

# MENTAL HEALTH TRIBUNAL

## PRACTICE NOTE 4

### ACCESS TO DOCUMENTS IN MENTAL HEALTH TRIBUNAL HEARINGS AND APPLICATIONS TO DENY ACCESS TO DOCUMENTS

#### I. PRELIMINARY

##### Authority

1. This Practice Note has been issued by the Rules Committee of the Mental Health Tribunal (the Tribunal) established by section 389 of the *Mental Health and Wellbeing Act 2022* (the Act) and this Practice Note has been made pursuant to section 391 of the Act.

##### Commencement date

2. This Practice Note takes effect on 1 September 2023. Amendments to this Practice Note relating to the list of specified documents and other matters take effect from 1 August 2024.

##### Introduction and purpose

3. Section 373(1) of the Act states that subject to section 373(3) at least 2 business days prior to a Tribunal hearing, a designated mental health service, or psychiatrist who has applied to the Mental Health Tribunal for authorisation for the performance of electroconvulsive treatment, 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.
4. Pursuant to section 373(2), an authorised psychiatrist or a psychiatrist may apply to the Tribunal for access to documents to be denied to the patient if the authorised psychiatrist or 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 373(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.
5. Under section 362(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 373(3) effectively abrogates this rule of procedural fairness in relation to a defined class of documentary material.
6. Accordingly, the Tribunal will apply section 373(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. This Practice Note is intended to guide members and all participants in hearings, including designated mental health services, psychiatrists who have applied to the Tribunal for authorisation for the performance of electroconvulsive treatment, patients and their legal representatives, nominated support 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.
8. 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).
9. This Practice Note is the key document concerning access to documents in Tribunal hearings.

### **Definitions**

10. This Practice Note may be referred to as 'PN4 – Access to documents'.
11. Unless otherwise specified, all references to sections in this Practice Note are to sections of the *Mental Health and Wellbeing Act 2022*.

### **Authorised psychiatrist**

12. References to the authorised psychiatrist in this Practice Note include any delegate of the authorised psychiatrist appointed in accordance with section 329 of the Act.

### **Document**

13. Section 38 of the *Interpretation of Legislation Act 1984* defines 'document' as follows:
  - 13.1 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.
14. Document also includes any part or any copy of any part of any thing referred to in paragraph 13.

15. For the avoidance of doubt, electronic clinical records are 'documents' for the purposes of section 373.

### **Hearing report**

16. The hearing report is the report about the patient an authorised psychiatrist or psychiatrist must provide to the Tribunal in accordance with Rules 14-16 of the *Mental Health Tribunal Rules 2023* and applicable Practice Notes issued for the purposes of providing, making and giving hearing reports.

### **Patient**

17. In this Practice Note, a patient includes any person who falls within the definition of 'patient' in section 3 of the Act, namely:
- an assessment patient; a court assessment patient; a temporary treatment patient; a treatment patient; a security patient; a forensic patient; and
  - any other person who is the subject of the proceeding but does not fall into the definition of 'patient' under section 3 of the Act.

### **Pending hearing**

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

### **Serious harm**

19. The wording of section 373(3) requires the Tribunal to be satisfied that serious harm may be caused by disclosing the document(s). There is no requirement that disclosure would, or would be likely to, cause that harm. However, an application under section 373(2) should not be made on the basis of consequences that are remote or purely speculative.
20. 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:
- 20.1 potential harms that alone may not be sufficiently serious to demand consideration may amount to serious harm when combined or taken together;
  - 20.2 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);
  - 20.3 prejudice to the patient's prospects of successful treatment or recovery;
  - 20.4 prejudice to relationships with persons who may support the patient's recovery.
21. The Tribunal may decide that a document exempt under the *Freedom of Information Act 1982* (FOI Act) or the *Health Records Act 2001* (HR Act) does not meet the serious harm test under section 373(3) and that it therefore should be provided to the patient (see, further, paragraphs 34-36).

## Scope of Practice Note

22. This Practice Note applies to a patient's right to access documents prior to Tribunal hearings under section 373(1) of the Act and to any application by an authorised psychiatrist or psychiatrist to deny access to documents pursuant to section 373(2) of the Act.

## II. REQUIREMENT TO PROVIDE ACCESS TO DOCUMENTS UNDER THE ACT

23. The Act states that a designated mental health service or a psychiatrist who has applied to the Tribunal for the performance of electroconvulsive treatment must give patients access to any documents in its possession in connection with the proceeding at least 2 business days prior the hearing.

### **What are the documents 'in connection with the proceeding' that must be provided?**

24. The scope of section 373 is very broad and neither the parties nor the Tribunal can unilaterally define which documents are connected to a particular proceeding. However, to promote the workability of section 373 and assist designated mental health services and psychiatrists meet their obligations under the Act, this Practice Note identifies the documents which, if they exist, will always have a connection with the hearing.
25. However, for the avoidance of doubt, just as designated mental health services or a psychiatrist can rely on additional documents to those identified by the Tribunal (see paragraph 27 below), nothing in this Practice Note prevents the patient or their legal representative from requiring the designated mental health service or psychiatrist to provide access to additional documents that they (that is, the patient or their legal representative) consider are connected with the proceeding in any particular matter. Subject to any application to deny access to those documents, the designated mental health service or psychiatrist should provide these additional documents to the patient or their legal representative at least 2 business days before the hearing.
26. Where the patient or their legal representative request additional documents to those referred to in this Practice Note the designated mental health service or psychiatrist is not required to provide those documents to the Tribunal. The Tribunal expects the patient or their legal representative to provide the Tribunal with copies of the particular documents that they intend to rely on.
27. The documents that always have the relevant connection to the proceeding are as follows.
  - *The relevant hearing report.* The report should be prepared in accordance with the applicable Tribunal Practice Note and any template approved by the Rules Committee.
  - *Copies of current orders and related documents-*
    - Temporary treatment patient: the temporary treatment order, assessment order or court assessment order and any variations made by the authorised psychiatrist

- Treatment patient: the treatment order, any variations made by the authorised psychiatrist, and the Tribunal's decision in any variation hearings and / or patient applications over the duration of the order
- Security patient: the secure treatment order or court secure treatment order, receipt of security patient form and Corrections Victoria Memorandum
- Forensic patient (ECT applications only): relevant order under the *Crimes (Mental impairment and Unfitness to be Tried) Act 1997*.
- 'Specified documents' as listed below.

#### *Specified documents*

- Discharge and / or admission summaries within the last 12 months
- Consultant notes for the last two reviews
- Notes from registrar / medical officer reviews in date order within the last six weeks
- Notes from Key Clinician or Case Manager reviews within the last six weeks
- Nursing notes within the last seven days during an inpatient admission
- Advance Statement of Preferences
- Second Psychiatric Opinion report completed within the last 12 months
- Correspondence from private / specialist practitioners or general practitioners that is being used to inform current treatment planning and decision making
- Forensic reports that are being used to inform current treatment planning and decision making
- Social work and/or occupational therapy reports that are being used to inform current treatment planning and decision making
- Psychological and neuropsychological reports that are being used to inform current treatment planning and decision making
- CMI extract
- Any other recent documents which the treating team believes are relevant to the hearing.

#### **Providing documents or access to documents to the patient and Tribunal**

28. The designated mental health service or psychiatrist must provide the patient with a copy of the hearing report whether or not the patient requests it and confirm the patient's wishes about access to other documents.
29. The hearing report should be provided to the patient in full at least 2 business days prior to the hearing in accordance with section 373(1) unless circumstances apply that make this impossible (see paragraph 37). In addition, the Tribunal considers that there is a positive obligation on the service to facilitate patient access to information in the hearing report which can include the provision of an interpreter or other assistance the patient requires in order to understand the contents of the hearing report.

30. At the beginning of the hearing the Tribunal will generally confirm with the patient and the representative/s of the designated mental health service or psychiatrist 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.
31. The designated mental health service or psychiatrist must upload to the Tribunal's extranet the documents in paragraph 27 (whether or not the patient has read the hearing report or requested to see the specified documents) before the hearing in compliance with the Tribunal's guide for uploading documents for the Tribunal.

**The obligation to provide access to documents under section 373 only applies when there is a pending Tribunal hearing**

32. The obligation of designated mental health services (or psychiatrists who have applied to the Tribunal for authorisation for the performance of electroconvulsive treatment) to give patients access to documents under section 373 of the Act only applies if there is a pending hearing of the Tribunal (see definition of pending hearing in paragraph 18).
33. 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 FOI Act or HR Act to the relevant 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 Freedom of Information and Health Records Acts are not determinative**

34. 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.
35. 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 373 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 373(3).
36. Accordingly, any documents exempt under the FOI Act or HR Act must be separately considered by the authorised psychiatrist or psychiatrist in accordance with the Act and this Practice Note.

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

37. Failure to provide a patient with access to documents in accordance with section 373(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; and
- whether it was possible in the circumstances to comply with the requirement to give the patient access to documents 2 business days 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**

38. The authorised psychiatrist or psychiatrist must make an application to the Tribunal in all instances where the authorised psychiatrist or psychiatrist seeks to deny the patient access to any specified documents.
39. The application to deny access to documents must be made at least 2 business days 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 or psychiatrist must make the application to deny access to documents at the same time as making the application for the substantive hearing.
40. An application to deny access to documents should be completed using the form [Application to deny access to documents \(MHT 30\)](#), which can be downloaded from the Tribunal's website at [www.mht.vic.gov.au](http://www.mht.vic.gov.au). The completed form must be returned to the Tribunal's registry via email to [registry@mht.vic.gov.au](mailto:registry@mht.vic.gov.au) at least 2 business days before the hearing date.
41. 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**

42. 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 mental health service not to reveal the contents of the documents (including the source of any document) to the patient, the patient's legal representative may view the documents which are the subject of the application prior to the preliminary hearing.
43. 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.
44. In accordance with the attendance requirements set out in *PN 1 – Applications, Reports and Attendance Requirements*, the authorised psychiatrist, 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**

45. 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**

46. Pursuant to section 373(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 in relation to the substantive hearing.
47. The Tribunal will complete a determination recording their decision. The Tribunal will list the documents (or parts of documents) which are the subject of the order in the schedule.
48. Except in the exceptional cases outlined in paragraphs 59-61 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 document(s).
49. 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 373(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 373(3) without putting that information (or the substance of it) to the patient.

### **Refusing to grant the application and ordering access**

50. Where the Tribunal is not satisfied of the serious harm test in accordance with section 373(4), the Tribunal may:
- order the designated mental health service or psychiatrist who has applied to the Tribunal for the performance of electroconvulsive treatment (as the case requires) to give the patient access to the relevant document pursuant to section 373(4)(a); and
  - adjourn the hearing for a period not exceeding 5 business days and extend the duration of the relevant order for the length of that period pursuant to s 373(4)(b) to allow the patient to review the documents.



51. With respect to the adjournment power in section 373(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 374 of the Act.
52. For the avoidance of doubt, the adjournment power under section 373(4)(b) is discretionary rather than mandatory.
53. The Tribunal members will make an order recording their decision, including any adjournment and any directions for the next hearing.

#### **Withdrawing an application to deny access to documents**

54. 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 or psychiatrist will therefore be required to send an email to the Tribunal's registry withdrawing the application.

#### **Future effect of the Tribunal's decision**

55. A decision under section 373(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 372). Each time there is a pending hearing, there is a fresh obligation under section 373(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 or 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**

56. Outside of an application to deny access to documents under section 373, 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.
57. Section 373 only allows the authorised psychiatrist of a designated mental health service or psychiatrist who has applied to the Tribunal for the performance of electroconvulsive treatment (as the case requires) to make an application to deny access to a document which includes correspondence or notes from family members or carers. Section 373 does not apply to documents in the possession of the Tribunal and the Tribunal is not able to make a determination under section 373 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 support person, carer, guardian, family member or other persons connected with a patient. The sender of any such correspondence 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 or psychiatrist.

58. If a nominated support 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, 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 where a patient may not be notified of an application to deny access to documents**

59. As a general rule, the Tribunal will give all persons to whom it is required to give notice of hearings under section 371(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 371(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.'
60. The Tribunal acknowledges that there may be certain, very rare circumstances in which an authorised psychiatrist or 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.
61. In such cases, the authorised psychiatrist or 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