

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.

FORENSIC REVIEW: CAMPBELL [2021] NSWMHRT 3
s 90 of the *Mental Health and
Cognitive Impairment Forensic
Provisions Act 2020*

TRIBUNAL: Ms Anina Johnson Deputy President
Dr Susan Thompson Psychiatrist
Ms Vanessa Robb Other Member

DATE OF HEARING: 2021

PLACE: Mental health facility

DECISION

1. The Tribunal reviewed Mr Campbell under s 90 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* and determined that Mr Campbell is a person with a condition that can be treated in a mental health facility and who should continue to be detained at X Hospital.
2. The Tribunal was satisfied that no financial management order was required for Mr Campbell.

REASONS

1. Mr Campbell is a correctional patient, currently detained at the X Hospital. Mr Campbell was transferred to the X Hospital from a correctional centre, by order of the Secretary dated [date].
2. The question for the Tribunal is whether Mr Campbell should continue to be detained at the X Hospital, whether they should be transferred to another mental health facility or other place, or whether they should be discharged to a correctional centre.
3. The evidence at the hearing established that Mr Campbell has a long history of distressing voices which have improved with antipsychotic medication. Continuing the admission will allow the ongoing modification of his medication and discharge planning.
4. At the review, Dr A said that Mr Campbell was being treated as a voluntary patient at X Hospital. This legal status was unknown to the Tribunal for a person receiving mental health treatment in custody. The Tribunal reserved its decision on the question of Mr Campbell's legal status and invited submissions from Justice Health and Forensic Mental Health Network and submissions in reply from Mr Campbell's lawyer, Ms Sinclair.
5. Having received those submissions, the Tribunal concluded that it does have jurisdiction to conduct the review under s 90 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA) and that Mr Campbell should remain in a mental health facility as a correctional patient.

STATUTORY CRITERIA

6. As Mr Campbell has been transferred to a mental health facility from a correctional centre by order of the Secretary, the Tribunal is required to conduct a review: s 90(1) of the MHCIFPA.
7. At this review, the Tribunal is required to determine whether the patient is a mentally ill person who should continue to be detained in a mental health facility or has a condition for which treatment is available in a mental health facility: s 92(1).
8. The MHCIFPA adopts the definitions used in the MHA: s 3(2). A person is a mentally ill person as defined by s 14 of the *Mental Health Act 2007* (MHA) if:
“the person is suffering from a mental illness and, owing to that illness, 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 for the protection of others from serious harm.”

In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account: s 14(2) MHA. A condition for which treatment is available in a mental health facility is undefined.

9. If the Tribunal orders the patient's detention in a mental health facility, the Tribunal must consider whether the person is capable of managing their financial affairs, and if not, order the estate of the person be subject to management under the *NSW Trustee and Guardian Act 2009*: see s 45 of that Act.
10. The Tribunal has had regard to the principles set out in s 68 of the MHA and the objects of the MHCIFPA set out in s 69 of that Act.
11. Section 92(2) of the MHCIFPA provides that the Tribunal may make an order for the transfer of a correctional patient to a mental health facility, correctional centre, detention centre or other place.
12. The MHCIFPA sets out a number of other matters that the Tribunal must also consider when conducting a review:
 - a. Does Mr Campbell have a mental health impairment or cognitive impairment?
 - b. Are there 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; and
 - c. the continuing condition of the person, including any likelihood of deterioration and the effects of that deterioration: s 75 of the MHCIFPA.

EVIDENCE BEFORE THE TRIBUNAL

13. The Tribunal has considered the documents which are exhibited to these reasons.
14. Those documents include two certificates completed under s 86 of the MHCIFPA:
 - a. The first completed by Dr A on [date], which said that Mr Campbell is not a mentally ill person but has a condition for which treatment is available in a mental health facility.
 - b. The second completed by Dr B on [date] which said that Mr Campbell is not a mentally ill person but has a condition for which treatment is available in a mental health facility.
15. The Tribunal also had a document completed under s 86(5) of the MHCIFPA evidencing Mr Campbell's consent to treatment with IMI aripiprazole 400mg every 4 weeks, olanzapine tablets 20mg at night and mirtazapine tablets 30 mg at night.

16. The transfer order was made by Dr C under s 87 of the MHCIFPA on 19 November 2021. That order relied on s 86(5) of the MHCIFPA, noting that Mr Campbell had a mental health condition that could be treated in a mental health facility and that he consented to treatment.
17. At the Tribunal hearing on 17 December 2021, Mr Campbell agreed to stay in the X Hospital. Mr Campbell continued to be concerned that items had been implanted in his head and was keen for further scans to be undertaken.
18. Dr A gave evidence that Mr Campbell had a longstanding diagnosis of schizophrenia complicated by polysubstance misuse. He heard voices and was concerned that items had been implanted in his head. These experiences were very distressing for him. Dr A said that the team were trying to establish the best medication regime, as well as put release plans in place. It was hoped that Mr Campbell would be released under s 14 of the MHCIFPA. This kind of intensive mental health care and treatment was only available in the X Hospital and could not be effectively achieved in a correctional centre.

Voluntary patient under the MHCIFPA

19. At the hearing, Dr A said to the Tribunal that Mr Campbell was being “treated in the [X] Hospital as a voluntary patient”.
20. The uncontroverted evidence before the Tribunal was that Mr Campbell’s treatment in a mental health facility should continue. However, Dr A’s comment about Mr Campbell being treated as a voluntary patient, whilst also an inmate in a correctional centre, raised questions about the legal framework underlying his admission to the X Hospital. The Tribunal reserved the question of Mr Campbell’s legal status to seek submissions from Justice Health and Forensic Mental Health Network and from Mr Campbell’s legal representative.
21. Written submissions were received from Mr D on behalf of Justice Health and Forensic Mental Health Network on [date] and from Ms Sinclair on behalf of Mr Campbell on [date].
22. Mr D submitted that a person with a mental health impairment who is detained in custody may be treated without their consent, if they meet the statutory criteria for being a “mentally ill person”: s 86(4) MHCIFPA. However if a person does not meet this criteria, but does have a mental health impairment or other condition for which treatment is available in a mental health facility, they can also be treated in a mental health facility provided that they agree to that treatment: s 86(5) MHCIFPA.

23. In either case, Mr D said that the next step involves a transfer order made by the Secretary (or delegate), a review following the patient's admission under s 87 and a Tribunal review under s 90 of the MHCIFPA.
24. Mr D submitted that Mr Campbell is therefore a correctional patient, as defined under s 73 of the MHCIFPA. The Tribunal's jurisdiction under s 90 of the MHCIFPA remains the same, regardless of whether the initial certificates rely on ss 86(4) or 86(5).
25. Mr D went on to say that if Mr Campbell refuses treatment, his treatment will need to be re-examined and involuntary treatment may be imposed. As a correctional patient, Mr Campbell could be involuntarily treated at any time, in accordance with section 84 of the MHA.
26. Although Mr D does not specifically say so, his submissions are to the effect that once transferred to a mental health facility under the MHCIFPA, any inmate is a correctional patient. As a correctional patient, the person can only be involuntarily treated. The concept of voluntary treatment under the MHCIFPA does not exist.
27. Although she did not say so expressly, Ms Sinclair's submissions concur with those of Mr D. Ms Sinclair submitted that the Tribunal's power to conduct a review for correctional patients does not distinguish between patients transferred under subs 86(4) or 86(5) of the MHCIFPA. The only category of treatment for correctional patients is involuntary treatment.
28. Ms Sinclair noted that the MHCIFPA does not allow for a regime of voluntary treatment. She contrasted the statutory scheme under the MHCIFPA with the statutory scheme for voluntary treatment under the MHA. Ms Sinclair noted that the only place where voluntary treatment was referred to in the MHCIFPA is in s 108. That section, read in context, clearly contemplates that the voluntary treatment will take place after the person's discharge from custody.
29. Ms Sinclair submitted that the Tribunal is "unable to make orders pursuant to s 75, s 92 and s 93" without a further report on Mr Campbell's current clinical condition. She does not elaborate on why that is the case.

DISCUSSION

30. Ms Sinclair and Mr D both submit that the voluntary treatment of correctional patients is not legally available under the MHCIFPA. The Tribunal agrees.
31. The starting point for the transfer of an inmate to a mental health facility can be different, depending on whether the certificate relies on subs 86(4) or (5) of the MHCIFPA.

32. However, once in a mental health facility the Tribunal's statutory function under ss 90 and 92 is simply to decide whether the person is a) a mentally ill person who should continue to be detained in a mental health facility or b) has a condition for which treatment is available in a mental health facility. If a person falls into the second category, there is no statutory requirement that they continue to consent to treatment, in order for treatment to be administered in the mental health facility. The Tribunal notes that that this requirement also existed under the previous statutory regime: see s 55(4) of the *Mental Health (Forensic Provisions) Act 1990*.
33. Once a person has been transferred to a mental health facility under ss 86 and 87 of the MHCIFPA the person is a correctional patient. A correctional patient is deemed to be an involuntary patient and may be given such treatment as an authorised medical officer thinks fit under s 84 of the MHA: s 82 of the MHA. The Tribunal's role is only to decide whether the person is a mentally ill person or a person with a mental health impairment for whom treatment is available in a mental health facility.
34. The question of why the person's consent to transfer is required by s 86(5) if consent to treatment is not an ongoing requirement is unanswered. However, the statutory regime is clear. There is no equivalent to the voluntary treatment regime which is provided for under the MHA, and any inmate transferred for mental health care to a mental health facility is deemed to be an involuntary patient.
35. Nonetheless involving a person in decisions about their care and treatment, and giving weight to their views and wishes is entirely consistent with s 68 of the MHA. It is appropriate and commendable that Justice Health and Forensic Mental Health Network clinicians take this approach to treatment where that is possible.
36. At the end of the December hearing, the Tribunal reserved the question of Mr Campbell's legal status. The Tribunal indicated that it would make a decision on the s 90 review once submissions had been received. That decision has now been reached, on the basis of the evidence taken in December. The Tribunal does not consider that it is prevented from finalising the reserved decision only because it does not have updated clinical information. The Secretary or delegate has always been under an obligation to discharge Mr Campbell if the criteria in s 87(3) are met.

DECISION

37. The Tribunal is satisfied that Mr Campbell is a person with a condition for which treatment is available in a mental health facility and that treatment is not reasonably available in a correctional centre.
38. Mr Campbell is a correctional patient and not a voluntary patient. He should continue to receive care and treatment in a mental health facility.
39. No financial management issues were raised to the Tribunal.
40. The Tribunal determined that the next review will be held within six months.

Signed

Anina Johnson
Deputy President

Date 26 April 2022