THE NEW SOUTH WALES BAR ASSOCIATION

REVIEW OF THE FORENSIC PROVISIONS OF THE *MENTAL HEALTH ACT 1990* AND THE *MENTAL HEALTH (CRIMINAL PROCEDURE) ACT 1990*

SUBMISSION CONCERNING DECISION-MAKING FOR FORENSIC PATIENTS

The review

1 In August 2006 the NSW Health Department published its *Report on Review of the Mental Health Act 1990* and released an *Exposure Draft Bill* open for consultation until 3 November 2006. That *Exposure Draft* does not include provisions addressing forensic patients or the administration of the Mental Health Review Tribunal. Those issues were incorporated into further reviews.

2 On 13 December 2006 the President of the Mental Health Review Tribunal (the Hon Greg James QC) published a "Consultation Paper: Review of the forensic provisions of the *Mental Health Act 1990* and the *Mental Health (Criminal Procedure) Act* 1990". It offers an overview of the existing law and practice in relation to the forensic mental health system, outlines various options for reform and calls for comments and submissions by 31 March 2007.

3 Section 5 of the Consultation Paper addresses the topic of decision-making for forensic patients in New South Wales.

4 At present orders for the detention, care, treatment, or release of a forensic patient may only be made by the Minister for Health and the Governor (acting on the advice of the Executive Council). Thus, even if the Mental Health Review Tribunal ("the Tribunal") has recommended the release of a forensic patient, the Minister for Health may refuse to act on that recommendation and the Attorney General may prevent the release of the person.

Summary of the Bar Association's position

5 The current system of executive discretion in decision-making for forensic patients should be overturned. There are numerous reasons for doing so and there is ample support for change. Among the review bodies that have recommended the replacement of the executive discretion are the Human Rights and Equal Opportunity Commission (1993), the New South Wales Law Reform Commission (1996) and the Senate Select Committee on Mental Health (2006).

6 The Consultation Paper identifies five options for reform of the present system.

7 The NSW Bar Association strongly supports Option 4, that is, replacing the executive discretion and transferring all decision-making relating to forensic patients to the Tribunal, subject to an appeal to the Supreme Court.

Background

8 In New South Wales persons suffering from a mental illness who have committed an act which would constitute a crime were it not for their mental illness can be subject to indefinite detention at the discretion of the government of the day. In addition, persons suffering from any mental impairment which renders them unfit to be tried can be subject to detention for a longer period than an individual who commits an identical crime but who is fit to be tried. So, too, those who suffer mental illness after having been convicted.[1]

9 Individuals in each of these categories are known as forensic patients under the *Mental Health Act* 1990 (NSW) ("the Act") and their status has historically been described as detention "at the Governor's pleasure." In a practical sense, the Act continues this anachronism. Under the regime it creates there is nothing to prevent the executive arm of Government making decisions about the release of such individuals based entirely on political considerations and regardless of unanimous expert opinion that the individual's mental impairment poses no risk to community safety. Yet, as Deane J said in *South Australia v O'Shea* (1987) 163 CLR 378 at 414:

> "… it is manifest that a discretionary power to reject, on "political" grounds such as the state of public opinion, independent medical advice and the recommendation of a specialist board for the release on licence of a person detained under such an order lies ill with acceptable minimum safeguards of human liberty and dignity. Indeed, one could be led to speculate about what kind of prisoner Mr O'Shea is in circumstances where his "at pleasure" and non-punitive incarceration is now being continued, against expert and specialist advice, as a result of a discretionary decision made by a political body."

10 New South Wales has fallen behind every other jurisdiction in Australia, other than Western Australia and the Commonwealth, in relation to the progressive abolition of executive discretion over release of forensic patients.

Justification for the present system

11 Those who advocate the retention of the executive discretion argue that it offers greater flexibility to deal with the circumstances of each forensic patient. They also contend that it is appropriate that members of the executive make decisions about forensic patients taking into account broader community concerns. A 1996 Department of Health publication *Caring for Health: Proposals for Reform- Mental Health Act* 1990 declares:

> "Ultimately, decisions in relation to forensic patients require considerations of a number of issues, including the clinical state of the patient, their dangerousness, as well as community attitudes and concerns. While the Mental Health Review Tribunal deals with issues of a clinical nature, it is not constituted to look at the

[1] See *Commissioner of Corrective Services v Wedge* [2006] NSWCA 271

broader community issues, which is really the province of the executive arm of government."[2]

What are the problems with retaining executive discretion?

12 The retention of the executive discretion is fraught with problems. We set out below some examples. Those problems alone provide ample reason for its removal.

- Political considerations may enter into decisions made about forensic patients, in particular whether or not a forensic patient should be released. For example, release of certain persons might be denied by the executive for reasons entirely unrelated to real public safety concerns and/or for reasons that are not based on appropriate clinical or treatment criteria. Media criticism and public alarm about the prospect of a forensic patient's release is often, if not invariably, uninformed by an understanding of the relevant mental illness and treatments available to control its symptoms. Retribution and deterrence have no part in determining detention periods for those found not guilty because of mental illness. Yet, they usually drive public criticism of the release of such people.

- Detainees have no adequate facility to secure their release or challenge the exercise of the executive discretion.

- Detention can be prolonged well beyond any period warranted by the patient's level of risk based on actual evidence, to the point that the period of detention may exceed the period the person would have spent in custody if found guilty of the relevant offence and sentenced accordingly.

- The executive decision-maker does not hear the evidence on which the Tribunal's recommendation to the executive is based. Oral evidence and submissions which modify the effect of written reports is not available to the executive decision-maker, except to the extent that it might be included in written reasons for the Tribunal's decision.

- The executive may act arbitrarily. It is not obliged to give reasons if it chooses not to accept the Tribunal's recommendations and therefore there is no opportunity to address any fresh concerns or correct misapprehensions of fact.

- The involvement of the executive in leave and release decisions leads inevitably to time delays;

- Because a finding of not guilty on the ground of mental illness carries with it the potential for indefinite or unwarranted prolonged detention, the insanity defence is very rarely raised. As a result, it is likely that in the current system some accused persons are convicted who otherwise would have been found not guilty (on the ground of mental illness); the role that

[2] P 41

mental illness plays as a cause or contributing factor in the offences is obscured; the convicted person is treated as an ordinary prisoner; and the community loses the opportunity of ensuring comprehensive treatment, post-release care and ongoing monitoring is provided to persons suffering from mental illness, jeopardizing the safety of the community.[3]

- The practical operation of the present system in New South Wales has led to problematic delays and other matters of concern in particular cases. These are considered in more detail below.

- As the Monitoring Committee said 15 years ago,

> "The justification for continued detention is the danger that the person may pose to themselves or the community. Once this danger has been judged to have passed, as persons found not guilty they are entitled to their liberty. To effectively impose a sentence of an unspecified additional period after the stated release criteria has been met makes a mockery of both the verdict and the review system."[4]

The practical operation of the executive discretion in New South Wales

13 In its most recently published Annual Report the Tribunal released statistics relating to its forensic jurisdiction for the two year period from January 2004 to December 2005. During that period there were 9 new cases of persons unfit to be tried and detained subject to a limiting term and 27 new cases of persons found not guilty because of mental illness. There were also 808 regular periodic reviews of forensic patients. For the period from January to December 2005 the Tribunal recommended:

- Less restrictive conditions of detention in 68 cases. The executive approved the recommendation in 26 cases, partially approved it in 3, rejected it in 26, and delayed making a determination in the remainder leaving those matters up in the air at time of publication.

- Conditional release in 20 cases. The executive approved the recommendation in 6 cases, partially approved it in 1, rejected it in 8, and delayed determination of the remainder, such that those matters were still pending at time of publication.

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[3] To take a hypothetical example, a person suffering from schizophrenia, who causes a victim's death whilst suffering an acute psychotic episode, but who elects not to raise mental illness as a defence due to the prospect of indefinite detention, might instead plead guilty to manslaughter arguing diminished responsibility. If a term of imprisonment is imposed, as is almost inevitable, there is likely to be a minimum term and an additional period to be served on parole. Once the total term has expired, and assuming the person has no apparent history of failing to comply with treatment, the authorities have no power to compel the person to take medication prescribed for the schizophrenia, unless and until the person again becomes so unwell as to warrant involuntary hospitalisation. By that time, the person may have again caused serious harm to others whilst unwell. This tragic outcome could be avoided if the choice of raising mental illness as a defence did not have such harsh consequences. Once a person is found not guilty by reason of mental illness, the person's post-release care and ongoing monitoring of his or her mental illness is supervised by the Mental Health Review Tribunal for as long as necessary.

[4] *Mental Health Act* Implementation Monitoring Committee Report (1992), page 33

- Less restrictive conditional release in 15 cases. The executive approved the recommendation in 10 cases, rejected it in 2, and delayed determining the remainder, such that those matters were still pending at time of publication.

- Unconditional release in 4 cases. The executive rejected all 4 recommendations.

14 According to an article published in the *Sydney Morning Herald* on18 September 2006, recent statistics on the executive response to recommendations by the Tribunal reflect a similar pattern of rejections and delays. As at June 2006 not a single person had been released during the year. The Herald article provided favourable coverage of the call for removal of executive discretion under the heading "*Mentally ill left to languish in jail limbo*".

15 On 24 September 2006 the Nine Network's *60 Minutes* program broadcast a report on the case of Kylie Fitter, a young woman now aged 20 who was found not guilty of the murder of her mother by reason of mental illness, following the death of her mother on 16 October 2001. At that time Ms Fitter was 15 years of age. Dr Bruce Westmore expressed the opinion that she fulfilled the *M'Naghten* criteria because it was probable that she had developed an acute but transient psychotic state. His diagnosis was that of shared delusional disorder or brief reactive psychosis. Dr Stephen Allnutt agreed. No differing expert opinion is referred to in the decision: *R v GJF, R v GFF, R v KHF* [2002] NSWSC 737. Both the Crown and defence counsel submitted the proper verdict was not guilty by reason of mental illness. By the time the judge decided that Ms Fitter not guilty on 22 August 2002, Dr Westmore and Dr Allnutt were of the view that her mental illness had resolved. Her case has been reviewed by the Mental Health Review Tribunal every 6 months since August 2002 and on the last 4 reviews the Tribunal has recommended her release from detention on the basis that the evidence disclosed that neither her safety nor that of any member of the public would be seriously endangered if she were. Yet, the executive has refused to follow the Tribunal's recommendation. Ms Fitter has been on limited conditional release for a significant period without incident. This includes weekend and day leave from the juvenile detention centre where she is held. She turned 21 on 25 January 2007, at which time she ceased to be a "juvenile inmate" within the meaning of the *Children (Detention Centres) Act*, and may find herself transferred to an adult prison or psychiatric hospital. By any measure this outcome is a cruel and unjustifiable punishment.

Applicable international human rights instruments

16 The retention of executive discretion offends two key international human rights instruments.

International Covenant on Civil and Political Rights

17 The *International Covenant on Civil and Political Rights* (ICCPR) was adopted by the United Nations General Assembly in 1966. Australia ratified the ICCPR on 13 August 1980. The First Optional Protocol to the ICCPR entered into force for

Australia on 25 December 1991 and allows aggrieved individuals to take action against Australia by complaint to the United Nations Human Rights Committee.

18 Article 9(1) of the ICCPR stipulates that:

> "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

19 Article 9(4) of the ICCPR stipulates that:

> "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

20 Interpretation of Article 9 of the ICCPR was considered by the United Nations Human Rights Committee in Communication 560/1993. The author of the communication was a Cambodian national detained by the Australian Department of Immigration. Relevant questions for determination by the Committee were:

- whether the prolonged detention of the author, pending determination of his refugee status, was 'arbitrary' within the meaning of Article 9(1); and

- whether the alleged impossibility to challenge the lawfulness of the author's detention was in violation of Article 9(4).

32 The Committee concluded that the author's detention for a period of over 4 years was arbitrary within the meaning of article 9 paragraph 1, after making the following observations (at paragraphs 9.2 and 9.4):

> "The Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.
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> "The Committee observes, however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres."

33 The Committee also concluded that the author's right under article 9 paragraph 4, to have his detention reviewed by a court, was violated, after making the following observations (at paragraph 9.5):

> "In the Committee's opinion, court review of the lawfulness of detention under article 9 paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9 paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release 'if the detention is not lawful', article 9 paragraph 4 requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9 paragraph 1, or in other provisions of the Covenant."

34 These remarks apply with equal force to the detention of forensic patients in New South Wales beyond the time of a determination by the Tribunal that they should be released.

35 The European Court of Human Rights considered a provision identical to Article 9(4) in *X v The United Kingdom* [1981] ECHR 6 (5 November 1981). The Court in that case was constituted by a panel of seven judges, including a professor of international law at Cambridge University. The applicant was a UK citizen who had a history of paranoid psychosis and pleaded guilty to wounding with intent to cause grievous bodily harm. The sentencing court made an order that X be detained in a secure mental hospital for the criminally insane and a restriction order for an indefinite period. X thereby became subject to the executive discretion of the Home Secretary in relation to leave, release and revocation of release. After nearly three years in detention, the Home Secretary ordered X's conditional release. Three years later the Home Secretary ordered X's immediate recall to Broadmoor Hospital, after receiving information suggesting there might be a recurrence of violent behaviour. X then applied unsuccessfully for a writ of *habeas corpus*. Three weeks later X lodged his application with the European Human Rights Commission, complaining (relevantly) that the habeas corpus proceedings did not fully investigate the merits of the decision to recall him, but merely examined if the recall had been ordered in accordance with the relevant provisions of the *Mental Health Act*. Thus, he argued, there was a violation of his rights under Article 5 paragraph 4 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, which provided:

> "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

36 The European Court of Human Rights determined that Article 5 paragraph 4 required an appropriate procedure that enabled a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of compulsory confinement was necessary in the interest of public safety, and that the *habeas corpus* proceedings provided too narrow a remedy to secure X the enjoyment of this right. The *Mental Health Act* also provided for periodic review on a comprehensive factual basis by the Mental Health Review

Tribunal, but because the Tribunal had advisory functions only, it lacked the competence to decide 'the lawfulness of the detention' and to order release if the detention were unlawful. Therefore, it held, the machinery of review by the Mental Health Review Tribunal did not serve to remedy the inadequacy of the *habeas corpus* proceedings. Hence, the Court unanimously concluded that there had been a violation of Article 5 paragraph 4.

37 Applying the reasoning of the UN Human Rights Committee and the European Court of Human Rights in the two cases above to executive discretion under the *Mental Health Act* shows how the statutory regime that maintains executive discretion can result in arbitrary detention contrary to Article 9(1) of the ICCPR, and also violate a person's right under Article 9(4) of the ICCPR to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his or her release if the detention is not lawful.

Convention on the Rights of the Child

38 Australia became a signatory to the *Convention on the Rights of the Child* on 22 August 1990 and ratified it on 17 December 1990. In any case where a forensic patient is under the age of 18 at the time of the incident warranting a criminal charge, there is potential for breach of the child's rights under the *Convention on the Rights of the Child*.

39 Article 3(1) of the *Convention on the Rights of the Child* stipulates that:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

40 Article 37(b) of the *Convention on the Rights of the Child* stipulates that:

> "States Parties shall ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

41 Article 37(d) of the *Convention on the Rights of the Child* stipulates that:

> "Every child deprived of his or her liberty shall have the right to… challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

42 Article 40(1) of the *Convention on the Rights of the Child* stipulates that:

> "States Parties recognize the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

Other International Instruments

43 There are several other international human rights instruments which by their titles suggest their contents might bear upon the operation of executive discretion over forensic patients. However, none of their provisions stipulates any directly relevant principles beyond those addressed by Article 9 of the ICCPR. Those other instruments are the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, the *United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care*, and the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*.

Recommendations of review bodies and other relevant developments

21 Removal of executive discretion in decision-making for forensic patients has been recommended by:

- the *Mental Health Act* Implementation Monitoring Committee in 1992;
- the Burdekin Report, adopted by the Human Rights and Equal Opportunity Commission (Clth) in 1993;
- the NSW Law Reform Commission in 1996; and
- the Senate Select Committee on Mental Health in 2006.

22 The *Mental Health Act* Implementation Monitoring Committee recognised the potential for breach of Article 9(4) of the ICCPR in its 1992 report. So did the NSW Law Reform Commission in Report 80 (1996) *People with an Intellectual Disability and the Criminal Justice System*, as well as by the *Review of the Mental Health Act 1990* published as Discussion Paper 2 in July 2004. The 1993 *Report of the National Inquiry into the Human Rights of People with Mental Illness* completed by the Human Rights and Equal Opportunity Commission (the *Burdekin Report*) recognised the potential for breaches of Article 9(1) and 9(4).

23 Executive discretion over release of persons found not guilty by reason of mental illness or not fit to be tried has its origins in the United Kingdom *Criminal Lunatics Act* 1800. At the time that Act came into force, people suffering from mental illness in England were in some cases still being restrained in chains in asylums and the general population had only relatively recently come to grips with the proposition that people with mental illness were not possessed by evil spirits or practitioners of witchcraft. At that stage the *M'Naghten* rules governing the test for acquittal on the grounds of mental illness had not been formulated.

24 In 1983 the United Kingdom removed executive discretion over the release of forensic patients. Instead, the Mental Health Review Tribunal was empowered to direct the release of such persons, and the Home Secretary's role was confined to urging the Tribunal to take a particular course.

25 In 1992 South Australia removed decisions about the release on licence of detainees from the Governor in Council and gave the decision to a relevant court after the passage of a private member's bill introduced by the Hon RJ Ritson.

26 In 1994 the Australian Capital Territory abolished executive discretion and vested the power to release in the Mental Health Tribunal: *Mental Health (Treatment and Care) Act* 1994, ss 68-75.

27 In 1995 the Standing Committee of Attorneys-General referred to the Model Criminal Code Officers Committee the task of preparing model legislation to reform the law relating to detention at the Governor's pleasure. The committee prepared the *Mental Impairment and Unfitness to be Tried (Criminal Proceedings) Bill* 1995.

28 In 1997 Victoria abolished the system of Governor's pleasure detention by passing the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

29 In 1999 Tasmania removed executive discretion by introducing the *Criminal Justice (Mental Impairment) Act 1999* (Tas), which transferred the authority to make release decisions to the Supreme Court.

30 By 2000 Queensland abolished executive discretion and transferred the authority to make release decision to the Mental Health Court (consisting of a single Supreme Court judge assisted by 2 psychiatrists): *Mental Health Act* 2000.

31 In 2001 Victoria introduced amendments to the *Crimes (Mental Impairment and Unfitness to be Tried) Act* to clarify the role of victims and families at review hearings, provide the Attorney-General with a right of appearance and appeal, and impose greater restrictions on forensic leave. There was no proposal to reintroduce executive discretion.

32 In 2002 the Northern Territory abolished executive discretion by introducing Part IIA into its *Criminal Code*, thereby vesting authority to release forensic patients in the Supreme Court.

33 In April 2004 the Australian Health Ministers Conference endorsed the *National Statement of Principles for Forensic Mental Health 2002*, which provide that:

- persons found unfit for trial or not guilty on the ground of mental illness should not have decisions to detain, release or transfer them made by "*a political process or the Governor/Administrator in Council*", but by courts or independent bodies of competent jurisdiction; and

- legislation dealing with people with a mental illness involved in the criminal justice system must comply with the *International Covenant on Civil and Political Rights.*

34 On 30 March 2006 the Australian Senate Select Committee on Mental Health published its First Report, *A National approach to mental health – from crisis to community*. In Chapter 13 of the Report, the Committee applauds those Australian jurisdictions making progress in endeavouring to incorporate into their legislation the *National Statement of Principles for Forensic Mental Health.*

35 The overwhelming support of review bodies and the developments elsewhere provide additionally compelling reasons to replace the executive discretion in

decision-making for forensic patients in New South Wales. Its abolition in this jurisdiction is long overdue.

How should the system be reformed?

44 If executive discretion is abolished, the question becomes who should be vested with the authority to release forensic patients or reduce or alter the level of restrictions on their detention. The two options most often cited are a specialist tribunal or a court. The Tribunal is such a specialist tribunal. When the Tribunal is dealing with forensic patients it must be constituted by a panel of three members, one of whom must be the President or a Deputy President of the Tribunal, one of whom must be a psychiatrist, and one of whom must be a person who is neither lawyer nor psychiatrist but who has other suitable qualifications or experience[5]. The current President of the Tribunal happens to be a retired Supreme Court judge. At present, the Tribunal is authorised to make recommendations rather than orders in relation to release of forensic patients.

45 In 1996 the NSW Law Reform Commission recommended a legislative amendment to authorise the Tribunal to make orders rather than mere recommendations in relation to forensic patients. The Law Reform Commission cited the argument made by the Tribunal that it is better placed than a court to assess dangerousness, and also noted that the Tribunal is generally quicker and less formal than the courts. Straightforward amendments to the *Mental Health Act 1990* would enable the Tribunal to make orders, rather than recommendations, and all references to executive discretion could be deleted.

46 Under the Victorian model the court which finds a person not guilty by reason of mental illness also determines whether the person should be released unconditionally or subject to supervision by way of a custodial or a non-custodial order. A supervision order is for an indefinite term. The DPP has a right of appeal against this initial determination. A Forensic Leave Panel (consisting of at least one Supreme Court judge, one County Court judge and the chief psychiatrist or his or her nominee) was established and authorised to grant limited forms of leave for periods up to six months and falling short of allowing a person to live within the community. Leave decisions effectively allowing a person to live within the community could only be granted by a court and could be granted for periods up to 12 months. The Attorney-General has a right of appearance and right of appeal in relation to decisions increasing a person's liberty in the community.

47 Under the Tasmanian model the court which finds a person not guilty by reason of mental illness or unfit to be tried also determines whether the person should be released unconditionally, released conditionally, subject to a treatment order or detained in a special facility under a restriction order. Where a restriction order is imposed, release is determined by the Supreme Court. Applications for release can be made two years after the order was made and every two years thereafter, unless the Mental Health Tribunal after one of its regular reviews forms the view that detention is no longer warranted, in which case the patient is granted a certificate by the Tribunal which enables the person to make an earlier application to the Supreme Court.

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5 *Mental Health Act 1990*, section 265.

48 Under the ACT scheme, power to release is vested in the Mental Health Tribunal. Under the Northern Territory model, power to release is vested in the Supreme Court.

49 Under the Queensland model, power to release is vested in the Mental Health Court which is constituted by a Supreme Court judge sitting alone but assisted by 2 psychiatrists. A Mental Health Review Tribunal also operates but determines other issues.

50 The NSW Bar Association believes there is much merit in the position adopted by the NSW Law Reform Commission in its 1996 Report that the power be given to the Tribunal to make orders for release rather than mere recommendations to the executive. Such an approach retains the advantage of maintaining the considerable specialist expertise of the Tribunal and allows that expertise to be brought to bear without the constraints that operate in a formal court room. Any residual signs of mental illness which might pose a risk to community safety are more likely to be detected by an experienced forensic psychiatrist sitting on the Tribunal in an informal hearing (applying appropriate clinical and treatment criteria) than by a Supreme Court judge presiding over a more formal proceeding in a courtroom. The relative speed and informality of Tribunal proceedings also avoids the revenue implications of either requiring a court to approve the Tribunal's recommendations or requiring a court to perform the entire decision-making process.

51 The Association considers that the Tribunal is in a good position to make the primary decisions about the detention, care, treatment and release of forensic patients by the application of appropriate clinical and treatment criteria.

52 However, the Association recognises that the NSW Law Reform Commission's proposal that the Tribunal's determinations not be reviewable on the merits is unlikely to find favour with governments concerned about community alarm at the release of high-profile forensic patients. A workable compromise, consistent with international human rights law, would be to provide a limited avenue appeal on the merits from the Tribunal to a single judge of the Supreme Court, and to provide the Attorney-General with a right of appearance before both the Tribunal and at any Supreme Court appeal. The Attorney-General would perform the role of contradictor and represent the position of the executive government on behalf of the community.

53 Having considered various alternative appeal mechanisms, the NSW Bar Association supports a system of limited merits appeal akin to that which applies to appeals by defendants against conviction in s 18 of the *Crimes (Appeal and Review) Act* 2001. Such a provision might, however, give both the forensic patient and the Attorney-General a right to appeal determinations of the Tribunal. The appeal should be by way of rehearing on the basis of transcripts of the evidence given in the Tribunal proceedings. Fresh evidence could be given, but only by leave of the Supreme Court, which might be granted only if the Court were satisfied that it would be in the interests of justice that fresh evidence be given. The Supreme Court would be empowered to exercise the powers of the Tribunal. Accordingly, the sole prerequisite for release of the forensic patient on appeal would be a finding by the Supreme Court that neither the patient nor any member of the public would be

seriously endangered by the patient's release. It may also be noted that in any such appeal the Supreme Court could avail itself of the rules of court, such as Part 31 Division 3 of the *Uniform Civil Procedure Rules* 2005, to seek the assistance of an additional expert advisor if required.

54 The Consultation Paper canvasses broadening the criteria for consideration in decisions concerning the release of forensic patients. At present only one prerequisite must be satisfied before release. One option proposed in the Consultation Paper would require the decision-maker to be satisfied of the following before ordering a forensic patient's release:

(i) neither the patient nor any members of the public would be seriously endangered by the person's release;

(ii) care of a less restrictive kind (where necessary) *is appropriate* and reasonably available to the patient within the community; and

(iii) reasonable arrangements have been made to ensure the person's continued care or treatment (where necessary) within the community.

55 Introducing a test as to the "appropriateness" of less restrictive care may involve political considerations. The decision-making process ought to be focussed on clinical state, dangerousness and safe management within the community, without reference to political considerations. With that qualification the Association sees some merit in release criteria being articulated with greater precision in the manner proposed.

56 The Association would welcome the opportunity to provide further comments or submissions that might assist in the review of the forensic provisions, including making representatives available to discuss particular issues.

21 March 2007