26 The law and people with mental illness

Legislation to guide the care of people with mental illness is society's means of resolving the conflict between an individual's right to liberty and the need on occasion to detain a mentally ill person for treatment, especially if they are at risk of causing harm to themselves or others [1]. The state also has a duty to care for those who have lost the capacity to recognise their need for treatment. Society continues to struggle for the right balance in this conflict, and responses have swung from excessive use of powers of restraint and treatment on the one hand, to an enthusiastic and insufficiently discriminating grant of individual freedom on the other. The former can unnecessarily curtail individual autonomy and freedom, while the latter can result in inadequate treatment and protection of people with severe mental illness. Getting the balance right involves giving careful consideration to internationally agreed human rights, as Australia is a signatory to the United Nations *Convention on the rights of persons with disabilities* [2]. It also involves consideration of local legislation on human rights (where the latter exists, as in the Australian Capital Territory and Victoria) [3].

In most states, the provision of resources and the organisation of services for people with mental illness have been progressively changed in response to the National Mental Health Strategy agreed by state and federal governments in 1992 [4]. This strategy emphasised minimising institutional care; placing psychiatric hospitals in general hospital environments ('mainstreaming'); use of the least restrictive modes of treatment and care; and provision of multidisciplinary community-based care designed to assist people with a mental disorder to live, work and participate in the community. Although widely supported by the health professions and the community, this new paradigm depended on adequate funding, which has been slow in forthcoming [5] and when made available may not have been well spent [6,7].

Additionally, the rights of people with mental illness were the subject of a national study, issued by Human Rights Commissioner Brian Burdekin in 1993 [8]. This report emphasised the need to deinstitutionalise people with mental illness where possible. It also highlighted discrimination against people with mental illness and made many recommendations about admission processes, the use of drugs in treatment, the privacy rights of patients and the need for independent review procedures.

Prior to the National Mental Health Strategy agreement in 1992 and the Burdekin Report in 1993, most states had taken steps to clearly separate the care of patients with mental illness from the care of those with intellectual disability. A brief summary of the legislation pertaining to the care of people with intellectual disability is given in Chapter 6; the present chapter concerns only patients with mental illness.

All Australian states and territories have specific legislation governing the care of patients with mental illness; the relevant acts are listed in Table 26.1. The basic aims of the various acts are similar but there are considerable differences of detail. This chapter should not be relied on as an authoritative guide to the detail of the legislation.

Table 26.1 Mental health legislation and mental health review tribunals

State	Legislation	Tribunal
New South Wales	*Mental Health Act 2007*	Mental Health Review Tribunal; http://www.mhrt.nsw.gov.au
Victoria	*Mental Health Act 2014*	Mental Health Tribunal; http://www.mhrb.vic.gov.au
Queensland	*Mental Health Act 2000*	Mental Health Review Tribunal; http://www.mhrt.qld.gov.au
South Australia	*Mental Health Act 2009*	Guardianship Board; http://www.guardianshipboard.sa.gov.au
WA	*Mental Health Act 2014*	Mental Health Review Board; http://www.mhrbwa.org.au/contact
Tasmania	*Mental Health Act 2013*	Mental Health Tribunal; http://www.mentalhealthtribunal.tas.gov.au