Guideline

Mental Health Review Tribunal

The role of the Mental Health Tribunal in relation to treatment

1. Introduction

The *Mental Health Act* ("the MHA") vests in the Tribunal a significant role in reviewing the care and treatment of consumers at

- mental health inquiries;
- involuntary patient reviews (including appeals);
- review of persons detained on a breach of CTO;
- applications for CTOs;
- applications for ECT determinations; and
- applications for consent to surgical and special medical treatment.[1]

A central principle of the Act is to ensure access to the best possible care and treatment whilst interfering minimally with a consumer's civil rights.[2] Therefore, reviewing a consumer's treatment, including medication, which should "meet the health needs of the person" is a core aspect of the Tribunal's review functions.

This guideline sets out the nature and scope of the Tribunal's role with respect to treatment having regard to the common law, the objectives of the MHA, the principles for care and treatment, and the legislative criteria in respect of specific orders.

The main purpose of the guideline is to clarify the Tribunal's role in reviewing treatment and to encourage Tribunal panels to adopt a consistent approach.

The Appendix to this Guideline makes suggestions about the ways in which treatment issues might be explored by panels and offers some sample questions.

Whilst the focus of this guideline is on treatment, with specific reference to medication, the biological treatment for mental illness and disorders is but one of a number of other evidenced based interventions - such as peer support, therapy and CBT - that can contribute to a consumer's wellbeing and recovery.[3] Information in relation to the biological treatment of the major mental disorders can be found in the link in Chapter 2 of the Members' Manual.

Before turning to the scope of the Tribunal's role, it is relevant consider the common law and legislation that underpin the role.

[1] The Members' Manual sets out in full the legislative criteria and procedure in respect of each matter.
[2] *Mental Health Act 2007*, s 68.
[3] For further information about recovery and trauma informed care, please refer to Chapter 2 of the Members' Manual.

2. The Tribunal's role concerning treatment at common law

At common law, it is a pre-requisite of medical treatment that the person consents to that treatment.[4] Enforced medication and the deprivation of a person's freedom to make decisions about their care and treatment can only be infringed if the relevant legislative criteria are fulfilled and procedural safeguards are met.[5]

The Tribunal's role in scrutinizing treatment is well established. Hodgson J in *Harry's case* referred to the MHA safeguards as to when this may occur, noting that the Act was

> "intended to provide means by which those who must make such diagnosis and would be liable in law if treatment was given when it was not justified, can form a calm judgment and do what is necessary in the patient's interest. **Their judgment is to be scrutinized and, if proper, supported by the magistrate or the Tribunal.**" (emphasis added)[6]

Referring to the MHA 1990, His Honour stated:

> "This Act, as did early Acts, establish procedures whereby the condition of those to whom the statutory powers are to be applied can be monitored to ensure that they are and continue to be in need of the statutory constraints. It is proper that these be monitored and that the courts and the tribunals ensure that the statutory requirements are satisfied."[7]

The Tribunal's role has been characterised as not only protecting consumers' rights against arbitrary detention and their right to refuse treatment but also protecting their 'positive right' to be provided with quality care, by scrutinizing care at hearings.[8]

3. The role of the Tribunal regarding treatment under the MHA

The Tribunal's role in relation to treatment derives from its function as an independent review body entrusted with the responsibility of upholding the s 3 objects of the MHA, the principles for care and treatment under s 68 and the objectives of the NSW Public Mental Health System under s 105. Orders that compel detention and, therefore, treatment require a careful consideration of the nature of the proposed treatment by the Tribunal. It should be also noted that the Tribunal has a greater role in relation to treatment in its forensic jurisdiction than in its civil jurisdiction.[9]

In its civil jurisdiction the best general and practical description of the Tribunal's role regarding treatment is one of constructive inquiry, clarification and reflection.[10]

Constructive inquiry and clarification usually involve:

- ensuring that the treatment given is in accordance with prescribed standards;
- exploring the treatment's nature, scope, effectiveness;
- having an understanding of the proposed treatment and its objectives and rationale;

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[4] *Rogers v Whitticombe* (1992) 175 CLR 479, 498.
[5] *Harry v Mental Health Review Tribunal* (1994) 33 NSWLR 315, 322d – 323b, 332g – 333f and 334B - 335d; *Z v Mental Health Review Tribunal* (2015) NSWCA 373, 35; *A (by his Tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31, [124] – [125].
[6] *Harry v Mental Health Review Tribunal* see above fn 5.
[7] Ibid.
[8] Terry Carney, David Tait and Fleur Beupert 'Pushing the Boundaries: Realizing Rights Through Mental Health Tribunal Processes? [2008] *Sydney Law Review* 328.
[9] The *Mental Health (Forensic Provisions) Act* ss 40, 46, 47 and 74 provide the Tribunal with a broad power to "investigate a patient's personal circumstances, and, as the nature of the case may require, to supervise detention, care and treatment in a facility"; *A by his tutor Brett Collins v Mental Health Review Tribunal (No 4)* [2014] NSWCS 31 [85] - [115]. Such inquiry is guided by the s 68 principles of care and treatment in the MHA s 76B. In this case the Supreme Court of NSW found that the Tribunal had a power to make an order prohibiting the forced use of injectable medication of a forensic patient [248].
[10] A Guide to Solution-Focused Hearings in the Mental Health Tribunal, Victoria.

- considering the views of consumers and carers in relation to treatment and recovery plans;
- if matters are unclear or seem incomplete, making further inquiry, and
- exploring gaps in treatment or gaps in information about treatment, as identified by the consumer, carers and the treating team;
- ensuring as far as possible, a collaborative pathway to recovery;[11] and
- considering these matters in light of the consumer's views and ensuring those views are expressed to treating teams.

4. Authorised Medical Officer's primary role in treatment

In carrying out its role with respect to treatment the Tribunal must be aware of the powers of the authorised medical officer (AMO). Under s 84 the AMO

> "may, subject to this Act and the *Mental Health (Forensic Provisions) Act 1990*, give, or authorize the giving of, any treatment (including any medication) the officer thinks fit to an involuntary patient or assessable person detained in the facility in accordance with this Act or that Act."

This broad discretion provides clinicians with the day to day power and responsibility for the provision of treatment to consumers. That discretion is to some extent circumscribed by ss12, 69 and 29.

Section 12 provides that the AMO must not admit, detain or continue to detain a consumer unless they are mentally ill person or mentally disordered person, and there is no other care of a less restrictive kind, that is consistent with safe and effective care.

Section 69 makes it an offence for an AMO, or any other person employed at a mental health facility, to wilfully strike, wound, ill-treat or neglect a consumer (punishable by 50 penalty units or imprisonment for six months).

Section 29 places an obligation on a person authorising medication to have "due regard to the possible effects" and such persons must also

> "prescribe the minimum medication, consistent with proper care, to ensure that the person is not prevented from communicating adequately with any other person who may be engaged to represent the person at a mental health inquiry."

5. Relevant general principles and provisions

The nature and scope of treatment, its effectiveness and consequences are a vital element of the MHA's stated guiding mental health principles. The Tribunal must consider and promote those mental health principles wherever possible. The principles should guide the Tribunal's interpretation of the MHA and how it is applied in hearings. Specific principles relating to treatment under the MHA are as follows.

Section 3 Objects

These require that consumers have access to care and treatment that:

- promotes their recovery;
- protects them or others; and
- facilitates their involvement in decisions.

[11] Ibid.

Section 68 Principles for care and treatment

The relevant principles in relation to treatment are:

- consumers should receive the "best possible care and treatment in the least restrictive environment" enabling that care and treatment to be effectively given;
- providing "timely and high-quality treatment in care in accordance with professionally accepted standards";
- providing care designed to assist consumers wherever possible to live, work and participate in the community;
- prescribing medicine should meet the "health needs of the person and should not be given only therapeutic or diagnostic needs and not as punishment or for the convenience of others";
- providing consumers with appropriate information about treatment alternatives and the effects of treatment and support to pursue their own recovery; and
- making every effort to involve consumers in developing their treatment and recovery plans, considering their views and expressed wishes, obtaining the consent of consumers in developing those plans, monitoring their capacity to consent and supporting them to understand their plans if they lack capacity.

6. Tribunal's general powers to assist in investigating treatment issues

The Tribunal can determine its own procedures as to the conduct of hearings.[12] It may obtain evidence by requiring relevant people to attend as witnesses and/or to produce documents.[13] The Tribunal has a broad power to request information from services or other agencies including health agencies and corrective services.[14] In addition, the Tribunal has broad powers of adjournment which may be used to allow further time to investigate treatment issues.[15]

7. Constructive discussion and inquiry

It is therefore a primary function of the Tribunal, and consistent with its responsibilities under the Act, to ensure that a consumer receives effective and safe treatment given all relevant circumstances, including the preferences of the consumer and the views of the treating team.

A Tribunal panel which has doubts about the nature, efficacy or consequences of particular treatment must explore those issues and doubts, so as to satisfy itself that the treatment is the most appropriate approach in those circumstances and satisfies all statutory requirements.

Tribunal panels should generally strive to determine treatment issues through constructive discussion in hearings, even when such discussion may involve some disagreement and some discomfort and some reluctance to participate on the part of some or all participants. Some cases will lend themselves readily to an approach of constructive discussion, whilst other cases may require more effort, and in some cases such discussions will be very challenging or very problematic.

Tribunal panels will need to use sensitivity and judgment in exploring significant treatment issues, particularly if the consumer is becoming distressed by what is occurring or if the therapeutic alliance between the consumer and treating team is being threatened. Nevertheless, panels must not resile from properly investigating and assessing critical issues that are part of its decision making.

[12] Section 160.
[13] Section 157.
[14] Section 162A.
[15] Section 155, s 36.

8. Scope of the Tribunal's role

Whilst Tribunal panels play an important role in this area they should not try to direct or dictate treatment. This is a critical limitation upon the role of the Tribunal.
Both in legal and practical terms, the Tribunal cannot have ongoing, primary responsibility for a person's treatment. As discussed above, primary legal responsibility for treatment under the MHA is given to AMOs.

In practical terms, the Tribunal's ongoing role in a consumer's treatment is necessarily limited. The Tribunal's actual involvement with most consumers is restricted to hearings which can be relatively brief, constrained to a formal setting, and limited in number.

Tribunal panels may often only gain a 'snapshot' of an individual's history and circumstances. The Tribunal is reliant on treating teams conveying all relevant aspects of an individual's treatment and circumstances. In cases where treating teams have prepared thorough, high quality reports a Tribunal panel may obtain a more comprehensive picture. However, this will not always be the case, and it is not uncommon for old reports to be rehashed for hearings. If the hearing is being held at a mental health facility, the Tribunal may have access to the consumer's entire file which might assist in filling in some gaps.

9. Gathering additional information

The main legal responsibility for the Tribunal with respect to treatment is to ensure that its orders conform to the standards and requirements set out in the MHA. There may be gaps in information at a hearing, without which Tribunal panels may not be able to make a determination. There may be cases where a consumer's diagnosis is in issue. Whilst the Tribunal's role is not to diagnose, Tribunal panels sometimes may wish to clarify this issue as the nature of treatment will be determined by a consumer's diagnosis. Frequently, this means that Tribunal panels may have to gather further information or seek clarification from treating teams about treatment options and plans. This might necessitate:

- adjourning or standing the matter in the list;
- making a shorter order with directions as to information required;
- asking a senior clinician or other allied health staff to attend the hearing;
- seeking the input of other experts (e.g. psychologist, social worker, dietician, occupational therapist, child psychiatrist, geriatrician, or a drug and alcohol worker)
- seeking the input of carers and family; and
- requesting a second opinion.

The South Eastern Local Health District (SELHD) has a Complex Care Review Committee that seeks to resolve cases of ongoing, unmet, and complex care needs for consumers with no transition pathway. It may be appropriate to recommend that the Committee review a consumer's case, if the treating team has been unsuccessful in establishing an appropriate transition or separation pathway. Similarly, consumers with complex mental health treatment plans that are not typical or standard may be referred for review to the Chief Psychiatrist's Review Panel.[16]

10. Specific considerations for various orders

Involuntary patient orders (IPOs)

Before making an IPO at a mental health inquiry or a s 37 review, the Tribunal must be of the opinion

[16] See NSW Ministry of Health. Mental Health Service Business Rule, SESLHD BR/029, Referral to the Mental Health Service (MHS) Complex Care Review Committee, April 2017; Chief Psychiatrist Panel Review of Complex Mental Health Treatment Plans, Number PD2011_055, Publication date 31 August 2011.

"that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available".[17]

This requires the Tribunal to consider:

- the nature of the care;
- its safety and effectiveness and measures to monitor these;
- how the care will address the symptoms of mental illness and serious harm issues;
- why the care is necessary; and
- if there is 'other care' that is less restrictive,[18] but nevertheless effective, safe and reasonably available.

Panels are encouraged to take a broad view of 'safe and effective' care that extends to aspects of care that will promote a consumer's recovery, well-being, autonomy and social integration.

This broader approach may involve exploring:

- the treatment of co-morbid conditions;
- the frequently difficult issue of the unwanted effects of medication;
- measures for the safe administration and monitoring of medication;
- issues with the consumer's physical health and the measures employed to address these issues, including the potential physical consequences of treatment such as obesity, diabetes and extrapyramidal effects;
- treatment for 'negative symptoms';
- measures to improve cognition;
- the role of other therapies (e.g. talking, psychology, occupational therapy, peer support; allied mental health and psychological interventions);
- interventions and support to increase the consumer's independence and engagement in voluntary treatment;
- relapse prevention and early intervention plans; and
- discharge arrangements in consultation with consumers and carers, which may include linkages with community health services and NGOs.

When setting the duration of an order at a mental health inquiry the Tribunal should consider the time in which the consumer's response to proposed treatment is likely to be known, having regard to the consumer's individual circumstances.

Community Treatment Orders (CTOs)

Relevant factors in determining if a CTO is appropriate include the Tribunal considering a treatment plan, the efficacy of any previous CTOs, and 'any other information placed' before the Tribunal.[19]

Treatment plans are to consist of:

(a) in general terms, an outline of the proposed treatment, counselling, management, rehabilitation or other services to be provided to implement the community treatment order,

(b) in specific terms, the method by which, the frequency with which, and the place at which, the services would be provided for that purpose.[20]

[17] Section 38(4).
[18] e.g. care in the community; care provided by a designated carer or principal care provider; care under a CTO; care on a voluntary basis.
[19] Section 53 (2)(d).
[20] Section 54.

A CTO may be made if several criteria are satisfied, including that

- there is "no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available"
- the consumer would benefit from the order as the least restrictive alternative consistent with safe and effective care; and
- the treatment plan is appropriate and can be implemented.[21]

The length of an order is based on an estimate of the time required:

(a) to stabilise the condition of the affected person; and
(b) to establish, or re-establish, a therapeutic relationship between the person and the person's psychiatric case manager.[22]

The provisions directly require panels to consider:

- the nature of the proposed treatment, its safety and effectiveness and the consequences if the treatment is not mandated;
- whether a CTO is the least restrictive option (i.e. could treatment occur without an order);
- the availability of other care and its effectiveness;
- the consumer's preferences regarding medication (some consumers may consider a three monthly injection as less intrusive (and therefore less restrictive than nightly supervision of oral medication by a case manager);
- how the treating team will work with the consumer to accept voluntary care or care with fewer restrictions;
- the time frame required for the consumer to reach stability or develop a therapeutic relationship with the case manager; and
- interventions and services that might contribute to the consumer's recovery and well-being.

Electro Convulsive Therapy (ECT)

ECT draws the Tribunal more directly into considering issues of treatment than any other matter it may consider. Section 94(3) requires two doctors, one of whom must be a psychiatrist, to provide a

> "certificate … in writing that, after considering the clinical condition and history of treatment of, and any appropriate alternative treatments for, the patient, the medical practitioners believe electro convulsive therapy is:
> (a) a reasonable and proper treatment to be administered to the patient, and
> (b) necessary or desirable for the safety or welfare of the patient."

In cases where the "patient is incapable of giving informed consent or is capable of giving informed consent to the electro convulsive therapy but has refused, or has neither consented nor refused", ECT is permitted if the Tribunal, after considering the medical opinions and other information placed before it

> "is satisfied the electro convulsive therapy is a reasonable and proper treatment and is necessary or desirable for the safety or welfare of the patient".[23]

The Tribunal must consider a broad range of matters including:

- the consumer's current treatment;

[21] Section 53(3).
[22] Section 56.
[23] Section 94.

- why the current treatment is regarded as insufficient or ineffective;
- whether a reasonable period has been allowed for the current treatment to work; and
- alternative treatments and how long they might take to provide relief or treat symptoms.

Whilst ECT does not have to be a treatment of last resort, the Tribunal must explore the effectiveness of current treatment and if other treatment options could be effective.[24]

As the Tribunal must set the maximum number of treatments over a defined period it must consider the nature and scope of the proposed course of treatment including its frequency. However, it is for the treating team, in collaboration with the consumer and their carer/s to review the need for ongoing reassessments as to its efficacy and the consumer's capacity to consent to decide when and how the treatment will be administered.

Section 90 provides that the administration of ECT is for the medical superintendent to determine. The medical superintendent has the power to refuse the treatment, even though the Tribunal has made a determination that enables the treatment to be given.

Surgery and special medical treatment

There are specific provisions that relate to the Tribunal's power to consent to surgery and special medical treatment. A criterion to consider for surgery is if

> "it is desirable, having regard to the interests of the patient, to perform the surgical operation on the patient".[25]

The Tribunal must consider whether surgery is required, and how it is manifestly in the patient's interests and any alternatives.

The Tribunal may consent to the carrying out of "special medical treatment" on a consumer (other than prescribed special medical treatment) if the Tribunal is satisfied that it is necessary to prevent serious damage to the health of the patient.[26] "Special medical treatment" refers to

> "Any treatment, procedure, operation or examination that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out".

That provision also requires discussion about the nature of the proposed interventions and why they are necessary.

11. Conclusion

The Tribunal clearly has an important role to play in relation to treatment. Its hearings and decision making will usually involve some consideration of treatment issues as required under the Act, both by provisions setting out general principles and specific provisions dealing with different orders.

However, hearings should generally not be limited to the mechanical or automatic application of legal criteria to the 'formal' facts or views of the treating team. Instead, the Tribunal processes should also promote dialogue between consumers, carers and treating teams in which discussions about treatment can lead to improvements in a consumer's well-being and assist in their recovery.

[24] Section 94(3).
[25] Section 101.
[26] Section 103(2).

APPENDIX. Suggested approaches and sample questions

How to deal with treatment issues

Tribunal panels have flexibility in the way hearings are conducted. Questions about care and treatment and their effectiveness can be explored in a variety of ways.

Taking into account the views of consumers and carers

Hearings can be conducted in ways that encourage and facilitate consumers, carers and clinicians discussing, identifying and committing to future actions. In this way, the Tribunal can act as a conduit for participants to exchange important information and views, which may then increase the understanding and agreement of the parties.

Sharing information may lead to hearings having a more significant therapeutic value, particularly where the concerns of a consumer are heard and addressed in a hearing. Seeking the views and preferences of consumers supports the emphasis on consumer recovery and autonomy as reflected in the MHA. Such an approach is more likely to put consumers and carers in the 'picture', allowing them to express their views and to maximise the therapeutic value of hearings.

Whilst the views and preferences of consumers and carers as to treatment plans are to be considered by treating teams they are not determinative, and preferences can be overridden. Nevertheless, Tribunal panels should facilitate discussions about treatment plans, as in some cases consumers may not have been asked about their views nor had an opportunity to express them. Importantly, where consumers have diminished capacity to understand their treatment plans, they are to be supported in understanding them. This role may be played by designated or principal care providers, or peer workers. Tribunal panels should be aware that there may be power imbalances and consumers and carers may be reluctant to express their views. Tribunal panels should establish that consumers and their support person have had a proper opportunity to raise their concerns and preferences and should seek the treating team's responses and views.

Exploratory rather than directive

As noted above, the Tribunal cannot direct a particular course of treatment, but it must understand its scope and nature. This will often require asking questions of treating teams, as well as eliciting from consumers their views and preferences. How a query or question is asked is of the utmost importance. Panels should not shy away from asking important questions as that is a central aspect of its work. Effective questions are more likely to elicit information that is responsive and that will assist the panels in making decisions.

Generally, it is helpful to ask for clarification where there is room for confusion. Panels should consider framing questions in ways that do not appear to impute blame or lack of skill by the treating team as such imputations are more likely to be met with a defensive and limited response and may damage the therapeutic relationship between the consumer and the treating team.

A question that is exploratory is more likely to be elicit more productive responses and indicates to participants that the panel has not made assumptions or drawn conclusions that turn out to be incorrect or unwarranted. Tribunal panels should pursue issues about treatment sensitively, respecting the views of clinicians and consumers.

Questions asked could generally concern the following:

- clarification as to the reasons for the inclusion or exclusion of certain options including types of medication, their dosage and method of administration;
- the identification of any concerns held by the Tribunal;

- requests for the treating team to consider alternative approaches;
- how any treatment issues may affect the Tribunal's decision making; and
- what follow-up on any issues may be necessary or desirable.

A number of sample questions follow.

Sample questions concerning treatment and care

- *I notice that recently the following medications have been added to XR's treatment. Could you please explain what the thinking was behind this change?*
- *I am having some difficulty in understanding the treatment that has been given or is proposed. I am wondering if you could assist me by explaining …*
- *Could you please tell us about the treatment options that have been considered?*
- *Has the team considered involving other support services?*
- *Mr XR is due for discharge next week. Has there been some thought about handover and discharge planning and what will that look like?*
- *The CTO plan has these medications… a), b) and c) listed. Are these current and when will they be reviewed next?*
- *The CTO plan has these medications listed. Are these likely to be changed by the treating team in the community?*
- *The team is proposing a long stay in hospital for XR. Can you please outline the proposed course of treatment and the treatment goals?*
- *I notice that the Treatment Plan has listed two antipsychotic medications. Can you please explain the thinking behind this? Are there any plans to review this?*
- *XR has nominated JB as her carer, who is not present today. Can you advise if JB was notified?*
- *XR has complex needs and she has not had an effective response to treatment to date. There are also several differing opinions as to her diagnosis and treatment needs. Has the team considered referring XR's case to the complex care committee or seeking an external second opinion?*
- *The material suggests that XR is experiencing some unwanted effects of medication. Has the team considered this? Is there a way of addressing them?*
- *XR has said that she will take medication voluntarily. Is there any need for an involuntary order?*
- *XR has said that he would prefer oral medication. Is this something that the team has considered?*
- *XR has said that he felt less sedated on a smaller dose of olanzapine? What does the treating team think about the current dose?*
- *We've noticed that XR is having the 'look ups'. Is this something that the team has considered?*
- *Olanzapine can lead to significant weight gain. Has the team considered any other medication options?*
- *There is a lot of evidence as to the effectiveness of psycho-social supports? Is the Service able to offer any supports that would interest XR?*
- *XR is experiencing acute symptoms of his illness which might interfere with his ability to participate in his treatment plan. Has the team sought the input of his carers/family in the treatment plan?*
- *XR has had a good response to treatment. However, in the past when discharged from hospital he has not taken medication and has relapsed very quickly. Is there a relapse prevention plan in place that has been discussed with XR and his carers?*

The sample questions do not start with the word 'why'. This is because starting a sentence in this way can make a participant to a hearing 'defensive and less open to communication, as they can

be perceived as being a demand for an explanation'.[27] On the other hand, sentences commencing with 'what' or 'how' are less confrontational and are more likely to elicit non- defensive responses.

For the same reasons the word 'you' should be used with caution when asking particular questions of clinicians.

The following example illustrates the point:

> *You haven't provided enough information about treatment to enable us to decide the appropriate duration of an order.*

A more effective question is:

> *We need some more information about the treatment and support XR will be given so as to decide how long an order should last.*

However, a 'you question' as per the next example could contribute valuable and constructive details regarding next steps:

> *What are some of the changes you would be looking for as an indication an order may no longer be needed?* [28]

This Guideline has been written by Maria Bisogni, Deputy President, Mental Health Review Tribunal - November 2018.

[27] A Guide to Solution-Focused Hearings in the Mental Health Tribunal, Victoria p 29.
[28] ibid.