Guidelines for Mental Health Panel Lawyers

Introduction

These guidelines apply to proceedings brought under the:

- *Mental Health Act 2007* (MHA)
- *Mental Health and Cognitive Impairment Forensic Provisions Act 2021* (MHCIFPA)
- *Drug and Alcohol Treatment Act 2007* (DATA)
- *NSW Trustee and Guardian Act 2009* (TGA)
- *Guardianship Act 1987* (GA)

These Guidelines must be read with the Legal Aid Quality Standards.

Terminology

The terms 'inquiry', 'inquiries' or 'proceedings' are used to refer to any proceedings before the Mental Health Review Tribunal (MHRT), the Guardianship Division of NCAT (GD NCAT) and Magistrates conducting proceedings under the DATA. Particular focus is given to proceedings conducted before the MHRT under the MHA as that is the work mental health panel practitioners undertake most frequently.

Application of Guidelines

These guidelines apply to practitioners who are members of Legal Aid NSW Mental Health Panel.

They provide a quick reference guide for panel practitioners when assisting and/or representing people subject to the above legislative schemes.

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.

General Principles

Drug and Alcohol Treatment Matters

The principles in the DATA 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.

Section 37(7) of the DATA provides that the dependent person must be represented in the proceedings by a lawyer unless that person states they do not wish to be represented. Proceedings are conducted by Magistrates who attend the treatment centre where the person is detained. The MHAS is contacted by the treatment centre and arranges representation.

Where a panel practitioner agrees to provide representation, they must attend the treatment centre to gain instructions and appear at the inquiry. On arrival at the treatment centre the practitioner must identify themselves to staff and confirm those dependent persons listed to appear and the time of the inquiries. The practitioner then asks the dependent person whether they wish to be represented and unless the dependent person states they do not wish to be represented, they must be represented.

Matters conducted under s 34 and 36 of the DATA are duty matters. Duty forms (either electronic or hard copies) must be completed and are retained by the practitioner including any documents and other materials such as reports and certificates.

Guardianship Matters

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.

Parties must be granted leave to be represented (s45 of the Civil & Administrative Tribunal Act). Panel practitioners rarely appear in this capacity. That is, where the subject person is directly represented in accordance with instructions.

Most representation provided by panel practitioners follows the MHAS receiving an order requiring the subject person be separately represented. Most of the work panel practitioners undertake is in the capacity of separate representative. People are subject to such orders where they are unable to properly state their views or are particularly vulnerable especially in relation to other parties to proceedings. The separate representative does not act on instruction, is independent of others including the subject person and ultimately provides submissions based on what they believe to be in the best interest of the subject person. Practitioners must familiarise themselves with the relevant guidelines provided by the GD NCAT regarding how representation is undertaken.

Guardianship matters are case matters that are assigned to private practitioners under a grant of aid. Practitioners retain the documents and materials related to the matter.

Mental Health Matters

The guiding principle for those subject to the MHA is the best possible care and treatment be provided in the least restrictive environment enabling that care to be given safely and effectively. The majority of matters assigned to mental health panel practitioners are conducted before the MHRT pursuant to the MHA and are commonly referred to as ‘civil mental health matters.’

Legal representation for those subject to proceedings before the MHRT under the MHA or MHCIFPA is no different from that provided in other proceedings save some accommodations

provided under the legislation. The words and expressions used in the MHA apply to the MHCIFPA. The MHA states that the fact that a person is '…suffering from a mental illness or intellectual disability or developmental disability or is suffering from a mental condition…. is not an impediment…' to their legal representation in proceedings before the MHRT (s 152). In practice this means the lack of capacity to provide instructions is not a barrier to the person being represented. In practice that may mean instructions are not provided or if provided, they may be meaningless. Nevertheless, representation must be undertaken which includes ensuring jurisdictional requirements are satisfied, testing the facts and ensuring the patient is heard and understands the proceedings, orders and their effect.

The following people must be represented by a lawyer unless they do not wish to be represented or are granted leave by the MHRT to be represented by a person other than a lawyer (s154):

- *forensic patient* in all proceedings before the MHRT
- *correctional patient* in all proceedings before the MHRT
- person under the age of 16 years in all proceedings before the MHRT
- *assessable person* who is before the MHRT for a *mental health inquiry* (1st presentation before the Tribunal for detention or community treatment order)

Legal Aid is available for representation to these four categories of people in the proceedings as described. Means and merit tests are not applied, and practitioners approach these people to provide advice and confirm they do not oppose being represented in these proceedings. Where these people do not refuse representation, they must be represented (s154 MHA). In effect, a person who remains silent or provides a response to the invitation to be representation that is not a refusal is represented. This aspect of the legislation is a protective measure that correctly reflects the effect of the disabilities these people experience that would otherwise create an impediment to legal representation.

In all other proceedings before the MHRT the patient may be represented. That is, the patient must indicate they wish to be represented.

Amicus Curiae

The effect of s154 of the MHA means the role of amicus curiae is necessary redundant. Secondly, where a person has refused representation, either seeking to appear in another capacity such as amicus curiae, 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 extremely unlikely, very rare and only undertaken in exceptional circumstances. Practitioners should not decide to seek leave to appear in this capacity based on their own decision.

Attending venues

Most, though not all, *Declared Inpatient Mental Health Units* (hospitals) conduct proceedings on a set day and time. This most commonly occurs with s34 *Mental Health Inquiries* (1st presentation before the MHRT after being detained) and, at larger venues.

Usually, the hospital sends a list of patients to be presented before the MHRT to the practitioner or the list is sent to the MHAS who then forward it to the practitioner. The list will indicate the names of patients and should include details of the application such as continued detention, community treatment order, financial management order or s44 appeal against refusal to discharge a patient on their request.

At smaller hospitals, MHRT inquiries are often listed “as and when required” and often at short notice. In those cases, details of the application/s before the MHRT, as provided by the hospital, are passed on to the practitioner 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. These notices 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 in Mental Health Matters

Representation is afforded in accordance with the Legal Aid Policy. The relevant policy for proceedings conducted before the MHRT is found at 6.15 of Legal Aid Policy Online found on the Legal Aid website at Policy Online

Representation is not afforded to all people and patients in all circumstances. Practitioners must not provide representation merely because they are representing others at a facility. That is, practitioners must not represent all patients on a hearing list merely because they attend the facility where they are to be presented. Representation can only be afforded in accordance with Legal Aid policy. The reason for that is such a practice means people at smaller venues concentrated outside urban areas are disadvantaged as Legal Aid does not have the resources to allocate such work in those places.

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 test* to be afforded representation. People subject to the merit test includes involuntary patients appealing against the doctor’s decision to refuse their request to be discharged (6.15.7).

To ensure the equitable allocation of resources throughout the State regardless of where a person lives, the MHAS has created a practice of approaching people subject to some proceedings and asking whether they wish to be represented. This includes all proceedings where the person must be represented, such as correctional and forensic patients, those under 16 years and assessable persons at a mental health inquiries. This also includes those presented at s37(1)(a), (b) and (c) proceedings and others as described in the table below.

Conversely, people subject to other types of proceedings are not approached by the practitioner asking them whether they wish to be represented. Rather, in these proceedings the person must request representation. That request is communicated to the practitioner through the medico-legal clerk at the facility or via the MHAS or the person approaching the practitioner

directly such as when attending the facility.

If a patient requests representation the practitioner must check whether the merit test applies. Where the merit test applies, representation can only be afforded where the person's position has *'reasonable prospects of success.'*

The following table is a quick guide to when and how representation may be afforded. The guide should be read with the Legal Aid policy 6.15. The first column of the table describes the proceedings with reference to the relevant section of the MHA. The second column refers to the relevant policy. The third column refers to whether you should approach the person and offer them representation. The fourth column refers to matters where the person must be represented unless they refuse. The firth column refers to matters which do not require you to apply the merit test. And the sixth column described matters in which you must apply the merit test.

AVAILABILITY OF REPRESENTATION – MENTAL HEALTH MATTERS

Inquiry/ Proceedings	***Policy***	***Approach person & offer them representation***	***Representation*:** **Afforded where patient does not refuse representation**	***Representation:*** **No merit test**	***Representation:*** **Apply merit test**
Assessable person at a Mental Health Inquiry (s34), under 16 yrs in all proceedings	6.15.2 & 6.15.1	yes	✓		
s.37 (1)(a), (b) or (c) Review Involuntary Patient	6.15.3	yes		✓	
Review after Breach of CTO s63	6.15.3	yes		✓	
Application for Financial Management	6.15.3	yes		✓	

Order s.46 NSW *Trustee & Guardian Act*					
Application for a CTO: involuntary patient	6.15.3	no		✓	
Revocation of Financial Management Order	6.15.10	no			✓
CTO: Application from community. **'Renewal' of CTO/person already subject of a CTO s51(4)**	6.15.4	no			✓
CTO: Application from community **Neither patient nor subject to a CTO s51(3)**	6.15.5	Yes, if never been subject of CTO. No, if subject to a CTO in the past		✓	
MHRT s.44 appeal **(Appeal against refusal to discharge *assessable person*)**	6.15.6	yes		✓	
MHRT s.44 **(Appeal against refusal to discharge *involuntary patient*)**	6.15.7	no			✓
ECT Application **(Assessable Person)**	6.15.3	yes		✓	
ECT Application **(Involuntary Patient) s.94(2)**	6.15.3	no		✓	

Duty Matters – mental health

Most mental health work undertaken by private practitioners are duty matters. Practitioners must complete a Legal Aid Duty Form (either electronic or in hard copy) and retain the form and any materials related to the proceedings such as reports and admission documents.

The following applies when appearing in mental health 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. It is recommended practitioners attend the venue where the proceedings are conducted at least 30 minutes prior to the list commencing. That allows the practitioner to properly deal with changes to the listing that invariably occur such as the addition of urgent applications and the withdrawal or changes to applications.

4. Failure to be in attendance 30 minutes prior to the commencement of the duty list may result in duty matters being re-allocated to other practitioners. In such circumstances, panel members will not be permitted to submit a duty invoice for that day.

5. 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.

6. Failure to notify the relevant Roster Coordinator that you are unable to attend a rostered duty may result in removal from future duty rosters.

Appearing At a Hospital

Attending Mental Health Facilities (MHF) is sometimes difficult and frustrating. Most, if not all hospitals are secure ('locked') 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. When attending a MHF please:

1. Obtain the list of patients in advance of the duty day from the MHF, MHAS or MHRT.

2. Check the list of patients including the details of the application before the MHRT. If those details are not included, immediately obtain those details from the MHF. The medico-legal clerk or person who arranges the proceedings at the facility will provide that information.

3. Ensure that you are aware in advance of the processes and procedures at the MHF.

4. 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.

5. Behave in a manner that recognises that you are a guest of the hospital and in effect you represent both the MHAS and Legal Aid NSW.

6. After entering the ward area 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. Ask the nurse for a staff member to take you to the patients on the list or to bring the patients to you.

7. Some venues allow you to enter the patient area within the ward whilst others bring patients to you in an area adjacent to the immediate ward area. Do not enter confined spaces with patients, such as bedrooms, without being accompanied by a member of staff.

8. Confirm with each patient on the list whether they wish to be represented at the inquiry noting;

   (i) At a Mental Health Inquiry (s34) the patient (assessable person) must be represented unless they refuse. The same process applies in any proceedings before the MHRT where the person is below the age of 16 years or is a correctional or forensic patient.

   (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 and reports 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. Provide advice and gain instructions in a safe and private space that satisfies the expectations of client and lawyer confidentiality. Do not provide advice and gain instructions in the presence of hospital staff. If the client insists hospital staff be in attendance, warn the client confidentiality has necessarily been waived and what is

said may be recorded in their medical record and used in the proceedings.

11. Do not give any documents provided by the hospital to the patient, including any copies of medical records and admission documents.

12. You may read the relevant aspects of documents to the patient.

13. Be cognisant that information regarding third parties, such as family, might be harmful if shared with the patient. If the patient seeks information that you believe 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). You may challenge that decision before the MHRT at the commencement of the inquiry if you are so instructed. That may be undertaken in the patient's absence where appropriate.

14. If a patient wishes to read documents and/or have copies of documents after you have read the documents to them, 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.

15. When reading the documents ensure the admission process accords with the MHA including:

    (i) the s18 process (when/how a person was initially taken to and/or admitted to the MHF); and

    (ii) the s27 process (separate examinations and determinations by 2 doctors, one being a psychiatrist) confirming the patient is a mentally ill person as defined.

16. 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 MHRT

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.'*[1]

Appearing before the MHRT 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.[2]

1. When appearing before the MHRT 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.

4. Despite a client lacking capacity to provide instructions or meaningful instructions it remains incumbent on the practitioner to test the evidence and legislative requirements.

5. Whereas the MHRT must be satisfied the legislative requirements for making an order are met in accordance with the requisite standard, whether a person 'consents' to the application or not, is necessarily not a relevant consideration. At its highest a person may 'not oppose' an application.

After the Inquiry – mental health

After the MHRT has made its decision, it is very important that clients understand orders and their effect. Where possible please:

- explain to the person the proceedings are not a mechanism for punishment and orders are not made because the person has done something 'wrong.'

- speak to the client in private outside the room where the inquiry was conducted.

- explain that 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.

- ensure the patient understands what has occurred at the inquiry as well as the decision and its affect.

- complete the Mental Health Duty Form and retain the form and any materials such as reports and admission certificates. Do not send the form or any materials to the MHAS or other Legal Aid office. The MHAS or others within Legal Aid may call on duty forms and documents related to proceedings. Please ensure duty forms are completed legibly and stored in a safe accessible place.

Dispute Resolution

Issues of concern including conflict and disagreement that are raised by the hospital, MHRT, patient or lawyer should be raised with either the Senior Solicitor (Civil) or Solicitor-in-Charge, MHAS.

Legal Aid NSW Contact Details

CONTACT	**DETAILS**
MHAS administrative staff	Phone: 9745 4277
Senior Solicitor Civil Practice MHAS	Phone: 8746 2647
Solicitor in Charge Mental Health Advocacy Service	Phone: 8746 2623

[1] S151 *Mental Health Act*

[2] ***Crime and Mental Health Law in New South Wales*** by Howard, Dan & Westmore, Bruce, Butterworths 2005.