

## Involuntary Detention in a Mental Health Facility, Mental Health Inquiries and Reviews of Involuntary Patients

Information to help you prepare for a mental health inquiry or a review of an involuntary patient by the Mental Health Review Tribunal

### Background Information

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

### Detention in a mental health facility

The Mental Health Act 2007 provides for a number of ways for a person to be detained in a mental health facility:

- On a mental health certificate by a medical practitioner or accredited person (s19);
- After being brought to a facility by an ambulance officer (s20);
- After being apprehended by a police officer (s22);
- After an order for an examination and an examination or observation by a medical practitioner or accredited person (s23);
- On the order of a Magistrate or bail officer (s24);
- After a transfer from another health facility (s25);
- On a written request made to the authorised medical officer by a designated carer(s), the principal care provider, a relative or friend of the person (s26).
- On the assessment of the Authorised Medical Officer following a breach of CTO (s61)

### Medical examination requirements for ongoing detention (s27)

There are three, possibly four steps that need to be taken after a person is taken to a mental health facility under the *Mental Health Act 2007*:

#### Step 1: examination by an 'authorised medical officer' (s27(a))

As soon as practicable (but no later than 12 hours) after arriving in hospital or after being detained if the person was a voluntary patient, he or she must be examined by an authorised medical officer.

(Note: If it is not reasonably practicable for the authorised medical officer or other medical practitioner to personally examine the person, the examination may be by a medical practitioner using an audio visual link or in person by an accredited person (s27A)). The medical practitioner or accredited person must, if it reasonably practicable to do so, seek the advice of a psychiatrist before making their determination.

The person completing the examination must complete a certificate (Form 1) and if of the opinion that the person is a mentally ill or a mentally disordered person, then a second assessment must take place.

If the person completing the form is not of the opinion that the person is either mentally ill or mentally disordered, they have to be discharged.

## **Step 2: second assessment (s27 (b))**

As soon as possible after the first examination and having been found by that officer to be mentally ill or mentally disordered, the person must be seen by a second medical practitioner. The second examiner must be a psychiatrist if the 'authorised medical officer' was not a psychiatrist.

The second examiner will also complete a certificate (Form 1) notifying the authorised medical officer if of the opinion that the person is either a mentally ill person or a mentally disordered person, or if not able to form such an opinion.

## **Step 3: third assessment (s27(c))**

If the second examiner is not of the opinion that the person is a mentally ill person or a mentally disordered person, the person must be examined by a psychiatrist as soon as practicable after being notified of that opinion. The psychiatrist will also complete a certificate notifying the authorised medical officer if of the opinion that the person is either a mentally ill person or a mentally disordered person.

The person should be immediately discharged if the third examiner does not find that the person is a mentally ill person or a mentally disordered person.

## **Step 4: mental health inquiry or discharge (s27(d))**

If a person is found to be either a mentally ill person in steps 1 and 2 or 3 they are known as an 'assessable person' and must be brought before the Tribunal for a Mental Health Inquiry as soon as practicable. This will usually take place within 2-3 weeks after the person is detained in the mental health facility to allow sufficient time for the person to be fully assessed and for an appropriate treatment or discharge plan to be developed.

## **Step 5: mentally disordered persons (s27(e))**

If a person is found to be a mentally disordered person in steps 1 and 2 or 3 they may be detained in a mental health facility as a mentally disordered person for a continuous period of not more than three working days and should be reviewed by an authorised medical officer at least once every 24 hours.

## **Actions may be delayed because of illness or conditions (s33)**

An authorised medical officer is not required to take or complete the above steps or to bring a person before the Tribunal for a mental health inquiry while the person is suffering from a condition or illness other than a mental illness or mental condition and is not, in the officer's opinion, fit to be the subject of the proposed action due to the seriousness of the person's illness or condition. Once the other illness or condition improves, the necessary steps should be completed and/or the person should be presented for a mental health inquiry.

## What is a Mental Health Inquiry

A mental health inquiry examines the reasons put forward for a patient's detention or release. Most mental health inquiries will be conducted by an experienced single legal member of the Mental Health Review Tribunal. However, if considered appropriate in a particular case, the member may refer a matter to a full three member panel which will have, in addition to a lawyer, a psychiatrist and another suitably qualified member.

In preparation for a mental health inquiry an authorised medical officer must:

- Give the person an oral explanation and written statement of their legal rights and other entitlements (s74 and Schedule 3);
- Notify the assessable person of the proposed mental health inquiry and that their capacity to manage their financial affairs must be considered if an involuntary patient order is made (s76);
- Take all reasonable steps to notify any designated carer(s) and the principal care provider (if the principal care provider is not the designated carer) of the mental health inquiry (s76);
- Ensure that the person is, as far as practicable dressed in street clothes (s34(2));
- Ensure that necessary arrangements are made for all appropriate medical witnesses to appear before the Tribunal and for all relevant medical evidence to be available and presented (s34(2));
- Have due regard to the possible effects of medication on the person and prescribe the minimum consistent with proper care to ensure that adequate communication with the person's representative at the inquiry is not impeded (s29).

## What happens at a Mental Health Inquiry

- At a mental health inquiry the Tribunal will determine whether on the balance of probabilities the assessable person is a mentally ill person, having regard to:
- Reports and recommendations of the authorised medical officer, other medical practitioners or accredited persons who examined the person under s27 after the initial detention;
- Any other information before the Tribunal;
- The administration of any medication to the person and its effect on the person's ability to communicate;
- Any relevant cultural factors relating to the person and to expert evidence as to its relevance to any question of mental illness.

At the beginning of the mental health inquiry the Tribunal must ask the assessable person:

- whether they have been given a written statement as to their legal rights; and
- whether they have been informed of the authorised medical officer's duty in relation to notice and other entitlements.

At a mental health inquiry the Tribunal can decide that:

- The person is not a mentally ill person and should be immediately discharged;

- The person is not a mentally ill person and that discharge should be deferred for up to 14 days;
- The person is a mentally ill person and should be:
  - Discharged into the care of their designated carer(s) or their principal care provider;
  - Discharged on a community treatment order;
  - Detained in a mental health facility as an involuntary patient for a specified period of up to three months on an Involuntary Patient Order.

The Tribunal can only order that someone be made an involuntary patient if satisfied that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available, or that for any other reason it is not appropriate to make any other order. A person can only be discharged on a Community Treatment Order if the Tribunal makes the necessary order.

To decide if the person is a 'mentally ill person' the Tribunal must consider whether the person is:

- suffering from a mental illness (as defined by the Act); and
- at risk of serious harm to themselves or others.

The Tribunal will:

- take into account the person's continuing condition, including any likely deterioration; and
- consider whether care of a less restrictive kind is appropriate and reasonably available to the person.

If the Tribunal determines at the inquiry to make an involuntary patient order, then the Tribunal must go on to consider whether or not the patient is able to manage his or her financial affairs (see Section 5 Applying for and Revoking Financial Management Orders).

## What is Mental Illness?

A condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence of any one or more of the following symptoms:

- Delusions
- Hallucinations
- Serious disorder of thought form
- Severe disturbance of mood
- Sustained or repeated irrational behaviour indicating the presence of one or more of the above

## What is Serious Harm?

Serious harm is not defined in the Act. However, it is interpreted to include:

- Physical harm
- Financial harm
- Harm to reputation or relationships
- Neglect of self
- Neglect of others (including children)

The risk of harm must be both serious and related to the person's mental illness.

## What is Continuing Condition?

s14(2) MHA 2007

*In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.*

## What is an Involuntary Patient Order?

This is a legal order that authorises the detention of a 'mentally ill person' in a mental health facility. The first Involuntary Patient Order is made by the Tribunal at a mental health inquiry (s35) and can be made for a maximum period of up to three months.

## How to arrange for a mental health inquiry or Tribunal review

The Tribunal has a roster for mental health inquiries or scheduled reviews at each mental health facility.

### Mental health inquiries

Inquiries will be conducted at most mental health facilities once a fortnight at pre-arranged times. However, there is scope for urgent inquiries to be organised in between the rostered days, for example, where an ECT determination is also requested.

Staff at the mental health facility will need to fax through a preliminary list of persons requiring an inquiry **at least five working days** before the rostered inquiry day and confirm that an inquiry is appropriate. A final list with all relevant documentation should then be faxed to the Tribunal **at least two working days** before the rostered inquiry day.

### Reviews of involuntary patients

If the mental health facility wishes to extend a person's involuntary stay beyond the period set by the initial Involuntary Patient Order, then the mental health facility must apply to the Tribunal for a further Involuntary Patient Order **before the first order expires** (s37).

If a further order is then made by the Tribunal, the patient continues to be detained as an Involuntary Patient until he or she is well and no longer qualifies as a 'mentally ill person'. However, the Tribunal must review each Involuntary Patient **at least** every three months for the first 12 months the person is an involuntary patient and, thereafter at least once every six months or, if considered appropriate, at intervals of up to 12 months.

Treating teams presenting patients for ongoing detention should be prepared to give evidence as to the proposed care and treatment plan and the time frame in which they will be delivered. However, it is not necessary to stipulate a time frame for review by the Tribunal, as the patient will be automatically reviewed by the Tribunal in three or six months, as the case maybe, if they remain detained. The AMO is under an ongoing obligation under s39 of the Act to "examine each involuntary patient to determine whether the patient's continued detention in the facility is necessary". A patient must be discharged if they no longer require care and treatment on an involuntary basis in hospital; or there is a less restrictive option, consistent with safe and effective care. This should be carefully explained to patients who might otherwise think that they can only be discharged by the Tribunal.

If an involuntary patient was subject to a community treatment order prior to their admission as an involuntary patient then that community treatment order has no effect during the admission, but the order continues to run and resumes if the person is discharged from the mental health facility.

In cases where ongoing detention is not appropriate the Tribunal must discharge the person and may make a new Community Treatment Order. If the Tribunal finds the person is not a mentally ill person an order for discharge must be made. The order for discharge may be deferred for up to 14 days, if the Tribunal is of the view that this is in the best interests of the patient.

The Tribunal may order that the discharge of an involuntary patient for whom a CTO is made be deferred for up to 14 days, if the Tribunal thinks it is in the patient's best interests to do so. (s53(8)).

The Tribunal may classify a patient as a voluntary patient if of the opinion that the patient is likely to benefit from care and treatment as a voluntary patient and the patient agrees to the classification. The Tribunal's power to re-classify a patient as a voluntary patient may be only exercised when conducting a review of the patient. The AMO also has the authority to effect the re-classification. However, this may be exercised at any time (s40).

Applications to extend a person's involuntary detention in a mental health facility will be heard by the Tribunal either in person at the facility on a rostered day or by video or telephone conference at a scheduled time.

As soon as you are aware that you need to apply to extend a patient's involuntary detention you should start making the necessary arrangements. Most mental health facilities have a Tribunal Clerk, or an officer who is responsible for coordinating mental health inquiries and organising applications to the Tribunal. 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 (fax number 9817 4543). Application forms are available on the Tribunal's website ([www.mhrt.nsw.gov.au](http://www.mhrt.nsw.gov.au)) or by phoning (02) 9816 5955.

Applications to extend a patient's involuntary detention should be faxed to the Tribunal **at least five working days** before the requested date for the hearing. This allows Tribunal staff to ensure that a time is available for the hearing, and to arrange legal representation, if appropriate. Some mental health facilities prefer to liaise directly with the Mental Health Advocacy Service about legal representation.

If you are concerned that the Tribunal may decide not to extend the Involuntary Patient Order you should consider whether a Community Treatment Order would be an appropriate alternative. The Tribunal has power to discharge the patient subject to a Community Treatment Order but you would need to have a Treatment Plan ready for the Tribunal to consider and comply with the notice of hearing requirements.

**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.**

## Adjournment of a mental health inquiry or Tribunal review

The Tribunal has a specific adjournment power in relation to mental health inquiries (s36) and may adjourn a mental health inquiry for a period no longer than 14 days, if not satisfied that:

- the subject person has been informed of the authorised medical officer's duty in relation to the giving of notice; or
- notice has been given or that all reasonably practicable things have been done to give notice.

The decision to adjourn a mental health inquiry may occur if:

- the Tribunal believes it is in the best interests of the subject person; and
- the Tribunal has considered the certificates given under the Act.

If the Tribunal adjourns a mental health inquiry the subject person is to continue to be detained in the mental health facility unless discharged or allowed to be absent on leave.

The Tribunal may adjourn its review of an involuntary patient to such times, dates and places and for such reasons as it thinks fit (s155). The purpose of adjourning proceedings is to ensure they are properly conducted. The Tribunal may adjourn proceedings if it is necessary to arrange for appropriate legal representation, or for an interpreter to assist the person or a family member or to allow for the production of important evidence.

As an adjournment may have significant consequences for a patient's liberty, the Tribunal does not regard administrative convenience as sufficient justification for an adjournment.

The authorised medical officer should ensure that involuntary patients are brought before the Tribunal well before the expiry or review date and with sufficient information to allow the matter to be finalised without the need for an adjournment.

### 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 proceedings.

## What to do before a mental health inquiry or Tribunal review

The authorised medical officer or appropriate clinician involved with the patient should:

- Give notice of the date of the mental health inquiry or hearing to the assessable person and their designated carer(s) and principal care provider and explain the mental health inquiry or review process to the person;
- Inform any of the patient's relatives and other key people of the inquiry or review and encourage them to attend (unless the patient objects). If family are unable to attend, facilitate alternative means for family and friends to participate e.g. by telephone;
- Organise legal representation;
- Make the mental health facility file available to the legal representative;
- Ensure that an appropriate level of security is arranged, if necessary;
- Organise an interpreter for the person or their family where necessary;
- Organise and prepare reports and documentation;
- Consider whether a CTO may be needed if the Tribunal does not agree to make an involuntary patient order. If you think it may be required then have a treatment plan available and ensure notice has been given to the patient;
- Have regard to the principles of care and treatment outlined in section 68 of the Act and in particular:
  - s68(e) which states that: *people with a mental illness or mental disorder should be provided with appropriate information about treatment, treatment alternatives and the effects of treatment and be supported to pursue their own recovery goals; and*
  - s68 (h) which states that: *Every effort that is reasonably practicable should be made to involve persons with a mental illness or a mental disorder in the development of treatment plans and recovery plans and to consider their views and expressed wishes in that development.*

## Reports and documents required

The Tribunal needs to see the following reports and documents before the mental health inquiry or review:

- All forms (including schedules) certificates and Clinical Notations that evidence that the person was lawfully detained in the facility in accordance with s18 of the Act;
- All certificates and medical reports (Form 1s) from the examinations of the person when detained in the facility;
- Evidence that notice of the mental health inquiry or hearing has been given to the person and where appropriate their designated carer(s) and principal care provider;
- Evidence that the person was given a Statement of Rights in oral and written form. If the person was not capable of understanding them when it was first given evidence that it was given again at least 24 hours before the mental health inquiry;
- A completed application form (for hearings);
- Report from treating psychiatrist, medical officer or accredited person (or delegate);
- Reports from other involved professionals, for example nursing report, social worker report, occupational therapist report, psychological report;
- Copy of recent progress notes from the person's mental health facility file including details of any medication administered to the person;

- Reports that give a longitudinal view of the patient's condition and response to treatment, for example discharge summaries, previous assessments.
- The reports must address the legal criteria on which the Tribunal will base its decision.
- Is the patient/person suffering from a mental illness as defined by the Act?
- Is there a risk of serious harm to themselves or others?
- Are they able to be cared for in a less restrictive environment?

## 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;
- Avoid comments that could be interpreted as judgmental;
- Address the specific legal issues that the *Mental Health Act 2007* requires the Tribunal to consider;
- Identify clearly the sources of the author's information. These sources may be direct personal observations of the author of the reports, or may be information obtained from file notes or other professionals involved in the person's care.

The reports should also give information about the person's continuing condition, including any likely deterioration. If the inquiry is not being held in person at the mental health facility, all reports should be faxed to the Tribunal at least two working days before the hearing date.

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 the Tribunal by telephone or video conference.

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.

## What should the reports contain?

### Treating Psychiatrist Report

- Basis for the opinion that the patient is suffering with a mental illness, including details of delusions, hallucinations, serious disorder of thought form, severe disturbance of mood, sustained or repeated irrational behaviour.
- Details as to why the patient requires inpatient treatment, addressing issues of serious harm to self or others and the patient's continuing condition.
- Details as to how involuntary care will benefit the patient as the least restrictive alternative consistent with safe and effective care.
- Details as to current treatment, medication, response to treatment and support to pursue their recovery.
- Details of any past application for discharge by the patient, and the authorised medical officer's reasons for refusing that discharge.
- Details of efforts made to obtain the patient's informed consent to their treatment and recovery plan; the ongoing monitoring of their capacity to consent and efforts to support them to understand those plans if they lack capacity.
- Brief background of the patient's history and events leading to current hospitalisation, including co-morbid conditions, for example substance abuse, intellectual disability or other relevant medical conditions.
- Progress in hospital, including current diagnosis, medication and response to medication.
- Plans for the patient's long term recovery, treatment and care.
- Confirmation that the contents of the report have been discussed with the patient, including the patient's viewpoint.
- Views of family, designated carer(s) and principal care provider concerning ongoing hospitalisation or discharge.

### Nursing or Social Worker Report

- Opinion as to whether patient requires involuntary treatment, addressing issues of serious harm to self or others and the patient's continuing condition.
- If an involuntary patient order is sought at an inquiry a report about the person's capacity to manage his or her financial affairs.
- Details of contact with the patient and observations in relation to symptoms of mental illness, patient's demeanor, behaviour, attitude to medication and treatment and understanding of the illness.
- 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.
- Details as to how inpatient care will benefit the patient as the least restrictive alternative consistent with safe and effective care.
- Progress in hospital, including details as to current treatment, medication and response to treatment.
- Plans for the patient's long term recovery, treatment and care.

- Confirmation that the contents of the report have been discussed with the patient, including the patient's viewpoint.
- Contact with designated carer(s), principal care providers and their views concerning ongoing hospitalisation or discharge.

## Other reports

Additional reports can be provided by health care professionals involved in the care of the patient, for example, psychologist, social worker or occupational therapist. These reports should include:

- Brief background of the person's history and contact with the person;
- Information addressing the question of whether the person remains a 'mentally ill person' as defined in the Act (**see page 1.4**) and requires ongoing detention;
- Other information relevant to the author's involvement with the person.

## Who should attend the mental health inquiry or hearing

- The person concerned (wearing street clothes, if possible).
- The person's designated carer(s), principal care providers, family, friends and support persons.
- Everyone who has prepared a written report for the Tribunal.
- The treating psychiatrist/doctor/registrar/accredited person or medical officer.
- Other involved professionals, for example the primary nurse, social worker.

If designated carer(s), principal care providers, family or friends are unable to attend they may still make their views known by writing to the Tribunal before the mental health inquiry or review. It might also be practicable for the Tribunal to hear their views by telephone or video.

## What to do after the mental health inquiry or review

If the person is detained as an involuntary patient, the authorised medical officer or some other appropriate health care professional should explain to the patient:

- The nature and effect of the order and how long the order has been made for.
- That unless the patient is discharged the Tribunal will review the involuntary patient order prior to its expiry.
- His or her appeal rights to the Supreme Court.
- His or her right to request discharge under s42, and to pursue an appeal to the Tribunal against any refusal to discharge or failure to determine an application for discharge three days after it was made (s44).
- The patient should also be given a Statement of Rights after a Mental Health Inquiry.

You might find it helpful to refer the patient to the Mental Health Advocacy Service for further information (phone (02) 9745 4277)