MHRT Review

NSW Ministry of Health, North Sydney

7 Sept 2017

1. Do current law and operational processes and procedures of the Tribunal regarding leave and release decisions appropriately balance community safety, interests of victims, and the care and treatment needs of forensic patients?

- Conditions are strict and can be tailored to the individual case – list included in s74 of the *Mental Health (Forensic Provisions) Act* 1990 is non-exhaustive
- Leave and release restricted to small no. – 35% or less of total FP
- 'Registered victims' can make submissions/give evidence and request non-association condition or place restriction condition on the release of the FP;
- Release only available where it can be established that it will not present a serious danger to the public or the FP: the test is 'the safety of the person or any member of the public will not be seriously endangered' by the grant of leave (s43 *Mental Health (Forensic Provisions) Act* 1990).
- *State of NSW v XY* [2014] NSWCA 466: this test has been interpreted to require consideration of both gravity of potential harm and likelihood (where gravity is higher, likelihood less significant).
- Test is a strict one: presumption is detention and positive test must be satisfied (presumption is for release in other jurisdictions).
- Leave is essential for rehabilitation – support and care and recovery

Approach in other jurisdictions:

ACT: ACAT can make orders for release subject to any conditions it considers appropriate
Cth: AGs power
NSW: as above
NT: Only court can vary supervision orders (ODPP applies to court)
QLD: Mental Health Tribunal interacts with Mental Health court
TAS: individuals subject to supervision by Chief Forensic Psychiatrist
VIC: Forensic Leave Panel governs detention management and release of FPs; FPs not eligible for non-custodial order unless they have completed an extended period of leave granted by a court, and complied with the conditions of that leave
WA: As a matter of practice, Mentally Impaired Accused Review Board requires 'staged' process prior to making an unconditional release order

- Lay people don't understand mental health or the system
- Problems with court process spill over into the MHRT (including NGMI)
- Govt. considering 'Guilty but not responsible' – 'accountability'? (to manage illness into the future)

- Explaining the NGBI verdict via ODPP
- Risk assessments: what support structures in place?
- 'Unacceptable risk': limiting terms with extensions; application bought by AG (preventive detention expanding) – too easy to meet
- UTP report from VIC – published today
- MHRT is conservative – more conservative than clinicians
- Tribunal disagrees with recommendations from clinicians 'adventurism'
- MHRT attempt to put time limit on order for compliance – may disadvantage other FPs – response to resource problem
- System aspires to 'least restrictive' options
- Ministers have taken a more interventionist role with government lawyers questioning experts as well as just making submissions and objecting to decisions to grant leave – MHRT functioning as an adversarial organ – not appropriate
- MHRT must remain non-adversarial to get through its case load
- But advocacy could be stronger
- FP can make an application for leave and release but it comes from the treating team: MHRT ask FP views
- Victim/offender separation not clear cut – FPs are victims too

Submission:

Current processes and procedures of the Tribunal regarding leave and release decisions do appropriately balance community safety, interests of victims, and the care and treatment needs of forensic patients. Release only available where it can be established that it will not present a serious danger to the public or the FP: the test is 'the safety of the person or any member of the public will not be seriously endangered' by the grant of leave (s43 *Mental Health (Forensic Provisions) Act* 1990). The test is a strict one: presumption is detention and positive test must be satisfied (I note that the presumption is for release in other jurisdictions). Leave and release restricted to small no.s – 35% or less of total forensic patient population. Conditions are strict and can be tailored to the individual case (s74 of the *Mental Health (Forensic Provisions) Act* 1990). 'Registered victims' can make submissions/give evidence and request non-association condition or place restriction condition on the release of the forensic patients. Most importantly, leave is essential for rehabilitation, and the MHRT must support and care and recovery of forensic patients. The system will not be made safer by overly restricting leave and release options.

2. Are there options that can improve victim engagement with the Tribunal?

- 243 registered victims for 117 FPs
- Victims can select the degree of information they receive from MHRT
- Support person can be present at hearings on behalf of victims (victim can be present via video link)
- Registered victims can attend hearings as observer/to give evidence when they have asked for non-intervention order, but cannot cross-examine a person appearing before the MHRT
- Countervailing concern is the privacy of FPs – NSWLRC recommended balancing these issues must be decided on a case-by-case basis.
- Victims rights governed by practice of the MHRT not legislation – NSWLRC did not recommend any changes to current practice
- *Mental Health (Forensic Provisions) Act* 1990 does not focus on victims but on members of the public and care/treatment of patients
- Specialist forensic victims service might be useful to MHRT (providing tailored support, drafting resource guide for victims).
- Additional rights for victims? (eg automatic notification when FP moves to less secure facility as per QLD).

- VISs – after plead accepted or verdict issued – and to be forwarded to MHRT
- QLD model: state run agency for victim support
- Victims may need treatment themselves – educational package for courts etc for mental illness might play for victims
- People with cognitive impairment
- Victims may come from within closed environments etc may not be able to access the system for victims (gender, Aboriginality, disadvantage etc)
- Impact of NDIS
- Situational and relational nature of victims relation with FP
- Absence of resources
- Clue is support of individuals
- When and how victims are engaged is the process, not degree of involvement
- Victims can provide valuable historical background to MHRT and to clinical team
- Is enough done for people to have opportunity to register as a victim?
- Human rights standards – UN Convention on People with Disability
- Public perceptions – may not be based on good knowledge – not a basis for reform

Submission:

Victim engagement with the Tribunal is generally good, but more could be done to assist victims to understand the forensic system. A specialist forensic victims service, along the lines of the model in place in Queensland, might be useful to MHRT

(providing tailored support, drafting resource guide for victims) and victims. This service would improve resources available to victims and is likely to be of more assistance than additional rights for victims such as automatic notification when a forensic patient moves to less secure facility, where the countervailing concern with the privacy of forensic patients must be borne in mind.

When and how victims are engaged in the forensic system, rather than the degree of involvement, is what matters most. Victims may come from within closed environments etc may not be able to access the system for victims (due to exclusions based on gender, Aboriginality, ability, disadvantage etc). More may be done to assist people to have opportunity to register as a victim, with additional resources in the form of administrative and support services. Victims can provide valuable historical background to MHRT and to clinical team, and also need support themselves as the victims of criminal conduct.

The forensic system aspires to 'least restrictive' options for forensic patients to aid their treatment, and to protect the public at the same time. This is appropriate and consistent with Australia's obligations under the United Nations Convention on the Rights of People with Disability. The way the balance must be struck must be decided on a case-by-case basis, and it would not be desirable to impose necessarily generic restrictions on the supervision of forensic patients in the community to address fear of crime.

3. Do the policy objectives prohibiting the publication of the name of any person in relation to a matter before the Tribunal remain valid?

- Starting position is the non-publication of names of anyone who comes before the MHRT (s162 Mental Health Act)
- MHRT can consent to publication of a name – attitude of person involved is considered but not determinative
- Non-publication is an essential aspect of the operation of the MHRT – S162 is a 'protective mechanism' (p19).
- This must be balanced with principles of justice requiring transparency: the balance is struck by providing for open hearings
- Health privacy; reports are not shared with patients

4. Are the criteria used to recruit members of the Tribunal appropriate?

- Three categories of members: (1) Australian legal practitioners; (2) psychiatrists and (3) other suitably qualified members
- President or Deputy President must have been judge or be eligible to be appointed as a Judge.
- Recruitment process seems appropriate
- Tough to recruit psychiatrists as the renumeration is not there for practioners so people are often semi-retired
- Different sets of eyes are looking at the one case
- Lay members: other professionals eg social workers
- Some lay members have lived experience
- Is the process of selection transparent?
- More clarity around the third member?

Anthony Whealy:

- Newspaper articles have triggered the Review
- Minister becoming more interventionist