Submission No 33

INQUIRY INTO SUBSTITUTE DECISION-MAKING FOR PEOPLE LACKING CAPACITY

Organisation: Mental Health Review Tribunal

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The Legislative Council Standing Committee on Social Issues
Parliament of NSW
Macquarie Street
Sydney NSW 2000
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Dear Committee

Re: Submission to the Legislative Council Social Issues Committee

This submission outlines the response of the NSW Mental Health Review Tribunal (MHRT) to the call for submissions by the Legislative Council Social Issues Committee in relation to an Inquiry into substitute decision making for persons lacking capacity and particularly into the need for legislative change to make better provision for the management of estates of persons incapable of managing their affairs; and the guardianship of people who have disabilities.

The Attorney General has also asked the Committee to consider whether amendments should be made to the NSW Trustee & Guardian Act 2009 to:

- allow the relevant Court or Tribunal to exclude part of a person's estate from financial management;
- allow the Court or Tribunal to vary or revoke an order (even where the person remains incapable of managing their affairs) on the application of a person who has a genuine concern for the protected person's welfare; and
- allow the Tribunal to appoint a private manager.

Your Inquiry is clearly a broad ranging one which encompasses incapacity across a number of areas. The Tribunal in this submission will confine itself to matters that arise within its own jurisdiction and functions.

In order to understand the Tribunal's position in respect of the issues raised in your inquiry it is necessary to outline the Tribunal's general functions in both its civil and forensic jurisdictions as described below. The legislation which governs the work of the Tribunal are the Mental Health Act 2007 (the Act) and the Mental Health (Forensic Provisions) Act 1990. The Tribunal also deals with matters pertaining to the financial management of people with incapacity pursuant to the Trustee and Guardian Act 2009 and makes decisions about persons who are subject to guardianship orders. There is an overlap between guardianship and mental health legislation in that in some instances a person may be subject to guardianship orders

and may require treatments (including mental health treatments) whilst detained in a mental health facility or subject to an order for community treatment.

The Tribunal, through its civil and forensic jurisdictions, is in a good position to identify gaps and shortfalls in relation to some aspects of NSW legislation concerned with the management of estates of persons incapable of managing their affairs and the guardianship of people who have disabilities who are subject to the Tribunal's jurisdiction.

In this paper I will identify the Tribunal's recommendation for reform in bold.

Tribunal's functions

The Tribunal is a specialist quasi-judicial body established under the *Mental Health Act 2007*. It has a wide range of powers that enable it to make and review orders and to hear some appeals about the treatment and care of people with a mental illness. The Tribunal has a President, nine Deputy Presidents, a Registrar and approximately 110 part time members. Each Tribunal panel consists of three members: a lawyer who chairs the hearing, a psychiatrist, and another suitably qualified member. All Tribunal members have extensive experience in mental health and some have personal experience with a mentally ill person or caring for a person with mental illness.

The Tribunal has a wide jurisdiction and conducts both civil and forensic hearings. The Tribunal makes decisions about a person's care and treatment both in hospital and also in the community. Decisions about specific treatments for patients and also decisions about the management of patient's financial affairs are made by the Tribunal.

In performing its role, the Tribunal actively seeks to pursue the objectives of the *Mental Health Act 2007* and *Mental Health (Forensic Provisions) Act 1990* including: delivery of the best possible kind of care to each patient in the least restrictive environment; and the requirements of the United Nations' *Principles for the Protection of Persons with Mental illness and the Improvement of Mental Health Care;* as well the *United Nations Convention on the Rights of Persons with Disabilities.* Overall the Tribunal seeks to maintain the balance between the Act's objectives while minimising the risk to the individual and the community.

<u>The Civil Jurisdiction</u>

The Tribunal can make orders to detain mentally ill persons as involuntary patients. The Tribunal's power to review involuntary patients depends on a magistrate's finding at an Inquiry that a detained person is a "mentally ill person" within the meaning of the Act. Recent amendments to the Act will soon see the Tribunal replacing the magistrate's functions, thereby ensuring that decisions about a person's detention in a mental health facility are made by one body.

The Tribunal reviews the care and detention of involuntary patients every three months in the first year of detention and thereafter every six months. The Tribunal also reviews the treatment and care of voluntary patients who have been hospitalised for a year or more, every 12 months. The Tribunal must also hear appeals against the refusal by the medical superintendent to discharge a detained or involuntary patient, or of a magistrate's decision to place a person on a Community Treatment Order. The Tribunal also hears applications for the granting, variation, and revocation of Community Treatment Orders.

The majority of the Tribunal's orders are for community treatment (CTOs). In its civil jurisdiction, CTOs essentially require that a person accept prescribed medication, therapy, counselling and rehabilitation in accordance with a treatment plan supplied by a community based mental health facility. An authorised medical officer of a mental health facility, a director of a community mental health facility and a medical practitioner who is familiar with the clinical history of the patient and primary carer may apply to the Tribunal for an order. An order may be made for a person residing in the community who has not previously been hospitalised or subject to an order if there has been a history of non-compliance with medication which led to, or could have justified involuntary detention in a mental health facility. Orders can also be made for persons who are detained in a mental health facility or voluntary patients. For persons subject to existing orders the Tribunal must be satisfied that they are likely to continue in or relapse into an active phase of mental illness if the order is not granted. In all cases before an order can be made the Tribunal must be satisfied of certain criteria, including: it is the least restrictive alternative consistent with safe and effective care and that the person would benefit from the order. A mental health facility must also demonstrate that it has an appropriate treatment plan and that it is capable of implementation.

Forensic CTOs essentially provide for person's care and treatment whilst detained in a mental health facility or correctional centre. At the time of preparing this submission only two such orders have been made and the Tribunal is liaising with Justice Health about their implementation.

The rationale for making CTOs is to provide persons who would otherwise be unlikely to accept treatment on a voluntary basis, with access to medication, care and treatment such as to enable them to live in the community. Orders can be made for up to 12 months, although the great majority are for six months. The length of an order is determined by the estimated time for the subject person to engage with their case manager and/or achieve mental health stability. Whilst CTOs compel acceptance of treatment and services it is clear that the long term goal is to foster voluntary compliance through support, education and negotiation with an appointed case manager. In some limited cases this outcome is achievable but for the majority of persons, orders are frequently the only mechanism to ensure appropriate treatment is administered. In cases where persons do not adhere to their treatment plan they are encouraged to do so and if there is continued non compliance and a significant risk that they will deteriorate mentally or physically they can be ordered to attend a community or inpatient mental health facility for review, care and treatment.

The Tribunal also hears applications for the administration of Electro Convulsive Therapy (ECT) and consents to surgical procedures.

The Tribunal also hears applications pursuant to the *NSW Trustee and Guardian Act 2009 f*or the appointment of financial managers for persons who are unable to manage their financial affairs because of mental illness.

The Forensic Jurisdiction

In its forensic jurisdiction, the Tribunal has a number of responsibilities under the *Mental Health Act 2007* and the *Mental Health (Forensic Provisions) Act 1990*. The latter Act came into effect on 1 March 2009 and gave the Tribunal determinative powers in relation to the care, treatment, detention and release of forensic patients. Previously such decisions were made by the Minister for Health and the Governor.

Forensic patients are patients who have been found unfit to be tried by a court and ordered to be detained or patients who have been found not guilty of criminal offences on the grounds of mental illness. In respect of fitness patients the Tribunal must determine whether they are likely to remain unfit for the 12 months after the court's finding of unfitness. The Tribunal is also required to review persons found not guilty on the grounds of mental illness and must make orders for their care, treatment and detention, leave or release commencing with a review as soon as practicable after the court's finding. Thereafter, reviews are on a six monthly basis. A key consideration at the reviews is whether any leave of absence from a mental health facility or the person's release whether subject to conditions (for care and treatment) or unconditionally would seriously endanger the subject person or any member of the public. The Tribunal must also have regard to the principles for care and treatment set out in s 68 of the Act.

The Tribunal also has a role in reviewing "correctional patients" who are inmates who develop a mental illness whilst in custody. In respect of such patients the Tribunal may order their care, treatment and detention in a mental health facility or correctional centre. This can be by way of a forensic community treatment order as well as detention in a mental health facility to enable care and treatment to be given.

RECENT LEGISLATIVE DEVEVLOPMENTS

The law that presently governs the Tribunal is the *Mental Health Act 2007* (the Act) which commenced on 16 November 2007 and replaced the *Mental Health Act 1990*. The Act contains a comprehensive legislative statement concerning the general rights of persons who suffer from a mental illness and their entitlement to appropriate treatment and care.

It also provides a system whereby a mentally ill or a mentally disordered person, as defined in the Act, can only receive involuntary treatment if that is necessary for the person's own protection from serious harm, or for the protection of others from such harm. It is a requirement that this treatment must be provided in the least restrictive environment possible which is consistent with safe and effective care. A set of checks and balances is also established to ensure that decisions made about treatment are reviewed on a regular basis by independent and impartial bodies including the Tribunal.

The 2007 Act was enacted following a wide-ranging review of the *Mental Health Act 1990* by the Government during 2005–2006. That review resulted in the new Act and reform of the provisions relating to civil patients. There was a widespread view that the 1990 Act did not reflect the changes to the way care was delivered in NSW and that service delivery could be made more effective and responsive to the needs of patients and the community. A further key reform was the recognition of the role of carers and patients in care plans and treatment decisions. The Act now provides for information sharing of the patient's care and treatment plan, with the carer being notified of when patients are admitted, discharged, transferred or absent. The subject person can nominate or exclude carers where they have capacity to do so. Importantly, the Act recognises the right of patients and carers to be involved in decisions concerning their treatment and care plans.

The Act builds on the rights of subject persons in the 1990 Act and establishes principles of care and treatment as follows:

- Care and treatment is to be designed to assist subject persons to live, work and participate in the community;
- Any restriction on the liberty of patients with a mental illness or disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum in the circumstances;
- Medications are to be prescribed to meet a patient's therapeutic and diagnostic needs only;
- Patients are to be given appropriate information about treatment, alternative treatments and the effects of treatment;
- That there be recognition of the religious, cultural, linguistic, age, gender needs and other special needs; and
- Patients be involved in the development of ongoing care and treatment plans.

These legislative changes emphasise the right of persons to access treatment that addresses their vocational, social and cultural aspirations and recognises their right to be involved in treatment decisions and care plans. These changes give greater emphasis to ensuring that mentally ill persons are given as much scope as possible to participate in decisions which affect them. The Tribunal does not consider that any further general review of this legislation is necessary at this time.

I now turn to some specific areas in which persons that come before the Tribunal may be subject to substitute decisions in relation to their care and treatment and financial management and where some change to legislation is desirable. The following changes are desirable as they make better and clearer provision for consent to medical treatment and procedures for the Tribunal's client group. There are also suggested changes in relation to financial management orders.

SUBSTITUTE DECISION MAKING UNDER THE MENTAL HEALTH ACT

Consent to medical treatment

1. The Mental Health Act provides that an authorised medical officer (AMO) may give or authorise any treatment (including medication) to involuntary patients, including assessable persons, forensic and correctional patients, if necessary without their consent as soon as they are admitted to a mental health facility (s 84).

   One of the concerns is that it is not clear if s 84 allows an authorised medical officer to authorise treatment other than mental health treatment if that treatment occurs in a place other than a mental health facility. For example, if a patient has been scheduled to a hospital but has a medical condition that requires treatment, such as chemotherapy, can that treatment be authorised by the AMO of the mental health facility? If not, what is the basis upon which treatment can occur, if the patient is unable to give an informed consent?

   The Tribunal is frequently contacted by mental health professionals seeking clarification of the ambit of s 84. They are understandably anxious to ensure that they are acting within the law. This is a matter which requires urgent clarification and consultation with relevant stakeholders such as the Health Department, medical officers and the Tribunal to determine the best approach (REC 1).

2. Some treatments for involuntary patients such as special medical treatment and Electro Convulsive Therapy are determined by the Tribunal. The authorised

medical officer can authorise emergency surgery, but only for involuntary, forensic and correctional patients.

In the case of surgery the Act provides that where the patient is unable to give an informed consent and where the primary carer agrees with proposed surgery the decision maker is the Director-General. In all other cases, the Tribunal is the decision maker and an order may be made if the Tribunal is of the opinion that the patient is incapable of giving informed consent to the operation and that it is desirable having regard to the interests of the patient to perform the surgery. This provision applies with variations to the consent requirements to different categories of patients.

In cases of special medical treatment only the Tribunal can consent in respect of involuntary patients if satisfied that the procedure is necessary as a matter of urgency to save the patient's life or to prevent serious damage to the health of the patient.

Special medical treatment is defined as any treatment, procedure, operation or examination that is intended, or is reasonably likely, to have the effect of rendering permanently infertile the person on whom it is carried out or such treatment as declared by the regulations. To date none have been declared.

The Act has not made provision for substitute consent for all categories of persons following their detention in a mental health facility and this is a source of much confusion for mental health professionals. For example, patients who have been detained in a mental health facility and who have yet to be made an involuntary patient by a magistrate and who require emergency surgery, surgery or special medical treatment must have their consents determined by reference the Guardianship Act. This appears to have been the result of legislative oversight as the Mental Health Act 1990 had made provision for all categories of patients.

It is submitted that all treatments in respect of persons detained in a mental health facility should be contained in the Mental Health Act. The present anomaly is confusing for medical practitioners and patients and as a matter of principle it is preferable that their care and treatment be determined under one legislative regime (REC 2).

3. The Tribunal notes that the Guardianship Act defines a termination as a special medical treatment, whereas the Act considers the same procedure to be surgery. Therefore a person who is not subject to the jurisdiction of the MHRT and through lack of capacity is unable to consent to a termination must have the issue determined by the Guardianship Tribunal. However, if a person is an involuntary patient under the MHA provided there is a primary carer who consents to the procedure, consent may be given by the Director-General. Where there is no agreement or no response from the primary carer the Tribunal may consider the application. Further, the criteria for consent to the treatment under the Guardianship Act are more strict requiring that it be "necessary to save the life of the patient or prevent serious damage", whereas under the MHA the test for surgery is less exacting as it only must be "desirable having regard to the interests of the patient".

   It is submitted that there should be consistency between the two regimes and because of the serious and irreversible nature of such a procedure it

should be redefined in the MHA as a special medical treatment which may only be approved by the Tribunal if a patient is unable to give informed consent (REC 3).

Financial management

The introduction of the NSW Trustee and Guardian Act on 1 July 2009 brought about desirable changes to the Tribunal's decision making powers in respect of incapacitated persons. It is submitted that the amendments largely conform with the set of principles enunciated in the Act which recognise: the subject person's right to personal autonomy; freedom of unnecessary interference in decisions or freedom of action; that the paramount consideration is the welfare and interests of the subject person and that they should be encouraged to be self reliant in personal, domestic and financial matters. Importantly, the views of the subject person are to be taken into account. It is anticipated that the Tribunal's decision making will be informed by these principles and the common law. A welcome reform was the removal of the onus on the patient to prove capacity. Prior to the amendments the subject person was presumed to be incapable of managing their affairs and if they were unable to demonstrate capacity the *Protected Estates Act 1983* required an order to be made.

Whilst there has been considerable reform, the Tribunal submits that further reform is necessary as follows.

The new Act still requires that the magistrate (and after the Tribunal assumes the role, the Tribunal) consider the issue of financial management at an Inquiry. As outlined above a person who is detained in a mental health facility is required to be presented to the Magistrate at an Inquiry if it is intended that the person requires further detention to receive care and treatment.

The Tribunal is of the view that the NSW Trustee and Guardian Act should be amended so as to remove the requirement that the magistrate routinely consider the issue of a person's capacity to manage their affairs and that in line with the standard that now applies to the Tribunal it should only be considered if there is a need to consider the issue (REC 4).

The NSW Trustee and Guardian Act also requires the Tribunal to routinely consider the issue when reviewing forensic patients and making an order for their detention in a mental health facility. It is submitted that the Tribunal should only consider the issue if an application is based on a perceived need for an order. Such amendment would remove the last vestiges of the presumption of incapacity arising from mental illness (REC 5).

The Tribunal also supports an amendment allowing for the variation or revocation of an order by a person with a sufficient interest in the matter even if the person remains incapable. Such an amendment would conform with the Convention on the Rights of Persons with a Disability and would allow persons who may not have regained capacity some autonomy if it was considered in their best interest and would also allow for persons to rely on informal supports in making financial decisions (REC 6).

In addition, the Tribunal considers that it should have a power to revoke an order for persons who remain patients in hospital. Presently, the Tribunal under s 88 can only consider an application for persons who are no longer patients (REC 7).

The Tribunal also supports the introduction of time limited orders with a power to review them and make further orders where appropriate (REC 8).

The Tribunal is strongly of the view that it should have a referral power to the Guardianship Tribunal in cases where it is sought to appoint a private person as the manager of a patient's estate or where the estate of the subject person is complex (REC 9).

The reason for this is that the Tribunal has in some cases very limited information upon which to make such orders. Persons are detained in urgent circumstances and the great majority are detained for less than three weeks. It is commonly the case that facilities do not have allied staff, such as social workers or therapists who are able to make the necessary enquiries to determine the full extent of a person's estate and the bona fides of a proposed private manager. The Guardianship Tribunal is specifically resourced to conduct full and detailed examination of these issues. It has a large investigatory unit which routinely gathers information from the relevant parties and presents that information to Tribunal panels for their consideration. The Unit is also able to corroborate information and examine the views, opinions and bona fides of proposed managers and relevant interested parties. A referral power would be an efficient and appropriate use of existing resources.

Intersection of guardianship and mental health legislation

As noted above, there is considerable overlap between guardianship and mental health legislation. There is a fundamental tension between the objectives of the guardianship provisions and the mental health provisions in that the former focuses on the best interests and welfare of the subject person whereas under the mental health provisions there is a need to balance the interests of the subject person with the need to protect the safety of the patient and the general community. A person who is subject to a guardianship order may be detained in a mental health facility for treatment. For example, s7 of the Act provides that a person may be admitted to a mental health facility as a voluntary patient if the guardian makes a request of an authorised medical officer. During the period of the person's admission the guardianship order is not suspended and a guardian can make decisions about treatment, but only so far as is consistent with any determination or order under the MHA. Persons that may be admitted in this way are often persons who cannot otherwise be accommodated safely in other settings and may suffer with severe brain injury or dementia and may lack capacity to make accommodation decisions.

However, in relation to forensic patients under guardianship there are currently considerable problems due to the overlap between the two regimes. These appear to have occurred because of legislative oversight and the Tribunal is presently liaising with the Crown Solicitor to have this rectified. A guardian may have, for example, an accommodation and medical consent function. A forensic patient may be released subject to a raft of conditions which usually include conditions about those matters. The issue of primacy of jurisdiction has arisen recently in relation to a forensic patient who was conditionally released to the community in 2006 under mental health legislation and who is also the subject of a Guardianship Order. The patient has mental illness, dementia and intellectual disability and was bound by the conditions of his release to accept medication prescribed by his psychiatrist. At the same time he had a guardian appointed to make decisions about health care, and medical and dental treatment. There was a concern that decisions were being made by the guardian about the patient's medication regime which had the potential to impact on the patient's mental state such that it could undermine his mental stability

and put him or others at risk of serious harm. Whilst there is clearly an obligation to protect and foster the best interests of the individual this must be considered in the context of community interest. Given that forensic patients by definition have been brought to the attention of the criminal justice system the need to ensure the primacy of mental health orders over guardianship orders is obvious. There is a clear issue of community safety as many forensic patients have been involved in serious index events such as murder, manslaughter, arson and serious assault.

It is recommended that where the Tribunal makes decisions in relation to forensic patients that any guardianship orders are inoperative to the extent that they are inconsistent with a Tribunal order (REC 10).

Please contact me should you wish to discuss any matters arising from our response.

Yours sincerely,

The Hon Greg James QC
PRESIDENT