examined the person concerned. Under the 1990 amendments, a person may be admitted on a recommendation or certification which relies upon facts not personally observed by the medical practitioner if the medical practitioner has reasonable grounds for relying on those facts; has personally observed some fact which supports the recommendation or certificate; or has relied upon facts personally observed by another medical practitioner in a 28 day period prior to the recommendation or certificate and communicated directly to the signatory of the recommendation or certificate'.

PRINCIPLE 6: CONFIDENTIALITY

Until the 1990 amendments, the Victorian *Mental Health Act* contained no general confidentiality provisions. The only prohibitions on divulging or communicating confidential information concerning patients related to proceedings of the Mental

Health Review Board's, considerations by the Psychosurgery Review Board's and activities of Community Visitors'. The *Mental Health (General Amendment) Act* 1990 inserted a new section in the principal Act creating penalties for unauthorised disclosure of information relating to patients acquired by those engaged or employed in psychiatric health services, by proprietors of psychiatric services or by the service itself'.

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards commensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication, abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

As noted above, the Departmental objectives in the *Mental Health Act* include a legislative commitment to standards and conditions of care and treatment for those who are mentally ill which are in all possible respects at least equal to those provided for persons suffering from other forms of illness[39].

The Act contains an express provision allowing a person who satisfies the criteria for involuntary admission to a psychiatric facility and who simultaneously requires "medical treatment which is life sustaining or to prevent serious physical deterioration which can only be appropriately provided in a general hospital" to be admitted "as an involuntary patient to the general hospital for the purposes of receiving the medical treatment"'. There is also an express requirement under the Act for each patient to be "examined as to his or her mental and general health on at least an annual
basis.4111

However, there are no provisions in the *Mental Health Act* prohibiting unjustified medication or any other form of abuse or mistreatment by act or omission - with the exception of sections regulating the use of mechanical restraint and seclusion of patients, as discussed under Principle 11, below.

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's needs. It also requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

As discussed above under Principles 3 and 7, the statutory object of providing persons who are mentally ill with treatment "in the least restrictive environment" is followed through in the statutory criteria for admission as an involuntary patient. Individuals may only be admitted involuntarily if they cannot receive adequate treatment or care for their mental illness "in a manner less restrictive_ of their freedom of decision_and action'. A person who satisfies the criteria for admission as a voluntary patient may, as an alternative to detention as an involuntary patient, be placed on a community treatment order for a period of 12 months which is renewable for 12 months at a time'. During this time a person is deemed to be an involuntary patient, supervised by a specified medical practitioner at a specified place".

The Victorian *Mental Health Act* does not contain provisions for individually prescribed treatment plans. It does contain detailed provisions for the use of psychosurgery, electro convulsive therapy and restraint or seclusion of patients. Psychosurgery requires written consent from individuals on whom it is to be performed after they have been given a clear explanation of benefits, discomforts, risks, any beneficial alternative treatments and any other information concerning the procedures to be used about which may ask". The doctor who is to perform psychosurgery must also apply to the Psychosurgery Review Board" which must conduct a hearing at which potential patients may be legally represented'.

The Board must consider the following:

> **whether the person on whom the surgery is to be performed has the capacity to give informed consent;**
>
> **whether he or she has in fact given informed consent;**
>
> **whether the proposed psychosurgery has clinical merit and is appropriate;**
>
> **whether the person proposing to perform it is properly qualified;**
>
> **whether the place in which it is proposed to perform the surgery is an appropriate place; and**
>
> **whether all other reasonable treatments have already been adequately and skilfully administered without sufficient and lasting benefit".**

Any approval by the Board must specify the name of the medical practitioner to perform the psychosurgery, the nature of the psychosurgery to be performed, the place in which it is to be performed and the period within which it is to take place".

Under the Act, the Board must receive reports of all psychosurgery performed in Victoria and must review, at regular intervals, the case of anyone on whom psychosurgery has been performed'.

In relation to electro convulsive therapy, the Victorian *Mental Health Act* also requires informed consent except in the case of involuntary or security patients who are incapable of giving informed consent'. In these cases a psychiatrist must authorise ECT and the consent of the primary carer or guardian must be sought and obtained ¯"wherever possible'. There is¯a further exception to the requirement for informed consent in relation to ECT where the "nature of the mental illness from which a patient is suffering is such that the performance of the electro convulsive therapy is urgently needed"". The Act limits administration of EC T to premises licensed for the purpose and makes detailed provisions for such licensing™.

PRINCIPLE 10: MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given for diagnostic or therapeutic purposes only, never as a punishment or for the convenience of others. All medication prescribed must be recorded in the patient's records.

The Victorian *Mental Health Act* makes no reference to medication as such. Nor does it contain provisions requiring the recording of medication. The *Health Services Act* 1988 requires public hospitals to comply with directions of the Chief General Manager with regard to records among other matters', and a separate provision of that Act makes more detailed provision for records to be kept by "health service establishments"' which include private hospitals, nursing homes, hostels and supported accommodation services.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that case, an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances.

Principle 11 specifically requires that physical restraint and involuntary seclusion be employed only if necessary to prevent immediate or imminent harm to the patient or others.

As discussed under Principle 9, above, the Victorian *Mental Health Act* contains detailed provisions requiring informed consent for psychosurgery" and, with some exceptions, for electro convulsive therapy". It also expressly requires informed

consent for "non-psychiatric treatment'', defined as any surgical operation or procedure or series of related surgical operations or procedures; the administration of an anaesthetic for the purposes of medical investigation or the administration of any course of treatment or course of medication requiring a prescription or medical supervision, the primary purpose of which is not the treatment of any mental illness or the effects of mental illness'.

There are no corresponding requirements in the Act for informed consent to psychiatric treatment, other than psychosurgery and ECT. The only reference to consent in relation to general psychiatric treatment is at the end of the section relating to admission and detention of involuntary patients and effectively denies such patients the right to refuse "necessary treatment'". Previously this provision allowed for the authorised psychiatrist or guardian to consent to treatment for mental illness only in the case of an involuntary patient who was "not capable of consenting". As a result of the 1990 amendments, the provision now extends the provision for substitute consent to any involuntary patient who refuses to consent to "necessary treatment". Thus, the only remaining scope for exercising basic common law rights in relation to informed consent is for voluntary patients and for involuntary patients deemed capable of consenting who are being offered treatment other than "necessary treatment".

The provisions of the *Mental Health Act* dealing with mechanical restraint permit its use to prevent the patient from causing injury to himself, herself or any other person. However, the Act also permits mechanical restraint to be used where this is necessary for the purpose of medical treatment or to prevent the patient from persistently destroying property.' The use and form of restraint must be approved by an authorised psychiatrist or, in the case of an emergency, by the senior psychiatric nurse on duty in which case the psychiatrist must be notified without delay.' Monthly reports on the use of mechanical restraint must be sent to the Mental Health Review Board and to the Chief Psychiatrist".

There are no provisions specifically relating to chemical restraint.

Seclusion or solitary confinement also requires authorisation by the same persons as restraint, and may only be used "if it is necessary for the protection, safety or wellbeing of -

(i) the patient; or

(ii) other persons with whom the patient would otherwise be in contact"."

The Act stipulates that acutely disturbed patients must be visited in seclusion by staff at intervals of not more than 15 minutes and must be examined by medical staff at intervals of not more than four hours. There are also requirements relating to provision of food, drink and basic facilities to patients in seclusion and for reports on the use of seclusion being furnished to the Board and the Chief Psychiatrist on a monthly basis".

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and-language-

Under the Victorian *Mental Health Act an* "appropriate prescribed printed statement" advising patients of their legal rights and other entitlements under the Act, including the rights to obtain legal representation and to have a second psychiatric opinion, is to be made available to every patient on admission'. The provisions include requirements that where a patient appears to be incapable of understanding the written statement, efforts be made to convey the information in terms which the patient is most likely to understand, including translation into other languages'. The Act places the duty of ensuring compliance with these provisions on the authorised psychiatrist. The Act also requires that information including the statement of patients' rights, copies of the *Mental Health* and *Guardianship and Administration Board Acts,* along with any Departmental publications explaining the provisions of these Acts, and contact numbers and addresses for the Mental Health Review Board, the Public Advocate, the Chief Psychiatrist, Community Visitors, the Legal Aid Commission of Victoria, the Ombudsman and the Health Services Commissioner be readily accessible to all patients'".

PRINCIPLE 13: PATIENTS' RIGHTS IN MENTAL HEALTH FACILITIES

Principle 13 guarantees patients' rights to recognition before the law; privacy; freedom of communication; freedom of religion; and conditions of living as close as possible to everyday life.

The Victorian *Mental Health Act* does not contain specific guarantees of such rights as privacy or freedom of religion, other than the provisions outlined above in relation to correspondence'. However, the Act provides for the appointment by the Governor of Community Visitors' with broad functions as watchdogs of the rights of patients"; powers to inspect premises or documents and to make enquiries into the admission, detention, care, treatment and control of patients'[s]; and duties to report to the Public Advocate and to the Minister". Specifically, their functions include enquiry into the adequacy of services for the assessment and treatment of inpatients, outpatients and other persons referred for assessment and treatment; enquiry into the appropriateness and standard of facilities for the accommodation, physical wellbeing and welfare of persons receiving treatment and care for mental illness; enquiry into the adequacy of opportunities and facilities for recreation, occupation, education, training and rehabilitation; and enquiry as to the extent to which treatment or care is provided in the least restrictive environment'.

The office of the Public Advocate is created under the *Guardianship and Administration Board Act,* although its functions encompass all people with disabilities,

not only those for whom a guardian is appointer. These functions include the facilitation and encouragement of the provision and co-ordination of services and facilities by government and community organisations for people with disabilities with a view to promoting their ability to act independently, minimising restrictions on their rights, maximising utilisation of services and facilities and encouraging the involvement of voluntary organisations, relatives, guardians and friends in the management of such services and facilities". The Public Advocate is appointed by the Governor for a period of seven years and has significant independence of government, requiring a motion of both Houses of Parliament for removal'.

The powers conferred on the Public Advocate are relatively broad and include intervention in any proceedings before the Guardianship and Administration Board, representation or advocacy on behalf of any person with disability, provision of advice to any person as to the provisions of the *Guardianship and Administration Act,* investigation of any complaint or allegation that a person is under inappropriate guardianship or being exploited or abused or in need of guardianship and reporting or making recommendations to the Equal Opportunity Board for or on behalf of people with disabilities'. There are specialist mental health advocates in the Office of the Public Advocate.

It should be noted that, as in other jurisdictions, even where the relevant legislation confers power on one or several individuals to enquire into the adequacy of facilities for education, recreation, communication, rehabilitation and other basic rights addressed in Principle 13 this is not to be confined with any assumption that such facilities are therefore provided or that the right to access to them is necessarily being respected.

PRINCIPLE 14: RESOURCES IN MENTAL HEALTH FACILITIES

This Principle requires that mental health facilities have access to the same level of resources as other health establishments, particularly in relation to staffing, equipment, care and treatment. It also requires that mental health facilities be inspected by the competent authorities at regular intervals to ensure compliance with the Principles.

Under the Victorian *Mental Health Act,* the Governor may proclaim any premises provided by the State for the care and treatment of persons who are mentally ill to be an approved psychiatric hospital. The psychiatric unit of a general hospital may also be proclaimed as an approved psychiatric unit if that unit satisfies "an appropriate standard as determined by the Department"". There is no reference in the Act to approved psychiatric hospitals being required to meet any specific standard nor are the "appropriate" standards used by the Department in relation to psychiatric units set out in the Act.

The *Mental Health Act* also provides for the appointment of a qualified psychiatrist to be the "authorised psychiatrist" in respect of each psychiatric inpatient service' and for the employment of staff in mental health services under the *Public Service Act* or subject to conditions not less favourable than those which apply under that Ace'. The Act also_ requires the Chief General Manager ta appoint a Chief Psychiatrist responsible for the medical care and welfare of persons receiving treatment for mental illness". The Chief Psychiatrist has the power to visit any psychiatric service, including community health centres, psychiatric outpatients clinics, community support services and general or private hospitals that care for persons who are mentally ill, and to inspect any part of the premises; to see any person who is receiving treatment for mental illness; to make enquiries relating to admission, detention, care, treatment and control of patients; or to inspect documents relating to any patient's.

Community support services, including crisis services, residential services, community assistance or rehabilitation services, family support services, advocacy services and any other training, educational, recreational or therapeutic services are to be funded by the Department, subject to any conditions which the Chief General Manager considers appropriate, having regard to the Department's objectives and functions under the Act". A community support service can only be registered if the Chief General Manager is satisfied that the service operates in accordance with principles specified in the Act". These include service provision in the least restrictive environment; participation by consumers in the planning, operation and evaluation of the service; minimal restrictions on and interference with the rights, dignity and self respect of consumers and adequate mechanisms for assessment and review of persons receiving the service".

The Chief General Manager is empowered to enter into Profits, Funding and Services Agreements with registered community services. Community services are bound under these agreements to use the funds for specified purposes and in specified ways and to keep appropriate records in relation to the services provided". There is provision for an administrator to be appointed to a community support service where the Minister forms the opinion that it is inefficiently or incompetently managed, has failed to provide an effective service in accordance with the statutory principles, or has breached or failed to comply with any provision of the Profits, Funding and Services Agreement".

The role of Community Visitors is discussed under Principle 13 above.

PRINCIPLE 15: ADMISSION

Principle 15 requires that a person who needs treatment in a mental health facility should have access to it on a voluntary basis in the same way as for any other illness and that wherever possible admission should be on a voluntary basis.

The Victorian *Mental Health Act* provides for voluntary admission as a psychiatric inpatient, subject to the discretion of the authorised psychiatrist who may refuse admission if not satisfied that the person is likely to benefit from care and treatment as a voluntary patient". There is a right of appeal to the Chief Psychiatrist against refusal by the authorised psychiatrist". Voluntary patients may leave the inpatient service at any time or may at any time be discharged by the authorised psychiatrist. The Act also provides that where the senior psychiatric nurse on duty considers that a voluntary patient who intends to discharge himself or herself meets the criteria set out in the Act for involuntary admission, the nurse "may reasonably restrain ... and prevent the voluntary patient from discharging himself or herself for a period not exceeding six hours so that the ... patient can be examined by a medical practitioner's".

PRINCIPLE 16: INVOLUNTARY ADMISSION

Principle 16 sets out the criteria for involuntary admission. It requires that a qualified mental health practitioner determine that the person has a mental illness; and that the consequence is either:

> **a serious likelihood of immediate or imminent harm to that person or to others; or**
>
> **that failure to admit that person is likely to lead to a serious deterioration in the condition which will preclude further treatment; and that, taking account of the principle of the least restrictive alternative, admission is necessary to provide treatment.**

Principle 16 also requires that involuntary detention be for only a short initial period pending review and that notice be given of this review to the patient, to the patient's family and to the patient's personal representative.

The criteria for admission and detention as an involuntary patient under the Victorian *Mental Health Act are* as follows:-

(a) that the person appears to be mentally ill; and

(b) that the person's mental illness requires immediate treatment or care and that the treatment or care can be obtained by admission to and detention in a psychiatric inpatient service; and

(c) that the person should be admitted and detained as an involuntary patient for that person's health and safety or for the protection of members of the public; and

(d) that the person has refused or is unable to consent to the necessary treatment or care for the mental illness; and

(e) that the person cannot receive adequate treatment or care for the mental illness_in a manner less restrictive_ of that _person's freedom of decision and action."

The Act does not specify the degree of probability of risk to the person concerned or to members of the public nor of the imminence of harm.

The procedure for involuntary detention under the Victorian *Mental Health Act* requires the production of a request for detention, together with a recommendation for admission by a medical practitioner who considers that the relevant criteria for admission and detention are met". This recommendation need no longer be based on personal examination by the doctor signing the recommendation, provided that doctor relies upon a medical examination made within the previous 28 days'. A person must be admitted to a psychiatric inpatient service by a medical practitioner employed in or by that service and must be examined within 24 hours of admission by the authorised psychiatrist for that service". The authorised psychiatrist, upon examination, must either confirm the admission if satisfied that continued detention is justified or, if not so satisfied, discharge the person".

Apart from the medical procedure of confirmation by the authorised psychiatrist, the only review required under the *Mental Health Act* subsequent to admission is conducted by the Mental Health Review Board - between four and six weeks after

PRINCIPLE 17: REVIEW

Principle 17 requires that involuntary detention be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an involuntary patient and should take place as soon as possible after admission. The principle also requires that the review body's procedures be simple and expeditious and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.

The Victorian *Mental Health Act* establishes the Mental Health Review Board, consisting of a President and other members appointed by the Governor'. Their terms are for seven years in the *case* of the President and three in the case of other members, terminable at the discretion of the Governor'. In relation to members, the Governor may act on the recommendation of the Minister made after consultation with the President of the Board'. Members include those with legal qualifications, those with psychiatric qualifications and those with experience or skills

appropriate to represent the views and opinions of members of the community'".

The functions of the Mental Health Review Board involve hearing appeals against the detention of involuntary patients and security patients four to six weeks after admission; reviewing thereafter at intervals of not more than 12 months the continued detention of involuntary patients and security patients; reviewing the extension of community treatment orders; hearing appeals against refusal by the -Chief Psychiatrist to *grant leave* to security patients; hearing appeals against transfers of involuntary patients or security patients; receiving reports on the use of restraint, seclusion or electro convulsive therapy given without consent; and receiving reports on consents by guardians or authorised psychiatrists to non-psychiatric treatment of involuntary or security patients deemed incapable of giving informed consent for themselves'. In relation to the latter, the Board is empowered to issue guidelines'.

The Board has the power to discharge persons detained as involuntary patients where it is not satisfied, on hearing an appeal or review, that continued detention is necessary in terms of the criteria for involuntary detention'. Similarly, in relation to security (i.e. forensic) patients, where the Board is not satisfied upon hearing an appeal or review that the criteria for psychiatric hospitalisation under the Act are met, the Board is required to order that the person be discharged from hospital'.

A person aggrieved by a determination of the Mental Health Review Board may apply to the Victorian Administrative Appeals Tribunal for review'. There is also provision under the *Mental Health Act* for the Board, of its own motion or on the application of any person who is a party to proceedings, to reserve a question of law arising in proceedings before it and state a case for the opinion of the Supreme Courtin. The Court's opinion must be obtained and applied by the Board in determining the matter before it.

The Act also contains a number of provisions concerning the procedure of the Board which are discussed under Principle 18 below.

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that a patient be entitled in relation to any complaint procedure or appeal, to an interpreter and to legal representation, neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative with further distribution only after consideration of the wishes and interests of the patient as well as the interests of the public.

The Mental Health Review Board is required by the Act to conduct its hearings "according to equity and good conscience without regard to technicalities or legal forms". The Act also states that the Board is not required to conduct proceedings in a formal manner; that it is bound by the rules of natural justice but is not bound by rules of evidence; and may inform itself in such manner as it thinks fit. There is no specific provision in the Act for access to an interpreter, although this may well be considered to come within the requirements of the rules of natural justice. There is a statutory right to representation before the Board' and the Board has the power to appoint a person to represent the patient in proceedings where the patient is not represented'''. There is no provision for payment for such representation.

The Act provides that proceedings of the Mental Health Review Board are to be closed to members of the public, with the proviso that the Board may direct that particular proceedings or any part of the proceedings are to be open to the public if the Board is satisfied that it would be in the best interests of the patient or the public to do so[ns]. The Board is required to provide written statements of its decisions and, where requested by a party to the proceedings, to provide written reasons for its decision'''. These statements are not for publication. Similarly, the reports of proceedings must not be published unless the Board determines otherwise in a particular case, in the public interest. Where the Board decides to publish or broadcast any report of its proceedings, it must ensure that the report does not contain any particulars that could lead to the identification of any person concerned in the case'.

The Psychosurgery Review Board has similar procedural provisions to the Mental Health Review Board'. There is no statutory right to representation before the Psychosurgery Review Board although it is bound by the rules of natural justice.

PRINCIPLE 19: ACCESS TO INFORMATION

Principle 19 requires that a patient or a former patient be given access to information from his or her medical and personal records. It also provides the right to have personal records amended.

The Victorian *Mental Health Act* does not contain any provision giving a general right of access to information on a person's health or personal records held by a mental health facility. Pursuant to the requirement to observe natural justice, the Mental Health Review Board has issued guidelines to ensure that patients whose cases are to be reviewed by the Board are afforded access to their clinical files prior to the hearing.

Victoria has freedom of information legislation giving a right of access to personal documents and a right of amendment, but it contains a provision allowing psychiatric records to be released only to a medical practitioner rather than to the person concerned if direct access is considered detrimental to that person's well-being".

PRINCIPLE 20: FORENSIC PATIENTS

Principle 20 requires that forensic patients, or any person detained in the course of criminal proceedings or investigations who is believed or determined lo have a mental illness, receive the best available mental health care, as provided in Principle 1. It also requires that the other Principles apply to such persons "to the fullest extent possible with only such limited modifications and exceptions as are necessary in the circumstances". Specifically, Principle 20 envisages that a court or tribunal may, on appropriate medical advice, admit these persons to a mental health facility.

The Victorian *Mental Health Act* contains provisions for hospital orders' and for restricted community treatment orders" for persons charged with or convicted of criminal offences. The hospital order may be for admission and detention of a person in a psychiatric inpatient service as an involuntary patient subject to the normal provisions applicable to such patients, with the exception that if the patient is discharged by the Mental Health Review Board or by the authorised psychiatrist before the expiration of the order, application must be made to the court for sentence to be passed, taking account of the period spent in detention under hospital order'. A hospital order may also be for a specified period not exceeding three months for the specific purpose of diagnosis, assessment and treatment'. Hospital orders may be made in lieu of sentencing after a person has been convicted of a criminal offence if the court is satisfied, on the production of a psychiatric certificate and such other evidence as the court may require, of the following criteria:

> **"(i) [that] the person appears to be suffering from a mental illness that requires treatment; and**
>
> **[that] the treatment can be obtained by admission to and detention in a psychiatric in patient service; and**
>
> **(iii) [that] the person should be admitted as an involuntary patient for his or her health or safety or for the protection of members of the public."'**

A hospital order may be made by the Director General of Corrections in order to transfer a person who is already imprisoned or legally detained and who appears to be mentally ill'. The criteria for the exercise of this discretion by the Director General of Corrections are identical to those applicable to the making of such an order by the court. The Director General must be satisfied as to these criteria after receiving a certificate from a psychiatrist'. The Director General must also receive a report from the authorised psychiatrist of the psychiatric inpatient service to which it is proposed to admit the person with a recommendation that the transfer be made".

Hospital orders made by the Director General of Corrections may be for admission as an involuntary patient or may be in the form of a "restricted hospital order" by which a person is admitted and detained as a security patient in a psychiatric

inpatient service'''. The Director General of Corrections must consider "the public interest and all the circumstances of the case including the person's criminal record and psychiatric history" in deciding whether to make a restricted hospital order's. The Act states that security patients, like involuntary patients, are to be detained and treated for their mental illness. If they are incapable of consenting to treatment or refuse to consent to necessary treatment, consent may be given by a guardian, where applicable, or by the authorised psychiatrist'.

The *Mental Health Act* makes a number of special provisions in relation to security patients. In particular, security patients are in the custody of the authorised psychiatrist of the inpatient service to which they are admitted and subject to such security conditions as that psychiatrist considers necessary'''. Security patients may be transferred to another psychiatric inpatient service, in which case the Director General of Corrections must be notified'', or may be given leave of absence by the Chief Psychiatrist or by the Mental Health Review Board if it is satisfied that the safety of members of the public will not be seriously endangered'''. Security patients may be discharged by the Mental Health Review Board or by the Chief Psychiatrist if satisfied that the continued detention of the person is not necessary in terms of the criteria specified for detention of security patients'™. Where the Board or Chief Psychiatrist orders the discharge of a security patient, the Director General of Corrections must be notified and the person concerned must be returned to prison'. Where a security patient is granted bail, released from custody by a court, or completes his or her sentence of imprisonment, the detention as a security patient ceases™.

Restricted community treatment orders may be made in respect of persons detained as involuntary patients under hospital orders made by a court'. The authorised psychiatrist of the hospital where the person is detained may apply to the Chief Psychiatrist for a restricted community treatment order where:

> **"(a) the person appears to be suffering from a mental illness that requires treatment; and**
>
> **(b) treatment can be obtained only by making the person the subject of restricted community treatment order; and**
>
> **(c) the person should be made subject to the restricted community treatment order for that person's health or safety or for the protection of members of the public."'**

As with ordinary community treatment orders, the restricted order must name the psychiatrist who is to supervise the treatment and where the patient is to receive treatment'''. In addition, restricted community treatment orders must specify the intervals at which patients must attend for treatment, the intervals at which they must attend the psychiatric inpatient service for monitoring, and the intervals at which psychiatrists must report on patients' treatment to the Chief Psychiatrist'.

The Chief Psychiatrist is required to send a copy of any restricted community treatment order to the Mental Health Review Board which in turn is required to review the order "as soon as is practicable."' The restricted community treatment order does not take effect until it has been approved by the Mental Health Review Board'. Restricted community treatment orders may alsa be--varied or _revoked by the Chief Psychiatrist or by the Board'. Where an order is revoked, the person concerned is deemed to be an involuntary patient absent from a psychiatric inpatient service without leave". There is also provision for extension of restricted community treatment orders for 12 months, without limit to the number of extensions.'

Under the *Sentencing Act* 1991, the courts now have an additional option of a "hospital security order" which allows a person found guilty of a criminal offence to be admitted to a psychiatric hospital for a specified period as a security patient'. The authorised psychiatrist of the hospital concerned must recommend such an admission to the court". As a security patient, someone subject to a hospital security order has a right of appeal to the Mental Health Review Board and must be reviewed at regular intervals by the Board. If the Board determines such a person no longer satisfies the criteria for detention as a security patient that person is to be discharged from the hospital and detained for the remainder of the specified term in gaol'.

The Victorian *Community Protection Act* 1990 is directed specifically at one individual, Mr Garry David. It allows the Supreme Court, on the application of the Minister (not defined in the Act)" to make an order, which may be made in the absence of Garry David, for his preventive detention'[s°]. Under the Act, the Supreme Court is required to consider whether Garry David is a serious risk to the safety of any member of the public and is likely to commit any act of personal violence to another person. If satisfied of this on the balance of probabilities, the Court is required to order preventive detention'''. The detention could be as a security patient at a psychiatric inpatient service, as a prisoner within the meaning of the *Corrections Act,* 1986 or at any other "institution of detention'''. Under these provisions, the Supreme Court has ordered the preventive detention of Garry David in Pentridge Gaol.

Originally the maximum period for such detention was not to exceed six months with the Supreme Court having the sole authority to discharge or release'. Under amendments made in 1991, this was extended to 12 months'. While the original Act had a sunset clause of one year, the 1991 amendments extended this to four years'''.

PRINCIPLES 21 AND 22: COMPLAINTS AND MONITORING

Principle 21 stipulates that every patient and former patient has the right to make a complaint through procedures provided by statute. Principle 22 requires appropriate mechanisms: to promote compliance with the Principles; for inspection of mental health facilities; and for investigation and resolution of complaints.

The role of the Community Visitors under the *Mental Health Act* has been discussed under Principle 13, above, as has that of the Public Advocate, established under the *Guardianship and Administration Board Act.* Provisions for approval of psychiatric hospitals and units and for the funding and regulation of community support services have been discussed under Principle 14.

Victoria also has an independent statutory body for monitoring complaints in relation to health services. The *Health Services (Conciliation and Review) Act* 1987 establishes the Health Services Commissioner with powers including the investigation and conciliation of complaints, the review and identification of the causes of complaints and ways of removing or minimising those causes'. The Commissioner is appointed by the Governor and can only be removed by resolution by both Houses of Parliament'. There is provision for an annual report by the Commissioner to the Minister and also for reports on any matter the Commissioner considers necessary to be placed before each House of Parliament'. The legislation gives the Commissioner significant powers to obtain information, including compulsory powers to require attendance and call for documents or other evidence'.

The *Health Services Act* 1988 empowers the Minister to declare a specified committee, council, or other body established by one or more agencies or health service establishments as an approved quality assurance body'. The functions of such a body must include the assessment and evaluation of the quality of health services provided by the agency or establishment, including the review of the clinical practices or clinical competence of persons providing those services'.

1. ***Mental Health Act,*** **1986 section 4.**
2. **ibid, section 5.**
3. **ibid, section 6.**
4. **ibid, section 8.**
5. **ibid., section 11.**
6. **ibid. section 10.**
7. **Victorian *Crimes Ac4* section 51, as amended by the *Crimes (Sexual Offences) Act 1991.***
8. **Victorian *Evidence Act* 1958, sections 23 and 23A.**
9. ***Mental Health Ac4*** **section 20.**
10. **ibid. section 47.**
11. ***Guardianship and Administration Board Act*** **1986, section 5 and schedule 1.**
12. **ibid, section 22.**
13. **ibid, section 7.**
14. **ibid. section 8.**

15. ibid. section 10.
16. i d .
17. ibid., section 24.
18. i d .
19. ibid., section 25.
20. ibid. section 46.
21. ibid., section 47.
22. ibid., section 48.
23. *Mental Health Act*, section 6.
24. ibid., section 104A.
25. ibid. sections 4 and S.
26. ibid. section 5.
27. i d .
28. ibid. section 6.
29. i d .
30. ibid. section 8.
31. ibid. section 14.
32. i d .
33. i d .
34. ibid. section 9, as amended.
35. ibid., section 35.
36. ibid., section 63.
37. ibid., section 117.
38. ibid, section 120A.
39. ibid. section 5.
40. ibid., section 13.
41. ibid. section 87.
42. ibid., section 8.
43. ibid. section 14.
44. i d .
45. ibid., section 57.
46. ibid. section 58.
47. ibid., section 59.
48. ibid., section 65.

49. ibid. section 66.

50. ibid, section 70.

51. ibid, section 73.

52. i d .

53. i d .

54. ibid. section 74.

55. Victorian *Health Services Act,* section 42.

56. ibid, section 109.

57. *Mental Health Ac4* sections 55-67.

58. ibid. section 73.

59. ibid. sections 84 and 85.

60. ibid. section 83.

61. ibid. section 12.

62. ibid. section 81.

63. i d .

64. i d .

65. ibid, section 82.

66. i d .

67. i d .

68. ibid. section 18.

69. i d .

70. ibid. section 19.

71. ibid. section 20.

72. ibid. section 108.

73. ibid. section 109.

74. ibid. section 112.

75. ibid. sections 115 and 116.

76. ibid. section 109.

77. *Guardianship and Administration Ac4* section 15.

78. i d .

79. ibid. section 14 and schedule 3.

80. ibid. section 16.

8L *Mental Health Act,* section 94.

82. ibid, section 96.

83. ibid, section 97.

84. ibid. section 100.

85. ibid. section 106.

86. ibid. section 100.

87. i d .

88. i d .

89. ibid, section 101.

90. ibid. section 102.

91. ibid. section 7.

92. i d .

93. i d .

94. i d .

95. ibid. section 8.

96. ibid. section 9.

97. i d .

98. ibid. section 12.

99. i d .

100. ibid. section 30.

101. ibid. section 21 and schedule 1.

102. ibid. schedule 1.

103. i d .

104. i d .

105. ibid. sections 14, 22 and 85.

106. ibid. section 85.

107. ibid. section 37.

108. ibid. section 44.

109. ibid. section 120.

110. ibid. section 118.

111. ibid. section 24.

112. i d .

113. ibid. section 26.

114. i d .

115. ibid. section 33.

116. ibid. sections 27 - 34.

117. ibid. section 34.

118. ibid. sections 60 - 63.

119. *Freedom of Information Act* 1982, section 33.

120. *Mental Health Act,* section *15.*
121. ibid, section 15A.
122. ibid, section 15.
123. id.
124. id.
125. ibid, section 16.
126. id.
127. id.
128. id.
129. id.
130. id.
131. ibid, section 47.
132. ibid, section 49.
133. ibid, section 51.
134. ibid, section 46.
135. id.
136. ibid, section 50.
137. ibid, section 15A.
138. id.
139. id.
140. id.
141. id.
142. id.
143. ibid, section 15B.
144. id.
145. ibid, section 15C.
146. *Sentencing Ac4* section 93.
147. id.
148. id.
149. Victorian *Community Protection Act* 1990, section 4.
150. ibid, sections 4 and 8.
151. id.
152. id.
153. id.
154. *Community Protection (Amendment) Act* 1991, section 8.
155. ibid, section 12.
156. *Health Services (Conciliation and Review)Act* 1987, sections 9 and 10.

157. ibid, section 6.

158. ibid. section 11.

159. ibid. section 25.

160. *Health Services Act,* section 139.

161. id.

QUEENSLAND MENTAL HEALTH LEGISLATION

INTRODUCTION

The Queensland *Mental Health Services Act* 1974-1991 has been significantly amended since its original passage and incorporates a mixture of old and more novel provisions. It contains no definition of mental illness or mentally ill person but extends its coverage "to drug dependence and intellectual handicap as if each of these conditions were a mental illness." It provides two levels of review tribunal, but no specialist body exists for guardianship of people with mental illness who are incapable of managing their own affairs.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. It also deals with rights associated with lack of legal capacity, including the right to have a determination made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

The Queensland *Mental Health Services Act* contains only the following statements of principle in relation to patients' rights: "This Act shall be construed and applied ... so as not to prevent any patient who is in need of care and treatment for mental illness from receiving the same ... with no more legal formality or restriction of liberty than is applied to people who need care and treatment because of other types of illness ..." subject to "considerations for the patient's own welfare or protection of others'. It also provides for the interpretation the Act "so that in the case of any patient the compulsory powers relating to detention conferred by this Act are exercised for the purposes only of the patient's own welfare or the protection of others"[2].

There are also provisions preventing "political, anarchic, religious or irreligious, legal or illegal or moral or immoral" opinions or activities from being taken as sufficient to identify a person as having a mental illness'.

Sexual exploitation or physical abuse and neglect are dealt with in a provision which makes the ill-treatment, wilful neglect or molestation of a patient by a member of hospital staff or another person having custody or care of a patient a criminal offence punishable by imprisonment or a fine or both'. There is also, however, a major qualifying provision -limiting the period- for bringing-proceedings for -criminal to 12 months from the date on which the offence was committed or six months from the date the complainant becomes aware of the offence[s].

The *Mental Health Services Act* gives the power of determination of mental incapacity in relation to a person admitted to a psychiatric hospital to the "designated medical practitioner" (defined as a doctor appointed by the hospital administrator)[6]. This person is given no legislative criteria to guide the exercise of their discretion. The decision is to be made "forthwith", normally on admission to hospital, without provision for a hearing or legal representation, still less for review. The doctor is required to notify the Public Trustee who is then charged with the custody, management and administration of the property and affairs of the patient in accordance with the provisions set out in the Fifth Schedule to the Act'. The Public Trustee must, without further authority, manage the estate of every person who is a patient except where the Supreme Court directs otherwise'. The Court is given the power, on the application of the Public Trustee or any person, to appoint mother person as well as or instead of the Public Trustee to manage the estate of a patient[9]. The onus is on the party seeking to prove that there is "sufficient reason" for appointing a person other than the Public Trustee. The person whose capacity is in question is not provided with any right to legal representation, still less to representation without cost.

In relation to people with mental illness who are not subject to involuntary detention, there is no provision in the *Mental Health Services Act* or elsewhere for management of property in cases of incapacity. Nor is there legislative provision for guardianship unless individuals come within the scope of the Queensland *Intellectually Disabled Citizens' Act* 1985 which does not extend to those whose incapacity is solely related to mental illness. These matters are left, therefore, to the protective jurisdiction of the Supreme Court.

The Queensland *Anti-Discrimination Act* 1991 covers discrimination on the ground of impairment, which is defined to include "a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour". It covers discrimination in the following areas: work, education, goods and services, superannuation and insurance, disposition of land, club membership, administration of State laws and programs and local government.

PRINCIPLE 2: MINORS

UN Principle 2 requires legal protection of the rights of minors including, where necessary, the appointment of a personal representative other than a family member.

There are no such provisions within the Queensland *Mental Health Services Act,* apart from a provision allowing someone over 16 years of age to be admitted as a voluntary patient "notwithstanding any right to custody or control of that patient vested in any person."'

PRINCIPLES 3 AND 7: LIVING, WORKING AND BEING TREATED IN THE COMMUNITY

UN Principle 3 requires that persons with mental illness have the right to live and work, as far as possible, in the community. Principle 7 provides that every patient has the right to be cared for, as far as possible, in the community (in both geographic and cultural senses) in which he or she lives. Where treatment does take place in a mental health facility, Principle 7 requires that this should be close to home, relatives and friends and that the person be returned as quickly as possible to the community.

There is no provision in the *Mental Health Services Act* to give effect to these Principles, apart from those allowing patients, other than security patients, to be granted leave from hospital - subject to such conditions as the designated medical practitioner may consider necessary "in the interests of the patient or for the protection of other persons."' Such conditions may, specifically, include a direction that the patient is to remain in the custody of another person during the period of leave. Leave of absence may be revoked and the patient recalled to hospital whenever the designated medical practitioner, the hospital administrator or the Director of Psychiatric Services considers that it is "necessary so to do in the interests or the patient's welfare or the protection of other persons'.

The Act authorises the transfer of involuntary patients from one hospital to another hospital, except a security patients' hospital, pursuant to arrangements made by the administrators of the hospitals concerned'. Such order may be made "for the purpose of providing suitable treatment or for any other reason whatsoever" that the Director of Psychiatric Services thinks sufficient. (While these provisions do not preclude detaining patients in hospitals that are as close as possible to their home communities no specific reference is made to such a consideration.)

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that a determination of mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status or membership of a cultural, racial, or religious group. Family or professional conflict or non-conformity with prevailing values should not be determining factors.

As noted under Principle 1, above, there is a provision in the *Mental Health Services Act* excluding political, anarchic, religious, irreligious, legal or illegal and moral or immoral opinions or activities from consideration as sufficient basis for determination of mental illness. There is not, however, any positive statutory definition of mental illness.

PRINCIPLE 6: CONFIDENTIALITY

The Queensland *Mental Health Services Act* contains no express provisions guaranteeing this right, except in relation to proceedings of the Mental Health Tribunal'.

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards commensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication; abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

Regulations under the *Mental Health Services Act* allow mechanical restraint "for the purpose of protecting other persons" only on the written order of the Medical Superintendent made with approval of the Director of Psychiatric Services'. This is the only limitation on the use of restraint.

Seclusion is defined as "confinement in any locked room or area during the hours of the day when the patient would ordinarily be allowed to associate freely with other patients'. The definition expressly excludes "a procedure known as 'time out' as part of a behavioural program in respect of the patient ... prescribed by a psychologist or medical practitioner and authorised by a Medical Superintendent or psychiatrist ... for the purposes of psychological intervention in response to disruptive or unacceptable behaviour"[17]. The hospital administrator is required to establish and maintain a register of seclusion and to ensure that a patient is not to be secluded except on the written orders of the Superintendent or medical practitioner in charge of the patient's treatment, although in a case "involving extreme violence" a patient may be secluded without prior authority".

There are no provisions restricting the use of the procedure known as "time out".

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's needs. It also requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

There is no express legislative commitment to treatment in the least restrictive environment. Nor is there any statutory provision for individual case plans or for the promotion or protection of the other rights dealt with in Principle 9.

PRINCIPLE 10: MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given for diagnostic or therapeutic purposes only, *never as* a punishment or for the convenience of others. All medication prescribed must be recorded in the patient's records.

There are no statutory provisions in the *Mental Health Services Act* to guarantee these rights although, as noted in relation to Principle 1, above, there is a statement of principle to the effect that the compulsory powers under the Act are to be exercised "for the purposes only of the patient's own welfare and the protection of others'".

The limitations contained in the Regulations in relation to mechanical restraint, discussed under Principle 8, above, do not extend to chemical restraint".

The Medical Superintendent has the responsibility under the *Mental Health Services Act* for keeping in respect of each ward a record called the "ward report book" which is to be "in such form and for such purposes as the Director determines"[n]. The Director of Psychiatric Services could therefore require the recording of all medication prescribed for patients but there is no express provision to this effect.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that *case,* an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances.

There are no statutory requirements in the Queensland *Mental Health Services Act* for consent to be given to any form of treatment.

The only statutory provisions concerning consent to treatment are those which allow the Governor in Council to declare "any surgical_procedure or medical or therapeutic intervention of a description specified therein" to be a proscribed treatment in which case it shall not be performed or carried out without the consent of the Director-General of the Department of Hea1th[22]. The Director-General's consent must not be given without written application having being made by the patient, acknowledging that the patient has been informed of the nature of the proscribed treatment and of all the foreseen possible consequences of it'. No procedure has been proscribed to date.

There is no other provision for any independent authority to consider the appropriateness of any proposed treatment. Moreover, the Act does not provide any restriction upon the performance of electro convulsive therapy or any other specific form of treatment.

There is no reference in the Act or Regulations to informed consent and no provision which authorises treatment in terms which clearly indicate an intention that a patient, on admission, loses his or her common law right to refuse treatment. Voluntary patients, who are capable of discharging themselves', would almost certainly retain the right to refuse treatment.

The position of involuntary patients is less clear. There is a general provision exempting from any liability actions done "in good faith and without negligence" in the exercise of powers under the Act, including the use of "force that is reasonably necessary in the circumstances and does not cause ... death or grievous bodily harm". This, however, does not constitute an express authorisation or justification of the use of force to administer medication or any other form of treatment to a patient (as was pointed out by Mr Carter, QC in the report of the inquiry into Ward 10B of Townsville General Hospital).

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and language.

The Regulations make detailed provision for information to be supplied to patients by the hospital administrator'. A notice (or more than one) is to be given to patients and displayed "in such manner and at such locations to ensure that every patient, unless prevented by unusual circumstances, has an opportunity to peruse a copy of the notice on at least one occasion during each day without having to request access thereto'".

These notices must be "written in legible characters and expressed in the English language"; may include additional statements in such language or languages as the hospital administrator thinks fit; and may advise on the procedure for obtaining the services of a translator or a written translation of the matters referred to in the notice. The information required to be provided includes-the-statutory provisions_for admission and detention of patients; the rights of application to the Patient Review Tribunal; the provisions for discharge from detention; the provisions relating to Official Visitors and the patients' access to them; information concerning management of patients' estates by the Public Trustee; rights to be visited and examined by private medical practitioners or other health professionals and by a legal adviser; and information concerning access to legal aid.

The Queensland *Mental Health Services Act* requires that where detention is renewed beyond the first 21 days, the hospital administrator shall ensure that the patient is informed of the renewal and also informed that an application may be made to the Tribunal personally or on the patient's behalf for discharge'. The medical practitioner who provides a second recommendation for involuntary admission, authorising detention for a period of up to 21 days, must "where possible inform the patient concerned that his detention has been renewed for a period not exceeding 21 days ... and enter in a patient's medical records the fact that he was so informed or, where he was not so informed, the reasons therefor'.

PRINCIPLE 13: PATIENTS' RIGHTS IN MENTAL HEALTH FACILITIES

Principle 13 guarantees patients' rights to recognition before the law; privacy; freedom of communication; freedom of religion; and conditions of living as close as possible to everyday life.

Apart from the principle of interpretation referred to under Principle 1, and the right to information discussed under Principle 12, above, the *Mental Health Services Act* and Regulations do not contain guarantees of patients' rights as required by Principle 14. There is a provision in the Regulations allowing patients to be searched "at the direction of a medical practitioner on admission to a hospital or an institution and at any time thereafter during the treatment" and requiring such a search to be carried out "with due regard to decency and self-respect and in as seemly a manner as is consistent with a thorough search for a concealed article". (In the absence of any more definitive safeguards, considerations of "decency and self-respect" may be of limited effect in protecting the basic rights in question.)

PRINCIPLE 14: RESOURCES IN MENTAL HEALTH FACILITIES

This Principle requires that mental health facilities have access to the same level of resources as other health establishments, particularly in relation to staffing, equipment, care and treatment. It also requires that mental health facilities be inspected by the competent authorities at regular intervals to ensure compliance with the Principles.

The Queensland *Mental Health Services Act* provides for the Governor in Council to establish psychiatric hospitals and security patients' hospitals and other such places as he or she thinks fit for the purposes of the Act'. The Governor in Council is also given power under the Act to declare that any such hospital or other place shall cease to be a psychiatric hospital, security patients' hospital or other place[32]. The Act does not, however, set out criteria upon which such declarations are to be based.

The Regulations set out certain requirements for the administration of psychiatric hospitals, security patients' hospitals and other places established under the Act. These consist of the general duties and responsibilities of the Medical Superintendent of a hospital or establishment' duties and responsibilities of a manager;" and duties and responsibilities of a principal nurse[35].

The Director General of Health has discretionary powers under the Act to visit and inspect every hospital, without notice, as he or she thinks necessary or as directed by the Minister'. There are penalties for obstruction of such an inspection'. The Director General assumes the powers of a Commissioner under the Queensland *Commissions of Inquiry Act* 1950 for the purposes of inspection of hospitals'.

The *Mental Health Services Act* also provides for the Governor in Council to appoint two or more Official Visitors in relation to any hospital". One of these is to be a medical practitioner or a person qualified to practice a profession that requires a special knowledge and interest with respect to mental health; and the other is to be a barrister, solicitor, Magistrate or person qualified for appointment as a stipendiary Magistrate.

Official Visitors are required to visit the hospital to which they are appointed at least once a month and make special visits as the Minister, Director General or Director of Psychiatric Services may direct'. Reports made by Official Visitors after each visit are to be furnished, in the case of a visit made at the direction of the Minister or Director General, to the Minister or Director General as the case may be, and otherwise to the Director of Psychiatric Services". The functions, powers and duties of Official Visitors are set out in the Regulations,' together with the requirements that the hospital administrator facilitate performance of those functions and duties'[s]. The Official Visitors are required to examine the registers, books and records kept in accordance with the Act (including the medical recommendations and applications for involuntary admission) as well as to inspect every part of the hospital and every patient'.

PRINCIPLE 15: ADMISSION

Principle 15 requires that a person who needs treatment in a mental health facility should have access to it on a vohmtary basis in the same way as for any other illness and that wherever possible admission should be on a voluntary basis.

The *Mental Health Services Act* provides for voluntary or "informal" admission of patients but also allows a hospital administrator to refuse to admit a patient after examination and assessment by a medical practitioner where he or she thinks that the patient would benefit from treatment at any other place.

PRINCIPLE 16: INVOLUNTARY ADMISSION

Principle 16 sets out the criteria for involuntary admission. It requires that a qualified mental health practitioner determine that the person has a mental illness; and that the consequence is either:

> **a serious likelihood of immediate or imminent harm to that person or to others; or**
>
> **that failure to admit that person is likely to lead to a serious deterioration in the condition which will preclude further treatment; and that, taking account of the principle of the least restrictive alternative, admission is necessary to provide treatment.**

Principle 16 also requires that involuntary detention be for only a short initial period pending review and that notice be given of this review to the patient, to the patient's family and to the patient's personal representative.

The provisions in the *Mental Health Services Act* for apprehension of people suspected of being or believed to be mentally ill are very broad and allow such a person to be "removed to a place of safety", which may be "any hospital other than a security patients' hospital, [a] police station or other suitable place the occupier of which is willing temporarily to receive a patient'". A person may be held at such a place for up to three days for the purpose of examination by a doctor and assessment with a view to "regulation", ie involuntary detention'.

The Act confers on police officers particularly wide powers to remove a person from a public place, without a warrant, requiring only that the officer "believes [the person] to be mentally ill and a danger to himself or other persons and in need of immediate treatment or control'". A police officer acting without a warrant is also given the power to remove a person from private premises to a place of safety if he or she "reasonably believes the obtaining of a warrant.., would involve unreasonable delay"; and if consent is obtained from the occupier or person apparently in control of the

premises'. However, if the occupier or person apparently in control of the premises is the person subject to removal or "does not appear to the member of the police force to be readily identifiable or available," then consent is not required'. The Act allows a justice to issue a warrant for removal of a person to a place of safety where "there is reasonable cause to suspect that a person is mentally ill and that in the interests of that person or for the protection of other persons it is necessary" to authorise such removal[53].

The provisions in the *Mental Health Services Act* for involuntary admission allow the patient to be admitted to any hospital "other than a security patients' hospital'. There is no other requirement as to the nature of the facility to which a person can be admitted involuntarily.

The criteria for involuntary admission under the *Mental Health Services Act* are:

> **that the person concerned "is suffering from mental illness of a nature or to a degree that warrants his detention in hospital"; and**
>
> **that "he ought to be so detained in the interests of his own welfare or with a view to the protection of other persons'".**

These criteria are clearly not as rigorous as those required by UN Principle 16. They do not specify the degree of likelihood of adverse consequences for the patient's own welfare nor limit the "protection of other persons" to the situation of "imminent harm" to such persons as required by the Principle. A broad discretion is left to the medical practitioner in relation to the nature or degree of mental illness warranting detention.

For detention up to three days a second medical opinion as to the existence of these criteria is not required'. Detention between three and 21 days requires a second medical opinion'. However, neither of these medical opinions needs to be provided by a psychiatrist. Only for involuntary detention beyond 21 days does the Act require psychiatric examination and recommendation and provide for review by an independent authority, the Patient Review Tribunal[s]'.

PRINCIPLE 17: REVIEW

Principle 17 requires that involuntary detention be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an involuntary patient and should take place as soon as possible after admission. The principle also requires that the review body's procedures be simple and expeditious and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.

The Queensland *Mental Health Services Act* establishes Patient Review Tribunals, each constituted by three to five members, appointed and capable of being removed from office by the Governor in Council°. Each Tribunal is to be chaired by a retired Judge or a person qualified to be a District Court Judge°. Tribunals must include at least one member who is a medical practitioner and at least one other member qualified to practice a profession "that requires a special knowledge and interest with respect to mental illness'.

In any case of involuntary detention in excess of 21 days, the hospital administrator is required to make application to the Patient Review Tribunal for review of the detention'. The administrator is also required to ensure that the patient is informed of his or her right to apply, or to have application made on his or her behalf'. Application may be made on behalf of the patient by any authorised person or relative or any other person by leave of the Tribunal".

Where the Patient Review Tribunal is satisfied that the patient is not suffering from mental illness of a nature or to a degree that warrants detention in hospital and does not need to be detained in the interests of his or her own welfare or for the protection of others, the Tribunal may order the Director to discharge the patient'. The Tribunal also has the power to order the Director to make appropriate arrangements for transfer or leave of absence, and to make recommendations in respect of any other matter'.

The Director may, within seven days of receipt of an order of the Tribunal for the discharge of a patient, apply to the Mental Health Tribunal to have the order set aside'. In this case the discharge order made by the Patient Review Tribunal does not operate, pending determination of the application by the Mental Health Tribunal". An application may also be made to the Mental Health Tribunal to set aside the refusal of a patient's application for discharge. However, in the case of a determination confirming renewal of detention upon an application made by the hospital administrator, the patient has no right to seek review by the Mental Health Tribunal". There is no appeal beyond the Mental Health Tribunal against a decision on an appeal from the Patient Review Tribunal'.

The Mental Health Tribunal, established under the *Mental Health Services Act,* consists of a Judge of the Supreme Court, assisted by two psychiatrists who are not a constituent part of the Tribunal'. The Judge and psychiatrists are appointed by Order in Council and may be removed by the Governor in Council'.

Power is conferred on the Mental Health Tribunal to direct any person to visit and examine a person detained as mentally ill and to inquire into and report upon such matters in relation to that person as the Tribunal thinks fit'. The Tribunal may exercise these powers on the application of any person or of its own motion'. Similarly, the Tribunal may, on application or of its own motion, direct the hospital administrator or the occupier or resident of any house in which a person may be detained as mentally ill, to bring such a person before the Tribunal'. Where the Tribunal is satisfied that such a person is not suffering from mental illness of a nature or to a degree that warrants detention in the hospital and does not need to be

detained in the interests of his or her own welfare or the protection of others or that the person is unlawfully detained, the Tribunal must direct that the person be immediately discharged from detention'".

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that a patient be entitled in relation to any complaint procedure or appeal, to an interpreter and to legal representation, neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative with further distribution only after consideration of the wishes and interests of the patient as well as the interests of the public.

The Act does not specify procedures for the Patient Review Tribunals other than for the making of applications's. Nor does the Act require the Patient Review TO:finialsto adhere to the rules of natural justice, allowing them to "admit, and proceed and recommend upon such information or evidence as [they think] fit, whether the same as the law would allow or admit in other cases or not.' Power is given to the Chairmen of these Tribunals to summon witnesses and to examine them on oath[s°]. The Tribunals have the discretion to dispose of applications with or without a formal hearing'. Any member of the Patient Review Tribunal may, at the Tribunal's direction, interview or examine in private a patient in respect of whom an application has been made'. The results of such interviews or examinations must be reported to the other Tribunal members'. The Act requires the Patient Review Tribunals to distribute copies of every "order, determination, finding, recommendation or report" made by them to the parties, including the patient concerned and the hospital administrator".

The Patient Review Tribunals have a discretion to allow an applicant to be assisted during a hearing by a barrister or solicitor who provides "legal representation determined by the Tribunal to be warranted" or by any other person'.

The rules for procedure before the Mental Health Tribunal repeat the formula used in the Act for the Patient Review Tribunal, allowing the Tribunal to "admit and proceed and make determination upon such information or evidence as it thinks fit whether or not such information or evidence is such that the law would require or admit in other proceedings.' However, there is also a provision which deems proceedings before the Mental Health Tribunal to be judicial proceedings, thereby importing common law rules of natural justice". The Act also requires that evidence before the Mental Health Tribunal be taken on oath or affirmation".

The Mental Health Tribunal is given powers to require the production of evidence and the attendance of witnesses as well as powers to direct a medical practitioner to examine and assess a person whose mental condition is in question".

Proceedings of the Mental Health Tribunal are to be held "in open court" unless the Tribunal orders otherwise". There are no criteria specified for the exercise of this discretion.

Decisions of the Mental Health Tribunal are to be recorded in writing" although there is no provision in the Act or Regulations for publication or limitation of their distribution.

PRINCIPLE 19: ACCESS TO INFORMATION

Principle 19 requires that a patient or a former patient be given access to information from his or her medical and personal records. It also provides the right to have personal records amended.

No right is provided by the *Mental Health Services Act* or the Regulations for a patient, former patient or his or her representative to get access to health or other personal records.

The *Freedom of Information Act* 1992 provides for access to personal records but allows a person's psychiatric records to be released to a medical practitioner rather than directly if the agency believes that direct access could prejudice the person's health.

PRINCIPLE 20: FORENSIC PATIENTS

Principle 20 requires that forensic patients, or any person detained in the course of criminal proceedings or investigations who is believed or determined to have mental illness, receive the best available mental health care, as provided in Principle 1. It also requires that the other Principles apply to such persons "to the fullest extent possible with only such limited modifications and exceptions as are necessary in the circumstances". Specifically, Principle 20 envisages that a court or tribunal may, on appropriate medical advice, admit these persons to a mental health facility.

A person charged with or convicted of a criminal offence may be admitted under the Queensland *Mental Health Services Act* to an ordinary psychiatric hospital or to a security patients' hospital if he or she is suffering from a mental illness "of a nature or to a degree that warrants detention in a hospital" and where he or she "ought to be so

detained in the interests of his own welfare and with a view to the protection of other persons'. The Act provides that such patients are to be treated as restricted patients".

Security patients' hospitals are established under both the *Prisons Act* 1958 - 1974 and the *Mental Health Services Act.* The Medical Superintendent of a security patients' hospital has responsibility for the treatment of patients and the supervision of medical and other staff engaged in treatment; and the Comptroller of Prisons has the responsibility in matters relating to the safe custody of patients and the security of the hospital". The Superintendent may refuse to grant permission to visit patients [95] Patients' mail at a security patients' hospital may be examined and withheld". Restricted patients are subject to significantly greater limitations on leave and discharge. In particular, the written consent of the Director General of Health is required for leave or discharge. There is a conspicuous absence of provision for positive rights for restricted patients - other than rights of review.

A person charged with a summary offence may, under the *Mental Health Services Act,* be admitted by the justice before whom he or she appears to a hospital, other than a security patients' hospital, as a restricted patient". The justice must have the evidence of two medical practitioners to make such an admission. Once a patient has been admitted in this way, a psychiatrist must conduct an examination and report to the Director of Psychiatric Services who must, in turn, report to the Minister for Justice. The Minister is given powers to direct that the hearing of the complaint may not proceed; to direct that the hearing should proceed if the patient is no longer detained; or to defer the determination for up to three months, in which case the Minister must refer the question of the patient's mental condition to the Patient Review Tribunal'.

The Tribunal, after consideration of all material that it considers relevant, must report to the Minister on the mental condition of the patient and state whether, in its opinion, the patient needs to be further detained on account of mental illness and whether he or she is fit for trial". If the Tribunal reports that in its opinion the patient requires further detention on account of mental illness or is not fit for trial, the complaint against the patient is deemed to have been dismissed and the patient continues to be detained as an involuntary patient but not as a restricted patient'.

In the case of patients charged with indictable offences, the procedure is similar - except that they are to be admitted to security patients' hospitals and the body to which the question of the patient's mental condition is to be referred is the Mental Health Tribunal'. If this Tribunal finds that the person was not suffering from unsoundness of mind at the time of the offence, it must determine whether he or she was suffering from diminished responsibility'. If the person is found to be fit for trial and not to have been suffering from unsoundness of mind at the material time, the proceedings continue according to law'. Where, however, the Mental Health Tribunal does not find the person fit for trial, it is required to order that the person be detained as a restricted patient in a security patients' hospital or in some other hospital'.

The Patient Review Tribunal is required to review the fitness of the patient for trial once every three months for the first 12 months from the time of the Mental Health Tribunal's order for detention, and thereafter at "reasonable" periods'". If the Patient Review Tribunal finds that it is unlikely that the person will be fit for trial within a reasonable time, it is required to report to the Minister for Justice who must report to the Governor with a recommendation as to the continuance or discontinuance of proceedings against the person'. The Governor in Council may order discontinuance of proceedings or defer the question of continuance for a period not exceeding six months at any one time".

There are similarly detailed provisions under the Queensland *Mental Health Services Act* relating to persons who are mentally ill while imprisoned on remand, either awaiting trial or awaiting sentence'". There are also provisions dealing with the admission of persons found not guilty on the basis of unsoundness of mind' and the admission of prisoners serving a sentence of imprisonment or detention following conviction for an offence'. Such persons are to be detained in a security patients' hospital or other hospital pursuant to an order of the court or of the Governor in Council, and are to be treated as restricted patients. Their mental condition must be reviewed at least every 12 months by the Patient Review Tribunal'. The Tribunal may make a recommendation to the Parole Board for the release of a patient found not guilty on the basis of unsoundness of mind'.

PRINCIPLES 21 AND 22: COMPLAINTS AND MONITORING

Principle 21 stipulates that every patient and former patient has the right to make a complaint through procedures provided by statute. Principle 22 requires appropriate mechanisms: to promote compliance with the Principles; for inspection of mental health facilities; and for investigation and resolution of complaints.

The provisions under the *Mental Health Services Act* for Official Visitors are discussed under Principle 14, above.

The Queensland *Health Rights Commission Act* 1991 establishes an independent body with broad functions including the handling of health service complaints; identifying and reviewing issues arising out of such complaints and suggesting ways of improving health services and preserving and increasing "health rights"'. The Commissioner is appointed by the Governor in Council for a period of five years'. There is provision for removal on specified grounds' and also an express requirement that in the performance of the functions of office the Commissioner is required to act "independently, impartially and in the public interest.'"

1. Queensland *Mental Health Services Act,* section 6.
2. i d .
3. i d .
4. ibid, section 59.
5. ibid, section 63.
6. ibid, section 55.
7. i d .
8. Fifth schedule.
9. i d .
10. ibid, section 17.
11. ibid. section 46.
12. i d .
13. ibid, section 44.
14. *Mental Health Tribunal Practice Rules* 1985, regulation 8.
15. *Mental Health Services Regulations* 1985, regulation 58.
16. ibid. regulation 4.
17. i d .
18. ibid. regulation 57.
19. *Mental Health Services Act,* section 6.
20. See definition of restraint: *Mental Health Services Regulations* 1985, regulation 4.
21. ibid. regulation 38.
22. *Mental Health Services Act,* section 53.
23. i d .
24. ibid. section 17.
25. *Mental Health Services Regulations 1985,* regulations 14 and 15.
26. ibid. regulation 14.
27. ibid, regulation 15.
28. ibid. section 21.
29. ibid. regulation 17.
30. ibid. regulation 59.
31. *Mental Health Services Act,* section 16.
32. i d .
33. *Mental Health Services Regulations,* regulations 38 and 51.
34. ibid. regulation 39.
35. ibid. regulation 40.
36. *Mental Health Services Act,* section 9.
37. ibid. section 61.

38. ibid, section 9.
39. ibid, section 12.
40. i d .
41. ibid, section 13.
42. i d .
43. *Mental Health Services Regulations*, regulation 12.
44. ibid. regulation 13.
45. ibid, regulation 12.
46. *Mental Health Services Act*, section 17.
47. ibid, division III of part III.
48. ibid. section 5.
49. ibid, section 27.
50. ibid. section 26.
51. i d .
52. i d .
53. ibid. section 25.
54. ibid. section 18.
55. ibid. section 18.
56. ibid. section 21.
57. i d .
58. i d .
59. ibid. section 14.
60. i d .
61. i d .
62. ibid, section 21.
63. i d .
64. i d .
65. ibid. section 15.
66. i d .
67. i d .
68. i d .
69. i d .
70. i d .
71. ibid. section 43A.
72. ibid. section 28B.
73. i d .
74. ibid. section 70.

75. id.

76. id.

77. id.

78. ibid, section 15.

79. id.

80. *Mental Health Services Regulations*, regulation 35.

81. ibid, regulation 36.

82. id.

83. id.

84. *Mental Health Services Act*, section 15A.

85. id.

86. *Mental Health Tribunal Practice Rules* 1985, regulation 9.

87. *Mental Health Services Act*, section 69A.

88. id.

89. ibid. section 70.

90. *Mental Health Tribunal Practice Rules*, regulation 13.

91. ibid, regulation 11.

92. *Mental Health Services Act*, sections 29A, 29C, 31 and 43.

93. ibid. section 50.

94. *Mental Health Services Regulations*, regulations 49 and 50.

95. ibid. regulation 50.

96. ibid, regulation 54.

97. *Mental Health Services Act*, section 50.

98. ibid. section 29A

99. id.

100. id.

101. id.

102. id.

103. ibid. sections 29B, 29C and 30.

104. ibid. section 33.

105. id.

106. ibid. section 34.

107. id.

108. id.

109. id.

110. ibid. sections 31 - 32.

111. ibid. sections 38 and 39.

112. ibid, section 43.

113. i d .

114. i d .

***115*. *Health Rights Commission Act,* sections 7 and 10.**

116. ibid, section 9.

117. ibid, section 18.

118. ibid, section 11.

TASMANIAN MENTAL HEALTH LEGISLATION

INTRODUCTION

The Tasmanian *Mental Health Act* 1963 is based substantially on the British *Mental Health Act* 1959 with adaptation that has not made it any easier to read. While it lacks many safeguards found in more recent legislation, it does provide for both a Mental Health Review Tribunal and a Guardianship Board.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. It also deals with rights associated with lack of legal capacity, including the right to have a determination made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

Given the age of the Tasmanian *Mental Health Act* it is disturbing but perhaps not surprising that there is no statement of objectives or commitment to principles such as respect for human dignity. There is a provision making ill-treatment or wilful neglect of patients an offence punishable by a $200 *fine* or 12 months imprisonment'. However, there is also an extraordinary section providing immunity from criminal or civil liability for acts done in pursuance of the Act, which goes far beyond the usual scope of such protection by requiring leave of the Supreme Court for such proceedings and further requiring the Court to be satisfied before granting leave that "there is substantial ground for the contention that the person to be proceeded against has acted in bad faith or without reasonable care'". This provision suggests an expectation of frivolous or vexatious litigation by psychiatric patients and adds a legal obstacle to the practical and psychological barriers to the effective exercise of rights by people with mental illness.

There are few provisions in the Tasmanian *Mental Health Act* that positively protect civil, economic, political, social and cultural rights of the mentally M. A number of the provisions, in addition to that imposing the legal disadvantage referred to above, impinge upon or infringe rights. Notably, there is a provision allowing a police officer

mental health facility, Principle 7 requires that this should be close to home, relatives and friends and that the person be returned as quickly as possible to the community.

The medical officer responsible for treatment or care of a patient involuntarily detained under the *Mental Health Act* may grant that patient leave of absence from the hospital subject to such conditions as are considered to be necessary in the interests of the patient or the protection of other persons.

The Act does not contain any other provisions for the maintenance of people with mental illness in the community except - insofar as the provisions relating to guardianship can be used as an alternative to hospital admission. Guardianship and hospital admission are not, however, mutually exclusive.

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that a determination of mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status, membership of a cultural, racial, or religious group Similarly, family or professional conflict or non-conformity with prevailing values be a determining factor.

As noted above, the Tasmanian *Mental Health Act* does not contain a definition of mental illness. It does contain a compendious definition of mental disorder which includes "mental illness, any arrested or incomplete development of the mind, psychopathic disorder, and any other disorder or disability of the mind'. The Act does not contain exclusionary provisions preventing political, religious or other nonconforming or minority beliefs or activities from being taken as the basis of a determination of mental illness or disorder.

PRINCIPLE 6: CONFIDENTIALITY

The Tasmanian *Mental Health Act* does not guarantee patients' confidentiality.

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards commensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication; abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

The Tasmanian *Mental Health Act* contains no provision for equity as between patients of mental health facilities and those in the general health system.

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's needs. It also requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

The Tasmanian legislation does not contain references to the principle of the least restrictive alternative nor to individual treatment plans. Indeed, the *Mental Health Act* does not make any express provision as to the nature or quality of treatment to be administered to patients. Other than the limits in relation to seclusion and mechanical restraint (see Principle 11, below), there are no restrictions on the type of treatment that may be given.

PRINCIPLE 10: MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given for diagnostic or therapeutic purposes only, never as a punishment or for the convenience of others. All medication prescribed must be recorded in the patients' records.

Neither the *Mental Health Act* nor the Regulations deal with medication - either by way of guiding principle, positive duty or restriction. Under the Tasmanian *Poisons Act* 1971 there are guidelines for the recording of medication prescribed for all patients.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that case, an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances. Principle 11 specifically requires that physical restraint and involuntary seclusion be employed only if necessary to prevent immediate or imminent harm to the patient or others.

There is no provision in the Tasmanian *Mental Health Act* that relates directly to the right of informed consent. The provisions for involuntary admission refer to admission either for "observation"' or for "treatment"", the former being for up to 28 days'. There is no reference to treatment in the sections dealing with admission for observation and nothing that could be said to represent a clear abrogation of the common law right to informed consent. In relation to the provisions dealing with admission for treatment, the need for treatment, in general terms, is the basis for the detention. This could be seen as indicating a legislative intention that treatment could not be refused. However, there is no clear or explicit statement that the common law right is no longer available. In relation to specific treatments such as ECT there is a strong orpiment that the right is retained.

The Act also provides penalties for the application of "any mechanical means of bodily restraint" or the use of seclusion unless these are "necessary for the purposes of treatment ... or to prevent [the patient] from injuring *himself* or other persons or destroying property'. The use of seclusion or restraint requires also the approval of "the responsible medical officer"[28].

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and language.

Neither the Tasmanian *Mental Health Act* nor the Regulations make any provision for patients to be informed of their rights.

PRINCIPLE 13: PATIENTS' RIGHTS IN MENTAL HEALTH FACILITIES

Principle 13 guarantees patients' rights to recognition before the law; privacy; freedom of communication; freedom of religion; and conditions of living as close as possible to everyday life.

The Tasmanian *Mental Health Act* makes no reference to patients' rights to privacy, to freedom of communication, freedom of religion or to any other freedom or facility associated with everyday life. As noted above, there are provisions allowing the interception of incoming and outgoing mail of both voluntary and involuntary patients".

PRINCIPLE 14: RESOURCES IN MENTAL HEALTH FACILITIES

This Principle requires that mental health facilities have access to the same level of resources as other health establishments, particularly in relation to staffing, equipment, care and treatment. It also requires that mental health facilities be inspected by the competent authorities at regular intervals to ensure compliance with the Principles.

The Tasmanian *Mental Health Act* does not contain any provisions relating to the level of resources committed to mental health facilities.

PRINCIPLE 15: ADMISSION

Principle 15 requires that a person who needs treatment in a mental health facility should have access to it on a voluntary basis in the same way as for any other illness and that wherever possible admission should be on a voluntary basis.

The Tasmanian *Mental Health Act* makes provision for voluntary admission, although there is no absolute right of admission". The Act also allows a person to remain in hospital after ceasing to be liable to be involuntarily detained'.

PRINCIPLE 16: INVOLUNTARY ADMISSION

Principle 16 sets out the criteria for involuntary admission. It requires that a qualified mental health practitioner determine that the person has a mental illness and that either:

> **as a consequence there is a serious likelihood of immediate or imminent harm to that person or to others; or**
>
> **that failure to admit that person is likely to lead to a serious deterioration in the condition which will preclude further treatment and that admission is necessary to provide treatment.**

Principle 16 also requires that involuntary detention be for only a short initial period pending review and that notice be given of this review to the patient, to the patient's family and to the patient's personal representative.

Under the Tasmanian *Mental Health Act* a person may be involuntarily detained either "for observation" or "for treatment"[32]. In either case an application for admission requires the recommendation of two medical practitioners, one of whom is "approved" by the Minister as having specialist expertise for the purposes of the *Mental Health Act"*. The medical recommendations must be in prescribed form and must be given by practitioners who have personally examined the patient within the previous seven days. The Act also prohibits the giving of recommendations for admission by medical practitioners who have any of a number of specified conflicts of interest in relation to the application or the person whose admission is sought'[s].

The grounds required for admission for observation under the *Mental Health Act* are as follows:

> **"(a) that the person is suffering from a mental disorder of a nature or degree that warrants his or her detention under observation (with or without medical treatment) for at least a limited period; and**
>
> **(b) that the person so ought to be detained in the interest of his or her own health or safety or with a view to protection of other persons."**

The duration of detention for observation on these grounds is up to 28 days'. In a case of alleged necessity the Act provides for an emergency application to be made and provides that in such a case it is sufficient for the application to be founded on one medical recommendation'. The Act does not specify the criteria on which an emergency application must be based. The person may be admitted for up to 72 hours upon the basis of an emergency application and if, during this period, a second medical recommendation is provided and the grounds for an application for admission for observation are made out in the medical recommendations, the person's detention may be extended for up to 28 days[39].

The criteria for admission for treatment under the *Mental Health Act* are substantially the same as those for observation, with the additional requirement that the person to be admitted is suffering either from mental illness or "severe subnormality" or, in the case of a patient under 21 years of age, from "psychopathic disorder"'. The duration of involuntary admission for treatment under the *Mental Health Act* is one year, renewable for a further year and thereafter for periods of two years'. Renewal of detention is determined by the hospital authority on the basis of a report by the responsible medical officer following examination of the patient'. The responsible medical officer is required to report on whether it is "necessary in the interests of the patient's health or safety or for the protection of other persons that the patient should continue to be liable to be detained"'. The hospital authority is required to inform a patient of the renewal of his or her detention and the patient is given a right to apply to the Mental Health Review Tribunal".

PRINCIPLE 17: REVIEW

Principle 17 requires that involuntary detention be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an involuntary patient and should take place as soon as possible after admission. The principle also requires that the review body's procedures be simple and expeditious and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.

The Tasmanian *Mental Health Act* establishes a Mental Health Review Tribunal.' consisting of legal, medical and other members, all appointed by the Governor". The terms of appointment and tenure and grounds for removal from office are not, however, provided by statute. This limits the independence of the Tribunal's position although it may not, in practice, adversely affect the impartiality of the members.

The jurisdiction of the Tribunal is limited to hearing and determining applications made by patients against their detention, renewal of detention or reception into guardianship'. There is no automatic review of detention orders, either initially or at intervals. Provision is made for the Minister, "if he thinks fit", to refer to the Tribunal the case of any patient liable to detention or guardianship". Patients are given the right to apply to the Tribunal "within the period of six months" from the initial involuntary admission or from any renewal of detention". The Tribunal has the power to direct that a patient be discharged if satisfied that the criteria for detention are not met". The Act, by requiring satisfaction of this negative state of affairs, seems to place the burden of proof on the applicant.

A right of appeal exists from the Tribunal to the Supreme Court'.

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that, in relation to any complaint procedure or appeal, a patient be entitled to an interpreter and to legal representation, neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative. The decisions should only be distributed further after consideration of the wishes and interests of the patient as well as the interests of the public.

The procedural provisions relating to the Tasmanian Mental Health Review Tribunal are contained in Regulations under the *Mental Health Act*[52]. They establish a right to representation for any applicant although no provision is made for payment of such representatives'. No reference is made to a right to an interpreter.

The Regulations include a written application form which places the onus on the applicant to make a special request for a formal hearing'. In the absence of such a request the Tribunal has no obligation to conduct a hearing, only to give the applicant the opportunity of an "interview" at which the applicant may state his or her views and draw the Tribunal's attention to any relevant evidence or information'. The Tribunal also has a general obligation to notify interested parties including the hospital when an application is lodged". The hospital then has three weeks to provide the Tribunal with a statement of relevant medical history and reasons for the order or refusal to discharge the patient'. Where a formal hearing has been requested the hospital is asked for an opinion as to whether this would be "detrimental to the applicant's health" and the Tribunal may, at its own discretion, proceed as if a formal hearing had not been requested".

Where a formal hearing is conducted, this must be in private unless the applicant requests otherwise and subject to the Tribunal's opinion as to whether a public hearing would be detrimental to the patient's health[59]. At a formal hearing the applicant has a right to appear and to be accompanied by any other person at the Tribunal's discretion'. The Tribunal must give the applicant, the hospital and any other person notified of the hearing the opportunity to address it, to give evidence and to call witnesses'. Both the applicant and the hospital have the right to question witnesses'.

The Regulations also require the Tribunal to give its decisions and reasons in written form and provide for the Tribunal to allow or to prohibit publication of these as it thinks proper'.

PRINCIPLE 19: ACCESS TO INFORMATION

Principle 19 requires that a patient or a former patient be given access to information from his or her medical and personal records. It also provides the right to have personal records amended.

The Tasmanian *Mental Health Act* leaves to subordinate legislation the details of record keeping in respect of patients. Regulations set out precise particulars of what is to be recorded and how [64] but do not make any provision for the patients' records to be shown to the patients themselves or indeed to any other person. The Regulations dealing with the Review Tribunal, however, make an important exception to this general lack of access. They require the hospital or other responsible authority, upon notification of an application, to send to the Tribunal a statement setting out the relevant patient history, diagnosis, reasons for the decision under review and

certain other particulars'. The Tribunal must then forward this statement to the applicant excluding any portion that the responsible authority has requested be withheld". However, the Regulations also require the Tribunal, except "in so far as [it] considers it undesirable to do so in the interests of the patient or for other special reasons "to make available to the applicant any such withheld material together with copies of any other document obtained by or furnished to the Tribunal for the purposes of the application'".

Freedom of information legislation has been passed in Tasmania but is not yet in operation. It is due to come into effect in January 1993.

PRINCIPLE 20: FORENSIC PATIENTS

Principle 20 requires that forensic patients, or any person detained in the course of criminal proceedings or investigations who is believed or determined to be mentally ill, receive the best available mental health care, as provided in Principle 1. It also requires that the other Principles apply to such persons "to the fullest extent possible with only such limited modifications and exceptions as are necessary in the circumstances". Specifically, Principle 20 envisages that a court or tribunal may, on appropriate medical advice, admit these persons to a mental health facility.

The Tasmanian *Criminal Code* contains provisions under which persons may be found by a court to be incapable of understanding proceedings after being charged with an offence or to be not guilty of an offence by reason of insanity". These provisions confer power on the court to order "that the accused person be dealt with as a mentally disordered person who has become subject to the criminal process?' Such an order authorises the Attorney-General to make a number of decisions concerning the disposition of the person concerned. The Attorney-General has an unfettered discretion as to whether and where to detain a "mentally disordered person who has become subject to the criminal process". In practice, most of these persons are placed under "restriction orders", made pursuant to the *Mental Health Act"*, in a prison hospital which has been declared a "special institution" under the Act for the accommodation and medical treatment of persons detained in conditions of special

The Mental Health Act also provides for "restriction orders" and 'hospital orders" to be made by the Supreme Court in respect of persons convicted of offences punishable by imprisonment'. A court of petty sessions has the power under the Act to make hospital orders or guardianship orders in relation to a person convicted of an offence punishable by imprisonment'. The hospital order authorises detention in a specified institution, usually the prison hospital'. A restriction order involves a number of limitations on the transfer, reclassification, leave of absence and discharge of a person detained'. In particular, the *Mental Health Act* requires that a person subject to a restriction order may only be discharged with a direction from the Governor on the recommendation of the Mental Health Review Tribunal.

Provision is made in the *Criminal Code* for review by the Attorney-General of fitness to stand trial'. Such review is to take place at quarterly intervals in the first year and annually thereafter. The Code provides for the Mental Health Review Tribunal to make recommendations to the Attorney General in relation to those found not guilty by reason of insanity and those found incapable of standing trial, but the Tribunal does not have power to determine these cases. The period of detention of such persons is subject to determination by the Governor.

PRINCIPLES 21 AND 22: COMPLAINTS AND MONITORING

Principle 21 stipulates that every patient and former patient has the right to make a complaint through procedures provided by statute. Principle 22 requires appropriate mechanisms: to promote compliance with the Principles; and for inspection of mental health facilities; and for investigation and resolution of complaints.

The *Mental Health Act* enables the Minister to declare a hospital maintained by public funds to be a hospital for the purposes of the Act" and to declare a place to be a "special institution" if satisfied that it is "suitable for the accommodation and medical treatment of persons who may become liable to be detained" under the Act and who need to be detained "in conditions of special security'. There are, however, no other provisions in the Act relating to the standards or other conditions which need to be maintained by such hospitals or institutions. Administration of psychiatric services was, until 1989, the responsibility of the Mental Health Services Commission, established under the *Mental Health Services Act* of 1967. Although not yet repealed, the Act no longer operates because the administrative functions of the Commission were transferred in 1991 to the Regional Health Boards.

The *Mental Health Act* does not contain any provisions for monitoring standards of service in psychiatric institutions or for handling complaints by consumers.

1. Tasmanian *Mental Health Act,* section 106.
2. ibid, section 114.
3. ibid, section 100.
4. ibid, section 99.
5. ibid, section 102.
6. ibid, section 109.
7. ibid, section 4.

8. id.

9. Tasmanian *Mental Health Act,* schedule 3.

10. ibid, section 22.

11. id.

12. ibid, section 23.

13. id.

14. ibid, section 85.

15. ibid, section 88.

16. id.

17. ibid, section 5.

1& ibid. section 50.

19. ibid, section 21.

20. ibid. section 22.

21. ibid. section 33.

22. id.

23. ibid. section 4.

24. ibid. section 19.

25. ibid. section 20.

26. ibid. section 19.

27. ibid. section 107.

28. id.

29. ibid. section 109.

30. ibid. section 5.

31. id.

32. ibid. sections 19 and 20.

33. ibid. sections 10 and 17.

34. ibid. section 17.

35. id.

36. ibid. section 18.

37. id.

38. id.

39. ibid. section 19.

40. ibid. section 20.

41. ibid. section 32.

42. id.

43. id.

44. id.

45 ibid, section 9.

46. ibid, schedule 4.

47. ibid, sections 75 - 76.

48. ibid. section 43.

49. ibid, section 23.

50. ibid. section 76.

51. ibid, section 78.

52. *Mental Health (Review Tribunal) Regulations* 1964.

53. ibid. regulation 10.

54. ibid. form 1, schedule to regulations.

55. ibid. regulation 12.

56. ibid. regulations 5 and 7.

57. ibid. regulation 6.

58. ibid. regulations 6, 16 and 22.

59. ibid. regulation 23.

60. ibid. regulations 10 and 24.

61. ibid. regulation 24.

62. id.

63. ibid. regulation 26.

64. *Mental Health (Hospital and Guardianship) Regulations* 1964, regulations 3,7 and 9.

65. *Mental Health (Review Tribunal) Regulations*, regulation 6.

66. id.

67. *Review Tribunal Regulations*, regulation 13.

68. Tasmanian *Criminal Code Ac4* sections 380-382.

69. id.

70. *Mental Health Act* section 48.

71. ibid. section 6A.

72. id.

73. ibid. section 49.

74. ibid. section 48.

75. *Mental Health Act*, sections 66,68 and 70; *Criminal Code* section 382.

76. ***Criminal Code,*** **section 382.**

77. **i d .**

78. ***Mental Health Act,*** **section 6.**

79. **ibid, section 6A.**

SOUTH AUSTRALIAN MENTAL HEALTH LEGISLATION

INTRODUCTION

The South Australian *Mental Health Act* 1977 contains a number of statements of principle concerning the rights of patients but lacks adequate safeguards to protect such rights. At present it provides for both a Guardianship Board and a Mental Health Review Tribunal. Bills recently introduced in the SA Parliament (but not yet passed) would, if adopted, replace the existing *Mental Health Act,* in particular transferring the provisions relating to guardianship to separate legislation establishing a new Guardianship Board that will subsume the functions of the Mental Health Review Tribunal.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. It also deals with rights associated with lack of legal capacity, including the right to have a determination made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

The South Australian *Mental Health Act* lists the objectives for mental health services in general terms, including ensuring "the best possible treatment and care"; meliorating the adverse effects of mental illness; and minimising restrictions on the liberty of patients and interference with their rights, dignity, and self respect, "so far as is consistent with the proper protection and care of the patients themselves and with the protection of the public."

Ill-treatment or wilful neglect of any person suffering from a mental illness and for whom one has care, control or supervisory responsibility is an offence under the Ace. Immunity is provided for any act or omission in good faith, without negligence and in exercise or purported exercise of powers or in discharge or purported discharge of duties under the Ace.

Nor are there statutory provisions for community treatment or community counselling orders, as such. The powers conferred on the Guardianship Board include power to require that the protected person receive medical or psychiatric treatment on either an inpatient or outpatient basis'. Clearly this can allow for community treatment. However, it is necessary to be received into the Board's guardianship and, at least potentially, subject to all the other powers of the Board to benefit from the Board's powers to order treatment in the community. The concern that the Guardianship Board's combined powers might work against the speedy release of persons from "control" or "custody" orders has already been discussed under Principle 1, above.

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that a determination of mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status or membership of a cultural, racial, or religious group. Family or professional conflict or non-conformity with prevailing values should not be determining factors.

The definition of mental illness in the South Australian *Mental Health Act* is very broad and lacking in objective criteria. It simply defines mental illness as "any illness or disorder of the mind"[21]. This lacks certainty and does not provide practitioners with any guidance. (As already noted above, the Act does not contain provisions preventing political, religious or other nonconforming or minority beliefs or activities from being taken as the basis of a determination of mental illness.)

PRINCIPLE 6: CONFIDENTIALITY

Under the SA *Mental Health Act* those acting in its administration have a duty to maintain the confidentiality of any personal information relating to a patient, obtained in the course of employment'. Breach of this duty constitutes an indictable offence, punishable by a one thousand dollar fine or a year's imprisonment'.

However, the Act also gives the Director of Mental Health Services the discretion to provide a person seeking information with details of whether someone has been admitted to or detained in a psychiatric hospital and dates of any admission or discharge'. The only proviso is that the Director form the opinion that the person seeking the information must have a "proper interest in the matter". an the absence of a statutory definition, those with a "proper interest" could be taken to include potential employers.)

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards commensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication; abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

There is no provision in the South Australian *Mental Health Act* for equity between patients of mental health facilities and those in the general health system. The only relevant statutory objective refers simply to the "best possible treatment and care". Neither the Act nor the Regulations provide any standards or guidelines for treatment or care or for the protection of hospital patients other than the penalties, referred to above, for abuse or wilful ill-treatment by staff; and provisions restricting certain forms of treatment which are discussed in more detail in the next section. There are also licensing provisions, including statutory conditions, for "psychiatric rehabilitation centres" or hostels which are discussed under Principle 14.

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's needs. It also requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

There is no legislative provision for individual treatment plans (nor, as already noted, is there any recognition of the principle of treatment comprising "the least restrictive alternative").

The Act places certain restrictions on the use of psychosurgery and EC. In the case of ECT, authorisation by one psychiatrist and the written consent of either the patient him or herself (if "capable of giving effective consent"), or a parent or the Guardianship Board are sufficient'. There are no criteria to guide the Guardianship Board in the exercise of its discretion in this area. In cases where ECT is "urgently needed for the protection of the patient or some other person", the requirement of consent, whether by patient, parent or Board, is dispensed with.

In relation to psychosurgery, the Act requires authorisation by the person who is to administer the treatment plus that of two psychiatrists (at least one of them "senior") who have each conducted independent examinations of the patient". Psychosurgery also requires written consent, as for ECI'[29].

The issue of enhancing personal autonomy as a goal of treatment is problematic in relation to the existing SA guardianship legislation. Because of its powers to order involuntary detention, and to consent to any form of psychiatric, other medical or dental treatment, the Guardianship Board has a "gatekeeper" function. People may be "received into guardianship" to facilitate one of these procedures and, once subject to the Board's authority, their autonomy in areas in which they may have been able to cope without assistance may be undermined.

PRINCIPLE 10: MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given for diagnostic or therapeutic purposes only, never as a punishment or for the convenience of others. All medication prescribed must be recorded in the patient's records.

The SA *Mental Health Act* requires that records for each patient include full particulars of treatment administered to the patient and authorisation for that treatment'". The Regulations contain a form for recording this information which makes reference to ECT and psychosurgery'[1]. This, and the reference to authorisation which is an express requirement for such forms of treatment, may indicate an intention to limit the recording requirement to treatment of this nature.

No statutory restrictions are placed on the purposes for which medication is used, nor do the Regulations deal with this issue.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that case, an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances.

Principle 11 specifically requires that physical restraint and involuntary seclusion be employed only if necessary to prevent immediate or imminent harm to the patient or others.

The only statutory requirements for informed consent in the South Australian legislation are those for ECT and psychosurgery and those which provide for consent to medical and dental procedures to be carried out on persons suffering from mental illness who are incapable of giving effective consent on their own behalf'.

Provision is made for an emergency medical procedure to be undertaken without consent where the doctor carrying it out (and, where practicable, a second medical practitioner) is of the opinion that the procedure is necessary "to meet imminent risk to the person's life or health'". In all cases other than emergencies, and sterilisation and termination of pregnancy for which special provisions are made, the Guardianship Board may either give consent on behalf of those incapable of effectively consenting themselves or appoint a delegate to do so[n]. Delegates may be family members or institutional care givers. They are appointed on a continuing basis and the delegation is reviewed by the Board after five years, or earlier if the Board considers that the delegate is not acting in the best interests of the person concerned".

Although the definition of such medical procedures does not explicitly exclude psychiatric treatment", this is not considered to be covered by these provisions since the only "procedures" in the strict sense of this word are EC T and psychosurgery - which are subject to specific requirements.

The criteria for involuntary admission under the SA *Mental Health Act* include the need for treatment for mental illness and the opportunity to obtain it at an approved hospital'. Alternatively, the Guardianship Board, after receiving a person into guardianship on grounds including incapacity', may order a person to be placed in a hospital or other institution". The Guardianship Board also has power to order that the "protected person" receive "medical or psychiatric treatment'". This combination of powers vested in the Board is probably sufficient to displace the common law right of informed consent. It is not clear, however, that involuntary admission by a medical practitioner who expresses an opinion as to the need for and availability of treatment is sufficient basis for abrogation of the right of informed consent, in relation to any and every form of treatment administered in the course of the detention.

There are no statutory provisions specifically governing the use of restraint or seclusion.

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and language.

The SA *Mental Health Act* provides that where patients are detained in a psychiatric hospital, they are to be given, as soon as possible after admission, a statement outlining their legal rights'. It also requires copies of the statement to be sent to relatives of the patient'. In relation to language and form, the Act provides for the statement to be in the language with which the patient is most familiar wherever possible. If the individual is illiterate or too disturbed to read and comprehend, the Superintendent is to take "such steps (if any) as may be practicable in the circumstances to convey the information contained in the statement to the patient'".

There is no requirement that the doctor making the determination in the first instance be a psychiatrist. Any medical practitioner who examines a person may, if satisfied of the requisite matters, make an order for involuntary detention effective for three days.

The first statutory requirement for examination and assessment by a psychiatrist is "as soon as practicable" after admission, and, where it is possible, within 24 hours of admission[s]'. On completion of this examination, the psychiatrist may confirm the order if it is found to be "justified" (presumably on the original criteria) or may discharge the patient[s]'. The single psychiatrist may continue the involuntary detention for up to twenty one days".

A continuing detention order may be made "where a patient is detained in pursuance of' a twenty one day order and where two psychiatrists, after separate examination, are satisfied that such detention is necessary "for the protection of others'. No other criteria are specified. Strictly interpreted, then, the only requirement for an order for involuntary detention on an ongoing basis, apart from the initial admission and detention in accordance with the relevant criteria, is the need to protect others. The provision is at best ambiguous as to the requisite criteria for continuing detention and, at worst, allows a person, having been appropriately detained as mentally ill in the first instance, to be involuntarily detained on a continuing basis regardless of whether or not he or she continues to be mentally ill, if the psychiatrists formed the opinion that such detention was necessary for the protection of others. While this may not have been the legislative intention, the provision is clearly open to this interpretation.

PRINCIPLE 17: REVIEW

Principle 17 requires involuntary detention to be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an **involuntary patient and should take place as soon as possible after admission. The Principle also requires that the review body's procedures be simple and expeditious and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.**

The South Australian *Mental Health Act* requires the Guardianship Board to review the circumstances of a protected person "at reasonable intervals". These reviews are initiated by the Board itself'. There is also a right of appeal provided from the Guardianship Board to the Mental Health Review Tribunal'.

The Mental Health Review Tribunal is a statutory three member body, chaired by a District Court judge, senior lawyer or special Magistrate. The Tribunal can consider appeals against the detention of a person in a psychiatric hospital or against the continued placement of a person in the custody of another, as well as the decision to receive a person into guardianship[s]'.

The patient, protected person, a relative, the Director of Mental Health Services or any other person who satisfies the Tribunal that he or she has a proper interest may apply for review". An application may be made three days after admission to a psychiatric hospital although an automatic review in relation to involuntary detention is not required to take place until after the expiration of two months and then at intervals of not more than six months'.

A right of appeal exists from the Tribunal to the Supreme Court'.

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that a patient be entitled in relation to any complaint procedure or appeal, to an interpreter and to legal representation, neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative with further distribution only after consideration of the wishes and interests of the patient as well as the interests of the public.

The SA *Mental Health Act* contains no statutory right to representation before the Guardianship Board. The right to legal representation is guaranteed in relation to review by the Mental Health Review Tribunal and appeals to the Supreme Court, with provision for a lawyer to be made available without cost to the patient from a list compiled by the Law Society'. Other procedural rights, however, receive no statutory recognition. The Tribunal has a broad discretion to act "according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms, and it shall not be bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks fit."' This would allow the Tribunal to accord the appropriate procedural safeguards to a patient as a matter of discretion, particularly as the Tribunal is given the power to require the production of any documents, attendance of any witness and the answering of any question put by the Tribunal, subject only to the privilege against self incrimination'.

There is no statutory requirement to provide written reasons for decisions. Nor, given the availability of appeal to the Supreme Court, is there any necessary implication under the common law rules of natural justice that the Tribunal must exercise its discretion to provide these safeguards.

3. ibid, section 50.
4. ibid. section 18.
5. i d .
6. i d .
7. ibid. section 26.
8. ibid. section 27.
9. ibid. section 26.
10. ibid, section 27.
11. ibid. part IVA.
12. ibid, sections 21 and 22.
13. ibid. section 20.
14. ibid, section 27.
15. ibid, section 28.
16. i d .
17. *Equal Opportunity Commission Ac4* section 5.
18. *Mental Health Act,* sections 19 and 28b.
19. ibid, section 28c.
20. ibid, section 27.
21. ibid. section 5.
22. ibid. section 48.
23 id and ibid. section 49.
24. ibid, section 12.
25. ibid. sections 40 - 42.
26. ibid. section 19.
27. i d .
28. i d .
29. i d .
30. ibid. section 1L
31. Regulations 3 and 4 in *Regulations under the Mental Health Act* (119 of 1979).
32. *Mental Health Act, part WA,* inserted by amendment in 1985.
33. ibid. section 28g.
34. ibid. sections 28b and 28h.
35. ibid. section 28h.
36. ibid. section 5.
37. ibid. section 14.
38. ibid. section 26.
39. ibid. section 27.

40. id.
41. ibid, section 16.
42. id.
43. id.
44. Regulation 8.
45. *Mental Health Act,* section 9.
46. ibid, section 10.
47. ibid, sections 40 42.
48. ibid, section 41.
49. id.
50. ibid, section 13.
51. ibid, section 14.
52. ibid. section 27.
53. ibid. section 26 and section 14.
54. ibid. section 26.
55. ibid, section 14.
56. id.
57. id.
58. id.
59. id.
60. id.
6L ibid. section 27.
62. ibid. section 37.
63. ibid, section 29.
64. ibid. sections 35 37.
65. id.
66. ibid. section 36.
67. ibid. section 35.
68. ibid. section 38.
69. ibid. section 39.
70. ibid. section 34.
71. id.
72. ibid. section 12.
73. SA *Freedom of Information Ac4* section 26.
74. SA *Criminal Law Consolidation Act,* section 292.
75. ibid. section 293.
76. ibid. sections 292 - 293.
77. ibid. section 293a.

78. SA *Mental Health (Supplementary Provisions) Act,* section 43.

79. *Mental Health Act,* section 10.

80. i d .

81. ibid, section 11.

82. ibid, section 12.

83. ibid, sections 40 - 42.

WESTERN AUSTRALIAN MENTAL HEALTH LEGISLATION

INI'RODUCTION

The Western Australian *Mental Health Act* 1962 predates the trend to provide statements of statutory objectives found in legislation passed in recent decades. It does provide basic safeguards and sets out the legislative requirements in a manner that is clear and concise enough to increase the likelihood of compliance. However, it does not make provision for patients' rights through structures such as a specialist review tribunal. Nor does it contain any provision for guardianship. Specific legislation, the *Guardianship and Administration Act,* passed in 1990, commenced operation in 1992.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. It also deals with rights associated with lack of legal capacity, including the right to have a determination made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

The main mechanism provided for the protection of patients' rights under the WA *Mental Health Act* is the Board of Visitors for each psychiatric hospital. These Boards consist of a lawyer, two medical practitioners and two other members'. The Boards are assisted by an executive officer who acts as their delegate. They are required to visit the hospital at least monthly, to interview patients who wish to see them and to receive complaints or recommendations concerning the welfare of patients'. The Boards have the power to "make such inquiries, examinations and inspections as they may consider necessary in the interests of patients and, in particular, in order to ascertain whether any patient ought to continue as a patient'. Their powers include ordering the examination of a patient by a psychiatrist and receiving a report of such examination'. The Boards also have specific duties to inspect hospital accommodation and related sections, report on their findings to the Minister and

to the hospital. The period of after-care may be extended although there is a right of appeal to the local Magistrate against such extension. The legislation makes no provision for involuntary community care without prior hospitalisation.

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that a determination of mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status, or membership of a cultural, racial, or religious group. Similarly, family or professional conflict or non-conformity with prevailing values should not be determining factors.

The definition of mental illness in the WA *Mental Health Act* is quoted above. It is based on impairment of mental health - but the concept of mental health is not defined in the Act. There are no statutory provisions that prevent political, cultural, religious or similar non-conformity from being taken into account in determining the existence of mental illness.

PRINCIPLE 6: CONFIDENTIALITY

The WA *Mental Health Act* does not contain any guarantees of patients' confidentiality.

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards commensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication; abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

The WA *Mental Health Act* contains no statement as to equity between patients of mental health facilities and those in the general health system.

Apart from the penalty for the ill-treatment or wilful neglect of patients, and the functions of the Boards of Visitors, referred to above, the Act does not contain any specific provisions relating to protection of patients from harm.

The Regulations require the of a hospital to make "such arrangements as he considers necessary for the safety and security of patients showing suicidal or homicidal tendencies or making attempts to escape'.

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's needs. It also requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

Treatment is only mentioned in the WA *Mental Health Act* as the purpose of involuntary hospitalisation'. The only specific reference to treatment is an enabling provision for regulations in respect of "the circumstances under which any specified treatment or class of treatment may be given or administered ... and the authority or consents to be obtained"'. No such regulation has been made in relation to psychiatric treatment. There is a regulation requiring the written consent of the Director or the Medical to surgical operations on psychiatric patients." There are no limits on the administration of ECT or psychosurgery.

PRINCIPLE 10: MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given for diagnostic or therapeutic purposes only, never as a punishment or for the convenience of others. All medication prescribed must be recorded in the patient's records.

Neither the *Mental Health Act* nor the Regulations deal with medication - either by way of guiding principle, positive duty or restriction. The Regulations that require the keeping of patient records and ward reports do not specifically refer to medication. Their form and content is left to the discretion of the and the Director'.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that case, an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances. Principle 11 specifically requires that physical restraint and involuntary seclusion be employed only if necessary to prevent immediate or imminent harm to the patient or others.

The WA *Mental Health Act* does not deal directly with the right of informed consent It is possible to infer that common law rights to refuse treatment and to be fully informed before consenting to treatment are not to apply to involuntary patients since the treatment is the stated purpose of admission (see Principle 9 above) and they are described in the Act as being "detained"". On the other hand, these provisions do not represent clear, express, abrogation of common law rights.

The position of informal patients in this regard is also unclear, since they are not free to leave at will but must either obtain a discharge from the or from the Director of Mental Health Services or wait for up to 72 hours'. However, the provisions for the admission of informal patients do not refer to treatment as the purpose of their hospitalisation'.

The restraint or seclusion of a patient without an order from a medical officer is prohibited by Regulation. There is, however, an exception allowing a matron, head male nurse or deputy to use restraint or seclusion in circumstances that require immediate action, provided he or she immediately informs a medical officer".

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and language.

Neither the *Mental Health Act* nor the Regulations makes any provision for patients to be informed of their rights.

PRINCIPLE 13: PATIENTS' RIGHTS IN MENTAL HEALTH FACILITIES

Principle 13 guarantees patients' rights to recognition before the law; privacy; freedom of communication; freedom of religion; and conditions of living as close as possible to everyday life.

The WA *Mental Health Act* makes no reference to patients' rights to privacy, to freedom of communication, freedom of religion or to any other freedom or facility associated with everyday life.

PRINCIPLE 14: RESOURCES IN MENTAL HEALTH FACILITIES

This Principle requires that mental health facilities have access to the same level of resources as other health establishments, particularly in relation_ to staffing, equipment, care and treatment. It also requires that mental health facilities be inspected by the competent authorities at regular intervals to ensure compliance with the Principles.

The WA *Mental Health Act* does not contain any provisions relating to the level of resources committed to mental health facilities. The *Hospitals Act* 1927, which provides for the establishment and funding of general hospitals under the joint state and federal arrangements (through Medicare), expressly states that it does not apply to "approved" hospitals within the meaning of the *Mental Health Act"*. This means that the only hospitals at which patients may be detained under the *Mental Health Act* are those precluded from this joint funding.

PRINCIPLE 15: ADMISSION

Principle 15 requires that a person who needs treatment in a mental health facility should have access to it on a voluntary basis in the same way as for any other illness and that wherever possible admission should be on a voluntary basis.

The WA *Mental Health Act* makes provision for voluntary admission on the condition that a psychiatrist is of the opinion that the person is "or appears to be suffering from mental disorder." In the *case* of a person over 18, the or another psychiatrist mat consider him or her to be capable of understanding the nature and effect of the request for admission. In the case of a person under 18 alyarent or guardian may request the admission. As noted above, an informal patient may not leave at will but requires either an order from the Director or or a wait for up to 72 hours before being discharged'.

PRINCIPLE 16: INVOLUNTARY ADMISSION

Principle 16 sets out the criteria for involuntary admission. It requires that a qualified mental health practitioner determine that the person has a mental illness and that either:

> **as a consequence there is a serious likelihood of immediate or imminent harm to that person or to others; or**

that failure to admit that person is likely to lead to a serious deterioration in the condition which will preclude further treatment and that admission is necessary to provide treatment.

Principle 16 also requires that involuntary detention be for only a short initial period pending review and that notice be given of this review to the patient, to the patient's family and to the patient's personal representative.

There are two methods by which a person may be involuntarily detained (other than as a security patient) under the WA *Mental Health Act.* The first is by referral from a medical practitioner who has examined the person within the previous 14 days. The doctor must certify that he or she is of the opinion that the person "appears to be suffering from a mental disorder and ... should be admitted for treatment"". This is sufficient to hold the person for a period up to 72 hours during which he or she is to be examined by a psychiatrist". If the psychiatrist is of the opinion that the person "needs to be treated in an approved hospital". The individual shall be detained or leave the hospital°.

The second method by which someone may become an involuntary patient is by "reception order" made by a justice on the application of any person'. This application must be based on a referral from a doctor who has examined the person in the previous 14 days and formed the opinion that he or she is suffering from a mental disorder'. The justice is then required to be satisfied that "it is in the interest of that person or of the public that he should be admitted to an approved hospital for treatment[943]

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These involuntary admission criteria fall far short of the requirements in UN Principle 16. The provisions relating to the duration of detention and review are also inconsistent with the UN standards. Involuntary detention in the first instance is for six months and this is renewable for periods of 12 months at a time "if the, on the advice in writing of another psychiatrist, is of the opinion that it is in the interest of the patient" to do so. As mentioned above, there is also provision for "discharge to after-care" which may prolong the period in which a person is subject to medical supervision. The main review mechanism available under the WA *Mental Health Act* is the Board of Visitors for each hospital. (The Boards' extensive powers and duties, including the power to call for a patient to be discharged, are further examined in the following section.)

PRINCIPLE 17: REVIEW

Principle 17 requires that involuntary detention be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an involuntary patient and should take place as soon as possible after admission. The principle also requires that the review body's procedures be simple and expeditious

and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.

The Boards of Visitors under the *Mental Health Act* are independent of the hospital but not entirely independent of the government. The members are appointed by the Governor and may have their appointments terminated without any statutory safeguard relating to cause or process. The Boards are "responsible to, and subject to the control of, the Minister".

As noted above (Principle 1), the Boards are required to visit the hospital at least monthly and to interview those patients who wish to see them. While patients have a statutory right to an interview with a Board, the Boards are not required to undertake automatic reviews of detained patients. Moreover, although the Boards have power to require discharge, there are no circumstances in which they are obliged to use this power. Nor is there any right of appeal against a decision of a Board or against a refusal to exercise a power vested in them.

No other statutory review procedures exist. However, where an application for the discharge of a patient has *been* made and been refused by the, the matter must be referred by the to the Director of Psychiatric Services, if the applicant "insists on the discharge". The Director must give the applicant an opportunity to be heard and determine whether to discharge the patient".

There is also provision in the WA *Mental Health Act* for an application to be made to the Supreme Court for discharge of a patient on the ground that he or she is not suffering from any mental disorder or that "in all the circumstances of the case, it is in the patient's interests and proper that he be discharged'.

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that, in relation to any complaint procedure or appeal, a patient be entitled to an interpreter and to legal representation, neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative. Further distribution of the decision and reasons should be made only after consideration of the wishes and interests of the patient as well as the interests of the public.

There are no procedural safeguards provided by the WA *Mental Health Act* in relation to review by the Boards of Visitors or by the Director, apart from the requirement that the latter afford an applicant the opportunity to be heard. There is no guarantee that applicants in either context will have the opportunity to hear or see

the evidence against them. Nor is there a right of access to records relevant to the case or a right to call other evidence. The Boards are to conduct their proceedings in such a manner as may be prescribed and in the absence of such prescription, they have the discretion to proceed in any manner they choose". No Regulations or other prescriptions have been made to limit their discretion.

There is no provision for representation of patients (or other applicants) in relation to any of these proceedings; nor is there provision for interpreters. The Boards are required to report to the Minister but no mention is made of providing the patient with written statements of reasons for any decisions they may make'.

In relation to applications to the Supreme Court, on the other hand, not only would the full form of the rules of natural justice be applicable but statutory rules of evidence and procedure also apply. There are specific Supreme Court (Mental Health) Rules" providing for some flexibility in proceedings under the *Mental Health Act* and also making certain special arrangements such as having matters heard in camera unless the Judge orders otherwise". These rules also provide that an application on behalf of "an incapable person" is to be made by the manager appointed to handle that person's affairs, unless the Court otherwise directs". This would seem to place at a significant disadvantage the patient who may have been found incapable but who may wish to seek discharge (which is not a matter within the normal scope of the manager's functions) or, indeed, to dispense with the manager appointed in relation to his or her estate.

PRINCIPLE 19: ACCESS TO INFORMATION

Principle 19 requires that a patient or a former patient be given access to information from his or her medical and personal records held by a mental health facility. It also provides the right to have personal records amended.

The WA *Mental Health Act* does not provide for access to patient records. Indeed, the Act itself only requires records to be kept in relation to the admission, discharge, transfer and status of patients[51]. Further provisions in the Regulations leave the manner in which patient case records are to be kept to the Director and the form of ward reports to the [52]. The Regulations do not make any provision for patient access to such records.

Freedom of information legislation has been introduced into the Lower House of the Western Australian Parliament - but it has not yet been adopted.

PRINCIPLE 20: FORENSIC PATIENTS

Principle 20 requires that forensic patients, or any person detained in the course of criminal proceedings or investigations who is believed or determined to have a mental illness, receive the best available mental health care, as provided in Principle 1. It also requires that the other Principles apply to such persons "to the fullest extent possible with only such limited modifications and exceptions as are necessary in the circumstances". Specifically, Principle 20 envisages that a court or tribunal may, on appropriate medical advice, admit these persons to a mental health facility.
The WA *Mental Health Act* confers on courts of summary jurisdiction the power to remand a person charged with a summary offence for up to 28 days. The person may be remanded on bail, to be examined by a medical practitioner, or in custody for reception into an approved hospital for observation. Following examination under these provisions, a person may be referred to an approved hospital by the medical practitioner; received at that hospital for observation for a period not exceeding 72 hours; and admitted as an inpatient under the Act if in the opinion of the or another psychiatrist, the person is in need of treatment. The person remanded in custody for observation in an approved hospital may also be admitted as a patient if the is of the opinion that he or she is suffering from a mental disorder. The is required by the Act to inform the court prior to discharge of such a patient and, if required to do so by the court, "discharge the person into his former custody".

The WA *Mental Health Act* also provides for a person found not fit to stand trial by means of mental disorder after committal for an indictable offence to be admitted by the Chief Secretary to a psychiatric hospital as a security patient. The duration of such detention is to be determined by the Chief Secretary, acting on the advice of the or another psychiatrist. A security patient may, if found fit, stand trial. On discharge, a security patient is to be returned "whence he came prior to admission". The Chief Secretary's decision to discharge a security patient must be based on the advice of the or another psychiatrist

Where a person has been found not guilty on the grounds of mental illness, the Act provides for the court to order that the person be held in custody at the Governor's pleasure. The Act confers a discretion on the Governor to order the admission of such a person to an approved hospital as a security patient and to discharge that person "as he thinks fit".

The provisions of the WA *Mental Health Act* relating to leave and discharge for other involuntary patients do not apply to security patients.

The WA *Prisons Act* 1903-1971 provides that a prisoner may be transferred, by order of the Director of the Prison Service or of a medical officer, to any hospital including a psychiatric hospital. The *Prisons Act* does not, however, provide any criteria to be applied when transferring prisoners to psychiatric hospitals. The *Mental Health Act* states that provision for voluntary admission and for admission by medical referral or judicial reception order under the Act are not applicable to sentenced or remand

prisoners. Overall, there appears to be an absence of defined criteria for the admission of prisoners to psychiatric hospitals.

PRINCIPLES 21 AND 22: COMPLAINTS AND MONITORING

Principle 21 stipulates that every patient and former patient has the right to make a complaint through procedures provided by statute. Principle 22 requires appropriate mechanisms: to promote compliance with the Principles; for inspection of mental health facilities; and for investigation and resolution of complaints

The WA *Mental Health Act* provides for the establishment of hospitals for the treatment of mental illness as well as the development of specialist facilities for children, for old people and for alcoholics and drug addicts". The Act also provides for the establishment of day hospitals, day centres and out-patient facilities for welfare, rehabilitation and other purposes specified in the legislation™. Such hospitals, funded from State consolidated revenue, are referred to in the Act as "approved hospitals"[55] and there is express prohibition on detention of a person under the Act other than in an approved hospital™. However, the only provisions made in the WA *Mental Health Act* for inspection or monitoring of these approved hospitals are those relating to the Boards of Visitors. The Director of Psychiatric Services is responsible to the Minister "for the medical care and welfare of every person treated by the Department and for the proper operation of every approved hospital and every service established "under the Act."[57] Apart from standard annual reporting requirements covering the medical care and welfare of persons treated under the Act", there are no statutory procedures specifically governing accountability.

The WA *Mental Health Act* does contain detailed provisions for the approval of private hospitals". These include a report by the Director to the Minister setting out details of certain matters', the issue and annual review of permits' and the annual payment of subsidies subject to regulations, conditions or directions of the Minister'. However, there are no private psychiatric hospitals approved to admit involuntary patients in WA.

The Boards of Visitors established under the *Mental Health Act* monitor the standards of care and treatment in hospitals and provide a basic complaint-handling service. Their functions are discussed under Principle 1 above. Their capacity to fulfil these functions was recently extended by provision for delegation to an executive officer".

1 WA *Mental Health Ac4* section 11.

2. ibid, section 18.
3. i d .
4. i d .
5. i d .
6. ibid. section 58.
7. ibid. section 61.
8. ibid. section 80.
9. ibid, section 59.
10. ibid. section 60.
11. *Mental Health Act* sections 62-78; WA *Guardianship and Administration Act* Part 6.
12. *Mental Health Act,* section 63.
13. ibid. section 64.
14. *Guardianship and Administration Act,* section 39.
15. "incapable by reason of mental illness, defect, or infirmity, however occasioned, of _____ virgis *affairs" Mental Health Act* (section 64).
16. "unable by reason of mental disorder, intellectual handicap, or other mental disability to make reasonable judgements relating to all or any part of his *estate" (Guardianship and Administration Act,* section 64).
17. *Mental Health Ac4* sections 65 and 66.
18. ibid. section 5.
19. ibid. section 30.
20. ibid. section 34.
21. i d .
22. ibid. section 31.
23. ibid, section 27.
24. ibid. section 51.
25. ibid. section 42.
26. ibid. section 43.
27. *Mental Health (Administration) Regulations* 1965, regulation 12.
28. ibid, sections 28 and 29.
29. ibid. section 88(f).
30. *Mental Health (Administration) Regulations* 1965, regulation 14.
31. *Regulations 9 and 10 under the Mental Health Act.*
32. *Mental Health Act,* section 38.
33. ibid. section 51.
34. ibid. section 27.
35. *Regulation 13 under the Mental Health Act.*
36. WA *Hospitals Act* 1927, section 3(1).

37. *Mental Health Act* section 51.

38. ibid, section 28.

39. ibid. section 34.

40. ibid, section 28.

41. ibid, section 29.

42. i d .

43. i d .

44. ibid. section 52.

45. ibid. section 55.

46. ibid. section 1.5.

47. ibid. section 18.

48. *Supreme Court (Mental Health) Rules* 1965.

49. ibid. sections 8 and 9.

50. ibid. section 16.

51. *Mental Health Act,* section 41.

52. *Mental Health (Administration) Regulations,* regulations 9 and 10.

53. ibid, section 19.

54. i d .

55. i d .

56. ibid. section 25.

57. ibid. section 8.

58. i d .

59. ibid. sections 21-24.

60. ibid. section 21.

61. ibid, section 22.

62. ibid. section 23.

63. Amendments to section 18 of the *Mental Health Act* were made in 1990 following recommendations made by the Zelestis Inquiry in 1989.

NORTHERN TERRITORY MENTAL HEALTH LEGISLATION

INTRODUCTION

The Northern Territory *Mental Health Act* 1980 is very basic - with minimal provision for patients' rights. The legislation is not supplemented by related Acts providing for safeguards or monitoring and its terminology and processes have a strong criminal law flavour. Magistrates, without specialist training, make most of the decisions about involuntary hospitalisation ("custody") and treatment.

PRINCIPLE 1: FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

The first UN Principle contains general guarantees of access to the best available mental health care; treatment with humanity and respect for human dignity; prohibition of discrimination; and the right to exercise all civil, political, economic, social and cultural rights recognised by the relevant international instruments. It also deals with rights associated with lack of legal capacity, including the right to have a determination of incapacity made by an independent statutory body; and the rights to a fair hearing, to legal representation, to review and to appeal.

The NT *Mental Health Act* does not contain statements of statutory objectives nor any definition of mental illness or mental health. It does, however, state that a person should not be considered to be mentally ill "by reason only that he expresses or refuses or fails to express a particular political, anarchic, religious, irreligious, legal, illegal, moral, or immoral opinion or engages or refuses or fails to engage in a particular political, anarchic, religious, irreligious, legal, moral or immoral act or activity." Moreover it goes on to state that "the taking of or addiction to a drug or psychotropic substance is not of itself evidence of mental illness, but a biochemical or psychological effect of a drug or psychotropic substance may be an indication of mental illness."'

The NT *Mental Health Act* does not contain any provisions creating civil or criminal liability for mistreatment, abuse or neglect of psychiatric patients.

The *Mental Health Act* states that a person "in custody" under the Act (ie an involuntary patient) "is not to be restricted in communications with other persons, either by mail or by receiving visitors "at reasonable times", unless a medical practitioner determines that such restrictions are necessary for the successful treatment of the-person or for the physical or mental health or safety of others including the staff and other patients'.

The procedures for apprehension and involuntary admission of persons under the NT *Mental Health Act all* involve orders made by a Magistrate. The Act uses the term "custody" to describe involuntary detention in a psychiatric facility's and provides that "such reasonable measures that are immediately necessary" may be used to control a person taken into custody under the Ace. The basic procedure by which a person is taken into custody is pursuant to a warrant issued by a Magistrate who has "after reasonable enquiry" formed the view that the person concerned "may be suffering from a mental illness and by reason of the illness may:

(a) require care, treatment or control;

(b) be incapable of managing himself or his affairs;

(c) be under inadequate care or control;

(d) be likely, by act or neglect, to cause death or serious bodily harm to himself or another person."

Any one of the criteria (a) to (d) is sufficient. It is also possible for a person to be taken into custody under the *Mental Health Act* under a warrant obtained by telephone where it is "impracticable for a person to appear before a Magistrate to make an application."'

Moreover, in situations regarded as more urgent either a member of the police force or a "medical practitioner who is performing duty in or in the vicinity of a hospital" is empowered to take a person into custody without a warrant on the same criteria as apply to the issue of a warrant[s]. Where a person is detained without a warrant, either the doctor, the police officer responsible or the Chief Medical Officer (CMO) must, "within 24 hours or as soon as possible thereafter", make an application to a Magistrate for a custody order under the Ace.

The Magistrate who hears the application for a person to be taken into custody under the Act is also empowered by the Act to make an order that the Public Trustee or any other person apply under the *Aged and Infirm Persons' Property Act* 1979 for a protection order in respect of the estate of the person whose custody is sought'. Such applications are heard by the Supreme Court.

The NT *Mental Health Act* also contains a provision vesting in the CMO "all the powers of a guardian in relation to the person but not the property" of patients, voluntary or involuntary, hospitalised for observation, care, treatment or control as mentally ill persons where such persons are in the opinion of the CM0 incapable of managing themselves or their affairs". The CMO's powers are limited in this respect - to the extent that they are

not to be exercised without the approval of a court or Magistrate unless the CM0 "is satisfied that it is not practicable, in all the circumstances of the case, to make an application to a court or Magistrate in the time available and that because of either the urgency or the trivial nature of the proposed action "it is desirable that the action should be taken before the application is made."' The Act confers jurisdiction on the Supreme Court, a court of summary jurisdiction or a Magistrate to hear and determine applications by the CMO for approval to exercise the guardianship powers'. There is an *Adult Guardianship Act* 1988 but this only applies to people with intellectual disability".

The NT does not yet have anti-discrimination legislation (although this is reportedly under consideration).

PRINCIPLE 2: MINORS

UN Principle 2 requires legal protection of the rights of minors including, where necessary, the appointment of a personal representative other than a family member.

There are no specific provisions in the NT *Mental Health Act* that relate to minors, other than those which allow "infants" to be admitted as voluntary patients at the request of parents or guardians and to be discharged by the same method[s].

PRINCIPLES 3 AND 7: LIVING, WORKING AND BEING TREATED IN THE COMMUNITY

UN Principle 3 requires that persons with mental illness have the right to live and work, as far as possible, in the community. Principle *7* provides that every patient has the right to be cared for, as far as possible, in the community (in both geographic and cultural senses) in which he or she lives. Where treatment does take place in a mental health facility, Principle *7* requires that this should be close to home, relatives and friends and that the person be returned as quickly as possible to the community.

The NT *Mental Health Act* contains provisions for either a Magistrate or a person in charge of a hospital to authorise the return of a patient to the community after being taken into custody under the Act. A Magistrate may order release from custody and has the discretion to impose conditions relating to observation, care, treatment and control including orders for regular reporting on the care, treatment or control of that person in the community. Magistrates may also, in the context of orders for release, make orders conferring on a relative, friend or other person powers amounting to guardianship'. The latter powers are expressed in terms of parental powers and specifically include the right to have the person subject to them admitted as "voluntary patient" under the Act.

The powers conferred upon the person in charge of a hospital include permitting patients to leave the hospital "in the course of [their] treatment" while providing that such patients

"shall not be held to have been released from custody."' The Act makes no positive provision for community care.

PRINCIPLE 4: DETERMINATION OF MENTAL ILLNESS

Principle 4 requires that a determination of mental illness be made in accordance with internationally accepted standards and never on the basis of political, economic or social status, or membership of a cultural, racial, or religious group. Similarly, family or professional conflict or non-conformity with prevailing values should not be determining factors.

The NT *Mental Health Act* contains no definition of mental illness, although it contains exclusions, quoted above, for political, religious, moral and other values or activities. In the absence of a statutory definition, the matter must be left to psychiatrists and other medical practitioners who make the day to clay determinations. Ultimately, the question would be determined by a court relying upon expert medical evidence.

PRINCIPLE 6: CONFIDENTIALITY

The NT *Mental Health Act* does not contain any provisions to protect the confidentiality of patients or other persons dealt with under the Act.

PRINCIPLE 8: STANDARDS OF CARE

Principle 8 stipulates that every patient has the right to receive appropriate health and social care at standards commensurate with those applicable to other ill persons. It also requires that every patient be protected from harm - including unjustified medication; abuse by other patients, staff or others; or other acts causing mental distress or discomfort.

The NT *Mental Health Act* has no provisions guaranteeing equity in standards of care for the mentally ill. Nor does it contain any provision designed to protect patients from harm, abuse or discomfort at the hands of staff, other patients or any other person.

PRINCIPLE 9: TREATMENT

Principle 9 requires treatment in the "least restrictive environment" and with the least restrictive or intrusive method appropriate to the individual patient's_ needs. It also requires that individually prescribed treatment plans be provided in accordance with applicable standards of medical ethics and directed towards enhancing personal autonomy.

The term "least restrictive environment" or its equivalent does not appear in the NT *Mental Health Act* (although the provisions discussed above, under Principle 7, suggest some movement in this direction). The Act allows a Magistrate when issuing a warrant or making an order for custody under the Act to make any further order authorising treatment, surgery or other procedure in relation to the person or a method of control that may be exercised over the person.' The CM0 is prohibited from allowing treatment, surgery or methods of control that have not *been* authorised by a Magistrate except in cases of emergency or where the treatment is, in the CMO's opinion, "recognised standard medical treatment."" Furthermore, the CM0 may only authorise treatment where one or more of the following circumstances apply:

> **"if the patient is capable of managing his or her own affairs;**
>
> **if the CM0 is satisfied, having sighted the reports to doctors who have independently examined the patient, that the treatment will not be detrimental to the patient's best interest;**
>
> **if the treatment is required as an emergency measure; or**
>
> **if it is "recognised" standard medical treatment the use of which has been authorised as a matter of course.""**

There are no more specific provisions in relation to electro convulsive therapy or psychosurgery.

These provisions for the authorisation of treatment, of operations and of other procedures, including methods of control to be exercised over patients, are relatively stringent. They appear to allow a Magistrate to impose an individual treatment plan of a general nature and they lay down a procedure and protocol for regulating psychiatric treatment, including methods of control exercised over patients. There is, however, considerable leeway in the expression "recognised standard medical treatment."

The Act prohibits the authorisation by a Magistrate of treatment or surgery "except for the purposes of treating an illness.' On the other hand, the Act expressly recognises that methods of control may be exercised over patients in the course of their custody under the Act.

PRINCIPLE 10: MEDICATION

Principle 10 requires that medication meet the best health needs of the patient and be given for diagnostic or therapeutic purposes only, never as a punishment or for the convenience of others. All medication prescribed must be recorded in the patient's records.

Apart from the prohibition on the authorisation of treatment or surgery for purposes other than treating an illness, there are no restrictions in the NT mental health legislation on the use of medication". Nor is there any requirement for the recording of medication prescribed or administered. The distinction made in the Act between "treatment" and methods of control that may be exercised over a patient suggests that medication may be used as a control measure.

PRINCIPLE 11: INFORMED CONSENT

Principle 11 requires informed consent to treatment except in the case of a prescribed plan of treatment given to an involuntary patient who lacks the capacity to consent. In that case, an independent authority must be satisfied that the proposed plan is in the best interests of the patient or, alternatively, a personal representative must consent on the patient's behalf. There are also exceptions for cases of urgent necessity and certain other specific circumstances. Principle 11 also specifically requires that physical restraint and involuntary seclusion be employed only if necessary to prevent imminent or immediate harm to the patient or others.

The authorisation of treatment by magisterial orders has, at one level, the potential to avoid some of the uncertainties that arise in other States in relation to the interplay of the common law right to informed consent and the statutory provisions. Where a Magistrate orders treatment for an individual there is little scope for the common law right to refuse treatment or to be informed before giving consent. However, the question immediately arises concerning the appropriateness and efficacy of such a regime in respecting the patient's other rights. Nor is the Magistrate required to authorise all treatment to be given to a patient. There remain, therefore, a number of problems, including a grey area in which the patient may retain common law rights. While the Act requires the CM0 to authorise treatment in certain specified circumstances (discussed under Principle 9, above), this lacks the clear expression of intention that would be required to override common law rights.

The position is different, however, for forensic patients. In that Part of the Act dealing with forensic patients express provision is made for treatment without consent - with authorisation from the courts. (These provisions are considered further in relation to Principle 20 below.) The contrast between the explicit provisions for forensic patients and the absence of provisions for others strengthens the argument that civil patients, or at

least those with the capacity to manage their own affairs, retain their rights at common law in relation to informed consent and refusal of treatment.

There are no specific provisions relating to limitations on restraint or seclusion.

PRINCIPLE 12: NOTICE OF RIGHTS

Principle 12 calls for patients to be informed of their rights in an appropriate form and language.

There is no provision in the NT *Mental Health Act* for information to be provided to patients about their rights.

PRINCIPLE 13: PATIENTS' RIGHTS IN MENTAL HEALTH FACILITIES

Principle 13 guarantees patients' rights to recognition before the law; privacy; freedom of communication; freedom of religion; and conditions of living as close as possible to everyday life.

Apart from the provisions relating to rights to communicate and receive visitors, discussed above, the NT *Mental Health Act* does not guarantee patients' rights to privacy, freedom of religion, or other conditions of everyday life.

PRINCIPLE 14: RESOURCES IN MENTAL HEALTH FACILITIES

This Principle requires that mental health facilities have access to the same level of resources as other health establishments, particularly in relation to staffing, equipment, care and treatment. It also requires that mental health facilities be inspected by the competent authorities at regular intervals to ensure compliance with the Principles.

The NT *Mental Health Act* does not specify that treatment for mental illness is to be restricted to any particular category of hospital and does not contain procedures for the approval or monitoring of psychiatric facilities.

PRINCIPLE 15: ADMISSION

Principle 15 requires that a person who needs treatment in a mental health facility should have access to it on a voluntary basis in the same way as for any other illness and that wherever possible admission should be on a voluntary basis.

The NT *Mensal Health Act* makes provision for persons to admit themselves as voluntary patients and allows such patients to be discharged from hospital "subject to the reasonable rules of the hospital concerning the admission and discharge of patients." The Act requires that voluntary patients be "psychiatrically examined by two medical practitioners acting independently of each other."' A person may only remain in hospital as a mentally ill person, whether as a voluntary patient or otherwise, if he or she is "capable of managing himself and his affairs" or, alternatively, if the CM0 is satisfied after sighting the reports of two independent medical examinations that the patient should be permitted to remain for observation, care, treatment or control as a mentally ill person. A further provision prohibits a person from remaining in hospital for observation, care, treatment or control as a mentally ill person "unless at intervals of not more than six months" the CMO is satisfied on the basis of two medical reports that the person should be permitted to remain'.

PRINCIPLE 16: INVOLUNTARY ADMISSION

Principle 16 sets out the criteria for involuntary admission. It requires that a qualified mental health practitioner determine that the person has a mental illness and that either:

> **as a consequence there is a serious likelihood of immediate or imminent harm to that person or to others:**
>
> **or that failure to admit that person is likely to lead to a serious deterioration in the condition which will preclude further treatment and that admission is necessary to provide treatment.**

Principle 16 also requires that involuntary detention be for only a short initial period pending review and that notice be given of this review to the patient, to the patient's family and to the patient's personal representative.

The criteria for involuntary admission under the NT *Mental Health Act are* as follows:

> **"that a person**
>
> **(a) by reason of a mental illness**
>
> **requires care, treatment or control; and**

(ii) is incapable of managing himself or his affairs;

(b) is not under adequate care and control; and

(c) is likely, by act or neglect to cause death or serious bodily harm to himself or another person.""

Where a person is taken into custody under a warrant" an application for involuntary admission must be made by the CMO to a Magistrate within three days "or as soon as practicable thereafter."

If a person has been taken into custody without a warrant, the CMO is required to apply to the Magistrate within 24 hours "or as soon as possible thereafter." The CM0 must place before the Magistrate a report on the mental health of the person taken into custody; on the care being given and the control being exercised over that person; on the treatment that has been given; and on the steps taken to ascertain whether there is a near relative or another person who should be given the opportunity to be heard before an order is made for the person to be taken or held in custody'".

The Magistrate may order the person to be kept in custody if, after "reasonable enquiry", it has been "made to appear" that the criteria set out above have been satisfied'. (This statutory formulation may indicate a standard of proof lower than the usual civil standard.)

Unless the Magistrate is satisfied that it would be "detrimental to the interests of the person in custody to do otherwise" he or she shall not make an order for a period longer than six months at any one time'. There is provision for the CMO to report to the Magistrate at intervals not exceeding six months "for such further order, if any, as may be necessary to keep the person in custody."'

PRINCIPLE 17: REVIEW

Principle 17 requires that involuntary detention be reviewed at reasonable intervals by a body that is judicial or otherwise independent, assisted by independent specialist medical practitioners. The initial review should be of the decision to admit as an involuntary patient and should take place as soon as possible after admission. The principle also requires that the review body's procedures be simple and expeditious and that there be a right of appeal to a higher court against a decision to admit to or to retain in a mental health facility.

The NT *Mental Health Act* states that a patient, whether voluntary or involuntary, shall not be permitted to remain in hospital as a mentally ill person unless, at intervals of not more than six months, the CM0 is satisfied, "after sighting the reports of two medical practitioners who have examined a person psychiatrically while acting independently of each other, that the person should be permitted to remain for observation, care, treatment

or control as a mentally ill person."' This would appear to place an onus on the person in charge of the hospital to ensure a medical review of psychiatric inpatients at no more than six monthly intervals as mentioned above. The CM0 is also required to report to the Magistrate at intervals not exceeding six months for the renewal of custody orders for those whose continued -detention is considered necessary.

There is provision in the Act for the Supreme Court to review any order made by courts or Magistrates under the Act'. An application may be made to the Court by the person subject to an order, by a guardian or specified close relatives of the person, by the CM0 or by any other person "who, in the opinion of the Supreme Court, has, by reason of tie of friendship or any other reason, bona fide interest of the welfare of the person who is subject to the order."' The Supreme Court is empowered to re-hear the application made to the court or Magistrate. The Act confers on the Supreme Court all the relevant magisterial powers in relation to such applications'[s]. There is also an express obligation on the Supreme Court to ensure that all persons considered by the court to have an interest in the application are represented or, alternatively, to satisfy itself that in the circumstances such representation is not necessary".

No specialised review body exists under the NT *Mental Health Act.* The procedures applicable to the periodic reviews by the Magistrate or on review by the Supreme Court are laid down in the *Mental Health Act* and discussed in the following section.

PRINCIPLE 18: PROCEDURAL SAFEGUARDS

Principle 18 specifies a number of procedural safeguards to give full effect to rights of review and other substantive rights such as access to information. The Principle requires that, in relation to any complaint procedure or appeal, a patient be entitled to an interpreter and to legal representation, neither of these being dependent on the patient's ability to pay. It also covers rights of access to information, to a review and to appear to produce evidence at a hearing. It requires that a decision whether to hold a hearing in public or in private be made after due consideration of the wishes of the patient. Finally, written reasons for decision on review are required and copies are required to be given to the patient and to his or her representative. Further distribution of the decision should only be made after consideration of the wishes and interests of the patient as well as the interests of the public.

The NT *Mental Health Act* sets out certain procedural provisions for the hearing of applications or reviews under the Act and incorporates by reference powers conferred under the *Coroner's Act* 1974 - 1988 as if an inquiry under the *Mental Health Act* were an inquest'.

The court or Magistrate is expressly required to ensure that a person in custody is represented by a legal practitioner or, alternatively, that in the circumstances such representation is not necessary'. The Act also provides for a court or Magistrate to appoint a legal representative for a person held in custody "additional to the legal

representation that, but for this section, that person would have."' This would appear to allow the court to override a person's own choice of legal representative. The reasonable costs and disbursements of legal representatives appointed by the court are to be paid by the NT at the court's discretion'. No provision is made, however, for payment from the public purse of legal representatives chosen independently.

A further provision states that "a legal practitioner may, at any time, ask a court or Magistrate to make or revoke an order under this Act" which suggests that to this extent a lawyer may act without instructions from the person concerned'.

The court or Magistrate is also specifically empowered by the Act to order that a person held in custody be examined "by such person and in such manner as the court or Magistrate directs, and that the results of the examination be given to the legal representative of the person examined."'

PRINCIPLE 19: ACCESS TO INFORMATION

Principle 19 requires that a patient or a former patient be given access to information from his or her medical and personal records held by a mental health facility. It also provides the right to have personal records amended.

There is no provision in the NT *Mental Health Act* providing a patient with a right of access to information from his or her records. Furthermore, there are no statutory requirements for the keeping of such records other than in relation to restrictions on communications, referred to above.

There is no freedom of information legislation at present in the NT.

PRINCIPLE 20: FORENSIC PATIENTS

Principle 20 requires that forensic patients, or any person detained in the course of criminal proceedings or investigations and believed or determined to have mental illness, receive the best available mental health care, as provided in Principle 1. It also requires that the other Principles apply to such persons "to the fullest extent possible with only such limited modifications and exceptions as are necessary in the circumstances". Specifically, Principle 20 envisages that a court or tribunal may, on appropriate medical advice, admit these persons to a mental health facility.

The NT *Criminal Code* 1983 contains provision for acquittal on the ground of "insanity". This would lead to an order for the person to be held in strict custody "until the Administrator's pleasure be known"". No legislative provision is made for review of such detention.

There is also provision in the Code for an accused person to be found to be incapable of understanding the criminal proceedings because of an "abnormality of mind" or some other reason. In such cases the court has complete discretion as to whether to discharge the person or hold him or her in custody (and to determine the nature of the custody) "until he can be dealt with according to law."

The NT *Mental Health Act* makes a number of provisions for psychiatric care, treatment and control of those accused of criminal offences or in custody under a sentence of imprisonment. Courts are given the power to adjourn proceedings at any stage while a person is admitted voluntarily for care, treatment or control for a mental illness'. Courts may also discharge a defendant without proceeding to a conviction or without imposing a penalty where the defendant is voluntarily receiving or has received care, treatment or control for a mental illness". Finally, there is power for the court to suspend the execution of a sentence or to release a person on a bond - on condition that the defendant submit to care, treatment or control for a mental illness'.

The Act also makes provision for a court or Magistrate to order involuntary care, treatment or control of a person who has mental illness and who is in custody on remand or under sentence for a criminal offence". The criteria for exercise of the power to order a person in such custody to "be cared for and controlled without his consent for a mental illness" are the same as those applicable to involuntary detention of a civil patient, outlined under Principle 16, above'.

The CMO is required to report to the court or Magistrate on the mental health, care, supervision, control and treatment given and proposed to be given to the person in custody'. Orders for the involuntary psychiatric care of such persons are not to be made for periods longer than six months unless the court or Magistrate is satisfied that it would be detrimental to the interests of the person to do otherwise". The orders are to be reviewed at intervals of not more than six months'.

The NT *Mental Health Act* contains some unusual provisions allowing special conditions to be applied to forensic patients. These provide for the making of orders as follows:

> **"(a) that the person be not kept locked up;**
>
> **(b) that the person be not kept under close guard;**
>
> **(c) that the person be allowed freedom to leave the hospital at which he is receiving treatment;**
>
> **(d) that prison regulations be not applicable to the person while he is in hospital;**
>
> **(e) that the person be released on parole notwithstanding that a minimum term of imprisonment was not specified or that he has not completed his minimum term of imprisonment;**

that the person be granted remission of sentence additional to the remissions that would otherwise be granted; or

(g) **that the person be released for a period while he receives care, treatment or control, and that the period in which he was released be counted as part of his sentence."**[55]

PRINCIPLES 21 AND 22: COMPLAINTS AND MONITORING

Principle 21 stipulates that every patient and former patient has the right to make a complaint through procedures provided by statute. Principle 22 requires appropriate mechanisms: to promote compliance with the Principles; for inspection of mental health facilities; and for investigation and resolution of complaints.

There are no statutory mechanisms in the NT for handling complaints under the *Mental Health Act* or in respect of health services generally. The Act does not contain any mechanisms for monitoring or inspection of standards in the delivery of mental health services. The only avenues of complaint available to a person in the NT are to the Ombudsman, to a Minister or to a senior departmental officer responsible for the administration of mental health.

1. NT *Mental Health Act* 1980, section 4.
2. *id.*
3. ibid, section 20.
4. ibid, part
5. ibid, section 10.
6. ibid, section 7.
7. ibid, section 7.
8. ibid, section 9.
9. id.
10. ibid, section 16.
11. ibid, section 38.
12. id.
13. id.
14. NT *Adult Guardianship Act* 1988, sections 3 and 15.
15. *Mental Health Act,* sections 5 and 6.
16. ibid, section 15.

17. ibid, section 21.

18. ibid, section 14.

19. i d .

20. ibid, section 36.

21. ibid, section 14.

22. ibid, sections 13-15.

23. There are, however, provisions in the NT *Poisons and Dangerous Drugs Act* 1987 relating to prescription and recording of the administration of scheduled drugs including psychotropic medication.

24. *Mental Health Act,* sections 5 and 6.

25. i d .

26. ibid, section 35.

27. i d .

28. ibid, section 7.

29. i d .

30. ibid, section 12.

31. ibid, section 13.

32. i d .

33. ibid. section 11.

34. ibid. section 35.

35. ibid. section 11.

36. ibid, section 34.

37. i d .

38. i d .

39. i d .

40. ibid, section 32.

41. ibid, sections 29 and 34.

42. ibid, section 30.

43. ibid, section 31.

44. i d .

45. ibid. section 30.

46. NT *Criminal Code* 1983, section 382.

47. *Mental Health Act,* section 22.

48. i d .

49. i d .

50. ibid, sections 23-25.

51. ibid, section 24.

52. i d .

53. i d .

54. id.

55. ibid, section 23.

APPENDIX 1
STATUTORY DEFINITIONS OF MENTAL ILLNESS AND RELATED TERMS

NSW	**"Mental Illness means a condition which seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:-** **(a) delusions;** **(b) hallucinations;** **(c) serious disorder of thought form;** **(d) a severe disturbance;** **(e) sustained or repeated behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a) to (d)."**
SA	**"Mental illness means any illness or disorder of the mind."**
TAS	**No statutory definition of mental illness.** **"Mental disorder" defined as "mental illness, arrested or incomplete development of the mind, psychopathic disorder, and any other disorder or disability of the mind."**
WA	**"Mental illness means a psychiatric or other illness that substantially impairs mental health";** **"Mental disorder means any illness or intellectual defect that substantially impairs mental health".**
ACT	**No statutory definition of mental illness.** **"Mental dysfunction" defined as "a disturbance of defect, to a severely disabling degree of perceptual interpretation, comprehension, reasoning, learning, judgement, memory, motivation or emotion".**
NT	**No statutory definition.** ,
VIC	**No statutory definition.**
QLD	**No statutory definition.**

APPENDIX 2

CRITERIA FOR INVOLUNTARY ADMISSION

NSW MENTAL HEALTH ACT 1990	**Involuntary admission is possible if a person is <u>either:</u>** **• a "mentally ill person" i.e.** **"... suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary.** **(a) for the person's own protection from serious physical harm; or** **(b) for the protection of others from serious physical harm,** **and a person is also a mentally ill person if the person is suffering from mental illness which is characterised by the presence in the person of the symptom of a severe disturbance of mood or the symptom of sustained or repeated irrational behaviour indicating the presence of that symptom and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious financial harm or serious damage to the person's reputation."** **• fit a "mentally disordered person" i.e.** **"A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:** **(a) for the person's own protection from serious physical harm; or** **(b) for the protection of others from serious physical harm."** **• and no other appropriate means for dealing with the person are, in the opinion of the medical practitioner, reasonably available;** **<u>and involuntary admission and detention are, in the opinion of the medical practitioner, necessary.</u>**

CRITERIA FOR INVOLUNTARY ADMISSION

SA MENTAL HEALTH ACT 1977	* **A medical practitioner may order immediate admission and detention if satisfied:** **"(a) that that person is suffering from a mental illness that requires immediate treatment;** **(b) that such treatment can be obtained by admission to, and detention in, an approved hospital; and** **(c) that that person should be admitted as a patient in an approved hospital in the interests of his own health and safety or for the protection of other persons ..."**
1 **NT MENTAL HEALTH ACT 1980**	• **"Where it is made to appear to a Magistrate ...that a person may be suffering from a mental illness and, by reason of the illness:** **(a) requires care, treatment or control;** **(b) [is] incapable of managing himself or his affairs;** **(c) [is] under inadequate care or control; or** **(d) [is] likely, by act or neglect, to cause death or serious bodily harm to himself or another person", the person may be held "in custody" for up to 3 working days.** • **"Where it is made to appear to a Magistrate ...that a person:** **(a) by reason of a mental illness -** **(i) requires care, treatment or control; and** **(ii) is incapable of managing himself or his affairs;** **(b) is not under adequate care and control; and** **(c) is likely, by act or neglect, to cause death or serious bodily harm to himself or another person ...", the Magistrate may make an order for the person's "custody for a period of observation, care, treatment or control" for up to 6 months at a time.**

CRITERIA FOR INVOLUNTARY ADMISSION

ACT MENTAL HEALTH ACT 1983	**A person may be detained for up to 72 hours where a medical practitioner or an authorised mental health officer "...has reasonable grounds for believing that:** **(a) a person is suffering from mental dysfunction;** **(b) the condition of the person gives rise to an immediate and substantial risk of actual bodily harm to the person or to another person; and** **(c) the person will not accept treatment which the medical practitioner or Mental Health Officer reasonably believes necessary to avert that risk ..."** **or "where a police officer has reasonable grounds for believing that:** **(a) a person is suffering from mental dysfunction; and** **(b) the condition of the person gives rise to an immediate and substantial risk of actual bodily harm to the person or to another person ..."** **A person may be detained for up to 28 days by a Magistrate or for up to 12 months by the Supreme Court if the Magistrate or court is satisfied that:** **"(a) the person in relation to whom the application is made is suffering from mental dysfunction;** **(b) by reason of that mental dysfunction -** **(i) the person has engaged, and is continuing to engage, in behaviour that has resulted, or is likely to result, in actual bodily harm to himself or to another person;** **(ii) the person is likely to engage in behaviour that is likely to result in actual bodily harm to himself or to another person; or** **(iii) the person is in a condition of social breakdown; and** **(c) the person has refused adequate treatment for that mental dysfunction, or has failed to accept such treatment within a reasonable time after it is offered to him, or is, in the opinion of the Court, incapable of weighing for himself the considerations involved in making a decision whether to accept such treatment ..."**

CRITERIA FOR INVOLUNTARY ADMISSION

WA MENTAL HEALTH ACT 1962	A person may be admitted by referral from a medical practitioner who is of the opinion: - that the person appears to be suffering from mental disorder, and - that the person should be admitted for treatment. A person may also be admitted by a reception order by a justice who is satisfied: - that the person is suffering from mental disorder, and - that it is in the interest of that person on behalf of the public that he/she should be admitted for treatment. * Grounds on which a person may be apprehended for examination and referral by a medical practitioner or to be brought before a justice are that he/she appears to be suffering from mental disorder and that the person: "(a) is without sufficient means of support; or (b) is wandering at large; or (c) has been discovered under circumstances that denote a purpose of committing an offence against the law, or of attempting to take his own life." or, in the case of apprehension by a police officer or Departmental officer: "(a) is not under proper care and control; or (b) is cruelly treated or neglected by any person having or assuming the charge of him; or (c) is detained in contravention of any of the provisions of this Act ..."
VIC MENTAL HEALTH ACT 1986	A person may be admitted and detained as an involuntary patient only if: "(a) the person appears to be mentally ill; and (b) the person's mental illness requires immediate treatment or care and that treatment or care can be obtained by admission to and detention in a psychiatric in-patient service; and (c) the person should be admitted and detained as an involuntary patient for that person's health or safety or for the protection of members of the public; and (a) the person has refused or is unable to consent to the necessary treatment or care for the mental illness; and (b) the person cannot receive adequate treatment or care for the mental illness in a manner less restrictive of that person's freedom of decision and action."

CRITERIA FOR INVOLUNTARY ADMISSION

TAS MENTAL HEALTH ACT 1963	A person may be admitted for observation (for up to 28 days) on the grounds: "(a) that he is suffering from mental disorder of a nature or degree that warrants his detention in a hospital under observation (with or without medical treatment) for at least a limited period; and (b) that he ought to be so detained in the interests of his own health or safety or with a view to the protection of other persons." A person may be admitted for treatment (for periods of 1 year at a time) on the grounds: "(a) that he is suffering from mental disorder, being - (i) in the case of a patient of any age, mental illness or severe subnormality; or (ii) in the case of a patient who has not attained the age of 21 years, psychopathic disorder or subnormality, and that the disorder is of a nature or degree that warrants the detention of the patient in a hospital for medical treatment; and (b) that it is necessary in the interests of the patient's health or safety or for the protection of other

QLD MENTAL HEALTH ACT 1974-1991	A person may be admitted to a hospital for treatment of mental illness on the grounds: "(a) that he is suffering from mental illness of a nature or to a degree that warrants his detention in a hospital; and (b) that he ought to be so detained in the interests of his own welfare or with a view to the protection of other persons." A person may be "removed to a place of safety" with a warrant and held, for up to 3 days, for examination by a medical practitioner where there is reasonable cause to suspect that the person is mentally ill and that it is in the interests of that person or necessary for the protection of other persons. A person may be "removed to a place of safety" without a warrant and held for up to 3 days for medical examination if a member of the police force believes the person to be mentally ill and a danger to himself or other persons and in need of immediate treatment or control.

APPENDIX 3
PROCEDURES FOR INVOLUNTARY ADMISSION

NSW MENTAL HEALTH ACT 1990	* **Detention may be initiated by:** **certificate from a medical practitioner** **request of a relative or friend** - **apprehension by police** - **court order** - **referral by welfare officer** - **medical examination at the direction of a Magistrate or similar authority** * **Examination by the Medical Superintendent must take place "as soon as practicable". The Medical Superintendent must refuse to detain if of the opinion that the person is not a mentally ill person or mentally disordered person.** * **Further examination by another doctor must take place as soon as possible after certification by the Medical Superintendent. If the second doctor does not confirm the Superintendent's opinion, a third opinion is required from a psychiatrist.** * **Magisterial inquiry must determine whether the person is a mentally ill person and whether care of a less restrictive kind is available.**
VIC MENTAL ACT 1986	**Involuntary admission may be initiated by a request and a recommendation by a medical practitioner following medical examination of the person.** * **The person is to be admitted by a medical practitioner employed in or by the psychiatric in-patient service, and examined within 24 hours by the authorised psychiatrist who must either confirm the admission or discharge the person.** * **A person may also be apprehended by the police, with or without a warrant, and examined by a medical practitioner.**

PROCEDURES FOR INVOLUNTARY ADMISSION

NT MENTAL HEALTH ACT 1980	* A person considered to be suffering from a mental illness may be taken "into custody":- under a warrant. - under a telephone warrant. - without a warrant. * Arrangements must be made, within 3 days, to admit the person to hospital which requires: application to a Magistrate for a custody order. - report by the Chief Medical Officer on the mental health of the person and the care and treatment given. - court order for the person to be kept "in custody" for a period of observation, care, treatment or control.
ACT MENTAL HEALTH ACT 1983	* Emergency detention at premises of the Board of Health for up to 72 hours may occur on the initiative of a medical practitioner, authorised mental health officer or police officer. * Application to Magistrate's Court for a treatment order may be made, jointly, by a medical practitioner and a mental health officer. The Magistrate's Court may make a treatment order.
WA MENTAL HEALTH ACT 1983	* Initial referral by a medical practitioner is sufficient to detain a person for 72 hours, during which the Medical Superintendent or another psychiatrist must examine the person and endorse the admission or discharge the person. A person may also be apprehended by the police and medically examined and then application may be made by the police or a departmental officer to a justice who may order that the person be received into an approved hospital with a referral from a medical practitioner. * A person received into an approved hospital may be received "for observation" for up to 72 hours, during which the Medical Superintendent or another psychiatrist must examine the person and endorse the admission or discharge the person.

PROCEDURES FOR INVOLUNTARY ADMISSION

SA MENTAL HEALTH ACT 1977	*	**A medical practitioner may make an order for admission and detention of a person at an approved hospital.**
	*	**A psychiatrist must, within 24 hours or as soon as practicable, complete an examination and confirm the admission or discharge the person.**
		The Guardianship Board may, after receiving a person into guardianship, make an order that the person be received into a specified hospital or other institution for treatment or care and be placed in the custody of the person in charge of the hospital or other institution.
QLD MENTA HEALTH SERVICES ACT 1974-1991	*	**A person may be admitted for up to 3 days on the application of a relative or an authorised person, supported by the recommendation of a medical practitioner;**
	*	**Detention for a period over 3 days requires a second medical recommendation.**
	*	**Detention for more than 21 days requires a psychiatric examination and report.**
		A person may also be removed, with or without a warrant, to a place of safety and examined there as soon as possible, by a medical practitioner.
TAS MENTAL HEALTH ACT 1963	*	**Application for admission for observation or for treatment may be made by either the nearest relative or an authorised officer.**
	*	**Recommendations of 2 medical practitioners are required to support the application; except in cases of urgent necessity, when one medical recommendation is sufficient to detain a person for up to 72 hours, during which a second medical opinion may be obtained in order to extend the admission to 28 days.**

PRINCIPLES FOR THE PROTECTION OF PERSONS WITH MENTAL ILLNESS AND FOR THE IMPROVEMENT OF MENTAL HEALTH CARE

APPLICATION

These principles shall be applied without discrimination of any kind such as on grounds of disability, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, legal or social status, age, property, or birth.

DEFINITIONS

In these Principles:

'counsel' means a legal or other qualified representative;

'independent authority' means a competent and independent authority prescribed by domestic law;

'mental health care' includes analysis and diagnosis of a person's mental condition, and treatment, care and rehabilitation for a mental illness or suspected mental illness;

'mental health facility' means any establishment, or any unit of an establishment, which as its primary function provides mental health care;

'mental health practitoner' means a medical doctor, clinical psychologist, nurse, social worker, or other appropriately trained and qualified person with specific skills relevant to mental health care;

'patient' means a person receiving mental health care and includes all persons who are admitted to a mental health facility;

'personal representative' means a person charged by law with the duty of representing a patient's interests in any specified respect, or of exercising specified rights on the patient's behalf, and includes the parent or legal guardian of a minor unless otherwise provided by domestic law;

'the review body' means the body established in accordance with Principle 17 to review the involuntary admission or detention of a patient in a mental health facility.

GENERAL LIMITATION CLAUSE

The exercise of the rights set forth in these Principles may be subject only to such limitations as are prescribed by law and are necessary to protect the health or safety of the person concerned or of others, or otherwise to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Principle 1

FUNDAMENTAL FREEDOMS AND BASIC RIGHTS

1. **All** persons have the right to the best available mental health care, which shall be part of the health and social care system.

2. All persons with a mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person.

3. All persons with a mental illness, or who are being treated as such persons, have the right to protection from economic, sexual and other forms of exploitation, physical or other abuse, and degrading treatment.

4. There shall be no discrimination on the grounds of mental illness. 'Discrimination' means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights. Special measures solely to protect the rights, or secure the advancement, of persons with mental illness shall not be deemed to be discriminatory. Discrimination does not include any distinction, exclusion or preference undertaken in accordance with the provisions of these Principles and necessary to protect the human rights of a person with a mental illness or of other individuals.

5. Every person with a mental illness shall have the right to exercise all civil, political, economic, social and cultural rights as recognised in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and in other relevant instruments such as the Declaration on the Rights of Disabled Persons and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

6. Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law. The person whose capacity is in issue shall be entitled to be represented by a counsel. If the person whose capacity is in issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it.

Principle 1 (cont.)

The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is in issue, unless the tribunal is satisfied that there is no conflict of interest. Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law. The person whose capacity is in issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision.

7. Where a court or other competent tribunal finds that a person with mental illness is unable to manage his or her own affairs, measures shall be taken, so far as is necessary and appropriate to that person's condition, to ensure the protection of his or her interests.

Principle 2

PROTECTION OF MINORS

Special care should be given within the purposes of these Principles and within the context of domestic law relating to the protection of minors to protect the rights of minors, including, if necessary, the appointment of a personal representative other than a family member.

Principle 3

LIFE IN THE COMMUNITY

Every person with a mental illness shall have the right to live and work, as far as possible, in the community.

Principle 4

DETERMINATION OF MENTAL ILLNESS

1. A determination that a person has a mental illness shall be made in accordance with internationally accepted medical standards.

2. A determination of mental illness shall never be made on the basis of political, economic or social status, or membership of a cultural, racial or religious group, or any other reason not directly relevant to mental health status.

Principle 4 (cont.)

3. Family or professional conflict, or non-conformity with moral, social, cultural or political values or religious beliefs prevailing in a person's community, shall never be a determining factor in diagnosing mental illness.

4. A background of past treatment or hospitalisation as a patient shall not of itself justify any present or future determination of mental illness.

5. No person or authority shall classify a person as having, or otherwise indicate that a person has, a mental illness except for purposes directly relating to mental illness or the consequences of mental illness.

Principle 5

MEDICAL EXAMINATION

No person shall be compelled to undergo medical examination with a view to determining whether or not he or she has a mental illness except in accordance with a procedure authorised by domestic law.

Principle 6

CONFIDENTIALITY

The right of confidentiality of information concerning all persons to whom these Principles apply shall be respected.

Principle 7

ROLE OF COMMUNITY AND CULTURE

1. Every patient shall have the right to be treated and cared for, as far as possible, in the community in which he or she lives.

2. Where treatment takes place in a mental health facility, a patient shall have the right, whenever possible, to be treated near his or her home or the home of his or her relatives or friends and shall have the right to return to the community as soon as possible.

Every patient shall have the right to treatment suited to his or her cultural background.

STANDARDS OF CARE

Every patient shall have the right to receive such health and social care as is appropriate to his or her health needs, and is entitled to care and treatment in accordance with the same standards as other ill persons.

2. Every patient shall be protected from harm, including unjustified medication, abuse by other patients, staff or others or other acts causing mental distress or physical discomfort.

Principle 9

TREATMENT

1. 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.

2. 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.

3. Mental health care shall always be provided in accordance with applicable standards of ethics for mental health practitioners, including internationally accepted standards such as the Principles of Medical Ethics adopted by the United Nations General Assembly. Mental health knowledge and skills shall never be abused.

4. The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

Principle 10

MEDICATION

1. Medication shall meet the best health needs of the patient and shall be given to a patient only for therapeutic or diagnostic purposes and shall never be administered as a punishment, or for the convenience of others. Subject to the provisions of paragraph 15 of Principle 11, mental health practitioners shall only administer medication of known or demonstrated efficacy.

2. All medication shall be prescribed by a mental health practitioner authorised by law and shall be recorded in the patient's records.

Principle 11

CONSENT TO TREATMENT

No treatment shall be given to a patient without his or her informed consent, except as provided for in paragraphs 6, 7, 8, 13 and 15.

2. Informed consent is consent obtained freely without threats or improper inducements after appropriate disclosure to the patient of adequate and understandable information in a form and language understood by the patient on:

(a) The diagnostic assessment;

(b) The purpose, method, likely duration and expected benefit of the proposed treatment;

(c) Alternative modes of treatment, including those less intrusive; and

(d) Possible pain or discomfort, risks and side-effects of the proposed treatment.

3. A patient may request the presence of a person or persons of the patient's choosing during the procedure for granting consent.

4. A patient has the right to refuse or stop treatment except as provided for in paragraphs 6, 7, 8, 13 and 15. The consequences of refusing or stopping treatment must be explained to the patient.

5. A patient shall never be invited or induced to waive the right to informed consent. If the patient should seek to do so, it shall be explained to the patient that the treatment cannot be given without informed consent.

6. Except as provided in paragraphs 7, 8, 12, 13, 14 and 15 a proposed plan of treatment may be given to a patient without a patient's informed consent if the following conditions are satisfied:

(a) The patient is, at the relevant time, held as an involuntary patient;

(b) An independent authority, having in its possession all relevant information, including the information specified in paragraph 2, is satisfied that, at the relevant time, the patient lacks the capacity to give or withhold informed consent to the proposed plan of treatment or, if domestic legislation so provides, that, having regard to the patient's own safety or the safety of others, the patient unreasonably withholds such consent; and

(c) The independent authority is satisfied that the proposed plan of treatment is in the best interests of the patient's health needs.

Paragraph 6 does not apply to a patient with a personal representative empowered by law to consent to treatment for the patient; but except as provided in paragraphs 12, 13, 14 and 15 treatment may be given to such a patient without his or her informed consent if the personal representative, having been given the information described in paragraph 2, consents on the patient's behalf.

8. Except as provided in paragraphs 12, 13, 14 and 15, treatment may also be given to any patient without the patient's informed consent if a qualified mental health practitioner authorised by law determines that it is urgently necessary in order to prevent immediate or imminent harm to the patient or to other persons. Such treatment shall not be prolonged beyond the period which is strictly necessary for this purpose.

9. Where any treatment is authorised without the patient's informed consent, every effort shall nevertheless be made to inform the patient about the nature of the treatment and any possible alternatives, and to involve the patient as far as practicable in the development of the treatment plan.

10. All treatment shall be immediately recorded in the patient's medical records, with an indication of whether involuntary or voluntary.

11. Physical restraint or involuntary seclusion of a patient shall not be employed except in accordance with the officially approved procedures of the mental health facility and only when it is the only means available to prevent immediate or imminent harm to the patient or others. It shall not be prolonged beyond the period which is strictly necessary for this purpose. All instances of physical restraint or involuntary seclusion, the reasons for them, and their nature and extent shall be recorded in the patient's medical record. A patient who is restrained or secluded shall be kept under humane conditions and be under the care and close and regular supervision of qualified members of the staff. A personal representative, if any and if relevant, shall be given prompt notice of any physical restraint or involuntary seclusion of the patient.

12. Sterilisation shall never be carried out as a treatment for mental illness.

13. A major medical or surgical procedure may be carried out on a person with mental illness only where it is permitted by domestic law, where it is considered that it would best serve the health needs of the patient and where the patient gives informed consent, except that, where the patient is unable to give informed consent, the procedure shall be authorised only after independent review.

Principle 11 (cont.)

14. Psychosurgery and other intrusive and irreversible treatments for mental illness shall never be carried out on a patient who is an involuntary patient in a mental health facility and, to the extent that domestic law permits them to be carried out, they may be carried out on any other patient only where the patient has given informed consent and an independent external body has satisfied itself that there is genuine informed consent and that the treatment best serves the health needs of the patient.

15. Clinical trials and experimental treatment shall never be carried out on any patient without informed consent, except that a patient who is unable to give informed consent may be admitted to a clinical trial or given experimental treatment but only with the approval of a competent, independent review body specifically constituted for this purpose.

16. In the cases specified in paragraphs 6, 7, 8, 13, 14 and 15, the patient or his or her personal representative, or any interested person, shall have the right to appeal to a judicial or other independent authority concerning any treatment given to him or her.

Principle 12

NOTICE OF RIGHTS

1. A patient in a mental health facility shall be informed as soon as possible after admission, in a form and a language which the patient understands, of all his or her rights in accordance with these Principles and under domestic law, which information shall include an explanation of those rights and how to exercise them.

2. If and for so long as a patient is unable to understand such information, the rights of the patient shall be communicated to the personal representative, if any and if appropriate, and to the person or persons best able to represent the patient's interests and willing to do so.

3. A patient who has the necessary capacity has the right to nominate a person who should be informed on his or her behalf, as well as a person to represent his or her interests to the authorities of the facility.

Principle 13

RIGHTS AND CONDITIONS IN MENTAL HEALTH FACILITIES

1. 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;

   (b) Privacy;

   (c) Freedom of communication which includes freedom to communicate with other persons in the facility; freedom to send and receive uncensored private communications; freedom to receive, in private, visits from a counsel or personal representative and, at all reasonable times, from other visitors; and freedom of access to postal and telephone services and to newspapers, radio and television;

   (d) Freedom of religion or belief.

2. The environment and living conditions in mental health facilities shall be as close as possible to those of the normal life of persons of similar age and in particular shall include:

   (a) Facilities for recreational and leisure activities;

   (b) Facilities for education;

   (c) Facilities to purchase or receive items for daily living, recreation and communication;

   (d) Facilities, and encouragement to use such facilities, for a patient's engagement in active occupation suited to his or her social and cultural background, and for appropriate vocational rehabilitation measures to promote reintegration in the community. These measures should include vocational guidance, vocational training and placement services to enable patients to secure or retain employment in the community.

3. In no circumstances shall a patient be subject to forced labour. Within the limits compatible with the needs of the patient and with the requirements of institutional administration, a patient shall be able to choose the type of work he or she wishes to perform.

4. The labour of a patient in a mental health facility shall not be exploited. Every such patient shall have the right to receive the same remuneration for any work which he or she does as would, according to domestic law or custom, be paid for such work to a non-patient. Every such patient shall in any event have the right to receive a fair share of any remuneration which is paid to the mental health facility for his or her work.

Principle 14

RESOURCES FOR MENTAL HEALTH FACILITIES

1. A mental health facility shall have access to the same level of resources as any other health establishment, and in particular:

(a) Qualified medical and other appropriate professional staff in sufficient numbers and with adequate space to provide each patient with privacy and a program of appropriate and active therapy;

(b) Diagnostic and therapeutic equipment for the patient;

(c) Appropriate professional care; and

(d) Adequate, regular and comprehensive treatment, including supplies of medication.

2. Every mental health facility shall be inspected by the competent authorities with sufficient frequency to ensure that the conditions, treatment, and care of patients comply with these Principles.

Principle 15

ADMISSION PRINCIPLES

1. Where a person needs treatment in a mental health facility, every effort shall be made to avoid involuntary admission.

2. Access to a mental health facility shall be administered in the same way as access to any other facility for any other illness.

3. Every patient not admitted involuntarily shall have the right to leave the mental health facility at any time unless the criteria for his or her retention as an involuntary patient, as set forth in Principle 16, apply, and he or she shall be informed of that right.

Principle 16

INVOLUNTARY ADMISSION

1. A person may (a) be admitted involuntarily to a mental health facility as a patient; or (b) having already been admitted voluntarily as a patient, be retained as an involuntary patient in the mental health facility, if and only if a qualified mental health practitioner authorised by law for that purpose determines, in accordance with Principle 4, that that person has a mental

illness and considers:

(i) That, because of that mental illness, there is a serious likelihood of immediate or imminent harm to that person or to other persons; or

(ii) That, in the case of a person whose mental illness is severe and whose judgement is impaired, failure to admit or retain that person is likely to lead to a serious deterioration in his or her condition or will prevent the giving of appropriate treatment which can only be given by admission to a mental health facility in accordance with the principle of the least restrictive alternative.

In the case referred to in subparagraph (ii), a second such mental health practitioner, independent of the first, should be consulted where possible. If such consultation takes place, the involuntary admission or retention may not take place unless the second mental health practitioner concurs.

2. Involuntary admission or retention shall initially be for a short period as specified by domestic law for observation and preliminary treatment pending review of the admission or retention by the review body. The grounds of the admission shall be communicated to the patient without delay and the fact of the admission and the grounds for it shall also ***be*** communicated promptly and in detail to the review body, to the patient's personal representative, if any, and, unless the patient objects, to the patient's family.

3. A mental health facility may receive involuntarily admitted patients only if the facility has been designated to do so by a competent authority prescribed by domestic law.

Principle 17

REVIEW BODY

1. 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 and independent mental health practitioners and take their advice into account.

2. The review body's initial review, as required by Principle 16.2, of a decision to admit or retain a person as an involuntary patient shall take place as soon as possible after that decision and shall be conducted in accordance with simple and expeditious procedures as specified by domestic law.

Principle 17 (cont.)

3. The review body shall periodically review the cases of involuntary patients at reasonable intervals as specified by domestic law.

4. An involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law.

5. At each review the review body shall consider whether the criteria for involuntary admission set out in Principle 16.1 are still satisfied, and, if not, the patient shall be discharged as an involuntary patient.

6. If at any time the mental health practitioner responsible for the case is satisfied that the conditions for the retention of a person as an involuntary patient are no longer satisfied, he or she shall order the discharge of that person as such a patient.

7. A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or be retained in, a mental health facility.

Principle 18

PROCEDURAL SAFEGUARDS

1. The patient shall be entitled to choose and appoint a counsel to represent the patient as such, including representation in any complaint procedure or appeal. If the patient does not secure such services, a counsel shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.

2. The patient shall also be entitled to the assistance, if necessary, of the services of an interpreter. Where such services are necessary and the patient does not secure them, they shall be made available without payment by the patient to the extent that the patient lacks sufficient means to pay.

3. The patient and the patient's counsel may request and produce at any hearing an independent mental health report and any other reports and oral, written and other evidence that are relevant and admissible.

4. Copies of the patient's records and any reports and documents to be submitted shall be given to the patient and to the patient's counsel except in special cases where it is determined that a specific disclosure to the patient would cause serious harm to the patient's health or put at risk the safety of others. As

domestic law may provide, any document not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any part of a document is withheld from a patient, the patient or the patient's counsel, if any, shall receive notice of the withholding and the reasons for it and it shall be subject to judicial review.

5. The patient and the patient's personal representative and counsel shall be entitled to attend, participate and be heard personally in any hearing.

6. If the patient or the patient's personal representative or counsel requests that a particular person be present at a hearing, that person shall be admitted unless it is determined that the person's presence could cause serious harm to the patient's health or put at risk the safety of others.

7. Any decision whether the hearing or any part of it shall be in public or in private and may be publicly reported shall give full consideration to the patient's own wishes, to the need to respect the privacy of the patient and of other persons and to the need to prevent serious harm to the patient's health or to avoid putting at risk the safety of others.

8. The decision arising out of the hearing and the reasons for it shall be expressed in writing. Copies shall be given to the patient and his or her personal representative and counsel. In deciding whether the decision shall be published in whole or in part, full consideration shall be given to the patient's own wishes, to the need to respect his or her privacy and that of other persons, to the public interest in the open administration of justice and to the *need* to prevent serious harm to the patient's health or to avoid putting at risk the safety of others.

Principle 19

ACCESS TO INFORMATION

1 A patient (which term in this Principle includes a former patient) shall be entitled to have access to the information concerning the patient in his or her health and personal records maintained by a mental health facility. This right may be subject to restrictions in order to prevent serious harm to the patient's health and avoid putting at risk the safety of others. As domestic law may provide, any such information not given to the patient should, when this can be done in confidence, be given to the patient's personal representative and counsel. When any of the information is withheld from a patient, the patient or the patient's counsel, if any, shall receive notice of the withholding and the reasons for it and it shall be subject to judicial review.

Principle 19 (cont.)

2 Any written comments by the patient or the patient's personal representative or counsel shall, on request, be inserted in the patient's file.

Principle 20

CRIMINAL OFFENDERS

1. This Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness.

2. All such persons should receive the best available mental health care as provided in Principle 1. These Principles shall apply to them to the fullest extent possible, with only such limited modifications and exceptions as are necessary in the circumstances. No such modifications and exceptions shall prejudice the persons' rights under the instruments noted in Principle 1.5.

3. Domestic law may authorise a court or other competent authority, acting on the basis of competent and independent medical advice, to order that such persons be admitted to a mental health facility.

4. Treatment of persons determined to have a mental illness shall in all circumstances be consistent with Principle 11.

Principle 21

COMPLAINTS

Every patient and former patient shall have the right to make a complaint through procedures as specified by domestic law.

Principle 22

MONITORING AND REMEDIES

States shall ensure that appropriate mechanisms are in force to promote compliance with these Principles, for the inspection of mental health facilities, for the submission, investigation and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient.

Principle 23

IMPLEMENTATION

1. States should implement these Principles through appropriate legislative, judicial, administrative, educational and other measures which they shall review periodically.

2. States shall make these Principles widely known by appropriate and active means.

Principle 24

SCOPE OF PRINCIPLES RELATING TO MENTAL HEALTH FACILITIES

These Principles apply to all persons who are admitted to a mental health facility.

Principle 25

SAVING OF EXISTING RIGHTS

There shall be no restriction upon or derogation from any existing rights of patients, including rights recognised in applicable international or domestic law, on the pretext that these Principles do not recognise such rights, or that they recognise them to a lesser extent.