

Shifting The Focus: Acknowledging The Rights Of Victims Of Mentally Ill Offenders Through Legislative Change

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Introduction: setting the legislative scene

Queensland arguably has the most progressive contemporary mental health legislation in the country, quite possibly the world. The *Mental Health Act 2000* (MHA2000) aims to safeguard and balance the rights and liberties of the mentally ill in the least restrictive way to protect the person's health and safety in keeping with the *United Nations Principles for the Protection of Rights of People with Mental Illness and for the Improvement of Mental Health Care* (1991). The MHA2000 also establishes special processes for persons with mental illness who are charged with criminal offences to ensure matters of criminal responsibility and fitness for trial are examined. Indictable offences may be referred to the Mental Health Court (MHC) for decisions on unsoundness of mind in other words an insanity defence.

The MHC is constituted by a dedicated Supreme Court judge and two senior forensic psychiatrists who assist the court in an advisory capacity. When an offender is charged with an offence and is also subject to an Involuntary Treatment Order (ITO) a process under the forensic provisions of the MHA2000 is initiated, commonly referred to as a "Chapter7 Part2". This process involves notification by the treating mental health service to the Director of Mental Health (DMH) who then issues notice to the Chief Executive for Justice. Legal proceedings are suspended while the Director of Mental Health seeks a psychiatric report from the treating psychiatrist to determine if a reference to the Mental Health Court be made, or to the Director of Public Prosecutions if the offence was not of a serious nature or if the DMH believes the offender to be of sound mind and currently fit for trial.

The Mental Health Court in effect determines whether the offender was criminally responsible for their actions. Section 27 of the Queensland Criminal Code Act 1899 states that a person is not criminally responsible for acts, or omissions to act, if their state of mental disease or natural mental infirmity deprives them of the capacity to understand what they were doing, control their actions, or know that they should not do the act or make the omission. The Court must be satisfied that the person's mental illness was of such a degree as to completely deprive them of one of these

capacities, and not through the intentional use of drugs and or alcohol to intoxication. When a person is found of unsound mind legal proceedings are discontinued and the Court may make a Forensic Order. The offender/defendant now becomes a Forensic Order patient.

The *Criminal Offences Victims Act 1995* (COVA) is the Queensland legislation that implements the *United Nations Declaration of Basic Principles for Victims of Crime and Abuse of Power* (1985). COVA makes a declaration of fundamental principles of justice for victims of crime. In brief these principles afford victims the right to fair and dignified treatment, access to justice, protection of privacy and person, that their welfare be considered, the right to provide their version of the offence and the impact this has had upon them, to receive information about the investigation and the prosecution of the offender, as well as information about compensation, health and legal services. However prior to recent legislative changes, when matters were diverted from the criminal justice system to the forensic mental health system some of the principles of COVA were also suspended due to differences in the jurisdictions of Justice and Health.

While it is essential that mentally ill offenders be accorded their right to access mental health services and to be treated in the least restrictive environment, the needs, rights and safety of victims must be viewed equally as essential.

Early in 2006, highly emotive media reporting on the alleged Gold Coast sighting of a high profile mental health patient, raised a significant outcry regarding public safety and expressed a greater need to consider the views of victims when community leave is to be approved for mentally ill offenders. The inadequacy of information and support provided to victims and their families along with diminished community confidence in the forensic mental health system were highlighted as major issues.

The Queensland Government responded by commissioning Brendan Butler AM SC to undertake a review of the Mental Health Act 2000. The review examined the efficacy of current legislative provisions and administrative arrangements relating to victims and considered amendments to enhance victim involvement in the decision making process. It also considered whether the Mental Health Act 2000 and associated arrangements attained an acceptable balance of the State's responsibility to ensure the safety of the community while simultaneously providing rehabilitation opportunities for patients who had been found of unsound mind for their offence.

Promoting balance in the forensic mental health system; Review of the Queensland Mental Health Act 2000 Final Report December 2006, or as it has become known the 'Butler Report', identified significant marginalisation, disrespect and lack of acknowledgement towards victims of mentally ill offenders and considered the legitimate needs of victims could and should be addressed through legislative and administrative reform. In response the Queensland Government made a commitment to better support victims of violent offences and their families through a reformed forensic mental health system. This commitment included legislative amendments to create an additional focus on victims of mentally ill offenders, with a central theme to formalise their rights and improve access to information, practical assistance and emotional support. A key feature of this was the establishment of a state-wide support service for victims of offences committed by people who are identified as having a mental illness and are diverted to the forensic mental health system from the criminal justice system.

Legislative Reform: balancing competing interests

Many of the amendments of the MHA2000 address processes in which the forensic mental health system accommodates the needs and rights of victims, their access to information and support as well as the ability to submit relevant information. The provision of greater access to information about patients and the affording of greater protection for victims is fundamental to the balancing of victims rights with those of patients.

Queensland Health has now established a Patient Information Order Register to enable eligible victims to gain access to information about their offender. There are two types of orders which have been established under Chapter 7A of the MHA2000. They are a Classified Patient Information Order (CPIO) and a Forensic Patient Information Order (FPIO).

Classified Patient Information Order (CPIO).

An offender who is either before a court, detained in custody or serving a sentence, becomes a classified patient when they are transferred from a court, watchhouse or correctional facility to an Authorised Mental Health Service (AMHS) for assessment and or treatment. The direct victim of an alleged offence, the parent or guardian of a victim if they are a minor or have a legal incapacity, or an immediate family member of a deceased victim are eligible to apply for a CPIO. Under the order they are

provided with the following information: any approval of leave from the AMHS and the conditions of the leave relevant to the victims safety; if the offender is absent without approval and when they are returned; if the offender is transferred to another AMHS or when the classified status ceases, when and why e.g. returned to custody.

Forensic Patient Information Order (FPIO)

As previously described an offender found of unsound mind may be subject to a forensic order and may be detained in an inpatient facility and or granted Limited Community Treatment (LCT). LCT enables the forensic patient to access leave in the community for rehabilitation opportunities under prescribed conditions and in consideration of the safety risk to victims and others. The Mental Health Review Tribunal, an independent body who review the person's forensic order, strictly governs the granting of LCT and the conditions of community leave every six months.

The MHRT determines FPIO applications. Again direct victims of the offence, the parent or guardian of a victim if they are a minor or have a legal incapacity, or an immediate family member of a deceased victim have automatic entitlement to a FPIO. In addition any concerned person who can demonstrate sufficient personal interest may also apply. With this order victims are informed when the MHRT is to review the patients forensic order; the outcome of the review including approval of LCT and the conditions relevant to the victims safety (e.g. not to have contact with victim, not to use drugs or alcohol, undergo random urine samples or blood tests, compliance with medication, access to children etc.); any absence without approval and when they are returned; approved transfers to another authorised mental health service or interstate; the revocation of the forensic order and if the forensic order is ceased the date and reason why.

The Queensland Health Victim Support Service has been given the mandated role to provide the information that victims registered for Patient Information Orders are approved to receive in a timely and respectful way. This information is conveyed to victims as per their preference e.g. face to face, phone, email, letter or any combination.

For both a classified patient and forensic patient information order the victim may discuss the information they receive with their personal support network however, they must sign an undertaking not to disclose the information publicly e.g. to the media or through the Internet. Broader dissemination could result in the order being cancelled.

Providing statements: having a voice

Victims and concerned persons may also make statements to the Mental Health Court and the Mental Health Review Tribunal for consideration, the information must be relevant and not already before the Court or Tribunal. Any information provided in the statement must be truthful and accurate, as these statements are required to be sworn or affirmed before a Justice of the Peace or Commissioner for Declarations. Providing these sworn statements gives victims the opportunity to tell some of their story: to express their knowledge and understanding of the offenders mental state prior to or at the time of the offence, to declare how the offence has impacted on their sense of safety and wellbeing, their relationships, work, family, their lives.

In some circumstances the Court or Tribunal will approve a confidentiality order if the disclosure of information to the offender would cause serious harm to the health of the offender or pose a serious risk to the safety of the victim or others. Confidentiality orders however are generally made only in exceptional circumstances.

Establishing a Statewide Victim Support Service: QHVSS

The Queensland Health Minister Stephen Robertson, in a press release from the official launch of the Queensland Health Victim Support Service on 28 February 2008, advised that the QHVSS was at the centrepiece of major reforms. It was his view that "...victims of crime committed by people with a mental illness will now have a reliable, confidential and well resourced avenue to turn to if they require support, counselling and information about their offender". Demonstrating a commitment to the people of Queensland the government allocated \$4.6 million to establish and operate the QHVSS.

The QHVSS is a unique and innovative statewide specialist service that specifically addresses the needs of victims of mentally ill offenders and to date is the only service of its kind nationally. A relatively small service, the QHVSS has an office in both Brisbane and Townsville. The Brisbane office houses the Manager and Assistant Manager, four Victim Support Coordinators (who also travel the State), a Principle Project Officer and Administration Officer. The Townsville office houses a Victim Support Coordinator and Administration officer. QHVSS also has a visiting office in Cairns for when the Victim Support Coordinators fly in to provide assistance in the Far North.

The QHVSS is commissioned to undertake a number of roles and responsibilities around the State. These include:

- The development of partnerships and networks to facilitate early identification of victims and referral pathways to ensure victims are provided with the opportunity to access QHVSS for advice and support of their rights and entitlements. Currently partnerships have been forged and formalised with the Queensland Police Service, the Office of the Director of Public Prosecutions and the Office of the Director of Mental Health. Other partnerships and networks are in the development phase.
- Promote coordination of the provision of services to victims of crime where the perpetrator has been diverted to the forensic mental health system. Provide information about the legislative rights of victims, their entitlements under COVA, as well as access and referral to specialist counselling and psychological services.
- Assist victims and their families with information and support with negotiating the processes and understanding the outcomes of the Mental Health Court and the Mental Health Review Tribunal proceedings. Importantly providing information and assistance to enable individuals to understand and make informed choices and decisions.
- Provide information and support to victims or concerned persons to make applications for Patient Information Orders and to provide them with the information approved under these orders in a timely and respectful way.
- In conjunction with the Office of the Director of Public Prosecutions, provide assistance and support to victims in the preparation of statements to the Mental Health Court and submissions to the Mental Health Review Tribunal.
- Develop strategic partnerships and collaborate with Indigenous health organisations and workers in the provision of information and support to Aboriginal and Torres Strait Islander victims of mentally ill offenders throughout the State.
- Promote the awareness and understanding of the rights, issues, and needs of victims with staff of authorised mental health services and the members of

the Mental Health Review Tribunal to ensure victim issues are given due consideration when decisions are being made in regards to gaining access to Limited Community Treatment or when requesting/hearing the revocation of Forensic Orders.

The QHVSS is now reaching six months young and although much has been accomplished in this short time there are many challenges ahead and still much more to do. Our vision is to establish and provide a progressive, responsive, contemporary victim support service that promotes the balance within the forensic mental health system by raising awareness of victims' rights, issues and concerns and promoting their recovery and wellbeing.

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www.health.qld.gov.au/qhvss

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