



FURTHER EXTENSION OF OUR STRATEGY IN RESPONSE TO ONGOING PRESSURES ON THE HEALTH SYSTEM

October 2022

Even though the pandemic declaration in Victoria ended on 12 October 2022, health services are still operating according to stringent protocols to limit the impact of COVID-19. The ongoing impact of COVID-19 and other pressures on the health system are still significant and continue to have the potential to affect the capacity of Health Services (services) to prepare for and support consumer participation in the hearings that are required under the *Mental Health Act* (the Act). While at this stage unlikely it remains possible the Mental Health Tribunal's (Tribunal) ability to conduct hearings may also be impacted. The Tribunal has developed this strategy to manage and mitigate this situation.

The following explains the strategy in terms of three elements:

1. Administrative processes within the Tribunal's registry.
2. Modified requirements governing the documents mental health services have to provide for hearings.
3. Conduct of hearings.

1. ADMINISTRATIVE PROCESSES

The Tribunal's administrative processes are contingent on our own staffing levels and our commitment to maintaining the health and safety of staff. As such the processes described here are under constant review in light of the changing impact of the pandemic.

Listings and hearing preparation

Registry will continue to prioritise urgent hearings and endeavour to provide as much notice as possible to the parties.

Ordinarily mental health services provide consumers, carers and other participants with the details and links that are needed to participate in hearings. Where this isn't possible registry will endeavour to provide a 'back up' service. Patients and other participants can contact registry directly and the link will be forwarded to their email address. Registry can also provide dial-in access advice and/or can transfer a participant into the hearing via phone or MS Teams. The Tribunal cannot guarantee it has the capacity to do this on a broad scale or for any significant period of time.

Registry will continue to check hearing paperwork and follow up any missing documents in the days preceding a hearing.

Managing missed hearings

At present the Tribunal can list all hearings that are required. However, if staff or member absences, or a rise in demand for hearings, means we are unable to list all hearings we will revert to the priority rankings that were used in the first phase of the pandemic i.e.:

Priority 1 – All ECT applications will be listed. Because this treatment can only proceed with the Tribunal’s approval, we are committed to doing everything possible to ensure every ECT application is determined in accordance with the timelines set down in the Act.

Priority 2 – Hearings and applications concerning a person whose current episode of compulsory treatment has not been independently reviewed by the Tribunal (most commonly patients on a Temporary Treatment Order).

Priority 3 – Further hearings and applications concerning a person whose current episode of compulsory treatment has already been independently reviewed by the Tribunal (most commonly patients on a Treatment Order).

In relation to priorities 2 and 3, a hearing for a person who is subject to an Inpatient Temporary Treatment Order or Inpatient Treatment Order will be accorded precedence.

2. HEARING DOCUMENTATION

Staff absences at services can impact all aspects of hearing preparation – clinical and administrative. We have amended Practice Note 1 to allow the following to be done if a report cannot be prepared in the usual way:

- If the patient has had a hearing of the same type in the previous 12 months, the report from that hearing can be provided with an attachment containing relevant updates.
- If there isn’t a report from the same type of hearing in the past 12 months, the Tribunal can be provided with a brief document setting out –
 - *the relevant clinical and personal background of the patient*
 - *the reasons the authorised psychiatrist or psychiatrist is satisfied of the criteria that apply to that hearing type*
 - *the current and proposed treatment*
 - *whether there is an advance statement or second psychiatric opinion (and provide copies if available)*
 - *the patient’s views and preferences*
 - *the views and preferences of any other persons whose views the Tribunal is required to take into account – for example any nominated person, guardian, carer etc.*
 - *Additional information required for ECT hearings is:*
 - *the proposed number of treatments and the proposed date by which treatment must be completed if the application is granted by the Tribunal.*
 - *for voluntary patients, any informed consent in writing that is required;*

- If this written summary cannot be prepared the following should happen –
 - *Provision of the usual extracts from the patient’s clinical file*
 - *Attendance at the hearing by a representative of the service with sufficient knowledge of the patient and experience with Tribunal hearings, to be able to provide oral evidence addressing the matters listed above that would otherwise be covered in a written summary.*

Services are required to advise the Tribunal in advance of any matter where no report or written summary can be prepared, and/or it is not possible for the service to provide parties and attendees with the MS Teams hearing links.

These changes were initially set to operate until 28 February 2022. Upon initial review the Tribunal’s Rules Committee decided to extend these changes to 30 April 2022. At subsequent reviews the Tribunal’s Rules Committee has decided to extend these changes further to 30 June 2022, to 31 October 2022 and most recently to 3 March 2023. The Tribunal will continue to monitor and review how this strategy is operating in practice, and a consideration of any refinements or changes that might be needed.

3. CONDUCT OF HEARINGS

As already noted, and implicit in the above, during this phase of the pandemic some hearings may proceed in an unusual manner. The Tribunal acknowledges that some of these arrangements are less than desirable. However, because this is being done out of necessity our view is that these temporary arrangements are permissible.

Arguably, some reassurance can also be taken from the recent Supreme Court decision in [JL v Mental Health Tribunal \[2021\] VSC 868](#). Central to the Court’s reasoning in that matter was the imperative of ensuring a compulsory patient’s access to independent oversight by the Tribunal. We cannot allow that process to become so diluted that it is oversight in name only, but nor can we be inflexible, because if our processes become in effect inaccessible, that leads to the possibility of a person being placed on a series of temporary Orders without independent oversight.

Whether to proceed or adjourn?

Divisions retain their usual ability to adjourn hearings, but the exercise of this discretion must take into account certain realities. Adjournment decisions will not be based on purely administrative considerations, but the consideration of an adjournment can and should take into account whether there is a realistic prospect of the adjourned hearing actually proceeding.

Neither the Tribunal nor services can manage a large number of adjournments. The Tribunal has a finite number of divisions and the capacity of staff in registry is stretched; and for services with reduced staffing, it simply won’t be possible to cover a bottleneck of hearings (i.e., the ‘usual’ number plus several adjourned matters). In this context divisions will be asking services whether if a hearing were to be adjourned, they have capacity to undertake further preparation. If the answer is no, an adjournment might be refused. If a matter is being adjourned with a Treatment Order extension, divisions will most likely extend the relevant Order for the full period of 10 business days to maximise options for re-listing.

It is impossible to predict all the scenarios that might arise in the coming weeks, but it is worth addressing some:

- Where a hearing is proceeding without a report but with clinical extracts and oral evidence, the Tribunal will ensure the evidence being considered by it is clearly disclosed and explained to the person who is the subject of the hearing.
- If an adjournment would serve no practical purpose or isn't possible because the matter has already been adjourned, divisions may be in a situation where there is little or no cogent evidence available to consider. Where this is the case and the Tribunal cannot be satisfied that the criteria are met, it will have no option but to revoke the current Order. In this hopefully small number of cases, it will be clarified with the participants in the hearing that there is the possibility, and it is legally permitted, for, a new Assessment Order and Temporary Treatment Order to be made (if the relevant criteria are met). In such cases the Tribunal will do what is reasonably possible to prioritise a subsequent hearing for that person.