

MENTAL HEALTH TRIBUNAL

PRACTICE NOTE 8

ACCESS TO DOCUMENTS IN MENTAL HEALTH TRIBUNAL HEARINGS

I. PRELIMINARY

Authority

1. This Practice Note has been issued by the Rules Committee of the Mental Health Tribunal (the Tribunal) in accordance with section 209(2) of the *Mental Health Act 2014* (the Act).

Introduction and purpose

2. Section 191(1) of the Act states that, at least 48 hours prior to a Tribunal hearing, a designated mental health service must give the person who is the subject of the proceeding (referred to in this Practice Note as the 'patient') access to any documents that it has in its possession which are in connection with the proceeding.
3. Pursuant to section 191(2), an authorised psychiatrist may apply to the Tribunal for access to documents to be denied to the patient if the authorised psychiatrist is of the opinion that the disclosure of information in such documents may cause serious harm to the patient or to another person (the 'serious harm test'). Section 191(3) allows the Tribunal to grant such an application if satisfied of the serious harm test and specifies the Tribunal's powers when determining such an application.
4. In practice, the majority of documents which are the subject of applications to deny access to documents are file notes concerning conversations with family members and / or carers or correspondence from family members and / or carers. Other common categories of document are Crisis and Assessment Treatment Team (CATT) reports and certain types of specialist clinical reports such as forensic reports.
5. Under section 181(1)(b) of the Act, the Tribunal is bound by the rules of procedural fairness. The Tribunal's approach to procedural fairness is set out in the *Guide to Procedural Fairness in the Mental Health Tribunal* which is available on the Tribunal's website. Procedural fairness includes ensuring that parties have the opportunity to respond to 'adverse material' that is relevant, credible and significant to a decision. By allowing the Tribunal to deny patients access to documents when it is satisfied that the serious harm test is met, section 191(3) effectively abrogates this rule of procedural fairness in relation to a defined class of documentary material.
6. Accordingly, the Tribunal will apply section 191(3) in a way which places as few limits on procedural fairness as possible while at the same time acknowledging that the Act deliberately recognises that the nature of Tribunal hearings and the sources of some of the information provided about patients mean that there are circumstances in which providing access to certain documents may cause serious harm to the patient or another person and this is to be avoided.
7. Section 191 of the Act raises complex issues and is the subject of some confusion. The primary cause of confusion is which documents are to be regarded as connected with the proceeding. Given the absence of binding case law on this point, the Tribunal has obtained legal advice to assist it to articulate a clear and

consistent approach to access to documents and applications to deny access to documents in Tribunal proceedings.

8. There are two broad approaches regarding what is meant by documents 'in connection with the proceeding,' namely a narrow approach and a broad approach. On a narrow reading of section 191(1), a designated mental health service need only give access to those documents it chooses to put before the Tribunal. In contrast, on a broad reading of the section a designated mental health service must do more than this and give access to all documents concerning a patient who is to have a hearing before the Tribunal.
9. Having considered Counsel's advice the Tribunal has adopted an intermediate approach. The Tribunal is not of the view that section 191 requires a designated mental health service to provide access to all documents in its possession concerning a patient who is to have a Tribunal hearing. However, the Tribunal's view is that the scope of documents connected with a proceeding is not a matter entirely within the discretion of a designated mental health service. Accordingly this Practice Note specifies a broad range of documents that, if they exist, will be considered to be connected with a proceeding and thus captured by section 191. In relation to other documents, whether or not those documents that are connected with a proceeding will depend on whether the designated mental health service needs to provide these to the Tribunal to support its application or position.
10. It is important to note that, of the 7,478 hearings conducted in the 2015/16 financial year, there were only 51 applications to deny access to documents (or approximately 0.7% of the total number of hearings). This does not diminish the significance or impact of these applications where they arise, but it does demonstrate that in the vast majority of matters before the Tribunal compliance with section 191 and this Practice Note can be managed in a very straightforward manner. If there are no documents on a patient's current clinical file containing information that, if disclosed, may cause serious harm to the patient or another person, designated mental health services may elect to simply provide the patient with access to the entirety of their current clinical file.
11. Accordingly, this Practice Note is intended to guide members and all participants in hearings, including designated mental health services, patients and their legal representatives, nominated persons, carers and families with respect to those very few cases where an application to deny access to documents is made. It outlines when and how an application to deny access to documents needs to be made and the procedure to be followed in the hearing of such applications.
12. It is also intended to provide guidance on patients' right to access documents in advance of Tribunal hearings more generally (including the majority of cases in which no application to deny access to documents is made).
13. This Practice Note is the key document concerning access to documents in Tribunal hearings. Other resources have been prepared and are designed to present the same information in a more accessible form and are particularly directed at designated mental health services, patients and their carers and family members.

Section 191 only applies when there is a pending Tribunal hearing

14. The obligation of designated mental health services to give patients access to documents under section 191 of the Act only applies if there is a pending hearing of the Tribunal (see definition of pending hearing in paragraph 29).

15. If there is no pending hearing before the Tribunal, a patient who wishes to access his or her health information must make the application under the *Freedom of Information Act 1982* (FOI Act) or the *Health Records Act 2001* (HR Act) to the relevant designated mental health service. The Tribunal has no jurisdiction with respect to these processes and this Practice Note does not purport to deal with them.

Exemptions under FOI and HR Acts are not determinative

16. A patient's right to access documents in connection with a proceeding pursuant to the Act are separate from any rights the patient has to access information under the FOI Act and HR Act. For the avoidance of doubt this means a patient is not required to make an FOI application, or an application under the HR Act, to access documents connected with a pending hearing.
17. Notations that documents are 'FOI Exempt' or that a decision to deny access pursuant to the FOI Act or the HR Act has previously been made, do not mean that the patient cannot have access to these documents pursuant to section 191 of the Act. Similarly, a decision to deny access pursuant to the FOI Act or the HR Act is not relevant to the Tribunal's consideration of whether access to the documents will satisfy the serious harm test. The Tribunal may decide that a document that is exempt under the FOI Act or HR Act does not meet the serious harm test under section 191(3).
18. Accordingly, any documents exempt under the FOI Act or HR Act must be separately considered by the authorised psychiatrist in accordance with the Act and this Practice Note.

Scope of application

19. This Practice Note applies to a patient's right to access documents prior to Tribunal hearings under section 191(1) of the Act and to any application by an authorised psychiatrist to deny access to documents pursuant to section 191(2) of the Act.

Commencement date and citation of Practice Note

20. This Practice Note takes effect on 20 February 2017.
21. This Practice Note may be referred to as '*PN8 – Access to documents.*'

Definitions

22. Unless otherwise specified, all references to sections in this Practice Note are to sections of the *Mental Health Act 2014* (the Act).

Authorised psychiatrist

23. References to the authorised psychiatrist in this Practice Note include any delegate of the authorised psychiatrist appointed in accordance with section 151.

Document

24. Section 38 of the *Interpretation of Legislation Act 1984* defines 'document' as follows:
 - 24.1 document includes, in addition to a document in writing:
 - (a) any book, map, plan, graph or drawing;
 - (b) any photograph;

- (c) any label, marking or other writing which identifies or describes anything of which it forms part, or which it is attached by any means whatsoever;
 - (d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
 - (e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and
 - (f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them.
25. Document also includes any part or any copy of any part of any thing referred to in paragraph 24.1.
26. For the avoidance of doubt, electronic clinical records are 'documents' for the purposes of section 191.

Clinical report

27. The clinical report is the report about the patient an authorised psychiatrist must provide to the Tribunal in accordance with Rules 12-16 of the Mental Health Tribunal Rules 2014 and applicable Practice Notes issued for the purposes of providing, making and giving clinical reports.

Patient

28. References to patient include:
- a person included in the definition of 'patient' in section 3 of the Act (i.e. compulsory, security or forensic patients); and
 - a young person who is receiving voluntary treatment at a designated mental health service and in relation to whom an application to perform ECT has been made to the Tribunal.

Pending hearing

29. A pending hearing means a Tribunal hearing that has been listed by the Tribunal.

Serious harm

30. The wording of section 191(3) requires the Tribunal to be satisfied that serious harm may be caused by disclosing the documents. There is no requirement that disclosure would, or would be likely to, cause that harm. However, an application under section 191(3) should not be made on the basis of consequences that are remote or purely speculative.
31. The Act does not define serious harm so this Practice Note draws on the dictionary definitions from the Australian Concise Oxford English Dictionary and the Shorter Oxford English Dictionary. Serious harm may include a hurt, injury or damage that is important, demands consideration, is very considerable, or is significant (and not slight, negligible or incidental). In considering the serious harm test, the Tribunal will take into account the following (non-exhaustive) list of considerations:

- 31.1 potential harms that alone may not be sufficiently serious to demand consideration may amount to serious harm when combined or taken together
 - 31.2 the psychological and physical health and wellbeing of the patient or another person; however serious harm is not necessarily limited to physical or psychological injury
 - 31.3 prejudice to the patient's prospects of successful treatment or recovery
 - 31.4 prejudice to relationships with persons who may support the patient's recovery.
- 32. The Tribunal may decide that a document exempt under the FOI Act or HR Act does not meet the serious harm test under section 191(3) and that it therefore should be provided to the patient (see, further, paragraphs 16-18).
 - 33. It is important to emphasise the Act does not include an equivalent provision to section 26(8)(c) of the *Mental Health Act 1986* which allowed applications for non-disclosure solely on the basis that information in a document had been provided on the condition that the document remain confidential.

II. REQUIREMENT TO PROVIDE ACCESS TO DOCUMENTS UNDER THE ACT

- 34. The Act states that a designated mental health service must give patients access to any documents in its possession in connection with the proceedings at least 48 hours before the hearing.

What are the documents 'in connection with the proceeding'?

- 35. There are some documents that the Tribunal considers always have the requisite '*connection with the proceeding*'. The Tribunal requires the designated mental health service to give the patient access to these documents at least 48 hours in advance of the hearing in accordance with section 191 unless the authorised psychiatrist is satisfied that the serious harm test is met. In these circumstances, the authorised psychiatrist must make an application to the Tribunal to deny the patient access to the particular documents.
- 36. The documents that always have the relevant connection to the proceeding are as follows.
 - *The relevant clinical report.* The clinical report should be prepared in accordance with the applicable Tribunal Practice Note and any template approved by the Rules Committee.
 - *Copies of relevant Orders that establish the Tribunal's jurisdiction.* These are the current Order to which the patient is subject and, if the patient is subject to a Temporary Treatment Order, the Assessment Order.
 - '*Specified documents*' on the current volume of the patient's clinical file. Any specified documents on the current volume of the patient's clinical file that are listed below must be either attached to the clinical report or on the clinical file provided to the Tribunal.

Specified documents

- 37. If they exist, the following documents are specified documents:

- The following progress notes:
 - (i) community patients – progress notes covering the last three medical reviews with the treating team and
 - (ii) inpatients who have been detained in hospital for three months or more (e.g. in a Secure Extended Care Unit) – progress notes covering the last two months
 - (iii) all other inpatients – progress notes covering the current admission.
- the patient’s current advance statement
- the patient’s individual service plan/recovery action plan/treatment plan
- client Management Interface (CMI) legal status history
- allied health, neuropsychiatric, neuropsychological, risk and/or forensic assessments
- relevant organic screening
- reports of adverse events – e.g. critical incidents
- most recent discharge summary
- Crisis and Assessment Treatment Team or equivalent entries
- correspondence from private/specialist practitioners or general practitioners especially where a shared care arrangement exists or is planned
- any second psychiatric opinion
- any ECT referral documents
- medication chart
- any documents required to be attached to the clinical report by Tribunal practice notes 2-6 (available on the Tribunal’s website). These practice notes concern less common hearing types.
- any other documents not otherwise in this list that support the patient’s position, views or preferences (for example, a document that contains information that disputes or questions the applicability of the treatment criteria, or information indicating that a patient has or may have capacity to give informed consent to ECT).

'General documents' from the current volume of the patient's clinical file

38. The remaining contents of the current volume of the patient’s clinical file, referred to as *'general documents'* in this Practice Note, should ordinarily be provided to the Tribunal and therefore made available to the patient in accordance with section 191, subject to two exceptions, namely:
- general documents that the designated mental health service **does** intend to rely on can be removed or redacted from the current volume of the clinical file if the authorised psychiatrist believes that the serious harm test is satisfied. In such cases, the authorised psychiatrist must make an application to deny access to documents under section 191(2) and the documents can be withheld from the patient until the Tribunal determines the application.
 - general documents that the designated mental health service **does not** intend to rely on in the hearing and which the designated mental health service does not wish to provide to the patient can be redacted or removed from the current volume of the clinical file. In essence, these are documents that do not have the requisite connection to the proceeding. In such cases, no application to deny access to documents is required; however, the Tribunal,

the patient and, where applicable, the patient's legal representative, should be informed that documents have been removed or redacted.

Providing documents or access to documents to the patient and Tribunal

39. The designated mental health service must provide the patient with a copy of the clinical report whether or not the patient requests it.
40. The clinical report should be provided to the patient in full at least 48 hours prior to the hearing in accordance with section 191(1) unless circumstances apply that make this impossible (see paragraph 44). In addition, the Tribunal considers that there is a positive obligation on the service to facilitate patient access to information in the clinical report which can include the provision of an interpreter or other assistance the patient requires in order to understand the contents of the clinical report.
41. The Tribunal expects the designated mental health service to ask the patient whether they wish to access other documents that will be provided to the Tribunal at the hearing. As noted above, in practice such documents will be the current volume of the patient's clinical file with the exception of:
 - specified or general documents that are the subject of an application to deny access to documents under section 191(2); and
 - general documents that the designated mental health service does not intend to rely on (and does not wish to provide to the patient) and therefore do not have the requisite connection with the proceeding.
42. At the beginning of the hearing the Tribunal will generally confirm with the patient and the representative/s of the designated mental health service that a patient has (to the extent that they wished to do so) been able to access documents in accordance with their rights under the Act and the procedure set down in this Practice Note.
43. The designated mental health service must provide access to all documents to which the patient has access (whether or not the patient has read the clinical report or requested to see the current volume of the clinical file) to the Tribunal before the hearing in compliance with the Tribunal registry's requirements including the *Tribunal's Video Hearing Guide for designated mental health services*.

Consequences of failure to provide access to documents in accordance with the Act and this Practice Note

44. Failure to provide a patient with access to documents in accordance with section 191(1) of the Act and this Practice Note may mean the hearing is unable to proceed. In deciding whether or not to proceed with the hearing, the Tribunal's primary consideration will be whether in all the circumstances a fair hearing can be conducted. This will depend on the circumstances of each hearing, but considerations across all proceedings will include:
 - the view of the patient, including whether or not they want to access the documents that are connected to their hearing
 - whether it was possible in the circumstances to comply with the requirement to give the patient access to documents 48 hours before the hearing (for instance, in hearings involving urgent ECT applications which are listed within 48 hours of receipt, it will not be possible) and, if not possible, the reasons why it was not possible.

III. APPLICATION TO DENY ACCESS TO DOCUMENTS

45. The authorised psychiatrist must make an application to the Tribunal in all instances where the authorised psychiatrist seeks to deny the patient access to any specified documents or to any general documents that she or he intends to put before the Tribunal for its consideration and believes meet the serious harm test.
46. The authorised psychiatrist is required to make an application to deny access to documents at least 48 hours before the hearing, regardless of whether or not a patient ultimately seeks to view the documents or has the benefit of legal representation. The exception is where it is not possible in the circumstances to comply with this requirement (for instance, in hearings involving urgent ECT applications which are listed within 48 hours of receipt). In such cases, the authorised psychiatrist must make the application to deny access to documents at the same time as making the application for the substantive hearing.
47. An application to deny access to documents should be completed using form *MHT 30 Application to deny access to documents*, which can be downloaded from the Tribunal's website at www.mht.vic.gov.au. The completed form must be returned to the Tribunal's registry via email to registry@mht.vic.gov.au at least two business days before the hearing date.
48. The Tribunal will list the application to deny access to documents as a preliminary hearing on the same day directly prior to the substantive hearing.

IV. TRIBUNAL HEARING

49. The Tribunal will consider the application to deny access to documents in a preliminary hearing before the substantive hearing. Subject to the patient's legal representative giving an undertaking to the Tribunal not to reveal the contents of the documents (including the source of any document) to the patient, the Tribunal will allow the patient's legal representative to view the documents which are the subject of the application prior to the preliminary hearing.
50. The patient will not attend the preliminary hearing to consider the application to deny access to documents. However, the person's legal representative (if any) may attend the preliminary hearing to make submissions regarding the application.
51. At the start of the preliminary hearing, and only if the application concerns general rather than specified documents, the Tribunal may ask the authorised psychiatrist or their representative/s to confirm whether they need to rely on the documents as evidence that the criteria for compulsory treatment, ECT treatment or other relevant criteria the Tribunal needs to consider in a particular case are met. If the authorised psychiatrist or their representative/s advise they do not need to rely on the general documents, the Tribunal may invite them to withdraw the application in accordance with section 188(4)(a) and paragraph 63 of this Practice Note.
52. For the avoidance of doubt, the authorised psychiatrist (or representatives) may not withdraw an application to deny access to specified documents on the basis that they do not intend to rely on them. This is because such documents will always have the relevant connection to the proceeding (see paragraphs 35-36) whether or not the authorised psychiatrist intends to rely on them.
53. In accordance with the attendance requirements set out in *PN 1 – Tribunal Documents (Application Forms, Urgent Applications and Clinical Report*

Templates) and Attendance Requirements, the authorised psychiatrist or their representative will be asked to make submissions to the Tribunal as to why they believe the serious harm test is met.

Viewing the documents

54. In some cases, the Tribunal will view the document(s) in order to determine whether it should grant an application to deny access to documents. However, the Tribunal is not required to view the document(s) and may exercise its discretion not to do so if it is satisfied that it has sufficient information about the document in order to make a decision.

Granting the application to deny access

55. Pursuant to section 191(3), if the Tribunal determines that the serious harm test is satisfied, the Tribunal may:
- a. grant the application to deny the patient access to relevant document/s; and
 - b. proceed with the hearing; and
 - c. have regard to that information when making its decision on the substantive hearing.
56. The Tribunal will complete determination *MHT 23 Access to documents order* recording their decision. The Tribunal will list the documents (or parts of documents) which are the subject of the order in the schedule.
57. Except in the exceptional cases outlined in paragraphs 68-70 when the patient enters the hearing room, the Tribunal will explain that the application to deny access has been granted, which means the patient will not be allowed to view the documents.
58. In order to minimise any procedural unfairness to the patient, the Tribunal may, at its discretion, put the substance of the information in the documents to the patient for their response. However, because under section 191(3)(c) the Tribunal is expressly authorised to have regard to information without disclosing that information to the patient, it is open to the Tribunal to have regard to information that falls within section 191(3) without putting that information (or the substance of it) to the patient.

Refusing to grant the application and ordering access

59. Where the Tribunal is not satisfied of the serious harm test in accordance with section 191(4), the Tribunal may:
- a. order the designated mental health service to give the patient access to the relevant document; and
 - b. adjourn the hearing and extend the duration of the relevant Temporary Treatment Order/Treatment Order (if applicable) for a period not exceeding five business days to allow the patient to review the documents.
60. With respect to the adjournment power in section 191(4)(b), the Tribunal may exercise this power even when a previous division of the Tribunal has already adjourned the hearing beyond the Order's original expiry date in accordance with section 192 of the Act.
61. For the avoidance of doubt, the adjournment power under section 191(4)(b) is discretionary rather than mandatory.

62. The Tribunal members will complete determination *MHT 23 Access to documents order* recording their decision, including any adjournment and any directions for the next hearing.

Withdrawing an application to deny access to documents

63. Pursuant to Rule 18 of the Tribunal's Rules, applications to withdraw an application must be in writing. A representative from the designated mental health service will therefore be required to note the words 'withdrawn' and to sign and date the application to deny access to documents. If the hearing is a video-hearing, an email to the Tribunal's registry withdrawing the application will be sufficient.

Future effect of the Tribunal's decision

64. A decision under section 191(3) to grant an application to deny the disclosure of document(s) is only effective in relation to a hearing held on the day the application is heard (including multiple matters in respect of the same patient being heard and determined concurrently under section 190). Each time there is a pending hearing, there is a fresh obligation under section 191(1) to give the patient access to documents in connection with the hearing. It follows that, if a further hearing is listed for the same patient and the authorised psychiatrist believes access to the documents should continue to be denied to the patient, a fresh application to the Tribunal to deny access to documents is required.

V. MISCELLANEOUS ISSUES

Family and carers should not send confidential documents to the Tribunal that they do not wish the patient to see

65. Outside of an application to deny access to documents under section 191, the Tribunal is not empowered to consider a document, correspondence or other information prior to, or at, a hearing without disclosing that document to the patient and the treating team.
66. Section 191 only allows the authorised psychiatrist of a designated mental health service to make an application to deny access to a document which includes correspondence or notes from family members or carers. Section 191 does not apply to documents in the possession of the Tribunal and the Tribunal is not able to make a determination under section 191 of its own motion. For this reason, the Tribunal's registry will not accept any document or correspondence marked confidential, private or for the attention only of the Tribunal from a nominated person, carer, guardian, family member or other persons connected with a patient. Any such correspondence received by the Tribunal's registry will be returned to the sender and the sender will be advised to contact the patient's treating team to discuss whether and how the documents can be provided to the Tribunal. The Tribunal's registry will not forward such correspondence to the designated mental health service.
67. If a nominated person, carer, guardian, family member or other persons connected with a patient seek to give the Tribunal division hearing a matter a document or documents on hearing day, the Tribunal division may only accept and take into account such document(s) on the basis that the patient may also view and have a copy of the document.

Exceptional cases

68. As a general rule, the Tribunal will give all persons to whom it is required to give notice of hearings under section 189(1) of the Act (of whom the patient is one)

written notice of a preliminary hearing regarding an application to deny access to documents. However, section 189(3) states that 'the Tribunal may dispense with giving notice under subsection (1) if the Tribunal is satisfied that it is appropriate to do so in the circumstances.'

69. The Tribunal acknowledges that there may be certain, very rare circumstances in which an authorised psychiatrist is of the opinion that notifying a patient that an application to deny access to documents has been made may cause or give rise to the serious harm that is the basis of the application. Similarly, the Tribunal recognises that there may be other circumstances of an exceptional nature where the patient should not be notified that an application to deny access to documents has been made.
70. In such cases, the authorised psychiatrist is requested to contact the Legal unit of the Tribunal at least three days before the hearing (and before lodging the application to deny access to documents with the Tribunal's registry) to discuss how to proceed.

END OF PRACTICE NOTE