

**NORTHERN TERRITORY OF AUSTRALIA
MENTAL HEALTH REVIEW TRIBUNAL**

IN THE MATTER OF A

REASONS FOR DECISION

This matter involves a review of the long term admission of A as a voluntary patient. The review is pursuant to the provisions of Section 122(1) of the Mental Health and Related Services Act which provides as follows:

“ The Tribunal must review the admission of a person as a voluntary patient where the person remains in the approved treatment facility for longer than 6 months and must continue to review the admission at intervals not longer than 6 months as long as the person remains admitted as a voluntary patient.”

Section 122 (2) of the Act provides as follows:

“ Following a review, the Tribunal if it is satisfied –

- (a) that the person is able to give informed consent, it may confirm the admission of the person as a voluntary patient;
- (b) that the person fulfils the criteria for involuntary admission on the grounds of mental illness, it may order that the person be detained as an involuntary patient on those grounds for not longer than 3 months and, where it does so, it must fix a date for the order to be again reviewed;
- (c) that the person fulfils the criteria for involuntary admission on the grounds of mental disturbance, it may order that the person be detained as an involuntary patient for not longer than 14 days and, where it does so, it must fix a date for the order to be again reviewed; or
- (d) that the person fulfils the criteria for involuntary treatment in the community, it may make a community management order in relation to the person.”

Section 122 (3) provides as follows:

“ Following the review, if the Tribunal is not satisfied that the person –

- (a) will benefit from continuing to be admitted as a voluntary patient; or

(b) fulfils a criteria referred to in subsection (2),

it must order that the person be discharged from the approved treatment facility.”

Section 122 (4) provides as follows:

“ Where the Tribunal makes an order under subsection 2(b) or (c), it must authorise the treatment that may be administered to the person under the order.”

This review raises a number of very important issues, the foremost of which is the relationship between the Adult Guardianship Act and the Mental Health and Related Services Act.

A is subject to a guardianship order made under the provisions of the Adult Guardianship Act .

A is also a long term voluntary patient. A’s admission predates the commencement of the Mental Health and Related Services Act, and originates under the now repealed Mental Health Act (see Section 5). Although the transitional provisions of Section 172 of the new Act do not deal with voluntary admissions under the repealed Act, the terms of Section 122 (1) are expressed in sufficiently broad language to require the review of voluntary admissions under the repealed Act.

Section 122 (1) requires the review of the admission of long term voluntary patients. As “voluntary patients” are not defined in the definition section, Section 4, one must turn to the substantive provisions of the Act to gain an understanding as to what is comprehended by the term “voluntary patient”.

The starting point is Part 5 of the Act which deals with “Voluntary Admissions”.

Section 25 deals with the admission of voluntary patients who are not subject to a guardianship order made pursuant to the provisions of the Adult Guardianship Act. In relation to that category of patient the confirmation of the patient’s admission as a voluntary patient is contingent upon satisfaction of two criteria:

- (1) that the person has given informed consent to his or her admission and
- (2) that the person is likely to benefit from being admitted.

Section 27 of the Act deals with the admission of persons under guardianship orders as voluntary patients. According to this section the patient’s admission is contingent upon satisfaction of four criteria:

- (1) that the adult guardian applies for the person to be admitted;
- (2) that the person is willing to be admitted;

- (3) that the person does not fulfil the criteria for admission as an involuntary patient; and
- (4) is likely to benefit from being admitted.

Section 54 of the Act deals with “Treatment after Voluntary Admission”.

Section 54 (1) provides as follows:

“ A person who is admitted to an approved treatment facility as a voluntary patient may only be treated under this Act where –

- (a) the person gives his or her informed consent to the treatment; or
- (b) a guardian of the person gives his or her consent to the treatment.”

Subsection (2) of Section 54 reads as follows:

“ For the purposes of subsection (1) (b), a guardian must be given sufficient information to make a properly informed decision regarding the treatment.”

The combined effect of Section 54 (1) (b) and Section 54 (2) is that a guardian can give informed consent, on the behalf of the patient, to treatment. In other words a guardian can “stand in the shoes” of the patient when it comes to giving informed consent.

Section 54 (3) delimits the capacity of guardians to give consent to treatment:

“ A guardian may only give his or her consent to treatment under this section if he or she is authorised by the Adult Guardianship Act to make a decision of that nature in respect of the person.”

The Mental Health and Related Services Act draws a distinction between voluntary admission and treatment after voluntary admission. The test applied in relation to voluntary admission is different to the test applied in relation to treatment after voluntary admission.

The provisions of Section 122 (1) and the immediately following subsections now fall for consideration by the Tribunal.

Section 122 (1) requires a review of the admission of a person as a voluntary patient. What precisely does that entail?

In the opinion of the Tribunal, the review is not confined to the actual admission as an historical event: the review focuses upon the continuing admission of the person as a voluntary patient. The longitudinal nature of the review is reinforced by the provisions of Section 122 (3) (a) which deal with the benefit accruing to a patient from continuing to be admitted as a voluntary patient. The criteria referred

to in that subsection must be satisfied in addition to the criteria set out in Section 122 (2) (a) if a patient is to remain as a voluntary patient following a review pursuant to Section 122 (1). More is said about that later.

Given that the focus of the review is upon the continuing admission of the person as a voluntary patient, how does one construe the provisions of Section 122 (2) (a) and its applicability to a person who is subject to a guardianship order. What is meant by the phrase “able to give informed consent “ as appears in Section 122 (2) (a)?

It is a reasonable assumption that it was the intention of the legislature to bring within the review provisions of Section 122 all categories of voluntary patients. The section is expressed in general language and no attempt is made, within the body of the section, to differentiate between the two classes of voluntary patients.

Furthermore, it would make no sense to exclude from the ambit of Section 122 voluntary patients who are subject to guardianship orders. Why should such patients receive lesser rights and protection than general voluntary patients. To construe Section 122 as not covering voluntary patients under guardianship orders would be completely at odds with the objects and principles of the Mental Health and Related Services Act.

Working from those premises, it is the opinion of the Tribunal that the phrase “able to give informed consent” in Section 122 (2) (a) must relate to treatment. The legislature has left open the object of “informed consent”. Given that the criteria for admission of a person, as a voluntary patient, who is not under a guardianship order, is different to the admission criteria for a person, as a voluntary patient, who is subject to such an order, sense can only be made of the phrase “able to give informed consent”, as appears in the subsection, if it is referable to treatment.¹ Of course, “informed consent to treatment” is a criteria that is applied to both categories of voluntary patients following their admission.

The general distinction drawn by the Mental Health and Related Services Act between the concepts of “admission” and “treatment” together with the content of paragraphs (b) (c) and (d) of Section 122 (2) provide textual clues as to how Section 122 (2) (a) should be construed. Amongst the criteria for involuntary admission on the grounds of mental illness, mental disturbance and involuntary treatment in the community is the recurrent criteria of “not capable of giving informed consent to treatment.” A precondition for an involuntary order is inability to give informed consent to treatment. If the phrase “able to give informed consent” as appears in subsection (2) (a) was to be read as “able to give informed consent to admission”, then the provisions of subsection (2) would be

¹ This is an instance of the application of the well established principle of statutory interpretation which requires a particular statutory provision not to be considered in isolation but read in the overall context of the statute in which it appears – a statute must be read as a whole.

somewhat asymmetrical. The symmetry of the subsection is maintained by construing the phrase as being referable to “treatment”.²

There is another reason why the phrase ought to be construed in that way. The whole purpose of voluntary admissions is to allow for patients to be voluntarily admitted to an approved treatment facility or agency for the purposes of receiving appropriate treatment or care. In considering whether or not the person’s voluntary admission ought to be confirmed the Tribunal must not lose sight of the purpose of the admission, being the administration of appropriate treatment or care. Viewed this way, the Tribunal needs to consider whether the person’s admission **for the purposes of treatment or care** should be confirmed. Accordingly, it would seem only natural and proper that the phrase “able to give informed consent” should be read as “able to give informed consent to treatment”.³

Furthermore, if the phrase were construed to mean “able to give informed consent to admission” that would mean that the ability of the person to give informed consent to treatment, as opposed to admission, would be an irrelevant consideration. Accordingly, the Tribunal would be bound to confirm the person’s voluntary admission even if the person were unable to give informed consent to treatment. That would yield a most absurd result. If, however, the phrase were to be construed as being referable to treatment that would yield a sensible result.⁴

Finally, if the material phrase were to be construed as “able to give informed consent to admission”, then Section 122 (2) (a), and hence the review provisions of Section 122, could have no application to voluntary patients who are subject to guardianship orders. “Informed consent to admission” is not a precondition for the voluntary admission of persons under guardianship orders. The only criteria is “willing to be admitted” (see Section 27(2) (a)) which is not capable of being read into the provisions of Section 122 (2) (a). It could never have been intended that long term voluntary patients under guardianship orders would not be subject to the review provisions of Section 122. To construe the section in that way would produce an unjust result, and unfairly discriminate as between the two classes of voluntary patients.⁵ For that reason the phrase “able to give informed consent” should be read as “able to give informed consent to treatment” so as to ensure that voluntary patients, subject to guardianship orders, fall within the ambit of Section 122 of the Act, and that that class of voluntary patients are not the subject of unfair discrimination.

² This is consistent with the principle of statutory interpretation that requires a statutory provision to be read as a whole.

³ This is an instance of the application of the purposive approach to statutory interpretation.

⁴ This is an accepted approach to statutory interpretation. Where two possible interpretations are open, the consequences of adopting either one of those interpretations can be considered. Where one interpretation is reasonable and the other is absurd, the former should be adopted. (See Pearce and Geddes “ **Statutory Interpretation in Australia**” **Third Edition para 2.9 at p 19**).

⁵ Again this is an instance of the application of a well established principle of statutory interpretation: a statutory provision should be construed so as to avoid an unjust or absurd result.

For all of the above reasons the Tribunal is of the opinion that the phrase “able to give informed consent”, as appears in Section 122 (2) (a), must be read as “able to give informed consent to treatment”.

According to the evidence, A is unable to give informed consent to treatment. On a literal reading of Section 122 (2) (a), A does not satisfy the criteria set forth in that subsection, thereby preventing the Tribunal from confirming A’s admission as a voluntary patient.

However, by reason of Section 54 of the Act a guardian may give his or her consent to treatment. So much is clear from the combined operation of subsection (1) (b)⁶ and subsection (2)⁷ and (3).⁸ For the reasons that follow, the Tribunal is of the opinion that a duly appointed adult guardian is able to give informed consent to treatment, on behalf of a patient, within the context of Section 122 (2) (a) of the Act

In the opinion of the Tribunal, the word “person”, as appears in Section 122 (2) (a), is to be read as including a guardian duly appointed under the provisions of the Adult Guardianship Act. If the word “person” were to be read narrowly, and construed not to include a guardian, then the result would be that voluntary patients under guardianship orders would be excluded from the review provisions of Section 122. That would produce an absurd and unjust result, and one which the legislature is unlikely to have intended. Such an absurd and unjust result - and unintended result - can only be avoided by reading “person” as including an adult guardian.

A’s adult guardian is able to give informed consent to treatment, on behalf of A, and indeed gives such consent. Furthermore, the adult guardian supports A remaining as a voluntary patient. The requirements of Section 122 (2) (a) of the Act are satisfied, thereby providing the basis for the Tribunal confirming the admission of A as a voluntary patient.

On the evidence presented at the hearing, A does not satisfy the criteria referred to in paragraphs (b) (c) and (d) of Section 122 (2). Accordingly it is not appropriate to order that A be detained as an involuntary patient (on the grounds of either mental illness or mental disturbance) or to make a community

⁶ Subsection (1) (b) provides:

“ A person who is admitted to an approved treatment facility as a voluntary patient may only be treated under this Act where..... a guardian of the person gives his or her consent to the treatment.”

⁷ Subsection (2) provides:

“ For the purposes of subsection (1) (b), a guardian must be given sufficient information to make a properly informed decision regarding the treatment.”

⁸ Subsection (3) provides:

“ A guardian may only give his or her consent to treatment under this section if he or she is authorised by the Adult Guardianship Act to make a decision of that nature in respect of the person.”

management order in relation to A. The appropriate order is to confirm A's admission as a voluntary patient.

However, this review does not end there because the effect of Section 122 (3) is that in addition to the person being able to give "informed consent" (ie informed consent to treatment) it must be shown that the person will benefit from continuing to be admitted as a voluntary patient. Unless the Tribunal is satisfied about both of those matters it must discharge A from the approved treatment facility.

Section 122 (3) is not an easy section to read. It needs to be closely examined and inverted so that its relationship to subsection (2) can be fully understood. Put another way, Section 122 (3) provides that a person is not to be discharged from an approved treatment facility if he or she fulfils a criteria in Section 122 (2)⁹, and where the person falls within the criteria referred to in paragraph (a), that person can only remain admitted as a voluntary patient if it is shown that he or she will benefit from continuing to be admitted as a voluntary patient.¹⁰

For the sake of completeness, Section 122 (3) (a) is not applicable where the person falls within the criteria set out in paragraphs (b), (c) or (d) of Section 122 (2) because in each case the person ceases to be a voluntary patient.

The only remaining issue is whether A will benefit from continuing to be admitted as a voluntary patient.

Although the Mental Health and Related Services Act is silent on this point, the purpose of voluntary admissions is to psychiatrically treat people who suffer from either a mental illness or a mental disturbance. In a similar vein, the likelihood of a person benefiting from being admitted as a voluntary patient¹¹ or benefiting from remaining as a voluntary patient,¹² is to be assessed in terms of the psychiatric treatment that is available to treat his or her mental condition, whether constituted by a mental illness or a mental disturbance. People, who neither suffer from a mental illness nor a mental disturbance, may well benefit from being admitted to an approved treatment facility in terms of being accommodated, nourished and treated for physical ailments – but that is not the objective of voluntary admissions under the Mental Health and Related Services Act. The use of the voluntary admission provisions of the Act (Sections 25 and 26) for the purpose of treating and caring for persons who do not suffer from a mental illness or a mental disturbance – and that includes persons who suffer from an intellectual disability – does not accord with the general principles that underpin the Mental Health and Related Services Act.

⁹ That is to say one of the criteria referred to in paragraphs (a), (b), (c) or (d).

¹⁰ That the criteria referred to in Section 122 (2) (a) and (3) (a) must be satisfied for a person to remain admitted as a voluntary patient is consistent with the general scheme of the Act relating to voluntary patients (see Sections 25 (6) and (8) and Section 27 (2)).

¹¹ See Section 25(6) and (8) and Section 27(2).

¹² See Section 122 (3) (a).

A suffers from neither a mental illness nor a mental disturbance within the meaning of the Mental Health and Related Services Act. However, A does suffer from an intellectual disability and it is for that reason that he is the subject of a guardianship order.

This case primarily gives rise to guardianship issues rather than issues arising under the Mental Health and Related Services Act. The main, if not sole, reason for A continuing to be a voluntary patient at Royal Darwin Hospital is that there is no other appropriate facility to care for people like A with an intellectual disability. Clearly there should be such facilities.

However having said that, A does from time to time suffer from mood disturbance and the treatment of mood disturbance is something within the ambit of psychiatric practice. It is worth mentioning that the evidence does not exclude the possibility that such mood disturbance has a cause independent of A's organic brain injury. Although A would be better placed in a facility specifically designed to cater for his condition, there are, according to the evidence, some elements of A's treatment that are within the purview of psychiatric practice. Treatment is available at Royal Darwin Hospital to prevent deterioration in A's physical and mental state and to relieve his symptomatology, consisting of periodic mood disturbance; although it is conceded that none of these arise out of mental illness or mental disturbance as defined by the Act.

Finally, the adult guardian is of the view that A will benefit from continuing to be admitted as a voluntary patient.

Although the Tribunal is of the opinion that A does not fall squarely within the statutory scheme of the Mental Health and Related Services Act, there are elements of his treatment program that are within the purview of psychiatric practice and the continuance of such treatment at Royal Darwin Hospital would be beneficial to A, particularly in the absence of any other appropriate treatment facility. The Tribunal is prepared to accept that A will benefit in a very "loose sense" from remaining as a voluntary patient. However, it is very questionable whether this, in fact, provides an adequate basis for the Tribunal confirming A's admission as a voluntary patient pursuant to Section 122 (2) (a) of the Act. In the final analysis, it is the choice of the lesser of two evils that persuades the Tribunal to confirm A's admission as a voluntary patient and, in effect, to sanction A remaining as a voluntary patient.

The first evil entails sanctioning access to approved treatment facilities by persons who suffer neither from mental illness or mental disturbance, but who nonetheless may reap some benefits from psychiatric treatment. The second entails discharging long term voluntary patients such as A (who have hitherto reaped some benefits from psychiatric treatment) from an approved treatment facility in circumstances where there has never been and continues to be no

other appropriate means by which to care for and treat such persons as A. The latter option carries with it the risk that the person may suffer serious mental or physical deterioration. Of the two evils the Tribunal chooses the first. The choice is a pragmatic one, paying due regard to human interests and the practical consequences of choosing the alternative.

This Tribunal should not have to make difficult decisions of this type – to make decisions based on pragmatism rather than principle. The solution is straightforward. The Northern Territory Government should establish specifically designed or tailor-made treatment facilities that are appropriate to the needs of persons such as A. In the opinion of the Tribunal this is a matter that should be given the utmost priority.

The decision of the Tribunal is that the admission of A as a voluntary patient be confirmed and that A remain as a voluntary patient.

According to Section 122 of the Act the Tribunal must review the admission of a person as a voluntary patient where the person remains in the approved treatment facility for longer than 6 months and must continue to review the admission at intervals not longer than 6 months as long as the patient remains admitted as a voluntary patient. In light of the fact that A's continuing admission as a voluntary patient is highly questionable, the Tribunal proposes to review A's voluntary admission three months from the date of this determination, namely 4 October 2000.

Dated this 25 day of August 2000

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The President of the Tribunal