

# *Sentencing and Mental Health Acts (Amendment) Act 2005*

## Summary of key amendments

### Chief Psychiatrist's Guideline

#### Key message

Major changes have been made to provisions in the *Sentencing Act 1991* and the *Mental Health Act 1986* concerning hospital orders, hospital security orders and restricted community treatment orders.

Mental health service management should ensure that relevant staff are familiar with the changes and that local policies and procedures are reviewed and revised as necessary.

#### Purpose

To provide a summary of key amendments to the *Sentencing Act 1991* and the *Mental Health Act 1986* that came into effect on 1 October 2006.

#### Background and scope

The *Sentencing and Mental Health Acts (Amendment) Act 2005* ('the SMHA Act') came into effect on 1 October 2006.

The SMHA Act makes significant changes to provisions in the Sentencing Act and the Mental Health Act that govern hospital orders, hospital security orders and restricted community treatment orders.

This guideline describes the legislative regime applying from 1 October 2006. Where it refers to previous arrangements, it means the law before 1 October 2006.

#### Restricted involuntary treatment orders

##### Introduction and background

- Up until 1 October 2006, if a person with mental illness was found guilty of an offence, the court had the option to make a hospital order under s. 93(1)(d) of the Sentencing Act, instead of giving the person a sentence. The person was then admitted under the hospital order to an approved mental health service as an involuntary patient and given treatment for their mental illness.
- From 1 October 2006, hospital orders are replaced with a new order known as a restricted involuntary treatment order (RITO).
  - Special transitional arrangements apply to existing patients who were subject to hospital orders on 30 September 2006. It should be noted that their hospital order has not been converted to a RITO. Refer to 'Transitional provisions' below for more information.

##### Making an order

- RITOs are made under an amended s. 93 of the Sentencing Act.
- RITOs cannot be made if a person is guilty of a 'serious offence' as defined in s.3 of the Sentencing Act.
  - Previously there was no restriction on the nature of the offence for which a person could be given a hospital order.

- Before making a RITO, a court must be satisfied that all the criteria in s. 93 of the Sentencing Act ('the s. 93 criteria') apply to the person, that is:
  - the person appears to be mentally ill; and
  - the person's mental illness requires treatment and that treatment can be obtained by the person being subject to a RITO; and
  - because of the person's mental illness, involuntary treatment of the person is necessary for their health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public.
- The court must also receive a report from the authorised psychiatrist of the relevant approved mental health service, recommending that the RITO be made and stating that there are facilities or services available to treat the person's illness.<sup>1</sup>
- The court is required to consider the person's current mental condition, their medical, psychiatric and forensic history and their social circumstances, before making a RITO.

## Duration

- RITOs can be made for terms of up to two years.
  - Previously, hospital orders had an indefinite duration.
- If a person on a RITO requires continuing involuntary treatment after their order expires, the usual procedures for initiating involuntary treatment under the Mental Health Act apply.
- The Chief Psychiatrist or the Mental Health Review Board (at an appeal or review) can discharge a person from their RITO before the end of the term, if the s. 93 criteria no longer apply to the person.

## Treatment setting

- Once a RITO is made, the person will be taken to the relevant approved mental health service. The authorised psychiatrist has the option to either admit the person as an involuntary inpatient or make a restricted community treatment order without admitting the person to the approved mental health service (see details below about making restricted community treatment orders).
  - Previously, when a person was placed on a hospital order, the person had to be admitted to an approved mental health service.

## Treatment

- A person on a RITO is an involuntary patient under the Mental Health Act and must be given treatment for their mental illness.
- If the person refuses to consent to necessary treatment or is unable to consent to treatment for their illness, the authorised psychiatrist may consent on their behalf in writing.
- The authorised psychiatrist must prepare, review on a regular basis, and revise as required, a treatment plan for the person.

<sup>1</sup> The Chief Psychiatrist's guideline, *Restricted involuntary treatment orders and restricted community treatment orders*, October 2006, outlines some of the matters the authorised psychiatrist should consider when deciding whether or not to recommend that a RITO be made. The guideline is available at [www.health.vic.gov.au/mentalhealth/cpg/index](http://www.health.vic.gov.au/mentalhealth/cpg/index).

## Review by Mental Health Review Board

- The Mental Health Review Board must review a RITO within eight weeks of it being made and then at least annually.

## Discharge

- The power to discharge a person from their RITO is limited to the Chief Psychiatrist or the Mental Health Review Board (at an appeal or review).
  - This power is unchanged. Previously, only the Chief Psychiatrist or the board could discharge people on hospital orders.
- The Chief Psychiatrist or the board must have primary regard to the person's current mental condition and consider their medical, psychiatric and forensic history and their social circumstances in deciding whether to discharge a person from their RITO.

## Restricted community treatment orders

### Introduction

- A person on a RITO can be placed on a restricted community treatment order (RCTO), permitting them to live in the community while receiving the treatment they need for their mental illness.

### Making an order

- The authorised psychiatrist or the Chief Psychiatrist can make a RCTO.
  - Previously, only the Chief Psychiatrist could make a RCTO and the Mental Health Review Board had to approve it before it took effect.
- A RCTO may be made at any time if the s. 93 criteria apply to the person and the treatment the person needs can be obtained through making a RCTO.
- The authorised psychiatrist must notify the Chief Psychiatrist in writing if he or she makes a RCTO.
- The Mental Health Review Board (at an appeal or review) can direct the authorised psychiatrist to make a RCTO. The board might make this order if it decides that the treatment the person needs can be obtained in the community through making a RCTO. The board must specify a reasonable period of time in which the authorised psychiatrist must make the RCTO. The authorised psychiatrist may apply to the board during this period to reconsider its decision if circumstances change.

### Duration

- Unlike a community treatment order, the psychiatrist making a RCTO does not decide the length of the order. The Mental Health Act specifies that a RCTO will continue for as long as the person remains on a RITO (until it expires or is discharged) or until the RCTO is revoked or discharged.
- A RCTO will, therefore, never need to be extended and there will be no risk of it expiring inadvertently.
  - Previously, a RCTO could only be made for up to 12 months.

## Revocation

- The authorised psychiatrist, Chief Psychiatrist or Mental Health Review Board (at an appeal or review) can revoke a RCTO. The grounds for revocation mirror the grounds for revoking a community treatment order.
  - Previously, only the Chief Psychiatrist or the board could revoke a RCTO.

## Variation of conditions

- The authorised psychiatrist, Chief Psychiatrist or the Mental Health Review Board (at an appeal or review) can vary the conditions of a RCTO.
  - Previously, only the Chief Psychiatrist could vary the conditions of a RCTO.

## Discharge

- Discharge from a RCTO is limited to the Chief Psychiatrist or the Mental Health Review Board (at an appeal or review).
- Discharge from a RCTO means the person is also discharged from their RITO.
  - This power is unchanged. Previously, only the Chief Psychiatrist or the board could discharge people on hospital orders.
- The Chief Psychiatrist or the board must have primary regard to the person's current mental condition and consider their medical, psychiatric and forensic history and their social circumstances in deciding whether to discharge a person from their RCTO.

## Reporting and monitoring

- The supervising medical practitioner must submit a report about the person's treatment to the monitoring psychiatrist at the intervals set out in the treatment plan.
  - Previously, the monitoring psychiatrist provided these reports to the Chief Psychiatrist.
- The monitoring psychiatrist must assess the person at regular intervals and notify the Chief Psychiatrist if the s. 93 criteria no longer apply to the person. The Chief Psychiatrist must then examine the person as soon as practicable.

## Review by the Mental Health Review Board

- The Mental Health Review Board must review a RCTO 12 months after it is made.
  - Previously, the board reviewed the extension of a RCTO. However, as discussed, RCTOs will no longer have a fixed term and therefore do not need to be extended.
- The board will not review the making of a RCTO.
  - Previously, the board had to approve a RCTO before it could come into effect.

## Effect while in custody

- A RCTO goes into abeyance if the person is detained in a prison. It will revive upon the person's release from prison, unless the RITO has expired.
- If a person subject to a RCTO is detained in prison and transferred from prison to an approved mental health service under s. 16 of the Mental Health Act, the RCTO automatically ends but the RITO survives (although it has no effect while the person is in hospital under s. 16). This is in contrast to community treatment orders, where a person's involuntary treatment order and community treatment order are both discharged on the making of a s. 16 order.

## Transitional provisions

### Background and context

- Transitional provisions in the SMHA Act mean that people on hospital orders on 30 September 2006 (the day immediately before the commencement day of 1 October 2006) will remain on the hospital order. **Their order will not be converted to a RITO.**
- Similarly, people on a RCTO on 30 September 2006 will also remain on that order and their hospital order.

### Duration

- All existing hospital orders have been given a duration of two years, which means these orders will automatically expire on 1 October 2008. Many people on hospital orders have been on these orders for many years. The purpose of the two-year transition period is to enable the authorised psychiatrist and the treating team, in consultation with the Chief Psychiatrist, to work with and prepare the person for the day when their order expires on 1 October 2008.
  - Previously, hospital orders had an indefinite duration.
- If a person on a hospital order requires continuing involuntary treatment after their order expires, the usual procedures for initiating involuntary treatment under the Mental Health Act apply.
- If a person was on a RCTO on 30 September 2006, the duration of their RCTO has not changed. The Chief Psychiatrist will continue to extend these RCTOs, if appropriate.

### Discharge

- Discharge from a hospital order or RCTO will continue to be limited to the Chief Psychiatrist or the Mental Health Review Board (at an appeal or review).

### Other transitional arrangements

- Existing laws will continue to apply to people on hospital orders during the two-year transition period. This means the Chief Psychiatrist will continue to make, vary, extend and revoke RCTOs.
- Old procedures, forms and patients' rights booklets will continue to be used and old legal codes, business rules and functions in the Client Management Interface (CMI/ODS)<sup>2</sup> will apply to this group for the two-year period.
- These transition arrangements only apply to existing hospital order patients. The new laws, policies and procedures apply to any RITO made from 1 October 2006.

<sup>2</sup> The CMI/ODS is the Victorian public mental health client information management system.

## Hospital security orders

### Introduction and background

- Before 1 October 2006, if a person with mental illness was found guilty of an offence, the court could make a hospital security order under s. 93(1)(e) of the Sentencing Act, by way of a sentence. The court set a term for the hospital security order, which did not exceed the period of imprisonment that the person would otherwise have been given. The court would also set a non-parole period. The person was then admitted and detained in an approved mental health service as a security patient and given treatment for their mental illness.
- From 1 October 2006, hospital security orders retain the same name but are now made under new s. 93A of the Sentencing Act.
- Section 93(1)(e) was repealed on 1 October 2006.

### Making an order

- There is no restriction on the type of offence for which a person can be given a hospital security order. In the past, however, the courts have limited these orders to more serious offences.
- Before making a hospital security order, a court must be satisfied that all the criteria in s. 93A(1)(a) of the Sentencing Act ('the s. 93A criteria') apply to the person, that is:
  - the person appears to be mentally ill; and
  - the person's mental illness requires treatment and that treatment can be obtained by the person being subject to a hospital security order; and
  - because of the person's mental illness, the detention and treatment of the person in an approved mental health service is necessary for their health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public.
- The court must also receive a report from the authorised psychiatrist of the relevant approved mental health service recommending that the hospital security order be made and stating that there are facilities or services available to treat the person's illness.

### Discharge criteria

- The Chief Psychiatrist or the Mental Health Review Board (at an appeal or review) may order that a person on a hospital security order be discharged as a security patient and sent to prison to serve the rest of their sentence.
- In making this decision, the Chief Psychiatrist or the board must consider whether the new s. 93A criteria still apply to the person and whether the continued detention of the person in an approved mental health service as a security patient is necessary.
- The new s. 93A criteria differ from the previous discharge criteria in that they require the Chief Psychiatrist or the board to decide whether the person's mental illness requires 'treatment'.
  - Previously the Chief Psychiatrist or the board had to decide whether the person's illness needs 'immediate treatment'. The purpose of this change is to clarify that hospital security orders are intended to enable longer-term treatment and rehabilitation at an approved mental health service, not just 'immediate' treatment.

### **Effect of return to prison and subsequent readmission**

- A person subject to a hospital security order who is sent to prison and later requires readmission to an approved mental health service during the period of their hospital security order, will now be readmitted as a hospital security order patient. This is achieved by the creation of a new order under s. 16A of the Mental Health Act.
  - Previously, such people were readmitted under s. 16(3)(b) of the Mental Health Act and effectively lost their hospital security order status.

### **Parole**

- The Parole Board will be able to grant parole to eligible hospital security order patients while they are still detained in an approved mental health service.
  - Previously, the person had to be returned to prison before the Parole Board had jurisdiction.
- A grant of parole will only take effect if, and when, the Chief Psychiatrist or the Mental Health Review Board discharges the person as a security patient. The person is then released into the community on parole.

### **Transitional provisions**

- Section 150(2) of the Mental Health Act provides transitional provisions for hospital security order patients. Any person detained in an approved mental health service on 1 October 2006 under a s. 16(3)(a) or (b) order of the Mental Health Act, and who before that order was serving a sentence of imprisonment which was originally made as a hospital security order, is reclassified from the s. 16(3)(a) or (b) order to a hospital security order.

## About Chief Psychiatrist's Guidelines

The information provided in this guideline is intended as general information and not as legal advice.

Mental health service management should ensure that relevant staff are familiar with the amendments and their changed responsibilities concerning people subject to RITOs, hospital orders, RCTOs and hospital security orders. Service providers should ensure that local policies and procedures are reviewed and revised as necessary to incorporate the changes.

If mental health staff have queries about individual cases or their obligations under the Mental Health Act or the Sentencing Act, service providers should obtain independent legal advice.

## Acknowledgements

Published by the Mental Health Branch,  
Metropolitan Health and Aged Care  
Services Division

Victorian Department of Human Services

Also published on  
[www.health.vic.gov.au/mentalhealth/cpg](http://www.health.vic.gov.au/mentalhealth/cpg)

Document number: CPG06104

## Document review cycle

**Last updated:** –

**This update:** October 2006

**Scheduled for review:** October 2008

**Guidelines issued:** October 2006

## Further information

For further information about the amendments, RITOs, hospital orders, RCTOs or hospital security orders, contact the Chief Psychiatrist on 9096 7571 or 1300 767 299 (toll free).

Information is also available on the Department of Human Service's website at [www.health.vic.gov.au/mentalhealth/cpg](http://www.health.vic.gov.au/mentalhealth/cpg).

Electronic copies of the Sentencing and Mental Health Acts (Amendment) Act, the Sentencing Act and Mental Health Act can be viewed or downloaded from the legislation and parliamentary documents website at [www.dms.dpc.vic.gov.au](http://www.dms.dpc.vic.gov.au).

The law as it was before the 1 October 2006 amendments can also be accessed on that site, by searching 'Victoria Law Today' and selecting the appropriate 'version history' of the Mental Health Act (version 85) and the Sentencing Act (version 93).



**Associate Professor Amgad Tanaghow**  
Chief Psychiatrist