# REPORT ON THE OPERATION OF THE *CORRUPTION, CRIME AND MISCONDUCT ACT 2003:* SUPPLEMENTARY REPORT REGARDING UNLAWFUL DETENTION IN PUBLIC HOSPITALS

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003* (WA)

15 February 2023

# INDEX

## 1. EXECUTIVE SUMMARY

This report is made pursuant to my functions in sections 195(1)(aa) and 195(1)(e) of the *Corruption, Crime and Misconduct Act 2003* (WA) (CCM Act) to audit the operation of the Act and to report and make recommendations to either House of Parliament and to the Joint Standing Committee on the Corruption and Crime Commission (JSCCCC).

This report provides a brief update to my *Report on the definition of 'public officer'* which I tabled with the JSCCCC on 7 February 2022 and which was subsequently tabled in the Parliament on 24 March 2022.

My focus in that report was not on the conduct of any one person, but on flaws inherent in the *Criminal Code* definition of 'public officer', which the CCM Act adopts for the purpose of determining the ambit of the Commission's serious misconduct jurisdiction. However, my report did address the question of whether it is lawful for hospital staff to prevent a voluntary patient from leaving a hospital. As I observed on page five:

> It was evident that the security officers detained [the complainant] in a corridor of the hospital and in his room, and that the alleged assault upon him occurred while doing so. There was no information in the file as to any law that enabled the hospital's staff or contractors to detain the complainant, and it appeared to me that the question as to whether it had been lawful to do so was simply not addressed.
>
> Relevantly, the Commission's conclusion that there was 'insufficient evidence to determine if the security officers used excessive force against [the complainant]' seemed to imply that some degree of force was warranted and therefore lawful. However, it was not clear to me that this was the case.
>
> The complainant was not under arrest. Whether or not he had appeared confused upon being admitted to the hospital, he was a voluntary patient who had decided to leave his room to go and meet his wife elsewhere within the building. In the absence of a lawful reason to detain him, *any* force used against him would have been excessive.

In that matter I ultimately concluded that the security guards who detained the complainant were not public officers as defined in the CCM Act and that their conduct therefore lay beyond both the Commission's jurisdiction and my own. Although I was of the view that the security guards' detention (and assault) of the complainant had been unlawful, it was therefore not necessary to establish whether this had been the case.

I have now become aware of a recent trial in the District Court of Western Australia[1] in which the trial judge, Black DCJ, addressed this question in her remarks to the jury at the conclusion of the trial. In directing the jury as to the relevant law, her Honour made the point that hospital staff have no lawful right to prevent a voluntary patient from leaving a hospital and that any force used to do so will therefore constitute an unlawful assault upon the patient.

Due to the relevance of this case to my previous report, and the fact that the legal position may not be known to all medical and administrative staff in the state's public hospitals, I have decided to draw it to the attention of the Parliament.

[1] *The State of Western Australia v Smith* DC/CRI/PER/IND/1788/2021.

## 2. THE RELEVANT LAW

The case referred to above related to a member of the public, Mr Lyndon Smith, who was taken to hospital on 28 January 2021 after he became intoxicated and passed out in a public place. After being admitted, Mr Smith informed hospital staff that he intended to walk outside and smoke a cigarette.

Just as was the case with the complainant referred to in my *Report on the definition of 'public officer'*, the hospital staff called a 'Code Black' to prevent Mr Smith from leaving. Five security guards forcibly brought Mr Smith back inside the hospital. In the ensuing struggle, all six participants fell to the floor and one guard suffered a fractured right ankle.

Mr Smith was thereupon charged with assault causing grievous bodily harm in circumstances of aggravation (the aggravating feature being that the injured person was a member of the hospital staff). He pleaded not guilty to the charge. As he had no fixed place of residence, he was remanded in custody until his trial, which took place before Black DCJ and a jury on 17 and 18 October 2022.

It appeared in this case that the hospital and security staff involved in the incident had believed that they had the right to prevent Mr Smith from leaving. In the words of her Honour, the State's case was that 'everyone was acting honestly, in the sense that no one was deliberately trying to breach the accused man's rights'. However, her Honour noted, 'The problem is that they did'. She explained that this was because none of the hospital staff (which her Honour expressed to include all doctors, nurses and security personnel) had any legal right to prevent Mr Smith from leaving the hospital or to detain him within the hospital.

Her Honour made it clear in her direction to the jury that Mr Smith was 'as a matter of law, entitled to leave for a smoke, entitled to leave to go home, entitled to leave to go and sit on a park bench'. Further, her Honour directed the jury that the hospital staff, as she had collectively described them, 'had no lawful right to use any force upon [Mr Smith]…so as a matter of law the two security guards who held either arm and the security guard who had his hand behind him were all acting, as a matter of law, unlawfully'.

Despite the police having charged Mr Smith with assault causing grievous bodily harm, by the time the matter came to trial both the prosecution and the defence were in agreement that it had been unlawful for the security guards to detain him. It might be thought that in those circumstances the State would withdraw the charge against Mr Smith. Instead, the prosecution contended that, notwithstanding the unlawfulness of the security guards' actions, Mr Smith's own acts in the struggle referred to above exceeded what was reasonably necessary to defend himself from their assault of him.

As well as raising self-defence, Mr Smith argued that the fracture of the security guard's ankle was entirely unintended and was an accident that could not have been reasonably foreseen by him when the melee started.

It seems that the jury accepted either or both of Mr Smith's defences, as it returned a verdict of not guilty.

## 3. CONCLUSION

There are some instances when a person may be detained in hospital against their will in Western Australia, such as where they are an involuntary patient pursuant to the *Mental Health Act 2014*[2] or the subject of a hospital order made under the *Criminal Law (Mentally Impaired Accused) Act 1996*.[3]

However, unless such circumstances apply, a person who presents at or is conveyed to a hospital, who is not under arrest or subject to a court order, is under no obligation to stay there. As Black DCJ observed in this case,

> Mr Smith was allowed to walk out. No one had the right to lay a hand on him, and no one had the right to detain him…he should have been allowed to leave.

Those observations are equally applicable to the complainant in my previous report, and to any other voluntary patient in Western Australia, although it seems tolerably clear that this may not be well understood by hospital staff.

Unfortunately, in Mr Smith's case and in the complaint referred to in my *Report on the definition of 'public officer'*, the hospital staff appear to have sincerely believed that they had the right to detain a patient where they did not consider the patient was ready to leave. This mistaken belief was no doubt well-intentioned and based on a concern for the patient's best interests. Nevertheless, this belief led to deprivation of liberty, injury, distress, and, in Mr Smith's case, criminal charges that resulted in his being remanded in custody for a significant period of time before finally being acquitted.

It is trite to say that freedom includes the freedom to make poor decisions. Certainly, in a medical context, patients are at liberty to make choices that healthcare professionals may consider unwise. They may disregard advice regarding treatment, continue to smoke and drink to excess. They may also, relevantly, decide to discharge themselves from hospital against medical advice. However, in the absence of specific legislative provision to the contrary, a doctor's duty of care to a patient will not trump the rights of the patient as an individual.

I respectfully suggest that this case, together with the complaint discussed by me in my previous report, demonstrate that there is a need to ensure that all hospital staff are made aware of the state of the law so that future incidents of this kind are avoided.

**MATTHEW ZILKO SC**
**PARLIAMENTARY INSPECTOR**

[2] See *Mental Health Act 2014*, Part 6.
[3] See *Criminal Law (Mentally Impaired Accused) Act 1996*, section 5.