Mental Health Laws

CHAPTER CONTENTS

INTRODUCTION

Mental illness is as much an illness as physical illness and affects people in the community from all walks of life. Mental illness is diagnosed by psychiatrists who consider the patient's mood, behaviour and appearance, the symptoms they are experiencing, and the results of tests. In making a diagnosis, psychiatrists essentially categorise symptoms to decide what description best fits the person's mental disorder.

In a great many cases, people who suffer from a mental illness receive treatment in the same way that physical conditions are treated, and no special laws apply. People with mental illness have the same legal rights and obligations, and are subject to the same laws as the rest of the population.

However, in some circumstances, people with a mental illness can be required to have involuntary treatment under a treatment authority, either in hospital or in the community. There are specific laws that determine when a treatment authority can be made, and regulate treatment and the rights and obligations of patients.

There are also laws that relate to the effect that a defendant's mental illness or intellectual disability may have in criminal proceedings. If a defendant is found to have been of unsound mind at the time of certain offences or unfit for trial, a forensic order or a treatment support order can be made under which involuntary treatment and/or care is to be provided.

In Queensland, the *Mental Health Act 2016* (Qld) (Mental Health Act) is the main piece of legislation that deals with these matters.

THE MEANING OF MENTAL ILLNESS

The Mental Health Act defines mental illness as a condition characterised by a clinically significant disturbance of thought, mood, perception or memory (s 10 Mental Health Act). 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
- is a member of a particular racial group
- has a particular economic or social status
- has a particular sexual preference or sexual orientation
- engages in sexual promiscuity
- engages in immoral or indecent conduct

- takes drugs or alcohol
- has an intellectual disability
- engages in antisocial or illegal behaviour
- is or has been involved in family conflict
- has previously been treated for mental illness or been subject to involuntary assessment or treatment.

However, none of the above things means that a person does not have a mental illness.

Intellectual disability

Although an intellectual disability is not a mental illness, the Mental Health Act applies to people with an intellectual disability in some situations. A person may have a mental illness as well as an intellectual disability. Also, an intellectual disability, even in the absence of any mental illness, may be the basis for a person who is charged with a criminal offence to have been of unsound mind at the time of the alleged offence (or of diminished responsibility in the case of murder) or unfit for trial. The Mental Health Court may consider these issues in relation to people with an intellectual disability and make appropriate findings and orders.

THE MENTAL HEALTH ACT AND OTHER LEGISLATION

The Human Rights Act

The main object of the *Human Rights Act 2019* (Qld) (Human Rights Act) is to protect and promote human rights (s 3). The civil and political rights are listed and defined in pt 2 div 1 of the Human Rights Act, and the economic, social and cultural rights are listed and defined in pt 2 div 3 of the Act. The main objects of the Human Rights Act are to be achieved by primarily:

- requiring public entities to act and make decisions in a way compatible with human rights (ss 4(b), 58)
- requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights (ss 4(f), 48)
- providing for how to resolve human rights complaints (s 4(i)).

A person, who alleges that the public entity has made a decision that is not compatible with human rights or has failed to give proper consideration to a human right, may make a complaint to the Human Rights Commissioner (appointed under the *Anti-Discrimination Act 1991* (Qld)) (s 64 Human Rights

Act). There are detailed provisions on how the commissioner is to deal with human rights complaints (ss 68–78 Human Rights Act), and for the conciliation of complaints (ss 79–87 Human Rights Act).

The Human Rights Act states that every person has the right to liberty and security, a person must not be subjected to arbitrary arrest or detention, and a person must not be deprived of their liberty except on grounds, and in accordance with procedures, established by law (s 29).

As described below, the Mental Health Act itself contains important provisions that are designed to protect human rights. For example, one of the principles underlying the Mental Health Act is that the same human rights apply to all people. Another is that the objects of the Mental Health Act are to be achieved in a way that safeguards people's rights and is the least restrictive of the rights and liberties of people with a mental illness.

The Criminal Code

In criminal law, a mental illness may result in a person not being criminally responsible for an offence they are charged with, or it may make them unfit for trial. The *Criminal Code Act 1899* (Qld) (Criminal Code) deals with these issues, but the Mental Health Act provides an avenue for people to be diverted from the criminal justice system so that these issues can be decided by the Mental Health Review Tribunal.

The Mental Health Act

The objects of the Mental Health Act and how they are to be achieved

The main objects of the Act are, in summary (s 3 Mental Health Act):

- to promote the health and wellbeing of people who have a mental illness but do not have the capacity to consent to treatment
- to divert people from the criminal justice system if they were of unsound mind at the time of an offence or if they are unfit for trial
- to protect the community if people diverted from the criminal justice system are at risk of harming others.

The objects are to be achieved in a way that (ss 4, 13 Mental Health Act):

- safeguards people's rights
- is the least restrictive of the rights and liberties of people with a mental illness. In other words, their rights and liberties are to be restricted only to the extent required to protect their safety and

- promotes the recovery and return to the community of people welfare or the safety of others who are mentally ill.

Matters dealt with in the Mental Health Act

The Mental Health Act deals with:

- the involuntary assessment and treatment of mentally ill people if they are incapable of consenting or refuse to consent
- mentally ill people charged with a criminal offence
- powers of courts hearing criminal proceedings
- the Magistrates Court's power to dismiss complaints in certain cases
- proceedings in the Mental Health Court
- proceedings in the Mental Health Review Tribunal
- protection of patients' rights.

The criminal law relating to mentally ill people is used to determine questions of criminal responsibility and fitness for trial. Treatment and further assessment may be ordered for a person found not criminally responsible for an offence or unfit for trial because of mental illness.

Other laws provide for the rights of patients, the capacity of mentally ill people to enter into contracts, make a will, vote in elections or marry, and the responsible management of financial affairs of people who are mentally ill.

Wherever possible, the treatment of mental illness is done on a voluntary basis like the treatment of any other illness, and should be part of the mainstream health system. The *Health Ombudsman Act 2013* (Qld) and the *Hospital and Health Boards Act 2011* (Qld) protect the rights of patients in the health system generally.

The Mental Health Act provides for the unique features of mental illness, such as involuntary treatment, that cannot be catered for in other mainstream legislation. Before there can be involuntary treatment, specific procedures have to be followed for the involuntary assessment, if necessary, of people who are reasonably believed to be mentally ill and in need of assessment. The Mental Health Act also regulates some specific treatments such as electroconvulsive therapy and psychosurgery, and prohibits other treatments altogether.

Principles underlying the Mental Health Act

The Mental Health Act sets out the following specific principles that apply to people with a mental illness (s 5):

- The same human rights apply to all people:
    - 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.
- Certain matters have to be considered in making decisions:
    - To the greatest extent practicable, a person is to be encouraged to take part in making decisions affecting their 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 their treatment and care.
- Family, carers and other support people are to be involved in decisions about treatment and care to the greatest extent practicable, subject to the person's right to privacy.
- Support and information are to be provided. To the greatest extent practicable, a person is to be provided with necessary support and information to enable them to exercise rights under the Mental Health Act (e.g. facilitating access to independent help to represent the person's point of view).
- 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.
- A person's needs have to be acknowledged. A person's age-related, gender-related, religious, communication and other special needs must be taken into account.
- The unique cultural, communication and other needs of Aboriginal people and Torres Strait Islanders are to be recognised and taken into account.
- The unique cultural, communication and other needs of people from culturally and linguistically diverse backgrounds must be recognised and taken into account.
- To the greatest extent practicable, minors receiving treatment and care must have their best interests recognised and promoted and their safety protected.

- To the greatest extent practicable, existing supportive relationships must be maintained and participation in community life must be continued (e.g. through treatment in the community where the person lives).
- The importance of recovery-oriented services and the reduction of stigma associated with mental illness must be recognised and taken into account.
- Treatment provided under the Mental Health Act must be administered to a person who has a mental illness only if it is appropriate to promote and maintain the person's mental health and wellbeing.
- Confidentiality must be maintained. A person's right to confidentiality of information about them must be recognised and taken into account.

The Mental Health Act also recognises that victims of an offence should be treated with compassion and provided with timely advice about the progress of proceedings against the offenders (s 6).

MENTAL ILLNESS AND THE CRIMINAL LAW

Criminal responsibility: unsoundness of mind and diminished responsibility

Under the Criminal Code of Queensland, a person is not criminally responsible for an act or omission of an act if, at the time of doing the act or making the omission, the person is in such a state of mental disease or natural mental infirmity as to deprive the person of the capacity to:

- understand what they are doing
- control their actions
- know that they ought not do the act or make the omission.

However, a state of mind resulting to any extent from intentional intoxication with alcohol or drugs is excluded.

When the charge is murder, the Criminal Code provides for a partial defence known as diminished responsibility. It refers to an abnormality of mind that has the effect of substantially impairing one or more of the capacities mentioned above. If diminished responsibility is established, the charge is reduced from murder to manslaughter.

Fitness for trial

Case law has established the minimum standards of understanding that a person must have in order to be able to receive a fair trial, and therefore to be regarded as fit for trial. The Criminal Code recognises this in two provisions—s 613 (Want of

understanding of accused person) and s 645 (Accused person insane during trial)—but draws on case law for the interpretation of these sections.

Fitness for trial is not defined in the Mental Health Act. The courts apply what is commonly known as the 'Presser test' to determine whether or not a person is fit for trial. Under the Presser test, to be fit for trial, a defendant must have the ability to:

- understand the nature of the charge
- plead to the charge and to exercise the right of challenge
- understand the nature of the proceedings, namely that it is an inquiry as to whether the accused committed the offence charged
- follow the course of the proceedings
- understand the substantial effect of any evidence that may be given in support of the prosecution
- make a defence or answer the charge.

Where can unsoundness of mind, diminished responsibility and fitness for trial be decided?

These issues were traditionally decided by a jury in a criminal trial under the relevant provisions of the Criminal Code. Juries may still be called upon to decide any of these questions. However, the Mental Health Court is also able to decide questions of unsoundness of mind, diminished responsibility and fitness for trial, and many cases in which these issues arise are now diverted from the criminal courts to the Mental Health Court for that purpose.

THE MENTAL HEALTH COURT

The Mental Health Court is constituted of a Supreme Court judge, who is assisted by two psychiatrists who sit beside the judge in court and provide advice to the judge about clinical matters.

The Mental Health Court has the jurisdiction to (s 639 Mental Health Act):

- hear references to it of a person's mental state in relation to criminal matters and to decide issues of unsoundness of mind, diminished responsibility and fitness for trial
- hear appeals from the Mental Health Review Tribunal
- review the detention of persons in authorised mental health services or in the forensic disability service, and to decide whether the detention is lawful.

THE MENTAL HEALTH REVIEW TRIBUNAL

The Mental Health Review Tribunal consists of a full-time president, who must be an experienced lawyer, a deputy president (also an experienced lawyer) and other members appointed on a full-time or part-time basis.

To be a member, a person must be a lawyer or a psychiatrist, or possess other qualifications and experience considered by the Minister for Health and Ambulance Services to be relevant to exercising the tribunal's jurisdiction.

In appointing members, the Minister for Health must take into account the need for balanced gender representation, the range and experience of members of the tribunal and the need for the membership of the tribunal to reflect the social and cultural diversity of the general community.

Constitution of the tribunal

For most hearings, the Mental Health Review Tribunal is constituted of three to five members, one of whom must be a lawyer, one of whom must be a psychiatrist (or another doctor if a psychiatrist is not readily available), and one of whom must be neither a lawyer nor a doctor (s 716 Mental Health Act). In some cases, the president can authorise hearings by less than three members (s 716(3) Mental Health Act).

For the hearing of an application for approval to perform a non-ablative neurosurgical procedure, the tribunal must be constituted of five members including an experienced lawyer, two psychiatrists, a neurosurgeon and a person who is neither a lawyer nor a doctor (s 718 Mental Health Act).

Jurisdiction

The Mental Health Review Tribunal has the jurisdiction to (s 705 Mental Health Act):

- review treatment authorities, forensic orders and treatment support orders
- review the fitness for trial of people who have been found by the Mental Health Court to be temporarily unfit for trial
- review the detention of minors who are detained in a high security unit
- hear applications for:
    - examination authorities
    - approval of regulated treatment
    - approval of transfers of particular patients into and out of Queensland
- decide appeals against various decisions by the chief psychiatrist

- decide appeals against a decision by the administrator of an authorised mental health service to refuse to allow a person to visit a patient (if the administrator is satisfied that it would adversely affect the patient's treatment and care).

Attendance and legal representation at tribunal hearings

The Mental Health Act sets out who can appear at hearings of the tribunal (s 739).

There is provision for legal representation or, with the leave of the tribunal, representation by an agent. The tribunal can also appoint someone to represent the views, wishes and interests of patients who are unrepresented (s 740 Mental Health Act).

Also, the tribunal must appoint a lawyer to represent the patient if the (s 740(3) Mental Health Act):

- patient is a minor
- hearing is a review of the person's fitness for trial
- hearing is of an application to perform electroconvulsive therapy
- Attorney-General is appearing or being represented.

A person with the requisite capacity to do so may waive the right to be represented at the hearing (s 740(4) and (5).

The appointment of a lawyer is at no cost to the patient (s 740(6).

Procedure and rules of fairness

The tribunal must exercise its jurisdiction in a way that is fair, just, informal and timely (s 733 Mental Health Act). At a hearing, the tribunal must:

- observe natural justice
- act as quickly and with as little formality and technicality as is consistent with a fair and proper consideration of the issues.

The tribunal is not bound by the rules of evidence.

Parties must be given a reasonable opportunity to present their case and in particular to inspect documents being considered by the tribunal, unless there is a confidentiality order in place (s 734 Mental Health Act). Hearings are not usually open to the public (s 741 Mental Health Act).

THE CHIEF PSYCHIATRIST

The chief psychiatrist is a psychiatrist appointed by the government whose functions include (s 301 Mental Health Act):

- ensuring, as far as possible, that patient's rights are protected and balanced with the rights of others
- ensuring that the involuntary assessment and treatment of patients complies with the Mental Health Act
- facilitating the proper and efficient administration of the Act, and monitoring and auditing compliance with the Act
- promoting community awareness and understanding of the Act.

However, the chief psychiatrist does not run authorised mental health services or employ the psychiatrists or other staff who work in them.

The chief psychiatrist is also represented in hearings in the Mental Health Court.

MENTAL ILLNESS AND CONSENT TO TREATMENT

In general, a person can only be treated for illness or injury with their consent. Consent is often implied—if you are unwell and go to the doctor, it is assumed that you consent to treatment. Consent is also implied in the case of a person who has been in an accident and is unconscious or unable to consent.

Even in the case of mental illness, the general principle that treatment requires the patient's consent applies. However, in some cases, the law adopts the approach that involuntary treatment can be given for mental illness on the basis that, because of the illness, the patient does not have the capacity to consent and treatment is in the patient's best interests. There are a number of requirements that must be satisfied before involuntary treatment can be given on this basis. These requirements are set out in the Mental Health Act, which also makes provisions for involuntary assessment if it is necessary to determine whether a person needs treatment for mental illness.

TREATMENT CRITERIA TO JUSTIFY INVOLUNTARY TREATMENT

The treatment criteria are the requirements that need to apply to justify involuntary treatment under the Mental Health Act. Each of the following must apply (s 12 Mental Health Act):

- The person has a mental illness.
- The person does not have capacity to consent to be treated for the illness.
- 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.

An authorised doctor may make a treatment authority for a person only if satisfied that all of these treatment criteria apply, and that there is no less restrictive way for the person to receive treatment and care for their mental illness (ss 48, 49 Mental Health Act). In deciding the nature and extent of the treatment and care under the treatment authority, the authorised doctor must discuss the treatment and care with the person and have regard to the views, wishes and preferences of the person, to the extent they can be expressed (s 53 Mental Health Act).

Note that the treatment criteria may not necessarily apply if a person is required to have involuntary treatment as a consequence of criminal proceedings against them. In those cases, the main consideration is protecting the safety of the community.

INVOLUNTARY TREATMENT FOR PEOPLE WITH MENTAL ILLNESS

There are essentially two different ways in which an order can be made requiring a person to have involuntary treatment for a mental illness.

- The first is when, following an assessment, a treatment authority is made for a person. This is a serious step to take because it is an interference with a person's personal liberty. Naturally, there are strict rules as to when this can happen and the steps that have to be taken. For more information see the section below on Assessment and Involuntary Treatment of People for Mental Illness Living in the Community.
- The second is when a person has been charged with a criminal offence and there is a concern that they may have been of unsound mind at the time of the alleged offence or that they be unfit for trial. Steps can be taken to have them assessed, and in some cases this may lead to involuntary treatment under either a forensic order or a treatment support order. Again, there are strict rules that must be followed. For more information, see the section below on Assessment and Treatment of People with a Mental Illness before a Court or in Custody on Criminal Charges.

ASSESSMENT AND INVOLUNTARY TREATMENT FOR PEOPLE WITH MENTAL ILLNESS LIVING IN THE COMMUNITY

This section does not concern the criminal law. It is concerned with people who may need assessment or treatment for mental illness, and how that assessment and treatment may come about. The situation where a person is charged with a criminal offence, which may then lead to an assessment being made of their mental health and possible detention under the Mental Health Act, is dealt with later in this chapter.

Voluntary assessment and treatment

The fact that a person has a mental illness does not necessarily justify either involuntary assessment or involuntary treatment. A person who is feeling mentally unwell can go to a doctor for assessment or treatment in just the same way that people who have physical injuries or illnesses seek treatment. There are many people in the community who are receiving treatment for mental illnesses on an entirely voluntary basis.

Involuntary assessment and treatment

Sometimes, however, a person's disturbed mental condition or disturbed behaviour means that it is necessary for other people to take steps to have the person assessed and, if necessary, given treatment.

Before a person can be given involuntary treatment for mental illness, they will need to be properly assessed. The purpose of involuntary assessment is to determine whether or not the person requires involuntary treatment.

Under the Mental Health Act there is effectively a three-stage process that may result in a person receiving involuntary treatment under the Act for mental illness:

(1) examination of a person to see if a recommendation for assessment should be made

(2) assessment of the person after a recommendation for assessment has been made

(3) the making of a treatment authority, authorising involuntary care and treatment.

How an examination can come about

Involuntary assessment begins with an initial examination by a doctor or authorised mental health practitioner, which can come about in different ways.

Examination by consent

A person may initially ask for, or consent to, an examination. The person might come in on their own or be brought in by a family member or friend. A doctor or authorised mental health practitioner can examine the person for the purpose of deciding whether to make a recommendation for assessment under the Mental Health Act (s 31). If they decide to make a recommendation for assessment and are concerned that the person will leave before that can be done, they can then detain the person for up to one hour to give them time to do the recommendation for assessment (s 36 Mental Health Act) and can use reasonable force for that purpose (s 37 Mental Health Act). If possible, they must also explain to the person what is happening (s 38 Mental Health Act).

Examination under an emergency examination authority

Ambulance officers or police can detain a person and bring them in to an authorised mental health service or a public hospital because they appear to be mentally disturbed and a risk to themselves or others. When this happens, an ambulance officer or police officer must make an emergency examination authority. The person will then be initially examined for a doctor or health practitioner to decide their treatment and care needs (s 157F *Public Health Act 2005* (Qld) (Public Health Act)). The person can be detained in a public sector health service for an examination period of up to six hours, which can if necessary be extended to up to 12 hours (s 157E Public Health Act). Reasonable force can be used to detain or to examine the person (ss 157N, 157O Public Health Act).

These provisions of the Public Health Act link in with the Mental Health Act. A person brought in under an emergency examination authority may also be examined by a doctor or an authorised mental health practitioner for the purpose of deciding whether to make a recommendation for assessment under the Mental Health Act (s 31), and that Act will then apply if they decide to make a recommendation.

Examination under an examination authority issued by the Mental Health Review Tribunal

A person may be examined under an examination authority issued by the Mental Health Review Tribunal. The following people may apply to the tribunal for an examination authority (s 502 Mental Health Act):

- the administrator of an authorised mental health service
- a person authorised in writing by the administrator of an authorised mental health service
- a person who has received advice from a doctor or an authorised mental health service about clinical matters for the person who is the subject of the application.

The approved form must be used (s 725 Mental Health Act) and can be obtained from the Mental Health Review Tribunal website.

The Mental Health Review Tribunal can issue an examination authority only if it is satisfied of certain things including that the person has, or may have, a mental illness and does not, or may not, have the capacity to consent to treatment (s 504 Mental Health Act).

Once an examination authority is made by the Mental Health Review Tribunal, it authorises a doctor or authorised mental health practitioner to do an initial examination in order to decide whether to make a recommendation for assessment (s 31 Mental Health Act). The doctor or authorised mental health practitioner has various powers for example to enter certain places to find the person and to examine the person without consent. The person can also be detained for the purpose of the examination for up to six hours at an authorised mental health service (which can be extended to up to 12 hours). If the person is found at another place, they can be detained there for up to an hour, or transported instead to an authorised mental health service (s 32 Mental Health Act). Reasonable force can be used (s 33 Mental Health Act), and police can be asked for help (s 34 Mental Health Act). If possible, the doctor or authorised mental health practitioner should explain the examination authority to the person and give them an opportunity to cooperate (s 35 Mental Health Act).

What happens at an examination

The examination of a person in any of the situations just described is the first stage in the process that may lead to involuntary care and treatment for mental illness. A doctor or authorised mental health practitioner may examine the person to decide whether to make a recommendation for assessment for the person (s 31 Mental Health Act).

Recommendations for assessment

After examining the person, the doctor or authorised mental health practitioner may make a recommendation for assessment only if satisfied that the treatment criteria (s 12 Mental Health Act) may apply, and that there appears to be no less restrictive ways for the person to receive treatment and care for their mental illness (s 39 Mental Health Act). The wording here is deliberate—a final decision is not being made).

The recommendation for assessment must be made within seven days after the examination (s 39(2) Mental Health Act).

If the doctor examines the person and decides to make a recommendation for assessment, but considers that there is a risk the person will leave before the

recommendation for assessment can be made, the doctor may detain the person for the period reasonably necessary, but no longer than one hour, to make the recommendation for assessment in an authorised mental health service or public sector health service facility (which would include the emergency department of a public hospital, but not a private doctor's surgery).

A recommendation for assessment authorises the detention of the person in the authorised mental health service or public sector health service facility for up to 24 hours so that the assessment can be carried out. However, the doctor who is doing the assessment may extend that period to up to 72 hours if necessary to complete the assessment (s 45(2) Mental Health Act).

Once a recommendation for assessment has been made, the next step is the actual assessment. The purpose of the assessment is for an authorised doctor to decide whether to make a treatment authority for the person, which is effectively the end of the examination and assessment process. If a treatment authority is made, it authorises involuntary care and treatment.

Treatment authorities

If, on making the assessment of a person, an authorised doctor is satisfied that all of the treatment criteria (listed above) apply, and that there is no less restrictive way for the person to receive treatment and care for their mental illness, the authorised doctor may make a treatment authority (ss 48, 49 Mental Health Act). The authorised doctor must decide whether the category of the treatment authority is to be (a) inpatient or (b) community. There are criteria listed for making this decision (s 51 Mental Health Act).

If the category of treatment authority is 'community', the person will be able to receive care and treatment while living in the community. If the authorised doctor decides to make the category inpatient, the doctor must then decide whether to approve limited community treatment, and the nature of the community treatment (s 52 Mental Health Act). Limited community treatment is, in effect, leave from hospital. It can range from escorted leave in the hospital grounds up to living full time in the community with conditions.

Under the treatment authority, the person can be required to have involuntary treatment and care.

If the authorised doctor who makes the treatment authority is not a psychiatrist, the treatment authority has to be reviewed by a psychiatrist within three days, or in some cases seven days (ss 56, 57 Mental Health Act).

ASSESSMENT AND TREATMENT FOR PEOPLE WITH MENTAL ILLNESS BEFORE A COURT OR IN CUSTODY ON CRIMINAL CHARGES

Assessment of people in custody

The Mental Health Act makes provisions for people in custody who may require assessment or treatment for mental illness to be transported to an authorised mental health service for that purpose. This can happen in various situations:

- If a recommendation for assessment is made for a person who is in custody, the person can be transported to the inpatient unit of an authorised mental health service for assessment (s 65).
- If a person in custody is subject to a treatment authority, a forensic order or a treatment support order, they can be transported to the inpatient unit of an authorised mental health service to receive treatment and care for their mental illness (s 66).
- In certain circumstances, a person in custody who is not subject to a recommendation for assessment, a treatment authority, a forensic order or a treatment support order can be transported with their consent to the inpatient unit of an authorised mental health service to receive treatment and care for their mental illness (s 67).

Classified patients

A person who is transported from custody to the inpatient unit of an authorised mental health service in these situations becomes a classified patient (s 64 Mental Health Act). The classified patient provisions are intended to enable people in custody who are or become acutely unwell to be transferred to an authorised mental health service so that they can receive appropriate care and treatment.

A person stops being a classified patient if later returned to custody (s 83 Mental Health Act), or if the Mental Health Court makes a decision on a reference in relation to the person (s 84 Mental Health Act).

The Mental Health Act also makes provisions for a person who has been transported under these provisions to an authorised mental health service to remain there if it is considered clinically appropriate (s 74 Mental Health Act), or to be returned to custody (ss 82, 671 Mental Health Act).

Court examination orders made by the Mental Health Court

Another situation in which a person who is in custody can be transferred to an authorised mental health service is when the person is the subject of proceedings in the Mental Health Court. If the court orders that the person be examined by a stated psychiatrist (a court examination order), the person may in certain circumstances be transported to an authorised mental health service for that purpose (ss 74, 670, 671 Mental Health Act).

Other orders for detention

There are a number of other specific situations in which a court can order that a person be detained in a stated authorised mental health service. For example under section:

124(1)(b) of the Mental Health Act, an order can be made by the Mental Health Court after a person has been found fit for trial, for the person's detention until they are brought before the criminal court for continuing the proceeding

183(c)(ii), an order for detention can be made by the Supreme Court or District Court when it makes a reference to the Mental Health Court

193(2), an order can be made by the Supreme Court, District Court or Magistrates Court for a defendant's detention during their trial

544(4), an order for detention can be made by the Mental Health Court when it grants a stay on an appeal from the Mental Health Review Tribunal)

551(4)(b), an order for detention can be made by the Court of Appeal when it sets aside a decision of the Mental Health Court and returns the matter for further determination.

These are referred to as 'judicial orders' in the Mental Health Act (see s 11).

PSYCHIATRIST REPORTS FOR PATIENTS CHARGED WITH SERIOUS OFFENCES

A psychiatrist's report may be requested by or on behalf of a person who is a patient in an authorised mental health service under a treatment authority, forensic order or treatment support order, and is charged with a serious offence. The expression 'serious offence' is defined in the Mental Health Act, and refers in general to the more serious criminal offences under state law.

The request is to be made to the chief psychiatrist, who must direct the administrator of the health service to arrange for the report to be prepared.

Alternatively, the chief psychiatrist can direct that a psychiatrist's report be arranged, even if there has been no request.

The report is then to be prepared within 60 days, which can be extended by the chief psychiatrist to up to 90 days. The report can also consider associated offences, which are offences alleged to have been committed at or around the same time as the serious offence.

Once the report is obtained, the chief psychiatrist must provide it to the patient or to whoever made the request, and to the administrator of the patient's treating health service.

The chief psychiatrist will also give consideration as to whether to refer the matter of the patient's mental condition to the Mental Health Court (s 101 Mental Health Act).

This is one of the ways in which references are made to the Mental Health Court. The various ways references can be made are discussed below.

POWERS OF COURTS HEARING CRIMINAL MATTERS

The Mental Health Act gives the Magistrates Court (including Childrens Court), District Court and Supreme Court powers to deal with cases where there is a concern about the mental state of a person charged with an offence. The powers include making a reference to the Mental Health Court in certain circumstances.

Magistrates Court powers

If a simple offence is to be determined by a Magistrates Court, and the magistrate is reasonably satisfied, on the balance of probabilities, that the person charged:

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

the court may dismiss the complaint (s 172 Mental Health Act).

A 'simple offence' includes an indictable offence that can be heard in a Magistrates Court (s 171 Mental Health Act).

Alternatively, if satisfied that the person is unfit for trial but is likely to become fit for trial within six months, the magistrate may adjourn the hearing. If, after six months, the person is still apparently unfit for trial, the magistrate may dismiss the complaint (s 173 Mental Health Act).

If the complaint has been dismissed or adjourned, but the person does not appear to the magistrate to have a mental illness (e.g. a person might be intellectually

impaired), the magistrate may refer the person to Queensland Health or to disability services for appropriate care or treatment (s 174 Mental Health Act).

The Court Liaison Service, which is part of Queensland Health, is available to see defendants to assist the Magistrates Court to determine whether a person was, or appears to have been, of unsound of mind at the time of committing an alleged offence or is unfit for trial. A person who has been charged with an offence who may have a mental illness or intellectual disability, may see the Court Liaison Service for an assessment.

If the charge before the Magistrates Court is an indictable offence, and the court is reasonably satisfied on the balance of probabilities that the person:

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

and, in addition:

- that the nature and circumstances of the offence creating exceptional circumstance in relation to the protection of the community and
- a forensic order or treatment support order may be justified,

the magistrate may refer the matter of the person's mental state to the Mental Health Court in relation to the indictable offence and any associated offence (s 175 Mental Health Act).

Magistrates also have power to make an examination order for a person charged with a simple offence (including an indictable offence that can be dealt with in the Magistrates Court). This can be done even if the magistrate has dismissed the complaint or adjourned the hearing, if the magistrate is reasonably satisfied that the person would benefit from being examined by an authorised doctor (s 177 Mental Health Act).

An examination report can be used in a number of ways, for example in deciding whether to make a reference to the Mental Health Court, and may be provided to the authorised mental health service where the person is being treated (ss 180, 180B Mental Health Act).

District and Supreme Court powers

If a person before the District or Supreme Court has pleaded guilty to an indictable offence and, on the balance of probabilities, the court is reasonably satisfied that the person:

- was, or appears to have been, of unsound mind (or, if the charge is murder, of diminished responsibility) when the offence was allegedly committed or
- is unfit for trial,

the court may adjourn the hearing and refer the matter of the person's mental state to the Mental Health Court, in relation to both the indictable offence and any simple offence that was to have been dealt with at the same time (s 183 Mental Health Act).

When that happens, the court may grant the person bail, remand the person in custody or, if the administrator of an authorised mental health service or alternatively the chief psychiatrist has agreed in writing, order that the person be detained there as an inpatient (ss 182–184 Mental Health Act).

REFERENCES TO THE MENTAL HEALTH COURT IN CRIMINAL MATTERS

Who can make a reference to the Mental Health Court?

Under the Mental Health Act, a reference in relation to a person's mental state can be made to the Mental Health Court in the following situations by the:

- chief psychiatrist in relation to a serious offence (s 101)
- person who is charged with a serious offence, by their lawyer or the Director of Public Prosecutions (s 110)
- Magistrates Court in relation to a person charged with an indictable offence (s 175)
- Supreme Court or the District Court in relation to a person charged with an indictable offence (s 183).

There are different requirements, depending on who is making the reference.

Note that references by the chief psychiatrist, the person who is charged or their lawyer, or the Director of Public Prosecutions can only be made in relation to a serious offence as defined.

However, a reference can be made by the Magistrates, District or Supreme Court in relation to any indictable offence, even if it is not a serious offence.

Also, a reference cannot be made in relation to a Commonwealth offence.

Reference by the chief psychiatrist

The chief psychiatrist may make a reference to the Mental Health Court in relation to a person charged with a serious offence only if satisfied that:

- the person may have been of unsound mind when the serious offence was allegedly committed or may be unfit for trial and
- having regard to the report and the protection of the community, there is a compelling reason in the public interest for the person's mental state in relation to the serious offence to be referred to the Mental Health Court.

Reference by the person charged, their lawyer or the Director of Public Prosecutions

The person charged with a serious offence, their lawyer or the Director of Public Prosecutions may make a reference to the Mental Health Court provided they have reasonable cause to believe that the person:

- was of unsound mind when the offence was allegedly committed (or of diminished responsibility if the charge is murder) or
- is unfit for trial.

Reference by the Magistrates Court

The circumstances in which a Magistrates Court can make a reference to the Mental Health Court are described above under Magistrates Court Powers.

Reference by the District Court or Supreme Court

The circumstances in which a District or Supreme Court can make a reference to the Mental Health Court are described above under District and Supreme Court Powers.

Suspension of criminal proceedings

If a reference is made to the Mental Health Court of a person's mental state in relation to an offence, the criminal proceedings are suspended until the Mental Health Court has made a decision on the reference or the reference is withdrawn (ss 616, 618 Mental Health Act). The suspension of the proceedings does not prevent a court from making decisions about bail or various procedural steps being taken including the discontinuation of the proceedings.

Applications to withdraw a reference

An application can be made by a person who made the reference to withdraw that reference. The Mental Health Court may refuse the application only if it considers that withdrawing the reference would be contrary to the interests of justice (ss 125–128 Mental Health Act).

FINDINGS THE MENTAL HEALTH COURT MAY MAKE ON A REFERENCE

When a reference has been made to the Mental Health Court, the court must decide whether the person was of unsound mind when the offence was allegedly committed or alternatively, if the charge is murder, whether the person was of diminished responsibility at the time.

However, the Mental Health Court may not decide these things (s 117 Mental Health Act) if there is a substantial dispute about whether the person committed the offence, unless the dispute results from the person's mental condition.

Also, the Mental Health Court may not decide these things (s 117A Mental Health Act) if satisfied there is a substantial dispute about a fact (a material fact) that is material to an opinion stated in an expert's report received in evidence by the court on the reference. A material fact may relate to:

- the person's relevant circumstances before, at the time, or after the offence was allegedly committed
- an event, act or omission related to the offence, whether the event, act or omission happened before, at the time, or after the offence was allegedly committed.

If the Mental Health Court finds that the person was of unsound mind, the criminal proceedings are discontinued. However, the Mental Health Act preserves the right of a defendant to elect to be tried in a criminal court despite the decision of the Mental Health Court.

If the court finds in relation to a charge of murder that the person was not of unsound mind but was of diminished responsibility, the charge is reduced to manslaughter. Provided the defendant is fit for trial, the criminal proceedings would then continue on the charge of manslaughter.

If the Mental Health Court decides the person was not of unsound mind at the time of the alleged offence, or the court is not able to decide because of a dispute, it must then decide whether the person is fit for trial.

If the Mental Health Court finds that the person is fit for trial, the criminal proceedings will continue according to law.

If the Mental Health Court finds that the person is not fit for trial, it must then decide whether the unfitness is temporary (in which case the criminal proceedings are stayed), or permanent (in which case the criminal proceedings are discontinued).

If the Mental Health Court finds that the fitness for trial is temporary, the person's fitness for trial must be reviewed by the Mental Health Review Tribunal at regular intervals (see Reviews by the Mental Health Review Tribunal below).

FORENSIC ORDERS AND TREATMENT SUPPORT ORDERS

If the Mental Health Court finds that a person was of unsound mind at the time of the alleged offence or that the person is permanently unfit for trial, the court must decide whether to make a forensic order, a treatment support order or neither (s 131 Mental Health Act).

If the Mental Health Court finds that the person is temporarily unfit for trial, it must make either a forensic order or a treatment support order (s 132 Mental Health Act).

A forensic order provides a higher level of supervision and oversight than a treatment support order.

When the Mental Health Court is required to decide whether to make a forensic order, a treatment support order or neither, it must have regard to the person's relevant circumstances (including their mental state, psychiatric history, any intellectual disability, social circumstances and willingness to comply with treatment), the nature of the offence and how long ago it was committed, and any victim impact statement (s 133 Mental Health Act).

The Mental Health Court must make a forensic order if it considers a forensic order is necessary because of the person's mental condition to protect the safety of the community (s 134 Mental Health Act).

The Mental Health Court must make a treatment support order if it considers that a treatment support order, but not a forensic order, is necessary because of the person's mental condition to protect the safety of the community (s 143 Mental Health Act).

It follows that a forensic order is more likely to be made than a treatment support order if the Mental Health Court considers that a higher level of supervision and oversight is necessary to protect the safety of the community.

If the Mental Health Court decides to make a forensic order, it must decide which of the two types of forensic orders it will make:

- It must make a forensic order (mental health) if the unsoundness of mind or unfitness for trial is because of a mental condition other than an intellectual disability (i.e. if the person has a dual disability and needs treatment and care for a mental illness, as well as care for their intellectual disability).

- It must make a forensic order (disability) if the unsoundness of mind or unfitness for trial is because of an intellectual disability for which the person needs care, but the person does not need treatment and care for any mental illness (s 134(3) Mental Health Act).

Note that in the second of these two situations, the alternative of making a treatment support order is not available.

If the Mental Health Court decides to make a forensic order, it must decide whether to make the category of the order inpatient or community (s 138 Mental Health Act). If the court makes an inpatient forensic order, it must also decide whether to approve limited community treatment (which means leave from the hospital) and to what extent and on what conditions (s 139 Mental Health Act).

Similarly, if the Mental Health Court makes a treatment support order, it may impose the conditions it considers appropriate (s 144 Mental Health Act). It must also decide whether the category of the order is to be inpatient or community. If the category is inpatient, the court may approve limited community treatment (leave from the hospital) to the extent and subject to the conditions decided by the court (s 145 Mental Health Act).

The Mental Health Act sets out various other orders that can be made, or restrictions that can be imposed.

Whether a forensic order or a treatment support order is made, it will be reviewed at regular intervals by the Mental Health Review Tribunal. The Mental Health Act sets out the powers of the Mental Health Review Tribunal at the hearing of a review.

REVIEWS BY THE MENTAL HEALTH REVIEW TRIBUNAL

The Mental Health Review Tribunal is required to review all treatment authorities, forensic orders and treatment support orders at set intervals. The effect is that involuntary treatment is subject to independent review on a regular basis.

Review of treatment authorities

A treatment authority must be reviewed within (s 413(1) Mental Health Act):

- 28 days after it is made
- six months after that review
- six months after that review

and then

- at intervals of not more than 12 months.

These are known as periodic reviews. They can be deferred in certain circumstances if the tribunal is satisfied that there are no new matters of relevance to be considered (s 414 Mental Health Act).

In addition, a treatment authority must be reviewed on an application by the patient, an interested person for the patient or the chief psychiatrist (s 413(2) Mental Health Act). The tribunal may also review a treatment authority at any time on its own initiative (s 413(3) Mental Health Act).

On a review, the tribunal must decide whether to confirm or revoke the treatment authority. If it confirms the treatment authority, it can make changes.

Review of forensic orders

A forensic order must be periodically reviewed (s 433(1) Mental Health Act):

- within six months after it is made

  and then

- at intervals of not more than six months.

These periodic reviews can be deferred in some circumstances if the tribunal is satisfied there are no new relevant matters to be considered (s 434 Mental Health Act).

A forensic order must also be reviewed on an application by the patient, an interested person for the patient, the Attorney-General or the chief psychiatrist (or director of forensic disability if the forensic disability service is responsible for the patient) (s 433(2) Mental Health Act). The tribunal may also review the forensic order at any time on its own initiative (s 433(3) Mental Health Act).

On a review, the tribunal has the power to revoke or confirm the forensic order, but must confirm the forensic order if the tribunal considers that the order is necessary to protect the safety of the community because of the person's mental condition (s 442(1) Mental Health Act).

As explained below, the tribunal also has the power to step a forensic order (mental health) down to a less restrictive alternative.

If the tribunal decides to confirm the forensic order, it may change the category of the order. If inpatient, the tribunal may make orders about limited community treatment and the conditions to apply to limited community treatment. In general, the tribunal is required in making these decisions to apply a test as to whether there is an unacceptable risk to the safety of the community.

Stepping down the order

The Mental Health Review Tribunal may revoke a forensic order (mental health) and make a treatment support order only if satisfied that a forensic order is not necessary to protect the safety of the community (s 450 Mental Health Act).

If the tribunal considers that neither a forensic order nor a treatment support order is necessary to protect the community, it may either make:

- no further order
- a treatment authority for the person (s 451(1) Mental Health Act).

However, the tribunal cannot make a treatment authority unless it is recommended by an authorised psychiatrist who has examined the person and considers that the treatment criteria apply and there is no less restrictive way for the person to receive treatment and care for their mental illness (s 451(2) Mental Health Act).

In summary, the Mental Health Act provides a process for a person who no longer needs to be on a forensic order to be stepped down to a less restrictive alternative. It also allows for a person to be progressively stepped down until they are well enough to be discharged from any form of involuntary order.

Reviews of treatment support orders

A treatment support order must be periodically reviewed (s 465(1) Mental Health Act):

- within six months after it is made

  and then

- at intervals of not more than six months.

These periodic reviews can be deferred in some circumstances if the tribunal is satisfied there are no new relevant matters to be considered (s 466 Mental Health Act).

A treatment support order must also be reviewed on an application by the patient, an interested person for the patient, the Attorney-General or the chief psychiatrist (s 465(2) Mental Health Act). The tribunal may also review the treatment support order at any time on its own initiative (s 465(3) Mental Health Act).

On a review, the tribunal has the power to revoke or confirm the treatment support order, but must confirm the order if it considers that the order is necessary, because of the person's mental condition, to protect the safety of the community (s 473(1) Mental Health Act). If the tribunal confirms the order, the

tribunal can also make decisions about the category of the order and the conditions to which it is subject.

Reviews of fitness for trial

The Mental Health Review Tribunal must review the fitness for trial of a person who has been found temporarily unfit for trial by the Mental Health Court or a jury. For the first year, the reviews must be conducted at intervals of not more than three months, and after that at intervals of not more than six months (s 486(1) Mental Health Act).

A person's fitness for trial must also be reviewed on an application by the patient, an interested person for the patient, the Attorney-General or the chief psychiatrist (or director of forensic disability if the forensic disability service is responsible for the person) (s 486(2) Mental Health Act). The tribunal may also review the fitness for trial of a person at any time on its own initiative (s 486(3) Mental Health Act).

If the tribunal finds that the patient is unfit for trial, the Director of Public Prosecutions must, within 28 days after receiving written notice of the tribunal's decision, decide whether or not to discontinue the criminal proceedings (s 490(a) Mental Health Act).

If the patient has been found unfit for trial after three years (or seven years if the offence carries a maximum penalty of life imprisonment), the criminal proceedings are discontinued (s 491 Mental Health Act).

If the tribunal finds that the person is fit for trial, the person will be returned for mention in the criminal court for the proceedings to continue. When the person appears at the mention, their forensic order or treatment support order automatically ends (s 497 Mental Health Act).

Reviews of detention of minors in a high security unit

The Mental Health Review Tribunal must review the detention of a minor in a high security unit for treatment or care within seven days after the detention starts, and afterwards at intervals of not more than three months (s 499(1) Mental Health Act).

The tribunal must also review the minor's detention on an application made by, or on behalf of, the minor (s 499(2) Mental Health Act).

Further, the tribunal may at any time, on its own initiative, review the minor's detention in a high security unit (s 499(3) Mental Health Act).

APPEALS UNDER THE MENTAL HEALTH ACT

The Mental Health Act provides for appeals to the:

- Mental Health Review Tribunal from certain decisions of the chief psychiatrist or the administrator of an authorised mental health service
- Mental Health Court against decisions of the Mental Health Review Tribunal
- Court of Appeal against decisions of the Mental Health Court (s 531 Mental Health Act).

Appeals to the Mental Health Review Tribunal

Under the Mental Health Act, an appeal can be made to the Mental Health Review Tribunal against a limited number of decisions, such as a decision by the:

- chief psychiatrist, if the chief psychiatrist considers that there is a serious risk to the life, health or safety of a person or to public safety because of a matter that has arisen in relation to a forensic patient
- chief psychiatrist on an application by a victim (or other person affected by an unlawful act) for an information notice in relation to a patient on a forensic order or treatment support order
- administrator of an authorised mental health service to refuse to allow a person to visit a patient. This is a decision the administrator may make if satisfied that the visit would adversely affect the patient's treatment and care.

Appeals to the Mental Health Court

The Mental Health Act provides for appeals to the Mental Health Court against decisions of the Mental Health Review Tribunal in a number of different situations. A list of the decisions that can be appealed against and the persons who can appeal is set out in sch 2 to the Mental Health Act.

The appeals most frequently heard by the Mental Health Court are appeals by patients against decisions of the tribunal to confirm forensic orders, treatment support orders or treatment authorities, appeals by patients against approval of electroconvulsive therapy and appeals by the Attorney-General against decisions of the tribunal to revoke forensic orders.

Appeals are started by filing a notice of appeal in the registry of the Mental Health Court (s 541 Mental Health Act). The notice of appeal must be in the approved form and state the grounds of appeal. It is to be filed within 60 days after the appellant receives notice of the decision, but the time may be extended by the Mental Health Court.

The Mental Health Court may also grant a stay of the decision appealed against until the appeal is decided.

An appeal is by way of rehearing. In order to succeed, it is not necessary to show that the Mental Health Review Tribunal made an error. The Mental Health Court may:

- confirm the decision appealed against
- set the decision aside and substitute another decision
- set the decision aside and send the matter back to the tribunal to reconsider it.

A decision of the Mental Health Court on an appeal from the tribunal is final. There is no right of appeal to the Court of Appeal, unless the Mental Health Court's decision is found to have been affected by what is known as jurisdictional error (s 548 Mental Health Act).

Appeals to the Court of Appeal

The Mental Health Act provides for appeals to the Court of Appeal against decisions made by the Mental Health Court on references in relation to a person charged with a criminal offence. The person who is the subject of the reference has a right of appeal, as does the Attorney-General, the chief psychiatrist and the director of forensic disability (s 549 Mental Health Act).

To succeed on an appeal to the Court of Appeal, it is necessary to show that the Mental Health Court made some error of law or fact, or some error in the exercise of discretion.

The Court of Appeal may:

- confirm the decision appealed against
- set the decision aside and substitute another decision
- set the decision aside and send the matter back to the Mental Health Court to reconsider it.

REGULATED TREATMENTS

Two types of treatment are categorised as regulated treatment:

- electroconvulsive therapy
- non-ablative neurosurgical procedure.

Electroconvulsive therapy can only be given with the informed consent of the patient in the case of an adult or with the approval of the Mental Health Review Tribunal (ss 232–236 Mental Health Act). However, electroconvulsive therapy can be given in an emergency situation, if certain procedures are followed, to save the

patient's life or to prevent the patient suffering irreparable harm (s 237 Mental Health Act).

Non-ablative neurosurgical procedures can only be performed with the informed consent of the patient in the case of an adult and the approval of the Mental Health Review Tribunal (ss 238–239 Mental Health Act).

'Informed consent' and 'capacity to give consent' for a regulated treatment are defined in s 233 of the Mental Health Act. It is important to note that the definition of 'capacity to give consent' to a regulated treatment under s 233 is different from the general definition of 'capacity to consent to be treated' under s 14 of the Act.

It is a criminal offence to give these treatments other than as provided for.

PROHIBITED TREATMENTS

It is a criminal offence to administer either of these therapies:

- insulin induced coma therapy
- deep sleep therapy (s 240 Mental Health Act).

It is also a criminal offence to perform psychosurgery on another person (s 241 Mental Health Act).

THE USE OF RESTRAINT AND SECLUSION

Chapter 8 of the Mental Health Act restricts the use of mechanical restraint, seclusion and physical restraint on patients in authorised mental health services.

The chief psychiatrist may give approval enabling an authorised doctor to authorise the use of mechanical restraint on an involuntary patient, if the chief psychiatrist is satisfied that there is no other reasonably practical way to protect the patient or others from physical harm.

Mechanical restraint may be used if authorised by an authorised doctor and a number of other requirements are met.

Similarly, an involuntary patient may be kept in seclusion only if a number of requirements have been met. The chief psychiatrist may give directions restricting the use of seclusion and, if such a direction has been given, it must be complied with.

APPOINTING A NOMINATED SUPPORT PERSON

A person may appoint up to two nominated support persons for purposes relating to the Mental Health Act (s 223 Mental Health Act). A nominated support person can receive notices and confidential information for the person. If the person is charged with a serious offence, a nominated support person may ask the chief

psychiatrist for a psychiatric report. Also, the nominated support person may act as a person's support person in the Mental Health Review Tribunal, or represent the person in the tribunal (s 224 Mental Health Act).

INTERSTATE MENTAL HEALTH LAWS

The Mental Health Act makes provisions for patients subject to a treatment authority to be transferred interstate, and also for interstate patients to be transferred to an authorised mental health service in Queensland.

The Act also provides for the return of patients who are absent without permission from an interstate mental health service, and likewise for the return to Queensland of patients who have absconded interstate.

A person who is subject to a forensic order or a treatment support order made by the Mental Health Court may apply to the Mental Health Review Tribunal for approval to be transferred to an interstate mental health service, unless the Mental Health Court has decided that they are temporarily unfit for trial. An application to the tribunal must be accompanied by a statement by the chief psychiatrist (or in some case the director of forensic disability) that interstate transfer requirements can be met.

MENTAL ILLNESS AND LEGAL CAPACITY

Contracts

A contract is an agreement, usually between two people, which a court can enforce. Some contracts are in writing, but many are not.

If a person is suffering from such a degree of mental illness at the time of making a contract that they are not capable of understanding the nature of the contract, the contract may still be binding and may still be enforced by a court. However, the contract is voidable, which means that a court will not enforce the contract against the mentally ill person, if they (or someone acting on their behalf) can prove that the mental disability was known or should have been known to the other party.

When a mentally ill person purchases necessaries, the contract cannot be avoided just because the buyer is not mentally competent. Necessaries are goods suitable to the condition of the life of the person buying them and to their actual requirements at the time of the sale and delivery.

Section 5 of the *Sale of Goods Act 1896* (Qld) provides that '... when necessaries are sold and delivered ... to a person who by reason of mental incapacity ... is incompetent to contract, the person must pay a reasonable price [for them] ...'.

Voting

A person who has a mental illness and retains an understanding of the nature of voting is entitled to vote.

To enforce a voting right, it could be necessary to obtain an opinion from a qualified person about the mental capacity of the patient seeking to vote.

The State Electoral Office will strike someone off the electoral roll if it has received a notice from the patient's relative, a doctor or the Public Trustee about the patient's mental illness.

Marriage

Section 23 of the *Marriage Act 1961* (Cth) provides that a marriage is void if either party was mentally incapable of understanding the nature and effect of the marriage ceremony.

Provided a patient's mental illness does not affect that capacity, a patient over the age of 18 can marry without seeking anyone's consent.

Wills

There is no prohibition on a mentally ill person making a will, as long as that person has a testamentary capacity and the person can understand the:

- will and its effects
- extent of the property involved
- claims of dependants or other family members for whom some provision should be considered.

However, sometimes the presence of delusions will affect a mentally ill person's capacity to make a will.

The Supreme Court has power to authorise a will to be made, altered or revoked for a person without testamentary capacity (s 21 *Succession Act 1981* (Qld)).

Property and personal matters

Management of the property of a mentally ill person is not regulated by the Mental Health Act.

The *Guardianship and Administration Act 2000* (Qld) (Guardianship and Administration Act) provides for the appointment of guardians to manage the personal affairs of adults with impaired capacity and for administrators to manage their financial affairs where necessary.

The Queensland Civil and Administrative Tribunal is responsible for appointing guardians and administrators to review such appointments and decide the matters on which guardians and administrators may make decisions for an adult with impaired capacity.

Together with the *Powers of Attorney Act 1998* (Qld), the Guardianship and Administration Act provides a comprehensive scheme to facilitate the exercise of power for financial matters and personal matters by or for an adult who needs, or may need, another person to do those things for them.

These matters are explained further in the chapter about Laws Relating to Individual Decision Making.

LEGAL NOTICES

Disclaimer

The Queensland Law Handbook is produced by Caxton Community Legal Centre with the assistance of volunteers with legal experience in Queensland. The Handbook is intended to give general information about the law in Queensland as at the date stated on each individual page. The content of the *Queensland Law Handbook* does not constitute legal advice, and if you have a specific legal problem, you should consult a professional legal advisor.

External links

The *Queensland Law Handbook* provides links to a number of other websites that are not under the control of Caxton Community Legal Centre. These links have been provided for convenience only and may be subject to updates, revisions or other changes by the entities controlling or owning those sites. The inclusion of the link does not imply that Caxton Community Legal Centre endorses the content, the site owner or has any relationship with the site owner.

Limitation of liability

To the maximum extent permitted by law, Caxton Community Legal Centre and the contributors to the *Queensland Law Handbook* are not responsible for, and do not accept any liability for, any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from the *Queensland Law Handbook*.

Copyright