

# MENTAL HEALTH REVIEW TRIBUNAL

## Practice and Policy Guideline #12

### COMMENT OUTSIDE THE REVIEW TRIBUNAL'S JURISDICTION

*Practice and Policy Guidelines provide general direction and assistance to the members and secretariat of the Review Tribunal. They may be departed from or supplemented by the Review Tribunal as circumstances require. They do not constitute legal opinions.*

### Introduction

1. Is the Review Tribunal permitted to express an opinion on issues about which it has no formal power to decide?
2. If so, when and how should it do so?
3. Examples of matters about which the Review Tribunal is often asked to express an opinion include:
  - The type or dose of medication which applicants should receive;
  - Whether hospitalisation is required.
4. For its part, the Review Tribunal may on its own volition wish to comment on, for example:
  - The standard of care which applicants are receiving;
  - Other treatment options which might be available.
5. The long title of the Mental Health (Compulsory Assessment and Treatment) Act 1992 describes the Act as:

*"An Act to redefine the circumstances in which and the conditions under which persons may be subjected to compulsory psychiatric assessment and treatment, to define the rights of such persons and to better provide protection for those rights, and generally to reform and consolidate the law relating to the assessment and treatment of persons suffering from mental disorder".*

6. Section 102(2) of the Act states that:

*“A Review Tribunal may at any time....report to the Director [of Mental Health] on any matter relating to the exercise or performance of its powers and functions under this Act.”*

7. In Waitemata Health v. AG and MHRT and H [2001] NZFLR 1122 and [2001] 21FRNZ 216 the Chief Justice stated:

*“... that the Act is a humane and careful response to the need to provide for compulsory treatment for those suffering from mental illness...”* (paragraph 78)

*“The Review Tribunal is a body required to act in accordance with the standards of procedural fairness described as natural justice”* (paragraph 96)

*“... the common law will supplement the statute to achieve fair procedure”* (paragraph 98)

*“The rights and interests which may require hearing are broader than legal rights and interests.”* (paragraph 99)

8. The references in the previous three paragraphs suggest that the Act is rights based legislation with a humane purpose, in respect of which the Review Tribunal has an important part to play.

9. This in turn suggests that the Review Tribunal is not prevented from commenting on matters which it is not formally required to decide, and arguably should do so in some circumstances.

10. However, these circumstances will be relatively infrequent and in general terms Review Tribunal hearings should not be used as a vehicle to raise issues not related to its core functions.

## Considerations

11. Subject to the general principle referred to in paragraph 10, considerations relevant to whether comment on matters strictly outside the Review Tribunal's jurisdiction is appropriate include:

- Whether there is a close interconnection between those matters, and the matters which it is required to decide;
- Whether there is a breach of the law or acceptable professional standards;
- The degree of importance of the matters to the rights and welfare of the applicant concerned;
- Whether the matters affect the rights and welfare of others as well as the applicant concerned;
- Whether comment might damage therapeutic relationships;
- Whether comment would give rise to misunderstanding or confusion as to the role of the Review Tribunal;
- Whether comment would diminish the standing of the Review Tribunal;
- Whether comment would serve to limit future cooperation with the Review Tribunal;
- Whether comment would distract from the primary issues before the Review Tribunal;
- Whether comment might give rise to false hopes or expectations on the part of applicants or family members;
- The extent to which the Review Tribunal has complete and reliable information to comment;
- The extent to which comment would be of practical benefit;
- Whether it is a matter about which authorities should be alerted;
- Whether or not the Review Tribunal will be in a position to monitor the issue commented on at later review hearings;
- Whether comment would involve personal or institutional criticism;
- Whether comment would be procedurally fair and in accord with natural justice;
- Whether comment is a means of acknowledging concerns and displaying sympathy;
- The extent to which third parties would expect comment;
- Whether there are other options available;
- Whether comment would give rise to controversy.

12. Any comment should be with the agreement of all members of the hearing panel.

13. The panel should decide on whether comment is best made verbally or in writing.
14. If the comment is to involve serious criticism of an individual or institution, the convener of the Review Tribunal should be consulted first.
15. The Review Tribunal should not communicate with persons other than those involved in hearings, except through the convener.

*Last updated August 2015*

NJ Dunlop

Convener