

APPLICATION BY AN AUTHORISED MEDICAL OFFICER FOR HEARING TO PROCEED IN THE ABSENCE OF THE PATIENT OR PERSON



PRACTICE DIRECTION

Purpose

1. The purpose of this Practice Direction is to specify the procedure to be followed by authorised medical officers (AMOs) when an application is made for a hearing to proceed in the absence of the patient or person.

Background

2. Involuntary patients detained in a mental health facility under s 37 of the *Mental Health Act 2007* ('the Act') or persons detained for breaching their CTO under s63 of the Act, or patients/persons subject to an application for an ECT inquiry under s96 of the Act are required by the Act to be 'brought before' the Tribunal for the hearing.
3. Every reasonable effort should be made to bring the patient/person before the Tribunal for all such hearings. Where appropriate, this can include participation by video or by telephone, where appropriate.
4. However, recent amendments to the Act now allow for these hearings to take place in the absence of the patient, in limited circumstances. In circumstances where the patient/person is too unwell to attend or refuses to attend the hearing the authorised medical officer may apply to the Tribunal for the hearing to take place in the patient's absence.
5. The Tribunal may conduct hearings in the absence of the patient only if it is satisfied that the patient is too unwell to attend the hearing or they refuse to attend the hearing within a reasonable period and that it is desirable for the safety and welfare of the patient that the hearing proceed. In making its determination the Tribunal is required to consider the views (if known) of the patient, any representative, the designated carer and the principal care provider.
6. The Principles for Care and Treatment in s68 of the Act require that every practicable effort is made to obtain the consent of patients to their treatment and recovery plans and, in cases where capacity is lacking, support given to understand those plans. That information is to be communicated in a language or mode that the patient is likely to understand. In making its determination, the Tribunal will consider what efforts have been made to provide these supports to the patient.

The legal and procedural requirements for an application to proceed in the patient's or person's absence are outlined below.

Section 37 Review of Involuntary Patients and s63 Reviews of Detained Persons

7. If an AMO is of the opinion that a patient or person is too unwell to attend or refuses to attend a s37 or s63 review, the AMO must apply to the Tribunal to have the review carried out in the absence of the patient or person (s37(3A) and s63(2A)).
8. The Tribunal may conduct the hearing in the patient or person's absence if satisfied that:
 - the patient or person has refused to attend or is too unwell to attend (and is unlikely to be well enough within a reasonable period), **and**
 - the patient's or person's representative (being an Australian legal practitioner or other person approved by the Tribunal to represent the person at the hearing) has been notified, **and**
 - it has considered the views (if known) of the patient or person, their representative, their designated carer and their principal care provider, **and**
 - is of the opinion that conducting the hearing in the absence of the patient or person is desirable for the safety or welfare of the patient or person.
9. The AMO should outline in the attached pro forma 'Application':
 - the basis of the opinion that the patient or person is too unwell to attend the hearing and why it is thought that the patient or person is unlikely to be well enough to attend within a reasonable period;
 - if known, the reason why the patient or person refuses to attend the hearing, including the efforts made to encourage their attendance; ;
 - why carrying out the hearing is 'desirable for the safety or welfare of the patient or person';
 - the steps taken to notify the Mental Health Advocacy Service or other known representative of the patient or person of the application;
 - the steps taken to notify designated and principal care providers of the application and advise them that the Tribunal may consider their views;
 - the steps taken to support the patient or person, designated carers and principal care provider in understanding the nature of the Tribunal's hearing and any proposed treatment plan; and
 - Note: The information should be communicated in a language or mode that the patient, designated carers and principal care provider are likely to understand.
10. In addition, the AMO is required to:
 - notify the patient's or person's representative and designated and principal care providers of the application and advise that the Tribunal may consider their views in relation to the application;
 - provide the contact details of the representative and designated and principal care providers in the application form, so that the Tribunal can contact them to seek their views; and
 - If possible, record the views of the designated carer and principal care provider in the application or subsequent report to the Tribunal.

Section 96 ECT Inquiries

11. Patients are required to be brought before the Tribunal for an ECT inquiry under s96 of the Act. An application to proceed in the patient's absence may be made by the AMO if of the opinion that the patient is too unwell to attend or refuses to attend the hearing (s96(5A)).
12. The Tribunal may conduct the hearing in the patient's absence if satisfied of all the matters in paragraph 8 above, except that in relation to the notification of the person's representative the Tribunal must be satisfied there has been such notification or that reasonable steps have been taken to notify the representative.
13. Accordingly, the AMO is required to attend to the matters set out in paragraphs 9 and 10 above.

Practical considerations

14. The rationale for the amendments to the legislation is to ensure that patients or persons who require ongoing care and treatment by way an involuntary patient order or as a detained person on a CTO breach order are reviewed by the Tribunal within the applicable statutory time frames; and that persons who require ECT are not deprived of appropriate treatment because they cannot be brought to the hearing. However, as a matter of procedural fairness, all efforts must be made by the AMO to have the patient or person brought before the Tribunal. This may require some flexibility in how a hearing is conducted. For example, if a patient or person is bedridden and cannot be brought to the hearing room, it may be appropriate for a bed side hearing to take place via telephone, face time, Skype or using other video technology. In cases where the Tribunal is physically present at the mental health facility, members of the panel may visit the patient or person in their room or on the ward.
15. In considering whether to make an application to proceed in the patient's or person's absence, the Tribunal and the AMO should also consider whether the patient's or person's participation might be achieved by adjourning the matter for a short period of time.
16. Applications should be made only if all reasonable efforts have been made to bring the patient or person to the hearing and an adjournment is not appropriate. For example, in cases where a person requires ECT treatment, adjourning the hearing may not result in any improvement in their mental state or ability to attend the hearing. What is a 'reasonable period' will vary from case to case and may depend, in part, on the type of review being conducted and the impact on the safety or welfare of the patient or person if the review is delayed.
17. Applications are to be made on the attached Application and are to be forwarded to the Tribunal at the earliest opportunity, including on the day of the hearing. This does not prevent an oral application from being made at the hearing, at the last minute, if the patient or person refuses to attend or becomes too unwell.
18. As the amendments will now require that designated and principal care providers are to be notified of all Tribunal matters, they must also be notified of any application to proceed in the absence of the patient or person (s78(1)(g)).

19. To ensure that designated carers and principal care providers are notified, AMOs should consider the following provisions in the Act:

- the nomination and identification of designated carers (s72);
- the appointment of a principal care providers (s72A);
- the AMO's duty to give effect to any nomination, variation or revocation of the designated carer (s72(6)), except in circumstances where the nomination variation or revocation may put the patient or others at risk of serious harm, or the person was incapable of making the nomination, variation or revocation (s72(7); and
- the AMO's duty to determine the patient's or person's principal care provider (s72A(2)).

This Practice Direction is issued under to s160 (3) of the *Mental Health Act 2007* and will have effect from 1 July 2018 when the Amendments to the Act come into effect.

His Honour Judge Richard Cogswell SC
President

DATED:5 June 2018

APPLICATION FOR HEARING TO PROCEED IN THE ABSENCE OF THE PATIENT OR PERSON



Mental Health Act 2007, Section 37(3A), 63(2A), 96(5A)

HEARING CONCERNING: MHRT No:

DoB: MRN:

DATE OF HEARING: TIME OF HEARING (if known):

MENTAL HEALTH FACILITY:

- HEARING FOR:
- S 37 - Review Of Involuntary Patient
 - S63 – Review of person detained following breach of CTO
 - S96 – Application for ECT Inquiry

AUTHORISED MEDICAL OFFICER MAKING APPLICATION:

NAME: Position:

Tel: Mobile: Fax

An application is made for the above hearing to proceed in the absence of the patient or person because:

- The patient or person is too unwell to attend* *The patient or person has refused to attend*

Please explain why the patient or person is too unwell to attend and why it is unlikely they will be well enough to attend within a reasonable period:

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Please explain, if known, why the patient or person refuses to attend and the efforts made to encourage the patient's or person's attendance:

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Please explain why having the hearing in the absence of the patient or person is desirable for their safety or welfare:

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Representative: Please explain the steps taken to notify the Mental Health Advocacy Service or the patient's or person's representative of the application and the hearing:

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Representative's Name and Contact Details:

Name: Tel:.....

Legal Aid: Other:

Carers: Please explain the steps taken to notify the patient's or person's designated carer/s and principal carer provider and to explain the nature of the hearing/proposed treatment and to obtain their views:

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Designated Carers' Names and Contact Details:

1) Tel:

What are his/her views?

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2) Tel:

What are his/her views?

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Principal Care Provider's Name and Contact Details:

1) Tel:

What are his/her views?

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Please explain the steps taken to support the patient or person or their carers regarding the application and any proposed treatment:

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Any other comments or relevant information?

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SIGNATURE: **DATE:**