The Royal Australian & New Zealand College of Psychiatrists

Queensland Branch

26 June 2015

Hon Cameron Dick MP
Minister for Health
GPO Box 48
BRISBANE QLD 4001

By email: health@ministerial.qld.gov.au
Cc: mha.review@health.qld.gov.au

Dear Minister

Re: Mental Health Bill 2015

The Royal Australian and New Zealand College of Psychiatrists (RANZCP) welcomes the opportunity to respond to the Department of Health's Mental Health Bill 2015 (the Bill). The RANZCP commends the State Government for the timely review of the Mental Health Act 2000 (the Act), and its focus in the Bill on safeguarding the rights and liberties of people with mental illness, and strengthening the rights afforded to families and support networks.

The proposed Bill addresses many of the issues that the RANZCP raised during the consultation period under the previous government. In particular, the RANZCP is pleased to see that under the Bill the Chief Psychiatrist's ability to impose monitoring conditions on patients has been removed. The RANZCP is also supportive of the Bill's position to discontinue mandatory psychiatric reports (commonly referred to as 238 reports in the Act).

However, in the RANZCP's view, there remain a number of issues in the Bill that are of concern.

Firstly, there are several issues previously raised by the RANZCP in response to the Queensland Government's *Review of the Mental Health Act 2000: Discussion Paper May 2014,* which have not been addressed or only addressed in part in the 2015 Bill. These issues are set out in more detail in the attached table 'Mental Health Bill 2015: Areas of Concern'. In summary, the RANZCP considers that:

- a 'lawyer' should not be included as a support person for a clinical examination
- the Bill should state the fundamental principle that if a person was of unsound mind at the time of an alleged offence, the person is not criminally responsible for the offence and should not to be punished for the offence
- the Mental Health Court should only be able to make recommendations for forensic or court treatment orders and not be able to impose conditions
- monitoring conditions in a forensic order or court treatment order should exclude the use of tracking devices, which are used in the criminal justice system (e.g. GPS bracelets)
- it is inappropriate for Patient Rights Advisers to be employed by the treating health service if they are to provide independent advocacy
- it is essential to have clear guidelines about the type of information victims can receive about patients. It is inappropriate for victims to receive clinical information about patients.

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Secondly, the RANZCP has some concerns regarding proposed new clauses in the Bill that the RANZCP has not commented on previously, as follows:

- **Clause 36:** The RANZCP is concerned that - in clause 36(1)'s recommendations for assessment - there are no longer separate assessment and treatment criteria for patients. Instead, the Bill states that – if the treatment criteria apply to a person and there is no less restrictive way for the person to receive treatment and care for the person's mental illness – an authorised doctor may make a recommendation for assessment. In practice, when an assessment process begins, it is unclear whether treatment criteria may or may not apply. The RANZCP recommends that the Bill's assessment criteria be altered to focus on whether the person 'appears to have mental illness', which focuses on the need for assessment instead of whether the person 'has a mental illness' (as per the Bill's treatment criteria) and, therefore, a person's need for treatment. A possible model for this could be section 29 of the Mental Health Act 2014 (Vic) where the criteria for an assessment order are based on the concept that the 'person appears to have mental illness.'

- **Clause 253:** The RANZCP does not support the practice of allowing the Chief Psychiatrist to issue a written direction about seclusion. We consider the proposal for the Chief Psychiatrist to issue seclusion directions about individual patients is inappropriate because it interferes with the clinical governance of these patients.

- **Clause 698:** While the RANZCP welcomes mandated legal representation for patients involved in certain Tribunal hearings in clause 698, there is no information regarding the process that will occur if lawyers are not available for the relevant hearing (for whatever reason). There is the potential for significant clinical deterioration if hearings such as electroconvulsive therapy applications are deferred because lawyers are not present.

- **Clause 875, subclause 157B(1):** The RANZCP believes that the conditions for an emergency examination authority should be extended to include that the person must appear to have 'major behavioural disturbances'. This is in addition to the conditions that the person appears to have a serious mental impairment as a result of drugs or alcohol, or a mental illness. This strengthens the conditions for the emergency examination authority so it is not abused or used incorrectly.

Thirdly, the RANZCP believes that the following provision should be added to the current draft Bill:

- A statement that a non-revoke period for a forensic order is exempt from automatically ending if the individual under that order has been out of the state for more than three years. It is unclear if these orders are meant to be subject to the three-year rule but it would seem inconsistent to place a non-revoke period on orders if these orders can be circumvented by leaving the state.

Fourthly, the RANZCP considers that there is another critical issue to be addressed that is broader than the review of the Bill, regarding the need for adequate and appropriate assessment and treatment facilities for serving and remanded prisoners. The RANZCP will be writing to you separately about this matter.

It is important to also note that a number of the amendments in the Bill will have significant resourcing implications. The demands on the Queensland Court Liaison Service and Forensic

Service will be difficult to meet without significant expansion of these services, and there are also ramifications for organisations such as Legal Aid, the National Disability Service, Office of the Director of Mental Health/Chief Psychiatrist and authorised mental health services. As the success of the new legislation will be dependent on sufficient government investment, it is crucial that careful attention be given to the additional resourcing requirements of the Bill.

We hope you will take the time to carefully consider the RANZCP's recommendations before reintroducing the legislation to the Parliament. If the RANZCP can be of any assistance in this process, please do not hesitate to contact the Queensland Branch Office on (07) 3852 2977 or via ranzcp.qld@ranzcp.org.

The RANZCP has met with the previous Health Ministers on a three monthly basis. We hope that we can continue this consultative relationship now that you have taken on the role of Health Minister. The RANZCP looks forward to hearing from your office about a meeting with you at your earliest convenience.

Yours sincerely

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Mental Health Bill 2015 – RANZCP Areas of Concern

This table displays RANZCP's areas of concern of the Queensland Government's *Review of the Mental Health Act 2000: Discussion Paper May 2014* that have not been addressed in whole or in part in the subsequent Mental Health Bill 2015. The table also shows whether the RANZCP's recommendations made in 2014 in response to the Discussion Paper were addressed.

Key: RANZCP's 2014 recommendation not addressed RANZCP's 2014 recommendation addressed in part

Proposals from QLD Government's Discussion Paper May 2014	Clause in Mental Health Bill 2015	RANZCP Position June 2015	Outcome
Proposal 3.7 Where the Director of Mental Health directs a psychiatric assessment, the Act to state that: • The purpose of the assessment is to provide an opinion on fitness for trial and unsoundness of mind at the time of the alleged offence for the purposes of referral to, and consideration by, the Mental Health Court • The person must attend for an interview • If the person has capacity, he or she may nominate another person to attend the interview, including a lawyer • The person is not required to	**Allows lawyer to attend but requires they not 'interfere' with examination.** ***Chapter 4 Part 4*** ***95 Support person*** *(1) A person being examined for a psychiatrist report may be accompanied by a support person, including, for example, a nominated support person, lawyer or personal guardian.* *(2) A support person must not interfere with the examination.* ***96 Person must participate in examination in good faith—report prepared on request*** *(1) If a psychiatrist report about a person is being prepared on a request under section 88, the person and any support person must participate in an examination for the psychiatrist report in good faith. Examples of participating in an examination in good faith—*	The RANZCP is **concerned by the inclusion of a person, other than the person being interviewed, being entitled to attend an examination** (referred to as 'interview' in the Discussion Paper). In particular, the RANZCP is concerned that the provision for a lawyer to attend the examination sets an unnecessarily adversarial tone for these purely clinical interviews. RANZCP recommends that 'lawyer' be removed from clause 95(1) of the Bill. The RANZCP is concerned that another person in the examination, such as a family member, may inhibit the patient's candour with the psychiatrist undertaking the assessment. The RANZCP suggests that strong guidelines need to be put in place about the role of the support person and restrictions on their actions during the examination.	

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answer self-incriminating questions • The psychiatric report is to be provided to the person (unless unsafe to do so) and the person's personal guardian, attorney or lawyer, and • The psychiatric report cannot be used for any other purpose without the consent of the person or the person's representative.	• *attending appointments in relation to the examination* • *answering questions during the examination* • *allowing access to the health records of the person the subject of the examination* *(2) If the authorised psychiatrist preparing the psychiatrist report is satisfied the person or support person is not participating in the examination in good faith, the authorised psychiatrist must give the administrator of the authorised mental health service who appointed the psychiatrist written notice of the psychiatrist's belief.*		
Proposal 4.1 The Act state the fundamental principle that if a person was of unsound mind at the time of an alleged offence: • The person is not criminally responsible for the offence and is not to be punished for the offence, and • An order of a court as a result of the alleged offence may only infringe on the person's rights and liberty to the extent necessary to protect the community.	**This principle has not been included in the Bill.**	The RANZCP **strongly supports the entrenchment of this important principle in legislation**. In addition, the RANZCP supports an extension to this principle to include that 'an order of the court as a result of the alleged offence may only infringe on the person's rights and liberty to the extent necessary to protect the community and to the extent necessary to provide appropriate treatment and care.'	

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Proposals 4.11 & 4.12 The Mental Health Court be able to attach conditions to forensic orders recommending the authorised mental health service or the forensic disability service consider specific interventions such as drug and alcohol programs or anger management counselling. The implementation of this condition, including the patient's willingness to participate in such programs, be considered during Mental Health Review Tribunal reviews.	**Allows the Mental Health Court to impose conditions and make recommendations.** ***Chapter 5 part 4*** ***140 Court may impose conditions and make recommendations*** *(1) The Mental Health Court may—* *(a) in a forensic order for a person, impose the conditions it considers appropriate, including, for example, a condition requiring the person to wear a tracking device; or* *(b) in a court treatment order for a person, impose the conditions it considers appropriate, other than a condition requiring the person to wear a tracking device.* *(2) Without limiting subsection (1), the court may impose a condition that the person must not contact a stated person, including, for example, a victim of the relevant unlawful act.* *(3) Also, the court may, in a forensic order for a person, make the recommendations it considers appropriate about particular intervention programs that the authorised mental health service or the forensic disability service should provide for the person.* *Examples of intervention programs —* *drug and alcohol programs, anger management counselling programs, sexual offender programs*	The RANZCP is concerned about **giving the Mental Health Court the power to impose conditions on Forensic Orders and supports the idea that the Mental Health Court can only make recommendations on forensic orders.** Treatment of the patient should remain the sole preserve of the treating psychiatrist. The treating psychiatrist is best placed to impose requirements on a patient as is clinically necessary at the time, allowing flexibility and consideration of the specific patient's current circumstances. The Mental Health Court has an important role in determining serious overarching questions such as unsoundness of mind and unfitness for trial and the Court should remain focused on these critical questions rather than day-to-day treatment considerations in relation to patients. The RANZCP considers the Mental Health Review Tribunal's current monitoring of patient's orders is appropriate.	

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Proposal 6.13 The Director of Mental Health be authorised to apply monitoring conditions to any involuntary patient (i.e. a forensic patient, classified patient, court order patient, or a patient on an involuntary treatment order) while in the community if: • There is significant risk that the patient would not return to the authorised mental health service as required, or • The patient has not complied with previous obligations while in the community and this non-compliance has resulted in a significant risk of harm to the patient or others.	**Tracking devices cannot be used on Court Order or Treatment Authority patients (they may be used for patients under a Forensic Order) at the direction of the Mental Health Court of Mental Health Review Tribunal rather than the Chief Psychiatrist) but other monitoring conditions may still be implemented.** ***Chapter 4 Part 4*** ***140 Court may impose conditions and make recommendations*** *(1) The Mental Health Court may—* *(a) in a forensic order for a person, impose the conditions it considers appropriate, including, for example, a condition requiring the person to wear a tracking device;* *or* *(b) in a court treatment order for a person, impose the conditions it considers appropriate, other than a condition requiring the person to wear a tracking device.* ***Chapter 7 Part 2*** ***Clause 200 Condition of treatment authority may not require patient to wear tracking device*** *(1) This section applies to a patient of an authorised mental health service who is subject to a treatment authority.*	The RANZCP **welcomes the continuation of clinically relevant monitoring conditions, however, objects to imposing tracking devices that are usually used in the criminal justice system**. It is the opinion of the RANZCP that monitoring conditions are of limited use in preventing patient self-harm or harm to others. Any criteria for imposing monitoring conditions should be based on a significant risk to the patient or others. The RANZCP also notes the significant stigmatisation likely to befall patients on whom the most serious monitoring conditions are applied. Patients wearing tracking devices (e.g. GPS bracelets) are at risk of being stigmatised due to being singled out as mentally ill or due to a misapprehension that they are a sexual offender. Even in the event that technology advances enable such devices to remain largely unobserved, there remains the risk of impact on the patient's mental health state, and the fact that such devices are contrary to key elements of both a therapeutic alliance and recovery principles. Furthermore, the RANZCP suggests that a person be entitled to legal representation at the expense of the State (or on a means test basis) at any hearing where a monitoring condition is to be considered	

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	(2) In deciding the conditions necessary for the person's treatment and care under the treatment authority, an authorised doctor must not impose a condition that requires the patient to wear a tracking device. *(3) To remove any doubt, it is declared that the authorised doctor may impose another type of monitoring condition, other than requiring the patient to wear a tracking device.*	due to the significant infringement of liberties the condition represents.	
Proposal 7.6 Require each authorised mental health service to employ or engage (e.g. from a non-government organisation) a person or persons as an 'Independent Patient Companion', who is to report directly to the administrator of the authorised mental health service and not be part of the treating team.	**As the Patient Rights Adviser is an employee of the treating service but is statutorily independent, the RANZCP remains concerned that it will be difficult for advisers to be independent when they are employed by the service.** ***Chapter 9 Part 5*** ***Patient rights advisers*** ***287 Appointment*** *(1) An authorised mental health service must have systems in place to ensure that patients are advised of their rights under this Act.* *(2) Without limiting subsection (1), the health service chief executive responsible for a public sector mental health service must appoint a patient rights adviser or advisers in a way complying with a policy or practice guideline.*	The RANZCP supports patients having access to better information and assistance to navigate the mental health system. However, the RANZCP notes that this proposal does not allow for the Patient Rights Adviser (referred to as Independent Patient Companion in the Discussion paper) to undertake a truly independent advocacy on behalf of the patient as they would be employed by the treating authorised mental health service. If the intention is that Patient Rights Advisers undertake advocacy on behalf of the patient, **it will not be appropriate for them to be employed by the treating health service instead they should be employed by an independent organisation or non-government organisation.** RANZCP recommends that 'must be an employee of the public sector mental health service' be removed from clause 287(3)(a).	

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	(3) The patient rights adviser— *(a) must be an employee of the public sector mental health service, or of another entity that the service has engaged to provide services; and* *(b) must report directly to the administrator of the service; and* *(c) must not be a member of the treating team of patients of the service.*	The RANZCP also suggests that there will need to be clarity about the skill set Patient Rights Advisers will be expected to possess. In addition, the RANZCP supports the right of patients to have access to an independent advocate in addition to the proposed Patient Rights Adviser.	
Proposal 8.8 The Mental Health Review Tribunal to provide a victim who has a forensic information order with a statement of reasons and a summary of the risk assessment that led to a decision for a forensic patient to be granted access to the community or for the revocation of a forensic order.	**Victim still to receive some information about the patient.** ***Chapter 1 Part 2*** ***Clause 27 Information notices*** *Victims of unlawful acts, close relatives of the victims, and other particular persons may apply to the chief psychiatrist to receive specific information about the person who committed the unlawful act, including when treatment in the community is authorised for the person.* *Chapter 10 Part 6* ***Clause 311 Right to receive information under notice*** *(4) However, the chief psychiatrist must not disclose under subsection (2)—*	The RANZCP understands the need to support victims and ensure they are provided with appropriate information to assist in their recovery. However**, it is not appropriate for victims to receive clinical information about patients**. In fact, it is the view of the RANZCP that providing information on a patient's risk assessment may be damaging to victims. It is important to understand the type of information included in a patient's risk assessment might include details of childhood trauma to the patient and the like. There is a risk that this kind of information could create an unnecessary focus by the victim on the offence or the offender and be a source of distress. The RANZCP is also concerned that clinicians may avoid providing frank and fearless advice to the Mental Health Review Tribunal in their risk	

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	(a) details about the specific treatment and care provided to the relevant patient, including, for example, the type of medication being provided to the relevant patient; or *(b) the address of a place in the community at which the relevant patient is living.*	assessment for concern that the information may be released. The RANZCP suggests it is **necessary to have clear guidelines about what kind of information can be provided to victims.** A process of independent review should be made available before the information is provided to the victim to ensure that the information is appropriate for release.	