

Mental Health Advocacy Practice Standards

This document sets out practice standards for lawyers representing clients in proceedings brought under the *Mental Health Act 2007*, the *Mental Health (Forensic Provisions) Act 1990*, the *Drug and Alcohol Treatment Act 2007*, the *NSW Trustee and Guardian Act 2009* and the *Guardianship Act 1987*.

These practice standards apply to in-house Legal Aid NSW solicitors and private lawyers acting in legally aided mental health, drug and alcohol treatment, financial management and guardianship matters.

Lawyers who are appointed to the Mental Health Advocacy Panel (the panel) are eligible to receive grants of aid and assigned work from the Grants Division, including case matters and duty work in all Mental Health Advocacy and Guardianship matters in NSW.

Legal Aid NSW may audit panel lawyers for compliance with practice standards. Continued inclusion on the panel is conditional on compliance with these practice standards.

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General Principles

The principles for care and treatment set out in the *Mental Health Act 2007* include a statement to the effect that persons who are mentally ill are to receive the best possible care and treatment in the least restrictive environment enabling that care to be given safely and effectively.

The principles in the *Guardianship Act 1987* include a statement to the effect that the welfare and interests of persons with disabilities should be given paramount consideration.

The principles in the *Drug and Alcohol Treatment Act 2007* include a statement to the effect that persons with severe substance dependence should be subject to involuntary detention only as a last resort, and should receive the best possible care and treatment for their stabilization, health and safety in the least restrictive environment.

Legal representation in Mental Health Advocacy matters occurs in the following ways:

Direct Representation

In the normal course of proceedings, a legal representative for a client involved in the proceedings acts as for any other client in any other forum.

Mental Health Matters

The *Mental Health Act 2007* provides that the fact that a person is suffering from a mental illness or developmental disability is not an impediment to their legal representation in a mental health inquiry or before the Mental Health Review Tribunal (s 152). This is accepted to be authority to act on the instructions of a person who may be mentally ill, as the purpose of most hearings under that Act is to make a determination as to the presence or otherwise of mental illness and the need for restrictive forms of care and sometimes coercive treatment. A forensic patient or correctional patient who is before the Tribunal must be represented by a lawyer unless that patient refuses to have representation. An assessable person who is before the Tribunal for a *mental health inquiry* (1st application before Tribunal for detention) must be represented by a lawyer unless the assessable person refuses to be represented.

Drug and Alcohol Treatment Matters

The *Drug and Alcohol Treatment Act* at s 37(7) provides that the dependent person must be represented in the proceedings by a lawyer unless that person states that he or she does not wish to be represented.

Guardianship Matters

Section 58 of the *Guardianship Act 1987* provides that a party may appear in person or, by leave of the Tribunal, be represented by a lawyer or agent. This section makes provision for the appointment of *guardians ad litem* and *separate representatives*. In cases where the person is not able to state a consistent or any view, the Tribunal appoints a *separate representative* where it determines that to do so would be in the person's interests.

Amicus Curiae

Section 154 of the *Mental Health Act* requires forensic patients, correctional patients and assessable persons be represented by a lawyer in all proceedings before the Tribunal unless the person decides they do not want to be represented. In effect these people must be represented even where they cannot give instructions and/or do not indicate they do not want to be represented.

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In all other proceedings before the Tribunal the patient *may* be represented. That is, the patient must indicate they wish to be represented. Section 152 of the *Mental Health Act* indicates a mental illness or intellectual disability is presumed not to be an impediment to the person being represented.

It is therefore unlikely the role of *amicus curiae* is required or necessary. Secondly, where a person has refused representation, either seeking to appear in that capacity or the Tribunal asking a solicitor to appear in that capacity is likely to create confusion, frustration and in effect be anti-therapeutic. Acting in the capacity of *amicus curiae* should be considered unlikely and rare.

1. Responsibilities to Clients

A lawyer representing a legally assisted client in a case or duty matter covered by the panel will do the following where applicable:

- 1.1 Read and observe the objects and principles listed in the respective Acts.
- 1.2 Provide representation in accordance with the Legal Profession Uniform Law (NSW) and the relevant Legal Profession Uniform Conduct Rules.
- 1.3 Act as the client's direct representative in all proceedings save where appearing in the capacity of *separate representative* following an order for separate representation being made in guardianship matters.
- 1.4 Advise the client of the availability of legal aid and, where appropriate, assist the client to complete an application for legal aid.
- 1.5 Obtain from the client adequate instructions as to the current status of the matter in order to apply for a grant or for an extension of legal aid.
- 1.6 Assist the client in obtaining a grant of legal aid by providing Legal Aid NSW with all information relevant to the application or extension.
- 1.7 Observe the principles governing the lawyer/client relationship and the privacy of instructions provided by the client.
- 1.8 Where necessary, use a qualified interpreter and obtain approval from the Grants Division if required.
- 1.9 Meet with the client as early in the process as possible and communicate with the client in a way that the client understands using language appropriate to the age, maturity, education and cultural background of the client.
- 1.10 Promptly comply with reasonable requests by a client for information regarding their matter.
- 1.11 Provide a meaningful reply to all correspondence, reply promptly to urgent matters and advise clients that a detailed response for advice may require more time.
- 1.12 Respond to all telephone inquiries promptly.

- 1.13 Keep their clients informed of the progress of their matter in a timely manner and ensure that the client is aware of the stages through which a matter progresses.
- 1.14 In all communications with clients, lawyers are to use language that is clearly understandable, free of jargon and calculated to assist the resolution of the matter.
- 1.15 Give advice and explain all available options to the client together with the consequences of any decision made by the client. When acting as a direct representative, lawyers must ensure that their clients make the decisions, not the lawyer making the decision for the client.
- 1.16 Advise the client to the extent reasonably necessary to permit them to make informed decisions regarding the matter, and to advise them of what they are expected to do to assist their case.
- 1.17 Obtain prior instructions from the client before presenting their case in court/tribunal. If there is insufficient time, the lawyer should seek instructions about adjourning the matter for such time as is necessary for the client to give proper instructions.
- 1.18 Advise the client at the first reasonable opportunity, if a possible delay in the progress of the matter becomes apparent.
- 1.19 Attend all court events in a timely manner; allowing adequate time to prepare.
- 1.20 Ensure the client is represented at all court events and that any agents engaged are members of the panel.
- 1.21 In guardianship matters, following the grant of legal aid, notify the Guardianship Division of NCAT that the lawyer is seeking leave to represent the client and liaise with the Tribunal officer about the provision of documents and listing arrangements.
- 1.22 Contact the client to arrange a conference to obtain instructions. When appropriate, the lawyer will attend the hospital, facility or other residence of the client for this to occur.
- 1.23 Seek to obtain such further evidence as is required and available. This may be done in consultation with the Tribunal officer or independently. Where a fee is involved in obtaining further evidence, the lawyer shall first obtain the approval of Legal Aid NSW.
- 1.24 When acting as separate representative in guardianship matters, ensure that you contact all parties and explain the independent role of the separate representative, but avoid the appearance of bias by doing such things as associating excessively with one side of a disputed hearing such as travelling, eating etc with them to the exclusion of other parties.
- 1.25 Represent the client at the hearing, acting on their instructions or as separate representative if so appointed, testing evidence and making appropriate submissions as to the satisfaction of the requirements of the relevant Act.
- 1.26 Advise the client of the availability of legal aid for matters under the *NSW Trustee and Guardian Act 2009* for a revocation of an Order.
- 1.27 Advise the client that a means and merit assessment will be undertaken by Legal Aid NSW to determine whether there is any merit in the revocation orders they are seeking,

in accordance with Legal Aid NSW policies and guidelines, and where appropriate assist the client in contacting the Social Worker assigned by Legal Aid NSW.

- 1.28 Ensure that the client is aware of the difference between an approval for funding under s33 of the *Legal Aid Commission Act 1979* (the merit assessment process) and a grant of aid for the hearing.
- 1.29 Observe the client's instructions and make procedural decisions with a view to advancing the client's matter.
- 1.30 Advise the client about the appeal process, appeal prospects and time limits for appeal.

2. Responsibilities to Legal Aid NSW

A lawyer appearing in Mental Health Advocacy case or duty matters for legally assisted clients will as applicable:

- 2.1 Comply with these practice standards.
- 2.2 Comply with the provisions of the [Legal Aid Commission Act 1979 \(NSW\)](#) and the [policies and guidelines](#) of Legal Aid NSW (as amended).
- 2.3 Comply with the [Terms and Conditions of use of Grants Online](#) (as amended).
- 2.4 Comply with the terms and conditions of the grant of legal aid.
- 2.5 Attend at hospital as assigned and ensure that if the lawyer cannot attend that the roster coordinator or alternatively the Mental Health Advocacy Service is notified as early as possible and at the very least no less than 24 hours prior to the lawyer's assigned day.
- 2.6 Be responsible for the matter and accountable to Legal Aid NSW for any breach of these practice standards including for any work undertaken in the matter by another lawyer or employee of the (your) firm.
- 2.7 Ensure that any Applications for legal aid, extensions of the grant of aid and requests for reconsideration and review are lodged promptly with all relevant information and supporting material to enable a decision to be made without delay.
- 2.8 Seek approval of the Grants Division for any disbursements prior to expenditure on the file by obtaining the appropriate grant or extension via Grants Online.
- 2.9 Review all files on completion of the matter to ensure all necessary steps have been taken before notifying the Grants Division that the matter is finalised. When submitting the final claim to the Grants Division the lawyer must complete the file outcome form setting out the steps involved in completion of the matter and the result in the matter.
- 2.10 Ensure prompt payment to experts, witnesses and other third parties who have undertaken work pursuant to a grant of aid for that work.
- 2.11 Reassign all pro forma invoices for Counsel's fees to the barrister who has been briefed so that the barrister can claim directly from Legal Aid NSW.

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- 2.12 Provide the file in a matter to Legal Aid NSW where a written authority is received from a client to hand over the file.
- 2.13 Seek orders for costs where appropriate.
- 2.14 Notify Legal Aid NSW immediately of any circumstances that could give rise to a claim for professional negligence and provide a detailed statement in relation to the matter.

3. Responsibilities to Others

When dealing with other lawyers, Counsel, experts, witnesses and the staff of the Tribunals or Courts or other agencies or institutions including hospitals, the lawyer will:

- 3.1. Conduct all communication in a courteous, prompt and professional manner.
- 3.2. Comply with time limitations, procedural steps, the practice directions of the Court or Tribunal and any undertakings given to the Court or Tribunal.
- 3.3. Avoid unnecessary expense or delays by ensuring that:
 - (i) documents are served or filed on time;
 - (ii) documents served, filed or given to the client are legible;
 - (iii) the client is aware of medical appointments, conferences and hearing dates and understands the importance of attending promptly and on time;
 - (iv) witnesses are aware of conferences and hearing dates and understand the importance of attending promptly and on time.

4. Duty Work

Duty Work Encompasses:

- Matters under the *Mental Health Act 2007* for:
 - Each appearance of any *assessable* person brought before the Mental Health Review Tribunal pursuant to s 34 or *involuntary patient* under s 37(1) (a), & (b) of the *Mental Health Act 2007*;
 - Appeals arising under s 44;
 - Applications for a CTO;
 - Reviews under s 63(1) following a breach of a CTO;
 - ECT inquiries.
- Matters pursuant to s 43 of the *NSW Trustee and Guardian Act 2009*;
- Matters under the *Drug and Alcohol Treatment Act 2007* for:
 - Reviews of the issue of dependency certificates under s 34;
 - Applications to extend dependency certificates under s 36.

Case matters are all other matters for which representation is available subject to the relevant means, and/or merit and availability of funds test.

A lawyer appearing on a duty day at a health facility will:

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- 4.1 Comply with the [Guidelines for Panel Lawyers in matters before the Mental Health Tribunal](#) (as amended).
- 4.2 Contact the health facility in advance of the hearing day to determine the number of eligible clients and allocate sufficient time to take instructions and be prepared before the hearing commences. This frequently involves up to 1 full day's attendance prior to the hearing day.
- 4.3 Introduce themselves to staff at each ward attended and provide identification as required prior to seeing patients.
- 4.4 Ensure compliance with Legal Aid NSW policy and guidelines so that representation is offered to all eligible clients appearing before the Mental Health Review Tribunal and all clients appearing before the drug and alcohol magistrate.
- 4.5 Provide representation to all assessable persons, correctional patients and forensic patients unless they refuse representation.
- 4.6 Complete a mental health duty application form on behalf of the patient. If they are unable to provide sufficient details, obtain these from their medical records.
- 4.7 Inspect the patient's file at the mental health facility (after receiving their permission) and take copies or record sufficient details of admission documents to demonstrate whether admission requirements have been satisfied.
- 4.8 Read all relevant documents including admission documents on the client's file, and provide sufficient detail of these to the client to obtain proper instructions.
- 4.9 Obtain the client's instructions regarding the matters contained in the reports, but not provide copies of the reports to them. Assist the clients in obtaining access to the records pursuant to s156 of the Act where appropriate.
- 4.10 Advise clients of their rights under the *Mental Health Act 2007*, the purpose and nature of the hearing and seek their instructions as to the desired outcome. Where feasible, realistic advice as to likely outcomes and potentially successful strategies should be given.
- 4.11 Explain the nature of the proceedings to the patient.
- 4.12 Represent the client at the hearing acting on their instructions, testing evidence and making appropriate submissions as to the satisfaction of the requirements of the *Mental Health Act 2007*, *NSW Trustee and Guardian Act 2009*, *Drug and Alcohol Treatment Act 2007* or other relevant legislation.
- 4.13 Following the hearing explain the outcome to the client in appropriate language, using an interpreter to assist if necessary and available and advise the client of their appeal rights.
- 4.14 Record the outcome of the proceedings on the mental health duty application form.
- 4.15 Complete a mental health duty application form for each client listing hearing details and outcomes and forward to:

- (i) The Mental Health Advocacy Service at PO Box 1350 BURWOOD 1805 or DX 8541 BURWOOD, or
- (ii) Legal Aid NSW branch office.

4.16 Retain a copy of duty applications for duty lawyer appearances in their office. An electronic record is acceptable. Legal Aid NSW reserves the right to conduct an audit of applications taken.

5. Training

A lawyer who is a member of the panel will:

5.1 Undertake to attend specialist training provided by Legal Aid where reasonably practicable.

6. File Management

A lawyer acting in a Mental Health Advocacy matter subject to a grant of legal aid must ensure that:

6.1 Files are maintained in an orderly manner so that Legal Aid NSW may effectively audit the file if required, and to ensure that another lawyer assuming conduct of the matter may quickly and easily understand its factual basis, the client's instructions, the stage the matter has reached and all further action required to run the matter in line with the practice standards.

6.2 All documents including:

- (i) correspondence from the Grants Division in relation to the grant of legal aid; and
- (ii) correspondence received and sent in relation to the matter

are kept on the file in date order.

6.3 Court or tribunal documents filed, served or issued in the proceedings are kept in a separate bundle on the file in date order.

6.4 Clear and legible file notes are kept of all telephone conversations, conferences, interviews, meetings with clients or witnesses and experts, including:

- (i) date;
- (ii) name of person spoken to; and
- (iii) relevant details of the conversation.

6.5 Clear and legible file notes are kept of information and advice given to a client that is not confirmed in writing.

6.6 All court or tribunal attendances are noted on the file in date order with:

- (i) Coram;
- (ii) date and venue of appearance;
- (iii) other parties' representative/s;
- (iv) summary of any negotiations and orders or directions made;

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- (v) start and finish time/s of the attendance; and
- (vi) the date proceedings have been adjourned to or the outcome of the matter.

6.7 Receipts or other verifying evidence for all disbursements claimed for payment from Legal Aid NSW are retained in a separate section of the file.