Mental Health: The Cinderella of the Detention System

"*The law and special legal procedures have been established to regulate the detention and control of [the mentally ill]. Because this control involves 'detention in hospital' or other serious curtailments of liberty it has to be both rigorously monitored and subject to challenge*."[1]

1. Proper challenge to the unlawful detention of the mentally ill, by way of the statutory review procedures and access to the Courts, is considered to be axiomatic for the protection of the rights of mental health detainees.

2. The dichotomy between the two opposing models of thought, parens patriae power and the principle of patient autonomy, has always been the battleground for such challenge:[2]

> There are clear and fundamental differences between the approaches of medicine and the law. The one tends towards an individualised and paternalistic 'caring', the other is founded on universal ethical concepts of liberty and rights. But both ethics and rights are difficult and often vague generalisations and so are hard to apply and often difficult to reconcile in individual cases….some sound method of adjudication between the two views is essential.

3. This article aims to illustrate how the current mental health legislative framework fails to vigorously monitor and adequately challenge the serious curtailments of liberty suffered by the mentally ill, thereby showing the extent that the rights of the most vulnerable group in society are neglected.

4. The various ways by which those detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 ("MHCAT") can challenge their involuntary assessment and detention will be critiqued, together with the examination of the relationship between MHCAT and the New Zealand Bill of Rights Act 1990 ("NZBORA"), and the core rights belonging to the mentally ill.

5. The following topics will be specifically explored:

A. (i) The right to a lawyer
(ii) The right to a family member

B. The role of a writ of habeas corpus

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1 J Wood, *Control and Compassion: The uncertain role of Mental Health Review Tribunals in the management of the mentally ill*, 1999, in D.Webb and R. Harris *Mentally Disordered Offenders: Managing People Nobody Owns*, Routledge Taylor and Francis, London, p127.

2 Ibid, p128.

C. **Analysis of Chu v District Court and Director of Area Mental Health Services**[3]

D. **Whether the rights under NZBORA are applicable to mental health detainees or whether they are subsumed under Mental Health legislation**

E. **Section 16 review before a District Court Judge**

F. **The role of the Mental Health Review Tribunal**

G. **Section 84 review before a High Court Judge- A statutory form of habeas corpus?**

H. **Which route to take, a Habeas, s16 review, Mental Health Review Tribunal, High Court s84 review?**

A. What rights are available particularly to a lawyer, and/or family, and when do they arise?

(i) Right to a Lawyer

6. In the words of Justice Richardson,[4] the right to consult a lawyer is considered to be part of our basic constitutional inheritance and which is pivotal in assuring so far as possible that both those detained, and those detaining them act in accordance with the law.

7. It is contended that mental health detainees in New Zealand are not treated as part of this basic constitutional fabric.

8. This is illustrated by the fundamentally inherent differences between the legislative schemes which confer the guarantee of the right to a lawyer, firstly on those who are detained and assessed under MHCAT, and secondly on those who are detained under all other enactments.

9. For those who are considered to be a patient under the MHCAT, s70 provides:

> 70 Right to legal advice
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> Every patient is entitled to request a lawyer to advise the patient on his or her status and rights as a patient, or any other matters on which persons customarily seek legal advice, and, if the lawyer agrees to act for the patient, he or she shall be permitted access to the patient upon request.

10. In contrast, s23(1)(b) of the NZBORA states:

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3 HC, 24/07/2006; Fogarty J, Wellington, CIV 2006-485-001572

4 Ministry of Transport v Noort [1992] 3 NZLR 261, 279.

> 23 Rights of persons arrested or detained
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> (1) Everyone who is arrested or who is detained under any enactment—
>
> (b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right;

11. It is clear that whilst everyone has the right to consult a lawyer **without delay and in private** under the NZBORA**,** the MHCAT provision is not nearly as strong.

12. The grave consequences of the failure to align s70 MHCAT to the right to a lawyer under BORA can be illustrated in a practical context, by considering the document "Patient's Rights", which is given to mental health patients upon first receiving compulsory assessment and treatment. (see Appendix 1)

13. It is clear that the document does not include the essential requisite criteria of "without delay" and "in private". Indeed, it only contains an obscure buried reference to the right to a lawyer, does not have a receipt clause, and does not contain any provision for an explanation as to what these rights are. What section of society needs clear explanation of their rights, drunk drivers or the mentally impaired? [5]

14. To compare with a NZBORA consistent notice of one's right to a lawyer, see the notice given to a person who is breathalised. (see Appendix 2).

15. **R v Samuelu**[6] conceptualizes that high standard required for the mentally ill:

> [101] In the circumstances of this case, similar care was called for. To adopt the words of the Court of Appeal in R v Narayan [1992] 3 NZLR 145, 149**, the rights secured and guaranteed by the Bill of Rights Act have a special value to those who are mentally impaired. The Courts will not simply turn a blind eye to treating people who are mentally unwell as if they are well. There is a real risk that the administration of justice may be undermined if extra care is not taken in dealings with such people.** This was acknowledged by the Court of Appeal in R v Hurihanganui [2004] 2 NZLR 1 where the Court said, at [24]: We are also conscious of the potential for injustice in convictions which depend exclusively on confessions when the accused has limited intellectual understanding, and suffers from mental disorders. Confessional statements made by such accused persons can be untrue ...
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> **[Bold added]**

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5 A cynic might say the drunk driver is mentally impaired however (fleeting that impairment may be)

6 HC, 7/07/2005; Frater J, Auckland, CRI 2003-004-38062.

16. It may be that mental health practitioners have turned a blind eye to patients' right to a lawyer. Based on mental health jurisprudence such as **R v Samuelu,**[7] the administration of justice and human rights have therefore been undermined.

17. The legal consequences of the failure to provide this fundamental right to mental health patients are significant. Immediately, a person's corollary right under s23(1)(c) BORA to challenge the validity of his or her detention by way of habeas corpus is rendered dead-letter, as without a lawyer how is the patient aware of this right. This may mean that patients are detained unlawfully, given that the entire process of compulsory assessment and treatment may have been premised on a serious error of law. In these circumstances, the patient may have a claim for unlawful detention.

18. It is also fundamentally important to consider the implications for the patient's right to silence and their right to be informed, if his or her right to a lawyer has not been enforced. Little, if any consideration seems to have been given to these fundamental rights.

19. The failure of the legal profession, district inspectors, and the Courts to come to grips with this dichotomy to align the empowering mental health legislation with some of our most fundamental rights under New Zealand's basic constitutional law is a sad indictment of the impoverished legal status of mental health patients in NZ today.

(ii) Right to Family

20. The right of a mental health patient to his/her family when the assessment process is invoked is provided for under s9(2)(d) MHCAT:

> 9 Assessment examination to be arranged and conducted
>
> (1) Where an application is made under [section 8A], the Director of Area Mental Health Services, or a duly authorised officer acting with the authority of that Director, shall make the necessary arrangements for the proposed patient to undergo an assessment examination forthwith.
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> (2) The arrangements required by subsection (1) of this section shall include the following:
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> (d) Ensuring that the purpose of the assessment examination and the requirements of the notice given under paragraph (c) of this subsection are explained to the proposed patient in the presence of a member of the proposed patient's family, or a caregiver in relation to the proposed patient or other person concerned with the welfare of the proposed patient.

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7 HC, 7/07/2005; Frater J, Auckland, CRI 2003-004-38062

21. In the context of what undeniably is a frightening and bewildering experience for those who are on the doorstep of compulsory assessment under the MHCAT, this right is an important procedural safeguard, aimed at conferring protection on a person in an immensely vulnerable position.

22. In the words of Justice Fogarty, in **Keenan v Director of Mental Health Services**,[8] "*the purpose of the family member, caregiver or this other person is to be someone listening to the explanation and able both to give comfort and reassurance, and further explanation if need be.*"

23. The importance given to this mandatory protection is illustrated both in **Keenan v Director of Mental Health Services**[9] and **Chu v District Court and Director of Area Mental Health Services,**[10] which resulted in two 2006 writs of habeas corpus issued in respect of mental health patients who had their assessment examination without their right to a family member.

24. **Chu v District Court and Director of Area Mental Health Services**[11] is an example of a particularly grave violation of this important procedural guarantee, given that the mental health patient was informed about the impending assessment examination in a holding cell in a District Court without any attempt being made to secure his right to a family member, who incidentally was in the Court room above him. A psychiatrist, Forensic Nurse and police officers were allowed in his cell, but no family member. The remarkable imbalance of that amply illustrates the not uncommon fate of the mentally ill.

25. The explanation given by the Justice Liaison Nurse who imparted this information was that family members were not allowed in police cells and that it was "*not reasonably practicable to comply with the requirements of s9(2)(d)*".

26. The highly critical judicial response to this draconian approach to a mental health patient's human rights is illustrated as follows:[12]

> …I deal with an argument as to fact as practicality…
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> I was utterly unconvinced by that submission. It seemed to me there would be no reason whatsoever why the police could not be asked by psychiatric service personnel and/or by the District Court Judge in charge of the case to co-operate and allow Mr Chu to have been taken to a more pleasant room in the Court buildings or indeed to a hospital or any other more appropriate environment which would be the venue

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8 HC, 30/07/2006; Fogarty J, Wellington, CIV 2006-412-000494
9 Ibid.
10 HC, 24/07/2006; Fogarty J, Wellington, CIV 2006-485-001572
11 Ibid.
12 Ibid, paras 8 and 9.

> where he would have explained to him the proposal for him to be assessed…

27. The requirement that a patient must be treated with as much dignity as possible during the process of compulsory assessment was important:[13]

> It seems to me to be quite plain that whatever Parliament intended under s9(2)(d) it certainly intended that the proposed patient be treated with as much dignity as possible in the circumstances; that he or she have the purpose of the examination and the intention of the examination carefully explained in the presence of a caregiver or other person concerned with their welfare, distinct from the applicant and other personnel working for the Mental Health services.

28. These habeas cases must serve as a reminder to mental health practitioners that statutory requirements which uphold the protection of mentally ill persons cannot be dispensed with as a matter of course, just because of "*impracticalities*".

B. The Role of a Writ of Habeas Corpus

29. The role of a writ of habeas corpus was succinctly put by Justice Fogarty as follows:

> The writ of habeas corpus has been described on many occasions as probably the most important remedy that the independent Courts have in our common law societies. There is a history so deep and complex associated with the importance of due process and the liberty of the person that is has to be kept in mind whenever one is examining a procedural requirement set by Parliament and directly relating to the liberty of a person.[14]

30. It is an ancient writ directed to a person holding another in custody, which commands the detaining party to produce or "have the body" of another before the Court.

31. Considered to be the most fundamental legal right[15] that exists, its remedy is sacrosanct, issued for the release of the person from detention. It is a writ of right (unlike judicial review which is discretionary).

32. Centuries of case-law have resulted in the issue of a writ of habeas corpus on grounds as varied as lack or excess of jurisdiction, failure to fulfil statutory procedures, an improperly constituted decision-

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13 Chu v District Court and Director of Area Mental Health Services, HC, 24/07/2006; Fogarty J, Wellington, CIV 2006-485-001572, para 9.

14 Ibid. para 15.

15 See D Clark and G McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*, Oxford University Press, 2000.

maker, acting under the wrong legislation, abuse or abdication of discretion, breach of the principles of natural justice, and bias.

33. Within the mental health context, historically habeas corpus has always been available, together with a writ *de lunatico inquirendo* which conferred the right to ask for a writ and to have the question of their mental state determined by a jury.[16]

34. However, there is little academic attention devoted to habeas corpus as a remedy for the mentally ill. The seminal text on habeas corpus *"Habeas Corpus: Australia, New Zealand, The South Pacific"*[17] merely provides 4 pages of analysis in this context, which is indicative of its under-use as a remedy for mental health patients historically.

35. As illustrated in **Chu and Keenan**, regard to a mental health patient's right to family, if mandatory statutory requirements are not fulfilled, there will be legitimate grounds for an application for a writ of habeas corpus.

36. An English leading case is instructive. In **Re SC (mental patient: habeas corpus)**[18] Lord Bingham MR[19] stated that since the social worker had failed to fulfil the statutory requirements of s11(4) Mental Health Act 1983, the application was defective and the detention of the appellant unlawful**:**

> Speaking for myself, I would accept almost everything in that passage as correct with the exception of the last sentence. The judge goes straight from a finding that the hospital managers were entitled to act upon an apparently valid application to the conclusion that the applicant's detention was therefore not unlawful. That is, in my judgment, a non sequitur. It is perfectly possible that the hospital managers were entitled to act on an apparently valid application, but that the detention was in fact unlawful. If that were not so the implications would, in my judgment, be horrifying. It would mean that an application which appeared to be in order would render the detention of a citizen lawful even though it was shown or admitted that the approved social worker purporting to make the application was not an approved social worker, that the registered medical practitioners whose recommendations founded the application were not registered medical practitioners or had not signed the recommendations, and that the approved social worker had not consulted the patient's nearest relative or had consulted the patient's nearest relative and that relative had objected. In other words, it would mean that the detention was lawful even though every statutory safeguard built into the procedure was shown to have been ignored or violated.
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> Bearing in mind what is at stake, I find that conclusion wholly unacceptable. I am, for my part, satisfied that on present facts an

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16 D Clark and G McCoy, *Habeas Corpus: Australia, New Zealand, The South Pacific*, The Federation Press, 2000, p99.

17 Ibid.

18 [1996] 1 ALL ER 532

19 as he then was

application for habeas corpus is an appropriate, and possibly even the appropriate, course to pursue.

37. A recent decision from the Supreme Court of Canada **May v Ferndale**[20] significantly shows that if the decision-maker fails to provide sufficient information, his decision is void and will result in an issue of a writ:

> However, habeas corpus should be granted because CSC's failure to disclose the scoring matrix for the computerized security classification rating tool unlawfully deprived the inmates of their residual liberty. While the Stinchcombe disclosure standard is inapplicable to an administrative context, in that context procedural fairness generally requires that the decisionmaker disclose the information relied upon. The individual must know the case he has to meet. If the decision-maker fails to provide sufficient information, his decision is void for lack of jurisdiction.

C. An Analysis of Chu v District Court and Director of Area Mental Health Services[21]

38. In **Chu v District Court and Director of Area Mental Health Services,** a full-scale attack was made on the compatibility of mental health legislation with BORA: The key question being does the MHCAT measure up to the protection offered by the NZBORA?

39. The matters raised included fundamental issues of human rights in respect to a mentally health patient's:

A. Right to a lawyer in private and without delay;
B. Right to silence;
C. Right to family;
D. Right to be treated with dignity, and
E. Right to a proper rights-based reasoned judgment when one's right to review is exercised

40. Whilst the writ was issued, Fogarty J dodged the NZBORA question. The submissions were met with surprise and astonishment from the bench, with Justice Fogarty stating words to the effect that "*Do you mean to say that this has not been litigated since 1992, the date of enactment of MHCAT*?"[22] Counsel replied "*yes*".

41. Despite meaningful attempts to be heard by counsel on the broad raft of grievances endured by Mr Chu, ultimately it was considered not necessary to examine these issues given that a writ was granted by reason of breach of the right to family.

42. The decision however is significant for at least two reasons.

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20 [2005] 3 S.C.R.
21 HC, 24/07/2006; Fogarty J, Wellington, CIV 2006-485-001572
22 Part of oral discussion with counsel, and not contained in the written judgment.

43. First, it reflects the sad reality of the state of New Zealand law in respect to mental health patients given that 14 years have passed without a challenge being made to what conceivably are extremely large and far-reaching lacunaes in our mental health legislation.

44. Secondly, it is significant for what is missing from the judgment and what will come: a comprehensive account of the extent of inconsistencies between the BORA and our principal mental health legislation.

45. **Chu v District Court and Director of Area Mental Health Services**[23] and its antecedent, **Keenan v Director of Mental Health Services**[24] have already been earmarked by the writer as the vehicles for this 2007 full-scale attack on NZ's impoverished status of the rights of the mentally disabled before the law.

D. Are the Rights under NZBORA applicable to Mental Health detainees, or are they subsumed under Mental Health legislation?

46. An irrefutable case can be made out that not only do the rights provided under BORA apply to mental health detainees, but that they must be applied.

47. If this were not the case, and it was considered that BORA rights do not apply to the paradigms of mental health law, mental health patients would clearly be second-class citizens.

48. Primo Levi states:[25]

> In every part of the world, wherever you begin by denying the fundamentals of liberties of mankind, and equality among people, you move towards the concentration camp system, and it is a road on which it is difficult to halt.

49. Such a proposition would shake the bedrock of what is the founding principle of international and domestic human rights law: the condemnation of discriminatory laws against the mentally disabled.

50. The question has already received comment from Fogarty J in **Chu v District Court and Director of Area Mental Health Services.**[26] On the basis that rights under BORA must clearly apply in order to protect mental health patients, it is viewed that the current system is only paying "*lip-service*" to "*some concept of access to law*" and that it is "*inadequate*".[27]

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23 HC, 24/07/2006; Fogarty J, Wellington, CIV 2006-485-001572
24 HC, 30/07/2006; Fogarty J, Wellington, CIV 2006-412-000494
25 Se questo e un uomo, La Tregua, (1989) 338, Translation from the English edition, Levi (1987) 390-1.
26 HC, 24/07/2006; Fogarty J, Wellington, CIV 2006-485-001572
27 Ibid. para 4.

> He has also drawn my attention that within the notice given to proposed patients under the 1992 Act the Crown has made reference to the right of a patient to have a lawyer. But it is quite apparent that such advice as it is falls way short of the requirements of New Zealand Bill of Rights Act should they apply. It would appear that somewhere in the Executive Government process someone has made a decision that some kind of reference to lawyers and rights of legal advice should be included in the notice anticipated under s9 of the 1992 Act. It does seem to me to some kind of halfway house, neither one thing nor the other. I would respectfully suggest that the Executive Government might consider what exactly they have in mind and whether they are taking the view that the New Zealand Bill of Rights Act applies. If the New Zealand Bill of Rights Act applies the current notice is inadequate, and if it does not apply it seems to be in the context paying lip service to some concept of access to law in the midst of what is intended by Parliament to be a compulsory assessment process.

51. For a Judge to pronounce that the rights of mentally disabled persons are represented by "*some kind of halfway house*", should ring alarm bells for those of us concerned with basic human rights, and the wider profession and the public.

E. A Section 16 Review before a District Court Judge

> There are…special features of the system of review that can never be overlooked. The first is that the holding of the review is itself an important indication to all concerned that the detention order is a very serious curtailment of liberty which must be carefully monitored.[28]

52. The need to justify ongoing compulsory psychiatric treatment, and so involuntary detention, makes the right to review essential.

53. Section 16 MHCAT enables the patient to make an application for review at any time during the first and second review periods of assessment and treatment.

54. The review itself is conducted as an 'examination' of the patient by the Judge, who is required to consult with the responsible clinician and at least one other health professional.[29]

55. The purpose of the examination is limited to a review of the patient's condition, with a view to determining whether the patient is fit to be released from compulsory status. Where a Judge considers that the patient is fit to be released from compulsory status, he or she must

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[28] J Wood, *Control and Compassion: The uncertain role of Mental Health Review Tribunals in the management of the mentally ill* , 1999, in D.Webb and R. Harris *Mentally Disordered Offenders:Managing People Nobody Owns*, Routledge Taylor and Francis, London, p138

[29] S Bell and W Brookbanks *Mental Health Law in New Zealand*, 2nd Edition, 2005, Brookers, p262

order the patient's release forthwith.[30]

56. It is to be remembered that a review under this section can only be undertaken where a patient has actively sought it.

57. Analysis of s16 review jurisprudence re-affirms that the currently understood purpose of the review is not to determine if the patient is being illegally detained but to determine the patient's mental condition at the time of the hearing. **Re BWA [mental health]**[31] and **Re G [mental health]**[32] both state that given the express provision of a remedy in s84(3) MHCAT, which confers a High Court Judge power to consider the legality of a patient's detention in a hospital, signaled the legislature's intention that only a High Court Judge should have that power.

58. How that can stand alongside s22 NZBORA (arbitrary detention) is a good question. In my view the current s16 jurisprudence is wrong.

59. In any event, does the mental health patient know the difference between the basis and purposes of the review procedures under s16 and s84 respectively. Very few mental health patients would know that the proper forum for challenging the illegality of one's detention would be s84 of MHCAT or habeas.

60. Nevertheless, it is contended that notwithstanding the limited purview of a District Court Judge's powers under s16, the patient still retains one of the most fundamental rights that a detained person can have when challenging his or her detention: the right to a proper reasoned judgment which has to be seen as inextricably tied with the right to be treated with dignity.[33]

61. In the European Court of Human Rights, an Oct 2006 case[34] has held that in respect to a complaint that a person's involuntary psychiatric treatment had been unjustified, in the sense that it had not been ordered in a procedure "prescribed by law":

> ..the reasoning of the Court decision to prolong his psychiatric detention had been very superficial and insufficient to show that his conduct had been dangerous for the purposes of paragraph 1 of that provision. As such, therefore, it had been inadequate to meet the requirements of a procedure prescribed by law within the meaning of Article 5.1 of the Convention.

62. This reinforces my view that the s16 is not as limited as currently believed. Some judgments which are produced from s16 review examinations pay scant regard to human rights of a mentally ill person and do not meet the requirement of a proper reasoned

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30 Section 16(5) MHCAT
31 (1994) 12 FRNZ 510
32 (1995) 12 FRNZ 709
33 T Ellis, *Breaking the Ambivalence towards the Mental Health: An International Revolution?*
34 Gajcsi v Hungary, Application no. 34503/03, 3 October 2006.

judgment.

63. It is clear that two or three or five lines of writing which comprise the entire decision made by a Judge in respect to his/her judicial examination of a patient would clearly breach one's right to a fundamental procedural guarantee in the context of a deprivation of liberty.

64. Absolute deference to the opinion of psychiatrists is also not representative of a reasoned judgment, as further shown in many s16 review decisions.

65. Indeed, the move to a more rights-based approach to the rights of the mentally disabled is illustrated in the criticism of the current deferential attitude towards the psychiatric profession as a whole. *Wood* comments:[35]

> There is at the same time an understandable belief that the judgment of relevant professionals-here largely psychiatrists and social workers-cannot be left to the standards of the individuals themselves, backed up by rules and vigilance of their own professional bodies. Indeed professional self-regulation alone is unlikely to be regarded in modern times as adequate protection for an individual whose liberty has been seriously curtailed.

F. The Role of the Mental Health Review Tribunal

> …the power to enforce detention or serious restrictions may be advisable and sought by an experienced and caring psychiatrist and a specialist social worker on well-founded medical and social grounds, but if it is resisted by the patient as a serious and unnecessary limitation on freedom, some sound method of adjudication between the two views is essential.…**It was for this reason that specialist bodies, the Mental Health Tribunals, were set up so that where the restraints are disputed, the differing viewpoints of the carers-doctor, social worker and usually the relatives-can be fully assessed and set alongside those of the patient, so that an authoritative decision can be taken…**
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> **The work of the tribunals brings into sharp focus the clash of two justifiable but contradictory forces-paternalism which is based on human concern for those who are ill and which underlies much of the mental health legislation, and personal liberty which is firmly enshrined in the common law and is a crucial background to the statutory provisions that are concerned with the protection of the mentally ill as well as their control.**[36]

66. The principal rationale of the Mental Health Review Tribunal must be

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35 J Wood, *Control and Compassion: The uncertain role of Mental Health Review Tribunals in the management of the mentally ill* , 1999, in D.Webb and R. Harris *Mentally Disordered Offenders:Managing People Nobody Owns*, Routledge Taylor and Francis, London, p127.

36 Ibid. p128.

seen as being one of the most important reconciliatory forces in respect to the power struggle between the two conflicting paradigms.

67. Serving to provide a regular and accessible method of review, it is one of the most significant means to ensure an independent and effective challenge of a mental health patient's involuntary detention.

68. Although the hearings are always concerned centrally with the mental state of the patient, the most important question is the underlying one of 'liberty', and its loss must be strictly justified in law.[37]

69. The Mental Health Review Tribunal is established under Part 9 of the MHCAT. It has an exclusively review jurisdiction in respect of committed, special and restricted patients, having the power to order the discharge of patients where the statutory conditions for compulsion are no longer met.

70. There are three principal concerns that can be expressed in respect to the current review trends before the tribunal.

(i) The review body "shall periodically review the cases of involuntary patients at reasonable intervals specified by domestic law"[38]

71. Although the right to review is now available at many points within the process of compulsory assessment and treatment, review by the Mental Health Review Tribunal is not mandatory in respect of committed patients. Review will only be triggered where the patient decides to apply to the tribunal for a review of the patient's condition.[39]

72. The more enlightened human rights approach is to have a mandatory review at periodic intervals.

(ii) *"…in those jurisdictions, including New Zealand, there is clearly scope for patients to be given better information about the right to tribunal review and encouragement to exercise that right*."[40]

73. It is contended in international academic commentary that relevant law should be more accessible to all participants in mental health review proceedings. Specifically, it has been argued that tribunals should be given the power to issue legally binding guidelines concerning the process of admission to involuntary status and the criteria for civil commitments.[41]

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37 Ibid. p136.

38 Principle 17(4) of the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991, G.A.Res. 6/119, U.N. GAOR, U.N. Doc A/RES/46/119 (1991).

39 S Bell and W Brookbanks *Mental Health Law in New Zealand*, 2nd Edition, 2005, Brookers, p260.

40 Ibid.

41 N Rees, "*International human rights obligations and mental health review tribunals*" 2003 10 Psychiatry, Psychology and Law 34.

(iii) Low number of cases before the Mental Health Review Tribunal

74. Of immediate concern is the relatively few number of cases which appear before the Mental Health Review Tribunal each year (approx 100) compared to the high number of cases before the Family Court (approx 5000).

75. Can these figures be accounted for by virtue of the Family Court being right? Or is it because a review before the tribunal is just too difficult?

76. The following table shows an insight into the potential causes of this statistical phenomenon:

Party	**Analysis**
Lawyers	Lawyers are often not fully unaware of their client's ability to challenge involuntary detention and assessment under MHCAT. They are also unaware of the fact that NZ mental health jurisprudence has not evolved in a manner that affords the same level of procedural protection to mental health detainees as provided to individuals in the criminal justice system. Police stations and mental health hospitals in fact share three striking similarities: (i) Involuntary detention, (ii) Possible seclusion and (ii) Occasional physical restraint. However, whilst one place of detention necessarily invokes the right to due process on behalf of its detainees under entrenched criminal law principles, the other may fall victim to the absence of procedural guarantees, merely because it implicates the detention of the mentally ill. **Where are the lawyers?**
Legal Services Agency	The culture of parsimony by legal aid authorities is illustrated by how low rated and graded mental health law is in terms of legal representation. Under the current manual by the Legal Services Agency, a lawyer is entitled to a maximum of 3 hours payment for a s16 review, a maximum of 6 hours payment for an application to the Mental Health Review Tribunal, and a maximum of 3 hours for an appeal from the tribunal. These allocated hours includes taking

	instructions from the mental health patient, identifying legal issues, preparing for the application and issues raised, corresponding with the client, preparing the legal aid documentation and attending the hearing itself. This results, for many lawyers, in a positive discouragement to do nothing, or conversely, a built-in motive to legally represent a mental health client pro bono in order to do it properly. This makes the few number of reviews a self-fulfilling prophesy. If there is no active legal profession, there will be no will to change the rules. **Where are the funds?**
Judiciary	The failure to provide reasoned judgments in the context of s16 review procedures has already been canvassed. If a patient is not assured of his right to reasons for his/her detention, then how can one appeal it before any tribunal or Court? The requirement to give reasons must be seen as part of the over-arching right to be only deprived of one's liberty based on a procedure prescribed by law. Where is the focus on the NZBORA. The NZBORA binds the judiciary. Where is there any legal analysis of arbitrary detention under s22 NZBORA? **Where are the reasons?** It is also noted that absolute deference to a psychiatrist's opinion usurps the role of the judge as ultimate decision-maker: In the Canadian context, one commentator notes: "Courts have been overly reliant on the paternalistic model of mental health law and…such reliance has led to the under-development of procedural protections for individuals facing involuntary treatment."[42] **Where are the decision-makers?**
Psychiatrists/Patient	The failure to uphold a mental health detainee's right to family and to a lawyer will irrefutably influence the patient's ability to

[42] I Grant, *Mental Health Law and the Courts*, 29 OsGoode Hall, L.J. 747 (1991)

Advocates/Forensic Nurses	bring a review of the legality of their detention. All professionals working within the area of mental health should be aware that the right to a lawyer is one of the most fundamental rights that anyone can invoke. In order to ensure that a mental health patient understands that he/she has a right to a lawyer, it must be communicated to him/her in a way that brings home its content to the person.[43] This signals a high standard of care when imparting this crucial information to the mentally ill. Similiarly, one's right to family is important in terms of the obligation to properly inform the patient. Without being fully informed as to the purpose of the processes under the MHCAT, one's right to review is prejudiced. **Where are the rights to a lawyer and to family?**

G. Section 84 Review-A Statutory Form of Habeas Corpus?

> *"Section 84 is an important watchdog provision providing an important means of redress for patients who consider that they should not be detained in a hospital."* [44]

77. The judicial inquiry under s84 has been described as the ultimate review power conferred by the Act. The power of review is far-reaching as the Judge may direct the writing of a report on any matter pertaining to a person detained as a patient "as the Judge thinks fit."[45]

78. It can be viewed both as a statutory form of habeas corpus, as well as a statutory expression of the inherent jurisdiction of the High Court to protect those who are mentally disabled.

79. **Re M (a mental patient),**[46] a 1985 case states:

> The purpose of s74 [the antecedent of s84] is to provide additional protection and an additional safeguard to those who may be detained or kept in a mental hospital. It is an important supervisor function of the court and is a statutory expression of the inherent jurisdiction of the High Court to maintain a protective and supervisory function over

43 **R v Samuelu**, HC, 7/07/2003; Frater J, CRI 2003-004-38062.
44 S Bell and W Brookbanks *Mental Health Law in New Zealand*, 2nd Edition, 2005, Brookers, p277.
45 Section 84(1) MHCAT.
46 HC, 21/4/86, Greig J, Wellington M716/85.

> those who are under a disability. It partakes to some extent of the application of the jurisdiction in habeas corpus but is more of that inherent protective jurisdiction of the court over such members of the community as infants and the insane.

80. Whilst a challenge to the various issues raised in **Chu v District Court and Director of Area Mental Health**[47] already mentioned could perhaps in technical terms be resolved under s84 MHCAT. Given that the jurisdiction conferred by the provision is concerned to provide redress for patients who are illegally detained, a judicial inquiry could provide an appropriate remedy for those whose detention could be challenged on the breadth and depth of the grounds stipulated; however it would likely be met the usual judicial resistance to review by this method except by judicial review. Simple challenges could without judicial reluctance be brought by a s84 review.

H. Which route to take, a Habeas, s16 review, Mental Health Review Tribunal, High Court s84 review?

81. This article has illustrated that there is a variety of tools available to mental health detainees in order to challenge involuntary detention, in addition to Judicial Review.

82. The determination of which avenue would proffer the best protection would inevitably depend on the facts and circumstances of each case.

83. However, one can note that because of the inherent problems of the present legislative framework, habeas corpus, together with s84 MHCAT are in my view the favoured means of redress which are currently available to mental health detainees, pending a major challenge to the current jurisprudence in respect to s16.

84. Serious challenges to the way the judicial system recognized/or failed to recognize the rights of the mentally ill are long overdue. 2007 would seem to be a good year for these challenges, and I look forward to that with relish.

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BARRISTER
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47 HC, 24/07/2006; Fogarty J, Wellington, CIV 2006-485-001572

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