Review Board & Patient Rights
A Discussion Paper Series for a New Mental Health Act
Discussion Paper 4 of 4

GNWT
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Review Board

The current Act does not contain any provisions for a Review Board or review panels. If a patient wishes to appeal any decision, they must do so through the court system.

Several provinces have created review boards as a mechanism to protect patients’ rights. Patients and/or their substitute decision makers may make applications to these boards. Newfoundland, Nova Scotia, and Manitoba place the authority to create the boards with the Lieutenant Governor (their equivalent to our Commissioner) while Alberta, British Columbia and Saskatchewan place that authority with the Minister. The membership of the board is used to draw up Review Panels to review an application. All jurisdictions reviewed (Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia and Saskatchewan) require that the boards and each panel be composed of at least one lawyer, one physician, and one layperson. Alberta, Newfoundland and Manitoba all specify that the chair must be a lawyer. Newfoundland further requires that the board’s membership must reflect the cultural, ethnic, and regional diversity of the province.

The new Act could require the creation of a Review Board that would be appointed by the Minister. The model for the Review Board and review panels would be similar to other jurisdictions. The panels would be appointed by the Chair of the Review Board and would hold a review to each appeal application accepted by the board. The composition of each panel would consist of at least one lawyer, one physician, and one layperson. The chair of the panel would be required to be a lawyer. The Chair is responsible for managing applications to the board which includes assigning members to review panels to review applications. The chairperson may delegate his or her powers. A provision similar to Newfoundland’s would be included requiring that the membership reflect the cultural, ethnic, and regional diversity.

Questions for consideration:

- How necessary is the creation of a Review Board to oversee any appeals?
- Who besides a lawyer, a physician, a layperson, an NGO representative should serve on the Review Board?

Conflict of Interest

Alberta, Manitoba, Nova Scotia, Newfoundland and Labrador, and Saskatchewan all include a provision prohibiting a board member from sitting on a review panel if s/he is related to the patient, is a lawyer acting on the patient’s or facility’s behalf, or has a close personal or professional relationship with the patient or who has been a psychiatrist or physician who is treating or has treated the patient. Additionally conflict of interest may occur if the
board member has sat on a Criminal Code review board hearing regarding the patient or if the board member’s participation would otherwise give reasonable suspicions of bias.

The new Act could prohibit a board member from sitting on a review panel if s/he:
- Is related to the patient;
- is a lawyer representing either the patient or the facility;
- has a close personal or professional relationship with the patient;
- has participated on a Criminal Code review board hearing regarding the patient; or
- has been a physician or nurse practitioner who is treating or has treated the patient.
- Has overarching personal gain

Questions for consideration:

1. Are there any additional conflicts of interest that would prohibit a board member from sitting on a review panel?

Applications that the Review Board must consider

Most provinces require that Review Boards consider cases upon application. In other words, if an application has been filed to the Review Board, they must consider it.

Cases that must be considered upon application are similar across the jurisdictions with some minor variations. For example, respecting the objection to a treatment decision, in Nova Scotia the review board can only decide as to whether a substitute decision maker has given or refused a capable informed consent. In Alberta, the review panel can make or refuse to make an order directing that treatment be administered.

The new MHA could require the Review Board to consider applications for the following:

- Review of Involuntary Admission or Renewal– a patient or their substitute decision maker may request a hearing to have the admission or the renewal cancelled
- Extension or Cancellation of Leave – a patient or their substitute decision maker may request a hearing to extend their leave
- Physician’s Finding of Mental Incompetence – a patient may request a hearing to review a physician’s opinion that the patient is not mentally competent to make treatment decisions. Once the application has been made, no treatment decisions can be made for the patient until the review panel makes a decision that the patient is incompetent to make treatment decisions.
- Withhold Clinical Record – a Medical Director may request a hearing for an order to permit all or part of a patient’s clinical record to be withheld from the patient.
- Objection to Treatment – a request for a hearing may be filed if a patient who is mentally competent objects to a treatment decision, the substitute decision maker objects to a treatment decision, or if the physician is requesting the review panel to order the treatment
- Cancel a Community Treatment Order (CTO) – a patient or their substitute decision maker may request a hearing to cancel a community treatment order. If the CTO has expired before a decision is made, the application is considered withdrawn.
- Request to Return to a Correctional Facility – a person who has been sent to a mental health facility for treatment (after having been sentenced to a correctional facility) may apply for an order to be transferred back to a correctional facility.

In addition to the reviews that are made when a person requests a hearing, the review boards in Alberta, Nova Scotia, Saskatchewan and Newfoundland also conduct some reviews automatically. Automatic reviews occur when a patient has had admission or renewal certificates for a continuous period of 6 months and has not applied for a review within that time.

Saskatchewan’s system is similar in that the review panel may hold a hearing if a patient disagrees with being held, transferred, or treated against their will. A review may also occur automatically if a patient is held for longer than 21 days and did not ask for a hearing for the initial admission certificate. In addition, a patient or their substitute decision maker may ask for hearing if the doctor has ordered Electroconvulsive Therapy. Electroconvulsive Therapy is not allowed while the review panel is reviewing the application.

Newfoundland has an automatic review upon the filing of the second renewal and on every second renewal after that, which means the case is reviewed at least once a year. It also includes that a patient may make an application alleging a denial of a right (for example, not being informed of their rights, access to counsel, etc.) and allows the board to make recommendations in those situations.

Manitoba includes that a request for an order requiring the patient’s attending psychiatrist or physician to comply with a personal directive of the patient where the substitute decision-maker appears to have made treatment decisions contrary to the personal directive. The Board can either uphold the personal directive of the patient or, if they are satisfied that the treatment decisions is in the patient’s best interests (is patient likely to improve, will their condition deteriorate without treatment, benefit outweigh risks, least restrictive/intrusive option), or have the treatment provided.
The new NWT Act could contain automatic reviews when a patient has been an involuntary patient for a continuous period of 6 months and has not applied for a review within that time. Patients may also request a hearing respecting the denial of a right (for example, access to counsel) and the board would be required to review and make recommendations if such an appeal was made.

In addition, Review Boards would also be required to consider applications for a hearing respecting the renewals of voluntary admission where the patient is a child or the adult would be considered “incapable” (not competent). This is to act as a safeguard against “detaining” children and incapable adults who wouldn’t be able to discharge themselves without a substitute decision makers’ agreement.

**Questions for consideration:**

1. *Are there any additional applications a Review Board should hear automatically?*

**Timelines**

In Alberta, upon receipt of an application, the Chair of the Review Board must give at least seven days’ notice of the hearing to the patient (or their substitute decision maker), the facility board and any other person the chair considers affected by the application. A hearing must occur within 21 days of receiving the application. If the patient (or his/her representative) requests, then the hearing may be adjourned for another 21 days or even further periods. Within 24 hours after the hearing, the review panel must make a decision and within 24 hours of making the decision, they must notify all parties.

Manitoba also requires that at least 7 days’ notice of hearing be given to the parties and the medical director of the facility. The hearing must begin as soon as possible and no later than 21 days.

In Newfoundland, within two days of receiving an application, the board chair must appoint a panel and the panel must hear and make a decision within 10 days of receiving the referral from the chair. Within 2 days of the referral, the panel chair must notify all the parties of the hearing date. Within 3 days of the decision, the panel chair must notify the parties of the results. Additionally Newfoundland requires that the record of evidence must be kept by the board for 7 years.

Nova Scotia requires that a hearing must begin no later than 21 days after receiving the application and that the review board must give at least 3 business days notice of the
application. Within 10 days of the review, the board must send its written decision to the parties to the review, the CEO of the facility and the Minister.

The new Act could use a model similar to Alberta’s requiring that the Chair give at least seven days’ notice of the hearing to the patient (or their substitute decision maker), the facility board and any other person the chair considers affected by the application. Hearings must occur within 21 days of receiving the application. If the patient or his/her representative requests, then that the hearing may be adjourned for another 21 days or even further periods. Within 24 hours after the hearing, the review panel must make a decision and within 24 hours of making the decision, they must notify all parties.

Questions for consideration:

1. How reasonable are the proposed timelines given the geographic realities of the NWT?
2. Do you think it would be appropriate for Review Boards to meet and review applications via telephone, as a way to deal with the geographic realities of the NWT?

Powers and Authorities of Review Panels

All provinces researched conduct the panel proceedings in private and in as informal a manner as appropriate. A hearing must be closed except to parties, the patient advisor, any person giving evidence, and/or any person required for security.

The new Act could allow Review Panels to make decisions respecting the following:

- issuing an order cancelling a certificate of involuntary psychiatric assessment or refusing to do so;
- issuing an order cancelling a certificate of involuntary admission and change the patient’s status to voluntary or refusing to do so;
- issuing an order cancelling a certificate of involuntary admission renewal and changing the patient’s status to voluntary or refusing to do so;
- make an order cancelling a certificate of mental incompetence or refusing to do so;
- issuing an order cancelling a certificate of leave—either allowing the patient to live in the community without a certificate of leave, or ordering the person be returned to a mental health facility, or refusing to cancel a certificate of leave;
- issuing an order cancelling a community treatment order or an order renewing a community treatment order, and either allowing the patient to live in the community without the order, or ordering the person be returned to a mental health facility, or refusing to do so;
• issuing an order to the person in charge of a mental health facility to take appropriate corrective action where the panel finds that a patient’s right has been denied;
• confirming that a capable informed consent by a substitute decision-maker has been given or refused in regards to a treatment decision;
• issuing an order appointing another substitute decision-maker or refuse to do so;
• issuing an order directing that treatment be administered where the substitute decision-maker has refused to consent to a specific treatment or refuse to do so; and
• issuing an order requiring the patient’s attending psychiatrist or physician to comply with a personal directive of the patient where the substitute decision-maker appears to have made treatment decisions contrary to the personal directive or refuse to do so.

A person who has made an application to a Review Board would not have to attend a hearing. The panel or a panel member could interview that person privately for the purpose of helping the panel to make a decision.

A hearing would be closed except to parties, the patient advisor, any person giving evidence, and/or any person required for security.

Questions for consideration:

1. Are there any additional orders or decisions a review board should be able to make?

British Columbia provides the review panel with the discretionary authority to make an order requiring a person to attend and give evidence or produce a document or anything else relevant to the issue being heard. In addition, the panel may apply to the court for an order directing a person to comply or make others comply with a review panel order. Legislation also requires that a hearing include consideration of all reasonable available evidence. The chair of the review may exclude the patient from hearing attendance but only if the chair is satisfied that it is in the best interests of the patient or may make orders respecting the taking, hearing, or reproduction of evidence to protect the interests of a patient or witness.

Manitoba requires that a hearing must be recorded and copies of documents filed in evidence and transcripts must be given to the parties in accordance with court rules. All parties must be allowed to review all materials that will be introduced during the hearing.
For the purpose of the hearing, the review board may arrange for the patient to be examined by a second psychiatrist. The review board must give all parties a copy of its decision and inform them of their right to appeal to the court and must provide written reasons for their decision. In addition, Manitoba’s Act allows the review board to permit the public to be present if the patient consents and the board believes there is no risk of serious harm or injustice to any person.

In Newfoundland and Nova Scotia, a panel may require the attendance of certain persons and the productions of certain documents, or may arrange for a psychiatrist examination and get independent medical, psychiatric or other professional opinions. A party has the right to be present during the presentation of evidence, be represented by counsel, examine evidence, present evidence, and cross examine witnesses. The chair of the panel must advise all parties of their right to appeal the panel’s decision. In Nova Scotia, the patient, substitute decision maker, and attending psychiatrist are parties and the CEO of the facility may also be a party. The board is empowered to add parties if they think they have a substantial interest in matters being reviewed. If the patient can’t or won’t attend and has not appointed someone to act on his/her behalf, the board must appoint a representative to attend and act on the patient’s behalf.

The new Act could allow for the Review Panel to have the discretionary authority to make an order requiring a person to:

- attend a hearing;
- give evidence; or
- produce a document or anything else relevant to the issue.

The panel could apply to the court for an order directing a person to comply with a review panel order. Hearings must include consideration of all reasonable available evidence. A patient may be excluded from attending the hearing if the chair of the review is satisfied that it is in the best interests of the patient. Panel proceedings will be conducted in private.

Hearings must be recorded and copies of documents must be filed as evidence and transcripts provided to the parties. Parties must be allowed to review all materials to be introduced during the hearing. The review board may arrange for the patient to be examined by a second physician.

Questions for consideration:

1. Should the Review Panel be able to use their discretionary authority to make any additional orders?
2. Do you agree that a patient can be excluded from attending a hearing if the Chair of the review is satisfied that it is in the best interests of the patient to do so?

In Newfoundland and Alberta, if the board chair believes an application for review is vexatious, frivolous or not made in good faith, then s/he may dismiss the application for review. If a review of a matter was considered by the panel within the previous 30 days and there is no reason to believe that circumstances have changed, the board chair will have authority to dismiss that application as well. There will be no appeals of a decision to dismiss. Nova Scotia permits the board to refuse the review of an application at any time during the 3 months following the filing of an application that was previously reviewed.

An application may be withdrawn at any time before a decision is made by serving a notice of withdrawal to the panel chair and any other parties to the application.

The new Act could allow the board chair to dismiss the application for review if she/he thinks the application is vexatious, frivolous, or not made in good faith. If a review of a matter was considered by the panel within the previous 30 days and there is no reason to believe that circumstances have changed, the board chair will have authority to dismiss that application as well.

Questions for consideration:

1. Should there be consequences established in the Act for those who file a vexatious or frivolous application or who file an application in bad faith? Will any consequences deter people from filing an application in anything but good faith?

Appeals

All jurisdictions that were researched use the Courts for the final appeal process. The difference lies in the timelines allowed for the decision to be appealed. Newfoundland, Nova Scotia, and Manitoba all give 30 days to appeal while Alberta only gives 14 days. Manitoba and Alberta require that the hearing of the appeal is in private unless otherwise directed by court. Additionally, Alberta allows the Court to consider evidence brought forth in review and may consider new evidence.

All provinces noted above give parties 30 days to file an appeal with the exception of Alberta which only gives 14 days. Additionally, Alberta requires that notice of the appeal
must be sent to the Minister, the facility board and any other person as directed by the Court at least 15 days before the appeal can be heard.

The proposed new Act could give 30 days to file an appeal to the Courts. The panel’s decision may be appealed but the findings of the panel on facts could not be appealed and additionally, the appeal would not stay the decision unless the court ordered a stay.

The proposed Act could require that the hearings would be private unless the court directed otherwise and will allow the Court to consider evidence brought forth in review and to consider new evidence.

Questions for consideration:

1. Are the proposed timelines reasonable given the geographic realities of the NWT?

Patient and Substitute Decision-maker Rights

Substitute decision-maker is an individual, other than a rights advisor, who has reached the age of 18 years, who is mentally competent and available, and who has been designated by, and who has agreed to act on behalf of, a person with a mental disorder. Where no individual has been designated, the substitute decision-maker would be considered to be the next of kin, unless the person with the mental disorder while mentally competent objects or has objected to this individual. Where there is no individual designated and no next of kin or the patient objects or objected to the next of kin, a guardian or alternate guardian named in a guardianship order or who became a guardian or alternate guardian under guardianship legislation would act as the substitute decision-maker.

Patient Rights

The current Act requires that patients must be advised of the reason for the admission to the hospital and the need for treatment. This must be given orally and in writing (within 48 hours after the assessment or examination). The NWT Act specifically includes a clause requiring that a suitable interpreter be provided if the patient does not speak the same language as the physician. If an involuntary patient is not in a state to comprehend the reason for admission and need for treatment, the hospital is required to provide an explanation or written notice at the first reasonable opportunity when the patient is able to understand. In addition, a patient’s right to private communication, visitors and independent medical opinion must be posted in conspicuous areas of the hospital.
This recognizes that the NWT has many cultures and that these cultures should be taken into account when assessing a person’s mental health.

The proposed Act could contain provisions respecting the psychiatric assessment of Aboriginal persons who are fluent in their Aboriginal language but are not fluent in English or French.

All provinces reviewed require that a patient be notified of the reason for their admission, renewal, transfer, and/or detainment. The provisions differ slightly as to who has the responsibility to notify the patient. BC and Manitoba require that it be the director of the facility, Nova Scotia requires that it be the Chief Executive Officer of the Regional Health Authority, while Newfoundland requires that it be the doctor of the patient. Alberta specifies that the patient must be notified in their language. BC requires that if the Director thinks the patient does not understand then the director must try again when s/he thinks they will understand. A patient must also be advised of their right to legal counsel and that their lawyer may visit the patient at any time. Newfoundland also specifies that patients have the right to consult and instruct their counsel in private at any time and specifically outline their rights (e.g. access to correspondence; right to communicate without it being examined, censored, or withheld; access to telephone; access to visitors during scheduled visiting hours; and access to representative) whereas Nova Scotia uses a blanket statement saying that a patient must not be deprived of any right or privilege enjoyed by others just because they are receiving or have received mental health services. Manitoba grants the patient the right to examine and receive a copy of his/her clinical record and may request corrections. Manitoba also contains a provision that states that except as provided within their Act, a patient has the right to consent to or refuse psychiatric or medical treatment. All provinces reviewed all clearly note that patients have the right to apply to the Review Board.

The new Act could require the physician to notify the patient of their rights and that if the patient does not understand, the physician must try again when s/he thinks the patient will understand. Patients must be notified of the reason for their admission, renewal, transfer, and/or detainment. They must also be advised of their right to legal counsel and that their lawyer may visit the patient privately at any time. Specific rights could be outlined such as the access to correspondence, right to communicate without it being examined, censored, or withheld, access to telephone, access to visitors during scheduled visitor hours. There could continue to be a provision similar to the current Act requiring that a suitable interpreter be provided if the patient does not speak the same language as the physician. A patient’s right to private communication, visitors, and independent medical opinion must
be posted in conspicuous areas of the hospital. The patient will have the right to examine and receive a copy of his/her clinical record and may request corrections. Patients will have the right to apply to the Review Board for a review of their case.

Questions for consideration:

1. Who should be responsible for notifying the patient of his/her rights?
2. Should the rights be specifically outlined (see for example, Newfoundland) or is a blanket statement like that used by Nova Scotia sufficient?

Substitute Decision Makers

All jurisdictions, including the NWT, provide for times when a patient may be considered mentally incompetent, or unable to make decisions for themselves. The current NWT Mental Health Act outlines the hierarchy which determines who may be their substitute decision maker. It lists the involuntary patient’s guardian appointed by a court (which could include the Public Guardian), an agent designated by the Personal Directives Act, a representative, the spouse/common-law partner, a child of the patient, a parent, a sibling, any other relatives or a friend.

Nova Scotia and Manitoba require that a substitute decision maker have contact with the patient over the last 12 months, be willing to assume responsibility of decision making, and make a written statement that they know of no other people who may be higher in the substitute decision maker hierarchy. Additionally the substitute decision maker is bound to follow the patient’s prior wishes provided the patient was capable when s/he made them. If there are no prior expressed wishes or if following those wishes might endanger the health or safety of the patient, then the substitute decision maker may make decisions in the best interests of the patient.

Saskatchewan and Newfoundland allow the attending physician to authorize the treatment for an involuntary patient. However, the physician must take into consideration the best interests of the patient, prior expressed wishes when the patient was competent, and the physician must consult and give consideration to the views of the patient and his/her representative (similar to substitute decision maker but without the authority). BC has a similar provision but the authority to make treatment decision rests with the Director of the psychiatric facility, based on the recommendations of the physician (again, the patient’s wishes must be taken into consideration). Newfoundland additionally includes a prohibition on psychosurgery on involuntary patients.

The proposed new Act could continue with the decision maker hierarchy as outlined in our current legislation. However, there would be a restriction on people acting as a substitute
decision maker if they have not had contact with the patient over the last 12 months. If the patient made express wishes respecting his or her care at a time when s/he was capable, then the substitute decision maker is required to follow those wishes unless that would endanger the patient’s health or safety. Otherwise they must make decisions in the best interests of the patient.

Questions for consideration:

- The NWT is unusual in that it lists “a friend” in the hierarchy of substitute decision makers in the current Mental Health Act. Should the proposed legislation keep “friends” on the list?

Privacy Provisions

The current Act contains specific provisions relating to the confidentiality of patient records in addition to the privacy protection for those who are alleged to have a mental disorder. No person shall disclose, send, or examine a patient’s record. However, a patient’s record may be shared to those who are in the ‘circle of care’ for the patient. Additionally, there are provisions relating to the courts and the conditions that must be satisfied before a patient’s health record may be disclosed. The proposed Health Information Act will govern the areas of privacy and health records. Until the Health Information Act comes into force, the Access to Information and Protection of Privacy Act is the legislation that is applicable.

Manitoba contains several provisions specific to privacy including clauses on when the medical director may (or be required to) disclose information and puts conditions on how that may occur (e.g. no more information should be released than necessary). It also describes the situations where the information may be shared without consent if those individuals are part of the patient’s circle of care (unless the patient while competent has instructed not to have information shared), including any person authorized to make treatment decisions about the patient. Disclosure may also occur if it is considered necessary in order to prevent or decrease the threat to the mental or physical health and/or safety of the patient or someone else. In addition, disclosure is allowed during Review panels (both under the Mental Health Act and under Manitoba’s Criminal Code.)

The Act also includes an exhaustive list for allowing disclosure without consent but must be limited to the minimum amount of information necessary in order to accomplish the purpose for which disclosure was made. Some examples may include research purposes, investigatory or disciplinary proceedings, payment for health care, and study or evaluation.
of medical practice by the medical staff committee, to the executor or administrator of the patient's estate or to a relative if the patient is dead.

By contrast, Newfoundland has a brief paragraph which allows the review panel the discretion to allow for those times where they believe releasing the patient's information to a patient may seriously endanger the health or safety of the patient or another person, then the panel is required to release that information to the patient’s legal counsel or representative but may refuse to disclose that same information to the patient. Alberta has a similar provision in addition to several clauses outlining the times where disclosure may be made if necessary (e.g. health profession disciplinary hearings), to the public guardian or public trustee, review panel or a Review Board under the Criminal Code, Workers Compensation, and/or for reasons relating to the administration of hospital insurance. There is also a provision requiring the copying and forwarding of the appropriate records when a patient is transferred from one facility to another.

The new Act could include provisions protecting confidentiality and disclosure, such as prohibiting anyone from disclosing personal health information unless it’s for a reason described in the Act (such as for a Review Panel or a Court hearing). Otherwise, the Access to Information or Protection of Privacy Act and the Health Information Act would cover any additional privacy provisions.

Questions for consideration:
- Are there any circumstances where the new Mental Health Act would have to take precedence over ATIPP or HIA?
- Are there any additional circumstances where health information should be disclosed/shared that aren’t already proposed through the new Act, ATIPP, or HIA?

Criminal Code / Remand Patients
The current Act contains provisions respecting people who have been charged with or convicted of an offence. A judge has the authority to order a person to attend a hospital for 30 days for observation if they suspect the individual has a mental disorder. If a person is remanded to a hospital for observation, then they will be admitted, examined, detained and discharged as outlined earlier in the discussion paper. A person, detained under the Criminal Code and who was found unfit to stand trial on account of insanity, may also be admitted, examined, treated, detained and discharged as outlined above. There are no opportunities for appeal.
The jurisdictions researched all contain provisions relating to the assessment, detention and treatment of individuals who may have mental disorders and who have been detained under the Criminal Code or the Youth Criminal Justice Act. Their legislation allows for individuals to be transferred from a correctional facility to a mental health facility (or vice versa) and all require the individual be discharged back to the correctional facility. Where they differ is on the authority required to transfer an individual back to the correctional facility. For example, in Newfoundland, the Minister of Justice (or his/her delegate) may order the transfer of an inmate to a psychiatric facility. If a physician says they no longer meet the criteria for involuntary admission, the Minister can then transfer the inmate back to the correctional facility.

The proposed Act could continue the restriction that provisions regarding discharge, leave, transfer, and, community treatment orders would not apply to patients detained under the Criminal Code or Youth Criminal Justice Act, those patients on remand, or those charged or convicted with an offence under another Act of Canada or an Act of the NWT for which they have been ordered to be detained in a mental health facility, unless authorized or in accordance with the Criminal Code and their sentencing or relevant warrants or orders. A person who is found not criminally responsible or unfit to stand trial due to a mental disorder, or has been found not guilty by reason of insanity, and is ordered detained in a mental health facility under the Criminal Code must receive care and treatment. This is similar to a provision in BC’s legislation. Authorized treatment is deemed to be with the consent of the patient. Otherwise, the timelines provided for in the legislation respecting assessment and examinations would apply.