

# Guidelines for Panel Lawyers in matters before the Mental Health Review Tribunal

## Introduction

These guidelines must be read in conjunction with the Mental Health Advocacy Practice Standards.

## Terminology

The terms ‘inquiry’ or ‘inquiries’ are used to refer to any proceedings before the Mental Health Review Tribunal (MHRT) including Mental Health Inquiries (s34); subsequent Reviews (s37); determination of Applications for ECT and financial management orders.

## Application of Guidelines

These guidelines apply to Mental Health Advocacy panel practitioners only.

They provide a quick reference guide for panel practitioners when assisting and/or representing people who are subject of inquiries conducted before the MHRT.

Legal Aid NSW expects the standard and quality of service provided to be no different to that provided to all other people receiving legal services. Indeed, because this population of people necessarily experience a disability, which places them in an obvious position of vulnerability, services must be delivered in a timely, accurate and thorough manner.

## List of Patients

Most, though not all, *Declared Inpatient Mental Health Units* (hospitals) hold s34 *Mental Health Inquiries* (1<sup>st</sup> presentation before the MHRT after being detained) on a regular day and time.

It is usual for a list of patients to be prepared by the hospital, a copy of which should be obtained in advance from the hospital if not received at the time of assignment by Mental Health Advocacy Service (MHAS). The list should include details of the application before the MHRT such as applications for continued detention, community treatment order, financial management orders and s44 appeals against refusal to discharge a patient on their request.

At other hospitals, all MHRT inquiries are listed “as and when required”, often at short notice. In those cases, details of the application/s before the MHRT, as provided by the hospital, will be passed on at the time of assignment by the MHAS or the hospital.

Otherwise the assigned practitioner will be provided with copies of *Listing Notices*, which are the applications made by the hospital and are forwarded by the MHRT to the MHAS and thence to the practitioner. Listing Notices indicate the name of the hospital and patient and the application to be considered by the MHRT.

## Legal Aid Policy for Representation

Representation is not afforded to all patients in all circumstances. The table below provides a quick guide to when and how representation is afforded in accordance with Legal Aid Policy. Some patients need to satisfy the *Merit* and/or *Means Tests* to be afforded representation.

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People subject to the merit and means tests include those detained as *involuntary patients* for over 12 months and are subject to a further application for continued detention under s37(1)(c) of the *Mental Health Act* (MHA).

If a patient is subject to an application requiring these tests to be satisfied, you should *not* ask that person whether they wish to be represented even if they are named on the list of patients who will be presented before the MHRT. That list indicates who will be presented before the MHRT and not who requires Legal Aid assistance and representation. However, if such a patient asks for representation you can only represent them if they satisfy the **merit test**. To satisfy the merit test the patient's position has to have '*reasonable prospects of success*.'

To satisfy the **means test** requires an application for a grant of Legal Aid to be made and an assessment of the person's financial status undertaken. In circumstances where the person seeking representation is detained in a hospital and the inquiry is scheduled to be heard on the same day as other matters, a formal application is not required. Rather, an immediate assessment of the patient's financial capacity to meet the costs of representation should be undertaken. Whereas the majority of patients receive social security benefits and/or do not have ready access to their finances because they are detained, the means test is satisfied in the circumstances. Where the person has the means to fund representation they should do so and Legal Aid should not be afforded.

For matters that fall in the column of '**on request**,' such as an application for ECT for an involuntary patient, representation should be given if the person asks for representation. Merit does not need to be determined.

#### AVAILABILITY OF REPRESENTATION

Inquiry	Representation Afforded as long as the patient does not refuse representation	Representation Afforded on basis of patient instructions	Representation Dependent on satisfying merit test	Representation Dependent on satisfying the means test	Representation On request only (No means or merit assessment)
Mental Health Inquiry Assessable Person s.34	✓				
s.37 (1)(a) Review Involuntary Patient		✓			
s.37 (1)(b) Review Involuntary Patient		✓			
s.37 (1)(c) Review Involuntary Patient		✓	✓	✓	

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s.63 (Breach Review) CTO		✓			
Financial Management Order s.46		✓			
Revocation of Financial Management Order		✓	✓	✓	
CTO Inpatient (s51)		✓			✓
CTO <i>In community &amp; 1<sup>st</sup> time CTO application</i>		✓			
CTO <i>In community &amp; <u>not</u> 1<sup>st</sup> time application / renewal</i>		✓	✓		✓
MHRT s.44 (Appeal-Assessable Person)		✓			
MHRT s.44 (Appeal-Involuntary Person)		✓	✓	✓	
ECT (Assessable Person)		✓			
ECT (Involuntary Patient) s.94(2)		✓			✓

## Duty Matters

1. Liaise with the relevant duty Roster Coordinator (*the person or office that allocates representation such as the MHAS or the nominated panel practitioner working with other panel practitioners in a particular area*) about duty roster commitments.
2. Be aware of the commencement time for the duty list and be in attendance accordingly.
3. Panel members rostered for duty must attend on each day that they are rostered on and are to be in attendance at the hospital 30 minutes prior to the list commencing. Failure to be in attendance 30 minutes prior to the commencement of the duty list may result in duty matters being re-allocated. In such circumstances, panel members will not be permitted to submit a duty invoice for that day.
4. Where a panel member is unable to attend on a rostered duty day, the panel member must contact and advise the Roster Coordinator as soon as possible of their unavailability, so that the Roster Coordinator can organise and obtain an alternate lawyer to attend the duty day.
5. Failure to notify the relevant Roster Coordinator that you are unable to attend a rostered duty may result in removal from future duty rosters.
6. Panel members must not delegate their duty roster commitments to lawyers and/or barristers who are not members of the panel. The Roster Coordinator and the MHAS must be notified of any delegation which can only be granted to another panel member or Legal Aid solicitor.

## Appearing At a Hospital

Attending mental health facilities is sometimes difficult and frustrating. Most if not all hospitals are secure and access and moving around the facilities can be cumbersome.

Each hospital is independent of the other and will have its own unique process and procedures.

1. Obtain the list of patients in advance of the duty day from the MHF.
2. Check the list of patients includes the details of the application before the MHRT. If those details are not included, immediately obtain those details from the MHF.
3. Ensure that you are aware in advance of the processes and procedures of the MHF at which you are appearing.
4. Arrive as early as possible before taking instructions or appearing before the MHRT.
5. On arrival at the hospital identify yourself, indicate why you are at the hospital and provide identification, if asked, such as your Law Society card.
6. Behave in a manner that recognises that you are a guest at a hospital and in effect you represent both the MHAS and Legal Aid NSW.
7. After entering the ward you should approach the nurse in charge or shift coordinator, introduce yourself and confirm patient details, including names of patients and applications to be determined.

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8. Approach each patient on the list and confirm with them whether they wish to be represented at the inquiry noting;
  - (i) At a Mental Health Inquiry (s34) the patient must be represented unless they refuse.
  - (ii) At all other inquiries (such as s37 reviews of involuntary patients) the patient must state they wish to be represented.
9. For those who are to be represented – read their medical records including:
  - (i) the admission documents indicating when and why they were admitted and detained;
  - (ii) the circumstances leading to admission; and
  - (iii) the evidence indicating whether the patient satisfies the statutory tests for being found to be a mentally ill person as defined.

Reading the relevant documents and taking instructions should take no less than 30 minutes for each patient, although this will vary depending on the patient's capacity, the application to be determined and the evidence, such as reports and the like.

10. Do not give any documents provided by the hospital to the patient, including any copies of medical records and admission documents.
11. You may read the relevant aspects of documents to the patient.
12. Be cognisant that information regarding third parties, such as family, might be harmful if shared with the patient. If the patient seeks such information and after reading it you feel it might be harmful speak to the author of the document (such as the doctor or nurse) and confirm whether they agree with the information being shared with the patient. If the author indicates the information should not be shared with the patient you must not share that information with the patient (s156(3) of the MHA).
13. If a patient wishes to read documents and/or have copies of documents after you have read the documents, ask the author of the documents (usually the treating doctor) whether they oppose. If opposed by the document's author or the treating team and the patient wishes to pursue access, at the commencement of the inquiry make an application to the MHRT for access (s156). If the patient is granted leave to read the documents sought the matter may be stood in the list whilst the patient reads the documents and then provides further instructions or the matter may be adjourned to another date.
14. When reading the documents ensure the admission process accords with the MHA including:
  - (i) the s18 process (when/how a person is initially taken to and/or admitted to the MHF); and
  - (ii) the s27 process (examination and determination by 2 doctors, one being a psychiatrist) confirming the patient is a mentally ill person as defined.

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15. Ensure the processes required for being presented before the MHRT are satisfied including:
  - (i) The *designated carer or principal care provider* have been notified of the inquiry (s78);
  - (ii) the person has been provided with a copy of the Statement of Rights (s74(3) & Schl 3);
  - (iii) the person is presented in fair manner, such as being dressed appropriately, and not being adversely affected by medication.

### **Inquiries before the Tribunal**

The MHA describes proceedings as being conducted with ‘...*as little formality and technicality and with as much expedition as the requirements of (the MHA), the regulations and the proper consideration of the matters before the Tribunal.*’<sup>1</sup>

Appearing before the Tribunal should be approached in the same manner as appearing before any other legal decision making body.

The inquiry should not be used as a forum intended to damage relationships such as those between patient and hospital staff. However, like any other decision making forum, where a person’s liberty and autonomy are at issue, there will be occasions when an adversarial approach is appropriate.<sup>2</sup>

1. When appearing before the Tribunal act in accordance with instructions, test the evidence where appropriate and ensure legislative requirements are met, including when orders are not opposed.
2. Be mindful of the ongoing relationship between the patient and hospital staff and avoid argumentative or aggressive advocacy styles.
3. The inquiry must not be used as a complaint forum.

### **After the Inquiry**

After the inquiry has been conducted and the Tribunal has made its decision it is very important that patients understand orders are:

- Not a mechanism for punishment or made because the person has done something ‘wrong’;
  - The length of an order for detention does not mean the patient must remain at the MHF for the entire period of the order. Rather, the doctors have the discretion to give the patient leave and discharge them at any time during that period;
  - If at the end of the period of the order the doctors want the patient to remain at the MHF as an involuntary patient the MHRT must conduct a further inquiry. The same principle applies in regard to ECT treatments.
1. Try to ensure the patient understands what has occurred at the inquiry, the decision and its affect.

<sup>1</sup> S151 *Mental Health Act*

<sup>2</sup> *Crime and Mental Health Law in New South Wales* by Howard, Dan & Westmore, Bruce, Butterworths 2005 at page 100.

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2. Where possible speak to the patient in private outside the room where the inquiry was conducted.
3. Keep legible written file notes of the information you provided to the patient after the inquiry.

### **Dispute Resolution**

Issues raised by the hospital, patient or lawyer should be raised with either the Senior Solicitor (Civil) or Solicitor-in-Charge, Mental Health Advocacy Service.

### **Legal Aid NSW Contact Details**

<b>CONTACT</b>	<b>DETAILS</b>
MHAS administrative staff	Phone: 8746 2649 or 8746 2631
Senior Solicitor Civil Practice MHAS	Phone: 8746 2647
Solicitor in Charge Mental Health Advocacy Service	Phone: 8746 2623