Involuntary Psychiatric Treatment Act (IPTA)

Annual Report

2011-2012

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January 10, 2014

Honourable Minister Glavine
Minister, Department of Health and Wellness
Province of Nova Scotia
P.O. Box 488
Halifax, Nova Scotia
B3J 2R8

RE: IPTA Annual Report – 2011-2012

Dear Minister Glavine:

I am pleased to submit this Annual Report of the Review Board under the *Involuntary Psychiatric Treatment Act* for the year ending March 31, 2012, as mandated by Section 80 of the *Act*.

This filing of this Report has been delayed due to issues pertaining to the administrative functioning of the Review Board. Unfortunately, the same delays are required for the Annual Report for fiscal 2012-2013. The Review Board was not able to obtain accurate statistics for these Reports, as the administrative office does not have a functioning database to collect data and report program metrics. In light of this, a paper review of all documentation pertaining to requests for review for fiscal year 2011-2012 was undertaken and the results were recently provided to the Review Board. This paper review process will also be necessary to obtain the data for the Annual Report for fiscal years 2012-2013 and 2013-2014, as currently there is no mechanized system or database for data collection for the Review Board's work.

As you are aware, the provision of adequate administrative support to the Review Board is one of the main recommendations of the independent, legislated review of the *Involuntary Psychiatric Treatment Ac*t which was tabled in the House on December 12, 2013. The Review Board was pleased to see so many of its concerns reflected in this report and we look forward to working to implement these recommendations.

Sincerely,
Anne Jackman
Chair, Review Board under the
Involuntary Psychiatric Treatment Act

C: Ken Scott
Lynn Cheek
Review Board Members

Annual Report

Review Board under the *Involuntary Psychiatric Treatment Act*
April 1, 2011 – March 31, 2012

Introduction

The Review Board established under s. 65 of the *Involuntary Psychiatric Treatment Act*, (S.N.S. 2005, c.42) (IPTA) hears and considers applications for various types of review. Most often the review is to consider whether or not a person continues to meet the criteria for admission as an involuntary patient either in a psychiatric facility or in the community on a community treatment order. A panel of at least three Review Board members (a lawyer member, a psychiatrist member and a lay member) hears the application and provides written decisions.

The Review Board at March 31, 2012 was comprised of eight lawyers, four psychiatrists and four lay members. As discussed later in this Report, inadequate numbers of Review Board members, particularly psychiatrist members, continues to hamper the work of the Board. Compounding this is the ongoing delays in the appointment process for new Review Board members as well as a lack of adequate administrative support to the Review Board.

This Annual Report is presented in three parts:

Part I provides a detailed look at the types of reviews which the Review Board may be asked to perform.

Part II presents the statistics and trends of the Board's operation during the period from April 1, 2011 – March 31, 2012.

In Part III, issues of ongoing concern to the Review Board are discussed.

Part I Types of Review

(i) Review of Status

The most common type of review is a review of a patient's status as an involuntary patient in a psychiatric facility. The Review Board reviews the decision of the treating psychiatrist that the person in the psychiatric facility should be held as an involuntary patient. A person may be held under involuntary status if they meet the criteria under s.17 of the *Act*.

The criteria for involuntary status are:

(a) has a mental disorder
(b) is in need of psychiatric treatment in the facility
(c) as a result of mental disorder, and
    (i) is threatening or attempting to cause serious harm to self or has recently done so, has recently caused serious harm to self, is seriously harming or is threatening serious harm towards another or has recently done so, or
    (ii) is likely to suffer serious physical impairment or serious mental deterioration, or both;
(d) is not suitable for inpatient admission as a voluntary patient; and
(e) as a result of the mental disorder, does not have capacity to make admission and treatment decisions.

With respect to capacity, the test is whether the patient fully appreciates:

(a) the nature of the condition for which treatment is proposed;
(b) the nature and purpose of the specific treatment;
(c) the risks and benefits involved in undergoing specific treatment; and
(d) the risks and benefits in not undergoing the specific treatment.
Also, whether the patient's mental disorder affects his or her ability to fully appreciate the consequences of making the treatment decision.

A review of a patient's status is most often triggered by a request from the patient but a review may also be requested by the substitute decision maker (SDM), the hospital or the Review Board itself.

Additionally, under the Section 37 of the *Act*, the Review Board is required to review the file of each person detained under a Declaration of Involuntary Admission 60 days after the initial declaration and at the end of the 6th, 12th, 18th and 24 month stage and every twelve months thereafter. At each of these intervals, an involuntary patient is deemed to have made a request for review. These are often referred to as "automatic" reviews. How the Review Board receives notification from the psychiatric facilities about the status of these patients is a challenge which is discussed in Part III below.

(ii) ***Has the substitute decision maker rendered a capable informed consent?***

Under s. 42(1), the Review Board can also review the decision of a substitute decision maker (SDM) if asked by a psychiatrist or a patient to do so.

The test for whether or not the SDM has made a capable, informed consent or refusal is that the decision must be made in accordance with the patient's "prior capable informed expressed wishes" or in the absence of this (or if this would endanger the patient or another person) that the decision be in the patient's "best interests". To date the Review Board has not been required to make such a determination.

(iii) ***Review of Community Treatment Orders (CTO)***

A patient or the SDM may apply under s. 58(1) for a review of whether or not the criteria for granting or renewing a Community Treatment Order (CTO) have been met. Automatic reviews of CTOs also occur on the 1st renewal and every 2nd renewal thereafter. Again, patients are deemed to have requested a review under the *Act*.

Criteria for CTOs (s.47)

In order to decide whether or not a CTO should be upheld or revoked the Review Board considers whether or not all of the criteria have been me.

Prior to issuing a CTO, a psychiatrist must have examined the patient in the last 72 hours and be of the view that:

> (i) the person has a mental disorder for which the person is in need of treatment or care and supervision in the community (and it can be provided),
>
> (ii) the person as a result of the mental disorder,
>
> > (A) is threatening or attempting to cause serious harm to self or has recently done so, is seriously harming or is threatening serious harm towards another or has recently done so, or
> >
> > (B) is likely to suffer serious physical impairment or serious mental deterioration, or both,
>
> (iii) as a result of the mental disorder, the person does not have full capacity to make treatment decisions.

With respect to capacity, the psychiatrist must consider whether a patient fully appreciates: the nature of the condition for which treatment is proposed; the nature and purpose of the specific treatment; the risks and benefits involved in undergoing specific treatment; and the risks and benefits in not undergoing the specific treatment. Also, whether the patient's mental disorder affects their ability to fully appreciate the consequences of making the treatment decision. (s.18).

(iv) during the immediately preceding 2 year period, the person

(A) has been detained in a psychiatric facility for a total of 60 days or longer,

(B) has been detained in a psychiatric facility on two or more separate occasions, or

(C) has previously been the subject of a community treatment order, and

(v) the services that the person requires in order to reside in the community

(A) exist in the community,

(B) are available to the person, and

(C) will be provided to the person.

At the conclusion of a CTO review, the Review Board may either revoke the CTO and allow the person to live in the community without being subject to the CTO or it may refuse to do so.

(iv) ***Review of Leave Certificates***

Leave Certificates or Certificates of Leave are similar to CTOs but are time limited (six months only) and they are non-renewable. They also do not require any prior involuntary hospitalizations.

The Review Board may be asked to review the status of a patient who is on a Certificate of Leave. Since a person on a Certificate of Leave is still an involuntary patient, the automatic review provisions of the *Act* still apply. As stated above, if a patient has been involuntary for sixty (60) days they are deemed to have requested a review. This is true even if they have left the hospital under a Certificate of Leave. After a hearing, the Review Board may revoke the Certificate of Leave and allow the patient to live in the community without being subject to the Certificate, or may refuse to do so.

Additionally, if a psychiatrist has canceled a Certificate of Leave, the Review Board may be asked to review it. A psychiatrist may cancel the Certificate of Leave if:

(a) the patient's condition presents a danger to the patient or others; or
(b) the patient failed to report as required. (s.44(1)).

The outcome of a hearing to review a cancellation of a Certificate of Leave is that the Review Board may confirm the cancellation or it may refuse to do so.

To date the Review Board has not been asked to review the cancellation of a Certificate of Leave.

(v) ***Review of competency to administer estate under the Hospitals Act***

The *Involuntary Psychiatric Treatment Act* replaces and repeals most portions of the *Hospitals Act* relevant to the Review Board. The Board does, however, retain its review powers under s.58 (1) of the *Hospitals Act* which authorizes the Review Board to review a declaration of competency for involuntary patients who have been found incompetent to manage their own estate.

The Review Board has never been asked to conduct this type of review under the *Hospitals Act*.

Part II Statistics and Trends

a) **Introduction**

During the period of operation from April 1, 2011 to March 31, 2012 the Review Board received one hundred and twenty-two (122) requests for review under the *Act*. This includes fifty-two (52) "automatic" requests under s.37 of the *Act*.

The total number of hearings held between April 1, 2011 and March 31, 2012 was fifty-three (53). (See Annex A for an overview of the IPTA Review Board Statistics for 2011-2012).

b) **Outcomes of Requests**

One hundred and twenty-two (122) requests for review were made from April 1, 2011 to March 31, 2012. Fifty-three (53) patients had their status changed to voluntary before the hearing. Three (3) patients withdrew their request, three (3) patients were placed on community treatment orders, two (2) requests for review were denied, three (3) patients had their community treatment orders revoked, two (2) were cancelled for unknown reasons and three(3) were cancelled for administrative errors.[1]

Of the fifty-three (53) hearings which were held between April 1, 2011 and March 31, 2012, thirty-five (35) patients had their status as involuntary patients upheld by the Review Board. Two (2) patients had their status changed to voluntary and three (3) hearings were adjourned. Thirteen of the hearings pertained to reviews of community treatment orders.

In the period April 1, 2011 – March 31, 2012 the Review Board did not receive any applications for a review of a SDM decision.

c) **Community Treatment Orders and Leave Certificates**

Psychiatric facilities are required to file Community Treatment Orders (CTOs) and Leave Certificates with the Review Board.

During the period April 1, 2011- March 31, 2012, thirty-seven (37) CTOs were filed with the Review Board. In this same time period the Review Board received thirteen (13) requests for a review of a CTO renewal. Of the thirteen (13) cases, twelve (12) CTOs were upheld and one CTO was revoked.

During the period April 1, 2011 - March 31, 2012 only one (1) Leave Certificate was filed with the Review Board.

d) **Legal Representation**

As discussed above, one hundred and twenty-two requests (122) for review were made from April 1, 2011 to March 31, 2012. Legal representation occurred in sixty-two (62) of the

[1] As is discussed in Part III below, errors in record keeping are a problem with the Review Board's administrative functioning.

requests. This accounts for fifty-one (51) percent of the cases. When it comes to the hearings themselves, the percentage of patients with legal representation increases. Fifty-three (53) hearings were held and patients were represented in thirty-four (34) of the cases. This means that sixty-four (64) percent of patients who appear before the Review Board have legal representation.

e) **Length of Time to Schedule a Hearing**

The Review Board is required to hold a hearing within twenty-one (21) days of receiving a request pursuant to s. 68 of IPTA. For this fiscal year the average time between a request and a hearing was twenty-two (22) days. Moreover, the legislative requirement to hold a hearing within twenty-one (21) days was not met in thirty-three (33) cases.

Part III Comments

As has been the practice in previous Annual Reports, in this part of the Report the Review Board raises concerns about the ongoing administration of the Act. Without question, the biggest challenge to the Board during this fiscal year has been the administrative functioning of the Board. As a starting point, the filing of this Report has been delayed due to issues pertaining to the administrative functioning of the Review Board. In particular, the Review Board was not able to obtain accurate statistics for the Report. In light of this, a paper review of all documentation pertaining to requests for review for fiscal year 2011-12 was undertaken. The same will be required for fiscal 2012-13 as there is no database presently being used for data collection for the Review Board's work and reporting requirements.

Adjournments and Delays

The issue of inadequate support to the Review Board has numerous consequences for the administrative functioning of the Board including, delays in scheduling hearings as well as the increased need for adjournments. The number of hearings which were not held within the twenty-one day legislative requirement was significantly higher this year than in previous years. More than sixty per cent of the Review Board hearings were held outside the twenty-one day legislative time frame. Arguably the Review Board did not have jurisdiction to hear these cases and an increasing trend is for the Board to change the status of individuals who have hearings scheduled outside the twenty-one day limit. This creates a situation whereby the Board will change a patient's status to voluntary due to non-compliance with the legislative requirements of the Act and the hospital will, for clinical reasons, immediately change the person's status back to involuntary. This is understandably frustrating for all parties.

When there are unavoidable reasons for a delay in the scheduling of a hearing, such as when a patient decides to consult a lawyer, the Review Board will schedule a hearing for the purpose of adjourning the hearing. This allows the Board to maintain jurisdiction as the initial convening for the Board occurred within the twenty-one day legislative requirement. This, however, is a costly process and often a confusing one for the family and facility alike. The Review Board favours a situation where the Chair of the Board would have authority to adjourn a hearing with the patient's consent.

Appointments to the Review Board

As mentioned in Part I above, membership for the Review Board is comprised of representatives from three competency areas: lawyers, psychiatrists (at least one of whom shall be an adolescent psychiatrist) and members of the public who have an interest in mental health issues. People interested in being appointed to the Review Board apply through the Executive Council application process for adjudicative Agencies, Boards and Commissions. Advertisements typically run in the fall and in the spring and appointments to the Board are through Orders in Council. The problem is that the appointments are not staggered and frequently the appointments to the Board expire at the same time. There is no mechanism in the Act to allow Board members to continue until they are re-appointed or

replaced and this places additional pressures on the Review Board to hold hearings within the legislative timeframes when there are too few members.

Perhaps the biggest issue, however, is the difficulty in recruiting psychiatrist members to the Board. This has been an issue for this Board for some time and was a concern prior to the implementation of this Act under its predecessor the *Hospitals Act.* The matter is more urgent now due to an increase in the number of hearings as well as the lengthy delays in the appointment process itself. While the Review Board can raise this matter as a concern it is the Department's responsibility to recruit within the psychiatric community for appointees and to find ways to make the process run more smoothly when potential candidates are identified.

Finally, at the end of fiscal year 2011-2012 the Review Board is without a Chair due to a failure to re-appoint the Chair. This will mean that patients who are legally entitled to a review of their status as involuntary patients will not receive them.

Unrepresented Patients

The Review Board continues to have difficulties with hearings where a patient does not attend. This is most common when a community treatment order was renewed and there is an automatic review of the order. Section 71(2) of *IPTA* requires the Board to appoint a representative where the patient is unable or unwilling to attend a hearing and has not appointed someone. It states as follows:

> **71(2)** Where the patient is unable or unwilling to attend a hearing before the Review Board and the patient has not appointed someone to act on the patient's behalf, the Review Board shall appoint a representative to attend the hearing and act on behalf of the patient.

The Review Board has had some success with asking patient rights advisors to represent a patient who has not attended a hearing. However, not all patient rights advisors are comfortable with this approach as it is not within their job description and they are not trained to be advocates. The patient rights advisors are also providing information to substitute decision makers and feel conflicted when asked to represent the patients themselves.

The Review Board is of the view that the Department of Health and Wellness should consider the appointment of guardians to represent people who do not wish to attend review board hearings. Alternatively, the *Act* should be amended to allow the Review Board to proceed in the person's absence.

Information Provided by the Facilities

The concern with respect to the information flow from the psychiatric facilities to the review Board is twofold: (a) the information provided in the Hospital Report by the attending psychiatrist for a specific hearing; and (b) the information provided by the facility with respect to the number of involuntary patients and whether or not they require a statutory review of their status as involuntary patients.

(a) **Hospital Reports** - The quality and quantity of information provided to the Review Board prior to a hearing varies tremendously from one facility to another and sometimes from one practitioner to another. The Review Board has provided a Hospital Report template to assist the psychiatric facilities but this is not always used or it is sometimes completed in almost illegible cursive writing. This results in hearings which take much longer than necessary as the Board is required to ask many questions and seek clarification on numerous issues. While the length of time for a hearing is a variable which is difficult to control and in itself is not a problem, the Board is mindful of the fact that the hearings are often emotional and difficult for the patients and families and anything which can be done to make them flow more smoothly and efficiently is ultimately in the best interest of the involuntary patient.

(b) **Monthly Status Reports** – The Act requires the Review Board to review the status of involuntary patients within certain time frames, for example sixty days after admission or after the initial renewal of a community treatment order. Since the Review Board does not maintain a database of involuntary patients the only way it knows when to conduct a statutory review is from the information provided by the psychiatric facilities themselves. The timeliness and comprehensiveness of these reports has also been a challenge to the Board. If the Board is not advised of the renewal of a community treatment order until weeks after it has been renewed it is impossible for the Board to meet the twenty-one day legislative requirement for a hearing. The Department needs to work more closely with the district health authorities to ensure that the data which is provided to the Board is both timely and accurate. It also highlights the need for additional training and education for those required to administer the Act, which is discussed below.

Information Provided to Involuntary Patients

It bears repeating that there is a great deal of disparity among the district health authorities in terms of the information which is being provided to involuntary patients. Section 26 of the *Act* requires that the hospital tell involuntary patients and their substitute decision makers (in writing) that, among other things, they have the right to apply to the Review Board for a review of the patient's status and the right to retain and instruct counsel without delay. This information is to be provided whenever there is a change in a patient's status.

The facility is also required to notify the Patient's Rights Service of changes in status so that a patient rights advisor can visit the patient and advise them of their rights under the *Act*. Some patient rights advisors have taken it upon themselves to visit the facilities and find out for themselves if there are new involuntary patients on the unit as some district health authorities are not providing timely information to the patients or the patient rights advisor.

The Department of Health and Wellness needs to ensure compliance with the informational aspects of the *Act* in the provision of timely information to involuntary patients.

Voluntary Patients

The Review Board continues to have serious concerns about the rights of voluntary patients who have been deemed incapable of consenting to treatment. Assessments of the capability of a voluntary patient to consent to treatment or the appointment of a substitute decision-maker are carried out pursuant to the relevant provisions of the *Hospitals Act*. The *Hospitals Act* lacks the same procedural safeguards for rights advice which are contained in the *Involuntary Psychiatric Treatment Act*.

The Review Board is aware of situations where patients who were scheduled for Review Board hearings as involuntary patients have had their status changed to voluntary but incapable immediately prior to the hearing date. The patient's only recourse for review in this situation would be an application to the Supreme Court pursuant to s. 58(2) of the *Hospitals Act*:

> (2) A declaration of capacity for a patient in a hospital or a psychiatric facility or a declaration of competency for a patient in a hospital or a voluntary patient may be reviewed by the Supreme Court of Nova Scotia (Family Division) or by the Family Court where there is no Supreme Court (Family Division).

The Review Board believes that it is the most appropriate body to be responsible for this type of review. Review Board hearings can be set down more quickly than a Court application and the Board has the expertise and experience to review capacity issues. The Review Board is always comprised of three members, one of whom is a psychiatrist and these types of reviews were routinely conducted by the Board under the Hospitals Act prior to the passage of the Involuntary Psychiatric Treatment Act. Furthermore, the Review Board has jurisdiction to review declarations of competency for involuntary patients pursuant to subsection 58(1) of the *Hospitals Act* and it should also be able to review declarations of incapacity pursuant to s. 58(2).

Continuing Need for Further Training and Education

Each year the Review Board suggests that more training and education is required for all individuals who are required to administer the Act. It says that it would be willing to facilitate this learning and participate in the process. To date there has been no response to this suggestion and any education which occurs is piecemeal and reactive to a particular crisis.

Conclusion

The number of requests for review has not changed significantly since last fiscal year. Even taking into account the incomplete or inconsistent data available to the Review Board there does not appear to be an increase in the number of requests. Similarly, there was no significant change in the number of hearings which were held. However, there continues to be an increase in the overall number of community treatment orders in the province but the data is insufficient to determine which district health authorities utilize them the most in their treatment of involuntary patients. Once again, the use of Certificate of Leave continues to be quite low, likely due to the fact that they are time-limited and non-renewable.

The Review Board is mandated to make decisions which significantly affect the rights of involuntary patients. In light of this, it is critical that the Review Board offer a high degree of procedural protection to those affected by its decisions. In failing to meet the legislated twenty-one (21) day requirement to hold a hearing in more than sixty (60) per cent of its hearings the Review Board has not provided the procedural protection required in the *Act*. The Review Board hopes that the administrative functioning of the Review Board will become more of a priority for the Department of Health and Wellness, and that the recommendations in the LaForest Report, pertaining to the Review Board's administrative functioning, will be implemented in the near future in order to reduce or eliminate the delays which affect the rights of involuntary patients.

Annex A
IPTA 2011-2012 Statistical Overview

Requests			Hearings				Hearing Outcome/Status				Legal Representation			
Total	Requested	Automatic	Held	Involuntary Inpatient	CTO Renewal	Adjourned	Patient Involuntary Status Upheld	Patient Status changed to Voluntary	CTO Upheld	CTO Revoked	At Request Stage		At Hearing Stage	
122[2]	**70**	**52**	**53**	**40**	**13**	**3**	**35**	**2**	**12**	**1**	**62/122**	**51%**	**34/53**	**64%**

[2] Eleven (11) hearing request files were excluded from this report (6 were CTOs) as documentation was either incomplete or inconsistent and a determination could not be made.