



**Comment
on the

The Review of
the ACT Mental
Health
(Treatment and
Care) Act 1994**

February 2008

INTRODUCTION

ACTCOSS acknowledges that Canberra is built on the traditional lands of the Ngunnawal people. We pay our respects to their elders and recognise the displacement and disadvantage they have suffered since European settlement. ACTCOSS celebrates the Ngunnawal's living culture and valuable contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage, and low-income people in the Territory. ACTCOSS is a member of the nationwide COSS network, made up of each of the state Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' objectives are representation of people living with disadvantage, the promotion of equitable social policy, and the development of a dynamic, collaborative and sustainable community sector.

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

ACTCOSS receives funding from the Community Services Program (CSP) which is funded by the ACT Government.

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

Introduction

ACTCOSS welcomes the release of the *The Review of the ACT Mental Health (Treatment and Care) Act 1994 Options Paper* (Options Paper) and commends the ACT Government for the extensive consultation that is currently taking place. ACTCOSS makes comment on the Options Paper with the appreciation of the difficulties associated with the development of mental health legislation and policy, and the understanding that the Options Paper is one part in an ongoing consultation process.

ACTCOSS advocates the right for all people to access mental health care, regardless of socioeconomic status, age, gender, beliefs and/or culture. ACTCOSS acknowledges the role of mental health legislation in informing the direction for provision of care and adopts the World Health Organisations (WHO) view that mental health policies and laws should:

*promote the rights of people with mental disabilities and empower them to make choices about their lives, provide them with legal protections, and ensure their full integration and participation into the community.*¹

Consequently, ACTCOSS supports the proposed inclusion of strategies within the *ACT Mental Health (Treatment and Care) Act 1994* (the Act) that promote access including the addition of further rights for consumers and carers, the inclusion of advanced directives and provisions for access to voluntary treatment.

ACTCOSS also emphasises the need for the Act to regard mental health consumers as having complex and holistic needs that include the delivery of health services, welfare assistance, community support services and appropriate housing options.²

The comments that follow relate to a select number of issues raised in the Options Paper. For the purpose of this submission and ease of reference, ACTCOSS uses the definitions of mental illness, mental dysfunction and mental disorder used in the current Act, although we observe that these may not be optimal or universally accepted.

Title

ACTCOSS supports a shift of focus in mental health services from acute care, to a more holistic care framework of prevention, promotion and early intervention (PPEI), which incorporates consumer treatment and support within the community. ACTCOSS understands that there is a role for mental health legislation to address a range of issues including the provision of high quality care, promotion of consumer integration into the

¹ World Health Organisation, 2005, *Mental Health Legislation and Human Rights*, Geneva, Viewed 6 February 2008, http://www.who.int/mental_health/policy/legislation/policy/en/

² Mental Health Council of Australia, 2005, *Not for service: Experiences of injustice and despair in mental health care in Australia*, Canberra, p.14

community, improvement of access to care, promotion of mental health and the prevention of mental health disorders.³

However, ACTCOSS questions the extent to which a change in legislation is achieved through the insertion of the terms 'community care' and 'recovery' within the title of the Act. We stress the need for this focus to be present throughout the legislation, and are aware that these terms may carry particular connotations for some stakeholders. We suggest that an extension in this focus throughout the Act can occur by specifying initiatives such as:

- the promotion of voluntary treatment for all people that wish to access it and appeal mechanisms for those that are refused treatment;
- the development of a stronger focus on community care within the consumers own environment;⁴ and,
- the development of a provision within the law that guarantees quality mental health care.⁵

ACTCOSS believes that the inclusion of such provisions will broaden the focus of the Act to encourage access to mental health services and may lead to a decrease in people being involuntarily treated.

Definitions

ACTCOSS understands that there has been diversity in opinions regarding the definitions to be used for mental illness, mental dysfunction and/or mental disorder within the Act. ACTCOSS appreciates the difficulties surrounding the development of mental health definitions for consumers, particularly where this is for the purpose of allowing restrictive and coercive treatments.

ACTCOSS observes that the discussion of definitions in the Options paper has resulted in strong and, at times, oppositional responses; which we are unsure were the intended effect. In particular, we are aware that the provisions of the current Act and the options raised by the paper contemplate a multiplicity of functions of the Act, and it is unclear to which purposes any 'definition' should attach. For instance, we would express concern if a very narrow definition of mental illness was applied before a person was able to access the option of completing an advanced directive – and indeed, whether there is any need for a definition for this purpose at all.

ACTCOSS asserts that mental health treatment services should be available to anyone who would benefit from them and consent to them, and that this should be endorsed by the Act.

³ This is consistent with the World Health Organisation, 2005, Mental Health Legislation and Human Rights, Geneva, Viewed 6 February 2008, http://www.who.int/mental_health/policy/legislation/policy/en/

⁴ United Nations, Principles for the protection of persons with mental illness and the improvement of mental health care, 1991, Viewed 4 February 2008, <http://www.unhchr.ch/html/menu3/b/68.htm>

⁵ World Health Organisation, 1996, Mental health care law: Ten basic principles, Geneva, p.5

The definitional debate, however, becomes more intense when discussing involuntary treatment. ACTCOSS notes there are a number of human rights instruments that provide some guidance to the circumstances in which involuntary treatment may be administered, although we observe that there remains some disagreement about their interpretation.

ACTCOSS has a particular interest in the interaction between the health system and the criminal justice system, and advocates that anti-social behaviours that result from underlying health conditions should be addressed through the health system, and not the criminal justice system. We note that while being far from ideal or preferred, the current provisions for involuntary treatment in the Act provide one avenue for addressing behaviours that might otherwise be addressed through the criminal justice system. We would be concerned if the effect of changing the definitions and conditions for involuntary treatment resulted in some people, for whom involuntary treatment might have been a better response, to instead be subjected to criminal proceedings and incarceration in prison.

More generally, ACTCOSS observes that medical diagnosis remains an inexact science, and it is not always possible to determine the ultimate 'cause' of a behaviour, particularly when there are several possible explanations present, such as the possibility that problem drug or alcohol use masks another underlying health condition.

While we do not necessarily endorse the current arrangements in the Act, ACTCOSS encourages further discussion of what an appropriate public response should be for people exhibiting behaviours that:

- may indicate the presence of mental concerns arising from any underlying health condition; and
- are perceived by their carers, the community or authorities as being unlawful, or a threat to themselves or others.

ACTCOSS is aware that a number of options have been suggested for this group. ACTCOSS has not yet formed a firm view of what the most appropriate approaches might be, other than stipulating that criminal proceedings or incarceration in prison should not be the preferred response, and that alternative approaches should be available.

In any case, ACTCOSS advocates that all circumstances when involuntary treatment is administered, ACTCOSS promotes the 'provision of the least restrictive type of mental health care'.⁶

Advanced Directives

ACTCOSS supports the inclusion of advanced treatment directives in the Act, as we recognise the importance of empowering consumers by allowing them to have greater participation in decisions relating to their

⁶ United Nations, Principles for the protection of persons with mental illness and the improvement of mental health care, 1991, viewed 4 February 2008, <http://www.unhchr/html/menu3/b/68.htm>

treatment and care.⁷ The inclusion of advanced directives within the Act is supported by the WHO Mental Health Care: Ten Basic Principles (WHO Ten Basic Principles) which recommend that 'Principle 5: Self Determination' can be applied by

*abiding by any wishes expressed by a patient prior to becoming unable to consent.*⁸

Due to the legal complexities associated with the development of advanced directives, including the difficulty mentioned within the Options Paper for '*services to fully comply with an external preference*', ACTCOSS supports option three of the included suggestions to:

*establish a separate section on the use of future care statements and to include provisions related to their status, development, use and review.*⁹

ACTCOSS considers that the allocation of a separate section for advanced directives will allow for a more definitive explanation of these complex issues and ensure a strong legal basis for their use and interpretation.

ACTCOSS also understands that the successful inclusion of advanced directives for mental health treatment and management within the ACT will involve a number of legislative and policy responses. Consequently we support that both legislative and policy responses are required to properly implement advanced directives.

ACTCOSS recommends that the new section relating to advanced directives within the legislation include clarification of the following issues:

1. The legal status of advanced directives

ACTCOSS understands that within the Options Paper it is reported that instruments such as advanced directives 'may or may not have legal status'.¹⁰ ACTCOSS believes that information regarding when advanced directives are valid and how advanced directives are withdrawn are required in the Act to confirm their legal status. The inclusion of advanced directives within the legislation will assist with ensuring that the statements are to be consulted by mental health professionals and the Tribunal on every occasion when a statement has been prepared.

2. Compliance with advanced directives

ACTCOSS believes that when an advanced directive has been prepared by a consumer, the Tribunal should be legally compelled to take into account the advanced directive on every occasion when acute care is being determined.

3. The ability for consumers to alter and withdraw their advanced directives

⁷ Commonwealth of Australia, 1995, Mental health national policy, Canberra, p.12

⁸ World Health Organisation, 1996, Mental health care law: Ten basic principles, Geneva, p.5

⁹ Morgan & Disney Associates Pty Ltd, 2007, The review of the ACT Mental Health (Treatment and Care) Act 1994, p.22

¹⁰ Morgan & Disney Associates Pty Ltd, 2007, The review of the ACT Mental Health (Treatment and Care) Act 1994, p.20

The Act should also detail the consumer's right to alter or withdraw their advanced directives at any time when they are deemed to be "legally or mentally well".

4. Involvement of carers and consumer advocates in the development of advanced directives

ACTCOSS believes that carers and consumer advocates should be involved with the development of advanced directives wherever possible. Carers are involved with the day to day mental health treatment and care of consumers. For this reason ACTCOSS believes that their input to an advanced directive should be strongly encouraged to determine the best treatment options for a consumer. We also believe that a consumer advocate plays an important role in ensuring that a consumer and their carer are best informed of the options for their treatment.

5. Assistance with the development of advanced directives

ACTCOSS would like to stress the importance of providing assistance and support for people with low literacy abilities, people from Culturally and Linguistically Diverse (CALD) backgrounds and Indigenous people in the development of advanced directives.

Voluntary Treatment

ACTCOSS supports the inclusion of the provision for voluntary treatment in the revised Mental Health Legislation and understands the importance of providing consumers with the opportunity to seek care when they deem it necessary. Within the WHO's Ten Basic Principles it is suggested that Mental Health Legislation should include:

*a voluntary admission procedure incorporated into the mental health law scheme which is abided by in practice.*¹¹

In line with this recommendation by the WHO, ACTCOSS regards the request for voluntary treatment as a consumer's right and subsequently supports the proposed inclusion of '*a short section on the right to seek voluntary treatment*'.¹² The inclusion of a section within the Act will assist to ensure that consumer's rights are properly addressed. We believe that these rights include the consumer's right to a mental health assessment as a minimal level of care. Additionally if the consumer is refused treatment, the consumer should receive an explanation in writing as to why their treatment was refused and every effort should be made to ensure that the patient receives the required support within the community. The patient should also be allowed the opportunity to appeal the resulting decision, if they feel that their case was not appropriately assessed.

¹¹ World Health Organisation, 1996, Mental health care law: Ten basic principles, Geneva, p.4

¹² Morgan & Disney Associates Pty Ltd, 2007, The review of the ACT Mental Health (Treatment and Care) Act 1994, p.25

Involuntary Assessment and Treatment

ACTCOSS believes that the determination of future options for involuntary assessment and treatment will depend heavily upon the definitions decided upon for mental disorder, mental illness, mental dysfunction or any other new terminology associated with these terms used within the Act. It is difficult to comment on the involuntary treatment and assessment of these individuals, when the Act has not yet clarified which individuals may be subject to this treatment.

In any circumstance, ACTCOSS would continue to support the 'provision of the least restrictive type of mental health care' in the delivery of involuntary treatment.¹³ Additionally in circumstances when physical and/or chemical restraints are absolutely required to be used in the treatment of a consumer, ACTCOSS advocates the implementation of the following safeguards:

- their use only after repeated attempts to discuss alternatives with the consumer;
- thorough examination and prescription by a qualified and approved health care provider;
- their use for the need to prevent the immediate harm to the consumer or others;
- regular observation;
- regular periodic reassessments of the requirement for the consumer to be restrained;
- a strictly limited duration; and
- documentation of their use within the patient's medical file.¹⁴

Care and Treatment

ACTCOSS supports the use of ambulance officers in the transportation of people that are subject to transportation for reasons specified within the Act. Further to this, ACTCOSS recommends that ambulance officers who transport consumers with mental disorders receive comprehensive training regarding mental health consumers. ACTCOSS would envisage that the increased powers granted to ambulance officers would result in the declining role of police officers in the transportation of people under the Act.

Rights

ACTCOSS supports the inclusion of a section within the Act relating to the rights of both consumers and carers. However, ACTCOSS is concerned about the lack of detail provided in the Options Paper surrounding the proposed section. While the Options Paper suggests that the section regarding rights "*should draw on*" the UN Principles, local or regional rights instruments and the MHCN proposed statement of consumer

¹³ United Nations, Principles for the protection of persons with mental illness and the improvement of mental health care, 1991, viewed 4 February 2008, <http://www.unhchr/html/menu3/b/68.htm>

¹⁴ This is consistent with World Health Organisation, 1996, Mental health care law: Ten basic principles, Geneva, p.7

principles, no discussion is given as to the extent to which these documents will be consulted. ACTCOSS recommends that the following issues should be addressed within the section relating to rights in the Act.

Dignity and Respect

ACTCOSS believes that all people with a mental disorder have the right to be treated with dignity and respect, whether they are in a mental health facility, or in the community.¹⁵ This right should be based upon UN Principle 1 (2) that:

*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.*¹⁶

Culturally Appropriate Treatment and Care

ACTCOSS advocates the provisions of culturally sensitive and appropriate treatment and care to Indigenous people and CALD people that is free from judgement and assumptions based upon stereotypes. ACTCOSS suggests that the Act include the right for Indigenous people and CALD people to receive treatment and care that takes into account their cultural differences, and where possible, offers treatment alternatives that accommodate these differences.

Involvement of Carers

ACTCOSS believes that carers play an integral role in the treatment, care and recovery of consumers and should be included in the development of treatment and care plans in circumstances when the consumer authorises their involvement. ACTCOSS understands that carers are sometimes refused information regarding the treatment and care of consumers, even when the consumer has authorised their involvement.¹⁷ This refusal can be difficult for both consumers and carers, particularly when a carer is expected to play a role in the treatment and care plan of a consumer. ACTCOSS believes that there should be a right within the Act that allows for carer involvement within the care and treatment of consumers, while demonstrating a balance between the consumer's privacy and the health and safety of the consumer.

Forensics

ACTCOSS advocates that people found not guilty due to mental impairment have access to the same standard of treatment and protections as other people experiencing mental health difficulties.

¹⁵ Mental Health Council of Australia, 2005, Not for service: Experiences of injustice and despair in mental health care in Australia, Canberra, p.143

¹⁶ United Nations, Principles for the protection of persons with mental illness and the improvement of mental health care, 1991, Viewed 4 February 2008, <http://www.unhchr/html/menu3/b/68.htm>

¹⁷ Mental Health Council of Australia, 2005, Not for service: Experiences of injustice and despair in mental health care in Australia, Canberra, p.158