THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO YOUNG AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 31 October 2023.	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.

FORENSIC REVIEW:	Mr Barrie s 78 Review of forensic patient *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA)	**[2023] NSWMHRT 1**
TRIBUNAL:	The Hon Peter Hidden AM KC	Deputy President
	Dr Kristin Kerr	Psychiatrist
	Ms Pamela Rutledge	Social Worker
DATE OF HEARING:	2023	
PLACE:	Mental Health Facility	

REASONS

1. These are the Tribunal's written reasons for its decision at the hearing held on 9 June 2023.

2. Mr Barrie is currently subject to an order for conditional release. He has been living at supported accommodation at [address] specified in Clause 18 of that order. However, Clauses 19 to 22 of the order provide for overnight leave to [address] in Victoria, with his care and supervision while there being provided by Facility A. He intends to seek a variation of his order to permit him to reside at this address.

3. The question arises whether the Tribunal has the power to make such an order, and the matter was listed for the purpose only of determining that question. If it were determined in his favour, the merit of his application would be considered at a review in due course.

4. The Attorney General of New South Wales wished to be heard on this question. The Tribunal received detailed written submissions, addressed orally, by Mr Jackson Wherrett, counsel for Mr Barrie, and Ms Naomi Wootton, counsel for the Attorney General. The Tribunal is indebted to both of them for their careful and balanced arguments. Mr Wherrett contended that the Tribunal does have the power and,

in the event, the Attorney accepted that that was the better view, although acknowledging the force of the competing view. The Tribunal reserved its decision.

5. Given the substantial agreement as to the outcome, these reasons need not be as detailed as the submissions. Nevertheless, it is necessary to examine not only the factors supporting the existence of the power, but also the countervailing factors.

STATUTORY PROVISIONS

6. The submissions referred to a variety of statutory provisions: principally, but not only, in the *Mental Health and Cognitive Impairment Forensic Provisions Act, 2020* (MHCIFPA). References to that Act included the familiar provisions for mandatory reviews of forensic patients: s 78, the power of the Tribunal to order a patient's conditional release: s 81(b), and the conditions which may be imposed on that release: s 85.

7. Central to the issue at hand was the power to impose conditions on accommodation and living conditions: s 85 (1)(d). As will be seen, the provisions for enforcement of orders for release in Part 5, Division 9 of the Act also arose for consideration.

8. The crucial question is whether the power to impose a condition relating to accommodation in s 85(1)(d) should be interpreted to have extra-territorial scope: that is, to permit the specification of accommodation outside New South Wales.

Extra-territorial Application

9. Section 12(b) of the *Interpretation Act 1987* (NSW) provides that "a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales." However, this applies "except in so far as the contrary intention appears…" in the Act concerned: s 5(2) of the *Interpretation Act.* This is consonant with the common law presumption against legislation having an extra-territorial effect, which could be rebutted where the contrary intention appeared (either expressly or impliedly).

10. As it was put in the plurality judgement in *BHP Group Limited v Impiombato* (2022) 96 ALJR 956, at [61]:

> *The so-called "presumption" is an interpretive principle whose force depends upon the extent to which the hinge of the provisions departs from common expectations that Parliaments' concern with the subject matter is limited to matters within its territory.*

11. In s 85(1)(d) of the MHCIFPA does the contrary intention appear? That it does, submitted Mr Wherrett,

emerges from the text, context and purpose of the provision. A number of factors were identified by counsel in the submissions.

12. Ms Wootton noted, correctly, that it is apparent that the central concern of the MHCIFPA is forensic patients from and within New South Wales. Parts 2, 3 and 4 of the Act are concerned with the criminal process in New South Wales courts, whereby a person might become a "forensic patient": s72N. Referring to the passage from *Impiombato* cited above, she argued that the object of legislative concern is plainly forensic patients within New South Wales. However, there is force in Mr Wherrett's response that the focus of the Act is upon the *persons* that acquire that status (rather than their place of residence), and it is this which is the requisite territorial connection.

13. He referred to another passage from the plurality judgement in *Impiombato* at [62]:

> *Where the central focus of the subject matter of the statute, on its proper construction, has a territorial connection, it will ordinarily be unnecessary to look for further territorial restrictions. The presumption has never been understood such that it needed to be applied to all elements or words in the statute.*

14. In this regard, counsel were agreed that it is important to consider the objects of Part 5 of the MHCIFPA, directed to the management of forensic patients, in s 69. The first of those is "to protect the safety of members of the public": s 69(a). Section 84(2) provides that the Tribunal must not make an order for the release of a forensic patient unless it is satisfied "that the safety of the patient or any member of the public will not be seriously endangered by the patient's release".

15. These provisions are not limited to members of the public in New South Wales. *Attorney General (NSW) v XY* [2014] NSWCA 466 was a case dealing with the unconditional release of a forensic patient. Referring to section 43(a) of the predecessor to the MHCIFPA, the *Mental Health (Forensic Provisions) Act 1990*, Basten JA said at [164] that the expression "any member of the public" was apt to cover "members of the public anywhere in Australia and, indeed, may well extend to other countries."

16. There may be cases in which a forensic patient's residence in another state would provide circumstances best suited to the interests of the safety of the public and of the patient. Placement there might provide the patient with better care and treatment, particularly if the support of family and other associates were available in that area. This is likely to be the thrust of Mr Barrie's foreshadowed application in this case.

17. Generally, Ms Wootton pointed out that this might be critical in the context of conditional release, which is part of a staged process leading ultimately to unconditional release. There would be a strong public interest in the patient being able to be conditionally released to the place where he or she might ultimately reside if unconditionally released.

18. On the other hand, Ms Wootton referred to the express provisions in the *Mental Health Act 2007* (MHA) for the interstate transfer of persons detained in a mental health facility under that Act, and of forensic patients: Division 1 of Part 2 of Chapter 8 of the MHA. By section 174(1) that transfer may take place if it is permitted by a corresponding law in the state to which transfer is sought.

19. There is such a corresponding law in Victoria, permitting transfer from another state if a number of conditions are met: s 73E of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). Those conditions include the Minister's satisfaction that appropriate facilities and services are available and that the transfer is necessary for the maintenance or re-establishment of family relationships.

20. Ms Wootten submitted that this express mechanism for interstate transfer, with the strict preconditions under the Victorian scheme, tends to point away from an interpretation of the MHA, read with the MHCIFPA, which would permit the Tribunal "to foist a forensic patient upon another State" without that State's express consent, and avoiding the preconditions set by that State. However, she noted that the transfer provisions apply only to a person who is detained in a mental health facility and would not apply to a person subject to conditional release under the MHCIFPA. The fact that there is no statutory scheme providing for the transfer of conditionally released patients might convey that Parliament did not consider it necessary to do so because s85(1)(d) was not intended to be limited to places within New South Wales.

21. That said, Ms Wootton referred to the variety of orders under s85 of the MHCIFPA which the Tribunal might make during the period of a patient's conditional release, embracing orders relating to medical and other services, including drug testing and other medical tests, and rehabilitative programs. If such a patient were transferred to another State, that State would bear the burden of providing and funding those services. It is doubtful that the Tribunal could by order compel the provision of those services.

22. This could be another factor to confine the operation of s85(1)(d) to New South Wales. However, as Mr Wherrett pointed out, the Tribunal would be unlikely to allow residence in another State unless it was clear that that State was prepared to provide those services to the extent that they were required. In the event, counsel were agreed that this was a matter bearing upon the exercise of the discretion to allow residence interstate rather than the power to do so.

Enforcement

23. An important question on this issue is whether an order for conditional release could be enforced if the patient were living outside New South Wales. As noted above, provision for the enforcement of orders in the MHCIFPA are to be found in Part 5, Division 9. Section 109 empowers the President of the Tribunal to make an order for the apprehension of a patient in breach of a condition release order, and s 110 provides that that apprehension order may be executed by a police officer.

24. Section 114 provides as follows:

> 114 **Issue of warrants for apprehension of persons outside State and other persons**
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> A Magistrate or an authorised officer within the meaning of the *Criminal Procedure Act 1986* may issue a warrant for the apprehension of a person if a credible person, on oath before the Magistrate or officer, shows reasonable cause to suspect that the person is a forensic patient or a correctional patient—
>
> (a) who has escaped from a mental health facility and is outside the State, or
>
> (b) is the subject of an apprehension order under this Division.

25. Counsel were agreed that this section would enable the apprehension of a person subject to a conditional release order who was interstate by order of the Tribunal. The fact that s114(a) expressly refers to persons outside the State should not be understood to indicate that paragraph (b) relates only to persons within the State. Paragraph (a) is limited to escapees from a mental health facility who are outside the State. Paragraph (b), on the other hand, refers to persons subject to an apprehension order under s109, wherever they might be. It is accepted that the power of apprehension by a police officer in s110 is confined to New South Wales police, but apprehension pursuant to a warrant under s114(b) could be executed by a police officer in another State under ss 82 and 83 of the *Service and Execution of Process Act 1992* (Cth).

26. It should be noted that Mr Wherrett raised another mechanism by which an order for apprehension might be executed interstate. Section 171 (b) of the MHA provides that the Minister for Health may enter into an agreement with the corresponding Minister of another State with respect to (among other things) the transfer and apprehension of a class of persons in this State which includes forensic patients. There is such an agreement with the Minister in Victoria relating to the apprehension of patients, but it would not be applicable to a case such as this because by its terms it is limited to patients who "escape" into Victoria. Nevertheless, the relevant provisions of the MHA would permit an agreement which embraced persons who were lawfully in another State according to the terms of their conditional release. Ms Wootton suggested that the fact that the MHA provisions include the

transfer of patients points away from an interpretation of section 85(1)(d) of the MHCIFPA allowing such a transfer to take place without an interstate agreement. However, this matter need not be explored further as it is clear that the question of interstate apprehension is resolved by s114.

Constitutional Issue

27. Mr Wherrett very properly raised a possible constitutional issue posing a jurisdictional impediment in this matter, but went on to make persuasive submissions that it did not arise. Ms Wootton agreed with his position. Accordingly, while the matter must be addressed, it can be dealt with relatively briefly.

28. Chapter III of the Commonwealth Constitution deals with the Judicature, vesting the judicial power of the Commonwealth in the High Court of Australia and envisaging the vesting of that power in Federal Courts and State Courts. By s75 (iv), that judicial power is invoked in "matters… between States, or between residents of different States, or between a State and a resident of another state…." In *Burns v Corbett* (2018) 265 CLR 304, the High Court held that there is a negative implication in the Constitution which prevents the Parliament of a State from conferring the judicial power of the Commonwealth on a body which is not a Court of a State. (Further examination of that important and complex case is not required for present purposes.)

29. It is common ground here that the Tribunal is not a court, that is, it is not a body exercising judicial power. If Mr Barrie were permitted to reside in Victoria, the question arises whether the Tribunal's continuing review while he is on conditional liberty, and its power to enforce the order if necessary, constitute a "matter between a State and a resident of another State" in the constitutional sense.

30. Mr Wherrett pointed out that none of the functions of the Tribunal involve the exercise of judicial power. He cited the classic statement of the indicia of judicial power by Griffith CJ in *Huddart, Parker and Co. Pty Ltd v Moorehead (*1909) 8 CLR 330 at 357, as "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property", with the capacity to "give a binding and authoritative decision…".

31. Mr Wherrett noted that, while the involuntary detention of a citizen in custody by the State is usually an exclusively judicial function, an exception is involuntary detention in cases of mental illness, which can "legitimately be seen as non-punitive in character and is not necessarily involving the exercise of judicial power": *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 28. More recently, in *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at [214], Callinan and Heydon JJ said that it is "accepted that in some circumstances, it is valid to confer powers on both

non-judicial and judicial bodies to authorise detention, for example, in cases of infectious disease or mental illness."

32. Mr Wherrett referred to the variety of orders which the Tribunal might make when reviewing forensic patients, and the various findings of fact underpinning those orders, noting the objects of Part 5 of the MHCIFPA set out in s69, including the protection of the safety of members of the public, the provision of care, treatment and control of forensic patients and the provision of an opportunity for them to have access to appropriate care. None of these functions, he argued, exhibit any of the usual indicia of judicial power. Rather, the review function is part of "an administrative structure, subject to judicial oversight, for discharge of the protective function of the State which, in the Anglo-Australian tradition, once resided in the Crown: *A v Mental Health Review Tribunal* [2014] NSW SC 31 at [150] (Lindsay J).

33. Equally, he argued, the power of apprehension for breach of an order for conditional release is not judicial in nature, being exercised for the purpose of protecting both the forensic patient and members of the public. He noted that, once the patient has been apprehended and detained, the Tribunal has the power to assess whether conditional release remains appropriate or whether the patient should continue to be detained or subject to new or different conditions. The process is not in any sense punitive and clearly falls within the exception referred to in *Lim* above.

34. Finally, Mr Wherrett argued that, if Mr Barrie were residing in Victoria, an apprehension order would not amount to a matter "between" the State and a resident of another State in the constitutional sense. Even if the Tribunal were properly characterised as the "State" within the meaning of s75 (iv) of the Constitution, that subsection would not be engaged.

35. He referred to the decision of the Supreme Court of Western Australia in *GS v MS* [2019] WASC 255, (2019) 344 FLR 386, in which Quinlan CJ found that proceedings for guardianship and administration orders in the State Administrative Tribunal of Western Australia were not "between" anyone in the relevant sense: at [119]. The Chief Justice added, at [120], that "an application to appoint guardians and administrators, being protective in nature, is not *inter partes* in the ordinary sense of that expression." A similar view was taken by the Supreme Court of Victoria in *German v State Trustees Ltd* [2023] VSC 7, also a matter under guardianship and administration legislation. Richards J, at [35], said that the relevant provisions "set up a procedure for the Tribunal to ascertain the views and wishes of relevant persons, which it must consider before making a decision on an application." His Honour continued:

> "That does not mean, however, that the application is *between* those persons. Rather, it is *about* the proposed represented person – whether that person needs a guardian or administrator and, if

so, who should be appointed and with what powers."

36. Here, Mr Wherrett argued, an apprehension order and the proceedings consequent upon it are *about* the forensic patient – to bring the patient before the Tribunal to decide whether or not he or she should continue to be subject to conditional release (and, if so, on what conditions). The President would simply be exercising a function similar to that exercised by the review power under s78.

37. These are compelling arguments, and the Tribunal is satisfied that no constitutional barrier to its decision arises. (It should be added that in determining this issue the Tribunal is not exercising judicial power. A tribunal which is not a court has the authority to decide the limits of its jurisdiction for the purpose of "moulding its conduct to accord with the law": *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476 at [24].)

Conclusion

38. As noted at the outset, the Tribunal's task in deciding this matter has been greatly assisted by the thorough submissions of counsel and their substantial agreement as to the outcome. Nevertheless, the Tribunal has given its careful consideration to the matter in determining that that outcome is the appropriate one.

39. It is clear that the preponderance of factors favour the conclusion that the Tribunal has power under section 85(1)(d) of the MHCIFPA to allow a forensic patient subject to conditional liberty to reside outside the State of New South Wales. Accordingly, the Tribunal can impose, as part of a conditional release order, a condition that a forensic patient reside in Victoria, and the Tribunal retains the power to make orders in relation to that patient while he or she is resident in that State.

40. Of course, whether that discretion should be exercised would depend upon the circumstances of each case, having regard to all the relevant factors, including whether the patient would have the requisite support, treatment and management.

Peter Hidden AM KC
Deputy President

Date 17 July 2023