

Practice Direction:

Documentary and evidentiary requirements to establish the Tribunal's jurisdiction for mental health inquiries (originally issued May 2013 - updated 23 September 2015)

Purpose

The Tribunal must satisfy itself that it has jurisdiction to hold a mental health inquiry. Section 34 of the Act provides that the Tribunal *“must hold an inquiry about an assessable person under step 4 in s 27 (d)”*. Section 17 defines *“assessable person”* as *“a person detained in a declared mental health facility for whom a mental health inquiry is required to be held under this Part”*.

This Practice Direction sets out the documents or evidence that the Tribunal will require to satisfy itself that it has jurisdiction under s34.

Evidence of lawful detention of a patient

Section 18 sets out the circumstances in which a person may be detained at a mental health facility.

Accordingly, the Tribunal requires the following documentation in relation to the initial detention:

- **If detained under s19 or s23 of the Act**, a completed form as set out by Schedule 1 of the Act.
- **If detained under s20**, evidence that the person was brought in by ambulance, preferably using the form made available by the Ministry of Health. (If the Ministry of Health form is not used, the Tribunal can consider other written or oral evidence. The hospital's staff should be able to provide that evidence themselves or identify the relevant clinical notes.)
- **If detained under s22**, evidence that the person was apprehended by a police officer and taken to a mental health facility, preferably using the form made available by the Ministry of Health entitled Request by member of NSW Police Force for Assessment of Alleged Mentally Ill or Mentally Disturbed Person. (If the Ministry of Health form is not used, the Tribunal can consider other written or oral evidence.)

The hospital's staff should be able to provide that evidence themselves or identify the relevant clinical notes.)

- **If detained under s24**, a Magistrate's or bail officer's order.
- **If detained under s25**, acceptable written or oral evidence confirming the decision by either by the medical officer of the transferring facility, or the AMO of the receiving mental health facility as to:
 - the arrangement to transfer and
 - confirming his or her opinion that the person is a mentally ill person or a mentally disordered person.
- **If transferred under s80**, acceptable written or oral evidence confirming the arrangement between the medical officers of each facility to transfer the patient, or, where the transfer is by order of the Director General, a copy of the order.
- **If detained under s26**, a copy of the written request to detain by a designated carer, principal care provider, relative or friend and a copy of the notation in the patient's file or other acceptable written or oral evidence of the decision to detain.
- **In the case of a voluntary patient** who has been caused to be detained by an AMO under s10 of the Act, acceptable written or oral evidence of this fact.

There must be evidence of the lawful detention of the patient for the Tribunal to have jurisdiction. **To avoid doubt, the Tribunal considers that where a patient self-presents at a mental health facility (including being brought in by family/friends) a Schedule 1 certificate must be completed.**

If the Tribunal does not have jurisdiction, it will indicate that to the participants. As the Tribunal is without power to conduct an inquiry it cannot adjourn the matter nor can it make an order for discharge (which would be a matter for the AMO). However, it may stand the matter in the list so that the patient can be re-presented later in the day after appropriate steps have been taken to ensure that the Tribunal has jurisdiction. If the treating team on behalf of the AMO indicate that it is not proposed to attend to any defects or to re-present the patient later in the day, then the Tribunal will note that its jurisdiction to hold the inquiry has not been established and will decline to deal with the matter.

Defects in the admitting document may be able to be resolved by using s193 of the Act, which allows the person who signed the document initially to amend an admitting document that is incorrect or defective in any particular, with the approval of the AMO and within 28 days after the admission of the person. Otherwise the AMO can do all things that are necessary to obtain a document in substitution for the document. However, s193 does not give the AMO the right to create a document where none existed.

Certification that a person is mentally ill or mentally disordered

Under s27 of the Act, the Tribunal requires two (or in appropriate cases, three) examinations certifying that the patient is a mentally ill or mentally disordered person (as the case may be).

If it is not reasonably practicable for an authorised medical officer of a mental health facility or other medical practitioner to complete the s27 examination in person, s27A allows for the examination to be completed (using the s27A Form):

- by audio visual link by a medical practitioner, or
- in person by an accredited person.

The Tribunal must have these forms in front of it to have jurisdiction to hold a mental health inquiry.

The Tribunal notes the following issues about the content of these forms:

- The Form 1 completed by the first examining AMO should be in the prescribed Form 1 (see Regulation 4 of the MHA Regulations).
- The second (and if necessary third) Form 1's must be in the prescribed form.
- Examinations completed under s27A should use the S27A Form.
- At least one of the two examinations must be completed by a psychiatrist. In cases where a third examination is required, it must be completed by a psychiatrist.
- The forms must record the fact that the patient is a mentally ill or mentally disordered person as the case may be. However, these forms are valuable information for the Tribunal and the Tribunal encourages medical practitioners to complete the forms legibly and in as much detail as possible.
- Whilst non-compliance with the statutory time frames in s27 of the Act as to the *timing* of the s27/27A examinations of the patient may give rise to appropriate avenues for redress elsewhere, the Tribunal does not have a supervisory role over such non-compliance. The Tribunal will, except in extreme circumstances of delay, proceed upon the basis that it has jurisdiction to hold the inquiry, despite such non-compliance, provided that it has before it two forms that are otherwise compliant with the requirements of the Act. However, these timeframes remain a legislative requirement and an important safeguard for patients. Any serious failure to comply with the timeframes will be raised by the Tribunal with the Clinical Director of the facility.

Checklist

The Tribunal has formulated a checklist to assist facilities to ensure that they have the correct documents ready for a mental health inquiry. The Tribunal encourages facilities to use this checklist.

This practice direction is issued pursuant to s160(3) of the *Mental Health Act 2007*.

Professor Dan Howard SC
President

DATED: Updated 23 September 2015