

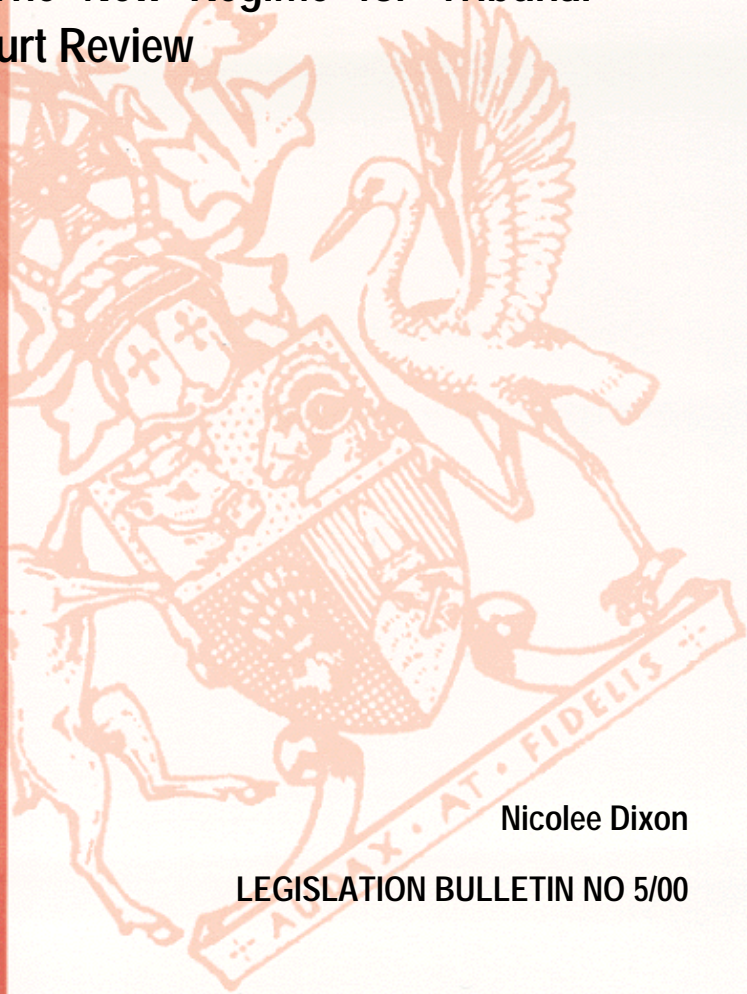


The Queensland Mental Health Bill 2000: The New Regime for Tribunal and Court Review

QUEENSLAND
PARLIAMENTARY
LIBRARY

Nicolee Dixon

LEGISLATION BULLETIN NO 5/00



**QUEENSLAND MENTAL HEALTH BILL 2000:
THE NEW REGIME FOR TRIBUNAL
AND COURT REVIEW**

LEGISLATION BULLETIN NO 5/00

NICOLEE DIXON

QUEENSLAND PARLIAMENTARY LIBRARY
Research Publications and Resources Section

BRISBANE
April 2000
ISSN 1324-860X
ISBN 0 7242 7876 1

This Legislation Bulletin was prepared to assist Members in their consideration of the Bill in the Queensland Legislative Assembly. It should not be considered as a complete guide to the legislation and does not constitute legal advice.

The Bulletin reflects the legislation as introduced. The *Queensland Legislation Annotations*, prepared by the Office of the Queensland Parliamentary Counsel, or the *Bills Update*, produced by the Table Office of the Queensland Parliament, should be consulted to determine whether the Bill has been enacted and if so, whether the legislation as enacted reflects amendments in Committee. Readers are also directed to the relevant *Alert Digest* of the Scrutiny of Legislation Committee of the Queensland Parliament.

© Queensland Parliamentary Library, 2000

Copyright protects this publication. Except for purposes permitted by the Copyright Act 1968, reproduction by whatever means is prohibited, other than by Members of the Queensland Parliament in the course of their official duties, without the prior written permission of the Parliamentary Librarian, Queensland Parliamentary Library.

Inquiries should be addressed to: Director, Research Publications & Resources, Queensland Parliamentary Library, Parliament House, George Street, Brisbane.
Director: Ms Mary Seefried. (Tel: 3406 7116)

Information about Research Publications can be found on the Internet at:

<http://www.parliament.qld.gov.au/parlib/research/index.htm>

ABSTRACT

Among the measures introduced to achieve the objectives of the Mental Health Bill 2000 is the creation of the Mental Health Review Tribunal to replace the existing Patient Review Tribunals and the Mental Health Review Tribunal to supersede the Mental Health Tribunal.

The Mental Health Review Tribunal will, among other things, carry out reviews relating to involuntary patients and hear applications to administer or perform treatments. The Mental Health Court will, among other things, decide the state of mind of persons charged with criminal offences.

This Legislation Bulletin focuses on reforms introduced by the Bill as they relate to the MHRT. Those include the new constitution and functions of the tribunal; provision for community representation; emphasis on timeliness and frequency of reviews; the right to legal representation and facilitation of access to representation; an express provision concerning the rules of procedural fairness; and a right to inspect documents, including psychiatric reports, except in certain defined circumstances. Some brief mention will be made of the reforms introduced by the Mental Health Court provisions of the Bill.

CONTENTS

1	INTRODUCTION.....	1
2	BACKGROUND TO THE MENTAL HEALTH BILL.....	2
3	FUNCTIONS OF THE TRIBUNALS.....	3
3.1	THE CURRENT LEGISLATION – THE PRT	3
3.2	THE PROPOSED LEGISLATION – THE MHRT.....	4
3.2.1	Reviewing The Application Of Treatment Criteria For Patients	4
3.2.2	Reviewing The Detention Of Young Patients In High Security Units..	5
3.2.3	Reviewing The Mental Condition Of Forensic Patients	5
3.2.4	Reviewing The Fitness For Trial Of—.....	6
3.2.5	Deciding Applications For Notification Orders	6
3.2.6	Deciding Treatment Applications	6
3.2.7	Deciding Applications for Approval For Particular Patients To Move Out Of Queensland.....	6
3.2.8	Appeals Against Refusal to Allow Visitors	7
4	COMPOSITION AND MEMBERSHIP OF THE NEW TRIBUNAL 7	
4.1	THE CURRENT LEGISLATION – THE PRT	7
4.2	THE PROPOSED LEGISLATION – THE MHRT.....	8
5	TIMELINESS AND FREQUENCY OF AUTOMATIC REVIEWS. 10	
5.1	THE CURRENT LEGISLATION – THE PRT	10
5.2	THE PROPOSED LEGISLATION – THE MHRT.....	11
6	REPRESENTATION AND PARTICIPATION AT HEARINGS.....	12
6.1	THE CURRENT LEGISLATION – THE PRT	12
6.2	THE PROPOSED LEGISLATION – THE MHRT.....	13
7	PROCEDURAL FAIRNESS.....	15
7.1	GENERALLY	15
7.1.1	The Current Legislation – The PRT	15

7.1.2	The Proposed Legislation – The MHRT	15
7.2	NOTICE OF THE HEARING	16
7.2.1	The Current Legislation – The PRT.....	16
7.2.2	The Proposed Legislation – The MHRT	16
7.3	DISCLOSURE OF MATERIAL	17
7.3.1	The Current Legislation – The PRT.....	17
7.3.2	The Proposed Legislation – The MHRT	18
7.4	REPRESENTATION	19
7.5	RIGHT TO CROSS-EXAMINE WITNESSES	19
7.5.1	The Current Legislation – The PRT.....	19
7.5.2	The Proposed Legislation – The MHRT	20
7.6	DEPARTURES FROM PROCEDURAL FAIRNESS REQUIREMENTS	20
7.6.1	Reasons for Decision	20
7.6.2	Confidentiality Orders.....	21
8	ACCOUNTABILITY	22
8.1	ANNUAL REPORTS	22
8.2	PRIVATE HEARINGS	23
9	APPEALS	23
9.1	THE CURRENT LEGISLATION – THE PRT	23
9.2	THE PROPOSED LEGISLATION – THE MHRT	24
10	THE MENTAL HEALTH COURT.....	25
10.1	JURISDICTION	25
10.2	ROLE OF PSYCHIATRISTS ASSISTING COURT	25
10.3	FACTUALLY CONTENTIOUS CASES	26
10.4	OTHER MATTERS.....	27
	BIBLIOGRAPHY	29

1 INTRODUCTION

On 14 March 2000, the Honourable W M Edmond, Minister for Health introduced the Mental Health Bill 2000 into the Legislative Assembly. The Mental Health Bill seeks to reflect the changes to the delivery of mental health services envisaged by all Commonwealth, state and territory health Ministers in formulating the National Mental Health Strategy in 1992. It replaces the current *Mental Health Act 1974* (Qld).

The general purpose of the Bill is to provide for the involuntary assessment and treatment, and the protection, of persons (whether adults or minors) who have mental illnesses, while at the same time safeguarding their rights.¹ Among the measures introduced to achieve this purpose is the creation of the Mental Health Review Tribunal (MHRT) to replace the existing Patient Review Tribunals (PRTs) and the Mental Health Court (MHC) to supersede the Mental Health Tribunal (MHT).

The MHRT will, among other things, carry out reviews relating to involuntary patients and hear applications to administer or perform treatments. The MHC will, among other things, decide the state of mind of persons charged with criminal offences.²

This Legislation Bulletin focuses on those reforms introduced by the Bill as they relate to the MHRT. Not all of the features of the new system can be explored within the scope of this Bulletin but those considered will include:

- the main powers and functions of the tribunal;
- the provision for community representation in the tribunal;
- the emphasis on timeliness and frequency of reviews;
- the right to legal representation and facilitation of access to representation and assistance, particularly for patient applicants;
- the express provisions concerning the MHRT's obligations to observe the rules of procedural fairness;
- the right to inspect documents, including psychiatric reports, except in certain defined circumstances;

Most of the powers and functions of the new MHC will be similar to those of its predecessor, the MHT. For that reason, this Bulletin will consider only on the most

¹ Mental Health Bill 2000, cl 4.

² Mental Health Bill, cl 5 (b) and (c).

important changes. Those include provisions clarifying the role of assisting psychiatrists, expansion of the circumstances in which a matter must be returned to the general criminal courts, and recognition of victims' rights in the context of proceedings and determinations by the MHC and the MHRT.

The procedures for involuntary assessment and treatment of patients are considered in a related Queensland Parliamentary Library publication: Legislation Bulletin No 4/00;³ and the entitlement of victims to have input into proceedings and be notified of certain matters is dealt with in Legislation Brief No 2/00.⁴

2 BACKGROUND TO THE MENTAL HEALTH BILL

As part of the National Mental Health Strategy, the states and territories agreed to develop legislation consistent with the 1991 *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*. The *Queensland Mental Health Policy* in 1993; the *Queensland Mental Health Plan* in 1994 and the *Ten Year Mental Health Strategy for Queensland* in 1996 formed the framework for reform of mental health services in Queensland.

Government policies to reform both the general treatment provisions and those dealing with mentally ill persons charged with criminal offences have been subject to extensive consultations with relevant stakeholders since 1993. A Green Paper outlining the proposals was released for public consideration in 1994. It appears that there have also been reviews specifically concerning the operation of the MHT and the PRT.⁵ In 1999, a further Discussion Paper was released canvassing issues relating to the rights and interests of victims in proceedings before the MHT and PRT.

During that process, the submissions received regarding the operation of the PRT commented upon:

- the need for timely reviews;

³ Karen Sampford, *The Queensland Mental Health Bill 2000: Involuntary Assessment and Treatment Procedures*, Legislation Bulletin No 4/00, Queensland Parliamentary Library, April 2000.

⁴ Cathy Green, *The Queensland Mental Health Bill 2000: Reforms to Victims' Rights in Relation to Proceedings and Notification Orders*, Legislation Brief No 2/00, Queensland Parliamentary Library, April 2000.

⁵ Mental Health Bill 2000 (Qld), Second Reading Speech, Hon WM Edmond MLA, Minister for Health, *Queensland Parliamentary Debates*, pp 345-352, p 345.

- the manner in which hearings are conducted;
- the need for consistent decision making across the regional panels;
- procedural fairness issues, including the right to legal representation;
- the role of victims in proceedings;
- the procedures following a finding by the MHT that a person is unfit to stand trial; and
- the accountability of the PRT and the MHT.

3 FUNCTIONS OF THE TRIBUNALS

It is proposed to deal only briefly with the main functions and roles of the PRT and the proposed new MHRT.

3.1 THE CURRENT LEGISLATION – THE PRT

Broadly speaking, the functions of the five PRTs are:

- to review the cases of patients who have been involuntarily detained for treatment;
- to review periodically whether an accused person continues to be unfit to stand trial and to review patients who are serving, or have served, sentences of imprisonment;
- to review transfers from one hospital to another;
- to review leaves of absence from the treating institution of patients; and
- to review the management of a patient’s estate by the Public Trustee.

There are two categories of patients who may be subject to the tribunal’s proceedings.

The first category covers patients who are detained for treatment but are not alleged to have committed an offence. A large part of the PRT’s workload here is to review the regulation of involuntary patients after they have been detained for more than 21 days (the “automatic review”). Before the expiration of the 21 days, the patient must be examined by a psychiatrist. That psychiatrist can recommend that the patient be detained for up to three months, which can be further extended for up to 12 months.⁶ In either case, and each time an extension is made, the hospital

⁶ *Mental Health Act 1974*, s 21(3)-(5).

administrator must apply to the PRT to review the detention.⁷ The PRT must determine whether the patient remains a danger to the public or to themselves due to their mental illness.

In addition, s 21(6A) of the *Mental Health Act 1974* enables the patient, or certain persons on the patient's behalf, to apply to the tribunal for a discharge.

The hearings are relatively informal and are often held at the institution where the patient is being detained. The tribunal generally uses its inquisitorial functions to ensure it is properly informed of all relevant matters.

The second category of patients are those who have been charged with an offence (forensic patients). The role of the MHT is to determine whether the patient has become fit to stand trial.⁸ If the MHT makes a finding of unsoundness of mind or unfitness for trial, the PRT must undertake periodic automatic reviews of the person.⁹

3.2 THE PROPOSED LEGISLATION – THE MHRT

It is proposed that the five regional PRTs be replaced with one MHRT with panels appointed across the State.

The MHRT's jurisdiction is set out in **clause 437** of the Bill.

3.2.1 Reviewing The Application Of Treatment Criteria For Patients

This is dealt with in **Chapter 6, Part 1** of the Bill.

If an authorised doctor or psychiatrist is satisfied that a patient meets the treatment criteria set out in **clause 14**, an involuntary treatment order may be made: **clause 108**. The consequence is that the patient will be treated under a treatment plan. The administrator of the patient's treating health service must give written notice of

⁷ *Mental Health Act 1974*, s 21(6)(a).

⁸ Queensland Health, *Victims of Crime and the Mental Health Act*, Discussion Paper, 1999, p15.

⁹ *Mental Health Act 1974*, ss 34, 36

the order to the MHRT within seven days.¹⁰ **Clause 187** sets out when the tribunal will conduct the review.¹¹

For the first time, forensic patients whose charges have not yet been determined will have a right to automatic review of the application of the treatment criteria.¹²

3.2.2 Reviewing The Detention Of Young Patients In High Security Units

These reviews are dealt with under **Chapter 6, Part 2** of the Bill.

Where the young patient is a classified patient¹³ in a high security unit subject to an involuntary treatment order, the administrator of the authorised mental health service must notify the MHRT of the patient's detention as a classified patient.¹⁴

3.2.3 Reviewing The Mental Condition Of Forensic Patients

These reviews are dealt with under **Chapter 6, Part 3** of the Bill.

Clause 302 allows the Minister to make a forensic order for persons who have been charged with an indictable offence and, on the trial of the person, a court has made a custody order in relation to that person.¹⁵ The effect of making a forensic order is that the patient is admitted to, and detained, in a treating health service for involuntary treatment until they cease to be a forensic patient.

The MHRT must review the mental condition of the forensic patient within six months of the forensic order being made and, thereafter, at six monthly intervals.¹⁶

¹⁰ Mental Health Bill, cl 113.

¹¹ This aspect of timeliness and frequency of reviews will be considered later in the Bulletin.

¹² Queensland Health, *Review of the Mental Health Act: The Forensic Provisions*, Discussion Paper No 4, May 1993, para 3.1.6.

¹³ Clause 69 of Mental Health Bill sets out when a person becomes a classified patient.

¹⁴ Mental Health Bill, cl 70(1) (c).

¹⁵ Custody orders are made by the court under cl 299(b).

¹⁶ Mental Health Bill, cl 200(1).

3.2.4 Reviewing The Fitness For Trial Of—

- persons found by the MHC to be unfit for trial and the unfitness for trial is not of a permanent nature; and
- persons for whom a jury has made a finding under section 613 of the *Criminal Code* (accused incapable of understanding the proceedings at trial) or section 645 of the *Criminal Code* (unsoundness of mind at the time of trial).¹⁷

These reviews are dealt with under **Chapter 6, Part 4** of the Bill.

Note that in the above three situations (application of treatment criteria, detention of young patients in high security units and fitness for trial) an application for review can also be made by the patient or by specified persons on the patient's behalf or, a review can be carried out at the initiative of the MHRT.¹⁸ The Director of Mental Health can also make an application for review in relation to the application of treatment criteria.

3.2.5 Deciding Applications For Notification Orders

Application can be made for an order that persons with a sufficient personal interest be given notice of certain proceedings and determinations involving persons who have been charged with criminal offences: **clauses 220 and 221**. Notification orders will be considered in more detail later.

3.2.6 Deciding Treatment Applications

Clauses 229 and 230 of the Bill allow a psychiatrist to make an application for approval to administer electroconvulsive therapy or to perform psychosurgery.

3.2.7 Deciding Applications for Approval For Particular Patients To Move Out Of Queensland

Application can be made by, or on behalf of, the patient, the administrator of the patient's treating health service or the Director of Mental Health for approval for

¹⁷ Mental Health Bill, ch 6, part 4, div 1.

¹⁸ Mental Health Bill, cls 187(1)(b), 188, 194(1)(b), 195, 200(1)(b), 201.

this transfer.¹⁹ Under the *Mental Health Act 1974*, this jurisdiction is currently exercised by the MHT.

3.2.8 Appeals Against Refusal to Allow Visitors

Pursuant to **Chapter 9, Part 4** of the Bill, the MHRT determines appeals against decisions of administrators of an authorised mental health services to refuse to allow persons to visit involuntary patients in health services. This appears to be a new provision.

4 COMPOSITION AND MEMBERSHIP OF THE NEW TRIBUNAL

Despite the considerable mention of the PRT in submissions during the consultation process, there was no suggestion that tribunals be replaced by other mechanisms of review. It appears to be accepted that a properly constituted and adequately resourced tribunal with explicit procedural safeguards was an acceptable means of providing independent review of involuntary treatment.²⁰ The provisions concerning the structure and composition of the new MHRT attempt to meet some of the concerns raised.

4.1 THE CURRENT LEGISLATION – THE PRT

Five separate PRTs each service a different region of the State. Each panel is separately constituted, thus creating the possibility and, indeed, the perception of inconsistency in decision making.

In each region, the PRT must comprise at least three, and no more than six, members appointed by the Governor in Council. The chairperson must be a retired Supreme Court or District Court judge, or a person who is qualified for appointment as a District Court judge, or a retired judge of a court of the Commonwealth, another state or a territory. At least one member must be a medical practitioner and at least one member must be a person qualified to practise a profession that requires a special knowledge and interest with respect to mental illness.²¹

¹⁹ *Mental Health Bill*, cl 171. See ch 5, part 1, div 3.

²⁰ Queensland Health, *Review of the Mental Health Act 1974*, Green Paper, 1994, para 2.38.

²¹ *Mental Health Act 1974*, s 14(3).

It is the practice to include a member who is a psychiatrist but that is not specifically required by the Act. It appears that the panels are reluctant hear matters without at least one of its members being a psychiatrist or without the presence of an independent advisory psychiatrist. Delays can arise while waiting for that to occur as it seems that the monetary rewards have not been such as to attract a great number of the psychiatric profession.²² A 1994 Queensland Health Green Paper noted that a number of submissions received during the consultation process saw the inclusion of a psychiatrist in the membership of tribunals as highly desirable.²³

There has, however, been some academic opinion to the contrary arguing that the review body might, in effect, become a 'rubber stamp' for inordinate psychiatric discretion which might be undesirable when it is realised that views of different psychiatrists will vary in relation to the same patient's illness.²⁴

The 1994 Green Paper also noted that the consultation process revealed the importance of having a tribunal constituted by other members of the community who are not lawyers or doctors and whose experience or expertise complements and balances those legal and medical perspectives (such as such as consumers, carers and allied health professionals). Additionally, the need for membership to reflect gender equity and include representatives from other backgrounds, such as from an Aboriginal or Torres Strait Islander background was expressed.²⁵

4.2 THE PROPOSED LEGISLATION – THE MHRT

The MHRT consists of a president and other members: **clause 436**. The requirements for appointment and qualification of its members are set out in **clause 440**. The president is appointed on a full-time basis for five years and must be a lawyer of at least seven years standing. This provision attempts to ensure greater consistency of decision making and a concentration of existing expertise.²⁶ The other members (who can be full-time or part-time) must comprise either a lawyer of

²² Queensland Health, *Review of the Mental Health Act – Treatment of People With Mental Illness*, Discussion Paper No 3, May 1993, p 31.

²³ Queensland Health, Green Paper, 1994, para 2.33.

²⁴ S Delaney, 'Autonomy Denied: International Human Rights and the Mental Health Act 1986 (Vic)', *Melbourne University Law Review* 18(3) 1992, 565-583 at 580-581.

²⁵ Queensland Health, Green Paper, 1994, para 2.33.

²⁶ Queensland Health, *Victims of Crime and the Mental Health Act*, Discussion Paper, 1999, p 18.

five years standing, or a psychiatrist, or have other relevant qualifications or experience. Those other members are appointed for three years.²⁷

If a psychiatrist is not readily available and another doctor is available instead, that doctor may be a member of the tribunal. However, in the case of a psychosurgery application, the tribunal **must** include a psychiatrist nominated by the Royal Australian and New Zealand College of Psychiatrists and another psychiatrist nominated by the Minister as well as a neurosurgeon nominated by the Royal Australian College of Surgeons.²⁸

Clause 440(4) of the Bill states that recommendations for appointments made to the MHRT must take into account the following:

- The need for gender balance in the membership;
- The range and experience of members;
- The need for membership to reflect the social and cultural diversity of the general community.

In addition, **clause 484(5)** provides that a person who is culturally appropriate to the patient must be a member of the tribunal hearing a matter involving that patient. For example, a member might be drawn from the Aboriginal or Torres Strait Islander community. It is intended that, as far as possible, members will sit in the community in which they live. It is also envisaged that the membership might also contain persons who may have had experience in caring for a person with a mental illness or who may have had one themselves.²⁹

The requirement that tribunals will include a member who is not a doctor or a lawyer and the considerations set out in clauses 440(4) and 484(5) attempt to take account of the concerns of the community generally and of victims.³⁰

The constitution of the MHRT will depend upon the type of hearing being conducted: see **Chapter 12, Part 3**. In hearings involving non-forensic patients, most (see **clause 447(1)**) will be conducted by tribunals of three to five members comprising of at least one lawyer, one psychiatrist or doctor, and at least one member who is not a lawyer or a doctor: **clause 447(2)**.

²⁷ Mental Health Bill, cl 441.

²⁸ Mental Health Bill, cl 447(4).

²⁹ See also Mental Health Bill, *Explanatory Notes*, p 99.

³⁰ Second Reading Speech, p 351.

A five member panel will really only occur where the president takes the view that the patient represents a current risk to themselves or to others: **clause 447(3)**. However, five members are required for the hearing of an application for approval to perform psychosurgery.³¹

In certain circumstances set out in **clause 448** the MHRT may, at the discretion of the president, be constituted by fewer than three members. Therefore, it is possible for a one member tribunal to hear a matter in situations of urgency or need for expediency.³²

It appears that the constitution and eligibility for membership of the proposed tribunal is similar to that of the Victorian Mental Health Review Board. The Victorian Board generally has three member divisions, chosen by the president, or divisions may consist of one member for some types of reviews. The chairperson of each division must be a legal practitioner of not less than eight years standing, while the other members comprise a psychiatrist and a person representing the views and opinions of the community.³³

5 TIMELINESS AND FREQUENCY OF AUTOMATIC REVIEWS

5.1 THE CURRENT LEGISLATION – THE PRT

Most of the comments made during the consultation process focused on the delays in the PRT conducting “automatic reviews” in respect of non-forensic patients and in obtaining a date for hearing an application for review.

The “automatic review” by the PRT should occur within 14 days of the receipt of the application and every six months thereafter. This does not appear to be specified in the legislation.³⁴ There have been noted examples of reviews being

³¹ Mental Health Bill, cl 447.

³² Also, under cl 222, an application for a notification order may be decided by the president on the papers or during the hearing for a review.

³³ *Mental Health Act 1986* (Vic), Sch 2 cl 1. The Mental Health Review Board of Western Australia is similarly constituted and must have at least one psychiatrist, one lawyer and one member who is neither: *Mental Health Act 1996* (WA) s 126. See also the *Guardianship and Administration Act 1993* (SA) ss 6-8.

³⁴ Although it might be implicit within s 21(6)(a) of the *Mental Health Act 1974*.

conducted of up to a month after the receipt of the psychiatrist's report extending involuntary treatment.³⁵

Much of the problem appears to have arisen from lack of expertise upon which to draw in forming panels for hearings and a shortage of funding needed to attract appropriate candidates for membership.

5.2 THE PROPOSED LEGISLATION – THE MHRT

The objects of the Bill emphasis timeliness. The measures to ensure timeliness of response by the MHRT are:

- a pool of members across the state with wide-ranging expertise that can be drawn upon by the president who is responsible for organising the constitution of panels for particular hearings. Panels may contain members from the region where the hearing occurs. Additional funding has been obtained to meet the expenses of this reform which has proved to be the most costly introduced by the Bill;³⁶
- substitution of a doctor for a psychiatrist in the hearing of matters (except for psychosurgery application hearings) where there will be some delay in having a psychiatrist present and the doctor is available;
- panels of fewer than three members (even single member panels) in matters involving non-forensic patients where it is appropriate and expedient to do so. This may arise, for example, in rural areas where it may be difficult to convene a full panel in a timely manner.

In Victoria, some problems have been encountered in attempting to schedule a one person division of the Board in advance because in any particular sitting there will, invariably, be a few cases that must be heard by a three person division. Thus, in 1998-1999, single member divisions comprised just 9.7 % of all of the divisions that sat during that year;³⁷

The following provisions seek to enhance the frequency of reviews of the detention of patients:

- “automatic reviews” of the application of treatment criteria to involuntary patients will occur every six months (with the initial review occurring within six weeks after the involuntary treatment order is made) rather than every twelve months, as is presently the case: **clause 187**. Applications for

³⁵ Queensland Health, Discussion Paper No 3, 1993, p 31.

³⁶ Second Reading Speech, p 348.

³⁷ Victorian Mental Health Review Board, *Annual Report*, 1998/99, para 5.1.

review of involuntary status must be heard within seven days of the application if made within the six week period prior to the initial “automatic review” or, otherwise, within a reasonable time;

- “automatic review” of the detention of young persons in high security units must occur within seven days of the start of detention and thereafter, at three monthly intervals: **clause 194(1)(a)**;
- “automatic review” of the condition of forensic patients occurs within six months of the forensic order being made and thereafter, at intervals of not more than six months: **clause 200(1)(a)**;
- “automatic review” of fitness for trial must occur at least every three months for the year commencing on the day of the court’s decision or the jury’s finding and, thereafter, at six month intervals: **clause 209(1)**.

The Western Australian Mental Health Review Board must carry out a review as soon as practicable after a person is detained as an involuntary patient and not later than eight weeks thereafter. Further review must occur after six months.³⁸ The Victorian Mental Health Review Board must review the detention of a patient within eight weeks of the initial detention and, thereafter, at twelve month intervals.³⁹

6 REPRESENTATION AND PARTICIPATION AT HEARINGS

6.1 THE CURRENT LEGISLATION – THE PRT

Under the *Mental Health Act 1974*, the PRT may allow any of the following persons to be present during a hearing of an application for the purpose of assisting an applicant—

- an authorised person (as set out in s 8 of the Mental Health Regulation 1985. For example, a nurse of the hospital in which the patient is being treated or a person appointed by the hospital administrator);
- the patient’s nearest relative or other relative determined by the tribunal;
- counsel or solicitor providing the tribunal determines legal representation is warranted (pursuant to s 36(2) of the Mental Health Regulation 1985);
- any other person determined by the tribunal.⁴⁰

³⁸ See *Mental Health Act 1996* (WA), ss 138, 139.

³⁹ *Mental Health Act 1996* (Vic), s 30.

⁴⁰ *Mental Health Act 1974*, s 15(8).

Usually, a doctor responsible for the patient's treatment (although generally not the treating psychiatrist) will attend to assist the tribunal. That doctor will probably have previously given the tribunal a report. It is usual procedure for the tribunal to hear from any person who the patient wishes to have address the tribunal. That practice is integral to the PRT's inquisitorial role of fully informing itself of all relevant matters.

Legal representation will usually be permitted but it is at the tribunal's discretion rather than of right.⁴¹ In all other jurisdictions, and before the MHT in Queensland, there is a right to legal representation. In Victoria, 8.1% of hearings before the Mental Health Review Board in 1998/99 had legal representatives present which was greater than for other years, possibly because of changes to Victoria Legal Aid's policies.⁴²

During the consultation process, many submissions indicated that protection of patients' rights and interests could be facilitated by procedural safeguards. Those included a right to legal representation at hearings and also access to the services of an interpreter, an advocate, or person of cultural relevance to the person subject of the proceedings.⁴³

The argument favouring the absence of lawyers from hearings is that legal representatives may add to the cost and delay of proceedings and can change a relatively informal process into something that is quite adversarial. However, the counter argument is based on procedural fairness grounds. This is that legal representation may balance the scales against an agency opponent who is familiar with the process and has considerable knowledge of the issues, including legal issues, presented to the tribunal. Both arguments are equally pertinent to the matters heard by the PRT where the Director or other institutional applicant may be a party to proceedings.

6.2 THE PROPOSED LEGISLATION – THE MHRT

Chapter 12, Part 4 of the Bill sets out the persons who are entitled to appear at particular types of hearings. It also expressly entitles patients and, sometimes other parties, to have legal representation.

⁴¹ *Mental Health Act 1974*, s 15(8) (c), *Mental Health Regulation 1985*, s 36(2).

⁴² Victoria, Mental Health Review Board, *Annual Report*, 1998/99, para 5.9.

⁴³ Queensland Health, 1994 Green Paper, paras 2.34, 2.35.

For example, in the case of a review under Chapter 6 (involuntary treatment orders, young patients detained in high security units, forensic orders, fitness for trial and mental condition of persons), the following persons may appear before the MHRT:

- the patient (who may be represented by a lawyer or, with the leave of the tribunal, an agent: **clause 450(2)**);
- if the director has made the application, the director;
- in the case of reviews concerning forensic patients and mental condition of persons to decide fitness for trial, the Attorney General: **clause 450(1)**.⁴⁴

The presiding member can also appoint a person to represent the patient's views, wishes and interests if the patient is not already represented: **clause 450(3)**.

In addition, **clause 455** permits the involuntary patient's "allied person" or someone else granted leave by the tribunal to attend the hearing (but not become a party) to assist the patient in representing the patient's views, wishes and interests. The persons who may become an "allied person" are set out in **clause 341**.⁴⁵ The concept of the "allied person" replaces that of "nearest relative" under the current legislation and thereby seeks to enhance the patient's right to privacy and confidentiality.⁴⁶

Pursuant to **clause 462**, the tribunal may appoint a person with appropriate knowledge or experience to assist it in a hearing, for example, a person with appropriate communication skills or appropriate cultural or social skills.

The above provisions seek to achieve the general principles for safeguarding the patient's interests and encouraging patient involvement in decision making: **clauses 8 and 9**.

⁴⁴ Similar provisions giving a right of appearance to the patient and the applicant is provided in the case of treatment applications, interstate transfers, notification orders: Mental Health Bill, cl 451-453. For hearing of appeals against decision to exclude a visitor, the appellant (who may have legal representation) and the administrator has right of appearance: cl 454.

⁴⁵ Where the patient lacks capacity to choose, see cl 342.

⁴⁶ Second Reading Speech, p 348.

7 PROCEDURAL FAIRNESS

7.1 GENERALLY

7.1.1 The Current Legislation – The PRT

There is no express provision in the *Mental Health Act 1974* obliging the PRT to observe the rules of procedural fairness. Any such obligation exists by legal implication. Such express provisions exist in some other jurisdictions.⁴⁷

In *R v Mental Health Review Tribunal; ex parte Gillespie*⁴⁸, the Full Court of the Queensland Supreme Court found that the Mental Health Review Tribunal (the predecessor of the PRT) was obliged to observe the rules of procedural fairness and went on to examine the extent to which they applied to the tribunal.⁴⁹ Ryan J stated that while the tribunal was not required to act judicially, it should give a fair opportunity to the applicant to present his case.⁵⁰

The Full Court indicated that although the rules of procedural fairness applied to the tribunal, they needed to be adapted to the nature of the tribunal, the type of functions that it performs, and the evidence or material it had to consider.⁵¹

7.1.2 The Proposed Legislation – The MHRT

A number of comments made during the consultation process regarded recognition and observance of the requirements of procedural fairness as an important and necessary feature of any proposed legislation.

Clause 459 of the Bill expressly provides that the MHRT is bound to observe the requirements of procedural fairness at a hearing.

⁴⁷ See, for example, *Mental Health (Treatment and Care) Act 1994* (ACT), s 97(1); *Mental Health Act 1986* (Vic), s 24(1).

⁴⁸ *R v Mental Health Review Tribunal; ex parte Gillespie* [1985] 2 Qd R 527.

⁴⁹ The comments made by the Court seem equally relevant to the PRT whose powers appear to be similar.

⁵⁰ *ex parte Gillespie* [1985] 2 Qd R 527 at 537.

⁵¹ *ex parte Gillespie* [1985] 2 Qd R 527 at 533.

7.2 NOTICE OF THE HEARING

It is a minimum requirement of procedural fairness that a person be informed of the hearing and be given adequate time to prepare.

7.2.1 The Current Legislation – The PRT

Under the Mental Health Regulation 1985, provision is made for notifying the applicant, the patient and the nearest relative not less than 14 days prior to the date fixed for hearing.⁵²

7.2.2 The Proposed Legislation – The MHRT

Under the Mental Health Bill, it is proposed that notice be given to a greater number of persons at least **seven** days before the hearing. The persons who must be notified by the tribunal vary according to the type of hearing being conducted. It will generally be the patient, the administrator, the director (if the patient is a classified patient), the “allied person”, the parent or guardian where the patient is a minor and, in some situations, the personal attorney or guardian.⁵³ The notice must contain the time and place of the hearing, information about the nature of the hearing and, if the recipient is a party, the right to be represented.

An innovation of the new legislation is the provision made for **notification orders** in cases involving a forensic patient who is alleged to have committed a criminal offence. The tribunal may, on application made to by it by a person, or on its own initiative, make an order that a person with a sufficient personal interest (eg a victim of the alleged criminal offence) be given notice of various matters concerning the patient, such as when a review will be carried out as a result of which the patient may be discharged, authorisation of limited community treatment, approvals for transfer and for movement out of the State.⁵⁴ Those provisions attempt to recognise the interests of victims in matters concerning such patients.⁵⁵

⁵² Mental Health Regulation 1985, s 34.

⁵³ Mental Health Bill, cl 189 (review of application of treatment criteria), cl 196 (detention of young persons in high security), cl 202 (review of forensic patient’s mental condition), cl 211 (review of mental condition to decide fitness for trial); cl 232 (treatment application), cl 377 (exclusion of visitors).

⁵⁴ Mental Health Bill, ch 6, part 5.

⁵⁵ Second Reading Speech, p 351.

7.3 DISCLOSURE OF MATERIAL

7.3.1 The Current Legislation – The PRT

In *ex parte Gillespie*, the Full Court considered that the powers bestowed upon the tribunal indicated that the tribunal must have a discretion whether or not to disclose the information made available to it.⁵⁶ The Court found that, in circumstances of the case, including the powers and functions that the tribunal was then exercising, procedural fairness did not require that the patient or his counsel be allowed to inspect any medical reports.

Similarly, the discretionary nature of the PRT's powers are such that it is not obliged, except in a very general way, to disclose any material or medical evidence it has before it. Therefore, there is usually no means of obtaining the psychiatric or other medical report before or during the hearing unless the doctor is prepared to provide the patient or their legal representative with a copy. If, however, the legal representative has acted for the patient in the MHT, the medical reports would be available from that hearing.

Use Of Freedom Of Information Procedures

One frequently used avenue of obtaining medical reports and other relevant material before the PRT is to make an application under s 25 of the *Freedom of Information Act 1992* (Qld). Generally, there is no real difficulty with giving an applicant access to their own medical or psychiatric reports.⁵⁷ However, under s 44(3) of the *FOI Act*, the applicant can be refused direct access to psychiatric reports where it appears that disclosure might be prejudicial to the physical or mental health or wellbeing of the person. Instead, the relevant reports are disclosed to a qualified medical practitioner thereby ensuring that the patient has appropriate assistance in dealing with the information contained in them.

See also further discussion in Cathy Green, *The Queensland Mental Health Bill 2000: Reforms to Victims' Rights in Relation to Proceedings and Notification Orders*, Legislation Brief No 2/00, Queensland Parliamentary Library, April 2000.

⁵⁶ *ex parte Gillespie* [1985] 2 Qd R 527 at 539.

⁵⁷ *Freedom of Information Act 1991* (Qld), ss 6, 44(2).

7.3.2 The Proposed Legislation – The MHRT

Clause 459(4) now gives parties to proceedings the right to inspect a document to which the tribunal proposes to have regard in reaching a decision and to make submissions about them. Patients and their representatives, as well as other parties can look at any medical and psychiatric reports so that the patient will, assisted by their representative, have the opportunity to question the practitioner supplying that report.

It is interesting to note that under s 26(7) of the Victorian *Mental Health Act 1986*, patients or their representatives are entitled to access any documents to be given to the Board in connection with a hearing **at least 24 hours prior to the commencement of the hearing**. This is subject to the right of the patient's doctor to apply to the Board to prevent access by the patient in certain circumstances.⁵⁸

The MHRT may also have regard to material submitted by a person who is not a party to the proceeding if it is relevant to the decision (**clause 464**). It would appear that such provision would enable persons such as relatives, carers or neighbours who are not parties to the proceedings to provide information to the tribunal that might assist it in making its decision. Indeed, the MHRT is not bound by the rules of evidence and may inform itself on matters as it considers appropriate: **clause 459(2)**.⁵⁹

However, the Bill recognises that admission of material that does not comply with the rules of evidence can sometimes deny procedural fairness to a party, particularly if a tribunal proposes to consider something lacking probative value without the party to whom it is adverse being able to respond to it.⁶⁰ The safeguard provided in the new Bill is that the weight accorded to the material by the tribunal in making its decision will be dependent upon various matters, including whether the person who is the subject of the proceeding has had sufficient opportunity to examine and reply to the material.⁶¹

⁵⁸ See also, for example, *Mental Health Act 1990* (NSW), s 276 and *Mental Health Act and Related Services Act 1998* (NT), s 132 which are similar to the new access provisions of the Mental Health Bill in Queensland and *Mental Health Act 1996* (WA), s 160, which gives a right to obtain access to their medical records as part of the general rights of patients set out in part 7.

⁵⁹ This is relatively common for administrative tribunals (eg. see s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth)).

⁶⁰ *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41.

⁶¹ Mental Health Bill, cl 464(2). The MHRT must give reasons for taking or not taking into account that material: cl 465. The MHC can also receive material relevant to its decision submitted by a non-party subject to it being sworn: Mental Health Bill, cl 284.

The right to inspect documents and other material before the tribunal is, however, subject to a confidentiality order made by the tribunal: **clause 459(5)**. Confidentiality orders are considered below.

It will be interesting to see if the effect of this new provision is to reduce the number of FOI access applications for psychiatric reports and, in the case of a confidentiality order being made, to note the interaction between the confidentiality order and the indirect access provision in s 44(3) of the *FOI Act*.

7.4 REPRESENTATION

This aspect was examined above and will not be dealt with in detail here. Increased access to representation, including legal representation, is integral to the fundamental requirement of procedural fairness that parties to proceedings must be given a reasonable opportunity to present their case: **clause 459(4)**.⁶²

In addition, the appointment of persons with certain skills and knowledge to assist the tribunal also enhances the participants' ability to put their case effectively before the tribunal (eg. the skills of an interpreter): **clause 462**.

7.5 RIGHT TO CROSS-EXAMINE WITNESSES

7.5.1 The Current Legislation – The PRT

In *ex parte Gillespie*, the Supreme Court found that the procedural fairness did not require that the applicant patient or his counsel be given the right to cross-examine witnesses or members of the tribunal who carried out a medical examination upon the applicant (see also s 15 of the *Mental Health Act 1974*). The Court did indicate that, in exercising its powers, the tribunal could require a witness to submit to cross-examination, but it did not follow that the applicant would have the right to cross-examine. The Court considered that in the case before it, the applicant would still have had full opportunity to present his case even without having the right to cross-examine and to inspect documents.

The rules of procedural fairness in a hearing before an administrative tribunal do not generally include a right to cross-examine, although if it is a disciplinary type hearing, an ability to cross-examine might be the only means of eliciting the truth

⁶² See *R v Board of Appeal; Ex Parte Kay* (1916) 22 CLR 183; *Finch v Goldstein* (1981) 36 ALR 287; *Cains v Jenkins* (1979) 28 ALR 219.

of the situation and presenting one's case fairly.⁶³ Some jurisdictions do, however, permit cross-examination of witnesses in mental health review proceedings.⁶⁴

7.5.2 The Proposed Legislation – The MHRT

A party must be given a reasonable opportunity to present their case and to inspect documents and make submissions on them: **clause 459(3)**. However, there is no express provision that entitles a party to cross-examine witnesses. Because the tribunal must act as quickly as possible and with as little formality and technicality as is consistent with a fair and proper consideration of the issues,⁶⁵ it is unlikely that cross-examination would be permitted in other than rare circumstances. An example might be where there is no other means for the tribunal to ascertain the truth of what a witness is putting to it.

7.6 DEPARTURES FROM PROCEDURAL FAIRNESS REQUIREMENTS

The extent to which any particular administrative body must observe the rules of procedural fairness will vary according to the circumstances of the case, particularly the nature of the hearing and the type of tribunal concerned. In the *Explanatory Notes*, some apparent breaches of the rules of procedural fairness were identified.⁶⁶ Essentially, the nature of the functions performed by the MHRT, the sensitivity of the information it deals with, the health of patients before it, and the safety of other parties and persons are factors which prevent it from applying the rules of procedural fairness to their full extent.

7.6.1 Reasons for Decision

There is an argument that fairness requires parties to mental health review proceedings be provided with reasons for decision because hearings are conducted in private (**clause 460**) and a person's freedom and individual rights may be affected to a significant extent. Making reasons available will assist the parties,

⁶³ *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 256.

⁶⁴ See, for example, *Mental Health Act 1996* (WA), sch 2, cl 2, *Guardianship and Administration Act 1993* (SA), s 14(6).

⁶⁵ Mental Health Bill, cl 459(1)(b).

⁶⁶ Mental Health Bill, *Explanatory Notes*, pp 16-17.

their representatives, and the public to properly evaluate the decision and the basis upon which it is made.⁶⁷ Indeed, the principles for administration of the Bill, contained in **clause 8**, recognise that a person should be provided with the necessary information to enable them to exercise their rights under the legislation.

If a statement of reasons is requested, the tribunal must provide it within **seven days** of receiving the request: **clauses 192, 198, 205, 213, 234**. Where the decision concerns notification orders, the tribunal must give its reasons for decision to the patient and to the person for whom the order is made or the applicant for the order (often the victim), subject to principles of confidentiality of information: **clause 226**.

The requirement to provide reasons is subject to any confidentiality order of the tribunal.

The tribunal will not automatically provide parties with written statements of reasons for its decision. In the *Explanatory Notes* the point is made that the reasons might discuss clinical matters of such a nature as to distress or anger a patient at a particular point of time in their treatment process and thereby jeopardise their treatment and recovery if disclosed to them at that point in time on an automatic basis. It is considered preferable that those matters be discussed with the patient at an appropriate time and in such circumstances where support and counselling mechanisms can be provided.⁶⁸

7.6.2 Confidentiality Orders

Clause 458 enables the MHRT to make “confidentiality orders” which have the effect of restricting or prohibiting the disclosure of particular information which is before the tribunal (such as psychiatric reports) and the statements of reasons.

Confidentiality orders can be made only in quite limited circumstances – where the tribunal is satisfied that disclosure would cause serious harm to the health of the person or patient (against whom they are usually directed) or would put the safety of someone else at serious risk. Thus, the tribunal cannot, as a matter of course, make a confidentiality order to prevent disclosure of material or its statement of reasons. In addition, the information or matter must still be disclosed to the

⁶⁷ Victorian Mental Health Review Board *Annual Report*, para 7.2

⁶⁸ Mental Health Bill, *Explanatory Notes*, p 16.

person's or patient's lawyer or agent and if the person or patient does not have one, then the tribunal must ensure that one is appointed: **clause 458(3) and (4)**.⁶⁹

Under the Victorian *Mental Health Act 1986*, a patient's doctor can apply to the Board to prevent the patient from seeing any, or any part of, documents. The Board may grant that application in circumstances similar to those in the new Queensland Bill.⁷⁰

Confidentiality type provisions in legislation concerning bodies that review sensitive matters, even apart from mental health matters, do not appear to be unusual. For example, s 35 of the *Administrative Appeals Tribunal Act 1975* (Cth) enables the AAT to restrict access to and publication of certain information in certain circumstances, such as where the issues involved are sensitive or extremely personal to the parties involved.

8 ACCOUNTABILITY

During the consultation period, comments were made about the need to enhance the accountability of the tribunals and to heighten public awareness about the functions that they perform.

8.1 ANNUAL REPORTS

The president of the MHRT must prepare an Annual Report for the Minister after each financial year. The Annual Report must be tabled in Parliament within 14 days of being received: **clause 487**. The president must also keep a register of the applications for reviews, treatment applications, reviews heard by it and its decisions on the reviews and reasons for them: **clause 486**.

At present, there is no obligation upon the chairperson of the PRT to provide an Annual Report of the PRT's activities.

⁶⁹ The new MHC will also have the power to make confidentiality orders in relation to information before it in the same circumstances: Mental Health Bill, cl 426.

⁷⁰ *Mental Health Act 1986* (Vic), s 26(8). The Board may, however, allow the patient's representative to see it.

8.2 PRIVATE HEARINGS

The PRT conducts hearings in private unless it directs in a particular case that it is in the public interest to do so.⁷¹ Hearings before the MHRT will normally be conducted in private, unless otherwise ordered: **clause 460**. The tribunal will be able to direct that a hearing or part thereof be conducted in open to the public if it is satisfied that the person the subject of the hearing has agreed, the privacy of the parties will not be adversely affected and the order will not result in serious harm to the person's health or risk the safety of anyone else.

In most jurisdictions, hearings are not generally open to the public unless the public interest or the interests of the person dictate otherwise.⁷² While this may appear to detract from openness and accountability of proceedings, it is not unusual for administrative tribunals to order that hearings be held in private, either in whole or part, where the issues or evidence are of a confidential or personal nature.⁷³

9 APPEALS

9.1 THE CURRENT LEGISLATION – THE PRT

Rights of appeal to the MHT against orders for discharge, transfers and leaves of absence, and the persons are as set out in ss 15(9) and 15(10) of the *Mental Health Act 1974*.

There is a general right of appeal against the PRT's determinations, findings, reports or recommendations (apart from directions for examination of a patent) under Part IV of the Act.⁷⁴

Generally, appeals must be lodged within seven days.

⁷¹ Mental Health Regulation 1985, s 36(5)

⁷² See, for example, *Mental Health (Treatment and Care) Act 1994* (ACT), s 95; *Mental Health (Review Tribunal) Regulations 1964* (Tas), s 23(1), *Mental Health Act 1986* (Vic), s 33, *Supreme Court (Mental Health) Rules 1965* (WA).

⁷³ The Commonwealth Administrative Appeals Tribunal can make such an order, although only in fairly limited circumstances: see s 35A of the *Administrative Appeals Tribunal Act 1975* (Cth).

⁷⁴ *Mental Health Act 1974*, s 37. Part IV of the *Mental Health Act 1974* deals with persons who have been charged with simple or indictable offences who may have a mental illness or condition or may have been found by a jury to be unfit for trial or suffering from unsoundness of mind.

There is no right of appeal to the MHT from an “automatic review” under s 21(6)(a). Such appeal rights flow only from applications for discharge. There is also no right of appeal from the PRT’s review of a determination of the Director under s 50 that a patient be a restricted patient.⁷⁵ It would appear that in both situations, an application for judicial review of the PRT’s decision could be made under the provisions of the *Judicial Review Act 1991* (Qld).

There is no further right of appeal from a decision of the MHT on appeal from the PRT: *Mental Health Act 1974* s 43A(3).

9.2 THE PROPOSED LEGISLATION – THE MHRT

Review decisions (involuntary treatment orders, detention of young persons in high security units, mental condition of forensic patients, fitness for trial), decisions on a treatment application and decisions on an application for approval for interstate transfer can be appealed to the MHC: **clause 319**.⁷⁶ **Clause 320** sets out the persons who may lodge an appeal.

It does not appear that decisions on application for a notification order or the appeal against the decision of an administrator of an authorised Mental Health Service to exclude a visitor are subject to a right of appeal to the MHC. It seems that judicial review proceedings would have to be instituted under the *Judicial Review Act 1991*.

A period of 28 days is now given within which to lodge an appeal: **clause 321**. There are similar representation rights given as are provided in hearings before the MHRT.⁷⁷

The appeal is a rehearing on the material before the tribunal and any further evidence the MHC allows: **clause 333(2)**. The Bill provides (**clause 327**) that the MHC’s decision on the appeal is final and conclusive.

⁷⁵ Section 50 is relevant where the Director is of the opinion that the patient might be dangerous to themselves or to others and should not be given leave or discharged without the Director’s consent.

⁷⁶ Mental Health Bill, ch 8 sets out the appeal process and hearing of appeals.

⁷⁷ See Mental Health Bill, ch 8, part 1, div 2.

10 THE MENTAL HEALTH COURT

Only the notable features of the new MHC will be explored in this Brief as its powers and functions are essentially the same as the current MHT.

10.1 JURISDICTION

The MHC has jurisdiction, under **clause 383**, to:

- decide appeals against decisions of the MHRT;
- decide references to it about the mental condition of persons (to determine issues of unsoundness of mind, diminished responsibility and/or fitness for trial where there is reasonable cause to believe that a person is alleged to have committed an indictable offence).

It is now proposed that, where an offence carries a maximum penalty of life imprisonment, proceedings will not be discontinued until the patient has remained unfit for trial for seven years (as opposed to three years under the *Mental Health Act 1974*). Less serious offences will usually be referred to the Attorney-General⁷⁸; and

- investigate the detention of patients in authorised mental health services.

Most of the work of the current MHT is dealing with references to it about persons charged with indictable offences.

10.2 ROLE OF PSYCHIATRISTS ASSISTING COURT

The MHC will continue to be constituted by a Supreme Court Judge sitting alone assisted by two psychiatrists: **clause 382**. The Bill seeks to clarify the role of the assisting psychiatrists, their independence from the parties to the hearing and to specify that their functions are limited to matters within their professional expertise.

Clause 389 provides that their function is to examine material received to identify matters needing further examination and to make recommendations to the MHC about those matters and about making court examination orders. They also advise the Court on the meaning and significance of clinical evidence and clinical issues relating to the treatment and detention needs of patients. As is currently the position under the *Mental Health Act 1974*, the psychiatrists have no decision-making function and their role is purely to assist the judge.

⁷⁸ Mental Health Bill, cl 240.

Any advice given before the hearing or during an adjournment must be provided to the parties, unless the parties indicate otherwise: **clause 406**. Any advice given during a hearing must be audible to the parties: **clause 407**. In addition, **clause 408** requires that the Court's reasons for decision disclose the advice received from the assisting psychiatrists if it materially contributed to its decision. This would also embrace any advice given after the hearing is completed that the parties may not have already seen. This provision seeks to ensure the openness and accountability of the decision making.⁷⁹

10.3 FACTUALLY CONTENTIOUS CASES

Factually contentious cases cannot be determined by the MHC and must return to the general criminal court system.

Currently, the MHT cannot determine unsoundness of mind if the facts of the alleged offence are so in dispute that it would be unsafe to make a determination.⁸⁰ If the person is otherwise fit for trial, the matter returns to the general court system.

Under the Bill the test for a dispute of facts has been expanded so that this will occur if MHC is satisfied that:

- there is reasonable doubt the person committed the alleged offence unless the doubt exists only as a consequence of the person's mental condition (eg. a delusional belief about the facts). Some flexibility is built in to enable the court to substitute charges if it is satisfied that there is reasonable doubt the person committed the disputed offence if that alternative offence is not disputed: **clause 268**; or
- a fact that is substantially material to the opinion of an expert witness is so in dispute that it would be unsafe to make the decision: **clause 269**.

In either of the above situations the MHC cannot make a decision about unsoundness of mind or diminished responsibility when the alleged offence was committed. The consequence is that a larger number of factually contentious cases will return to the criminal court system than occurs at present.

⁷⁹ Mental Health Bill, *Explanatory Notes*, p 95.

⁸⁰ *Mental Health Act 1974*, s 33(2).

10.4 OTHER MATTERS

The MHC will have similar inquisitorial powers to the present MHT, allowing it to admit as evidence material that would not normally be admissible in a criminal court.⁸¹ The MHC can conduct its own independent examination of the person (which can be required by a court examination order)⁸² rather than rely upon an examination by an expert who will then need to be called as a witness. The possibility of perceived bias should not, therefore, arise.⁸³

It is envisaged that the MHC will be able to use its inquisitorial powers and flexible approach to the admissibility of evidence to accept evidence from victims as to the behaviour of the patient prior to the commission of the alleged offence.⁸⁴ It is not clear whether victims will be able to provide any further information than that to the Court.

The MHC is not bound by the rules of evidence unless it decides it is in the interests of justice to be bound.⁸⁵ The 1999 Discussion Paper indicated that criteria would be provided for the Court to follow when considering whether it was necessary to apply the rules of evidence.⁸⁶

The MHC can, pursuant to **clause 410**, appoint a person to assist it if the person has appropriate knowledge or experience such as language skills or specific cultural knowledge or experience. In the *Explanatory Notes*, it is stated that the MHC can also use this clause to appoint a person to assist the subject of the hearing to understand or endure the proceedings.⁸⁷

⁸¹ Mental Health Bill, cl 404.

⁸² Mental Health Bill, cl 422.

⁸³ Second Reading Speech, p 350.

⁸⁴ Mental Health Bill, *Explanatory Notes*, p 8, Mental Health Bill, cl 284; See the role of victims in MHC proceedings in Cathy Green, *The Queensland Mental Health Bill 2000: Reforms to Victims' Rights in Relation to Proceedings and Notification Orders*, Legislation Brief No 2/00, Queensland Parliamentary Library, April 2000.

⁸⁵ Mental Health Bill, cl 404.

⁸⁶ 1999 Discussion Paper, p 17.

⁸⁷ Mental Health Bill, *Explanatory Notes*, p 95.

BIBLIOGRAPHY

Monographs

- Queensland Health, *Review of the Mental Health Act – Treatment of People With Mental Illness*, Discussion Paper No 3, May 1993.
- Queensland Health, *Review of the Mental Health Act 1974*, Green Paper, 1994.
- Queensland Health, *Review of the Mental Health Act: The Forensic Provisions*, Discussion Paper No 4, May 1993.
- Queensland Health, *Victims of Crime and the Mental Health Act*, Discussion Paper, 1999.
- Queensland. Parliamentary Library, *The Queensland Mental Health Bill 2000: Reforms to Victims' Rights in Relation to Proceedings and Notification Orders*, Legislation Brief No 2/00, April 2000.
- Queensland. Parliamentary Library, *The Queensland Mental Health Bill 2000: Involuntary Assessment and Treatment Procedures*, Legislation Bulletin No 4/00, April 2000.
- Victoria. Mental Health Review Board, *Annual Report*, 1998/99.

Journal Articles

- Delaney S, 'Autonomy Denied: International Human Rights and the Mental Health Act 1986 (Vic)', *Melbourne University Law Review*, 18(3) 1992, pp565-583.
- 'Mental Health Legislation', Law Book Company (LBC) *The Laws of Australia*, Chapter 20 Part F, last updated 31 April 1999.

Legislation

Australian Capital Territory

- *Mental Health (Treatment and Care) Act 1994* (ACT)

Commonwealth

- *Administrative Appeals Tribunal Act 1975* (Cth).

New South Wales

- *Mental Health Act 1990* (NSW)

Northern Territory

- *Mental Health Act and Related Services Act 1998* (NT)

Queensland

- *Freedom of Information Act 1991* (Qld).
- *Mental Health Act 1974* (Qld)
- *Mental Health Bill 2000* (Qld)
- *Mental Health Regulation 1985* (Qld)

South Australia

- *Guardianship and Administration Act 1993* (SA)

Tasmania

- *Mental Health (Review Tribunal) Regulations 1964* (Tas)

Victoria

- *Mental Health Act 1996* (Vic).

Western Australia

- *Mental Health Act 1996* (WA)
- *Supreme Court (Mental Health) Rules 1965* (WA).

Cases

- *Cains v Jenkins* (1979) 28 ALR 219.
- *Finch v Goldstein* (1981) 36 ALR 287
- *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41.
- *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 256.
- *R v Board of Appeal; Ex Parte Kay* (1916) 22 CLR 183
- *R v Mental Health Review tribunal; ex parte Gillespie* [1985] 2 Qd R 527.



This Publication:

LB 5/00 *The Queensland Mental Health Bill 2000: The New
Regime for Tribunal and Court Review*
(QPL April 2000)

Related Publications:

LB 4/00 *The Queensland Mental Health Bill 2000: Involuntary
Assessment and Treatment Procedures*
(QPL April 2000)

LBR 2/00 *The Queensland Mental Health Bill 2000: Reforms to
Victims' Rights in Relation to Proceedings and
Notification Orders* (QPL April 2000)