

Mental Health Act 2016

Guide to Patient Rights

Guide to patient rights under the *Mental Health Act 2016*

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An electronic version of this document is available at www.health.qld.gov.au/mental-health-act

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Further information is available at the Mental Health Act (MHA) 2016 website:
www.health.qld.gov.au/mental-health-act

1 Introduction

1.1 Purpose

The Guide to Patient Rights summarises the provisions of the *Mental Health Act 2016* (MHA 2016) relating to the rights of patients.

For the purposes of this guide, a 'patient right' is an entitlement for a patient to have or do something. For example, inpatients of a mental health service are entitled to be visited by support persons at any reasonable time.

The Act also contains extensive safeguards and protections for patients. For example, an involuntary patient may only be secluded under the Act under tightly defined circumstances. This guide does not detail safeguards and protections - these can be found in *A Guide to the Mental Health Act 2016* on the MHA 2016 website.

1.2 Audience

This guide is for persons interested in obtaining a detailed understanding of patient rights under the Act. This would include advocacy and patient support groups, support persons, Independent Patient Rights Advisers, legal practitioners, and individual patients.

All mental health service staff should familiarise themselves with the patient rights outlined in the Guide.

1.3 Definition of patient

In this guide, a patient means:

- an involuntary patient under the Act
- a person receiving treatment and care for a mental illness in a mental health service other than as an involuntary patient, including under an advance health directive or with the consent of a personal guardian or attorney.

An involuntary patient under the Act is a person subject to any of the following:

- an Examination Authority
- a Recommendation for Assessment
- a Treatment Authority
- a Forensic Order
- a Treatment Support Order
- a Judicial Order.

An involuntary patient also includes:

- a person detained in a mental health service or public sector health service facility while a Recommendation for Assessment is being made for the person, and
- a person who is absent without permission from another State who is transported and detained in a mental health service under an interstate warrant.

1.4 Chief Psychiatrist

The position of Chief Psychiatrist is established under the Act with the main role of protecting the rights of patients. This includes:

- to the extent practicable, ensuring that the examination, assessment, treatment, care and detention of patients complies with the Act
- monitoring and auditing compliance with the Act

- issuing Chief Psychiatrist Policies that persons exercising functions under the Act must comply with, and
- undertaking investigations of mental health services, for example, where concerns are raised about the treatment and care of patients.

1.5 Independent patient rights advisers

It is a requirement under the Act for Hospital and Health Services (HHS) to appoint independent patient rights advisers to advise patients and their nominated support persons (see Section 9.2) family, carers and other support persons of their rights under the Act.

While independent patient rights advisers play a key role in advising patients of their rights, this does not affect the obligations of other mental health service staff, such as authorised doctors and authorised mental health practitioners, to advise patients of their rights in line with good clinical practice.

An independent patient rights adviser may be either an employee of an entity that a HHS has engaged to provide services, such as a non-government organisation, or an employee of the HHS, but not employed in the mental health service. Separation from the mental health service reinforces the independence of the positions.

The functions of independent patient rights advisers under the Act are to:

- ensure the patient and the patient's nominated support persons, family, carers and other support persons are advised of their rights and responsibilities
- help the patient and a patient's nominated support persons, family, carers and other support persons to communicate to health practitioners the patient's views, wishes and preferences about the patient's treatment and care
- work cooperatively with community visitors performing functions under the *Public Guardian Act 2014*
- consult with authorised mental health practitioners, authorised doctors, administrators of mental health services, and the Chief Psychiatrist on the rights of patients under this Act, the *Guardianship and Administration Act 2000*, the *Powers of Attorney Act 1998* and other laws
- in relation to Mental Health Review Tribunal hearings:
 - advise the patient, and the patient's nominated support persons, family, carers and other support persons of the patient's rights at the hearings
 - if requested, help the patient engage a representative for the hearings
- identify whether the patient has a personal guardian or attorney and, if so, work cooperatively with the personal guardian or attorney to further the patient's interests
- advise the patient of the benefits of an advance health directive or enduring power of attorney for a personal matter.

An independent patient rights adviser must act independently and impartially and is not subject to the direction of any person in relation to the advice given to the patient or a patient's nominated support persons, family, carers or other support persons.

Patients can ask to speak to an independent patient rights adviser at any time.

1.6 Statement of Rights

It is a requirement under the Act for the Chief Psychiatrist to prepare a written *Statement of Rights* which must contain information about:

- the rights of patients, nominated support persons, family, carers and other support persons under the Act
- the rights of patients to make complaints about the treatment and care provided at a mental health service and how complaints are made.

The *Statement of rights* can be found on the MHA 2016 website.

2 Objects and principles

The objects and principles of the Act play a crucial role in determining how it is interpreted and administered.

All persons performing a function under the Act need to familiarise themselves with the objects and principles of the Act and ensure they are embedded in day-to-day practice.

This includes authorised doctors, authorised mental health practitioners, administrators, the Chief Psychiatrist, the Mental Health Court and the Mental Health Review Tribunal.

Objects of Act

- to improve and maintain the health and wellbeing of persons who have a mental illness who do not have the capacity to consent to be treated
- to enable persons to be diverted from the criminal justice system if found to have been of unsound mind at the time of committing an unlawful act or to be unfit for trial
- to protect the community if persons diverted from the criminal justice system may be at risk of harming others.

The objects must be achieved in a way that:

- safeguards the rights of persons
- is the *least restrictive* of the rights and liberties of a person who has a mental illness
- promotes the recovery of a person who has a mental illness, and the person's ability to live in the community, without the need for involuntary treatment and care.

A way is the *least restrictive* of the rights and liberties of a person who has a mental illness if the way adversely affects the person's rights and liberties only to the extent required to protect the person's safety and welfare or the safety of others.

Principles for administration of Act

(a) Same human rights

- the right of all persons to the same basic human rights must be recognised and taken into account
- a person's right to respect for their human worth and dignity as an individual must be recognised and taken into account

(b) Matters to be considered in making decisions

- to the greatest extent practicable, a person is to be encouraged to take part in making decisions affecting the person's life, especially decisions about treatment and care
- to the greatest extent practicable, in making a decision about a person the person's views, wishes and preferences are to be taken into account
- a person is presumed to have capacity to make decisions about the person's treatment and care and other matters under this Act

<p>(c) Support persons</p> <ul style="list-style-type: none"> to the greatest extent practicable, family, carers and other support persons of a person who has a mental illness are to be involved in decisions about the person's treatment and care, subject to the person's right to privacy <p>(d) Provision of support and information</p> <ul style="list-style-type: none"> to the greatest extent practicable, a person is to be provided with necessary support and information to enable the person to exercise rights under this Act, including, for example, providing access to other persons to help the person express the person's views, wishes and preferences <p>(e) Achievement of maximum potential and self-reliance</p> <ul style="list-style-type: none"> to the greatest extent practicable, a person is to be helped to achieve maximum physical, social, psychological and emotional potential, quality of life and self-reliance <p>(f) Acknowledgement of needs</p> <ul style="list-style-type: none"> a person's age-related, gender-related, religious, communication and other special needs must be recognised and taken into account a person's hearing, visual or speech impairment must be recognised and taken into account <p>(g) Aboriginal people and Torres Strait Islanders</p> <ul style="list-style-type: none"> the unique cultural, communication and other needs of Aboriginal people and Torres Strait Islanders must be recognised and taken into account Aboriginal people and Torres Strait Islanders should be provided with treatment, care and support in a way that recognises and is consistent with Aboriginal tradition or Island custom, mental health and social and emotional wellbeing, and is culturally appropriate and respectful to the extent practicable and appropriate in the circumstances, communication with Aboriginal people and Torres Strait Islanders is to be assisted by an interpreter <p>(h) Persons from culturally and linguistically diverse backgrounds</p> <ul style="list-style-type: none"> the unique cultural, communication and other needs of persons from culturally and linguistically diverse backgrounds must be recognised and taken into account services provided to persons from culturally and linguistically diverse backgrounds must have regard to the person's cultural, religious and spiritual beliefs and practices to the extent practicable and appropriate in the circumstances, communication with persons from culturally and linguistically diverse backgrounds is to be assisted by an interpreter
<p>(i) Minors</p> <ul style="list-style-type: none"> to the greatest extent practicable, a minor receiving treatment and care must have the minor's best interests recognised and promoted, including, for example, by receiving treatment and care separately from adults if practicable and by having the minor's specific needs, wellbeing and safety recognised and protected <p>(j) Maintenance of supportive relationships and community participation</p>

- to the greatest extent practicable, the importance of a person’s continued participation in community life and maintaining existing supportive relationships are to be taken into account, including, for example, by providing treatment in the community in which the person live
- (k) Importance of recovery-oriented services and reduction of stigma**
- the importance of recovery-oriented services and the reduction of stigma associated with mental illness must be recognised and taken into account
- (l) Provision of treatment and care**
- treatment and care provided under this Act must be provided to a person who has a mental illness only if it is appropriate for promoting and maintaining the person’s health and wellbeing
- (m) Privacy and confidentiality**
- a person’s right to privacy and confidentiality of information about the person must be recognised and taken into account.

3 Capacity to make decisions about treatment and care

A person is presumed to be able to make decisions about their own healthcare. This is called ‘capacity’ to make decisions. If a person has the capacity to make decisions with the assistance of someone else, the person is taken to have capacity to make the decisions. This is called supported decision-making.

A person with capacity to make decisions about their own healthcare has the right to consent to treatment and care, or not to consent to treatment and care.

If a doctor believes the person understands the consequences of receiving or not receiving treatment, their choice is irrelevant in deciding capacity.

The Act includes a comprehensive definition of ‘capacity to consent to be treated’.

A person has capacity to consent to be treated if the person is capable of understanding, in general terms:

- that the person has an illness, or symptoms of an illness, that affects the person’s mental health and wellbeing, and
- the nature and purpose of the treatment for the illness, and
- the benefits and risks of the treatment, and alternatives to the treatment, and
- the consequences of not receiving the treatment.

The person must also be capable of freely and voluntarily making a decision about the treatment and communicating the decision in some way.

4 Treatment Authorities and ‘less restrictive way’ of treatment

4.1 Making of a Treatment Authority

If a person is not able to consent to treatment of their mental illness, an authorised doctor may make a Treatment Authority to authorise involuntary treatment for the person. The doctor must

be satisfied that the treatment criteria apply and that there is no less restrictive way of providing treatment and care for the person. The person's views, wishes and preferences are considered.

The treatment criteria include **all** of the following:

- the person has a **mental illness** (see below)
- the person does not have **capacity** to consent to be treated for the illness (see Chapter 3)
- because of the person's illness, the absence of involuntary treatment, or the absence of continued involuntary treatment, is likely to result in:
imminent serious harm to the person or others, or
the person suffering serious mental or physical deterioration
- there is no **less restrictive way** for the person to receive treatment and care for the person's mental illness (see below).

As outlined in Chapter 3, a person is presumed to have capacity to make decisions about their treatment and care. This means an authorised doctor needs to make a positive clinical decision that a person lacks capacity.

Mental illness is a condition characterised by a clinically significant disturbance of thought, mood, perception or memory.

However, a person must not be considered to have a mental illness merely because:

- the person holds or refuses to hold a particular religious, cultural, philosophical or political belief or opinion
- the person is a member of a particular racial group
- the person has a particular economic or social status
- the person has a particular sexual preference or sexual orientation
- the person engages in sexual promiscuity
- the person engages in immoral or indecent conduct
- the person takes drugs or alcohol
- the person has an intellectual disability
- the person engages in antisocial behaviour or illegal behaviour
- the person is or has been involved in family conflict, or
- the person has previously been treated for a mental illness or been subject to involuntary assessment or treatment.

A matter listed above does not prevent a person having a mental illness. For example, a person may have a mental illness caused by taking drugs or alcohol, or a person may have a mental illness as well as an intellectual disability.

A decision that a person has a mental illness must be made in accordance with internationally accepted medical standards.

There is a **less restrictive way** for a person to receive treatment and care if the person is able to receive appropriate treatment and care in one of the following ways:

- if the person is a minor—with the consent of the minor's parent
- if the person has made an advance health directive—under the advance health directive

- if a personal guardian has been appointed for the person—with the consent of the personal guardian
- if an attorney has been appointed by the person—with the consent of the attorney, or with the consent of the person's statutory health attorney (other than the Public Guardian).

If a person makes an advance health directive, the person should request an independent patient rights adviser or a staff member of a mental health service to record the directive on the

patient's health records. The directive will then be recorded in the Consumer Integrated Mental Health and Addiction (CIMHA) application, which is the State-wide electronic mental health database.

More information on making advance health directives is available at the MHA 2016 website.

4.2 Categories

There are two categories of Treatment Authority - community and inpatient.

A person placed on a community category lives in the community full-time. A Treatment Authority must be a community category, enabling the person to live in the community on an ongoing basis, unless the person's treatment and care needs cannot be met this way.

A person placed on an inpatient category is detained in a mental health service. An inpatient may receive limited community treatment, for a period of not more than seven consecutive days, which allows the patient to go outside of the inpatient unit in a way decided by an authorised doctor. The purpose of limited community treatment is to support a patient's recovery by transitioning the patient to living in the community with appropriate treatment and care.

4.3 Treatment and care

An authorised doctor is responsible for deciding the treatment and care to be provided to a patient under a Treatment Authority. In making this decision the doctor must:

- discuss the treatment and care to be provided with the patient
- have regard to the views, wishes and preferences of the person, including in an advance health directive.

Authorised doctors have specific responsibilities if a person has an advance health directive in place for their mental illness.

Where the doctor decides to make a Treatment Authority for the person despite the existence of an advance health directive, the authorised doctor must:

- explain to the person why a Treatment Authority was made, and why the advance health directive was not adequate for the person's treatment and care, and
- record the reasons in the person's health records

Authorised doctors are also to take into consideration the views, wishes and preferences outlined in an advance health directive, even if a Treatment Authority is made for the person.

Where the treatment and care is inconsistent with the directive, the authorised doctor must:

- explain to the person why the advance health directive was not followed, and
- record the reasons in the person's health records.

See Chapter 7 for further detail about a patient's right to information.

4.4 Regular assessments

Authorised doctors must:

- regularly assess patients to decide whether the patient should be subject to a Treatment Authority
- make an assessment of the patient if the doctor considers, at any time, that the treatment criteria may no longer apply to the patient, or there may be a less restrictive way for the patient to receive treatment and care, and
- discuss the assessment with the patient.

After the assessment, the authorised doctor must decide, and record in the patient's health records:

- whether the treatment criteria continue to apply to the patient and whether there is a less restrictive way for the patient to receive treatment and care
- if the patient's Treatment Authority continues, whether the category of the patient's Treatment Authority and any limited community treatment continues to be appropriate
- the date of the patient's next assessment, which must be within three months.

An authorised doctor must revoke the patient's Treatment Authority if the treatment criteria no longer apply to the patient or there is a less restrictive way for the patient to receive treatment and care for the patient's mental illness. However, the authorised doctor is not required to revoke the Treatment Authority if the patient's capacity to consent is not stable, for example, if the person gains and loses capacity to consent to be treated during a short time period.

4.5 Role of Mental Health Review Tribunal

The Mental Health Review Tribunal must review the making of a Treatment Authority within 28 days after it is made and at regular intervals after that time, namely;

- within 6 months after the initial review and 6 months thereafter
- at subsequent intervals of not more than 12 months.

A patient or a person on the patient's behalf can apply to the Tribunal to review a Treatment Authority at any time.

When a Treatment Authority is reviewed, the Tribunal must decide whether the Treatment Authority should continue or be revoked, based on the treatment criteria and treating the person in a 'less restrictive way'. The Tribunal may also decide that a patient must be placed on a community category or have a stated amount of limited community treatment.

More information on the Tribunal is provided in Chapter 14.

5 Responsibilities of doctors and administrators for treatment and care

5.1 Authorised doctors

Authorised doctors are doctors who are appointed under the Act to perform specific functions. Doctors must have the required competencies to become an authorised doctor. Most authorised doctors are specialist psychiatrists.

When a person becomes a patient, an authorised doctor must, as soon as practicable, examine a patient and decide the nature and extent of treatment and care to be provided to the patient.

Under the Act, an authorised doctor has a duty to ensure the treatment and care provided to a patient is appropriate for the patient's treatment and care needs, and in compliance with the requirements of the Act.

Authorised doctors must record in the patient's health records the treatment and care planned to be provided, and that is provided, to a patient.

5.2 Administrators

An administrator is appointed for each mental health service by the Chief Psychiatrist. The overall role of administrators is to ensure, as far as practicable, that the service complies with the Act.

Administrators must:

- take reasonable steps to ensure the patient receives the treatment and care planned to be provided to the patient, as recorded in the patient's health records
- take reasonable steps to ensure the patient receives the treatment and care appropriate for any other illness or condition affecting the patient
- ensure auditable systems are in place for recording the patient's treatment and care
- ensure that regular assessments of the patient happen as decided by an authorised doctor
- take reasonable steps to ensure the patient's treatment and care complies with the requirements of the Act.

The administrator of each mental health service must arrange for the *Statement of Rights* to be explained to the patient when the patient is admitted.

In addition, the administrator must arrange for a copy of the *Statement of rights* to be given to a patient or the patient's nominated support person, family, carers and other support persons, if requested. The administrator must also display signs in the service advising the *Statement of Rights* is available on request.

Administrators play an important role in facilitating the provision of a second opinion. The administrator must make arrangements to obtain the second opinion from a health practitioner who is independent of the patient's treating team. This is discussed further in Chapter 8.

6 Right to information

The Act emphasises the importance of involving patients in their own healthcare, including through discussing treatment decisions with the patient. Subject to a patient's right to privacy, support persons should also be involved in a person's treatment and care (See Chapter 9).

There are various provisions in the Act that require persons, such as authorised doctors, to tell, explain or discuss a matter with a patient. This includes:

- explaining when a Recommendation for Assessment is made for a person
- discussing the treatment and care to be provided under a Treatment Authority
- discussing the regular assessment of a Treatment Authority
- discussing the treatment and care to be provided to a patient subject to a Treatment Authority, Forensic Order or Treatment Support Order when the patient is to be treated in the community.

Where this applies, the person must:

- take reasonable steps to ensure the patient understands the information
- tell or explain the thing to, or discuss the thing with, the patient in an appropriate way having regard to the patient's age, culture, mental illness, ability to communicate and any disability
- tell or explain the thing to, or discuss the thing with, the patient in a way the patient is most likely to understand, for example, in the patient's language.

A full listing of matters that doctors and other persons must explain or discuss with patients is provided in the *Fact Sheet - What You Need to Discuss with Patients: A Reference Guide for Clinicians*, found at the MHA 2016 website.

Examples of appropriate communication:

- If a patient is acutely unwell and does not appear to understand the information given, an authorised doctor must explain the information again when the patient's condition improves.
- After providing information to a patient, an authorised doctor could ask the patient to restate the information to ensure it has been understood.

- An authorised doctor may explain information to a patient in the presence of a family member or support person who can help the patient understand it.
- An authorised doctor may tell, explain or discuss the matter with a patient at a later time if the patient would better understand the matter then.

Patients must receive written notices and other documents about important matters under the Act, such as notices of hearings of the Mental Health Review Tribunal, and copies of Treatment Authorities. A full listing of written notices and other documents is provided in the *Fact Sheet – Written Notices and Documents for Patients*, found at the MHA 2016 website.

In addition, the Act provides that a patient has the right to receive timely, accurate and appropriate information about the patient’s treatment and care.

Also, see Chapter 9 in relation to the disclosure of information to support persons under the *Hospital and Health Boards Act 2011*.

7 Rights as an inpatient

7.1 Overview

As an inpatient of a mental health service, patients are afforded a number of important rights which must be observed.

7.2 Visitors

Patients have the right to be visited by a nominated support person, family, carer or other support person at any reasonable time. The administrator of each mental health service is responsible for deciding the ‘reasonable times’ for the service, having regard to the practices of the service and the comfort of patients.

The right to be visited does not apply if:

- the person is excluded from visiting the patient (see below)
- the patient does not wish to be visited by the person.

Patients also have the right to be visited and examined by a health practitioner at any reasonable time. The health practitioner may also consult with an authorised doctor about the patient’s treatment and care. The health practitioner may do this:

- if asked by the patient or a nominated support person, family, carer or other support person, and
- under arrangements made with the administrator of the service.

Patients also have the right to be visited by a legal or other adviser at any reasonable time. The legal or other adviser may do this:

- if asked by the patient or a nominated support person, family, carer or other support person, and
- under arrangements made with the administrator of the service.

A person can be excluded from visiting a patient in a service if the administrator of the service is satisfied the visit will adversely affect the patient’s treatment and care. This may apply, for example, if a previous visit by the person resulted in a deterioration of the patient’s mental state. Where this occurs, the person excluded from the service must be given a written notice of the decision. The person has a right to appeal the decision to the Mental Health Review Tribunal.

An administrator cannot exclude a community visitor, a legal representative or health practitioner under these exclusion provisions.

7.3 Communication

A patient has a right to communicate with another person by post, fixed line telephone, mobile telephone or other electronic communication device.

However, this does not apply if:

- the other person has asked the administrator of the service that the patient not communicate with the person
- the communication is prohibited under another provision of this Act, for example, under a non-contact condition of a Forensic Order.

In addition, the administrator of a service may prohibit or restrict a particular patient or patients from communicating by telephone or an electronic communication device. This authority can only be exercised if the communication is likely to be detrimental to the health or wellbeing of the person or others. This may occur, for example, if an electronic device is being used to photograph staff or patients and sent to other persons.

8 Complaints and second opinions

8.1 Complaints

All mental health services have local policies and procedures in place to receive and manage complaints made by a patient or someone on the patient's behalf. Independent patient rights advisers and other staff are available to explain how to make a complaint about any aspect of a patient's treatment and care.

More information on the management of complaints is available in the *Chief Psychiatrist Policy on Management of Complaints about Treatment and Care of Patients* available on the MHA 2016 website.

8.2 Second opinions

If a complaint about a patient's treatment and care cannot be resolved, the patient, or someone on the patient's behalf, may request the administrator of the health service to obtain a second opinion about the patient's treatment and care from another health practitioner.

The administrator must make arrangements to obtain the second opinion from a health practitioner who is independent of the patient's treating team.

This does not prevent a health practitioner from requesting a second opinion (without a complaint being made) on the health practitioner's own initiative or upon request of a patient or interested person for the patient. This may apply, for example, if the patient wishes to confirm a clinical diagnosis.

More information on seeking a second opinion is available in the *Chief Psychiatrist Policy on the Right of a Patient to Request a Second Opinion* available at the MHA 2016 website.

9 Support persons

9.1 Overview

Nominated support persons, family, carers and other support persons play a very important role in a patient's treatment, care and recovery.

A patient's nominated support persons, family, carers and other support persons may, subject to the Act:

- contact the patient while the patient is receiving treatment and care
- participate in decisions about the patient's treatment and care
- receive timely, accurate and appropriate information about the patient's treatment
- arrange support services for the patient, including, for example, counselling, community care and respite care.

A patient's nominated support persons, family, carers and other support persons have a responsibility to:

- respect the patient's dignity and humanity
- consider the opinions and skills of health practitioners who provide treatment and care to the patient
- cooperate with reasonable programs of assessment, treatment, care, support, rehabilitation and recovery of the patient.

9.2 Nominated support persons

A person may appoint one or two nominated support persons in advance to assist the person if he or she becomes an involuntary patient. The person must have capacity at the relevant time to make the appointment.

If the appointing person becomes an involuntary patient, a nominated support person:

- must receive the notices under the Act that the patient is entitled to receive
- may discuss confidential information relating to the patient with the treating team
- may act as a support person or represent the patient at Tribunal hearings.
- may request a psychiatrist report for the patient, if the patient is charged with a serious offence.

The person should request an independent patient rights adviser or a staff member of a mental health service to record the appointment of the nominated support person in the patient's health records. The appointment will then be recorded in CIMHA which is the State-wide electronic mental health database.

A person can only revoke the appointment of a nominated support person if the person has capacity at the relevant time to revoke the appointment.

9.3 Communication about patient with others

Where the Act requires persons, such as doctors, to explain or discuss a matter with a patient, the person must also explain or discuss the matter with a nominated support person. If the patient does not have a nominated support person, the person must also explain or discuss the matter with one or more of the patient's family, carers or other support persons.

A summary of the provisions that require persons to tell, explain or discuss a matter with a patient, and therefore with a support person, is provided in the *Mental Health Act 2016: Patient Discussion Reference Guide* found at the MHA 2016 website.

However, the communication with a support person is not required in the following specific circumstances:

- if the patient requests, when the patient has capacity, that the communication not take place

- if the person is not readily available or willing for the communication to take place (for example, the person is not willing to visit the patient in hospital or cannot be contacted by phone)
- if the communication with the person is likely to be detrimental to the patient's health and wellbeing (for example, the person has previously disrupted the patient's treatment and care resulting in the patient's condition deteriorating).

9.4 Disclosure of information under the *Hospital and Health Boards Act 2011*

The requirement to keep patient information confidential is addressed in the *Hospital and Health Boards Act 2011*.

The *Mental Health Act 2016* clarifies that the provisions of the *Mental Health Act 2016* requiring certain communications to take place (for example, with a nominated support person) does not limit the discretion to disclose confidential information to other persons if it is permitted under the *Hospital and Health Boards Act 2011*.

For example, a person's family, carers and other support persons can receive information about the person in particular circumstances under the following provisions of the *Hospital and Health Boards Act 2011*:

- section 144 (disclosure with consent)
- section 145 (disclosure of confidential information for care and treatment of person)
- section 146 (disclosure to person who has sufficient interest in health and welfare of person).

Under these provisions, nominated support persons, family, carers or other support persons could request information from a clinician in a mental health service about a person's treatment and care. Clinicians can use their judgement in determining whether the disclosure of information is appropriate in the circumstances under the above provisions.

For example, where a person is being discharged to the care of a support person after a stay in an inpatient unit, the support person may request information about the patient to assist with their treatment and care. The practitioner has the discretion to provide this information. The express consent of the patient is not required for this to occur.

9.5 Written notices

Where the Act requires persons, such as administrators or the Mental Health Review Tribunal, to give a written notice to a patient, support persons must also be notified as follows:

- if the patient has a nominated support person, the notice must be given to the nominated support person, and need not be given to the patient if the patient may not understand or benefit from it
- if the person is aware the patient has a personal guardian or attorney, the notice must be given to the guardian or attorney, and need not be given to the patient if the patient may not understand or benefit from receiving the notice
- If the patient does not have a nominated support person, personal guardian or attorney, the person may give the notice to one or more of the patient's family, carers or other support persons as well as, or instead of, to the patient if it appears to be in the patient's best interests, and the patient has not asked for the communication to not take place
- for a minor, the person may give the required written notice to one or more of the minor's parents as well as, or instead of, to the minor if the minor may not understand or benefit from receiving the notice and it appears to be in the minor's best interests.

9.6 Other rights and responsibilities

Nominated support persons, family, carers and other support persons have a number of other rights under the Act, namely:

- to receive the Statement of Rights upon request (as discussed in Section 5.2)
- to visit patients at reasonable times (as discussed in Section 7.2)
- to communicate with patients (as discussed in Section 7.3)
- to request a second opinion on behalf of a patient (as discussed in Section 8.2).

10 Persons in custody

Provisions of the Act apply to persons in custody (namely, in prison, a watch-house or a youth detention centre) who become acutely unwell with a mental illness.

Persons in this situation are entitled to ‘equivalence of care’ with persons in the general community and may be transferred to an inpatient unit of a mental health service for treatment and care. These persons are referred to as ‘classified patients’.

Various approval processes are required for a classified patient to be transferred to a mental health service as a classified patient.

The Chief Psychiatrist is notified if a patient is not transferred within 72 hours of a recommendation for a transfer to a mental health service being made. Where necessary, the Chief Psychiatrist may direct that a transfer take place to ensure the person’s receives the appropriate treatment and care.

11 Psychiatrist reports

A person subject to a Treatment Authority, Forensic Order or Treatment Support Order who is charged with a ‘serious offence’ may request a psychiatrist report at no cost.

A ‘serious offence’ is an indictable offence, other than an offence that must be heard by a magistrate. The relevant mental health service is required to advise patients and support persons when a request for a psychiatrist report may be made.

The purpose of the report is to provide an opinion on whether the person was of unsound mind at the time of an alleged offence or is unfit for trial.

A request for a psychiatrist report may also be made by:

- the person’s nominated support person, if it is in the person’s best interests
- a personal guardian who has the authority to make this decision for the person
- an attorney who has the authority to make this decision for the person
- a parent of a minor
- the person’s lawyer, acting on instructions of the person.

A person being examined for a psychiatrist report has the right to be accompanied by a support person, including a nominated support person, lawyer or personal guardian.

On receiving the psychiatrist report, a lawyer for the person may refer the matter to the Mental Health Court (see Chapter 12).

12 Mental Health Court

The Mental Health Court decides whether a person charged with a ‘serious offence’ was of unsound mind at the time of the alleged offence or is unfit for trial. If the alleged offence is murder, the Court may also decide if the person was of diminished responsibility at the time of the alleged offence, in which case the charge may be downgraded.

A person, or a lawyer on the person's behalf, has a right to refer a matter to the Mental Health Court if they have a reasonable belief that the person was of unsound mind at the time of the alleged offence or is unfit for trial.

After a referral to the Court is made, a party to a proceeding may appear in person or be represented by a lawyer, or with the leave of the Court, another person.

If the Court decides the person was of unsound mind or permanently unfit for the trial, the relevant charges are dismissed.

As a consequence of these findings, a Forensic Order or Treatment Support Order may be made for the person. These orders require involuntary treatment and care for the person, and, if necessary, detention in an authorised mental health service.

13 Magistrates Court

A person with a mental illness, intellectual disability or other mental condition who appears before a magistrate may have the charges dismissed if the magistrate is reasonably satisfied, on the balance of probabilities, that the person:

- was, or appears to have been, or unsound mind when the offence was allegedly committed, or
- is unfit for trial.

Queensland Health offers a Court Liaison Service which provides mental health assessments and support for mentally ill persons who are either appearing before a magistrate or have been arrested and are being held in a watch house.

Under the Act, a magistrate may refer a person with a mental illness to a mental health service for examination. This referral does not mandate treatment but may result in:

- a plan for voluntary treatment and care
- the making of a Treatment Authority for the person, or
- if the person is already on an order or authority, a change to the treatment and care under the order or authority.

14 Mental Health Review Tribunal

14.1 Jurisdiction

The Mental Health Review Tribunal plays a key role in protecting patient rights.

The Tribunal is an independent body and is not part of Queensland Health.

The Tribunal reviews:

- Treatment Authorities
- Forensic Orders
- Treatment Support Orders
- the fitness for trial of persons found temporarily unfit for trial, and
- the detention of minors in high security units.

The Tribunal hears applications for:

- Examination Authorities
- the approval of regulated treatments —electroconvulsive therapy (ECT) and deep brain stimulation
- the transfer of Forensic Order and Treatment Support Order patients out of Queensland, and
- the transfer of equivalent patients into Queensland.

14.2 Review and applications

A Treatment Authority must be reviewed at set intervals (see Section 4.5) and are also reviewed on application by the relevant patient or someone on the patient's behalf, or on the initiation of the Tribunal.

This ensures independent oversight to decisions made by authorised doctors to make, and continue, Treatment Authorities, given that the individual concerned is unable to consent to treatment.

For Treatment Authorities, the tribunal decides whether a Treatment Authority should continue based on the treatment criteria and treating the person in a 'less restrictive way'.

If the Treatment Authority continues, the Tribunal must decide whether the patient should have greater treatment in the community.

The Tribunal reviews Forensic Orders and Treatment Support Orders every six months. When a review is undertaken, the Tribunal may confirm or revoke the order. The Tribunal's decision must take into account the management of risks to the community.

If the Tribunal confirms the order, the Tribunal may decide the category of the order, limited community treatment and any conditions on the order. A Forensic Order cannot be revoked during any non-revocation period set by the Court, or if the patient remains temporarily unfit for trial.

If a person has been approved by the Tribunal to transfer out of Queensland, the requirement to conduct periodic reviews are suspended while the person subject to the order is out of Queensland.

A patient, someone on the patient's behalf, or the Chief Psychiatrist, may apply to the Tribunal for a review of a Forensic Order or Treatment Support Order at any time.

The Tribunal may also order the person's transfer to another authorised mental health service or a transfer out of Queensland if it would benefit the person, for example, by being closer to family members.

The Tribunal acts as a safeguard for the use of electroconvulsive therapy (ECT) for the patients in specific circumstances. For example, the use of ECT requires the approval of the Tribunal for—

- an adult without capacity to consent to ECT
- an adult with capacity to consent to ECT, but is subject to a Treatment Authority, Forensic Order or Treatment Support order
- a minor (under 18 years of age)

14.3 Rights for hearings

Right to a clinical report

For a review of a Treatment Authority, Forensic Order, Treatment Support Order, a person's fitness for trial or the detention of a minor in a high security unit, the Tribunal must ensure a treating practitioner prepares a report for consideration by the Tribunal.

A copy of the report is to be given to the Tribunal and the person subject of the review at least seven days before a hearing.

Right to appear and support

A person subject to a Tribunal proceeding may appear at the hearing and be represented by a nominated support person, lawyer or other person.

The person may be accompanied at the hearing by a support person (such as a nominated support person), or with the Tribunal's leave, more than one support person.

A person who represents the person at the hearing of a proceeding must:

- to the extent the person is able to express the person's views, wishes and preferences - represent the person's views, wishes and preferences, and
- to the extent the person is unable to express the person's views, wishes and preferences - represent the person's best interests.

No cost representation

The Tribunal must appoint a lawyer for a hearing at no cost to the person:

- if the person is a minor
- for a hearing of a person's fitness for trial
- for a hearing to consider an application to perform ECT
- for a hearing where the Attorney-General is represented.

If the person is an adult with capacity, the person may, in writing, waive the right to be represented by a lawyer.

Statement of reasons and appeals

A party to a proceeding may request the Tribunal to provide written reasons for the Tribunal's decision. The Tribunal must comply with the request within 21 days.

A person has a right to appeal Tribunal decisions to the Mental Health Court.

15 Community visitors

One of the functions of independent patient rights advisers is to work cooperatively with community visitors under the *Public Guardian Act 2014*.

The Office of the Public Guardian operates community visitors programs for adults and minors (persons under 18 years of age). The purpose of these programs is to protect the rights and interests of patients at 'visitable sites', which include mental health services.

A patient, or someone on the patient's behalf, may request that a community visitor visit a mental health service. A community visitor must comply with this request.

Independent patient rights advisers and other staff of mental health services are available to assist patients or support persons request a visit by a community visitor.