

30 July 2019

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Dear Jodie

Response to Question on Notice

I refer to my appearance as a witness at the hearing for the Royal Commission into Victoria's Mental Health System on 11 July 2019.

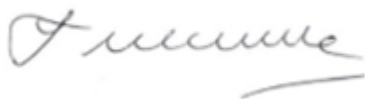
During my evidence, I took a question on notice from Commissioner McSherry regarding the rates of legal representation in Victoria's Mental Health Tribunal, compared to the New South Wales Mental Health Review Tribunal.

My response to this question is enclosed.

Please let me know if you have any questions about this response or other information in my evidence or VLA's submission.

Congratulations on the comprehensive work of the Royal Commission to date. We look forward to continuing to work with you and your team.

Yours faithfully



LOUISE GLANVILLE
Chief Executive Officer

What is the rationale for the lower representation rate before Victoria's Mental Health Tribunal compared with that before New South Wales' Mental Health Review Tribunal?

In 2017-2018 in Victoria, 15 per cent of consumers were legally represented at their Mental Health Tribunal (**Tribunal**) hearing.¹ Victoria Legal Aid (**VLA**) is the main provider of representation at the Tribunal, representing 13 per cent of consumers (more than 1000 hearings) in the 2017-2018 financial year. Representation was also provided by the Mental Health Legal Centre in 139 matters.² VLA also gave advice in relation to Tribunal matters on over 3,000 occasions.

Victoria's representation rate of 15 per cent compares unfavourably to New South Wales's representation rate of 80 per cent for equivalent matters.³ In our view, the primary reasons for this difference in representation rates are:

1. Legislative differences between states;
2. A lack of policy and practice to facilitate access to legal assistance in Victoria; and
3. Resource constraints and the impact of limited data for service planning.

Part 1.3.4 of VLA's July submission to the Royal Commission, *Roads to Recovery: Building a Better System for Victorians Experiencing Mental Health Issues (VLA Submission)*, discusses the role of legal representation for people before the Tribunal in more detail. In summary, it identifies the impact that independent legal advice and representation can have both on the outcome of a person's Tribunal hearing and on the exercise of their rights under the *Mental Health Act 2014 (Vic) (Mental Health Act)* more generally, including:

- Assisting people to understand proposed treatment and reasons for treatment.
- Making people aware of their rights in relation to:
 - Communicating with lawyers, advocates and the Tribunal
 - Access to avenues of appeal against treatment orders
 - Participating in treatment decisions, even when subject to compulsory treatment.
- Liaising with the treating team on the progress of leave, discharge plans, treatment options or referrals for supports.
- Accessing information in a way people can understand, for example, using interpreters and explanations of reports with consumers who cannot read.
- Exploring less restrictive treatment options based on a person's preferences.

In addition to improving individual outcomes for people and increasing people's ability to engage with decisions and processes that affect them, the VLA Submission identifies examples where lawyers and advocates have played a role in identifying and addressing systemic issues that are apparent through high volume work with clients.⁴

Each of the three primary reasons we have identified for the difference in representation rates will now be explored in more detail.

¹ Mental Health Tribunal, *Annual Report 2017-2018*, 30 (**MHT Annual Report**).

² Mental Health Legal Centre, *Annual Report 2017-2018*, 14.

³ NSW Mental Health Review Tribunal, *Annual Report 2017-18*, 31, which refers to a rate of 80 per cent for matters in the Tribunal's civil jurisdiction (**NSW Tribunal Annual Report**).

⁴ Victoria Legal Aid, *Roads to Recovery: Building a Better System for Victorians Experiencing Mental Health Issues* (July 2019) 18-21.

1. Legislative differences between states

Victoria's Mental Health Act provides that a person who is the subject of a proceeding has a right to appear before the Tribunal⁵ and that the person may be represented at their hearing.⁶ However, there are no statutory provisions (and limited processes) to give effect to this right.

The Mental Health Act does not require the provision of legal representation and does not require the Tribunal or mental health services to facilitate representation, refer consumers for legal representation, or notify VLA of hearings. There is also no provision to facilitate legal representation where a consumer does not have capacity to instruct a lawyer. The Mental Health Act provides that if a consumer is unrepresented the Tribunal may appoint a person to represent them.⁷ However we are not aware of the Tribunal having exercised this power.

In contrast, the *Mental Health Act 2007* (NSW) (**NSW Act**) requires legal representation at a mental health inquiry for involuntary treatment unless the person does not want this.⁸ This requirement also applies to forensic or correctional patients.⁹ Further, the NSW Act mandates representation for anyone under the age of 16 years unless a determination is made by the Tribunal that it is in that person's best interests to proceed without representation.¹⁰

In relation to ECT inquiries, unlike in Victoria, in NSW a person must appear before the NSW Mental Health Review Tribunal (**NSW Tribunal**) unless the NSW Tribunal is satisfied by a medical officer that the person is too unwell to attend.¹¹

Legal Aid NSW's Mental Health Advocacy Service (**Legal Aid NSW**) provides an 'automatic right of representation' for all mental health inquiries; reviews within the first 12 months of involuntary treatment; ECT inquiries; reviews of community treatment order breaches; and all matters for someone under the age of 16 years. Representation in those matters is subject only to an 'availability of funds' test—a merits test is only applied in relation to appeals, long-term involuntary patient reviews and community treatment order hearings.¹² In addition, the NSW Act provides the legislative power for lawyers to access medical records, which results in policies and practices for these records to be provided (discussed further in part 2 below).¹³

By way of another source of comparison and information for the Royal Commission, we also note that the *Mental Health Act 2016* (Qld) (**Queensland Act**) provides a right of representation for people

⁵ *Mental Health Act 2014* (Vic) s 184(1).

⁶ *Mental Health Act 2014* (Vic) s 184(3).

⁷ *Mental Health Act 2014* (Vic) s 184(4).

⁸ *Mental Health Act 2007* (NSW) s 154(2A).

⁹ *Mental Health Act 2007* (NSW) s 154(2).

¹⁰ *Mental Health Act 2007* (NSW) s 154(4).

¹¹ *Mental Health Act 2007* (NSW) s 96(5A)(c). Under s 96, 'ECT inquiries' refers to: 'ECT consent inquiries', where the NSW Tribunal determines whether or not the person is capable of giving informed consent to the administration of ECT and has given that consent; and 'ECT administration inquiries', where the Tribunal determines whether or not an ECT determination should be made in relation to the patient or person under the age of 16 years about whom the inquiry is held.

¹² Legal Aid New South Wales Civil Law - Guideline 6; NSW Tribunal Annual Report, above n 3, 12.

¹³ *Mental Health Act 2007* (NSW) s 156(2).

subject to hearings by a nominated support person, lawyer or another person.¹⁴ The Queensland Act requires a representative to either “represent the person’s views, wishes and preferences”¹⁵ or, if unable to do so, to represent the person’s best interests.¹⁶

Further, the Queensland Tribunal has an overriding discretion to appoint a lawyer or other person to represent the person if it considers it is in that person’s best interests to do so.¹⁷ Lawyers must be appointed to represent minors,¹⁸ and in all applications for ECT.¹⁹

2. Policy and process to facilitate access

a. Practices in other states that support access to legal assistance

New South Wales

The legislative requirements for legal representation in NSW are supported by policy, practice and resources that proactively facilitate access to legal assistance. The NSW Tribunal recognises that ‘having a lawyer test the evidence is an important review mechanism on the exercise of significant powers’²⁰ and it has taken steps to facilitate access to legal assistance from Legal Aid NSW. This includes a service agreement between the NSW Tribunal and Legal Aid NSW for the provision of legal representation and the direct provision of hearing lists to Legal Aid NSW.²¹

In addition, the NSW Tribunal has issued practice directions to mental health services to facilitate legal representatives having timely access to consumers’ clinical files and medical reports.²²

Queensland

A service agreement also exists between the Queensland Tribunal and Legal Aid Queensland to facilitate mandated representation. The Queensland Tribunal is able to refer directly to Legal Aid Queensland where the Tribunal considers a person’s ‘best interests’ should be represented.²³ The matter is then allocated by Legal Aid Queensland, and a lawyer will contact the consumer directly. The service is provided by Legal Aid Queensland’s inhouse mental health law team, private practitioners, regional Legal Aid Queensland offices, and community legal centres.²⁴

¹⁴ *Mental Health Act 2016* (Qld) s 739(1). Although the Commissioner’s question relates specifically to Victoria and NSW, we have also included in this response information regarding comparable legislation and practice in Queensland as another source of information and comparison for the Royal Commission.

¹⁵ *Mental Health Act 2016* (Qld) s 739(3)(a).

¹⁶ *Mental Health Act 2016* (Qld) s 739(3)(b).

¹⁷ *Mental Health Act 2016* (Qld) s 740(2).

¹⁸ *Mental Health Act 2016* (Qld) s 740(3)(a).

¹⁹ *Mental Health Act 2016* (Qld) s 740(3)(b)(i).

²⁰ NSW Tribunal Annual Report, above n 3, 12.

²¹ NSW Mental Health Review Tribunal, Procedural Flowchart

<https://www.mhrt.nsw.gov.au/files/mhrt/pdf/MHI_Flowchart_Aug15.pdf>.

²² NSW Tribunal Annual Report, above n 3, 12.

²³ Queensland Mental Health Review Tribunal, *Information for Legal Representatives*

<<https://www.mhrt.qld.gov.au/information-for/legal-representatives>>.

²⁴ Conversation with Principal Lawyer, LAQ, Brisbane on 24 July 2019.

To enable Legal Aid Queensland to follow up referrals, the Queensland Tribunal will provide Legal Aid Queensland with details of the client, hearing date, time and location.²⁵ While Legal Aid Queensland does not provide an outreach duty lawyer service to inpatient units, the Queensland government funds an Independent Patient Rights Advice service which does have an outreach service and can provide information, support and referrals for people about their rights under the Queensland Act.²⁶

b. Practices in Victoria

In contrast to NSW and Queensland, Victoria does not have processes in place at a system level to facilitate access to legal assistance. In addition, there are no consistent processes that services must follow. Provision of hearing lists, sharing of consumer information and access to consumers are largely at the discretion of services and vary greatly across the state. Arrangements for VLA's service are determined by agreement with each service.

Many services do not allow lawyers to meet with consumers to explain and offer access to our services. Rather, they provide the consumer with the option of access to legal aid and if the person declines, their details are not shared with VLA. Whilst this may not be intended to discourage access to legal assistance, allowing VLA to explain the service directly to the consumer often provides a better basis for them to understand the lawyer's role. It also makes clear to the consumer, who may be overwhelmed with information or dealing with crisis or distress, that the lawyer is separate and independent from the clinical service, which can be an important factor in their decision.

Similarly, there are no standards or practice directions that govern lawyers' access to information relevant to a Tribunal hearing, as there are in NSW. Such arrangements generally depend on an individual mental health service's privacy policies, and interpretation of privacy laws. In our experience, concerns about confidentiality commonly override concerns about ensuring that lawyers have a proper opportunity to consider all the evidence relevant to the person's matter.

These varied practices create difficulties for legal assistance service planning and result in inconsistent access for consumers. These issues are discussed in more detail in parts 5.1 and 6.3 of the VLA Submission.

c. Listing and referral practices of the Tribunal

There are no arrangements for the Tribunal to provide VLA with hearing lists or for a person who wants legal representation to be referred directly from the Tribunal to VLA as would be common in other areas of VLA's practice. The Tribunal's view is that confidentiality provisions prevent direct sharing of hearing lists as occurs in other states. VLA's resource constraints also mean that we may not be able to represent a person who is referred.

Representation rates are also affected by the fact that the Tribunal frequently lists hearings on days on which the Tribunal does not ordinarily sit at a particular venue, meaning there is no duty lawyer

²⁵ Conversation with Principal Lawyer, LAQ, Brisbane on 24 July 2019.

²⁶ Queensland Health, *Independent Patient Rights Advisers* <<https://www.health.qld.gov.au/cq/services/mental-health/independent-patient-rights-advisers>>.

service available and VLA is not advised or notified of the hearing.²⁷ Advice and representation therefore only occurs if the consumer proactively requests assistance by contacting VLA. If a consumer does contact us, our ability to arrange representation is limited by time constraints and resourcing (discussed further below). Listing matters on non-normal sitting days therefore significantly limits VLA's ability to provide representation to as many consumers as possible.

Hearings may be listed on non-normal sitting days at the request of the mental health service or because of a listing decision of the Tribunal. We note that ECT matters are more likely to come up on an ad hoc basis, and, due to time limits in the Mental Health Act, may need to be listed urgently. We do not have access to data on the proportions of inpatient hearings that are listed on normal sitting days versus those that are listed on non-normal hearings days, so are unable to assess the magnitude of impact of this on representation rates. The Tribunal will have this data.

3. Resource constraints

a. Inpatient hearings, including ECT

The primary way in which VLA provides legal representation at the Tribunal is through our inpatient duty lawyer service, which we deliver at almost all inpatient units across Victoria.²⁸ Our inpatient duty lawyer service involves an in-house VLA lawyer outreaching to the inpatient unit and offering legal advice to inpatients with hearings listed the following business day and returning the next day to provide representation at hearings to eligible consumers.²⁹

The Tribunal duty lawyer service is part of the Civil Justice program at VLA. It is part-funded through the Department of Health and Human Services. The remainder of the funding comes from VLA's general legal assistance funding which VLA directs to this area of work.

VLA is not able to service every inpatient sitting day with its existing resources and has not been able to meet increases in service demand arising from the introduction of the Mental Health Act in 2014. Under the Mental Health Act, the period within which a first review had to occur was shortened from eight weeks to four weeks, increasing the number of people who would still be on an order at the time that the first review was required. This increased the number of hearings, particularly inpatient hearings.³⁰ As a result the Tribunal now sits at most services every week (and at some services more than once per week). No additional funding was allocated during implementation to account for the consequential increase in demand for legal assistance. Accordingly, VLA is unable to service all

²⁷ It is also relevant that in Victoria there is a relatively low attendance rate by consumers at Tribunal hearings. In 2017-18, consumers attended their hearings in only 57 per cent of hearings: MHT Annual Report 2017-18, 30. This compares unfavourably to New South Wales, where the attendance rate in its civil jurisdiction was 86 per cent.

²⁸ We regularly service 29 out of 33 inpatient services. The exceptions are Bundoora Extended Care, Normanby House, Peter James Centre and the Royal Talbot, which are serviced on request.

²⁹ In practice, each hearing is listed for an hour. Usually the making of an order is opposed by the consumer, and the hearing is therefore 'contested'. A technical report is prepared by the mental health service, and the Mental Health Tribunal is also provided with the consumer's clinical file. Quality representation requires the taking of detailed instructions from the consumer on sensitive issues in a difficult environment, careful reading of the report and clinical file, preparation of questions for the consumer, the treating team, and other parties involved (such as family and carers) and the making of legal submissions. Due to time limits in the Mental Health Act, matters generally cannot be adjourned to facilitate more preparation time. Almost all matters therefore proceed by way of substantive hearing.

³⁰ In 2013/14 the Mental Health Review Board conducted 1,830 inpatient hearings (Mental Health Review Board, *Annual Report 2013/14*, 11). The Tribunal does not report on the number of inpatient hearings, but in 2017/18 it made 2,580 inpatient treatment orders, meaning it conducted at least this many inpatient hearings.

inpatient sitting days. There are currently 69 inpatient sitting days per fortnight. Of these, 50 days (72 per cent) are serviced by our duty lawyer service and 19 days (28 per cent) are not. Funding limitations are therefore a major reason for Victoria's low representation rate.

Similarly, no funding was allocated to provide for the addition of the ECT jurisdiction and the consequent increased need for legal advice and representation. There are currently over 700 ECT hearings per year. VLA represents consumers at only around six per cent of ECT hearings. Our work in relation to ECT hearings and the difference this makes for individual and systemic outcomes is discussed in part 1.3.4 of the VLA Submission.

Our ability to plan our service provision to maximise representation rates within existing resources is also limited because of the lack of available data regarding which services have the most people on orders, or which have the most ECT applications. This is discussed further in part 6.3 of the VLA Submission.

b. Community treatment orders

VLA has chosen to prioritise people on inpatient treatment orders for our Tribunal legal service. As a result, we provide only a very limited service for people on community treatment orders (**CTOs**).

We do not provide a duty lawyer service to people on CTOs, rather, we only provide assistance to those consumers who contact VLA to request assistance (usually via our phone advice line). This assistance is generally advice via telephone. Time constraints can make representation difficult to arrange. For instance, consumers need only be notified of their hearing date seven days in advance of their hearing, and need only be given a copy of the report prepared by the mental health service for the hearing 48 hours in advance of the hearing, making it difficult for us to assess, advise and arrange representation in time for the hearing. In some cases, representation can be arranged, usually by a private barrister, funded through a grant of legal assistance.

Some representation is provided for people on CTOs by the Mental Health Legal Centre, other community legal centres and private practitioners.³¹

Overall, however, legal assistance for people on CTOs is limited by resources. In 2017-2018, VLA appeared in 139 Tribunal hearings related to CTOs.

³¹ In 2017-18, the Mental Health Legal Centre provided representation in 64 CTO hearings, Mental Health Legal Centre, *Annual Report 2017-18*, 14.