

Chapter Eight

The Mental Health Tribunal

Increased powers of review

The 'old' Mental Health Review Tribunal was established under the 1963 Act, to review decisions made under mental health legislation. The old Tribunal had limited operation, holding only 3 – 4 hearings annually, generally dealing with forensic clients and occasional hearings relating to treatment orders. With the advent of the *United Nations Principles*, the law relating to the Tribunal required amendment to enable the Tribunal to review decisions within a shorter time frame.

The Tribunal has been restructured under the 1996 legislation. It is now known as the Mental Health Tribunal, and has a wider review and oversight role. It introduces automatic reviews (review without an application by the patient) of continuing care orders and community treatment orders, and will review the use of restraint and seclusion in approved hospitals. The Tribunal will also review transfers of involuntary patients between hospitals or jurisdictions, and any withholding of information about diagnosis and treatment from people on involuntary hospitalisation orders. This chapter will explain the changes, and provide an indication of the possible procedures it may adopt.

As the staffing and other administrative arrangements of the Tribunal had not been finalised at the time of publication, the following information about the Tribunal is based on the legislation. It is anticipated that the Tribunal may wish to add information to this Guide on procedures for hearings when the President and other Tribunal members have been appointed.

The role of the Tribunal ([section 51](#))

The Tribunal has 4 main roles:

- to review orders relating to involuntary patients;
- to review the use of restraint and seclusion, and the withholding of information from involuntary patients, and issue any regulations or guidelines for regulating these matters;
- to receive notification of suspected breaches of the Act from official visitors; and
- to report annually to Parliament.

These roles are discussed below.

1. Reviewing orders relating to involuntary patients

Ensuring independent, external review of mental health orders as soon as possible after the person has been placed on an order is a focus of human rights in mental health. The emphasis on review is due to the serious view the law takes on depriving a person of their freedom, whether this is freedom to leave the hospital or freedom to choose to undergo medical treatment. To ensure that review of these decisions occurs within a short time frame, automatic reviews have been placed in the legislation of most States and Territories, and form part of the new *Mental Health Act*.

Automatic review is the review of a decision to place a person on an order within a particular time frame and without the need for the person to apply for a review. A review of an order can also occur on the application of the patient, the person responsible or another person with an interest in the welfare of the patient.

Automatic review of orders

The Tribunal must review all continuing care orders and community treatment orders within 28 days of the order being made or renewed. As the review must occur within 28 days, it can take place at any time up to the 28 day limit, for example within a day, a week or two weeks of the order being made. Review of a continuing care order or community treatment order will occur irrespective of whether the patient has applied to have the order reviewed.

The Tribunal must also review a transfer of an involuntary patient to Tasmania within 28 days after the date that the person is transferred. The Act states that the Tribunal must be notified of a number of events such as the making of orders, so that reviews can be triggered and so the Tribunal knows if the circumstances change (for example, by the person being discharged from the order, or being transferred to another hospital). A summary of the notifications required is included at the end of this chapter.

Review of orders on application [section 52\(4\) and \(5\)](#)

On an application by the patient, the person responsible, or another person with an interest in the welfare of the patient, the Tribunal can review:

- a continuing care order;
- a community treatment order;
- the transfer of an involuntary patient to another approved hospital, or the refusal to transfer an involuntary patient to another approved hospital;
- the transfer of an involuntary patient into or out of Tasmania.

If the application is made by a person other than the patient, this person must satisfy the Tribunal that they have a proper interest in the welfare of the patient. The Tribunal may still review an order even if the person has been released from the order. The Tribunal will decide who has a proper interest in the welfare of the patient, but this may include the person responsible, the public guardian, an official visitor or a mental health professional.

Under the Act, if a patient indicates a wish to apply to the Tribunal for a review, reasonable assistance must be provided to the patient by hospital staff to make and lodge an application.

When can an application for review be declined? [section 52\(5\)](#)

The Tribunal can decline to review a matter if:

- it is three months or less since the Tribunal last reviewed the matter; and
- there is no material change in circumstances since the last review. A material change means one that has an impact on the decision. For example, the person may have moved in with a carer who is able to assure the Tribunal that medication will be taken.

The Tribunal can combine a hearing on application with an automatic review. If the application to review a decision is accepted, it must be heard within 21 days from the date when the application was made, unless another review under the Act is due to be heard within the following 35 days.

2. Reviewing the use of restraint, seclusion, and any withholding of information from involuntary patients (sections [36](#), [46](#), [71](#) and [72](#))

(a) Bodily restraint and seclusion

Instances of restraint and seclusion must be reported to the Tribunal every month (on Forms 11 and 12). These forms may change from time to time, as they are in a form that the President [of the Tribunal] directs. The Tribunal will examine these registers monthly, and may issue guidelines and directions relating to the use of restraint and seclusion. A direction will apply to a specific matter whereas a guideline may have more general application to mental health services delivery. The Tribunal will develop a consultative mechanism so that the views of mental health professionals can be heard and considered prior to any new guidelines being promulgated.

(b) Withholding of information

A person on an order, and their person responsible, must be given information on the person's diagnosis and treatment when this has been determined by the treating team. Information can be withheld from this statement if the medical practitioner in charge of the person's treatment considers that the information will have an adverse effect on the person's treatment.

If information is withheld, the Tribunal must be notified within 48 hours. The Tribunal may issue guidelines or directions relating to the withholding of information.

3. Notification by the official visitors of suspected breaches

The official visitors have an obligation to report suspected breaches of the Act to the Tribunal. The Tribunal may then accept an application for a hearing from an official visitor (as a person with a proper interest in the patient's welfare) and review the matter, or may consider the information during the course of any scheduled hearing. The Tribunal may also report any breaches to Parliament in its Annual Report.

Tribunal hearings

Prior to the hearing

Prior to a hearing, the Registrar of the Tribunal must give reasonable notice of the hearing to:

- the patient;
- the person responsible for the patient;

- the controlling authority of the hospital; and
- any other person to whom the Tribunal directs that notice should be given (ie, other interested parties).

While reasonable notice is not defined in the Act, it is assumed that in the ordinary course of events, a minimum of one week's notice would be given. Where a matter appears to have greater urgency (for example a matter concerning the transfer of a patient), the Tribunal could hold a hearing more quickly so long as each party appearing agreed to the proposed hearing date. What notice is reasonable will therefore vary in a particular case.

Tribunal members can visit and interview in private an involuntary patient who has made an application to have their order reviewed. This applies whether the application is by the patient, the person responsible or another person who has an interest in the welfare of the patient.

The Tribunal may require the hospital to provide it with a report on the patient or copies of the patient's record, and it can be anticipated that this will be required on a regular basis.

The Tribunal can also require the patient to have a medical examination before the hearing, or during a hearing, if it appears that this is necessary. The Tribunal must give the patient written notice of the medical examination, stating the date, time and place of the examination and the name of the medical practitioner who will conduct the examination, and must satisfy itself that the examination is necessary. The medical practitioner who conducts the examination may be a member of the Tribunal.

At the hearing

The hearing will be held at a time and place that the President considers suitable. It can be anticipated that hearings for patients being detained in hospital will be held at the hospital to avoid moving the person. The venue chosen for reviews of community treatment orders will also take into account the needs of the person subject to review and the other parties attending. Possible venues include community mental health centres, an approved hospital or other appropriate public building. Hearings may also take place by video conference and this will obviously limit the choice of venue on these occasions.

Proceedings before the Tribunal are closed to the public unless the Tribunal orders otherwise. The Tribunal can exclude a person from the hearing if they disrupt the proceedings.

At the hearing the Tribunal must consider the objects and principles in sections 6 and 7, and is bound by the principles of natural justice. The two basic principles of natural justice are that the person adversely affected by a decision must be given the opportunity to be heard and the decision maker must not be biased in the matter to be decided.

People who have a right to be present at the hearing, and who can be represented at the hearing by a lawyer or another person are:

- the patient;
- the person responsible;
- the controlling authority of the hospital;
- any other person who is made a party to the hearing by the Tribunal.

For an interesting perspective on the provision of medical evidence to Mental Health Review Boards and Tribunals see the article by Stephenie du Fresne, 'Preparation and Presentation of Medical Evidence for Civil Commitment Hearings' in the *Journal of Law and Medicine*, February 1996 pp 256-261. Copies can be obtained from the DHHS library or Tribunal.

Evidence can be given to the Tribunal orally or in writing. A Tribunal member may ask the people who appear before it to give evidence on oath, and may require written information to be in the form of a statutory declaration. Evidence given to the Tribunal cannot be used in any legal proceedings other than for offences against the *Mental Health Act*. A person who gives information to the Tribunal for the purpose of a hearing or when requested to do so by the Tribunal, cannot be found liable for doing so as long as they give the information in good faith and have reasonable grounds for believing the information to be true. A person who gives information that is malicious or false cannot claim this protection, and may be found guilty of an offence under [section 84\(2\)](#).

The Act expressly states that a medical practitioner can disclose information about a patient to the Tribunal without the consent of the patient.

While the procedure for hearings will be determined by the President and members of the Tribunal, the basic procedures for mandatory reviews would include the following:

- the Tribunal members will be introduced to the patient, the medical practitioner and any other party. The nature and format of the proceedings will be explained;
- the Tribunal will check to see that matters that need to be completed before the hearing have been completed (such as notice to the parties and any medical examination);
- the medical practitioner will be invited to address the Tribunal;
- the Tribunal will question the medical practitioner;
- the patient will be given the opportunity to question the medical practitioner;
- the medical practitioner will be given the opportunity to question the patient;
- the patient and the medical practitioner will be given the opportunity to make any comments;
- the parties will be asked to leave the room while the Tribunal considers its decision;
- the Tribunal will deliver its decision with brief oral reasons.

The order of proceedings may be altered when the Tribunal hears a review on the application, so that the person making the application can present their evidence to the Tribunal at the commencement of the hearing.

It is worth emphasising that while the Tribunal must be fair and thorough, it must avoid any unnecessary formality. Hearings will work best if all involved are aware of the expectations upon them and the process to be followed, and any practitioners who are concerned about appearing before the Tribunal are encouraged to contact the Registrar or President prior to the hearing to discuss the procedures. Training and information sessions for practitioners can also be provided on request. The Tribunal's contact details are listed at the end of this chapter.

Powers of the Tribunal and offences created

The Tribunal can require any person to appear before it and produce books, papers or other documents as required. If the person does not respond to the summons to appear and/or produce documents they may be charged with an offence under [section 91](#).

The Act also creates some offences concerning the Tribunal. A person who misbehaves before the Tribunal, insults a Tribunal member or a person assisting the Tribunal, interrupts Tribunal proceedings or refuses to be sworn or answer questions may also be charged with an offence under section 91. In addition, a person who does not comply with a decision of the Tribunal may also be found guilty of an offence under [section 67](#).

The maximum penalty that can be imposed on a person following summary conviction (ie conviction before a magistrate) under these sections is a fine not exceeding \$2000 or imprisonment for a term of one year, or both. It will hopefully be a rare occurrence that a person is charged with an offence under these provisions, although experience from similar jurisdictions would suggest that the threat of the penalty can sometimes be a very useful deterrent.

The Tribunal's membership ([section 48](#) and [schedule 1](#))

The *Mental Health Act* specifies that the Tribunal will have a President, who must be a qualified legal practitioner of at least seven years standing, a Deputy President, and at least one approved medical practitioner. There must be at least six members of the Tribunal, however perhaps 20 members will be appointed to ensure that members are available and that the workload is not too onerous for busy practitioners. Members will be selected from each region of Tasmania, and will be employed on a sessional basis.

Tribunal members are appointed by the Governor on the recommendation of the Minister. In nominating a person to become a member of the Tribunal, the Minister must consider the matters that the Tribunal will determine, and the need for members to have appropriate knowledge and experience to decide these matters. Expressions of interest have been sought from psychiatrists and other health professionals, lawyers and those with an interest or experience in the treatment and care of people with a mental illness. It is anticipated that there may be some overlap between the membership of the Tribunal and the Guardianship and Administration Board, although the Tribunal's membership was not finalised at the time of publication. If the Board and Tribunal share some members in common, it will be possible to hold joint hearings when a matter involves issues from both jurisdictions.

The President and Deputy President are appointed for five years. The remaining members are appointed for up to five years. The Governor can remove or suspend a member from his or her position if the member is unable to adequately perform his or her duties.

The Act states that a member is removed from office if he or she:

- becomes bankrupt;
- is convicted of an indictable offence;
- resigns; or
- is of or over the age of 70.

Staff of the Tribunal (schedule 1)

The Act specifies that the Tribunal will have a Registrar, and other staff as necessary to assist in running the Tribunal. The Tribunal is co-located with the Guardianship and Administration Board, and the administrative staff will assist in the running of both the Board and the Tribunal.

For further information contact:

The Mental Health Tribunal
Ground floor, Emily Dobson House
99 Bathurst Street
GPO Box 1307
HOBART TAS 7001
Telephone: (03) 6233 3033
Facsimile: (03) 6233 4509
Email: mht@justice.tas.gov.au
Web site: under construction at time of publication
access via: <http://www.justice.tas.gov.au>

Summary of notifications to the Tribunal required under the Act

The Act states that the **Tribunal must be notified** of a number of events and these must be provided to the Tribunal within a set time-frame, usually 48 hours, 7 days or each month. The notifications are provided by the **senior approved medical practitioner** to the Registrar of the Tribunal. Standard notification forms have been prepared, however these may be revised during the first few months of the Act's operation to include any additional particulars that the President of the Tribunal may require. The relevant sections of the Act are included below, if you wish to refer to them.

48 hour notifications

- continuing care orders (CCOs) made or renewed – [section 70\(1\)\(a\)](#);
- transfer of patient to another approved hospital (if it occurs within the first 48 hours of them being admitted) – [section 70\(1\)\(c\)](#);
- community treatment orders (CTOs) made or renewed – [section 70\(3\)](#);
- discharge of community treatment orders – [section 70\(5\)](#);
- transfer of a person to an approved hospital under Part 12 (via interstate Agreement) [section 70\(4\)](#);
- withholding of information from involuntary patients on CCOs or CTOs under [section 45\(3\)](#) – section 72.

Weekly notifications

- discharge of involuntary patients during the previous week – [section 70\(2\)\(a\)](#);
- transfer of involuntary patients under [section 39](#) or Part 12 (ie to another approved hospital or from interstate under an inter-jurisdictional agreement) – [section 70\(2\)\(b\)](#).

Monthly notifications

- report on use of bodily restraint – [section 71](#).
This report must include:
 - (a) the name of the patient; and
 - (b) the form of restraint used; and
 - (c) the reasons for the restraint; and
 - (d) the name of the person who authorised the use of restraint; and
 - (e) the period for which the patient was kept under bodily restraint.
- report on seclusion of involuntary patients – [section 71](#).
This report must include:
 - (a) the name of the patient; and
 - (b) the place of seclusion; and
 - (c) the reasons for the seclusion; and
 - (d) the name of the person who authorised the seclusion of the patient; and
 - (e) the period for which the patient was kept in seclusion.

How to notify the Tribunal

The Tribunal can be notified by facsimile (on (03) 6233 4509) or by mail. It is expected that notifications will be faxed due to the short time frames provided by the Act. However, during the first months of operation, it may be a useful double check for the original copy of any notification to be mailed to the Tribunal. If you have any queries about notifications, please contact the Tribunal by telephone on (03) 6233 3033 to discuss your concerns.

Key points

The Mental Health Tribunal

- The Tribunal has 4 main roles:
 - (a) to review orders relating to involuntary patients;
 - (b) to review the use of restraint and seclusion, and the withholding of information from involuntary patients, and issue any regulations or guidelines for regulating these matters;
 - (c) to receive notification of suspected breaches of the Act from official visitors;
 - (d) to report annually to Parliament.

Reviews by the Tribunal

- Reviews can be mandatory (automatic) or on the application of the person, their person responsible or other interested person.
 - (a) The Tribunal must review within 28 days:
 - (i) continuing care orders and community treatment orders made – [section 52\(1\)](#);
 - (ii) continuing care orders and community treatment orders renewed – [section 52\(2\)](#);
 - (iii) transfers of involuntary patients to Tasmania under Part 12 of the Act – [section 52\(3\)](#).
 - (b) In addition, on application (by the patient; their person responsible; or a person with a proper interest), the Tribunal will review within 21 days:
 - (i) a continuing care order – [section 54\(4\)\(a\)](#);
 - (ii) a community treatment order – [section 54\(4\)\(b\)](#);
 - (iii) a transfer to an approved hospital, or refusal to transfer – [section 54\(4\)\(c\)](#);
 - (iv) a transfer to or from Tasmania under Part 12 of the Act – [section 54\(4\)\(d\)](#).
 - (c) If a mandatory review is being heard within 35 days, a review on application can be combined with the mandatory review – [section 54\(2\)](#).

Consideration of reports

- The Tribunal will receive and consider reports on:
 - (a) the use of seclusion in approved hospitals;
 - (b) the use of bodily restraint in approved hospitals;
 - (c) the withholding of information from a person or their person responsible under [section 45](#) of the Act.
- The Tribunal may issue directions or guidelines on the use of seclusion, bodily restraint and withholding of information – [section 51\(d\)](#).
- The Tribunal will also receive reports from official visitors on suspected breaches of the Act.

Annual report

- The Tribunal must prepare an annual report giving full particulars of its exercise of powers under this Act.