LEARNED FRIENDS

"Appearing before the Mental Health Review Tribunal"

Cape Town, South Africa

25 September 2017

1. SCENARIOS

a) A person living in the community with a history of Schizophrenia. They also take cannabis and medication. They go off the medication and become unwell and have delusions. The voices are telling them that their mother is the devil and has to be destroyed. They take a knife and stab her to death. They are then charged with murder but found not guilty by reason of mental illness.

b) A man with a serious intellectual disability sexually assaults girls in his family. It is reported and he is charged with the sexual assaults. But he does not understand much about the court process. Indeed, he lacks the ability to concentrate for the duration of the day or to instruct a lawyer or to understand the role of the judge or jury or prosecutor.

c) Your flatmate starts talking to herself and describes her ability to receive special messages from the TV and has communications with aliens. She stops going to work and stays at home on the computer all day communicating with aliens.

d) Your parent starts to become uncharacteristically moody. They stop their usual activities and resign from work. They lose interest in doing things around the house, even watching TV or walking the dog or reading. They don't say much and then take to their bed and don't want to get up at all.

2. STATISTICS ON MENTAL HEALTH Slides 3 - 6

Mental Health in Australia

How Many

- *One million people in NSW living with a mental illness*
  - *Depression – 1 in 7 Australians*
  - *Schizophrenia – 1 in 100 Australians*
  - *Bipolar – 1.6 in in 100 Australians*

- ◘ *Anxiety – 10 in 100 Australians*
- ☐ *45% of Australians will experience a mental disorder at some time in their life*
- ☐ *Only 350,000 a year receive assistance*

Stigma and Discrimination

- ☐ *45.% of people don't want a person with schizophrenia marrying into their family or 28.2% if the potential in-law had depression;*
- ☐ *32.6% - 48.6 % of people would avoid someone with a mental health difficulty – from Post Traumatic Stress Disorder (PTSD) to chronic schizophrenia;*
- ☐ *37% of people would not employ a person with chronic schizophrenia and 23.4% would not employ someone with depression.*

Hope and Recovery

- ☐ *Most people living with mental illness live full, meaningful lives.*
- ☐ *Important that all mental health services, including the Tribunal, keep a focus on a person's recovery*

Recovery is restoring a sense of self, of agency and choice, of meaning and of a valued social role

3. MHRT: WHAT? WHERE? WHO? LEGISLATION Slides 7-10

The MHRT is established by the Mental Health Act. The Tribunal's headquarters and all its full time staff are in a building on a campus in Gladesville that was the old Gladesville Hospital. The campus accommodates a range of health and community services, including Northern Sydney Home Nursing, Sydney Cochlear Implant Centre, St John's Ambulance, Medical Council of NSW, Schizophrenia Fellowship, Health Education and Training Institute, Mental Health Commission, Cornucopia Café and the Giant Steps School.

Up to a dozen panels sit every weekday at Gladesville or somewhere in the metropolitan or regional areas. Most panels comprise a lawyer, a psychiatrist and an another suitably qualified person.

141 Membership of Tribunal

(1) The Tribunal consists of the following members appointed by the Governor:

(a) the President of the Tribunal who is to be appointed as a full-time or part-time member,

(b) 1 or more Deputy Presidents of the Tribunal who may be appointed as full-time or part-time members,

(c) other members (if any) who may be appointed as full-time or part-time members.

(2) The members (other than the President and any Deputy President) are to be appointed from the following classes of persons:

(a) Australian lawyers,

(b) psychiatrists,

(c) persons having, in the opinion of the Governor, other suitable qualifications or experience, including at least 1 person selected from a group of persons who are nominated by consumer organisations.

(3) The members are to include 1 or more women and 1 or more persons of ethnic background and a different person is to be appointed to satisfy each of those qualifications, even though a person so appointed may possess both of those qualifications.

(4) If, at the time at which an appointment is required to be made of a person selected from a group of persons who are nominated by consumer organisations no such group has been nominated, the Governor may appoint as a member instead a person who, in the opinion of the Governor, has suitable qualifications or experience.

The last group comprises members who hold qualifications or, have experience. They are psychologists, social workers, psychiatric nurses, occupational therapists, former police officers, counsellors, carer advocates, nurses, neuropsychologists, one member who is a Doctor of Philosophy in drug and alcohol research, medical practitioners and criminologists. They also include people with lived experience of their own mental health problems.

There are four larger hearing rooms at the Gladesville premises and three small ones. Usually two or three of these larger rooms and one of the small ones are used each day. I will come to describe what happens during those hearings.

In the small room there is a lawyer who sits by himself or herself. There is a roster system. That lawyer could be me or one of my two Deputy Presidents or it could be someone who is on the Tribunal panel of lawyers who comes in on a sessional basis.

These hearings are usually by videolink to mental health facilities including community mental health. The could be by telephone.

In addition, each day there will be panels sitting at various metropolitan or regional hospitals. There are also lawyer members who do a circuit of metropolitan hospitals doing mental health inquiries.

The Tribunal comprises two teams, the Civil Team and the Forensic Team. Each team has a Deputy President and a Team Leader.

Objects section 3 *Mental Health Act* Principles section 68 *Mental Health Act* and section 105 *Mental Health Act.*

Slides 11-13

3 Objects of Act

The objects of this Act are:

- (a) to provide for the care and treatment of, and to promote the recovery of, persons who are mentally ill or mentally disordered, and
- (b) to facilitate the care and treatment of those persons through community care facilities, and
- (c) to facilitate the provision of hospital care for those persons on a voluntary basis where appropriate and, in a limited number of situations, on an involuntary basis, and
- (d) while protecting the civil rights of those persons, to give an opportunity for those persons to have access to appropriate care and, where necessary, to provide for treatment for their own protection or the protection of others, and
- (e) to facilitate the involvement of those persons, and persons caring for them, in decisions involving appropriate care and treatment.

Note.

See also section 68 which contains principles for care and treatment and section 105 which sets out objectives for the New South Wales public health system

68 Principles for care and treatment

It is the intention of Parliament that the following principles are, as far as practicable, to be given effect to with respect to the care and treatment of people with a mental illness or mental disorder:

(a) people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given,

b) people with a mental illness or mental disorder should be provided with timely and high quality treatment and care in accordance with professionally accepted standards,

(c) the provision of care and treatment should be designed to assist people with a mental illness or mental disorder, wherever possible, to live, work and participate in the community,

(d) the prescription of medicine to a person with a mental illness or mental disorder should meet the health needs of the person and should be given only for

therapeutic or diagnostic needs and not as a punishment or for the convenience of others,
(e) people with a mental illness or mental disorder should be provided with appropriate information about treatment, treatment alternatives and the effects of treatment and be supported to pursue their own recovery,
(f) any restriction on the liberty of patients and other people with a mental illness or mental disorder and any interference with their rights, dignity and self-respect is to be kept to the minimum necessary in the circumstances,
(g) any special needs of people with a mental illness or mental disorder should be recognised, including needs related to age, gender, religion, culture, language, disability or sexuality,
(g1) people under the age of 18 years with a mental illness or mental disorder should receive developmentally appropriate services,
(g2) the cultural and spiritual beliefs and practices of people with a mental illness or mental disorder who are Aboriginal persons or Torres Strait Islanders should be recognised,
(h) every effort that is reasonably practicable should be made to involve persons with a mental illness or mental disorder in the development of treatment plans and recovery plans and to consider their views and expressed wishes in that development,
(h1) every effort that is reasonably practicable should be made to obtain the consent of people with a mental illness or mental disorder when developing treatment plans and recovery plans for their care, to monitor their capacity to consent and to support people who lack that capacity to understand treatment plans and recovery plans,
(i) people with a mental illness or mental disorder should be informed of their legal rights and other entitlements under this Act and all reasonable efforts should be made to ensure the information is given in the language, mode of communication or terms that they are most likely to understand,
(j) the role of carers for people with a mental illness or mental disorder and their rights under this Act to be kept informed, to be involved and to have information provided by them considered, should be given effect.

105 Objectives of New South Wales public health system
(cf 1990 Act, s 6)

The objectives of the New South Wales public health system under this Act in relation to mental health services are to establish, develop, promote, assist and encourage mental health services that:

(a) ensure that provision is made for the care, treatment, control and rehabilitation of persons who are mentally ill or mentally disordered, and

(b) promote the establishment of community mental health services for the purpose of enabling the treatment in the community wherever possible of persons who are mentally ill or suffering from the effects of mental illness or who are mentally disordered, and

(c) develop, as far as practicable, standards and conditions of care and treatment for persons who are mentally ill or mentally disordered that are in all possible respects at least as beneficial as those provided for persons suffering from other forms of illness, and

(d) take into account the various religious, cultural and language needs of those persons, and

(e) are comprehensive and accessible, and

(f) permit appropriate intervention at an early stage of mental illness, and

(g) assist patients to live in the community through the provision of direct support and provide for liaison with carers and providers of community services.

4. MY APPOINTMENT AND TRANSITION

The process of being appointed to the MHRT.

From District Court Judge to MHRT.

From one of 70 plus judges doing civil and or criminal work to one of 30 full time staff and 150 part time members.

Schedule 5 Provisions relating to members of Tribunal

5A Appointment of judge as President not to affect tenure etc

(1) The appointment of a person who is the holder of a judicial office as a President, or service by a person who is the holder of a judicial office as a President, does not affect the person's tenure of that judicial office or the person's rank, title, status, precedence, salary, allowances or other rights or privileges as the holder of that judicial office.

(2) For all purposes, the person's service as a President is to be taken to be service as the holder of that judicial office.

(3) This clause extends to any person who, at the commencement of this clause, is a current President and the holder of a judicial office.

(4) In this clause, judicial office means an office of judge but does not include an office of acting judge.

From the city to Gladesville.

A campus at Gladesville. Slides 14-15

From "Judge" and "Your Honour" to "Richard".

"From the Bench to the Table

Sitting with Others.

1. *Sitting with others is new. I am used to running the show myself. I ask all the questions, formulate the issues, decide which way to go and articulate the reasons; or in other cases start on the writing of reasons and let the decision emerge. This is a*

process that may take minutes from the Bench, over lunch in my chambers or over weeks or months in chambers, at home, in cafes and aeroplanes. But it is all up to me: my perceptions, my observations, my analysis and my understanding of the case.

2. *Now I usually sit with others. (I say 'usually', because lawyers sit alone on Mental Health Inquiries.) When I do sit with others, they are not lawyers. The niceties of statutory interpretation are lost on them. (That does me good.) They are extra pairs of eyes and ears, perceptions and opinions. They are sources of relevant expertise I do not have. They ask questions I have not thought of. It takes a little getting used to, but I come to appreciate that my task is shared.*

3. *There is another aspect of sitting with others. I am used to being in charge and making the call on what is happening. I am used to cross examination and the discomfort that may cause a witness. Provided the questions are allowable, then the discomfort comes with the territory. But in one case, I allowed the patient to cross examine the treating psychiatrist. Well, I thought to myself, this is what the Tribunal is all about. Every few months the patient's case is reviewed. The idea is that the patient can find out about their treatment and progress. It can be examined and challenged if need be. The doctor is answerable. What I didn't realise was that the patient was becoming more and more mentally unstable as his cross examination proceeded. He was unravelling. The psychiatrist and psychologist sitting with me could see that happening. They whispered to me to stop it. No I said, it is all just cross examination. When I checked later by asking one of my Deputy Presidents to review the tape, I found that my colleagues were right and I was wrong. There was a dimension to cross examination I was unaware of in this context.*

Informality

4. *I don't think anyone in court has called me "Richard". But at the Tribunal I introduce my self as "Richard Cogswell" and sometimes a patient will say "G'day Richard". In court I am literally elevated and alone. In the Tribunal, I am sharing a table and over the table is the patient and their treating team as well as friends and relatives, all at eye level and almost within touching distance.*

Caseload.

5. *At the Tribunal I can find myself dealing with half a dozen to a dozen cases a day, depending on the jurisdiction. I am used to this from sitting as a Judge on circuit or indeed on Civil Motions Day or Short Matters Days in crime. As a judge I was used to providing as much time as I personally needed to hear a particular case. There was obviously some expectation that I should try to finish as much as was allocated to me but that expectation was a little removed. Here I find that such considerations are more direct. My giving myself lots of time to hear one case impacts on other cases that the Registrar can list. The sense of responsibility is closer at hand and more direct than indirect.*

***Staff**.*

6. *I went from having a staff of one (my associate) to a full time staff of about 30 and a part time sessional staff of about 150, mostly professional members."*

5. ISSUES OF POLICY/"STAKEHOLDERS"/DAILY TELEGRAPH ATTENTION/ THE REVIEW

Terms of reference of the review Slides 16-20

The review will consider and make such findings and recommendations for administrative, procedural or legislative change as it considers appropriate regarding:

- *whether decisions by the Mental Health Tribunal on leave and release in forensic cases strike an appropriate balance between the interests of community safety, victims (including the families of victims) and the care and treatment needs of forensic patients, having regard to matters including, but not limited to:*
  - *the information available to the Tribunal and the method adopted to assess and determine questions of risk of harm (to victims and their families, to the community and to patients)*
  - *the legislative test for leave and release in the Mental Health (Forensic Provisions) Act 1990, tribunal interpretation of the test and similar tests relied on in comparable jurisdictions*
  - *the methods available for supervising forensic patients whilst on leave and release*
- *options to improve the engagement of victims with the Mental Health Tribunal, including in relation to information available to victims, the mechanisms for victims to be heard by the Tribunal when considering the leave or release of a forensic patient, and support services*
- *whether the policy objectives for prohibiting the publication of the name of any person in relation to a forensic matter before the Tribunal remain valid*
- *whether the criteria used to recruit members of the Mental Health Tribunal are appropriate.*

Slides 21 – 63 Sections of the Acts

11-19 here

6. TYPICAL DAYS IN MENTAL HEALTH INQUIRIES, CIVIL REVIEWS AND FORENSIC REVIEWS

7. WHAT'S THE LAW? WHAT ARE THE STATUTORY CRITERIA?

Part 5 Forensic patients and correctional patients
Division 1 Preliminary
40 Objects

The objects of this Part are as follows:

(a) to protect the safety of members of the public,

(b) to provide for the care, treatment and control of persons subject to criminal proceedings who are suffering from a mental illness or mental condition,

(c) to facilitate the care, treatment and control of any of those persons in correctional centres through community treatment orders,

(d) to facilitate the provision of hospital care or care in the community through community treatment orders for any of those persons who require involuntary treatment,

(e) to give an opportunity for those persons to have access to appropriate care.

Note.
Section 68 of the Mental Health Act 2007 sets out general principles with respect to the treatment of all people with a mental illness or mental disorder.

Division 2 Forensic patients
Subdivision 1 Review of forensic patients by Tribunal
43 Criteria for release and matters to be considered by Tribunal

The Tribunal must not make an order for the release of a forensic patient unless it is satisfied, on the evidence available to it, that:

(a) the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and

(b) other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.

Note.
See section 74 for matters that the Tribunal must consider in deciding what orders to make under this Part. Section 75 sets out conditions that may be imposed on release.

Subdivision 2 Leave of absence
49 Tribunal may grant leave

(1) The Tribunal may make an order allowing a forensic patient to be absent from a mental health facility, correctional centre or other place for such period and subject to such terms and conditions, if any, as the Tribunal thinks fit.

(2) An order may be made on the application of the patient or on the motion of the Tribunal.

(3) The Tribunal must not make an order allowing a forensic patient to be absent from a mental health facility, correctional centre or other place unless it is satisfied, on the evidence available to it, that the safety of the patient or any member of the public will not be seriously endangered if the leave of absence is granted.

(4) This section does not prevent leave of absence being granted to a forensic patient detained in a correctional centre under any other Act or law.

(5) The section has effect despite the Crimes (Administration of Sentences) Act 1999.

74 Matters for consideration

Without limiting any other matters the Tribunal may consider, the Tribunal must have regard to the following matters when determining what order to make about a person under this Part:

(a) whether the person is suffering from a mental illness or other mental condition,

(b) whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm,

(c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration,

(d) in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release,

(e) in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody.

35 Purpose and findings of mental health inquiries
(cf 1990 Act, ss 50–52)

(1) The Tribunal when holding a mental health inquiry is to determine whether or not, on the balance of probabilities, the assessable person is a mentally ill person.

(2) For that purpose, the Tribunal is to do the following:

(a) consider the reports and recommendations of the authorised medical officer and other medical practitioners who examined the person under section 27 after the person's detention,

(b) consider any other information before the Tribunal,

(c) inquire about the administration of any medication to the person and take account of its effect on the person's ability to communicate,

(d) have due regard to any cultural factors relating to the person that may be relevant to the determination,

(e) have due regard to any evidence given at the inquiry by an expert witness concerning the person's cultural background and its relevance to any question of mental illness.

(2A) As soon as practicable after the beginning of a mental health inquiry, the Tribunal must ask the assessable person whether the person:

(a) has been given a written statement, in the prescribed form, of the person's legal rights and other entitlements, as required by section 74, and

(b) has been informed of the duty imposed under section 76 on the authorised medical officer relating to the giving of the notice specified in that section.

(2B) As soon as practicable after the beginning of a mental health inquiry, the Tribunal must ascertain from the authorised medical officer whether the written statement and notice referred to in subsection (2A) have been given or all such things as are reasonably practicable have been done to give that statement or notice, as the case requires.

(3) If the Tribunal is not satisfied, on the balance of probabilities, that an assessable person is a mentally ill person, the Tribunal must order that the person be discharged from the mental health facility.

(4) The Tribunal may defer the operation of an order for the discharge of a person for a period of up to 14 days, if the Tribunal thinks it is in the best interests of the person to do so.

(5) If the Tribunal is satisfied, on the balance of probabilities, that an assessable person is a mentally ill person, the Tribunal may make any of the following orders:

(a) an order that the person be discharged into the care of a designated carer or the principal care provider of the person,

(b) a community treatment order,

(c) an order that the person be detained in or admitted to and detained in a specified mental health facility for further observation or treatment, or both, as an involuntary patient, for a specified period of up to 3 months, if the Tribunal is of the opinion that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available or that for any other reason it is not appropriate to make any other order under this subsection.

37 Reviews of involuntary patients by Tribunal

(1) The Tribunal must review the case of each involuntary patient as follows:

(a) at the end of the patient's initial period of detention as a result of a mental health inquiry,

(b) at least once every 3 months for the first 12 months the person is an involuntary patient,

(c) at least once every 6 months while the person is an involuntary patient after the first 12 months of detention.

(1A) The Tribunal may review the case of an involuntary patient at such other times as it sees fit.

(2) An authorised medical officer must cause an involuntary patient to be brought before the Tribunal:

(a) as soon as practicable before the end of the initial period of detention, if it appears to the officer that the person should continue to be detained, and

(b) at such other times as may be required by the Tribunal for the purposes of any review under this section.

(3) The authorised medical officer must ensure that, as far as practicable, a person brought before the Tribunal is dressed in street clothes.

(4) Despite subsection (1) (c), the Tribunal may review the case of an involuntary patient at intervals of up to 12 months if it is of the opinion that it is appropriate to do so.

38 Purpose and findings of reviews of involuntary patients

(1) The Tribunal is, on a review of an involuntary patient, to determine whether the patient is a mentally ill person for whom no other care (other than care in a mental health facility) is appropriate and reasonably available.

(2) For that purpose, the Tribunal is to do the following:

(a) consider any information before it,

(b) inquire about the administration of any medication to the patient and take account of its effect on the patient's ability to communicate.

(3) If the Tribunal determines that the patient is not a mentally ill person, the patient must be discharged from the mental health facility in which the patient is detained.

(4) If the Tribunal determines that the patient is a mentally ill person and that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient, the Tribunal must make an order that the patient continue to be detained as an involuntary patient in a mental health facility for further observation or treatment, or both.

(5) In any other case that the Tribunal determines that a patient is a mentally ill person, it must make an order that the patient be discharged from the mental health facility in which the patient is detained and may make any of the following orders:

(a) an order that the patient be discharged into the care of a designated carer or the principal care provider of the person,

(b) a community treatment order.

(6) The Tribunal may defer the operation of an order for the discharge of a patient for a period of up to 14 days, if the Tribunal thinks it is in the best interests of the patient to do so.

(7) An order made by the Tribunal under this section is to be in the form approved by the President.

8. QUESTIONS AND/OR HYPOTHETICALS FOR SMALL GROUP DISCUSSION OR PRESENTATION OF PRO AND CON ARGUMENTS