THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR RESINOVIC AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 23 DECEMBER 2015

Mental Health Review Tribunal

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

TRIBUNAL MEMBERS:

Anina Johnson Lawyer member

REVIEW: Consideration of the Attorney General's request to participate in the review to be conducted under s. 37 *Mental Health Act 2007* on 3 September 2015

DATE AND PLACE OF HEARING:

14 August 2015, MHRT Conference Room

PRESENT AT THE HEARING:

- Robert Montgomery, counsel for Mr Resinovic, instructed by Todd Davis and Robert Wheeler of Legal Aid NSW
- David Kell, counsel for the Attorney General, instructed by Dana McMullen of the Crown Solicitor's Office

REASONS FOR DECISION

Summary

1. Mr Resinovic is an involuntary patient who has been detained at the Forensic Hospital under the *Mental Health Act 2007* ("the MHA") since March 2011. Tribunal is required to conduct regular reviews of involuntary patients and decide whether the person should continue to be detained as an involuntary patient.

2. Mr Resinovic is also subject to an Extended Supervision Order under the *Crimes (Serious Sex Offenders) Act 2006* (which is now known as the *Crimes (High Risk Offenders) Act 2006*). This order is suspended while Mr Resinovic is in lawful custody, which includes detention as an involuntary patient under the MHA: Orders 3(a) and (b). The Attorney General is the Minister responsible for administering the *Crimes (High Risk Offenders) Act 2006*.

3. The Attorney seeks to appear at the next Tribunal review under s. 37 of the MHA to:
   a) provide factual assistance in relation to the implementation of the Extended Supervision Order;
   b) ask questions of witnesses with the Tribunal's leave; and
   c) make legal submissions, again with the leave of the Tribunal.

4. Mr Resinovic says that the Attorney may only provide factual assistance. Through his counsel, Mr Montgomery, he says that the Tribunal does not have the power to allow the Attorney to ask questions of witnesses or make legal submissions.

5. I consider that the Tribunal does have the power to allow a person in the Attorney's position to participate in a review hearing by asking questions of witnesses and making legal submissions. However, participation in this way will only be appropriate in highly unusual circumstances. If the Tribunal requires assistance with difficult matters, the preferable course is to appoint a person to assist it under s. 151(1) of the MHA. In the circumstances of Mr Resinovic's next Tribunal review, I consider that it is not appropriate for the Attorney General's representatives to be allowed to ask questions of witnesses or make legal submissions.

Can the Tribunal allow the Attorney General to appear?

6. The Tribunal is a creature of statute, and its jurisdiction is limited to the powers which are expressly conferred upon it, or which are necessarily implied from the grant of those express powers: see for example *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1 per Dawson J at [21] (with whom Mason CJ, Toohey J agreed).

7. Both parties agreed that the Attorney General has no express right to appear before the Tribunal when the Tribunal is exercising its jurisdiction under the MHA.

8. The Attorney General says that the Tribunal's powers to conduct its proceedings are expressed in sufficiently broad terms that it could allow the Attorney to ask questions of witnesses or make legal submissions, if the Tribunal considered that it would be helpful on a particular occasion.

9. The Tribunal's proceedings are intended to be flexible. Section 151(1) of the MHA relevantly provides:

> "Meetings of the Tribunal are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act …. and as the proper consideration of the matters before the Tribunal permit." It was agreed by the parties that the use of the word "meeting" in s. 151(1) would encompass a review hearing under s. 37 MHA.

Section 160(1) provides:

> "Subject to this Part and the regulations, the procedure for the calling of, and for the conduct of business at, any meeting of the Tribunal is to be as determined by the Tribunal."

10. Mr Kell submitted that it would be a matter for the Tribunal on the day to decide whether or not it would be assisted by the Attorney's representative asking further questions or making legal submissions. However, he suggested that in a complicated matter, such as this one, the Tribunal may well decide that assistance from the Attorney's representative would be useful.

11. Although the powers under s. 151 and 160 are very broad in their terms, they must still be

construed in accordance with the general statutory scheme of the MHA: see for example *Project Blue Sky v ABA* [1998] HCA 28 at [69]. Counsel for Mr Resinovic submitted that scheme of the MHA does not allow for the legal representation of the Attorney at Tribunal hearings. He pointed to the following factors:

a) Sections 151 and 160 should be read in light of the objects of the Act and in particular s. 3(e) which relevantly says that the MHA is to facilitate the involvement of people with mental illness and "persons caring for them" in decisions involving appropriate care, treatment and control. Section 3(e) contemplates that only the person concerned, or those involved in caring for them (which would include both family/friends and professional staff) are entitled to be involved in the Tribunal's processes.

b) The MHA generally involves the adjudication of medical issues, on which the Attorney has no particular expertise.

c) The Tribunal is a specialist body, well equipped to decide complicated medical questions.

d) The MHA makes specific provision for rights of appearance and representation in s. 154. These are limited to the person who is the subject of the Tribunal's proceedings or a person appointed to assist the Tribunal.

e) The Attorney has no special rights or interests which will be affected by the Tribunal's review under s. 37 MHA. The effect of the Supreme Court's decision under the *Crimes (Serious Sex Offenders) Act 2006* is that once Mr Resinovic stops being an involuntary patient under the MHA, arrangements in relation to management of any risk he may pose to community safety passes to those who will be administering the Extended Supervision Order. Prior to that time, Mr Montgomery says that there is no role for the Attorney to play in monitoring Mr Resinovic's care, treatment or control.

12. As there is no statutory role for the Attorney within the MHA, Mr Montgomery says that the Tribunal has no jurisdiction to allow the Attorney to ask questions or make submissions. Mr Montgomery relied on the decision in *Corporate Affairs Commission v Bradley* [1974] NSWLR 391 at 398, saying that if the Supreme Court did not have the power to allow the Attorney General to intervene in its proceedings, then neither did the Tribunal. Mr Montgomery acknowledged that later cases had cast doubt on the correctness of the decision in *Bradley*, because the Court had not considered what was permitted by the inherent jurisdiction of the Supreme Court under s. 23 of the *Supreme Court Act 1970* : see for example *Rushby and Another v Roberts and Another* [1983] 1 NSWLR 350, 353-355.

13. It is unnecessary to trace that line of authority further, as I think that the scope of the Attorney's powers to intervene or appear as amicus curiae in other jurisdictions is a red herring. The question here is whether the Tribunal, in the exercise of its statutory powers under the MHA, is able to allow the Attorney to ask questions and make legal submissions

in a s. 37 review.

14. I also consider that Mr Montgomery's characterisation of the Tribunal's statutory role is too narrow. The Tribunal does more than decide medical issues. It is required to reach a decision on whether the statutory criteria provided for in the MHA have been met. These criteria include an assessment of whether a person has a mental illness, poses a risk of serious harm to him/herself or others and consideration of the options for less restrictive forms of care: ss 12 and 14 MHA. The obligation to consider the question of whether a person poses a risk of serious harm to others by reason of their mental illness (s. 14) necessarily includes questions of whether there is any risk posed to the public.

Providing evidence or information to the Tribunal

15. In conducting a hearing, I think that the MHA contemplates that the Tribunal is able to obtain information from whomever it considers appropriate, having regard to the individual circumstances of the person concerned. In reaching a decision on these issues the Tribunal will consider medical evidence, but is also likely to consider evidence from other health professionals, social workers, any guardian, family, friends and other people who have relevant information to provide.

16. In Mr Resinovic's case, his return to the community will be impacted upon by the Extended Supervision Order. The order provides, amongst other things, that Mr Resinovic is to reside at accommodation approved by his supervising officer and wear an electronic monitoring device. As noted above, it provides that the order is suspended whilst Mr Resinovic is an involuntary patient under the MHA. Being an involuntary patient is defined to include the use of "escorted leave from any such facility, at least in circumstances where the defendant's' freedom is directly controlled and limited." It is implicit from the terms of order 3(b) that if Mr Resinovic begins to have more extensive leave from a mental health facility, whilst still being an involuntary patient, the Extended Supervision Order and his involuntary detention may operate simultaneously.

17. If the Tribunal were to find that Mr Resinovic was not a mentally ill person, and unable to be detained as a voluntary person, then the Tribunal would need to decide whether it should order his immediate discharge, or a deferred discharge for 14 days under s. 38(3) and (6) MHA. Alternatively, if Mr Resinovic is a mentally ill person, it may be relevant for the Tribunal to consider whether there are less restrictive forms of safe and effective care which could facilitate the safe management of any risk that Mr Resinovic may pose. Given the obligations which will be imposed on Mr Resinovic when the Extended Supervision Order comes into effect, information surrounding the practical implementation of the Order may well be relevant to the Tribunal's consideration of these issues.

18. If a representative of the Attorney General is the most appropriate person to provide that information, then it is likely that the Tribunal will want to hear from the Attorney's representative at any hearing.

19. Plainly the Attorney General will not attend the Tribunal's proceedings in person, and it is expected that any information to be provided to the Tribunal would be provided through a representative. It could be that the Attorney choses a lawyer as her representative. But,

the choice of representative does not dictate the scope of that person's participation in the Tribunal proceedings.

Questioning other participants in Tribunal hearings

20. The next question is whether participants in a Tribunal hearing can ask questions of other participants. It would not usually be the case that participants or witnesses "cross-examine" one another. However, I consider that there may be circumstances where it is appropriate for participants in Tribunal hearings (such as family members) to ask questions of other participants (such as hospital staff). These questions would need to be permitted by the Tribunal on a case by case basis. The Tribunal would need to be satisfied that the questions to be asked are relevant to the statutory criteria it must consider. Allowing limited questioning and with the permission of the Tribunal is consistent with the informal and flexible approach contemplated by the MHA, particularly when it is read in light of the statutory role of primary carers and carers generally (see for example ss. 3(e), 26, 34, 43, 57(4)(b), 68(j), 78 and 101 of the MHA).

21. The situation is different if a person who seeks to ask questions is not involved in the care of the person with mental illness, in either a personal or professional capacity, but is simply attending to provide information about services. In that case, it is difficult to foresee circumstances when it might be appropriate for that person to be allowed to ask questions of other participants.

22. The Attorney General's participation falls within this second category. The Attorney General has no statutory role in determining the question of whether Mr Resinovic should remain as an involuntary patient. The Extended Supervision Order is expressed to take effect at the end of the involuntary patient order. At most the Extended Supervision Order may, at some point, operate in parallel with an involuntary patient order. While the Attorney is understandably interested in the outcome of the Tribunal's decision on whether to continue the involuntary patient order, that does not mean that the Attorney has a legal interest in the outcome of the order.

Making legal submissions

23. The right to appear through legal representatives and ask questions of other participants and make legal submissions under the MHA is limited. The person who is the subject of the Tribunal hearing is able to be represented by a lawyer under s. 154(2), (2A) and (3). No other participant has that specific statutory right. That is consistent with fact that the person who is the subject of the Tribunal proceedings has the most at stake in any Tribunal review. They may also be disadvantaged from presenting their case by the ongoing impact of a mental illness.

24. However, I do not consider that s. 154 (2), (2A) and (3) limit the circumstances in which legal representatives can appear before the Tribunal. Mr Montgomery did not suggest that s. 154 should be construed in such a narrow way. Rather, it seems to me that these provisions set out some basic rights for those who are the subject of Tribunal proceedings. The circumstances in which any other person might appear via a legal representative will need to be determined on a case by case basis, having regard to the Tribunal's broad

powers under ss. 151 and 160. There may, for example, be unusual circumstances where the hospital staff, a person's family, the Public Guardian or perhaps an applicant for a financial management order may seek to be represented by a lawyer in a review hearing conducted by the Tribunal.

25. However, the more general involvement of lawyers risks making Tribunal reviews more formal, technical and adversarial than they might otherwise be. Having regard to the Tribunal's obligations under s. 151(1), the Tribunal should be slow to allow any person, other than the person who is the subject of the review, to appear through a lawyer.

26. When deciding whether to allow other participants to be legally represented, the Tribunal will need to be satisfied that the participation of legal representatives would enhance the Tribunal's "proper consideration of the matters before it" so as to justify a departure from its usual informal procedures. Where the person seeking to appear through a legal representative has only a general "public interest" in the proceedings, rather than a personal or professional interest, then it will be vanishingly rare that it would be appropriate for that person to be allowed to make legal submissions in the substantive resolution of the Tribunal's review.

Should the Attorney General be allowed to appear at Mr Resinovic's review?

27. In the circumstances of Mr Resinovic's case, I do not think that the Attorney's representatives should be allowed to ask questions of witnesses nor make legal submissions.

28. Mr Kell suggested that the Attorney General had a particular role to play in protecting the public interest, which takes the Attorney's application beyond simply a request from an ordinary bystander to participate in the hearing. Mr Kell also submitted that Mr Resinovic's matter raises some particular factual and legal complexities. He suggested that the Tribunal might be assisted if a lawyer for the Attorney was able to ask questions and make legal submissions.

29. The answer to this argument lies in the Tribunal's power to appoint a person to assist it in hearings: s. 151(1) MHA. Where the Tribunal considers that it needs assistance, it is more appropriate to obtain that assistance from a lawyer appointed to assist the Tribunal, rather than from a person who is instructed as an advocate for a participant in the proceedings.

30. [The Tribunal canvassed one other issue, which was factually relevant to this matter only and is not included in this Official Report.]

Signed:

Anina Johnson, Deputy President

Dated: 21 August 2015