

COMHWA Member Briefing Paper – August 2023



The Unlawful Detention of people in Hospitals

Purpose

To provide an overview of recent incidents where hospital staff have facilitated the unlawful practice of detaining people in hospital settings.

Background

The context for the recent call to provide education for healthcare workers in hospital settings emerged from a distressing incident in 2021, where a man suffered a reaction between pain medicine and alcohol and was taken to hospital after passing out near some shops. Upon waking up, the man decided he was going to leave the hospital briefly to have a cigarette, and hospital staff—concerned for his safety—called a Code Black to have him returned to the ward by security. The medical staff informed the security guard that the man had not been ‘psychologically cleared’ to leave the hospital.¹ The man resisted being forced to return, injuring a security guard during the struggle which led to police charging him with causing grievous bodily harm. After a trial in October 2022, the man was found not guilty, and District Court Judge Linda Black clarified that he had been unlawfully detained by the security guards who followed the directions of medical staff.²

Following this decision, there have been a number of calls for education to be provided to hospital staff to ensure that they understand that their duty of care to people attending hospital does not allow them to detain people against their will. The only circumstances where hospitals may enact lawful detention are either: a) with a written order through section six of *The Mental Health Act (2014)* or through b) a hospital order issued under the *Criminal Law (Mentally Impaired Accused) Act (1996)*.³ Outside of these circumstances, people voluntarily attending hospitals always have the right to leave *at any time*, and refuse treatment *for any reason*. Even if leaving would guarantee worsening a person’s condition, the duty of care health professionals have for patients does not permit them to impinge on the autonomy of those attending the service.

The Issue

While it was found that the hospital staff involved in the above court case had not acted maliciously, it was determined that they had acted unlawfully. They also did not understand this aspect of the law, believing that their duty of care over the person in question afforded them the right to order them to be detained for their own good. The ‘Code Black’ that was issued is a protocol reserved for situation where staff feel that ‘...there is a threat of physical harm or violence to themselves, other staff, patients and/or visitors.’ A code black cannot be used to compel a person’s compliance simply because it would be in their best interest—it is

¹ David Weber. 2023. ‘Court case highlights concerns over patients being held unlawfully in WA hospitals’

<https://www.abc.net.au/news/2023-01-21/concerns-over-unlawful-detention-of-patients-in-perth-hospitals/101861020>

² *Ibid.* <https://www.abc.net.au/news/2023-01-21/concerns-over-unlawful-detention-of-patients-in-perth-hospitals/101861020>

³ Joint Standing Committee on the Corruption and Crime Commission. 2023. ‘Unlawful Detention in Public Hospitals: Parliamentary Inspector’s report’

[https://www.parliament.wa.gov.au/parliament/commit.nsf/\(WebInquiries\)/8120E8408522ECE24825898100036EF7?opendocument](https://www.parliament.wa.gov.au/parliament/commit.nsf/(WebInquiries)/8120E8408522ECE24825898100036EF7?opendocument) p. 9

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reserved for situations where hospital staff, property or other people undergoing care are at risk of physical violence or harm. People attending hospitals who have not been subjected to compulsory treatment under the Mental Health Act (2014), do not need to be 'psychologically cleared' to leave, and it is illegal to use mechanisms such as Code Black alarms to infringe their autonomy. The unawareness of hospital staff about the limitations of their power, as well as the rights of those people attending hospitals, signals a need for greater education within the health profession sector.

Response to date

The reporting of the above case has led to a series of calls for further education targeted at hospital staff to ensure that they are aware of the rights of people attending hospital and the limits of their duty of care and obligation to do no harm.⁴ In March 2023, the Parliamentary Inspector issued a report that examined this issue in light of Judge Black's finding. In this report, a recommendation was made to the Minister for Health to review the report and take action to ensure that hospital staff were educated about the risks of unlawful detention.⁵ Michael Eburn, a medical law researcher at the Australian National University, summarised the law surrounding hospital detention simply: 'Hospitals are not a prison... people are free to go, people can accept or reject medical treatment for any reason they want.'⁶

Further, the Office of the Chief Psychiatrist is currently taking action to provide clinical staff working in non-authorised spaces, such as emergency departments, with guidance and practical strategies on the use of detention and restraint of people who present with mental health or alcohol or other drug-related issues. We also understand that the Department of Health will soon be issuing a policy framework, to ensure a consistent approach by all public hospital staff to the detention and restraint of persons in clinical settings.

CoMHWA's Position

- CoMHWA supports efforts to provide better education to healthcare professionals about the preeminence of consumer autonomy and the unlawfulness of ordering detention against a person's wishes.
- CoMHWA holds the view that, even when healthcare staff have good intentions, they have the *potential* to cause harm to consumers through curtailing or outright denying people their autonomy in the clinical setting. Accordingly, this serious potential should be emphasised in professional training to make healthcare providers aware of their power and help to mitigate unintended distress.
- CoMHWA believes that explicit education should be provided to emergency department staff about the conditions in which a Code Black can be legitimately called. Additionally, staff should be educated that the notion they need to provide 'psychological clearance' for voluntary hospital attendees to leave is an illegal assumption.

⁴ David Weber. 2023. 'Medical law expert issues warning to WA hospital staff over patients who want to leave' <https://www.abc.net.au/news/2023-06-20/warning-for-wa-health-workers-over-unlawful-detention-hospitals/102497536>

⁵ Joint Standing Committee on the Corruption and Crime Commission. 2023. 'Unlawful Detention in Public Hospitals: Parliamentary Inspector's report' [https://www.parliament.wa.gov.au/parliament/commit.nsf/\(WebInquiries\)/8120E8408522ECE24825898100036EF7?opendocument](https://www.parliament.wa.gov.au/parliament/commit.nsf/(WebInquiries)/8120E8408522ECE24825898100036EF7?opendocument) p. 3

⁶ David Weber. 2023. 'Medical law expert issues warning to WA hospital staff over patients who want to leave' <https://www.abc.net.au/news/2023-06-20/warning-for-wa-health-workers-over-unlawful-detention-hospitals/102497536>

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Have your say:

CoMHWA is dedicated to representing your views on these reforms. To have your say, please get in touch with our Systemic Advocacy Team at sysadvocacy@comhwa.org.au.

