

LONG TIME, NO SEE

Australians with mental illnesses wait too long before independent review of detention

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Imagine that you found yourself arrested in a New South Wales country town; Dubbo, for example. The local constabulary tell you that you are guilty of some offence and that you are now looking at several weeks inside. You know you are innocent.

If you know the law, you are anxious, certainly, but you are not dismayed. You know that in New South Wales the police must 'as soon as is reasonably practicable, take [you] ... before an authorised officer to be dealt with according to law'.¹ This will be a magistrate, or another independent person, who will review your arrest. You also know that in New South Wales 'as soon as is reasonably practicable' is normally interpreted as being within 24 hours, 365 days of the year.

All Australians who find themselves detained against their will have a right to be brought before a court or other independent body to ensure that the terms of their detention are lawful. This ancient right is protected in the civil law through the writ of habeas corpus and in the legislative rules requiring prompt review of criminal detention in each state and territory.

Timely independent review of restrictions on liberty is also applied in the medico-legal context. For example, while the *Guardianship Act 1987* (NSW) allows a person responsible or guardian to consent to medical treatment for a patient who lacks capacity, if that patient objects to the treatment, the Act stipulates that a quasi-judicial body — the Guardianship Tribunal — must authorise this consent, to check that this deprivation of freedom is justified.² The Tribunal is available to hear urgent matters around the clock and urgent orders are usually made within a week.³

At the time of writing, New South Wales law demands a similar timely independent review of measures that restrict the liberty of people with mental illnesses. The *Mental Health Act 2007* (NSW) stipulates that people who are deemed 'mentally ill persons' must be taken before a magistrate 'as soon as practicable' after two doctors decide they warrant detention.⁴ Currently, and since 1958,⁵ 'as soon as practicable' is interpreted as meaning within a week or so. Again the short timeframe is intended to protect the civil rights of the person detained.⁶

If, however, changes proposed to the operation of the *Mental Health Act* are allowed to proceed, people living with mental illnesses in New South Wales may have lost a substantial degree of this human rights protection by the time this article is published.

In late 2008 the passage of the *Courts and Crimes Legislation Further Amendment Act 2008* (NSW) provided for initial magistrate reviews of involuntary patients (known as 'mental health inquiries') to be replaced with review by the Mental Health Review Tribunal ('MHRT').⁷ The *Amendment Act* made no further changes to mental health laws, other than allowing mental health inquiries to be conducted by a legal member of the MHRT sitting alone, and permitting the use of audio visual links for hearings. Significantly the *Amendment Act* did not make any change to the timing of mental health inquiries — which must still occur 'as soon as practicable'.⁸

Nonetheless, in February, the Hon Greg James QC, President of the New South Wales MHRT, wrote to the state's Area Directors of Mental Health advising that, when the amendments came into effect, mental health inquiries could be expected to take place 'during the 3rd or 4th week of [the patient's] detention'.⁹ In other words, the definition of 'as soon as practicable' which had stood as 'about one week' since 1958, would be recast as 'within about a month'.

Imagine your response if you were to find that the judicial review of your Dubbo detention, legislated to take place 'as soon as is reasonably practicable' would not actually take place until your third or fourth week in custody!

When the proposed change became the subject of media attention,¹⁰ the longer wait times were defended on the basis that a high percentage of adjournments made at the early magistrate's hearings constituted evidence that the current New South Wales system was dysfunctional.¹¹ This interpretation is difficult to understand. It is true that the number of adjournments is high — 58 per cent of magistrate's hearings were adjourned in 2007–8.¹² However the remainder — fully 5095 cases in the same period — were *not* adjourned and, in any case, to claim that even the adjourned hearings were a 'waste for the patients and the treating team'¹³ seems to dangerously overlook a fundamental reason for judicial review. The magistrate's role is to ensure that proper process is being followed, that the patient's rights are protected and that the system is not being abused. This can be achieved as readily in an adjourned hearing as it can in a hearing where an order has been made. It can hardly be seen as a waste.

It was also claimed that early review meant 'patients were too unwell to take part or to be adequately assessed by the treating teams'.¹⁴ We have been unable

REFERENCES

1. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99(4).
2. *Guardianship Act 1987* (NSW) ss 46, 46A.
3. New South Wales Guardianship Tribunal, 'Annual Report 2008/2009' (2009).
4. *Mental Health Act 2007* (NSW) s 27(d).
5. Pat O'Shane, 'Mental Health Act 1958 (N.S.W.)' (1977) 2 *University of New South Wales Law Journal* 398.
6. New South Wales, *Parliamentary Debates, Legislative Assembly*, 27 November 1958, 2150–2166 (William Sheahan).
7. *Courts and Crimes Legislation Further Amendment Act 2008* (NSW) sch 16.
8. *Mental Health Act 2007* (NSW) s 27(d).
9. Letter from Greg James to NSW Mental Health Service Area Directors, 25 February 2010.
10. Joel Gibson, 'Mentally Ill Forced to Wait a Month to Appeal', *Sydney Morning Herald* (Sydney) 13 March 2010, 5.
11. Greg James, 'Mental Health Changes Will Respect Patients' Needs' (Letter to the Editor), *Sydney Morning Herald* (Sydney) 17 March 2010, 12.
12. New South Wales Mental Health Review Tribunal, 'Annual Report 2007–8' (2008).
13. James, above n 11.
14. *Ibid.*
15. New South Wales Mental Health Review Tribunal, 'Mental Health Review from 1993 to the Year 2000 Including the Annual Reports for 1997 and 1998' (1999).
16. *Mental Health Act 1996* (Tas) s 52.
17. *Mental Health Act 1993* (SA) s 12; *Mental Health Act 2009* (SA) s 25.
18. *Mental Health Act 2000* (Qld) s 187(1).

to verify this claim, as there is no publicly-available data on the reasons for adjournments in New South Wales; however we are concerned about this assertion on a number of fronts.

First, some matters are undoubtedly adjourned because of the acuity of the patient's condition, but we suspect this is rare. It would be unusual for an experienced psychiatrist to take more than an hour or two to come to a decision about symptoms, likelihood of harm and treatment alternatives, which is all the information required for the mental health inquiry. In our experience, it is equally unusual for a patient to be so unwell that they may take *no* part in the independent review. Furthermore, even if a patient is very unwell, or has been inadequately assessed, this is not necessarily a reason to delay review. Arguably the need for independent evaluation of the patient's condition and treatment plan is even more pressing in those circumstances.

Secondly, adjournments in the New South Wales system have not always been so common. They have steadily grown in prevalence since 1993, when only 15 per cent of hearings were adjourned without resumption.¹⁵ We suspect a more likely reason for the increase is that changes in psychiatric practice since the 1990s have seen treating teams in New South Wales come to anticipate discharging many mentally ill people within two weeks, and that they have come to regard an adjournment as a sort of 'short order', more acceptable and less stigmatising to the patient than a formal order. Though this practice may raise concerns of its own, it nonetheless allows the early independent review so crucial to safeguarding the right to liberty.

Unfortunately, supporters of the changes may have been on more solid ground had they pointed to even longer waits in other Australian states for review of involuntary hospital treatment. In Tasmania patients wait four weeks,¹⁶ in South Australia¹⁷ and Queensland¹⁸ it is six weeks. In Victoria¹⁹ and Western Australia²⁰ legislation permits people living with mental illness to be detained for up to eight weeks without independent review. Only the two territories match the timeliness of New South Wales hearings, requiring that they should take place within a week.²¹ Still, the fact that there are even longer waits in other states and territories hardly seems a good reason to cut back the conditions of detention for New South Wales mental health patients. In our view, it is difficult to understand why Australians living with a mental illness should be deprived of the right to timely independent review of restrictions on their liberty — in any jurisdiction.

In addition to the concerns just raised about the *justification* for the New South Wales procedural changes, we also suggest that the *legality* of a lengthy delay in hearing mental health inquiries may be questionable in New South Wales. Parliament has made no changes to the requirement that mental health inquires should be held 'as soon as practicable', and it is concerning that the time period qualifying as 'as soon as practicable' could be stretched, overnight, to up to four times its well-established interpretation of within

'around a week'. There is a good argument that such a marked departure from long practice, without clear statutory language authorising it, would constitute an unlawful interpretation of the current statute.²²

In addition the delays in New South Wales, as well as in other states, might also be open to challenge on the basis that they are discriminatory. Perlin has written extensively about provisions within legislation and the operations of courts that discriminate against the mentally ill — a phenomenon he has dubbed 'sanism'.²³ In Victoria, the apparent distinction between the rights of people with mental illness to timely review of detention and the rights of others in similar circumstances may engage a number of sections of the *Charter of Human Rights and Responsibilities*.²⁴ The mental health legislation of all states is arguably inconsistent with Australia's recent endorsement of the *United Nations Convention on the Rights of Persons with Disabilities*.²⁵

In 2001 an English court found that the practice of the Mental Health Review Tribunal imposing a routine eight-week delay before the hearing of appeals was 'bred of administrative convenience' and that it was not lawful to make 'no effort to see that an individual application is heard as soon as reasonably practicable'.²⁶ The Court found that the practice was in violation of the *European Convention on Human Rights*²⁷ and that no consideration could be given for any alleged constraint on resources when arguing against this protection.²⁸

Australians do not enjoy the same formal safeguards of human rights that are in place in Europe. Nonetheless it seems the length of time that people with mental illness are required to spend in detention without independent review demonstrates that a discriminatory double standard applies in the protection of basic freedoms. On this measure at least, those who find themselves imprisoned in the criminal justice system may enjoy much better legal safeguards than those detained in hospital for no reason other than their diagnosis of mental illness.

The changes in New South Wales are particularly concerning because they represent an erosion of the existing rights of a vulnerable group of people. However they may ultimately prove to be just another example of entrenched discrimination against people living with mental illness, exemplified in legislation in every state and territory. It is time this was addressed.

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19. *Mental Health Act 1986* (Vic) s 30(1).

20. *Mental Health Act 1996* (WA) s 138.

21. *Mental Health (Treatment and Care) Act 1994* (ACT) s 17(1); *Mental Health and Related Services Act 1998* (NT) s 123.

22. In a number of Australian cases concerned with the coercive powers of mental health legislation, courts have held that the natural meaning of the statute should not be extended so as to restrict patient rights. See *'MM' v Mental Health Review Board* [1999] WASC 1005 (Scott J); See also *Watson v Marshall & Cade* [1971] HCA 33.

23. Michael L Perlin, 'On "Sanism"' (1992) 46 *Southern Methodist University Law Review* 373; Michael L Perlin, "'Half-Wracked Prejudice Leaped Forth': Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did' (1999) 10 *Journal of Contemporary Legal Issues* 3.

24. *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 8, 12, 13, 21. See also Fleur Baupert & Terry Carney, 'Mental Health Tribunals: Rights Drowning in Un-Chartered' Health Waters?' (2008) 13 *Australian Journal of Human Rights* 181.

25. *United Nations Convention on the Rights of Persons with Disabilities* (2006) articles 5, 12, 14(2), 22.

26. *C, R (on the Application of) v Mental Health Review Tribunal London South & South West Region* [2001] EWCA Civ 1110, [64], [66] (Lord Phillips). [Emphasis added]

27. *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 11 with Protocol Nos 1, 4, 6, 7, 12 and 13* (2003), art 5(4).

28. *C, R (on the Application of) v Mental Health Review Tribunal London South & South West Region* [2001] EWCA Civ 1110, [45] (Lord Phillips); *Bezicheri v Italy* [1989] 12 EHRR 210.