

Mental Health Review Board

Practice Direction 2007/1

Charter of the Human Rights and Responsibilities Act 2006

In accordance with the provisions of clause 4(1)(a) and (b) of Schedule 2 of the *Mental Health Act 1986* (the Act), the President makes the following Practice Direction to specify the arrangement of the business of the Board and the procedures to be adopted in relation to the Board's consideration of issues arising under the *Charter of Rights and Responsibilities Act 2006* (the Charter).

This Practice Direction applies to all Board hearings conducted on and from 1 January 2008.

1. Background

The Board was established with specific decision-making jurisdictions under the Act. The Charter was assented to on 25 July 2006 recognising in legislation key civil and political rights and principles. The Charter becomes fully operative on 1 January 2008. Under the Charter, as "an entity established by a statutory provision that has functions of a public nature" (s4), in its administrative capacity, the Board is a "public authority" and is therefore required to act in a way that is compatible with human rights and, in making decisions, to give proper consideration to a relevant human right (s38). In undertaking its decision-making functions, in almost all hearings, the Board applies the Act's provisions to the facts found from the evidence. In the very few exceptional cases where it is required to interpret the Act's provisions, the Board must do this, "so far as it is possible to do so consistently with their purpose", in a way that is compatible with human rights (s32).

In relation to the Board's decision-making functions under the Act, the Charter is an interpretive tool which does not affect the validity of the Act, or any provision of the Act, irrespective of its incompatibility with a human right.

As a tribunal, in appropriate circumstances and in accordance with s33 of the Charter, the Board may refer to the Supreme Court a question of law relating to the application of the Charter or a question with respect to the interpretation of a statutory provision in accordance with the Charter. This discretionary power of referral will be exercised by members in accordance with this Practice Direction and the Board's members' guidelines.

The Board's decision-making functions and jurisdictions do not change as a result of the Charter. The Board has no power under the Charter to determine the compatibility of the Act, or any provisions of the Act, with the Charter. Also, the Board has no power to make a determination in an individual case whether an involuntary patient's Charter rights have been affected or breached. Save for the s32 interpretation requirement and s33 referral discretion, the Charter does not change the Board's substantive decision-making role under the Act.

2. Charter Issues and the Board

If, in any hearing, any party intends to raise for the Board's consideration one or more specific Charter issues or arguments relevant to the Board's determination, the parties are to comply with the procedures set out in this Practice Direction.

3. Pre-Hearing Notice of a Charter Issue or Argument and/or an Application for Referral to the Supreme Court, Production of Statement and Time Estimate

3.1 Notice of Charter Issue or Argument and/or an Application for Referral to the Supreme Court

Where a party intends to:

- raise at a hearing a Charter issue or argument relevant to the determination which the Board must make in the particular case; and/or
- make application to the Board for referral of a Charter issue or argument to the Supreme Court,

that party shall **give to the Executive Officer and any other party** no later than **by the close of business five days before the date fixed for the hearing** a notice in, or to the effect of, the form marked as *Appendix 1 Notice of Charter Issue or Argument and/or Notice of an Application for Referral to the Supreme Court*.

3.2 Statement with respect to a Charter Issue or Argument and/or Application for Referral to the Supreme Court

Accompanying a notice given under clause 3.1, the party shall **provide to the Executive Officer and any other party** (no later than **by the close of business five days before the date fixed for the hearing**):

- a brief statement of facts, issues and contentions relevant to the Charter issue or argument and/or referral to the Supreme Court in, or to the effect of, the form marked as *Appendix 2 Statement with respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court*. This statement shall set out in a numbered list of points, each stated in no more than a few sentences:
 - a succinct outline of the Charter issue or argument;
 - an explanation of the relevance of the Charter issue and/or argument to the Board's determination in the particular case;
 - the skeleton argument/s addressing the Charter issue or supporting the case for referral to the Supreme Court;
 - references to any documents to be relied on at the hearing;
 - where points of law are relevant, legal authorities/cases shall be cited in support of legal principles, including specific page references; and
- an estimate of the length of time the hearing of the Charter issue or argument and/or application for referral to the Supreme Court is likely to take; the number, if any, of witnesses to be called at the hearing; and an outline of any other factors that may affect the length of the hearing.

4. Listing Practices

4.1 Except as specified below, in general, the Board will maintain its current practices for scheduling hearings.

4.2 On receipt by the Executive Officer of a notice and statement under clause 3, the Board will consider the impact of the information on the proper and timely disposal of the Board's scheduled business. If the Board is of the view that the statement raises a genuine Charter issue or argument that is relevant to the Board's determination in the particular case and the hearing may have a significant impact on the sitting, the Executive Officer will reschedule the hearing and list it for a special fixture, including an estimated time allocation, and notify the parties.

4.3 Where the hearing is to be listed as a special fixture, in accordance with Schedule 2, Clause 5(1) of the Act, the President may determine that the hearing will be conducted at the Board's office rather than at the approved mental health service.

4.4 Where the hearing is to be listed as a special fixture, if the patient is not represented before the Board, the Board may order the appointment of a person to represent the patient at the hearing of the special fixture in accordance with s26(5) of the Act.

5. Charter Issues or Arguments Arising During a Hearing

5.1 Where an issue or argument arises or a party purports to raise an issue or argument during a hearing that, the Board considers, involves a question of law relating to the application of the Charter or a question with respect to the interpretation of a statutory provision in accordance with the Charter relevant to its determination in the particular case, the Board will adjourn the hearing to enable it to be listed as a special fixture.

5.2 Where a Charter issue or argument arises or a party purports to raise a Charter issue or argument during a hearing that, in the Board's view, does not require the specific application of s32 and/or s33 of the Charter, the Board will proceed with the hearing and to make its determination in accordance with its normal procedures.

6. Special Fixtures

6. Where a hearing is to be listed as a special fixture, the following will apply:

6.1 The President will select the members of the division to conduct the hearing in accordance with Schedule 2, Clause 1(3) of the Act.

6.2 Unless the Board orders otherwise, the party who raised an issue or argument under clause 5.1 shall comply with clause 3.2 no later than **by the close of business five days before the date fixed for the hearing of the special fixture.**

6.3 Unless the Board orders otherwise, any party, other than the party who raised an issue or argument under clause 3.2 or 5.1, shall **provide to the Executive Officer and any other party** (no later than **by the close of business three days before the date fixed for the special fixture hearing**) the form *Appendix 3 Response with respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court*.

6.4 Any party who intends to rely on any documents or legal authorities/cases at the hearing, whether under clause 3.2 or otherwise, will **provide complete copies to the Board and any other party** no later than **by the close of business three days before the date fixed for the hearing of the special fixture.**

6.5 If the President considers it appropriate, the Board may notify the Attorney-General and/or the Victorian Equal Opportunity and Human Rights Commission (the Commission) of the hearing, and will notify the parties accordingly.

7. Procedures for Hearing Special Fixtures

7. Subject to the discretion of the chairperson, at the hearing of a special fixture, the following will apply:

7.1 If the Attorney-General and/or Commission appear at the hearing and are not already joined as a party to the proceedings, the Board may join them in accordance with Schedule 2, Clause 5A(a) of the Act.

7.2 No party shall seek to raise an issue or argument, or rely on a document or authority, that has not been notified and provided to the Board and any other party in accordance with this Practice Direction.

7.3 In respect of Charter issues or arguments relevant to the determination which the Board must make in the particular case, the Chairperson will determine the order of proceeding after the Board has determined the implications, if any, of the submissions for the interpretation of the relevant provisions of the Act.

7.4 The Board may reserve its decision in respect of the Charter and/or referral issues in accordance with Schedule 2, Clause 5A(d) of the Act.

8. Referrals to the Supreme Court

8. At a hearing, where notice of an application for a referral to the Supreme Court has been given, the following will apply:

8.1 The Board will hear and determine the referral issue before deciding whether to proceed to hear the substantive matters in relation to the patient and determine whether the relevant criteria set out in the Act are or are not met.

8.2 The Board will consult with the President and/or the Executive Officer before making an order to refer a question to the Supreme Court in accordance with s33 of the Charter.

8.3 Referrals will be made in accordance with the Rules of the Supreme Court.

8.4 Unless the Supreme Court directs otherwise, on referral of a question to the Supreme Court, the Board will not make a determination in respect of the patient, the subject of the referral, until the Supreme Court gives its opinion.

9. Board's Powers on Failure to Comply with this Practice Direction

9.1 Where a party has failed to act in accordance with or comply with this practice direction, particularly clauses 3.2, 6.3 or 6.4, the Board may adjourn the hearing on such terms as the chairperson considers appropriate to facilitate compliance with this practice direction.

John Lesser
President
11 December 2007

MENTAL HEALTH REVIEW BOARD

Mental Health Act 1986
Practice Direction 2007/1

Charter of Human Rights and Responsibilities Act 2006

Appendix 1
Notice of Charter Issue or Argument and/or
Notice of an Application for Referral to the Supreme Court.

Hearing Number: _____

Patient Name: _____

Statewide UR Number: _____

Date of Hearing: _____

Name of Mental Health Service: _____

Person Making this Notification: _____

Contact details: _____

Address: _____

Telephone Number: _____

I _____ (insert name and position) hereby give notice in relation to the abovementioned Mental Health Review Board hearing of an:

- Intention to raise at the hearing an issue or argument in relation to the Charter relevant to the determination which the Board must make in the case; and/or
- Intention to make application for referral to the Supreme Court in accordance with s33 of the Charter.

(Delete inapplicable option, if any)

Dated this _____ day of _____ 20____

.....
Signature
Patient/Patient's Legal Representative/for the Patient
Authorised Psychiatrist/for the Authorised Psychiatrist

(Delete inapplicable options)

See following page for **INFORMATION ABOUT THIS NOTICE**

INFORMATION ABOUT THIS NOTICE

- Once this Notice has been completed, it must be delivered (**no later than by the close of business five days before the date fixed for hearing**) to the Executive Officer either by email (as an attachment) to mhrb@mhrb.vic.gov.au, or by fax to 03 8601 5299, or personally at or by post to:

Mental Health Review Board
Level 30, 570 Bourke Street
MELBOURNE VIC 3000

- At the same time, this Notice must also be delivered to any other party involved in the hearing.
- Where a party has given this notice to the Board, the party must also deliver to the Executive Officer and any other party **no later than by the close of business five days before the date fixed for hearing** the form *Appendix 2 Statement with Respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court*.

MENTAL HEALTH REVIEW BOARD

Mental Health Act 1986
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Appendix 2
Statement with Respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court.

Hearing Number: _____

Patient Name: _____

Statewide UR Number: _____

Date of Hearing: _____

Mental Health Service: _____

Person Making this Statement: _____

Contact details: _____

Address: _____

Telephone: _____

I _____ (insert name and position) hereby outline the facts, issues and contentions relevant to the Charter issue or argument as follows:
(note – please provide additional pages if required)

(i) a succinct outline of the Charter issue or argument

(ii) an explanation of the relevance of the Charter issue or argument to the Board's determination in the particular case

(iii) the skeleton argument/s addressing the Charter issue and/or supporting the case for referral to the Supreme Court

(iv) references to any documents to be relied on at the hearing

(v) where points of law are relevant, legal authorities/cases to be cited in support of legal principles, including specific page references

Information on Estimated Length of Hearing

Estimated length of time the hearing of Charter issues is likely to take: _____ hours

The name of each person to be called as a witness:
(note – please provide additional pages if required)

Name	Nature of evidence to be given

Any other factors that may affect the length of the hearing:

Dated this _____ day of _____ 20____

.....
Signature
Patient/Patient’s Legal Representative/for the Patient
Authorised Psychiatrist/for the Authorised Psychiatrist

(Delete inapplicable options)

See following page for **INFORMATION ABOUT COMPLETING THIS STATEMENT**

INFORMATION ABOUT COMPLETING THIS STATEMENT

- Clause 3.2 of the Practice Direction requires a party making a notification under clause 3.1 to **provide to the Executive Officer and any other party** (no later than **by the close of business five days before the date fixed for the hearing**):
- a brief statement of facts, issues and contentions relevant to the Charter issue or argument and/or referral to the Supreme Court in, or to the effect of, the form marked as *Appendix 2 Statement with Respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court*. This statement shall set out in a numbered list of points, each stated in no more than a few sentences:
 - a succinct outline of the Charter issue or argument;
 - an explanation of the relevance of the Charter issue and/or argument to the Board's determination in the particular case;
 - the skeleton argument/s addressing the Charter issue or supporting the case for referral to the Supreme Court;
 - references to any documents to be relied on at the hearing;
 - where points of law are relevant, legal authorities/cases to be cited in support of legal principles, including specific page references; and
- an estimate of the length of time the hearing of the Charter issue or argument and/or application for referral to the Supreme Court is likely to take; the number, if any, of witnesses to be called at the hearing; and an outline of any other factors that may affect the length of the hearing.
- Once this Statement has been completed, it must be delivered to the Executive Officer **no later than by close of business five days before the date fixed for the hearing** either by email (as an attachment) to mhrb@mhrb.vic.gov.au, or by fax to 03 8601 5299, or personally at or by post to:

Mental Health Review Board
Level 30/570 Bourke Street
MELBOURNE VIC 3000

- A copy of this Statement must also be sent to all other parties involved in the hearing **no later than by close of business five days before the date fixed for the hearing**.
- On receipt of this Statement, the Board will consider the impact of the information on the proper and timely disposal of the Board's scheduled business.
- If the Board is of the view that the Charter issue or argument is relevant to the Board's determination in the particular case and the hearing may have a significant impact on the sitting, the Executive Officer will reschedule the hearing and list it for a special fixture, including an estimated time allocation, and notify the parties.
- A Response to this Statement is required to be delivered to you under Clause 6.4 of the Practice Direction which states that any party, other than the party who raised an issue or argument under clause 3.2 or 5.1, to **provide to the Executive Officer and any other party** (no later than **by the close of business three days before the date fixed for the special fixture hearing**) the form *Appendix 3 Response with respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court*.
- Clause 6.4 of the Practice Direction requires any party who intends to rely on any documents or legal authorities/cases at the hearing, whether under clause 3.2 or otherwise, to **provide complete copies to the Board and any other party** no later than **by the close of business three days before the date fixed for the hearing of the special fixture**.
- In the event of a failure to comply with the Practice Direction, clause 9 provides:

9. Board's Powers on Failure to Comply with this Practice Direction

Where a party has failed to act in accordance with or comply with this practice direction, particularly clause 3.2, the Board may adjourn the hearing on such terms as the chairperson considers appropriate to facilitate compliance with this practice direction.

MENTAL HEALTH REVIEW BOARD

Mental Health Act 1986
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Appendix 3

Response with Respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court.

Hearing Number: _____

Patient Name: _____

Statewide UR Number: _____

Date of Hearing: _____

Mental Health Service: _____

Person Making this Statement: _____

Contact details: _____

Address: _____

Telephone: _____

I _____ (insert name and position) hereby outline the response to the Appendix 2 Statement as follows:
(note – please provide additional pages if required)

(i) my succinct response to the outline of the Charter issue or argument

(ii) my response to the explanation of the relevance of the Charter issue or argument to the Board’s determination in the particular case

(iii) my skeleton argument/s in response to the skeleton argument/s addressing the Charter issue or supporting the case for referral to the Supreme Court

(iv) references to any documents to be relied on by me at the hearing

Four horizontal lines for providing references to documents.

(v) in respect of any relevant points of law, legal authorities/cases to be cited by me concerning legal principles, including specific page references

Four horizontal lines for providing legal authorities and page references.

Estimated length of time the hearing of Charter issues is likely to take: _____hours

The name of each person to be called by me as a witness:
(note – please provide additional pages if required)

Name	Nature of evidence to be given

Any other factors that may affect the length of the hearing:

Dated this _____ day of _____ 20____

.....
Signature
Patient/Patient’s Legal Representative/for the Patient
Authorised Psychiatrist/for the Authorised Psychiatrist

(Delete inapplicable options)

See following page for **INFORMATION ABOUT COMPLETING THIS RESPONSE**

INFORMATION ABOUT COMPLETING THIS RESPONSE

- Clause 6.3 of the Practice Direction requires any party, other than the party who raised an issue or argument under clause 3.2 or 5.1, to **provide to the Executive Officer and any other party** (no later than **by the close of business three days before the date fixed for the special fixture hearing**) this form *Appendix 3 Response with respect to a Charter Issue or Argument and/or an Application for Referral to the Supreme Court*.
- Once this Response has been completed, it must be delivered to the Executive Officer **no later than by close of business three days before the date fixed for the hearing** either by email (as an attachment) to mhrb@mhrb.vic.gov.au, by fax to 03 8601 5299, personally, or by post to:

Mental Health Review Board
Level 30/570 Bourke Street
MELBOURNE VIC 3000

- A copy of this Response must also be delivered to all other parties involved in the hearing **no later than by close of business three days before the date fixed for the special fixture hearing**.
- Clause 6.4 of the Practice Direction requires any party who intends to rely on any documents or legal authorities/cases at the hearing, whether under clause 3.2 or otherwise, to **provide complete copies to the Board and any other party** no later than **by the close of business three days before the date fixed for the hearing of the special fixture**.
- In the event of a failure to comply with the Practice Direction, clause 9 provides:

9. Board's Powers on Failure to Comply with this Practice Direction

Where a party has failed to act in accordance with or comply with this practice direction, particularly clause 3.2, the Board may adjourn the hearing on such terms as the chairperson considers appropriate to facilitate compliance with this practice direction.