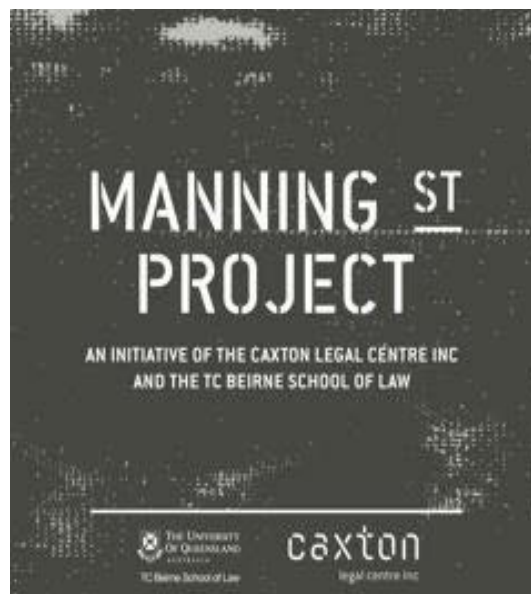


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Delays within the Mental Health Act in Queensland: section 238 reports

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INTRODUCTION

This research paper will examine section 238 of the *Mental Health Act 2000* (Qld) (**'the Act'**), and in particular, the significant delay in the preparation of the psychiatric reports, which are used by the Director of Mental Health (**'DMH'**) in determining whether a case involving mentally ill patients should be referred to the Office of the Director of Public Prosecutions (**'DPP'**) or the Mental Health Court. The effect of such delays on the parties and the reasons for the delays will be identified. Different jurisdictional approaches will also be considered. A set of recommendations for legislative reform will be formulated to address the problems identified. Although there may be other issues which delay proceedings involving people with mental illness, this research paper focuses on the issues regarding section 238 reports.

METHODOLOGY

This research project is a part of the Manning St Project, a partnership between the UQ Pro Bono Centre and Caxton Legal Centre, which aims to strengthen the capacity of the community legal sector and other organisations to undertake law reform and public interest research. This project was conducted on behalf of Queensland Advocacy Incorporated, an independent and community-based organisation that provides legal advice and representation for people in the mental health system.

The purpose of this research was to evaluate the existing system and the structural impact the law has on individuals coming before the Mental Health Court, and make recommendations for law reform. In doing so, this paper addresses an issue that has been well known by advocates in the area of mental health law, and which has received media attention in recent times.¹ Media coverage highlights the persistence of these delay problems despite continuing reforms and improvements to the mental health system. Yet while popular news can help humanise this complex bureaucratic issue, putting a human face on the problem is only the first step, with the findings of this paper seeking to add an additional layer to calls for reform.

¹ See, eg, Daniel Hurst, 'Mental health failings hold up court cases', *brisbanetimes.com.au*, 22 May 2012 <<http://www.brisbanetimes.com.au/queensland/mental-health-failings-hold-up-court-cases-20120521-1z149.html>>; Bridie Jabour, 'Cases delayed as psychiatric reports lag', *brisbanetimes.com.au*, 18 January 2013 <<http://www.brisbanetimes.com.au/queensland/cases-delayed-as-psychiatric-reports-lag-20130117-2c wd6.html>>.

Working in a small research group on a pro bono basis, this paper was prepared over the course of one academic semester. The following activities were undertaken as part of the research process for this report:

- Visiting the Mental Health Court in Brisbane to observe hearings that dealt with section 238 reports, and associated matters;
- Reviewing existing literature on this issue, including annual reports and government statistics; and
- Making personal contact with professionals in the field, particularly those working in interstate jurisdictions.

Due to the scarcity of publicly available data on section 238 reports, the scope of the research undertaken was limited by the lack of empirical evidence and academic investigation into identified issues. Consequently, the authors have had to rely on anecdotal evidence and official government reports. It is hoped that this report will fill a gap in the existing literature surrounding issues of delay, and be a trigger for further investigation into problems associated with section 238 reports in Queensland.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: That there be greater transparency in the implementation of the recommendations in the Butler Report.

Recommendation 2: That the practical impact and effectiveness of legislative and administrative changes be monitored and the results reported.

Recommendation 3: That reasons for psychiatric appointment postponements, and for delay in the preparation of section 238 reports in general, and their associated statistics, be made publicly available for greater transparency in the system.

Recommendation 4: That section 238 report training for psychiatrists be adjusted to include a greater focus on the role of section 238 reports in the

overall process, and on the aims of expediency and succinctness in report writing.

Recommendation 5: That the number of State appointed psychiatrists be increased to ease the congestion of outstanding reports.

Recommendation 6: That enforcement mechanisms be introduced into the Act, such as the imposition of penalties on appropriate authorities for overdue section 238 reports, where there is no valid reason for the delay in its preparation.

Recommendation 7: That Queensland implement a mental health court diversion and support program, similar to the one present in Tasmania, and currently being piloted in Western Australia.

DESCRIPTION OF CHAPTER 7 PART 2 PROCESS IN QLD

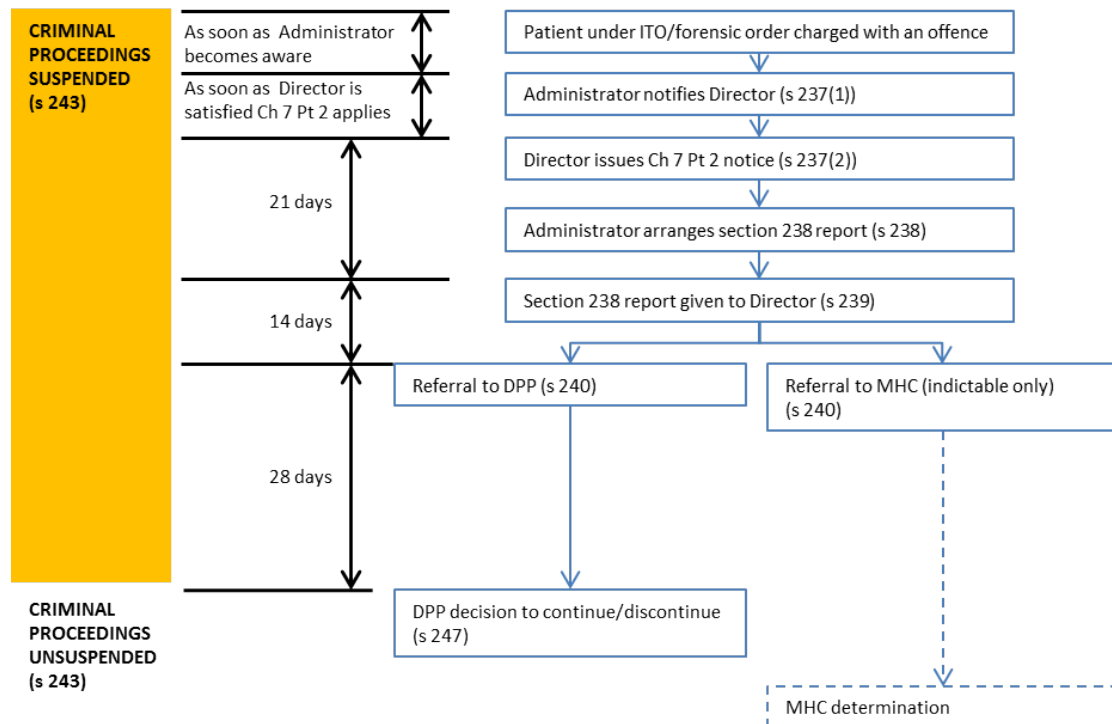
The process under Chapter 7, Part 2 of the Act commences when a person under an involuntary treatment order or a forensic order is charged with an offence. At that time, the DMH is notified by the administrator of the patient's treating health service, and criminal proceedings are suspended. If the DMH agrees, the administrator must arrange for the psychiatric examination of the patient as soon as is practicable.

Under section 238 of the Act, a psychiatrist must examine the patient and prepare a report on the examination, commonly referred to as a 'section 238 report'. In making the examination, the psychiatrist must have regard to:

- (a) the patient's mental condition; and
- (b) the relationship, if any, between the patient's mental condition and the alleged offence and, in particular, the patient's mental capacity when the alleged offence was committed having regard to the Criminal Code, section 27; and
- (c) the likely duration of the patient's mental condition and the likely outcome of the patient's treatment or care; and
- (d) the patient's fitness for trial; and
- (e) anything else the psychiatrist considers relevant.

The psychiatrist must give the administrator a report on the examination, which is then to be provided to the DMH within 21 days of Chapter 7, Part 2 commencing. Once the DMH receives the section 238 report, he or she uses it to determine whether the matter must be referred to the DPP or the Mental Health Court within 14 days. The reference cannot be made until the section 238 report is completed to a particular standard.²

Chapter 7 Part 2 process



PROBLEMS WITH THE SYSTEM IN QLD

In 2006, the Queensland Government conducted a comprehensive review of the Act, focusing on the efficacy of the legislative provisions and administrative arrangements. This review resulted in the publication of the Butler Report, which drew attention to the fact that, despite reforms introduced in the Act, significant problems still persisted within the Queensland forensic mental health system. Specifically, increasing delays in the production of section 238 reports were found to be unduly prolonging resolution of criminal proceedings.

² 11-12 Annual Report of the Director of Mental Health 27-8.

Reporting Year	Average number of days to provide s 238 reports
2007-08	75
2008-09	101
2009-10	115

Since 2010-11, the DMH has broken down the statistics to provide a more detailed representation. In that year, in which 971 s 283 reports were produced, only 14% were provided within the required 21 day time frame, 46% were provided between 43 and 180 days, and an alarming 22% were provided after 180 days. The statistics for 2011-12 were similar.

Effect on parties

Delays in court proceedings in general have a significant impact on parties, let alone mentally ill patients on an involuntary treatment order or a forensic order who are already vulnerable and who are unable to choose whether or not the process under Chapter 7, Part 2 of the Act is invoked. The delay can increase the time that patients are held on remand, which has a negative effect on the patient, delays treatment and is a strain on prison resources. Delay in proceedings may also cause stress to the parties involved, including the families of patients and particularly victims, who may have to wait an extended period of time to obtain relief. Resolution of criminal matters months or even years after the event may lose meaning for a patient, or worse, the resulting stress can be a significant setback in the patient's recovery.

Efforts to address the problem

The Butler Report made a set of recommendations as to how the system should be improved. All 106 recommendations in the Butler Report were accepted by the Queensland Government on 11 December 2006,³ and all but two were implemented within two years of the report being released, with the final recommendation implemented in 2011.⁴

Although some of the recommendations resulted in legislative amendment, it is unclear whether others have in fact been implemented due to the lack of

³ 09-10 Annual Report of the Director of Mental Health 3.

⁴ 11-12 Annual Report of the Director of Mental Health 2.

information available. For example, it is uncertain whether a Mental Health Intervention District Coordinator, or a person occupying a similar role within the Queensland Police Service ('QPS'), has been appointed to liaise between the police service and the psychiatrists preparing the report.

Recommendation 1: That there be greater transparency in the implementation of the recommendations in the Butler Report.

Other steps have also been taken to address the problem of prolonged delays in the reporting process. The DMH has implemented a weekly, monthly and quarterly reporting system, in which overdue section 238 reports are identified and relevant Authorised Mental Health Services' administrators are made aware.⁵

However, given the overwhelming majority of s 238 reports are still overdue, it appears attempts to eliminate delay issues in the preparation of section 238 reports have not been successful.

Reasons for persistent delay

Cooperation between departments

A reason identified in the Butler Report for the delay in the preparation of section 238 reports by psychiatrists was the delay in acquiring information from relevant organisations, including the QPS and the DPP. In many instances, section 238 reports were prepared by psychiatrists without details of the circumstances of the alleged offence from the QPS. There were also delays in the provision of other relevant information including witness statements and the patient's criminal history. However, this delay may have been due to legislative barriers on the passing of information between the QPS and the DMH.⁶

In response to a recommendation in the Butler Report, section 237A was inserted into the Act, which was aimed at increasing cooperation between the QPS and mental health practitioners. Specifically, it required police to provide more relevant

⁵ 11-12 Annual Report of the Director of Mental Health 29.

⁶ Butler Report 84.

information to administrators to help in the assessment of patients. However, the practical effectiveness of this legislative amendment is unknown.

Recommendation 2: That the practical impact and effectiveness of legislative and administrative changes be monitored and the results reported.

Time required to prepare section 238 reports

Non-compliance with the statutory time frame of 21 days for the preparation of section 238 reports has been attributed to the length of time that psychiatrists require to produce these reports. In particular, more time is required in cases where serious offences are committed by patients, or where there is a complicated relationship between the patient's mental condition and the alleged offence. There are also reported difficulties associated with interviewing fragile patients for prolonged periods of time, and patients failing to attend scheduled appointments with psychiatrists.⁷ However, these anecdotal reasons given in the annual reports are not supported by publicly available statistics.

Recommendation 3: That reasons for psychiatric appointment postponements, and for delay in the preparation of section 238 reports in general, and their associated statistics be made publicly available for greater transparency in the system.

Overly cautious reports

Delay in the preparation of section 238 reports may also be due to the rise of 'defensive medicine' in Australia, and the preparation of overly cautious reports. The term 'defensive medicine' describes a deviation from sound medical practice due to fear of legal ramifications.⁸ Defensive medicine can include both assurance and avoidance type measures, whereby medical practitioners either supply additional services of no medical benefit or seek to distance themselves from sources of legal risk.⁹ In regards to section 238 reports, psychiatrists may choose to take a longer time to prepare more accurate reports, as they may feel largely responsible for the

⁷ 11-12 Annual Report of the Director of Mental Health 29.

⁸ Omar Salem and Christine Forster, 'Defensive medicine in general practice: Recent trends and the impact of the Civil Liability Act 2002 (NSW)' (2009) 17 *Journal of Law and Medicine* 235, 235.

⁹ *Ibid.*

fate of the patient. Anecdotal evidence also suggests the length of the average report is on the increase. Although the importance of correct and well-informed reports is undeniable, given the new power of the DMH to obtain a second psychiatric report if necessary,¹⁰ it is arguable that the negative effect of delay upon victims, patients and the court system itself outweigh the need for extensively detailed section 238 reports. This is especially so, when the intent of section 238 is to facilitate expedient referral of the matter to the most appropriate legal process; it is not the final determination of the matter.

Recommendation 4: That section 238 report training for psychiatrists be adjusted to include a greater focus on the role of section 238 reports in the overall process, and on the aims of expediency and succinctness in report writing.

Excessive caseload of mental health system

A further explanation for the delay could be the significant increase in the number of section 238 reports requested. Compared to 2005/06 where only 522 reports were made,¹¹ in 2011/12 1598 had to be processed.¹²

Recommendation 5: That the number of State appointed psychiatrists be increased to ease the congestion of outstanding reports.

Lack of enforcement mechanisms

Although the Act specifies a 21 day statutory time frame for section 238 reports to be prepared, the lack of suitable enforcement mechanisms means that this time limit is often not complied with.

Recommendation 6: That enforcement mechanisms be introduced into the Act, such as the imposition of penalties on appropriate authorities for overdue section 238 reports, where there is no valid reason for the delay in its preparation.

¹⁰ *Mental Health Act 2000* (Qld) s 239A.

¹¹ 2006 Annual Report of the Director of Mental Health 27.

¹² 2011-2012 Annual Report of the Director of Mental Health 10.

INTERSTATE JURISDICTIONS

Other jurisdictions take a different approach to mentally ill patients who have allegedly committed an offence while subject to mental health legislation.

New South Wales

A court liaison program was established in New South Wales in 2002 which screens people for mental health problems. A comprehensive mental health assessment is conducted where appropriate, and a referral can be made to the magistrate. If the accused is found to be unfit for trial, the court refers them to the Mental Health Review Tribunal, in accordance with section 14 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

Tasmania

Tasmania has a similar program known as the Court Liaison Service. Court Liaison Officers identify mentally ill offenders before or through the court process, and make referrals to the Mental Health Diversion List. They also provide psychiatric assessments requested by magistrates and judges.¹³

The Mental Health Diversion List is a voluntary option to the magistrate court process for patients with a mental illness charged with minor offences. It is an alternative process which occurs in the Hobart Magistrates Court, and is less formal and allows patients to participate in rehabilitation programs. The List is monitored until the matter is determined.¹⁴

Western Australia

Western Australia has started to implement a mental health court diversion and support project, a joint initiative of the Western Australian Mental Health Commission and Department of the Attorney General. It is currently being piloted over 20 months, to form the basis of future programs. The project consists of a diversion service in the Perth Magistrates Court and the Perth Children's Court, and involves identifying people who may have a mental illness, and listing them in the

¹³ *Criminal Justice (Medical Impairment) Act 1999* (Tas) s 10.

¹⁴ Tasmania Department of Health and Human Services, Community Forensic Mental Health Service.

dedicated court. Referrals can also be made by general courts, the police service or prosecutors based on information provided by the offender, their family or carer.

Mental health specialist teams are placed in those courts to provide mental health assessments and reports to court. After an initial assessment, the court can make a determination as to what step to take next, which could include referring the offender to the hospital, or reconnecting them with their mental health service provider. Some may be diverted into treatments that address their mental conditions and offending behaviour, which could involve treatment by the court-based team, or referral to community services. By participating in this program, the person's condition may be stabilised which makes it easier to grant bail and divert people away from custody. However, participation in this plan is voluntary.

Furthermore, the new system encourages liaison with community services, and the participation of families and carers. Support will also be provided to the people involved by non-governmental organisations.¹⁵

Recommendation 7: That Queensland implement a mental health court diversion and support program, similar to the one present in Tasmania, and currently being piloted in Western Australia.

CONCLUSION

Overall, significant delay still exists in the Chapter 7 Part 2 process, specifically in the preparation of section 238 reports, even after the implementation of the recommendations in the Butler Report. The recommendations made above aim to address this problem and speed up the reporting process, to ultimately minimise the negative impact that delay has on all parties involved. The authors also consider that this is an area in need of further examination, and that any future work should specifically canvas the experiences of both psychiatrists involved in the preparation of section 238 reports, and also individuals and their families for whom the delays cause so much pain and frustration.

¹⁵ Government of Western Australia Mental Health Commission, *Mental health court diversion and support program* (2010)
<http://www.mentalhealth.wa.gov.au/mentalhealth_changes/Mental_Health_Court_Diversion.aspx>.