Electronic audio recordings project

Submission to the Mental Health Review Tribunal

March 2019

The Public Advocate

Influencing change to empower lives

Introduction

The Public Advocate was established under the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of Queensland adults with impaired decision-making capacity. The primary role of the Public Advocate is to promote and protect the rights, autonomy and interests of Queensland adults with impaired decision-making capacity.

More specifically, the Public Advocate has the following functions:

- promoting and protecting the rights of adults with impaired capacity for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.[1]

The Public Advocate welcomes the opportunity to make a submission regarding the Mental Health Review Tribunal's (the Tribunal) Electronic Audio Recording Project.

Electronic audio recordings project

Requirements of the *Recording of Evidence Act*

The Tribunal is aware that my position regarding the *Recording of Evidence Act 1962* (Qld) is that handwritten notes do not satisfy the requirements of section 5 of the Act.

Specifically, section 5 provides:

5 Recording of relevant matter in legal proceedings

(1) All relevant matter in a legal proceeding is to be recorded.

Examples of ways of recording—

- in shorthand
- by recording equipment

(2) The recording may be done—

(a) for any legal proceeding—

(i) under an arrangement under section 5A; or

(ii) by a public service employee in the department; or

(b) for a legal proceeding before QCAT—by a member of QCAT or an adjudicator under the QCAT Act; or

(c) for an inquiry or examination—under an arrangement under section 5C.

(3) Subsection (1) applies subject to any direction given by the court in which, or judicial person before whom, the legal proceeding is being taken.

(4) In this section—

relevant matter, in a legal proceeding, means—

(a) evidence given in the legal proceeding; and

(b) a ruling, direction, address, summing-up or other matter in the legal proceeding.

It is accepted that proceedings before the Tribunal are 'legal proceedings' for the purposes of the *Recording of Evidence Act*. Therefore, the real issue at hand is whether handwritten notes satisfy the requirement that 'all relevant matter' is 'recorded'.

[1] *Guardianship and Administration Act 2000* (Qld) s 209.

The Act provides two examples of recording methods (either in shorthand or by recording equipment), but no further definitions or explanation are provided regarding how this requirement is to be satisfied. 'Relevant matter' itself is defined to include evidence given in a proceeding as well as essentially all other matters in the proceeding.

The use of the word 'all' before 'relevant matter' in this context should be taken to mean that 'all' evidence, rulings, directions, etc. should be recorded. By implication, this would require that the record (however made) must accurately and completely record the proceeding in a way that essentially amounts to a verbatim record (see the discussion about the *Former wording of section 5* below). This would be difficult, if not impossible, for Tribunal members to achieve when attempting to take the record in handwriting.

This interpretation of the intention of the *Recording of Evidence Act* is supported not only through the words of the current legislation, but a historical analysis of the same legislation.

Former wording of section 5

The *Classification of Computer Games and Images and Other Legislation Amendment Bill 2012* amended section 5 of the *Recording of Evidence Act*. The current wording has been in force since 5 April 2013.

Prior to that amendment, and since the *Recording of Evidence Act*'s commencement in 1962, the wording of the section was as follows:

> **5 Power to direct recording under this Act**
>
> (1) In any legal proceeding in or before any court or judicial person, the court or judicial person may in its or the judicial person's discretion, with or without any application for the purpose, direct that any evidence to be given and any ruling, direction, address, summing up, and other matter in the legal proceeding (or of any part of the legal proceeding in question) be recorded—
>
> (a) if a shorthand reporter is available—in shorthand; or
>
> (b) if recording equipment and a recorder are available—by the recording equipment; or
>
> (c) if a shorthand reporter, recording equipment, and a recorder are available—in shorthand or by the recording equipment or partly in shorthand and partly by the recording equipment.
>
> (2) The recording under this Act pursuant to any such direction shall be made by any 1 or more shorthand reporters who are available or, if the recording is made by mechanical means, under the supervision of or operation by a recorder or recorders who are available.

As can be seen, the former wording of this section was much more prescriptive in terms of how matters were to be recorded. It essentially provided the options of shorthand and/or recording equipment, both of which allow proceedings to be recorded accurately and fully. It is clear that the requirements of this previous provision would not have been satisfied through the taking of general handwritten notes by sitting members of a tribunal or court.

The Explanatory Notes from the Bill that amended the *Recording of Evidence Act* to its current form state that the main purpose of the changes were to enable the outsourcing of the recording and transcribing of legal proceedings in Queensland.[2] No further explanation is provided in the Explanatory Notes regarding the operation or interpretation of section 5(1). However, regarding what is now section 5(3), the Notes state that: 'The requirement that all relevant matter be transcribed is subject to the judicial discretion in subsection [(3)].'[3]

[2] Explanatory Notes, *Classification of Computer Games and Images and Other Legislation Amendment Bill 2012* (Qld) 1.
[3] Ibid 19.

Therefore, the words 'subject to any direction given by the court' in the current section 5(3) appear to relate only to whether a matter is ultimately transcribed.

There does not appear to have been any intention by the legislature at the time of the 2012 amendment to the *Recording of Evidence Act* to reduce the standard for recording of legal proceedings. The *Recording of Evidence Act* was originally created to require proceedings to be recorded in full, and unless there are express provisions to the contrary, such a requirement should be logically assumed to have been continued under the amended Act. This intention is also reflected in the examples of ways of recording provided in the current section 5(1), being either by shorthand or by recording equipment, which are the same recording methods that were provided for in the original provision.

Issues arising from alternative interpretations of section 5 of the Recording of Evidence Act

Even if section 5 of the *Recording of Evidence Act* could be interpreted to include handwritten notes, this would place extreme pressures on sitting Tribunal members, as they must ultimately be held responsible for the Tribunal's compliance with the legislation.

Tribunal hearings, like other legal proceedings, are dynamic environments and can often be fast-paced. It is highly impracticable to expect that Tribunal members are able to take detailed handwritten notes that meet the requirements of the *Recording of Evidence* Act, moderate the proceedings, consider in detail all relevant legal and medical issues raised, and properly evaluate all of the evidence and witnesses. If, however inadvertently, the sitting Tribunal members do not manage to record all of the relevant matters in the proceedings, it raises questions about whether the Tribunal is operating in breach of the *Recording of Evidence Act*.

The requirement of section 5 in the *Recording of Evidence Act* strictly requires that a recording of all relevant matters must be kept. It would not be an excuse that the Tribunal members attempted to take a record or that all reasonable efforts were made, especially if the obvious methods by shorthand or by recording equipment were not considered.

Section 5B of the Recording of Evidence Act

Section 5B of the *Recording of Evidence Act* states:

5B Availability of copies of records and transcriptions

(1) The chief executive must ensure appropriate arrangements are in place to ensure the availability to any person, by purchase or otherwise, of—
(a)copies of records under this Act; and
(b)copies of transcriptions of records under this Act.
(2) Subsection (1) does not apply to the extent that, under this or another Act or under an order of a court or judicial person, a copy of a record or transcription must not be made available to a person.
(3) The arrangements must include arrangements for providing copies of records or transcriptions on request—
(a)to judicial persons at no cost; and
(b)to other persons, at no cost or at a cost that is less than the amount that would otherwise be payable, in accordance with the entitlements prescribed under a regulation.
(4) The chief executive may put in place arrangements for providing copies of records or transcriptions to the Supreme Court Library Committee established under the *Supreme Court Library Act 1968,* at no cost, for the purposes of enabling the committee to maintain and administer QSIS under that Act.

(5) However, despite an arrangement put in place under subsection (4), the chief executive must not provide to the Supreme Court Library Committee copies of the following records or transcriptions—

(a)any part of a record under this Act of a criminal proceeding that has been made while the court is closed under a provision of an Act, or an order made under a provision of an Act requiring the court to be closed;

(b)any part of a record under this Act of a criminal proceeding if the court makes an order prohibiting access to, or the disclosure or publication of, the part.

(6)The chief executive may delegate, to an appropriately qualified officer of the department, a function of the chief executive under this section.

Example of a function—

Under a regulation made under subsection (3)(b), the chief executive may have a function of making a decision about whether a person qualifies for an entitlement to a free copy of a transcription.

(7)In this section—

appropriately qualified includes having the qualifications, experience or standing appropriate to exercise the function.

function includes a power.

This section requires that the chief executive must ensure appropriate arrangements are in place to ensure the availability of copies of records and transcripts of records under the Act. The provision provides that the arrangements must include arrangements for providing copies of records or transcriptions on request.

It does not appear that the Tribunal currently has any formal arrangements in place for making copies of the record of proceedings available to relevant parties and interested persons (as may be permitted under the *Mental Health Act 2016*). Nor does it appear to have any information available to explain the process for providing copies of records or transcripts to interested persons.

In the circumstances, it would appear that the Tribunal is in breach of section 5B of the Act.

Mental Health Review Tribunals and their equivalents in other jurisdictions

Although mental health legislation across Australia is unique to each jurisdiction, an analysis of the practice of other Mental Health Review Tribunals (and their equivalents) is nevertheless informative.

A summary of the practices regarding the recording of proceedings of other jurisdictions is attached as Appendix 1 to this submission.

The summary shows that, apart from Victoria, Queensland is the only jurisdiction to not fully record proceedings. The Victorian arrangements arise due to strict secrecy obligations contained in their legislation that generally prohibit the creation of records that are not deemed completely necessary. This is considered to be an unusual approach to the operation of such Tribunals.

While the Queensland *Mental Health Act* 2016 has quite strict confidentiality provisions, it does not contain any provision that specifically prohibits the recording of Mental Health Review Tribunal proceedings.

General issues regarding the recording of proceedings

Below is a discussion addressing various points that have been raised during the on-going debate around the recording of Tribunal proceedings.

Wellbeing of patients

The Tribunal has suggested that there may be some concern among patients appearing before the Tribunal who suffer from significant paranoias and delusions about the recording, monitoring and/or use of electronic devices in Tribunal proceedings. There is no suggestion that patients in those other Australian states and territories that record proceedings before their Tribunals suffer from any negative effects as a consequence of the recording of proceedings.

Many patients with paranoid conditions may have already been charged with criminal offences and will have already had experience of appearing in criminal courts and/or the Mental Health Court, all of which routinely record their proceedings. In any event, to not record proceedings based on a relatively small number of patients with a specific condition with the result of denying proper record keeping and transparency for all other patients would be a disproportionate response to the issue.

Self-incrimination

The Public Advocate is aware that some issues have been raised regarding incriminating admissions made by patients during Tribunal hearings that could be used against them if the proceedings were recorded.

Even if such statements were admissible in evidence in any later prosecution, and it is extremely unlikely that they would be (as discussed below), then whether these admissions are recorded is irrelevant. Even if incriminating admissions made by patients are not recorded, such admissions could be produced by calling those people who witnessed the person make the admissions. Considering the fact that this has not occurred in the history of Tribunal proceedings, it is unlikely that prosecuting authorities are willing to use such evidence.

However, it is arguable that any admissions made during a Tribunal hearing would not be admissible against a patient in other criminal proceedings. The fact that all confessions must be voluntary to be admissible has been well-established in common law for centuries, and has since been codified in Queensland criminal law.[4]

It is doubtful whether admissions made by a patient during a Mental Health Review Tribunal hearing (to determine the patient's status as an involuntary patient) could be considered fully voluntary. Questions about the patient's capacity would arise due to their mental illness. Further, given the context of the Tribunal hearing, it could be strongly argued that in making of such confessions the patient was trying to present themselves in a better light before an authority figure (the Tribunal). Finally, without adequate warnings and cautions about the potential use of this evidence against them, there would be manifest unfairness in the use of the evidence in any attempted future prosecution of the patient.

In light of the above, concerns regarding patients incriminating themselves before a Tribunal are unlikely to raise significant issues in the context of the recording of Tribunal proceedings. However, should there be a wider legal view that this matter requires addressing, the Public Advocate would be prepared to make representations to the Attorney-General seeking specific provision for such evidence to be inadmissible in other legal proceedings.

[4] *Criminal Law Amendment Act 1894* (Qld) s 10.

Benefits of recording proceedings

Irrespective of the legal requirements of the *Recording of Evidence Act* there are other sound reasons why the Tribunal should commit to recording its proceedings going forward. The recording of tribunal proceedings is a fundamental requirement of a modern and transparent justice system. Keeping comprehensive and accurate records of proceedings and making those records available to parties in appropriate circumstances helps to maintain confidence in legal processes and the accountability of legal agencies.

Usefulness of recordings

Questions have been raised by the Tribunal as to the usefulness of recordings, given that any appeals to the Mental Health Court are heard *de novo*, or afresh.

Lawyers practicing in court will know the many uses of recordings and transcripts, which are not simply limited to being used as a basis of appeal.

First, lawyers, advocates and their patients may wish to review the evidence and determinations of the Tribunal in detail before deciding to appeal. For example, new evidence may have been introduced by the treating team that patients or their representatives had not had the time to consider in detail, and may later decide to appeal on that basis.

Second, recording the proceedings in full will no doubt assist the Tribunal itself. Tribunal members will no longer be expected to take notes in such detail to comply with the *Recording of Evidence Act* and instead will be free to give their full attention to those giving evidence and making submissions. Further, as noted by the Tasmanian Mental Health Review Tribunal, the full record of proceedings assists Tribunal members when preparing their statement of reasons as they can revisit the record of the proceedings in detail.

Third, recordings are important to ensuring the accuracy of the record. The Public Advocate has heard from various lawyers and advocates that have appeared before the Tribunal that, on occasion, the statement of reasons that they received did not reflect their recollection of the submissions made and the evidence given.

Fourth, a full record of proceedings has the effect of holding those giving evidence before the Tribunal to account. The Public Advocate has personally observed witnesses before the Tribunal giving what at best could be described as incorrect or misleading evidence. As proceedings are not recorded, such concerns with the evidence are difficult, if not impossible, to raise or prove.

Resources

Recording all proceedings before the Tribunal may require additional resources to be made available to the Tribunal. The Public Advocate will continue to make representations to both the Health Minister and the Attorney-General for further resourcing to be made available to the Tribunal for this purpose.

Concluding remarks

Thank you again for the opportunity to provide submissions regarding the important matter of the recording of Tribunal proceedings.

The recording of proceedings is a fundamental requirement of every tribunal and court in a modern, transparent and accountable justice system. As can be seen from the examination of other equivalent Mental Health Review Tribunals across Australian jurisdictions (appendix 1), the Queensland Tribunal is out of step with modern tribunal practice in not recording its proceedings and making those records available to interested persons.

I look forward to the Tribunal's response to the feedback it has received during the course of this consultation. Again, I would be very happy to assist the Tribunal in any way I can to progress this issue and commence the proper electronic recording of Tribunal proceedings along with the provision of those records to appropriate interested persons in accordance with the requirements of the *Recording of Evidence Act*.

Yours sincerely

Mary Burgess
Public Advocate

Appendix 1 – Analysis of Mental Health Review Tribunals (and equivalents) in Australia

New South Wales	South Australia	Tasmania	Western Australia
In New South Wales (NSW), the *Mental Health Act 2007* (NSW) requires that proceedings before its Mental Health Review Tribunal is to be recorded.[5] There are no further provisions regarding how matters are to be recorded. A Practice Direction from the NSW Mental Health Review Tribunal notes that all proceedings are recorded with a hand-held dictaphone.[6] The recording is made available where the person requesting the recording can demonstrate a legitimate reason for requiring the recording.[7]	South Australia does not have a dedicated Mental Health Review Tribunal, and such functions are instead undertaken by the South Australian Civil and Administrative Tribunal (s.3).[8] SACAT records its proceedings and makes such recordings and transcripts available at the discretion of the Tribunal.[9] The Tribunal considers whether the person has a 'proper interest' in the matter and that the release of such material is appropriate.[10]	The Tasmanian Mental Health Review Tribunal is required to keep a record of all of its proceedings under the *Mental Health Act 2013*.[11] The Tasmanian MHRT records all of its proceedings by audio, which is then used for the purpose of: - Assisting Tribunal members in writing statement of reasons when a request is made to the Tribunal; - Producing a transcript when an appeal in the Supreme Court is initiated; or - To be listened to by a legal representative or other relevant person upon request.[12]	The Western Australian Mental Health Tribunal is required under the *Mental Health Act 2014* to record all hearings, and that the 'recording is kept in a form from which a transcript of the hearing can be prepared if required.'[13]

[5] *Mental Health Act 2007* (NSW) s 159.
[6] Mental Health Review Tribunal (NSW), *Practice Direction – Access to transcripts and audio recordings of proceedings,* 19 June 2013, 1.
[7] Ibid.
[8] *Mental Health Act 2009* (SA) s 3.
[9] *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 90(2)(d), *South Australian Civil and Administrative Tribunal Regulations 2015* (SA) s 10.
[10] South Australian Civil and Administrative Tribunal, *Requesting a transcript, audio recording or other documents* < http://www.sacat.sa.gov.au/bringing-a-case/requesting-a-transcript-audio-recording-or-other-documents>.
[11] *Mental Health Act 2013* (Tas) sch 4, pt 2, s 10.
[12] Mental Health Review Tribunal (Tas), *Annual Report 2017 – 2018*, 49.
[13] *Mental Health Act 2014* (WA) s 467.

Northern Territory	Australian Capital Territory	Victoria
The Mental Health Review Tribunal in the Northern Territory is required by the *Mental Health and Related Services Act 1998* to record all of its proceedings 'in the form of a recording of sound, or sounds and pictures, by electronic means.'[14] A person subject to a review or involuntary detention application before the Mental Health Review Tribunal can request a copy of the recording at no cost,[15] unless the Tribunal is satisfied that it will cause serious harm to the health of the person or risk the safety of others.[16]	The Australian Capital Territory (ACT) does not have a dedicated Mental Health Review Tribunal, and instead hearings regarding patients under the *Mental Health Act 2015*(ACT) are heard before the ACT Civil and Administrative Tribunal (ACAT).[17] Although it appears that ACT legislation does not specifically regulate recording before ACAT, it appears that transcripts are available to order regarding all ACAT matters.[18]	The Victorian *Mental Health Act 2014* (Vic) creates strict secrecy obligations of the Mental Health Tribunal to not create any records of any information.[19] This prohibition applies unless it can be shown that creating these records are necessary to perform a function under the Act, is necessary for the purpose of criminal proceedings or written consent is given by the person to whom the information relates to.[20] The Mental Health Tribunal's policy in relation to this provision is to not allow audio or audio-visual recordings of hearings.[21]

[14] *Mental Health and Related Services Act 1998* (NT) s 136(1).
[15] Ibid s 136(2).
[16] Ibid s 136(3).
[17] See, for example *Mental Health Act 2015* (ACT) ch 7, 9.
[18] Australian Capital Territory Civil and Administrative Tribunal, *Ordering Transcripts* <http://acat.act.gov.au/about_acat/current-policies-and-procedures/ordering-transcripts>.
[19] *Mental Health Act 2014* (Vic) s 175.
[20] Ibid.
[21] Mental Health Tribunal (Vic), *Recording Hearings – Mental Health Tribunal Policy on Recording Tribunal Hearings.*