

Case management standards—Mental Health Review Tribunal

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A1. Notification of representation

As soon as the file is received, the practitioner should:

- Notify the client in writing of their appointment as legal representative and provide the client with the information contained in the Client Information Sheet.
- Where a relevant guardian has been appointed by the Queensland Civil or Administrative Tribunal (QCAT) or a court, notify the guardian in writing of their appointment as legal representative.
- Notify the Mental Health Review Tribunal (MHRT) in writing of their appointment as legal representative.
- Notify Crown Law of their appointment as legal representative (where applicable).

A2. Obtain all relevant material

All material relevant to the hearing should be obtained by the practitioner.

For all matters, practitioners should obtain a copy of the relevant application or notice for the proceedings along with any updated clinical report.

For forensic orders reviews and fitness for trial reviews, the practitioner should obtain the forensic dossier from the MHRT. The dossier will typically include:

- material from the Mental Health Court (including decision, reasons for decision (if available) and psychiatric reports tendered at the MHC hearing)
- one clinical report (provided to the MHRT for the previous hearing)
- any past independent reports ordered by the MHRT
- copy of the MHRT's most recent decision
- copy of the most recent Limited Community Treatment conditions.

A3. Adjournments

In circumstances where a report or material is not received in sufficient time to take instructions, practitioners should consider whether it is appropriate to seek an adjournment of the hearing on the basis of procedural fairness and natural justice pursuant to sections 733, 734 and 749 of the Mental Health Act 2016 ("MHA").

Practitioners should provide advice to, and obtain instructions from, their client where appropriate. Practitioners should consider the length of adjournment required having regard to the best interests of their client.

Wherever possible, a request for an adjournment should be made in writing to the MHRT at least 48 hours prior to the hearing.

A4. Confidential material

Practitioners must be aware of the confidential nature of material prepared for MHRT proceedings, including victim impact statements, and their obligations under section 743 and Chapter 17 Part 2 of the MHA.

In circumstances where material is subject to a confidentiality order, practitioners must ensure that they comply with the requirements of section 722 of the MHA and only disclose material in accordance with the conditions of the order.

Material subject to a confidentiality order and victim impact statements should be securely stored on file and clearly marked to ensure it is not disclosed to the client during the proceedings, or in the event of an Administrative Access or Right to Information request.

A5. Conference with the client

Prior to the hearing the practitioner should arrange for a conference with the client. The conference should take place face to face whenever possible. The practitioner must communicate regularly with the client and ensure the client is kept up to date.

A5.1 Capacity

The practitioner should conduct an assessment as to the client's capacity to provide instructions for the proceedings. Practitioners must be mindful of their primary duty to represent the client's views, wishes and preferences. The threshold for assessing the client's capacity should proceed from that basis.

Under common law, adults are presumed to have capacity to provide instructions unless there is evidence to the contrary to rebut the presumption. Practitioners must be mindful that capacity is time specific, domain specific and decision specific.

Practitioners may have regard to the principles outlined in the Queensland Handbook for Practitioners on Legal Capacity when assessing client capacity.

Practitioners should take all reasonable steps to enhance their client's capacity to provide instructions, such as:

- meet with the client in person and alone
- focus on the client as an individual and consciously put biases to one side
- establish client trust and confidence by emphasising the independence of the representation and duties owed to the client, in particular, loyalty and confidentiality
- adapt communication style to meet the needs of the client
- ensure necessary interpreters, non-verbal communication tools, visual and auditory aids are available for the client to use
- choose a meeting environment that will put the client at ease
- consider the timing of the meeting and whether gradual decision making (over a series of meetings) is required
- seek assistance from third parties such as friends, family or caregivers but only with the prior consent of the client.

Practitioners should keep a detailed record of their assessment process, ultimate conclusion and reasoning.

A5.2 Advice

During the conference, the practitioner should advise the client on all matters relevant to the proceedings and representation, for example:

- their appointment as an independent legal representative under section 740 of the MHA. The client should be fully advised that the practitioner acts independently to the MHRT, Queensland Health and their treating team
- their role as a legal representative to represent the client's views, wishes and preferences, or best interests
- client confidentiality

- the right by an adult with capacity to apply to waive legal representation and the relevant provisions in relation to waivers under s740(4)&(5) of the MHA
- the nature of the proceedings
- the client's right to have a support person at the hearing
- the contents of any application, notice or report (excluding material subject to a confidentiality order or victim impact statements)
- the options available to the MHRT
- the likely outcome of the review/application

A5.3 Instructions

Professional and ethical obligations

A practitioner must rely and act on the lawful, proper and competent instructions of their client (ASCR, rule 8). A practitioner must also act in the best interests of their client (ASCR, rule 4)

Practitioners should have regard to their assessment of the client's capacity when determining when to take instructions, and any limitations of the instructions.

For a client lacking capacity, the practitioner should make enquiries as to whether an applicable attorney is in place. If there is, the practitioner should seek the attorney's view as to the client's views, wishes and preferences to the extent the client has been able to express them to the attorney. Otherwise, to the extent the client has not been able to express their views, wishes and preferences, the practitioner should seek the attorney's views as to the client's best interests. The practitioner still has an obligation to represent the client's best interests at the hearing as per section 739(3)(b) of the MHA.

Practitioners should also enquire as to whether the client has a valid and applicable Advance Health Directive. Practitioners should have regard to any views, wishes and preferences expressed in the Directive when representing the best interests of the client.

For all matters, practitioners should make enquiries as to whether a guardian has been appointed for legal matters by QCAT or a court. In the event that a guardian has been appointed, the practitioner is obliged to seek the guardian's position as to the client's views, wishes and preferences to the extent the client has been able to express them to the guardian, and otherwise to the extent the client has not been able to express their views, wishes and preferences, the practitioner should seek the guardian's views as to the client's best interests. The practitioner still has an obligation to represent the client's best interests at the hearing as per section 739(3)(b) of the MHA.

Circumstances may arise where instructions provided by a guardian are not consistent with the views, wishes and preferences expressed by a client assessed as having capacity to give instructions. Practitioners should attempt to resolve the conflict by speaking with the guardian about their assessment of the client's capacity, the views, wishes and preferences expressed by the client and matters assessed as being in the client's best interest. Section 739(3) applies.

Where a conflict of instructions continues, practitioners should advise the tribunal of the guardian's position, but continue to represent the client's views, wishes and preferences to the extent the client can communicate them. If the client is unable to express their views, wishes and preferences, practitioners should represent the client's best interests.

Format of instructions

Best practice is taking written instructions, face-to-face from the client which are signed by the client and witnessed by the practitioner.

Situations will arise where this is not possible. These may include urgent hearings where there is insufficient time to arrange a face to face conference or where face to face contact with the client cannot be arranged due to their residing in a remote location. Lawyers should consider the alternatives below:

- schedule a time to speak to the client by telephone. Post, fax or email the instructions to the client. Read through the instructions during the telephone conference and have the client sign the document
- request the client return the instructions by post, or email/fax where the instructions relate to an urgent matter.

In circumstances where written instructions are unable to be taken from the client, practitioners must keep a detailed file note of their client's verbal instructions, and arrange for such a conversation to be witnessed wherever possible.

Practitioner should take instructions on all relevant matters, for example:

- their mental health diagnosis, insight into treatment, treatment plan and compliance
- their personal circumstances, including engagement with support networks
- their views, wishes and preferences in relation to the review/application
- their index offence/s and outstanding charges (if any)

A6. Consideration given to whether a second opinion report is required

Practitioners should give consideration to whether a second opinion report is required from a medical specialist to address the relevant matters subject to the hearing.

Practitioners should consider the following report options:

- second opinion about treatment and care under section 290 of the MHA
- examination ordered by the MHRT under section 721 of the MHA
- a private psychiatrist or psychologist (e.g. that a client has already engaged with on a voluntary basis and may be provided free of charge).

Practitioners should consider if an adjournment of proceedings is required to prepare an independent report and take client instructions accordingly.

Where clients are represented under a MHR grant of aid, practitioners should seek funding in accordance with the Grants Handbook if a report outside of the above options is required.

A7. Waiver of right to legal representation

Where an adult client declines legal representation, the practitioner must assess whether the client has capacity to do so.

Practitioners must assess whether the client has the capacity to understand the nature and effect of a decision to waive the right, and the ability to make and communicate the decision. Practitioners should keep a written record of their assessment, decision and reasons.

If the practitioner assesses that the client has capacity to waive legal representation, and the client instructs they want to apply to waive the right to be represented by their appointed representative, such a waiver must be requested in writing from the MHRT as required by s740(4) of the MHA. Because a person must have the capacity to make and communicate the decision to waive the right to be represented, and have the ability to understand the nature and effect of a decision to waive the right, the actual communication to the Tribunal of the application to waive such a right should be made by the client. Wherever possible, signed instructions from the client instructing they want to apply to waive representation should be obtained prior to the client's communication to the Tribunal.

If the practitioner assesses that the client does not have capacity to waive legal representation, the client may still apply to waive their appointed representative.

Where the MHRT accepts the waiver of legal representation, the practitioner is not required to represent the client further or attend the hearing.

A8. Obtain supporting material on behalf of the client

The practitioner should obtain any supporting material the client wishes to rely upon at the hearing. This material may include letters of support, independent reports or a self-report.

Practitioners should also consider preparing written submissions for particularly complex or meritorious cases, such as where the client is seeking significant changes to limited community treatment conditions or revocation of an order.

Practitioners must comply with s738 of the MHA and provide any supporting documentation to be relied upon to the MHRT within three days of the hearing.

A9. Consider briefing counsel

Practitioners should consider whether the client's matter is so complex as to require counsel.

Where clients are represented under a MHR grant of aid, and where the practitioner considers that counsel should be briefed, the practitioner should seek funding in accordance with the Grants Handbook and brief counsel in accordance with Legal Aid Queensland's briefing counsel policy.

A10. Hearing

Practitioners should encourage and support clients to attend their hearing and participate in the review/application process.

Wherever possible, practitioners should appear at the hearing in person. Where a practitioner cannot attend in person, they may contact the MHRT to arrange an appearance by video conference or telephone. Appearance by telephone should only occur as a last resort.

Practitioners should make arrangements with the MHRT for appearance by video conference or telephone as soon as possible after receiving notice of the hearing date.

To the extent that the client has capacity to provide instructions on their views, wishes and preferences, a practitioner must comply with s739(3)(a) of the MHA and represent the client's views, wishes and preferences at the hearing.

To the extent that the client lacks capacity to provide instructions on their views, wishes and preferences, a practitioner must comply with s739(3)(b) of the MHA and represent the client's best interests at the hearing.

Practitioners should remember that their paramount duty is to the MHRT.

A11. Following the hearing

Practitioners should advise their clients in writing of the outcome of the hearing and explain the consequences of the decision. This should be done as soon as possible after the hearing.

Practitioners should advise their clients of their right to obtain a statement of reasons for the decision from the MHRT. Where appropriate, practitioners should obtain a copy of the statement of reasons and provide it to the client.

Practitioner should advise their clients of the right to appeal the MHRT's decision and the merits of an appeal. Practitioners should also advise clients of their right to apply for legal aid for an appeal to the Mental Health Court.

Practitioners should consider advising their clients of appropriate steps they can take to assist in the preparation of their next review.

These standards are subject to review following a 6 month practice period.