Northern Territory Office of the Public Guardian Submission to the Department of Health

MENTAL HEALTH AND RELATED SERVICES ACT 1998 REVIEW

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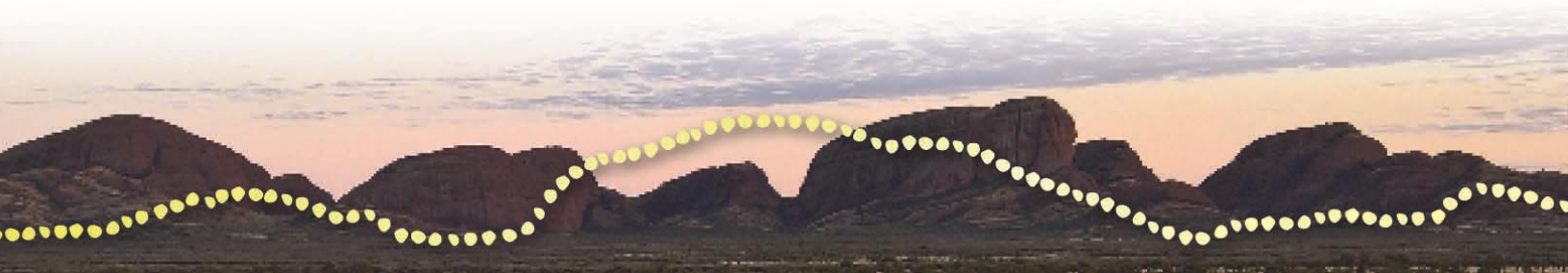

Introduction

The Office of the Public Guardian welcomes the opportunity to provide a submission to the *Mental Health and Related Services Act 1998* Review. The review provides an opportunity for stakeholders to advocate for changes to the Northern Territory's mental health legislation to reflect contemporary thinking and promote the rights and wellbeing of users of mental health services in the Northern Territory.

The Office of the Public Guardian is an independent office established under the *Guardianship of Adults Act 2016* (the Act). The Act provides a legal decision-making framework for adults with impaired decision-making capacity in relation to their personal (including health care) matters and/or financial matters. The Act recognises the overall wellbeing, human rights and fundamental freedoms of persons with impaired decision-making capacity and aligns with the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The CRPD's purpose is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".

With the commencement of the *Guardianship of Adults Act 2016* the scope of persons captured within guardianship legislation broadened to include adults with impaired decision-making capacity from any cause including mental illness, dementia, intellectual disability or acquired brain injury. For people with a mental illness involved in guardianship there is a clear intersection between the *Guardianship of Adults Act 2016* and the *Mental Health and Related Services Act 1998*. The Office of the Public Guardian is committed to safeguarding and promoting the human rights of people with impaired decision-making capacity, including the reform of mental health legislation to embed the concepts of supported decision-making, the protection and promotion of human rights, person-centred and directed practice, recovery oriented practice and any compulsory interference with a person's autonomy of decision and action as a last resort.

Represented persons[1] with mental illness

There are currently 1,067 persons under a guardianship order in the Northern Territory. The Office of the Public Guardian teams are located in Darwin and Alice Springs and are responsible for providing guardianship services to approximately 606 of these persons. Compared to other jurisdictions, the Northern Territory has the lowest number of adults under guardianship orders however, has the highest percentage of the population under guardianship.

The significant change in scope of guardianship legislation in 2016 to capture persons with impaired decision-making capacity from any cause has meant there has been an increasing number of people living with major mental illness as their primary diagnosis or persons with complex cognitive impairments and complex care needs (which may include mental health issues) becoming

[1] Represented person means an adult for whom a guardianship order is in place.

subject to adult guardianship orders in the Northern Territory. In 2019-20 ten percent of applications for guardianship for persons with impaired decision-making related to mental illness.[2]

The intersection between the *Guardianship of Adults Act 2016* and the *Mental Health and Related Services Act 1998* has at times been difficult to navigate for represented persons, their families and carers, guardians and health professionals. Successful navigation of mental health services for the Office of the Public Guardian on behalf of represented persons with mental illness has been largely dependent on the knowledge and skill of individual health professionals and their personal understanding of the role of guardians and other substitute decision makers rather than a systemic understanding and appropriate policies, procedures and training to support this understanding.

In particular, adherence to current legislative requirements regarding reporting and collaboration with guardians has been poor. Historically good systems of collaboration and information sharing have not been developed and implemented. Legislative reform must be accompanied with concurrent system improvements and adequate resourcing, including staff development and training.

The Office of the Public Guardian cannot contribute to the lived experiences of people with mental illness. Key consumer and representative organisations and people with lived experience are best placed to provide this input and the Office of the Public Guardian respects and supports submissions from these organisations and individuals. This submission aims to share the observations and experiences of the Public Guardian, as guardian of last resort, regarding people with mental illness involved with guardianship.

The mental health system in the Northern Territory

It is the experience of the Office of the Public Guardian that similar to other jurisdictions, the mental health system in the Northern Territory is under resourced to meet current and increasing demand for mental health services and is operating in a reactive crisis intervention mode. Despite the efforts of dedicated health professionals, there is limited capacity to provide person centred early intervention practice to prevent the need for crisis intervention, which is reinforced within existing legislative provisions. The review of the *Mental Health and Related Services Act 1998* provides an opportunity to develop a strong legislative framework that promotes recovery orientated, trauma informed person-centred practices and uphold the rights of the person throughout the process. Consideration should also be given to how the legislation may promote early intervention and alternative models of care that are not reliant upon admission to an approved treatment facility.

Legislative reforms must be matched with appropriate levels of funding for increased personnel within mental health facilities and community mental health, workforce development and growth strategies and the development of mental health services to provide alternative models of care for

[2] Office of the Public Guardian Annual Report 2019-20, page 37.

persons, including forensic mental health patients, increased community based care and stepped down models of care.

Principles and rights of the patient

New mental health legislation

Mental health legislation is the foundation of the delivery of mental health services. It should provide a strong legislative framework to uphold best practice principles and policies in mental health and its importance and how it can lead to new standards and ways of practice that are in line with current values, human rights and the best available evidence[3] should not be understated. New mental health legislation should be developed to reflect contemporary human rights practice and thinking and modernise the delivery of mental health in the Northern Territory. It should embed the concepts of supported decision-making, the protection and promotion of human rights, recovery oriented practice, person-centred and directed practice and any compulsory interference with a person's autonomy of decision and action as a last resort.

Recovery oriented practice

Incorporating the concept of recovery into mental health legislation provides clear direction to users of the legislation that mental health treatment goes beyond the provision of clinical care. It places the person central to any care and treatment provided under the legislation and should drive recovery-oriented values and principles in mental health policies and practices. In particular it provides an opportunity to focus the attention of mental health practitioners on supports available and necessary for the person to promote their recovery in the community upon discharge, including NDIS funding and supports. In turn this should encourage mental health practitioners to be actively engaged in NDIS planning meetings so that current information is shared between all stakeholders involved in the person's care and treatment and there are agreed goals and outcomes that all stakeholders are working towards with the person. With a focus on recovery-oriented practice, this information should subsequently be shared with the Tribunal in any required reports.

Leaving the term 'recovery' undefined in the legislation allows an interpretation of the term that reflects continued development of what 'recovery' means for best practice care and treatment within mental health and for it to be applied in the context of the person's individual circumstances.

Decision-making capacity

Determining a person's decision-making capacity or impaired decision-making capacity has critical consequences to their autonomy of decision and action and what care and treatment may be provided without their consent. Wherever possible, the definitions of decision-making capacity and impaired decision-making capacity should be consistent across intersecting pieces of legislation, including the *Guardianship of Adults Act 2016*, the *Advance Personal Planning Act 2013* and mental health legislation. A consistent definition provides a consistent approach to the human

[3] State of Victoria, Royal Commission into Victoria's Mental Health System, Final Report, Volume 4; The fundamentals for enduring reform, Parliamentary Paper No 202, Session 2018-21 (document 5 of 6), page 35.

rights of individuals in the Northern Territory and the point at which an interference with these rights is authorised.

Although the *Guardianship of Adults Act 2016*[4] provides a contemporary definition of decision-making capacity and impaired decision-making capacity there is scope for its improvement and the Office of the Public Guardian will advocate for these improvements in any future review of the *Guardianship of Adults Act 2016*. In the meantime, the definitions of decision-making capacity in the Victorian guardianship legislation[5] and the Victorian mental health legislation[6] provide sound examples of contemporary definitions that include the following components:

- a person is presumed to have decision-making capacity until the contrary is shown
- decision-making capacity is specific to a particular decision
- a person has decision-making capacity in relation to a matter if they can make the decision with practicable and appropriate support[7]
- an assessment of a person's capacity should occur at a time and in an environment in which the person's capacity to give informed can be assessed most accurately.

Person-centred and directed approach

Will and preferences

The importance of a person's will and preferences and how they should be recognised must be embedded in legislation to truly reflect a commitment to person-centred and recovery-oriented practice in mental health and so that wherever possible the person is engaged and empowered during all aspects of their care and treatment. The legislation should specifically require the participation of the person, wherever practicable, in decisions affecting them including treatment decisions and that the person's will and preferences should be taken into account when making care and treatment decisions.

The principle of least restrictive treatment options should be embedded in the legislation to ensure any compulsory interference with a person's autonomy of decision and action as a last resort and to promote the use of advance planning documents including advance personal plans, advance consent decisions and advance care statements. The person should be encouraged to complete advance personal plans with advance consent decisions and advance care statements when they have the required planning capacity and so that they have the opportunity to truly direct their care and treatment during periods that their capacity may be impaired, either temporarily or permanently. If a person's capacity is episodic they should be encouraged to include recovery oriented advance consent decisions and advance care statements in their advance personal plan.

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[4] See section 5 *Guardianship of Adults Act 2016* (NT)

[5] See section 5 *Guardianship and Administration Act 2019* (Vic)

[6] See section 68 *Mental Health Act 2014* (Vic).

[7] Practicable and appropriate support may include using information and formats tailored to the particular needs of the person or being supported by another person in understanding the elements needed to exercise decision-making capacity about a decision[7].

Nominated support person

The introduction of a nominated support person into mental health legislation to further embed a person-centred planning and human rights approach is endorsed. As highlighted by the Northern Territory Mental Health Coalition (the Coalition) the nomination of a support person can also be an important tool for excluding an abuser[8]. The role of the nominated support person should be clearly articulated in the legislation including their rights in relation to the receipt of notices and confidential information and to provide support and represent the person at treatment planning meetings and Tribunal hearings. Importantly a support person may also fulfil the role of supporting a person to understand the elements needed to exercise their decision-making capacity about a decision (supported decision-making).

It is the experience of the Office of the Public Guardian that there are many people who may be unable to nominate a support person. Therefore, the recommendation of the Coalition to legislate for an external, opt-out support service, made up of Social and Emotional Wellbeing and Peer Support Workers is endorsed[9]. The functions of this service should include advocacy, capacity building, care planning and ensure quality safeguards and improvement. As an example, the Office of the Public Guardian notes the success of the Independent Mental Health Advocacy Body, operating in Victoria, in creating non-legal representation and advocacy[10].

The appointment of a nominated support person should not interfere with the rights and responsibilities of a guardian appointed under the *Guardianship of Adults Act 2016* or decision maker appointed by the person under the *Advance Personal Planning Act 2013*. Any interrelatedness between the role and rights of a nominated support person and a guardian and/or decision maker[11] should be clearly articulated in the legislation. The number of nominated support persons should be limited to two.

Cultural security

A commitment to person-centred and recovery oriented practice must be underpinned by the inclusion of cultural security within mental health legislation and as practice. The Office of the Public Guardian notes the Coalition's submission highlighting the importance of embedding Social and Emotional Wellbeing (SEWB) in mental health policies and frameworks and how language, country, culture and family are essential to implementing SEWB and trauma informed care[12]. The inclusion of principles of SEWB and trauma informed care within the objects of the mental health legislation is supported.

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[8] Northern Territory Mental Health Coalition, *Submission to the Mental Health and Related Services Act 1998 Review*, 2021.

[9] Ibid.

[10] Paving the roads for recovery: Building a better system for people experiencing mental health issues in Victoria, Victorian Legal Aid, https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-rcvmhs-paving-roads-to-recovery-june-2020.pdf

[11] Appointed in an advance personal plan under the *Advance Personal Planning Act 2013*.

[12] Northern Territory Mental Health Coalition, *Submission to the Mental Health and Related Services Act 1998 Review*, 2021.

The use of interpreters and/or other communication aids for Aboriginal people or people from culturally and linguistically diverse (CALD) backgrounds is essential to ensure the opportunity for real participation and engagement by the person. It is the experience of the Office of the Public Guardian that although the *Mental Health and Related Services Act 1998* provides for the use of an interpreter in a number of situations this does not always occur in practice due to the limited availability of an interpreter in the person's language and other resource constraints within mental health services, including personnel resources.

On other occasions when an interpreter is engaged the language used by health professionals and Tribunal members is too complex to enable appropriate interpretation that can be understood by the person. The provisions in relation to the use of interpreters in mental health legislation should be strengthened with a complimentary commitment from the Northern Territory Government to the development and growth of accredited interpreters in the Northern Territory. There should also be a strengthened commitment to mental health proceedings being accessible and culturally appropriate for Aboriginal people and people from CALD backgrounds.

Admission and Treatment

The Office of the Public Guardian has experienced the following difficulties in accessing treatment for represented persons under the *Mental Health and Related Services Act 1998*:

- difficulty in obtaining assistance for a person before their condition deteriorates to a level that they require admission to an approved treatment facility
- proposed discharge of a person when there are not appropriate supports for the person in the community
- overlap between behaviour and mental illness and a siloed approach to supporting people when they are displaying harmful behaviour, including self-harm but are not captured under the *Mental Health and Related Services Act 1998*.

Mental health legislation needs to address these difficulties and provide clinical pathways to support persons before their condition deteriorates to a crisis point. It involves a collaborative, multi-disciplinary approach with community care models embedded in legislation and promoted over admission to an approved treatment facility.

<u>Involuntary admissions</u>

Admission and treatment provisions should be least restrictive and involuntary treatment should be as a last resort. Legislative safeguards during admission and treatment phases should be strengthened to ensure the person and their nominated support person, family and carers (where appropriate) and/or guardian are provided with all relevant information, are aware of their rights and understand any review processes. Additionally, mental health professionals must receive appropriate training in relation to their obligations in these areas so that practice is consistent with the legislation.

The legislation should be strengthened in relation to the use of community management orders as a least restrictive option to admissions. It should provide a clear pathway for the use of community management orders to treat a person in the community and as a preventative measure before a person requires admission in an approved treatment facility.

Voluntary admissions

Provisions in relation to voluntary admissions should clearly articulate the process for discharge if a voluntary patient is no longer willing to receive treatment. To ensure certainty the legislation should state that a voluntary patient may take temporary leave from the facility. Any associated policy and procedures to record leave for voluntary patients should recognise the status of the person as a voluntary patient and should be different to the procedure for granting leave for an involuntary patient.

Any legislative provisions in relation to an application by a guardian or decision maker for a person to be admitted to an approved treatment facility as a voluntary patient should specify that such an admission must be in accordance with the will and preferences of the person. Unless a person's status is changed to involuntary, a person admitted to a facility as a voluntary patient on application of a guardian or decision maker, must be discharged from the facility if they choose. They must also be free to take temporary leave from the facility. The guardian or decision maker should be advised of any discharge or temporary leave of the person as soon as practicable, but not later than 12 hours after it has occurred.

Police assistance

Although current principles provide that police assistance should only be sought as a last resort, in the absence of any alternative, they are usually the first point of call if there are concerns about a person's behaviour or mental health condition. Consideration should be given to alternative options to the use of police assistance and where they are the only response, how they can assist without waiting for the person's condition to deteriorate. Programs and initiatives introduced in other states and territories to support police in responding to mental health related incidents include crisis intervention teams comprising police who receive mental health training and co response models whereby health professionals and/or ambulance services directly assist police.[13]

In remote and very remote communities police should have remote access to dedicated mental health professionals who can assist remote health workers and the police to respond to a person with mental illness or suspected mental illness. Legislative provisions must recognise that the ability to bring the person to an appropriate practitioner for an assessment is reliant upon other services including ambulance and aero-medical services. The person and the police should be supported during this time to ensure least restrictive care and support to the person. Any requirement for the use of restrictive practices, particularly chemical restraint during transport of

[13] Productivity Commission 2020, *Mental Health*, Report no.95, Canberra, page 1026.

a person for the purpose of assessment and/or admission should be regulated through an appropriate authorisation and monitoring framework. Any use of restrictive practices in an emergency should be reported to an appropriate regulatory body.

Powers of search and seizure

The Office of the Public Guardian supports the inclusion of search and seizure powers within mental health legislation for the protection of all persons within mental health facilities. Legislative provisions should be included for any search and seizure to be minimised wherever possible and to not be cruel or unnecessary. Appropriate safeguards must be detailed in the legislation including, the requirement of any search to be undertaken by a person of the same gender and for the search to be conducted in a culturally safe manner.

Monitoring

The Chief Psychiatrist

The Office of the Public Guardian advocates for mental health legislation to provide for the statutory appointment and functions of the Chief Psychiatrist. The statutory appointment of the Chief Psychiatrist provides impartiality and independence to the important functions of the role and ensures consistency despite any change in government. The functions of Chief Psychiatrist detailed in the Discussion Paper are supported, including that the Chief Psychiatrist have powers of direct intervention and power to initiate investigations by their own motion.

Regulating restrictive practices

The reduction and elimination of restrictive practices for persons with impaired decision-making capacity across all service settings is a significant area of advocacy for the Office of the Public Guardian. The mental health legislation should include a guiding principle for the reduction and elimination of the need to use restrictive practices. The term 'restrictive practice' and all types of restrictive practices, including chemical restraint should be defined in the legislation. Existing provisions should be strengthened in relation to the use of any restrictive practice only as a last resort and that their use should be transparent, accountable, and limited to specific circumstances. The use of any restrictive practices should be in accordance with a behaviour support plan or interim behaviour support plan. Behaviour support plans which provide an individualised approach to a person's behaviour and strategies to reduce the use of restrictive practices are consistent with person-centred practice. Wherever possible definitions and principles should be consistent with those contained in the *National Disability Insurance Scheme (Authorisations) Act 2019*.

To achieve real transparency and accountability consideration should be given to whether an authorisation framework similar to that established in the *National Disability Insurance Scheme (Authorisations) Act 2019*, including the authorisation role of the Senior Practitioner is appropriate for the use of restrictive practices in mental health services. Rather than just monitoring and reporting the use of restrictive practices an authorisation framework provides an independent and proactive framework to consider and authorise the need to use restrictive practices for a person with mental illness. The use of restrictive practices in an emergency to prevent an immediate

threat of harm could be excluded from the authorisation framework, but with real time reporting to ensure integrity and transparency of the framework.

Electroconvulsive therapy

In relation to the regulation of electroconvulsive therapy (ECT) the Office of the Public Guardian notes that section 66(1)(b) of the *Mental Health and Related Services Act 1998* is inconsistent with relevant provisions in the *Guardianship of Adults Act 2016*[14] and the *Guardianship of Adults Regulations 2016*[15], in which a guardian is not authorised to make decisions in relation to any ECT for a represented person. The mental health legislation should be drafted to reflect the authority of a guardian in the *Guardianship of Adults Act 2016*.

The Office of Public Guardian endorses the recommendations contained in the Northern Territory Health and Community Services Complaints Commission Investigative Report[16] in relation to the regulation of ECT. In particular the Office of the Public Guardian supports the legislative requirement for a report to be made to the Tribunal on each occasion that ECT is performed without informed consent or without authorisation of the Tribunal.

Increased monitoring and safeguards

Increased safeguards should be introduced into the legislation including the scope of the community visitor program expanded to include all mental health facilities and services. The external, opt-out support service, made up of Social and Emotional Wellbeing and Peer Support Workers (described under Nominated Support Person above) should also be legislated with the functions of this service to include advocacy, capacity building, care planning and ensure quality safeguards and improvement.

Forensic provisions

The criminal justice system is not equipped to support people with specific health, emotional or cultural needs including people with disability, people with impaired decision-making capacity and people with mental illness. The overrepresentation of these groups within the criminal justice system, the associated rates of recidivism and the intersection with poverty, violence, discrimination, inadequate or inappropriate accommodation and poor English language literacy skills demands systemic and coordinated action across multiple service sectors.

The reviews and independent reports in relation to forensic mental health care[17] support the reform of mental health legislation in the Northern Territory for forensic clients. The scope of the recommendations and findings warrant a comprehensive analysis of these reviews and reports by the Department of Health and the Department of the Attorney-General and Justice to develop a

[14] Section 8(1)(e).
[15] Regulation 3(b).
[16] Health and Community Services Commission (2019) *De-Identified Investigation Report*.
[17] Northern Territory Government (2020) *Discussion Paper for the Mental Health and Related Services Act 1998 Review,* page 101.

proposed action plan for comment by stakeholders. Additionally, it can be confusing and difficult to navigate legislative provisions relevant to forensic clients across multiple pieces of legislation. Specific legislation for forensic provisions will provide greater certainty and usability of the legislation. It will also provide the opportunity to adopt the recommendations contained in the reviews and independent reports and for a real commitment to a legislative framework, funding and associated resources to provide person-centred and recovery oriented practice to people with mental illness who are involved in the criminal justice system.

Although the recommendations from the reviews and reports must be considered and adopted as part of a holistic legislative framework the Office of the Public Guardian advocates for consideration of the following inclusions:

- Ongoing management of supervision orders transferred from the criminal justice system to a Tribunal.
- The establishment of a Mental Health Court or Mental Health Diversion List, with associated legislative provisions in relation to assessments, expertise of reporting health professionals and evidentiary matters, to deal with all matters currently dealt with by the Court of Summary Jurisdiction.
- Specific provisions to wherever possible eliminate the indefinite detention of people who are subject to supervision orders under Part IIA of the *Criminal Code Act 1983*.
- An established clinical pathway of care with a stepped resource model for individuals subject to supervision orders that allows them to move through a least restrictive care paradigm, have their clinical and risk management needs met and progress back towards community placement[18].

The Office of the Public Guardian welcomes further opportunity to contribute to the development of legislation for forensic mental health care in the Northern Territory.

Other matters

Authority of a guardian and decision maker for treatment

Current provisions within the *Mental Health and Related Services Act 1998* in relation to authority to make decisions for non-psychiatric treatment and major medical procedures for involuntary and voluntary patients must be aligned with the *Guardianship of Adults Act 2016* and the *Advance Personal Planning Act 2013*. The legislative provisions must also be clearer so that all users of the legislation have certainty regarding the decision making authority of the person and/or any substitute decision makers when a person is admitted as either a voluntary patient or an involuntary patient.

Health care decision maker legislation

Relevant provisions within new mental health legislation will need to align with the proposed health care decision makers legislation. This legislation will provide legislative authority for health

[18] David McGrath Consulting (2019) *Report on the review of the Forensic Mental Health and Disability Services within the Northern Territory*, page 8.

care decision making for an adult with impaired decision-making capacity. It will give legal authority to family members and other persons who have an existing relationship with the adult to make health care decisions on their behalf and will ensure that wherever possible, health care decisions are made for the adult by a person who is familiar with the adult's views and wishes. The Department of the Attorney-General and Justice has responsibility for progressing this proposed legislation.

Access to the Tribunal

The Tribunal is an independent panel with relevant expertise, convened to make decisions about the care and treatment of persons under the *Mental Health and Related Services Act 1998*. Access to the Tribunal should be the same for all persons irrespective of whether they have a guardian or decision maker appointed. That is, the oversight, review and appeal rights of a person who has a guardian or decision maker appointed should be the same as a person who does not have a guardian or decision maker appointed. To ensure this occurs consistency must be achieved throughout the mental health legislation and with the *Guardianship of Adults Act 2016* and *Advance Personal Planning Act 2013* in relation to decision making authority of the person, their guardian or decision maker and the right of oversight, review and appeal for persons receiving mental health services.

Conclusion

The review of the *Mental Health and Related Services Act 1998* provides an opportunity to develop a strong legislative framework for the delivery of mental health services in the Northern Territory and to embed the concepts of supported decision-making, the protection and promotion of human rights, person-centred and directed practice, recovery oriented practice and any compulsory interference with a person's autonomy of decision and action as a last resort.

Legislative reforms must be matched with appropriate levels of funding and resources for increased personnel within mental health facilities and community mental health, workforce development and growth strategies and the development of facilities to provide alternative models of care, including specialised forensic mental health facilities, increased community based care and stepped down models of care.

The Office of the Public Guardian welcomes the opportunity to be further engaged in the development of new mental health legislation in the Northern Territory.