

1. About QAI

QAI is an independent, community-based, systems and individual legal advocacy organisation. Our mission is to promote and protect the fundamental rights of people with disabilities, extending beyond the defence of civil and political rights to the defence of rights without a legal foundation, rights to self-respect and respectful treatment embodied in the simple quality of human dignity.

We hold ourselves to account by including people with disability as paid staff, in our membership, and in key board positions. Our board members have experience in advocacy, institutional living, community legal services, private legal practice, legal aid, accountancy and community work. QAI is a member of the National Disability Advocacy Network of Australia (DANA) and Combined Advocacy Groups Qld (CAGQ).

As well as its traditional systems advocacy QAI provides individual legal advocacy to people with a disability at risk of human rights abuses, particularly around guardianship and restrictive practice matters, and assists people required to appear before the Mental Health Review Tribunal. We also provide non-legal advocacy to people with disability at risk from the criminal justice system by working with legal and community services that help the person with a disability remain in the community.

We acknowledge that our comments in this submission were developed collaboratively with a number of advocacy organisations and people with disability organisations around Australia.

Recommendations

- 1. A reconsideration of the criteria determining a person's eligibility to government supported representation according to the prospect of custodial orders of any kind.**
- 2. Provision for government assisted representation for persons with diminished capacity facing the prospect of custodial orders or Restrictive Practices**

Why we are submitting

QAI is uniquely placed to make observations about the accessibility of the justice system for people with disabilities, including mental health-related disabilities. We provide individual legal advocacy in support of persons whose disability is at the centre of their legal issue. We run two direct-delivery legal services:

1. The Human Rights Legal Service (HRLS)

The HRLS advocates for people with intellectual disability and/or cognitive impairments (including ABI), or who have a dual diagnosis of intellectual disability/cognitive impairment plus mental illness, who have a profound physical disability, and require legal assistance in-

- challenging the use of restrictive practices,¹ including the use of seclusion, containment and chemical, mechanical and physical restraint;
- guardianship and administration matters;²
- anti-discrimination matters;³
- forensic orders and forensic orders- disability;
- health care and life sustaining measures; or
- abuse, neglect and serious injury.

Much of the work of the HRLS involves representation in administrative tribunals, particularly the Queensland Civil and Administrative Tribunal (QCAT).

2. The Mental Health Legal Service (MHLS)-

The MHLS provides advice and representation to people who have matters before the Mental Health Review Tribunal (MHRT)⁴ including:

- reviews of involuntary treatment orders (ITOs);
- fitness to plea;
- reviews of forensic orders (FOs);

¹ Physical and Chemical Restraint, Containment and Seclusion pursuant to the *Guardianship and Administration Act 2000* & *Disability Services Act 2006* Qld

² Pursuant to the *Public Trustee Act 1978* & *Guardianship and Administration Act 2000*

³ Pursuant to the *Anti-Discrimination Act 1991* (Qld)

⁴ Pursuant to the *Mental Health Act 2000* (Qld) *et al*

- applications for electroconvulsive therapy (ECT); and
- applications by involuntary patients who wish to move out of Queensland.

In this submission

Pursuant to the Productivity Commission's Terms of Reference we will comment on people with disability's experiences of access with respect to the following tribunals, courts and areas of law:

- The Mental Health Review Tribunal (MHRT)
 - i. Intensive Treatment Orders
 - ii. Review of Forensic Orders
 - iii. Fitness to Plea
 - iv. ECT Hearings

- The Queensland Civil and Administrative Tribunal (QCAT)
 - i. Guardianship Matters
 - ii. Restrictive Practices

Representation in some Tribunal Matters is no less Critical than for Serious Criminal Matters- Liberty is at Stake

The High Court's decision in *Dietrich v The Queen* (1992) 177 CLR 292 established an accused's right to an adjournment pending the provision of legal representation. That decision is applicable only to criminal proceedings in which the accused faces a custodial sentence. By analogy we submit that the Court's reasoning must also bear on the question of representation in civil matters where the person before the court or tribunal:

- is facing a term of incarceration against their will (whether therapeutic or corrective is arguably moot, see discussion below); and
- is disadvantaged by a capacity-related disability; and
- is not well-versed in law and legal processes.

Administrative proceedings in relation to mental health treatment orders, forensic or not, often determine whether the patient will continue to be held against their will. The Tribunal frequently makes custodial orders. Punishment is not a part of the Tribunal's remit, but the proceedings are no less intimidating and often more so in the patient's subjective experience.

Queensland Advocacy Incorporated's Mental Health Legal Service provides legal representation to people with intellectual disabilities and/or mental illness who appear in Queensland's Mental Health Review Tribunal. The Tribunal hears more than 11 500 matters each year, primarily relating to the review of Intensive Treatment Orders (ITO), Forensic Orders (FO), Fitness for Trial (FFT) and applications for Electroconvulsive Therapy (ECT).

Our Human Rights Legal Service represents people subject to Restrictive Practices, which are forms of physical and chemical restraint, containment and seclusion regulated pursuant to the *Disability Services Act 2006* (Qld) and the *Guardianship and Administration Act 2000* (Qld). These practices often involve a serious infringement of people's liberty- people who lack legal capacity, and who are therefore unable to represent themselves in the Queensland Civil and Administrative Tribunal. As recently as 1 October 2013 the South Australian Public Advocate noted that many of the Restrictive Practices around this country are likely to be a breach of the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, a Convention this country has yet to ratify.

In *Dietrich* the court recognized that most of us are not equipped to understand complicated legal processes, and justice is better served by appropriate representation. *Dietrich* had been under indictment for serious drug-related offences. At the time of the initial Victorian County Court hearing he was in custody on remand, knew very little about the Australian legal system, and by his

own admission did not have the emotional resources to self-represent when so much, for him, was at stake.

The High Court's Gaudron J quoted Dietrich's own words to the County Court:

"I don't want to show any disrespect to this court. I'm not emotionally and mentally fit to conduct my own trial, and I don't want to take the brunt of ... I know my own character, I know what's going to happen, and it's going to look bad in front of the jury and I'm not prepared to take that chance. I'll just sit here mute."

"He is doubly disadvantaged" said Gaudron J, "first by lack of knowledge and, then, by the stress of the occasion".

People with capacity-related disabilities appearing before the MHRT or QCAT share those disadvantages, and although not tried criminally they also share similar custodial prospects. Pursuant to an Intensive Treatment Order or Forensic Order a person may be detained in a mental health facility for months, sometimes years, and Forensic Orders often remain in place for years after a person's release from custody.

1.1. Recognised benefits of legal representation

QAI submits that legal representation is a necessary component of an acceptable system of involuntary mental health treatment.

Under the Act, the Mental Health Review Tribunal is to exercise its jurisdiction in a way that is "*fair, just, economical, informal and timely*" (s 438). While still observing natural justice, hearings must be conducted with as little formality and technicality as possible and the Tribunal is not bound by the rules of evidence (s 459). On this basis legal representation is considered unnecessary and by some an obstruction to a fair and proper hearing.

However, the Tribunal is charged with the very important responsibility of determining issues of liberty, freedom of choice and bodily integrity. It serves to protect vulnerable people with mental illness from arbitrary state action.

Access to legal representation in such matters is fundamental and need not be incompatible with informality.

Legal representation:

- Improves the quality and efficiency of tribunal hearings by summarising the client's case, testing the evidence and highlighting the legal issues.
- Supports vulnerable people with mental illness through a legal process which determines their fundamental human rights. Many patients report high levels of anxiety about tribunal hearings and, particularly those without a support person, find it an intimidating process.⁵
- Increases patient attendance at hearings. Anecdotally, many of QAI's clients would not attend hearings without the attendance of their lawyer or advocate. For some, we are their form of only support. For others, a lawyer ensures a fair hearing and their voices heard, not just a rubber stamp.
- Enables the treating team to focus on their role of providing evidence, without feeling responsible to the patient to represent their views and wishes.
- Improves the patient's perception of the review process.
- Improves the patient's understanding of the review process, the law and their rights.
- Can improve understanding and communication between patient and treating team.
- Reduces incidences of appeal.

1.2. Current position

In all cases where a patient has a right to appear before the Mental Health Review Tribunal, the patient also has the right to be represented by a lawyer or, with the leave of the tribunal, an agent. An allied person also has a right to attend the hearing to help the involuntary patient represent the patient's views, wishes and interests. If the patient is not represented, the presiding member may appoint a person to represent the patient's views, wishes and interests (a separate representative). (Chapter 12 Part 4)

The right to representation does not translate to actual representation. In 2011-12, 2.27% of patients were legally or non-legally represented before the Tribunal. Overall, 32.4% of hearings were attended by some sort of support person (including allied persons), and only 43% of patients attended their hearings.

Despite the importance of legal representation there is a remarkable lack of resources allocated by government to the representation of people before the Mental Health Review Tribunal. Legal Aid Queensland is insufficiently funded to regularly provide aid in this area. QAI receives yearly project

⁵ Terry Carney, Fleur Beaupert, Julia Perry and David Tait (2008). *Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe-Dreams?* <http://ssrn.com/abstract=1307346>.

funding to support 1 full time lawyer and a part time paralegal. The Advocacy and Support Centre (Toowoomba) is funded to provide some representation in the Toowoomba area and ATSILS is just starting to do more work in the area. QPILCH's advocacy program is not government funded. Even if a person has money to retain a lawyer, QAI is only aware of a handful of lawyers in the private sector with experience in the Tribunal.

The Act overcomes this lack of resources in respect of confidentiality order applications by *requiring* the Tribunal to appoint a lawyer, if there is none, in these matters. (s 458) This ensures that there is someone to advocate for the patient who has knowledge of all the evidence to be considered by the Tribunal, in line with the principles of natural justice.

It is submitted that the requirement for legal representation should equally apply to particularly vulnerable patients, or where representation is desirable in the interests of justice, for example,

- The proceeding is likely to involve complex questions of fact or law; or
- Another party to the proceeding is represented in the proceeding. (Taken from *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, s 43 Representation)

Representation in forensic order and fitness for trial matters falls squarely into this category:

- The Attorney-General has a right of appearance, and in 2011-12 attended 50.7% forensic hearings. The significant power imbalance, by virtue of the Attorney-General's position, expertise and longitudinal knowledge of the matter (having been involved since the forensic order was first made), makes it difficult for self-represented patients to adequately present their own case. Further, the lack of patient representation creates difficulties for the Attorney-General, whose role is to represent the community, not advocate for the patient.
- The test applied by the Tribunal under s 204 reverses the onus of proof usually applied in matters concerning state detention and restriction on civil liberties; the patient is required to satisfy the Tribunal that the approval of less restrictive measures would not represent an unacceptable risk to their own safety or the safety of others.
- Given amendments to the Act earlier this year that empowers the Director of Mental Health to impose monitoring conditions on forensic patients, it is even more imperative that forensic patients have access to legal representation.

Patients subject to applications for ECT should also have access to legal representation, given the nature of the treatment, the power imbalance between the applicant (that is, the consultant psychiatrist) and patient, and the inherent reduced capacity of the patient to represent themselves (if they are so unwell as to warrant ECT). The same reasoning could be applied to patients who, at the time of hearing, are subject to seclusion and are usually not allowed to attend their hearing.

Legal representation should also be available for Chapter 7 Part 2 patients who are in detention (whether in prison or an authorised mental health service), given the complexity of their status and the potential for these people to be "lost in the system", leading to lengthy and possibly unwarranted detentions.

At the same time, it is important that a person’s right to choose their own representation, including the right to have no representation, is respected. In cases where the patient does not have capacity to choose legal representation or instruct, and the legal guardian (if any) refuses to give instructions, the Tribunal should appoint a separate representative.

1.3. Proposed Solution

Ideally, all patients appearing before the Mental Health Review Tribunal and all persons who lack capacity and who are subject to, or may be subjected to, Restrictive Practices should have access to legal representation should they want it. However, given the 10,972 hearings conducted in 2011-12⁶ in the Mental Health Review Tribunal alone, it is accepted that this may not be a viable option.

QAI submits that where the patient is not represented by a lawyer or agent, representation in mental health related matters must be appointed in the following matters (in order of priority):

Matter type	Statistics in 2011-12
(1) Forensic order and fitness for trial review hearings	1390 hearings(Forensic order) 20 hearings (Forensic order (disability)) 22 hearings (Fitness for trial) Total: 1432 hearings⁷
(2) Electroconvulsive therapy applications	545 hearings⁸
(3) Matters concerning a patient who at the time of the hearing is held in seclusion	Not known
(4) Matters concerning Chapter 7 Part 2 patients in detention (whether in prison or an authorised mental health service)	Not known 963 patients subject to Ch 7 Pt 2, detained and non-detained ⁹
(5) People with another vulnerability in addition to mental illness, impacting on their ability to self-represent, eg, children, Aboriginal and Torres Strait Islander people, people under personal guardianship, people with intellectual disability, people from non-English speaking backgrounds. ¹⁰	Not known 1317 hearings for Indigenous patients, 19.4% or 255 related to forensic order reviews ¹¹
(6) People who have been in inpatient care for longer than 12 months.	Not known

⁶ Mental Health Review Tribunal Annual Report 2011-12 at p 10

⁷ Mental Health Review Tribunal Annual report 2011-12

⁸ Mental Health Review Tribunal Annual report 2011-12

⁹ Director of Mental Health Annual report 2011-12

¹⁰ Multiple vulnerabilities is discussed in more detail at Chapter **Error! Reference source not found.** of this submission

¹¹ Mental Health Review Tribunal Annual report 2011-12

We further submit that representation should be available on request for any matter in relation to Restrictive Practices.

It is imperative that any representation appointed is appropriately experienced and qualified and understands their role to be to represent, and act on the instructions of, the patient/person.

However, representation should not be appointed if the tribunal knows that the person objects to being represented. If the person does not have capacity to give instructions, and the legal guardian (if any) refuses to instruct a representative, the tribunal must appoint a separate representative.

Another option to consider is to implement a duty lawyer system at, for example, The Park, in SE Queensland, along the lines of the experimental domestic violence service recently introduced at Holland Park Magistrates Court. This service provides much more intensive support and assistance to people involved in domestic violence matters than is normally delivered through the standard duty lawyer model. This may offer a stop-gap measure that would at least offer something until fuller services could be provided.

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