

Information to help you apply and prepare for a Tribunal hearing

## Background Information

Note: Sections in brackets refer to the *Mental Health Act 2007*.

### When is an application required?

The Mental Health Review Tribunal becomes involved in decisions about ECT in the following circumstances:

- when the mental health facility is uncertain of a voluntary patient's capacity to give consent to treatment with ECT; and
- when the mental health facility proposes ECT for an involuntary patient or a person under the age of 16. For this purpose, this includes patients on an involuntary patient order, detained patients (or assessable persons) who have not been presented for a mental health inquiry, patients on a Tribunal adjournment, forensic and correctional patients.

### Voluntary patients

If a voluntary patient (not under the age of 16 years) can give informed consent to ECT and does so in writing, then the mental health facility may administer ECT treatment. There is no need to apply to the Tribunal.

Nevertheless, two medical practitioners (at least one of whom is a psychiatrist) must have:

- considered the clinical condition of the patient, the history of treatment and any appropriate alternatives; and
- certified in writing that ECT is a reasonable and proper treatment to be administered to the patient, and is necessary or desirable for his or her safety or welfare.

If the Authorised Medical Officer is unsure whether or not a voluntary patient is capable of giving informed consent, the Authorised Medical Officer may apply to the Tribunal for an ECT Consent Inquiry to determine that issue.

The Authorised Medical Officer must do everything reasonably practicable to give notice to any designated carer and the principal care provider of the person (s78(1)(e)).

**Attachment 1 should be used to notify the designated carer(s) and principal care provider about the application.**

## What is Informed Consent?

A patient can give informed consent if he or she understands the nature, purpose and effect of the proposed treatment. Section 91 of the Mental Health Act 2007 sets out a number of requirements for obtaining informed consent. These include:

- an explanation of the procedure;
- a full description of the possible risks and expected benefits;
- information about alternative treatments;
- a reply to the person's questions about the procedure in appropriate terms;
- a full disclosure of any financial relationship between the person proposing or administering ECT and the mental health facility; and
- notice of the right to obtain legal and medical advice before giving consent and the right to withdraw consent at any time.

The patient's consent must be free, voluntary and in writing.

**Attachment 2 should be used to seek written consent from the patient.**

## ECT Consent Inquiry

The Tribunal's role at an ECT Consent Inquiry is limited to deciding whether the voluntary patient:

- is capable of giving informed consent to ECT; and
- has given that consent.

If the Tribunal decides that the person can consent and the person has given consent in writing, then the hospital may administer ECT treatment. If the Tribunal decides that the person lacks capacity, or if the person has capacity but refuses treatment, then the hospital may not administer ECT while the person is a voluntary patient.

## Involuntary patients and persons under the age of 16

The following material concerns all involuntary patients or persons under the age of 16, including patients on an Involuntary Patient Order, detained patients (or assessable persons) who have not been presented for a mental health inquiry, patients on a Tribunal adjournment, forensic and correctional patients.

If a mental health facility intends to administer ECT to any of these involuntary patients or a person under the age of 16, the Authorised Medical Officer must first apply to the Mental Health Review Tribunal for an ECT Administration Inquiry. The Authorised Medical Officer must do everything reasonably practicable to give notice in writing to the designated carer(s) and the principal care provider of the person.

**Attachment 3 should be used to notify designated carer(s) and principal care provider about the application in relation to an involuntary patient, and Attachment 4 in relation to a person under the age of 16 years.**

## ECT Administration Inquiry

At an ECT Administration Inquiry the Tribunal will first determine whether or not an involuntary patient or a person under the age of 16:

- is capable of giving informed consent to ECT; and
- has given that consent.

If the Tribunal determines that:

- an **involuntary patient can consent**, and has done so, then the hospital may administer the ECT treatment;
- a **person under the age of 16 can consent**, and has done so, the Tribunal must then determine if ECT:
  - is a reasonable and proper treatment; and
  - necessary and desirable for the safety or welfare of the patient;and if so, then the hospital may administer the ECT treatment.

If the Tribunal determines that the **involuntary patient or person under the age of 16** is:

- incapable of giving informed consent; or
- is capable of giving informed consent but has refused; or
- has neither consented nor refused,

the Tribunal must then determine if ECT is a reasonable and proper treatment, and is necessary and desirable for the safety or welfare of the patient.

The Tribunal must specify the time frame in which the treatments are to be administered (not exceeding six months), the frequency of the treatment and the maximum number of individual treatments, which should not ordinarily exceed 12 in number. A determination has effect for six months from the date it is made, unless a shorter period is specified. There may be, on occasions, exceptions to the 12 treatment limit, based on clinical information presented to the Tribunal.

The Tribunal does not put a limit on how many treatments are clinically appropriate and administered, only on how many may be administered before the Tribunal must be asked to review any further treatment.

Where the maximum number of treatments has been reached, or where the treatment is not given within the specified time frames and it is considered that further ECT is necessary, a

fresh application must be made to the Tribunal. Any substantial change to the course of treatment will also require further consideration by the Tribunal.

## Applications for long term patients

Sometimes there is a need for a long term involuntary patient to have maintenance ECT on an ongoing basis. Applications for ECT should be made in accordance with the above requirements. It may be the opinion of the treating team, based on clinical considerations, that more than 12 treatments are required. If so, this is a matter which can be brought to the Tribunal's attention.

## Legal issues the Tribunal must address

- is ECT a reasonable and proper treatment in the circumstances? and
- is ECT necessary or desirable for the safety or welfare of the patient?

Before it may make this determination, the Tribunal must have evidence from two medical practitioners, at least one of whom is a psychiatrist. **If the application is for a person under the age of 16 at least one of these must be a psychiatrist with expertise in the treatment of children or adolescents. (See Attachment 7)**

These medical practitioners must have:

- considered the clinical condition of the patient, the history of treatment and any appropriate alternatives; and
- certified in writing that ECT is a reasonable and proper treatment to be administered to the patient, and is necessary or desirable for his or her safety or welfare.

## Patient's views

In considering any application for ECT, the Tribunal must take into account the views of the person and the effect if any, of medication on the person's ability to communicate.

**For a summary of the procedures in relation to applying for consent to administer ECT please see the flowchart — Attachment 5.**

## Practice Direction: ECT Determinations

The Tribunal has issued a Practice Direction which sets out the Tribunal's practice in relation to certain ECT applications:

- Urgent ECT applications prior to a Mental Health Inquiry
- Maintenance ECT applications
- Administration of ECT at a mental health facility that did not apply for the ECT determination

The Practice Direction can be found on the Practice Direction page of Tribunal website at: <http://www.mhrt.nsw.gov.au/the-tribunal/practice-directions.html>

## How to apply to the Tribunal

As soon as you are aware that you will need to apply to the Tribunal in relation to ECT, you should start making the necessary arrangements.

Some of the larger mental health facilities have a Tribunal Clerk, or someone who is responsible for organising applications to the Tribunal. If this is the case you should contact them directly and they will apply to the Tribunal on your behalf.

If there is no Tribunal clerk at your site, you will need to contact the Tribunal directly. To book a hearing for an individual patient you will need to fax an application form to the Tribunal (**see Attachment 5 — Application for ECT Consent: Request for Hearing**). Forms can be obtained by phoning 9816 5955.

The Tribunal has a roster for when panels visit the mental health facilities in the Sydney, Illawarra, Central Coast and Newcastle regions. For example, the Tribunal might send a panel to your venue on the second and fourth Tuesday of every month. Should you need to have a hearing before the next panel is due to visit, please contact the Tribunal so alternative arrangements can be made.

**If your application is urgent you should phone the Tribunal after faxing the application form and ask to speak to a Senior Registry Officer to confirm receipt of the fax and to make arrangements for the hearing.**

## What to do before the hearing

### Preparation for the hearing

The appropriate clinician involved with the patient should:

- Inform the person of the application and your reasons for making it.
- Explain the hearing process to the person and inform him or her of the hearing date and time.
- Organise and prepare reports and documentation.
- Notify the patient's designated carer(s) and principal care provider and other key people of the hearing and encourage them to attend. **Attachment 1 or 3 should be used to notify designated carer(s) and principal care provider about the application in relation to ECT.**
- Facilitate alternative means for family and friends to participate in the hearing, if necessary.
- Discuss the proposed treatment and answer questions about ECT with the patient, his or her designated carer(s) and principal care provider, and family and friends before the hearing.
- Organise legal representation (Note: Representation is generally provided through Legal Aid for ECT hearings for: persons under the age of 16; assessable persons; and involuntary patients where ECT is opposed by the patient and the patient request representation.)
- Organise an interpreter for the patient or family members, if necessary.
- Ensure that an appropriate level of security is arranged, if necessary.

### Tribunal Proceedings (s151)

Hearings are to be open to the public. However, the Tribunal can decide that a hearing be closed. An application can be made by the person or another person appearing at the proceedings. The Tribunal can make any one or more of the following orders:

- an order that the hearing be conducted wholly or partly in private,
- an order prohibiting or restricting the publication or broadcasting of any report of proceedings before the Tribunal,
- an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence before the Tribunal,
- an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the

## Reports and documents required

The Tribunal needs to see the following reports and documents before the hearing:

- A completed application form.
- Copy of any written consent the patient might have given.
- Doctor's report on issue of consent and views of the patient to the treatment.
- Written evidence from two medical practitioners, at least one being a psychiatrist, regarding the need for ECT. **If the application relates to a person under the age of 16**, then at least one of these must be a psychiatrist with experience in the treatment of children or adolescents (**see Attachment 6 — Recommendation for ECT for Involuntary Patients**).
- An opinion as to the duration and frequency of treatments including the maximum number of treatments and the time frame in which they are to be given.
- Reports from other involved professionals, for example nursing or social worker report.
- Evidence that the designated carer(s) or principal care provider have been notified.
- Written submissions (if any) from the patient, their designated carer(s) or principal care provider, family and friends.
- Copy of recent progress notes or other relevant documents from person's hospital file.

In addition, in the case of an involuntary patient or a person under the age of 16, the Tribunal will also need to see a copy of the current Tribunal order (or the Schedule or other forms detaining the patient). If the patient is voluntary, the Tribunal will need to see evidence of that.

The Tribunal will refer to the reports during the hearing. For this reason, the authors of reports should be available to come to the hearing to answer any questions arising from the reports. Sometimes the Tribunal arranges for the authors of reports to talk with Tribunal members by telephone or by a video link.

The Tribunal may make reports available to the patient and his or her legal representative. See note below.

## Medical records

The law allows patients and their representatives to inspect or have access to the patient's medical records (s156). However, it is possible to ask the Tribunal to order that medical records not be disclosed for some good cause. This might happen, for example, if the treating medical practitioner believes that disclosure of the information may be harmful.

If you consider that there is a need for a preliminary hearing to discuss the disclosure of medical records, you should phone the Tribunal to arrange this well before the scheduled hearing.

## Report style

Reports should:

- Be written in plain and simple English and avoid where possible the use of medical or technical jargon.
- Provide, as appropriate, a full and frank description of the patient's circumstances (see note above).
- Avoid comments that could be interpreted as judgmental.
- Address the specific issues that the *Mental Health Act 2007* requires the Tribunal to consider.
- Identify clearly the sources of information. These sources may be direct personal observations of the author of the report, or may be information obtained from file notes or other professions involved in the person's care.

## What should the reports contain?

The Authorised Medical Officer and treating psychiatrist should provide reports addressing the issues outlined below.

## Authorised Medical Officer or Psychiatrist Report

The report should address the following issues:

- Reasons for applying to the Tribunal in relation to the administration of ECT.
- Brief background of the patient's history and events leading to the current hospitalisation, including details of previous ECT treatment if applicable.
- Reason for requesting ECT (including opinions as to whether ECT is a reasonable and proper treatment that is necessary or desirable for the patient's safety and welfare).
- Other treatment options.

- Current legal status including date of admission.
- Details of current condition, diagnoses and treatment, including details of medication used since admission.
- Confirmation that due consideration has been given to the person's medical conditions in particular any conditions that could be adversely affected by ECT and that a proper medical 'work up' has or will be completed
- Details of notice given to the designated carer(s) or principal care provider.
- Report as to explanation of ECT process to the patient and opinion as to whether the patient is able to give informed consent.
- Details of medication administered to the patient before the Tribunal hearing.
- Details of proposed number of treatments and when they will be administered.
- Plans for the person's ongoing care and future treatment and management.
- Benefits of the treatment generally.
- Notification of whether or not the patient will be attending the hearing and if not, why not.
- Confirmation that contents of the report has been discussed with the patient, including the patient's viewpoint.

## Other reports

Additional reports can be provided by health care professionals involved in the care of the patient, for example, primary nurses, social worker, or occupational therapist.

These reports should include:

- Brief background of the patient's history and events leading to current hospitalisation, including co-morbid conditions, for example substance abuse, intellectual disability other relevant medical conditions.
- Opinion as to whether patient would benefit from ECT with reference to his or her progress in the mental health facility, including details as to current treatment, medication and response to treatment.
- Details of contact with the patient and observations in relation to symptoms of mental illness, patient's demeanour, behaviour, attitude to medication and treatment and understanding of the illness.
- Any comments as to the patient's capacity to give informed consent to ECT.
- Plans for the patient's long term treatment, management and care.
- Contents of the report have been discussed with the patient and his or her viewpoint obtained.
- Contact with designated carer(s) or principal care provider and their views concerning ECT.

## Who should come to the hearing

- The patient concerned (wearing street clothes if possible).
- The patient's designated carer(s) or principal care provider, other family members and friends.
- Everyone who has prepared a written report for the Tribunal.
- The treating psychiatrist/doctor.
- Other involved professionals, for example the primary nurse, social worker.

If the designated carer(s), principal care provider or family are unable to come to the hearing, they may still make their views known by writing to the Tribunal before the hearing. It might also be practicable for the Tribunal to hear their views by telephone or video.

## What to do after the hearing

The Tribunal will give the applicant a copy the Tribunal's determination.

The applicant or other appropriate health care professional should:

- Explain the nature and effect of the determination to the patient and their family.
- Be prepared to answer any questions the patient or their family might have.
- Inform the patient of his or her appeal rights. Refer patient to Legal Aid (phone 9745 4277).

## Attachments

The following attachments are available by clicking on the following links:

1. [Notification to designated carer\(s\) or principal care provider of hearing in relation to ECT for \*\*voluntary\*\* patients not under the age of 16 years](#)
2. [Consent form to obtain written consent from the patient](#)
3. [Notification to designated carer\(s\) or principal care provider of hearing in relation to ECT for \*\*involuntary\*\* patients](#)
4. [Notification to designated carers\(s\) and principal care provider of hearing in relation to a person under the age of 16](#)
5. [Summary flowchart of procedures for ECT determinations](#)
6. [Tribunal application form to request ECT hearing](#)
7. [Certificates from two medical practitioners for administration of ECT](#)
8. [Information Sheet for ECT.](#)