



SUBMISSION MADE BY THE COUNCIL OF OFFICIAL VISITORS

to the

**Review of the *Mental Health Act 1996* and
*Criminal Law (Mentally Impaired Defendants) Act 1996***

in accordance with the *Mental Health Act 1996*, section 215.

MENTAL HEALTH REVIEW BOARD

Term of Reference:

“In regards to the operation and effectiveness of the Mental Health Act 1996, consider and have regard to Part 6 and the:

- 1 Effectiveness of the operations of the Mental Health Review Board; and*
- 2 Need for the continuation of the functions of the Mental Health Review Board.”*

Legislation: *Mental Health Act 1996*, sections 138 and 139

“Initial review

138. (1) After the making of --
(a) an order for a person to be admitted to, and detained in, an authorized hospital as an involuntary patient; or
(b) a community treatment order,

(“the initial order”) the Board is to carry out a review of whether or not the order should continue to have effect.

(2) *The review is to be carried out as soon as is practicable after the initial order is made, and in any event not later than 8 weeks after that time.*

(3) *Subsection (1) only applies if the person has been continuously an involuntary patient since the initial order was made.*

(4) *Subsection (1) does not apply where an order of the kind mentioned in that subsection is made while a person is an involuntary patient if --*

- (a) *a review under this section was previously carried out in respect of the person; and*
(b) *the person has been continuously an involuntary patient since the previous review.”*

“Periodic reviews

139. (1) *Not later than 6 months after a review in respect of a person has been carried out under section 138 or this section, the Board is to carry out a further review of whether or not the order should continue to have effect.*

(2) *Subsection (1) only applies if the person has been continuously an involuntary patient since the last review was carried out.”*

COMMENTARY:

Figures obtained from Mental Health Review Board show that in WA for 2001/2002 64.9% of patients admitted involuntarily (1551 out of 2390) were discharged from that status within 28 days of admission (refer Mental Health Review Board Annual Report 2002, page 17). This phenomenon is experienced in other jurisdictions for example the Auditor General Victoria report, ***Mental health services for people in crisis***, 17 October 2002 reported that:

“5.37 Statistics provided by the Department of Human Services show that, during 2001, 51.6 per cent of involuntary patients were discharged within the first 2 weeks of admission and were not therefore listed for initial review by the Board. Of the 6 372 initial reviews listed for hearing in 2001, 37.8 per cent of patients listed for hearing were discharged from their involuntary status prior to the hearing date. Thus, the majority of involuntary patients (69.8 per cent) do not appear before the Board to have their situation independently reviewed, unless they appeal.”

Given the high incidence of discharge from involuntary status prior to the 28-day initial period there appears grounds to ensure a regular detailed review by a psychiatrist at shorter intervals, and by implication review by the Mental Health Review Board. It is unclear why the initial review period is currently set at 8 weeks when the initial order is only for a maximum of 28 days. This discrepancy ensures that a significant proportion of individuals do not have review by an external and independent body of their involuntary status.

Extracting other figures from the Mental Health Review Board 2002 Annual Report, there were 2390 persons made involuntary in 2001/02, but only 958 reviews completed. After allowing for a number of long-term patients who in one year would have had 2 reviews, the discharge from involuntary status in the period after initial involuntary admission and before their first periodical review at a maximum of 8 weeks must be very high. The Council of Official Visitors could not determine the number.

Council is of the view that the initial periodic review by the Mental Health Review Board be within the first 14 days with subsequent periodic reviews by the Board being at 3 monthly rather than 6 monthly periods.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, section 138 be amended to require the initial review by the Mental Health Review Board to be not later than 14 days.

It is recommended that the *Mental Health Act 1996*, section 139 be amended to require subsequent periodic reviews to occur at not later than 3 months.

Issue: PATIENT ACCESS TO REPORTS MADE TO MENTAL HEALTH REVIEW BOARD

Legislation: *Mental Health Act 1996*, sections 137, 160 and 161

“137. In making a determination upon a review, the Board is to have regard primarily to the psychiatric condition of the person concerned and is to consider the medical and psychiatric history and social circumstances of the person.”

COMMENTARY:

In practice the Mental Health Review Board requests reports (medical, psychiatric, social) from the treating team to assist in their consideration of a patient’s situation. The Board’s preferred position is that the patient be provided with a copy of any reports provided to it (Mental Health Review Board Handbook 2001, item 3.10, page 22) prior to the hearing to assist in procedural fairness. This is reliant on the patient knowing that he/she can ask for access to such reports, rather than an automatic entitlement.

Patients can, with some exceptions, also request access to their medical records via sections 160 and 161 of the Act. Refer to the Council’s submission **“Protection of Patients’ Rights - Access to Personal Records, *Mental Health Act 1996*, sections 160 & 161”** for more detailed discussion of this matter.

Difficulty is still encountered with the timely provision of documents requested for the purposes of a Mental Health Review Board hearing, placing pressure on the patient and often increasing anxiety levels in the lead up to a Mental Health Review Board review.

A further concern with the present section 160 and 161 provisions is that there are no time limits on compliance (or refusal) of a request. Although the Freedom of Information Act requires compliance within 45 days, this period would be too great for a medical record required for a Mental Health Review Board hearing.

Overlapping with the procedures of the Mental Health Review Board the practice of medical practitioners submitting reports at the last minute for the Board’s consideration is a serious breach of procedural fairness.

In the case of *EO v Mental Health Review Board & Others* WASC 1265 of 2000 Templeman J found that *“the appellant was not accorded procedural fairness because he did not have access to relevant material”*. This was a case where the applicant was not provided with his full medical record prior to his hearing (at which the Board referred to the full record). Producing a report at the last minute effectively denies the patient access to that part of their record.

Under the Model Mental Health Legislation and in some other jurisdictions, for example Tasmania, the tribunal may order that all or any part of the record must not be disclosed to the patient even if given to their representative. Generally the practice is where clinicians wish to not disclose information then that information

must be specified and reasons given. The reasons provide an accountability trail which has the potential to be subject to challenge.

Council is of the view that patients must be provided with, as a minimum, a copy of the medical or other reports provided to the Mental Health Review Board for a hearing before that Board, prior to the hearing. Applications by clinical staff to have any of that information withheld from the patient should be made to the Board, who should have the power to determine whether it will be withheld.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended such that patients are automatically provided with a copy of the medical or other reports provided to the Mental Health Review Board for a hearing before that Board, prior to the hearing. Applications by clinical staff to have any of that information withheld from the patient should be made to the Board, who should have the power to determine whether it will be withheld.

Legislation: *Mental Health Act 1996*, section 146

“Complaints

146. (1) *The Board is to enquire into any complaint made to it concerning –*

- (a) any failure to recognize the rights given by this Act to an involuntary patient; or*
- (b) any other matter to do with the administration of this Act.*

(2) The Board may, either generally or as otherwise provided in the delegation, delegate its functions under subsection (1) to a member of the Board.

(3) Subsection (2) does not limit the power of the Board to delegate its functions under subsection (1) to the Registrar.”

COMMENTARY:

The Mental Health Review Board (the Board) is given the obligation and the power to enquire into a complaint made concerning the failure to recognise rights given by the *Mental Health Act 1996* to an involuntary patient and any other matter to do with the administration of the Act.

In the preceding provisions of Division 2, the Board is empowered and required to conduct various reviews relating to involuntary patients and by section 145 is empowered to make a determination on such matters and to make orders, vary orders or give direction in relation to an order. However in regard to any enquiry into a complaint the Board is not empowered to do anything in relation to the enquiry.

In Council’s view the Board should have powers similar to those provided in section 145 for enquiries into complaints.

“145. (1) *Subject to this Act, the Board may determine any matter coming before it for consideration and may make such order in respect of a matter as it thinks appropriate.*

(2) Without limiting subsection (1) the Board may --

- (a) order that the person is no longer an involuntary patient;*
- (b) order that a community treatment order be made in respect of the person, giving such directions, if any, as it thinks fit in relation to the terms of the order; or*
- (c) if the person is the subject of a community treatment order, vary the order, and give such directions in relation to the order as it thinks fit.”*

One solution would be that where the Board finds on enquiry that a complaint is substantiated, then the Board of its own motion, may then review the case under the terms of section 144.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, section 146 be amended to allow the Mental Health Review Board to carry out a review at its own initiative where an enquiry into a complaint finds the complaint substantiated.

Legislation: *Mental Health Act 1996, Schedule 2*

COMMENTARY:

The Council has been informed that on some occasions the Mental Health Review Board has adopted the practice of preventing participants in hearings taking contemporaneous notes.

In Council's view it is imperative for participants to take their own working notes during a hearing so that they may properly manage their case. There are sufficient controls on publication to prevent misuse of those notes.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996*, Schedule 2 Item 2 be amended to include "*the reasonable opportunity to make notes*".

UNITED NATIONS PRINCIPLES FOR THE PROTECTION OF PERSONS WITH MENTAL ILLNESS AND FOR THE IMPROVEMENT OF MENTAL HEALTH CARE (“UN PRINCIPLE”)

PRINCIPLE 1

“6. ... The person whose capacity is at issue shall be entitled to be represented by a counsel. If the person whose capacity is at issue does not himself or herself secure such representation, it shall be made available without payment by that person to the extent that he or she does not have sufficient means to pay for it. The counsel shall not in the same proceedings represent a mental health facility or its personnel and shall not also represent a member of the family of the person whose capacity is at issue unless the tribunal is satisfied that there is no conflict of interest. Decisions regarding capacity and the need for a personal representative shall be reviewed at reasonable intervals prescribed by domestic law. The person whose capacity is at issue, his or her personal representative, if any, and any other interested person shall have the right to appeal to a higher court against any such decision.”

Legislation: *Mental Health Act 1996, Schedule 2, Item 3*

“Representation

- 3.** (1) *A party to proceedings before the Board –*
- (a) *may appear personally unless the Board, being of the opinion that the personal appearance of a person would be detrimental to the health of the person, orders that the person be represented; or*
 - (b) *may be represented in those proceedings by counsel or, with the leave of the Board, by any other person.*
- (2) *The Board may arrange for a person to be represented in proceedings before it if the person wishes the Board to do so.*
- (3) *A person who is not a certificated practitioner, within the meaning of the Legal Practitioners Act 1893, must not demand or receive any fee or reward for representing a party to proceedings before the Board.*
- Penalty: \$1 000.”*

COMMENTARY:

In line with UN Principle 1, item 6 the Act provides for patients to have the right to legal representation at Mental Health Review Board hearings (Schedule 2 Item 3).

According to the Mental Health Review Board’s Annual Report 2001 (pages 9-10) for 1999 – 2000 12.6 % of individuals who appeared before the Board had legal representation. For 2000 – 2001 the figure was 14.2 %. The Council is concerned at the low number of individuals who are legally represented at Board hearings. An even smaller percentage had the assistance of Official Visitors (Refer to the Council

of Official Visitors' submission regarding the Review of the Council – Recommendation 14).

In general terms, the experience across Australia is that persons with decision making capacity are more likely to have a more acceptable outcome if legally represented. The present lack of meaningful access to legal representation merely ensures those already vulnerable, disadvantaged and disempowered remain so.

An Australian Law Reform Commission Report showed that, for matters before the Administrative Appeals Tribunal, represented applicants were more than twice as likely to succeed in their appeals than those unrepresented, with a success rate of 23% for unrepresented compared with 51% for represented applicants.

In its 2002 Annual Report the Mental Health Review Board (page 16) reported that only 2.7% of the total patients reviewed by the Board were discharged from their involuntary order. However of the 69 reviews at which the Mental Health Law Centre attended 9 individuals (13%) were discharged by the Board from involuntary status.

The difference in outcome rate should by itself be sufficient to support the need for legal representation to be generally available.

Without independent legal representation the fairness of a system where people's rights are under consideration must be in question.

The Australian Bureau of Statistics' Quinquennial Census of Population and Housing Index of Relative Socio-economic Disadvantage identified that people with a mental illness in Western Australia tend to be located in the socio-economic groups experiencing more disadvantage (Lawrence, Holman and Jablensky 2001, page 24-25). Thus this group's ability to access private legal representation is limited.

In the absence of other safeguards available independently to the individual, Council considers there is clear need for free legal representation for this group. Council is of the view that legal representation should be mandatory unless specifically declined by the patient.

RECOMMENDATION:

It is recommended the *Mental Health Act 1996* be amended to require patients attending before the Mental Health Review Board to have legal representation without payment by that person, unless declined by them.

It is recommended that a review of the method and process by which consumers are advised of the right to access the Council and/or the Mental Health Law Centre be undertaken to ensure this occurs in a meaningful way.

It is recommended that the provisions of the *Mental Health Act 1996* relating to the Mental Health Review Board be amended to provide for automatic referral of involuntary patients to the Council of Official Visitors when a Mental Health Review Board hearing is scheduled for them. (Refer Recommendation 14 Council of Official Visitors' submission regarding the Review of the Council)

Issue: TRANSCRIPTS OF MENTAL HEALTH REVIEW BOARD PROCEEDINGS

Legislation: *Mental Health Act 1996, Schedule 2, Items 13 & 14*

“14. The Registrar is to cause a recording to be made and kept of all proceedings before the Board in a form that is suitable for enabling a transcript of the proceedings to be prepared if required.”

COMMENTARY:

The Mental Health Review Board, by Schedule 2 Item 14, is required to keep a recording and make a transcript if required of its proceedings. However patients who have appeared before the Mental Health Review Board have reportedly encountered difficulty in obtaining a transcript of the hearing.

The Mental Health Review Board in its publication, “Mental Health Review Board Western Australia Handbook” (July 2001 edition) page 14, indicates that the Registrar will decide if a transcript will or will not be provided when requested and sets out items which are relevant for the Registrar’s consideration:

“2.6 Transcript of Proceedings

The Act requires the Registrar to keep a record of proceedings in a form suitable for enabling a transcript of proceedings to be prepared if required. (Schedule 2, Item 14) Upon notification by a party of the lodgement of a Supreme Court appeal (See 2.7), the Registrar will obtain a transcript of the review and provide it to the Supreme Court.

In all other circumstances, a person requesting a transcript of a review should write to the Registrar who will make a decision on the request after considering the reasons for it. Relevant considerations for the Registrar’s decision about the preparation of a transcript include the following:

- (a) whether the request is from or on behalf of a participant in the review;*
- (b) whether the order to which the review relates is still in existence;*
- (c) whether an appeal is being considered; and*
- (d) whether the person requesting the transcript has agreed to pay the transcription costs.*

The Board does not provide either the actual recording or copies of it.”

This process by the Registrar seems to be necessary because of Schedule 2 Item 13 which provides for the suppression of publication of any material or account of proceedings which may identify a range of persons except for those circumstances / cases set out in Item 13(3):

“(3) Subclauses (1) and (2) do not apply to -

- (a) *the communication to persons concerned in proceedings in any court or tribunal of any transcript of evidence or other document for use in connection with those proceedings;*
- (b) *the communication of any transcript of evidence or any other document to a body that is responsible for disciplining members of the legal or medical profession or to persons concerned in proceedings before such a body;*
- (c) *the communication to a body that grants assistance by way of legal aid of any transcript of evidence or any other document for the purpose of facilitating the making of a decision as to whether such assistance should be granted or continued in any particular case; or*
- (d) *the publishing of a publication genuinely intended primarily for the use of members of any profession, being-*
 - (i) *a separate volume or part of a series of law reports; or*
 - (ii) *any other publication of a technical character.”*

With respect, any person who is a party to a hearing should have an unqualified right to a transcript of that hearing subject to the payment of reasonable transcription costs, say equivalent to that payable for courts of petty sessions' transcripts.

The exclusion of providing a transcript to a person who is a party to proceedings except when they have proceedings on foot in another court or tribunal places unnecessary obstacles in the way of a person deciding if an appeal should be made or not. That is, unless an appeal has been lodged, the person is not concerned in proceedings in a court (or tribunal) and is, therefore, not entitled to a transcript.

However, if the person approaches a body that grants legal aid (e.g. Legal Aid WA (LAWA) or the Mental Health Law Centre (MHLC)) then that body can obtain a transcript for the purpose of deciding whether to grant aid or lodge an appeal. Thus, the appeal could then still be only in contemplation.

For example, the MHLC could request a transcript of proceedings to determine if an appeal should be lodged, the strength of the appeal being a factor in deciding whether to grant aid or not.

Another example could be unrelated to the outcome of the review process. In the case where LAWA may be considering an application for a grant in aid for a criminal case and in order to establish the client's qualifications against LAWA criteria for a grant it may be relevant to obtain the evidence given by treating personnel before a Mental Health Review Board hearing.

In the cases above a legal aid provider body can obtain the transcript but a person acting in their own right cannot nor can a person seeking representation by a legal practitioner without legal aid assistance. This approach appears to defy logic.

An alternative view may be the suppression of publication (Item 13) does not apply to providing a transcript to a party to the proceedings of the Board. However this interpretation is not clearly available on the plain words of Item 13.

In Council's view a transcript of proceedings should be available as a right for a person who is a party to a Board hearing and any person who is a witness at such a hearing.

Schedule 2 Item 14 refers to a "... *transcript of proceedings to be prepared if required*". By implication "*if required*" should mean if required by a party to the proceedings.

Further, the Registrar of the Board should not have the discretion in the provision of a transcript, but must prepare and provide it on request; with reasonable costs being paid by the person requesting it. The Council's view is that the person who was the subject of the hearing should be able to obtain a transcript for a nominal fee, say \$10 (Refer Schedule 2 Item 10 – Each party must bear their own costs).

In view of the present provisions and the practice adopted by the Mental Health Review Board, legislative intervention to ensure clarity seems appropriate together with time lines to ensure timely provision of the transcript.

RECOMMENDATION:

It is recommended that the *Mental Health Act 1996* be amended to provide:

- 1 a right for any party to Mental Health Review Board proceedings to obtain a transcript of those proceedings at a reasonable cost;
- 2 with any person the subject of those proceedings being able to obtain a transcript for a nominal fee of say \$10; and
- 3 that the transcript should be provided in a timely manner, say within 10 working days.

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LEGISLATION

Mental Health Act 1996

Western Australia