

Patient Access to Files for Mental Health Review Board Hearings

Purpose

To provide information about section 26 of the Mental Health Act 1986, which allows patients to have access to documents for Mental Health Review Board (MHRB) hearings.

Background

For many years, it was required by the Mental Health Act that patients be given access to their clinical file and other relevant documents before a MHRB hearing.

This practice led to concerns by some clinical staff about the release of sensitive information contained in the file. In ordinary circumstances, access to clinical files is regulated by the Freedom of Information Act 1982.

The Mental Health Act was amended in 1996 to provide a statutory right of access to information prior to a MHRB hearing. This guideline explains the relevant provisions and addresses some practical issues.

Legislation

Under section 26(7) of the Mental Health Act, a patient or the patient's representative is entitled to inspect any documents to be given to the MHRB in connection with a hearing, at least 24 hours before the hearing.

Section 26(8) provides for the authorised psychiatrist to apply to the MHRB to prevent access by a patient to a document or part of any document if such access is likely to:

- Cause serious harm to the patient's health or the health or safety of another person; or
- Involve the unreasonable disclosure of information relating to the personal affairs of any person; or
- Breach a confidentiality provision imposed by a person who supplied the information contained in the documents.

The MHRB makes the final decision about whether the patient should see the documents. If the MHRB decides the patient should not see any document, it may allow the patient's representative to have access to the document.

Principles

The MHRB is required in all procedural matters to act according to the rules of natural justice or procedural fairness.

Mental health services should ensure that:

- Patients are informed about their right to have access to their file for MHRB hearings.
- Administrative procedures are simple and accessible and do not discourage patients from seeking access.

- Administrative decisions are open and accountable.
- Procedures are in place for resolving disputes.
- The response to all requests is timely.
- Staff are supportive and facilitate all requests.

Local Policy

Each approved mental health service should develop local policy and procedures governing access to documents for MHRB hearings which:

- Conform with the provisions of the Mental Health Act.
- Comply with the rules of natural justice.
- Incorporate the practice standards described in this guideline.

Procedures for Access

The patient is to be given the opportunity to inspect any documents, which are to be given to the MHRB in relation to a hearing.

Prior to authorising and facilitating patient access, the treating consultant psychiatrist (or another doctor under the supervision of the psychiatrist) should review the clinical file and other relevant documents to identify any information, which should not be released to the patient. This information could be temporarily removed from the file or a photocopy could be given to the patient with the exempted material deleted or covered. The rest of the file should be made available to the patient as soon as practicable. Access to the whole file should not be denied on the basis of one or two sensitive entries.

The patient must be allowed to inspect the relevant documents at least 24 hours before the hearing. Access should be provided in a quiet and private area. If it is considered necessary, a member of staff may sit with the patient to assist and answer any questions. The presence of a staff member should be a positive experience and not intimidatory or restrictive in any way.

If any documents have been withheld, pending an application to the MHRB to prevent access to the documents, the patient should be informed and the process explained.

The patient may wish to take notes or photocopy some pages. This should be facilitated. The patient may also want to spend an extended period of time examining the file or may wish further access at a later time. Decisions about these requests should be made in the context of what is fair and reasonable in the circumstances. For example, where there is extensive documentation, it would be reasonable to allow the patient a longer period of time or a follow-up session. Local policy should establish clear guidelines for dealing with these matters and for resolving disputes if they arise.

Patient's Representative

The Mental Health Act also allows a person authorised by the patient to represent them to inspect all relevant documentation. This may be a friend or family member or it could be an advocate or legal representative. The principles regarding access and procedural fairness apply equally to a personal representative.

Application for Non-Disclosure

The authorised psychiatrist or the medical practitioner representing the authorised psychiatrist may make an application to the MHRB to prevent the patient having access to a document or part of a document.

The MHRB should be informed before the hearing that an application will be made. This can be done on the day of the hearing or earlier by contacting the MHRB's Executive Officer or Legal Officer. The MHRB can be contacted on (03) 8601 5270.

The MHRB will hear the non-disclosure application, which can be verbal or written, as a preliminary issue before the commencement of the hearing. The application should be

presented in general terms and address the criteria in section 26(8) of the Mental Health Act. Specific details of the relevant documents are usually not required.

The non disclosure application will be heard and determined by the Board in the absence of the patient. If the patient has a representative, the MHRB may allow the representative to be present and to see the document. The MHRB will ask the representative to undertake to keep the information confidential and not pass it on to the patient if the MHRB makes an order for non-disclosure.

If the MHRB decides the patient should not see a document, it may decide that it too will not see the document. This follows from the rules of natural justice, which require that a determination of the MHRB should be based on information which is available to all parties. The MHRB will decide on a case by case basis whether it should see the document, having regard to the relevant circumstances.

Penalties

If a patient or their representative has not been given the opportunity to inspect all relevant documents before the hearing, the MHRB may need to adjourn the hearing to enable this to occur. If there is no good reason for the patient having been denied access, the MHRB may make an order for costs against the party responsible for the delay (section 131 of the Mental Health Act).

Self Assessment Tool

The following indicators are provided to assist services in the internal quality monitoring of practices, and form the basis for the Chief Psychiatrist's Clinical Review of mental health services.

- Each service has local policy and procedures to facilitate timely and appropriate access to documents for MHRB hearings.
- The clinical record contains documentation that the patient has been given the relevant Patient Rights Booklet 'Mental Health Review Board: How It Can Help You' , and informed of their right to access their file for MHRB hearings.
- All clinicians are fully informed about a patient's right to access their documents for MHRB hearings, and to assist patients in exercising their right.

**For further information regarding these guidelines
contact the Office of the Chief Psychiatrist on 9616 8124.**