

**THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH
REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR
DESMOND COLLIE AUTHORISED BY THE PRESIDENT OF THE
TRIBUNAL ON 19 APRIL 2017**



This is an edited version of the Tribunal's decision. The patient has been allocated a pseudonym for the purposes of this Official Report

FORENSIC REVIEW: Desmond Collie

s46(1) Review of forensic patients
Mental Health (Forensic Provisions) Act 1990

TRIBUNAL: Richard Cogswell SC President
Janelle Miller Psychiatrist
Sally McSwiggan Other Member

DATE OF HEARING: 3 February 2017

PLACE: MHRT Conference Room

APPLICATION: That the former Minister's undated request made in early November 2016 not be taken into account in determining whether or not to grant escorted day leave to Mr Collie to the LGA

DECISION

The Tribunal determined that it was appropriate to grant the application made on behalf of Mr Collie that the medical superintendent may not have regard to the former Minister's letter in exercising his decision to allow Mr Collie the extended leave granted by the Tribunal.

In addition, the medical superintendent must have regard to the fact that the Tribunal has already determined that the extended leave will have therapeutic value for Mr Collie.

Signed

His Honour Judge Richard Cogswell SC
President
Dated this day 7 February 2017

REASONS

1. This is the 15th review of Desmond Collie who is currently detained in Hospital with access to escorted day leave restricted to the Local Government Area. At this review, Desmond Collie, through his lawyer, is seeking an order that the former Minister's undated request not be taken into account in determining whether or not to grant escorted day leave to Mr Collie to the LGA.
2. ...

BACKGROUND

3. Mr Collie was found not guilty by reason of mental illness ...

TRIBUNAL REQUIREMENTS

4. This is a review pursuant to section 46(1) of the *Mental Health (Forensic Provisions) Act 1990* ("the Act"). Under section 46 the Tribunal is required to review the case of each forensic patient every six months. On such a review the Tribunal may make orders as to the patient's continued detention, care or treatment or the patient's release.
5. The Act has special evidentiary requirements in relation to leave or release which must be satisfied before the Tribunal can grant leave or release. In view of this, the Tribunal requires notice of applications for leave or release to ensure that the necessary evidence is available.
6. This process also enables the Tribunal to provide notice of such applications to the Minister for Health, the Attorney General, and any registered victims who are entitled to make submissions concerning any proposed leave or release. A notice was provided to the Tribunal prior to this review advising the Minister of Mental Health and the Attorney General that the review would be limited to seeking orders that the former Minister's undated request not be taken into account in determining whether or not to grant Mr Collie escorted day leave to the Local Government Area.
7. Without limiting any other matters the Tribunal may consider, the Tribunal must consider the principles set out in section 40 of the Act and section 68 of the *Mental Health Act 2007* as well as the following matters under section 74 of the Act when determining what order to make:
 - (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)

(e)

DOCUMENTARY EVIDENCE

8. The Tribunal considered documentary material and reports, an exhibit list of which is held on the Tribunal's files

ATTENDEES

9. Desmond Collie attended the hearing by videolink and was represented by his lawyer of the Mental Health Advocacy Service. Also in attendance were:
- Psychiatrist (by videolink)
 - Medical Superintendent (by videolink)
 - Area Clinical Director (by telephone)
 - Clinical Nurse Consultant (by videolink)
 - Registered Nurse (by videolink)
 - VOCAL
 - 3 x observers

PRESENT CIRCUMSTANCES

Mr Collie's application

10. In his helpful written submissions the Solicitor for Mr Collie, sought on behalf of his client "orders or directions that the Minister's undated request and letter may not be taken into account by the Medical Superintendent or his delegate in determining whether or not to granted escorted day leave to the Local Government Area".

Reports

11. There was a report from the treating psychiatrist who is also the Clinical Director of the Forensic Unit at the Hospital. He reported that "Mr Collie's condition remains very stable". He recorded that it was the opinion of the treating team (as well as an independent psychiatrist – see at [13] below) "that it is safe for Mr Collie to exercise escorted day leave in the LGA". He said that there are "no clinical grounds for continuing to withhold escorted day leave". Indeed, "continuing to withhold this leave is prejudicing Mr Collie by delaying his recovery and limiting his capacity to fully engage in his recovery program". The treating team will re-instate the escorted day leave "as soon as it is authorised to do so by the medical superintendent".
12. In a nursing report the RN noted that "Mr Collie's overall clinical risk is currently considered low as he is currently in remission in a controlled environment". He is fully compliant with medication and has insight into his illness and need for abstinence. He is participating in programs and courses. On behalf

of the nursing staff, it was the recommendation that “Mr Collie’s current leave provisions are re-instated back to escorted leave to the CBD for the purposes of shopping, recreational and leisure activities based on his continued ongoing assessment of low risk by the Treating Team”.

13. Included amongst the papers was the report provided by a psychiatrist. He was the psychiatrist engaged on behalf of the then Minister for Mental Health late last year to provide an independent opinion. The psychiatrist provided a report noting the concerns “that leave and transfer may have been progressed too early in this case”. He expressed the opinion that there is significant evidence that the time required to address the relevant risk factors in this case has been achieved”. Any faster progress in Mr Collie’s case “is due to the individual risk factors in this case responding to interventions, rather than undue haste”. He thought that appropriate monitoring is in place “and leave can be halted or slowed if required”. He thought “Mr Collie would fall into a group of persons with a risk of offending while on escorted day leave that is low due to sustained effective treatment and monitoring of his major mental illness”.

Correspondence

14. The letter referred to in Mr Collie’s application was from the then Minister for Mental Health (the Hon Pru Goward MP) to the Registrar of the Mental Health Review Tribunal. The letter is undated but was apparently sent in early November. She expressed “ongoing concerns regarding Desmond Collie’s risk to the safety of the public” and advised the Registrar that she was seeking “an independent clinical review of Mr Collie’s care”. (The report of the psychiatrist referred to at [13] above comprised that review.) The Minister went on to advise that once she had the report she would “consider whether further action is required including whether to seek a further review of Mr Collie”. She asked the Registrar that “due to these concerns, the Medical Superintendent ceases leave to the Local Government Area until the review is complete”.
15. The Registrar of the Tribunal responded by letter that it will be “a matter for the Medical Superintendent at the Hospital to determine if access to this leave should cease pending the independent clinical review you have requested”.

A change in Ministers

16. Following the resignation of the NSW Premier, a new Premier was sworn in. All Cabinet positions were then vacated. Premier Berejiklian appointed the Hon Tanya Davies as the new Minister for Mental Health.

The listing of this hearing

17. This hearing was listed at short notice at the request of Mr Collie’s solicitor. Efforts were made to obtain an appearance on behalf of the new Minister for Mental Health. Regrettably, but understandably, this

was not possible because the new Minister had just been sworn in and was not yet in a position to provide instructions.

18. The Tribunal determined to proceed in any event. This was because of the risk that further uncertainty about Mr Collie's leave could compromise its therapeutic value. It also put at risk Mr Collie's opportunity to advance his case at future reviews by pointing to the exercise of his extended leave.

The Hearing

19. The Medical Superintendent at the Hospital acknowledged that he had directed that the extended leave not be given to Mr Collie because of the Minister's letter. There had been no other request apart from that letter. He was aware that the treating team thought that the leave should be given. Asked by Mr Collie's solicitor what he would do if the Tribunal directed him not to take into account the former Minister's letter in exercising his discretion on leave, he responded that he would seek a legal opinion from the Ministry of Health. Cross examined about the reasons for needing such advice, he said that he has to take notice of the Minister. He is not a lawyer and queried whether he is allowed to ignore the Minister's wishes. He appreciated that the new Minister had not had an opportunity to consider this case. He agreed that clinical considerations concerning leave were a matter for the treating team. Asked by me where he regarded the Tribunal in the hierarchy, he acknowledged that that was a difficult question. He confirmed his respect for the Tribunal but acknowledged his view that there is a need for checks and balances. He felt a little like the "meat in the sandwich" with the Tribunal on one side and the Minister on the other. He would prefer to err on the side of caution and seek advice. If the advice was that he could grant leave with such a restriction then he would proceed. Asked about the alternative application made on behalf of Mr Collie that the discretion be transferred to the treating team, he said that he would not be offended. However, he would like to be reassured that such a transfer of the discretion would be "legal". He acknowledged in response to a question from Tribunal member Dr Miller that as medical superintendent he was also responsible for the hospital as a whole as well as the decisions of the treating team.
20. The treating psychiatrist was asked his attitude to discretion being transferred to the treating team for leave for Mr Collie. He said that he would be comfortable with that provided the Medical Superintendent agreed and provided the Area Clinical Director agreed.
21. The Tribunal President telephoned the Area Clinical Director who informed him that he could not provide that agreement on the spot during that phone call but would need to consider the position.
22. At that stage we adjourned the proceedings so that the Area Clinical Director could complete his appointments. (The phone call to him was made without notice.)

23. After resuming, the treating psychiatrist recounted that he had spoken to the Area Clinical Director during the adjournment. The Area Clinical Director's position was that he was not comfortable with the discretion being transferred to the treating team this afternoon but would need time to consider its implications and also to seek legal advice. He was not willing to endorse the plan this afternoon. The treating psychiatrist confirmed that he himself was not willing to proceed as the holder of the discretion without the agreement of the Area Clinical Director.

Victim's question

24. There were three victims present during the morning's proceedings. They asked not to be identified publicly. One of the victims who returned for the afternoon proceedings acknowledged that it was good to have checks and balances and that the boxes should be ticked before leave extended. That victim acknowledged feeling safer having another check and balance such as the Minister and that the medical superintendent should be following the law. That victim was concerned that the Minister may lose her power.

25. On behalf of the Tribunal the President assured that victim that any order made by the Tribunal today could be reviewed in the future by the new Minister by an application on her part. The President acknowledged the reasonable expression of concerns on behalf of that victim.

A way ahead

26. The Tribunal formed that view that they would be in favour of Mr Collie's primary application to direct the medical superintendent not to take into account the former Minister's letter. Mr Collie's solicitor said that he would have nothing to say against that position. The Tribunal proceeded to make an order to that effect.

27. The Tribunal then asked the medical superintendent to obtain from the Ministry of Health that afternoon the advice that he said he would need before feeling ready to comply with such an order. The Tribunal provided the name of a lawyer in the Ministry of Health and that lawyer's telephone number. The Medical Superintendent said that he would make the telephone call.

28. The Tribunal resumed and the medical superintendent said that he had spoken to another lawyer in the Ministry of Health (the first lawyer was not available). He received advice from that lawyer that because the Minister had changed, the former Minister's letter could be disregarded. He told the Tribunal that he was advised that he could go ahead with the Tribunal decision. He told the Tribunal the advice was that if the new Minister wanted a fresh review then she can seek one. The medical superintendent said that he was happy to approve the extended leave ordered last year by the Tribunal, given the advice that he had received.

29. The treating psychiatrist checked whether the medical superintendent might want the order made by the Tribunal this afternoon in writing. The medical superintendent asked the Tribunal whether he could act on the order given verbally this afternoon by the Tribunal. The Tribunal said that he was able to act on that order and he agreed that he would not take into account the former Minister's letter in considering any application made by the treating team.

Consideration

30. In the Tribunal's opinion, it was no longer relevant for the medical superintendent to take into account the former Minister's letter. Even in its own terms, the former Minister's request was that the extended leave be ceased "until the review is complete". The review of the (independent) psychiatrist was complete and that psychiatrist confirmed that the extended leave was appropriate.
31. In addition, the Tribunal respectfully differs from the medical superintendent's view that he should consider the authority of the Minister as a relevant consideration to granting extended leave. In saying that, the Tribunal can understand where the medical superintendent is coming from; but it is the Tribunal that has made the final determination and that determination is legally binding on him. It was made after hearing from the Minister. Not only that, the Minister has not yet exercised her right to appeal from the Tribunal's decision of last year.

Some general observations

32. This case provides an opportunity for the Tribunal to make some observations about the apparent dilemma the medical superintendent found himself in. From the Tribunal's point of view, there was no dilemma. There was an order of the Tribunal and discretion vested in medical superintendent. The former Minister's letter was not a relevant consideration for him in exercising that discretion.
33. Again, the Tribunal expresses this opinion respectfully. The medical superintendent is an experienced psychiatrist, not a practising lawyer. What is clear to a lawyer may not be so clear to a non-lawyer, especially in a hierarchical context where powers are vested in various office-holders and institutions. The Minister for Mental Health and the Mental Health Review Tribunal are two examples. The medical superintendent's decision to err on the side of caution is understandable in the circumstances.
34. This is not the only case where orders of the Tribunal have been delayed in their implementation or temporarily discontinued because of uncertainty about the law on the part of those charged with implementing the orders. This too is understandable. Some of the cases dealt with by the Tribunal are particularly difficult and the Tribunal's decisions are potentially controversial.
35. However, the orders made by the Tribunal should be put into effect according to their terms as soon as practicable. The Tribunal relies on that occurring unless it is told otherwise.

36. Sometimes, of course, the Minister may exercise the right of appeal from the Tribunal's orders. It is important to appreciate that those orders remain valid and enforceable in such circumstances, unless the Minister obtains from the Tribunal or the Court a suspension of the Tribunal's orders pending the outcome of the appeal. The Tribunal understands that the Minister needs to take advice and is allowed by law a period within which to lodge an appeal. Nevertheless it expects the orders to be implemented in the meantime by those responsible for doing so. If there is a concern about implementing the orders pending the appeal, then the appropriate course is a suspension application by the Minister
37. Other delays may be unconnected with any appeal process by the Minister. For example, there will be some cases where there are practical or logistical problems. If such problems delay the implementation of the Tribunal's orders, the Tribunal should be notified immediately. There may be other cases - again, unconnected with any appeal by the Minister - where the person responsible for implementing the Tribunal's orders wishes to seek their own advice about the validity or terms of the orders. This is understandable; but there should be minimal delay in seeking that advice. It needs to be obtained within hours or a day or two of the issue arising, not weeks. If the delay will be greater than one or two days, then the Tribunal should be told. It needs to know about the fact that there is a delay and how long it is expected to be. This enables the Tribunal to allow for the delay or to fix another review urgently to hear from the parties.

Conclusion

38. For these reasons the Tribunal determined that it was appropriate to grant the application made on behalf of Mr Collie that the medical superintendent may not have regard to the Minister's letter in exercising his discretion to allow Mr Collie the extended leave granted by the Tribunal. In addition, he must have regard to the fact that the Tribunal has already determined that the extended leave will have therapeutic value for Mr Collie.

Signed

His Honour Judge Richard Cogswell SC
President

Dated this day 7 February 2017