Recent reforms to the work of the **Mental Health Review Tribunal** in NSW

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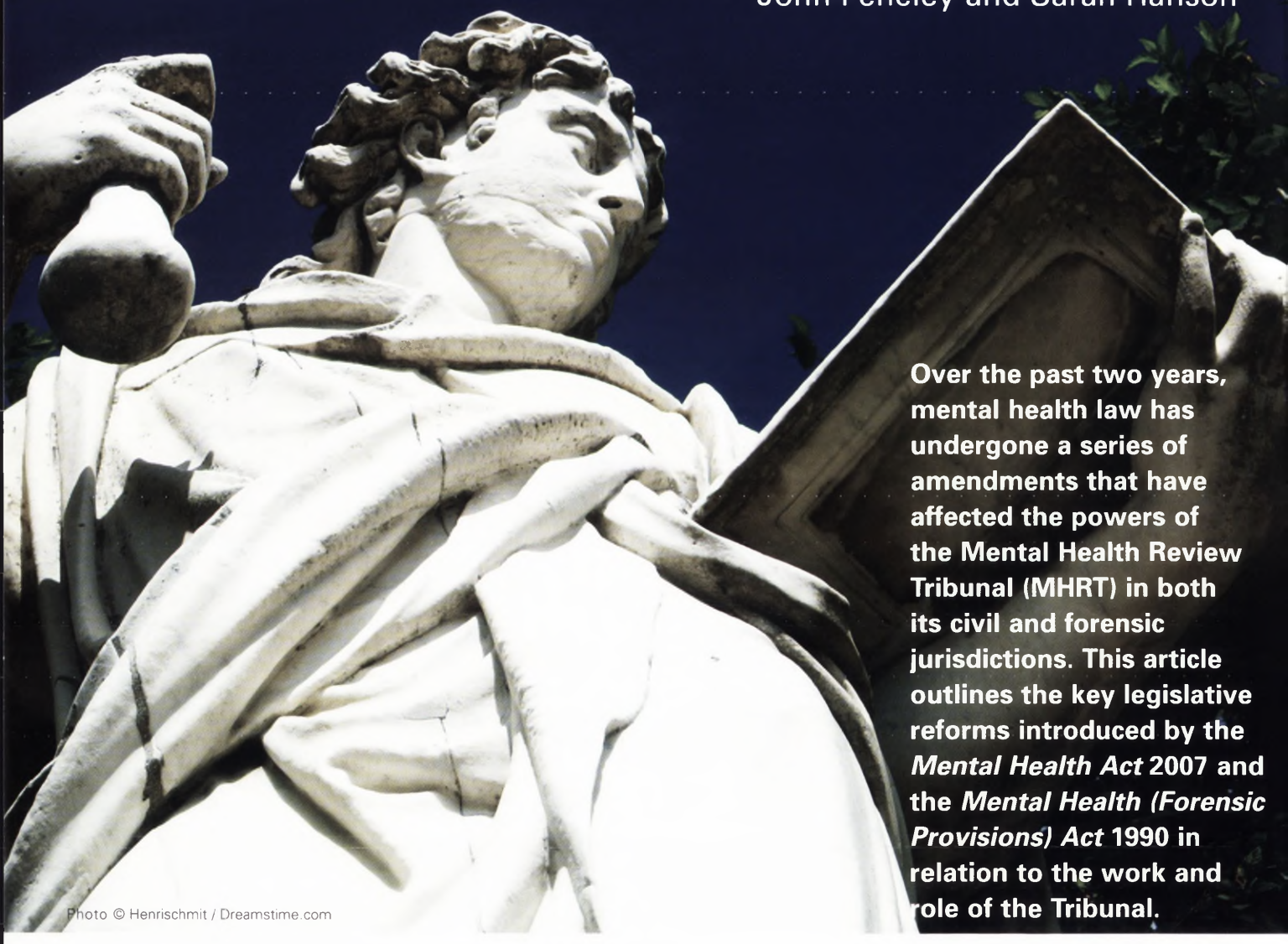

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Over the past two years, mental health law has undergone a series of amendments that have affected the powers of the Mental Health Review Tribunal (MHRT) in both its civil and forensic jurisdictions. This article outlines the key legislative reforms introduced by the *Mental Health Act* 2007 and the *Mental Health (Forensic Provisions) Act* 1990 in relation to the work and role of the Tribunal.

OVERVIEW OF THE FUNCTIONS OF THE MHRT

The MHRT is an independent, quasi-judicial body that operates under the provisions of the *Mental Health Act* 2007 and the *Mental Health (Forensic Provisions) Act* 1990. Each Tribunal panel consists of three members: a lawyer member who chairs the hearing, a psychiatrist, and another suitably qualified member. All Tribunal members have extensive experience in mental health, with a number of members having personal experience of mental illness as either consumers or carers.

The Tribunal has a wide range of powers to make decisions regarding the care and treatment of mentally ill persons in NSW in both civil (*Mental Health Act* 2007) and forensic (*Mental Health (Forensic Provisions) Act* 1990) matters. In the

last financial year, it conducted 8,429 civil reviews and 788 forensic reviews.

Under the *Mental Health Act* 2007, the Tribunal reviews the cases of involuntary patients, and long-term voluntary psychiatric patients; hears appeals against an authorised medical officer's refusal to discharge a patient; makes, varies and revokes community treatment orders; determines applications for certain treatments (such as ECT) and surgery, as well as making orders for financial management where people are unable to manage their own financial affairs.

Under the *Mental Health (Forensic Provisions) Act* 1990, the Tribunal reviews the care, treatment and detention of forensic and correctional patients, makes orders in relation to the detention, transfer, leave and release of persons acquitted of crimes by reason of mental illness, or those subject to a limiting term; hears appeals against the [department of health's] director-general's refusal or failure to grant special circumstances leave; makes orders for apprehension if it appears that a forensic patient has breached a condition of leave or release; as well as determining matters concerning persons found unfit to be tried.

The Tribunal is required to conduct its hearings with as little formality and technicality as a proper consideration of the matters before it allows. Participants at hearings usually include the patient and their lawyer, primary carers and members of the treating team, and/or case managers. In forensic review hearings, it is also not uncommon for victims to attend.

In performing its role, the Tribunal actively seeks to pursue the principles for care and treatment as described in s68 of the *Mental Health Act* 2007 and, in particular, to provide for the delivery of the best possible care and treatment of each patient in the least restrictive environment that is consistent with safe and effective care. Section 3 provides for the objects of the Act. They include the provision of appropriate care, while protecting civil rights – including the patient's right to participate in healthcare decisions.

CIVIL JURISDICTION

The *Mental Health Act* 2007 (MHA07) came into effect on 16 November 2007.[1] The revised legislation introduced a number of reforms, two of which particularly affected the work of the Tribunal:

- the review and management of those receiving involuntary treatment in a mental health facility; and
- the making and operation of Community Treatment Orders.

Detention in a mental health facility

Mental health legislation in NSW provides a strict external review regime to ensure that a person is not inappropriately subjected to involuntary detention or treatment. Central to this in the civil regime has been an early review hearing (presently conducted by a magistrate), 'a mental health inquiry' followed up by further reviews and appeals to the Tribunal should the mental health facility seek to continue the person's involuntary status. There have been a number of significant changes in recent times to the regime and the Tribunal's role.

Prior to the MHA07, the legal status and classification of a person detained in a mental health facility would change on at least two occasions during the first three months of detention. The MHA07 simplified this process by abolishing the temporary patient and continued treatment patient categories and instead classifying all persons ordered to be detained after a mental health inquiry as involuntary patients. This simplification allowed for a clearer articulation of patients' rights at all stages of their involuntary treatment in a mental health facility. In particular, it provided that a person detained for involuntary treatment in a mental health facility may apply at any time for discharge,[2] and appeal to the Tribunal if that application is refused, or not considered within three working days.[3]

The MHA07 also provided for greater oversight and review of the care and treatment of involuntary patients. Now, during the first 12 months of involuntary treatment, the Tribunal reviews the cases of involuntary patients every 3 months. It is only when an involuntary patient is detained for more than 12 months that the review period falls back to the pre-2007 frequency of once every 6 months.

Further reforms

In 2009, Parliament passed legislation that provides for the >>

A single oversight mechanism for involuntary patients should provide continuity and consistency.

mental health inquiry function to pass to the Tribunal. The new provision is expected to commence in 2010. While the current system has worked well, the Tribunal expects that having a single oversight mechanism for the involuntary patient regime will provide continuity of oversight and an opportunity to achieve consistent standards from the outset of the involuntary patient assessment and review process.

Community Treatment Orders (CTOs)

The Act's principles of care and treatment[4] clearly state that a person should receive care and treatment in the least restrictive environment possible consistent with the safe and effective delivery of that care and treatment, and that treatment in the community should be provided wherever possible. The use of CTOs in appropriate cases plays a significant role in achieving this objective by allowing individuals to receive care and treatment in the community instead of being detained in a mental health facility. Applications for CTOs represent a major area of activity for the Tribunal. It considered 4,347 applications in 2008/2009.

The MHA07 introduced a number of significant reforms in the area of community-based treatment. It abolished Community Counselling Orders, instead providing that an application to the Tribunal can be made for a CTOs for a person experiencing mental illness in the community, without the person first having to deteriorate to the extent that they require actual admission to hospital. This has been a very important reform, for a number of reasons. First, it helps treating teams and the Tribunal to achieve the goal of treatment in the community wherever possible. Secondly, it is consistent with the clinical goal of reducing long-term harm to the individual through relapse prevention strategies. Thirdly, it reduces the load on mental health facilities by reducing the number of admissions.

Any person who is subject to an application for a CTO must be given notice of the application and a copy of the proposed treatment plan. However, where the application concerns a person in the community, who is not currently on a CTO, a minimum 14-day notice period was introduced to ensure that the person is aware of the application and has an opportunity to review the proposed treatment plan, prior to the application being considered by the Tribunal.

In a further major change, the Tribunal can now make CTOs for a period of up to 12 months, rather than the previous limit of 6 months. This extended period of time for the operation of a CTO is beneficial in those cases where long-term case management is required, and/or when more frequent reviews cause distress to the person subject to the CTO. Currently, approximately 12 per cent of the CTOs made by the Tribunal each year are made for a period greater than six months.

FORENSIC JURISDICTION

The forensic mental health system is concerned with managing and reducing any risk posed by forensic patients to the community and to themselves. It provides for their mental health treatment both in mental health facilities and correctional centres, as well as in the community. The system offers highly specialised treatment and rehabilitation services, which aim to reduce the risk to the point where the person can safely be treated or managed in the community.

The Tribunal is responsible for the care, treatment, detention and possible leave or release of patients within the forensic system in NSW. The legislative framework for the system and the Tribunal's role within it has undergone momentous change in recent years.

Overview of legislative changes

The *Mental Health Legislation Amendment (Forensic Provisions) Act* 2008 (the Amendment Act) came into effect on 1 March 2009.[5] The Amendment Act retitled the *Mental Health (Criminal Procedure) Act* 1990 as the *Mental Health (Forensic Provisions) Act* 1990 (the Act). The Amendment Act abolished the previous system whereby determinations for the treatment, care, detention and release of persons found not guilty by reason of mental illness or unfit for trial under the *Mental Health (Criminal Procedure) Act* were made by the minister for health or governor. It makes the MHRT, constituted by a special forensic panel, the determining authority in such matters. The panel must be presided over by a current or former judge when considering release matters. The Amendment Act also introduces a new category of patient – 'correctional patient' – for persons who develop mental illness while in custody, whether on remand (including persons refused bail) or while serving a sentence. The category 'forensic patients' includes only persons found not guilty by reason of mental illness and who are either detained or released subject to conditions, or persons found unfit to stand trial who are detained.

The Act does not change the legal concepts of 'unfitness for trial' or the verdict of 'not guilty due to mental illness'. The NSW Law Reform Commission is currently considering those concepts and the relevant court procedure as part of its reference on sentencing of persons suffering from mental illness or cognitive deficit.

Role of the Tribunal

In the forensic area, following the amendments, the Tribunal is required to review the cases of correctional patients and forensic patients as soon as practicable after their referral, and then at least once every six months thereafter. In some circumstances, the Tribunal can now extend the review period to up to 12 months.

In the case of persons found unfit to be tried, the Tribunal is to determine whether they are likely to remain unfit for 12 months following the finding of unfitness.[6] At the same

time, the Tribunal may now make a recommendation to the court about the person's care and treatment needs. When the Tribunal conducts further reviews of persons found unfit to be tried, it must consider the fitness issue at each review.

The Tribunal may make orders to permit leave and release for forensic patients from mental health facilities, correctional centres or other places, and may make orders that effectively terminate the status of a person as a forensic patient.[7] This is considered further below.

Specific requirements for orders

The Act is now far more prescriptive about the matters the Tribunal should consider when determining what order to make in relation to forensic patients and correctional patients.[8] When the Tribunal considers the release of a forensic patient, s74 specifically provides for:

> 'a report by a forensic psychiatrist or other person of a class prescribed by the regulation (such as a forensic psychologist) not currently involved in treating the person, as to the condition of the patient and whether the safety of that person or any member of the public will be seriously endangered by that person's release'.

The requirement for an independent report in release matters reflects s43, which provides that when considering ordering the release of a forensic patient, the Tribunal must first be satisfied that the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and that no other care of a less restrictive kind, consistent with safe and effective care, is appropriate.[9]

The Act provides that the Tribunal may release a person with or without conditions. If the Tribunal releases a person conditionally, it may impose conditions specified in s75, including conditions as to medication, living arrangements and use or non-use of alcohol and other substances. In addition, victims may apply for further conditions to be imposed under s76 for non-contact with the victim or their family members, and prohibitions or restrictions on visiting places. Such restrictions may also be imposed in relation to any leave granted by the Tribunal.

While none of these requirements is surprising, they do add a degree of transparency and accountability to the Tribunal's decision-making process and make it clear that forensic patients and correctional patients are entitled to receive appropriate care and treatment, which is no more restrictive than is necessary for safety reasons.

Correctional patients

As noted at the outset, the Amendment Act introduces a new category of patient – correctional patient – which covers persons who develop mental illness while in custody on remand (including persons refused bail) or while serving a sentence. Such persons are ordered to be transferred to a mental health facility for care and treatment under s55 by the director-deneral (or delegate) if it appears that the person is a mentally ill person, or with the consent of the person if they are suffering from a mental condition for which treatment is available in a mental health facility.

When the director-general (or delegate) makes an order under s55, the actual transfer does not always take place immediately because a place may not be immediately available in a mental health facility. Section 58 makes provision for the Tribunal to conduct limited reviews at least once each month of such cases, until the person is transferred (or until the order is revoked).

Under s59, the Tribunal must review the case of a person transferred to a mental health facility as soon as practicable after the transfer, and may order the person's continued detention, care or treatment in a mental health facility or correctional centre. The Tribunal must continue to review the case of a correctional patient every six months, and may review them at any time (s61(1)).

The significant point in relation to correctional patients is that the Tribunal cannot grant them leave or release them, but under s62(2) can recommend leave for correctional patients to the commissioner of corrective services, who can grant the leave.

Community Treatment Orders and reclassifying patients

A real innovation under the new provisions is that the Act now provides (in s67) for forensic CTOs for compulsory treatment in correctional centres. These orders can be made by the Tribunal for forensic patients, correctional patients and inmates.[10] The Tribunal is currently working with >>

Justice Health to implement this aspect of the legislation. Generally speaking, the CTO provisions of the MHA07 apply to forensic CTOs, with some variations as specified in the Regulations. The Act envisages that the forensic CTO may be amended in order to continue when the person is released, thereby providing a vital continuity of care link between the corrections environment and the community.

The Act also continues the Tribunal's power to reclassify a forensic patient, on a limiting term, as an involuntary patient when they are in the last six months of the term,[11] or to similarly reclassify a correctional patient who is in the last six months of their term of imprisonment.[12] These provisions are commonly used in conjunction with the CTO provisions under the MHA07 to reclassify the person and then release them immediately to the community on a CTO. A patient may be subject to a CTO while also subject to parole conditions. Both systems can apply in a complementary fashion.

Right of appearance or submissions

Section 154 of the MHA07 provides that forensic patients having any matter before the Tribunal must be represented; unless they decide that they do not want to be represented. The forensic patient is to be represented by an Australian legal practitioner or, with the approval of the Tribunal, by another person of the patient's choice.

Although the Tribunal is now the determining authority for leave and release matters, the Act provides that the minister for health and the attorney-general may appear before the Tribunal, or make submissions to the Tribunal, in relation to the possible release or grant of leave to a forensic patient.[13] Because of this provision, and the victim's right to seek place restriction and non-association orders on leave and release matters, the Tribunal has introduced a requirement for treating teams and forensic patients to give notice of any intended application for leave and release. This allows the Tribunal to give the minister for health, the attorney-general and victims appropriate notice of such applications.

Appeals from the forensic division of Tribunal

The Act now provides in s77A for appeals from Tribunal decisions to the Supreme Court and to the Court of Appeal.

A forensic or correctional patient who is party to proceedings before the Tribunal under the amended Act may, with leave, appeal a Tribunal determination to the Court on a question of law or on 'any other question'. The appeal to the Supreme Court can be from any Tribunal determination other than a release determination.[14] Appeals in relation to release determinations are by leave to the Court of Appeal.[15]

The Minister for Health may appeal to the Supreme Court from any determination of the Tribunal in a proceeding before it under the amended Act, as of right, on a question of law or 'any other question' other than a release determination.[16] Appeals in relation to release determinations are as of right to the Court of Appeal.[17]

The attorney-general may, as of right, appeal to the Court of Appeal from a Tribunal determination concerning the release of a person made under the Act, on a question of law.[18]

A victim of a forensic patient who has applied to the Tribunal seeking non-association or place restriction orders in relation to leave or release under s76 may, by leave, appeal to the Supreme Court from any Tribunal determination under that section in those proceedings on a question of law or 'any other question'.[19]

After deciding an appeal made under s77A, the court may (unless it affirms the Tribunal determination):

- make such order as, in its opinion, should have been made by the Tribunal (s77A(9)(a); or
- remit its decision on the question to the Tribunal and order a rehearing of the proceedings by the Tribunal (s77A(9)(b)), which on rehearing must not proceed in a manner or make an order or decision that is inconsistent with the decision of the court (s77A(10)).

The Act also provides for the Tribunal or the court to suspend the Tribunal's order pending the outcome of an appeal: s77A(11). The suspension can be terminated under s77A(12).

If a rehearing is held, fresh evidence – or evidence in addition to or in substitution for the evidence on which the original determination was made – may be given on the rehearing: s77A(13).

COLLABORATIVE WORK

In addition to the statutory roles in both the civil and forensic jurisdictions described above, the MHRT also works closely with a number of government departments and non-government organisations, including the Department of Health, area health services, Justice Health, the Department of Justice and the Attorney-General, and Corrective Services NSW. As well as providing education as to the legislation and the work of the Tribunal, the MHRT also works with these agencies to promote and assist in the development of standards.

CONCLUSION

The developments and changes provided for by the amendments to mental health legislation in NSW are very positive. In the civil area, the revised legislation allows for greater support for persons suffering from a mental illness in the community and improved continuity of care. In the forensic area, there is now a level of transparency and accountability in relation to the decisions concerning forensic patients that should, in time, build confidence in the system. ■

Notes: **1** Gazette No. 169 of 16 November 2007, p1. **2** *Mental Health Act* 2007, s42. **3** *Ibid*, s44. **4** *Ibid, ss3 and 68.* **5** Gazette No. 44 of 27 February 2009, p1. **6** *Mental Health (Forensic Provisions) Act* 1990, s16(1). **7** *Ibid*, ss51–53. **8** *Ibid*, s74. **9** *Ibid*, s43. **10** *Ibid*, s67. **11** *Ibid*, s53. **12** *Ibid*, s65. **13** *Ibid*, s76A(2). **14** *Ibid*, s77A(1). **15** *Ibid*, s77A(4). **16** *Ibid*, s77A(2). **17** *Ibid*, s77A(5). **18** *Ibid*, s77A(6). **19** *Ibid*, s77A(3).

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