THIS IS AN OFFICIAL REPORT OF THE MENTAL HEALTH REVIEW TRIBUNAL PROCEEDINGS IN RELATION TO MR RICHARD PETERS AUTHORISED BY THE PRESIDENT OF THE TRIBUNAL ON 18 June 2015

Mental Health Review Tribunal

This is an edited version of the Tribunal's decision. The patient has been allocated a pseudonym for the purposes of this Official Report

MENTAL HEALTH REVIEW TRIBUNAL DECISION

CONCERNING: Mr Richard Peters **MHRT NO: CXXXXX**

TRIBUNAL MEMBERS:

Maria Bisogni Lawyer member

Susan Thompson Psychiatrist member

John Haigh Member

APPLICATION FOR: s9 Review of Voluntary Patient

DATE AND PLACE OF HEARING: 8 May 2015, Mental Health Review Tribunal, Gladesville

This is a review under s 9 of the *Mental Health Act 2007* (the Act) for Mr Richard Peters who is a voluntary patient, having been admitted as such by the Public Guardian in February 2013. The Public Guardian was appointed in 2006 by the NSW Guardianship Tribunal and has a health care and accommodation function and coercive powers. Mr Peters was first admitted to X Hospital in 2009.

Mr Peters seeks discharge from the mental health facility. He has sought discharge from the Hospital and it has been refused.

Under s 9(2) of the Act, the Tribunal "in addition to any other matters it considers on a review, is to consider whether the patient consents to continue as a voluntary patient".

The Tribunal had before it a number of reports, including a written report of 29 April 2015 and the report of the CFMHS of 2 February 2015; a number of progress notes and both oral and written submissions by Mr Turner, Mr Peters' lawyer and the Public Guardian. Mr Peters' psychiatrist, Dr XY and his sister gave oral evidence to the Tribunal.

A relevant matter for the Tribunal to consider is whether Mr Peters is obtaining any therapeutic benefit as a voluntary patient and whether he is likely to continue do so. Subsection 5(2) provides:

> 'An AMO may refuse to admit a person to a mental health facility as a voluntary patient if the officer is not satisfied that the person is likely to benefit from care and treatment as a voluntary patient'.

Dr XY, who has been Mr Peter's treating psychiatrist for the last 12 months noted in his report that Mr Peters has a diagnosis of schizophrenia, with features of paranoid delusions and auditory hallucinations. He has impaired intellectual ability. His IQ is assessed to be 54. He has a history of absconding from hospital and using illicit substances which have the effect of worsening his mental state. Mr Peter's poor insight into his condition, impaired intellectual

functioning, impaired ADLs, ongoing substance misuse and noncompliance with medications puts him at high-risk situations. Further, the risk factors according to Dr XY are:

> "Chronic, long standing and ongoing and that hospitalisation for six years has not mitigated the risks. He is at high risk of death by misadventure, suicide, homicide drugs side effects and neglect. The risks will not mitigate unless Mr Peters has intensive rehabilitation at Hospital".

The CFMHS noted that Mr Peters was transferred to the locked ward in September 2014. He was previously admitted to an open ward where he would frequently abscond and use illicit substances. He is now unable to access illicit substances and takes medication under supervision and his mental state appears to have settled.

Dr XY said that Mr Peter's case has involved a range of health professionals attempting to arrange his discharge into the community into suitable accommodation where his needs and care may be met. The CFMHS has reviewed Mr Peters and has recommended that he be managed in a high care unit until his mental state has improved and then in a structured rehabilitation facility. The team is following this advice and Mr Peters was recommenced on Clozapine medication four weeks ago with significant improvements being noted in his mental state. The treating team is not seeing psychotic symptoms. Since being in the high care unit his access to the community and illicit drugs has been minimised. His behaviour has improved and he has become more engaged.

Dr XY said that Mr Peter's request for discharge has arisen in the context of his wanting to visit his girlfriend and that he does not understand the difference between leave from the hospital and discharge, nor does he understand the consequences. This increases Mr Peter's risk of using illicit substances and engaging in high risk sexual activity. Dr XY is of the view that the likely outcome of any discharge is that Mr Peters will present to the ED unit and request admission. He has done this a number of times over the last five to six years.

The plan is to stabilise Mr Peter's illness with a view to his transition to the community. At this stage no accommodation or service has accepted Mr Peters. There are a number of high level meetings taking place to try and progress this. Dr XY considers that Mr Peters' discharge to the community without appropriate supports will result in a serious decline and deterioration in Mr Peters' mental health.

On balance, the Tribunal was satisfied that Mr Peters would continue to benefit from treatment as a voluntary patient. The evidence suggests that significant improvement has occurred recently, since the re-introduction of Clozapine medication. Dr XY's report clearly outlines that Mr Peters nevertheless has a considerable way to go. He has many difficulties and it is likely that any treatment approach will have to be multi-faceted and cater to his impaired intellectual functioning, proclivity to use illicit substances and possible personality issues. Mr Peters requires intensive support. The Tribunal notes that a number of placements in the community have failed.

Turning now to a key issue for the Tribunal to consider under s 9(2), that is, whether Mr Peters consents to continue as a voluntary patient.

Mr Peters' position was clear. He wants to be discharged from the hospital. He does not consent to remaining in hospital as a voluntary patient. He does not want to go to XR Hospital. He said that being in hospital has been a waste of time. He would reside with his girlfriend in the community and he would attend the ED unit if he needed medication. The Clozapine causes him side effects. He does not know what it was for. He said that he would continue it take it in the community. He said that he would not use illicit drugs in the community.

It is likely that Mr Peters does not fully appreciate the consequences of being in the community without care, treatment and support. He may well not continue with medication in the community on a voluntary basis. This is perhaps likely on the basis of his history which has been characterised by non-compliance with medication and use of illicit substances resulting in deterioration of his mental state and multiple presentations to hospital. Whilst it was clear to the Tribunal that Mr Peters lacks understanding as to the nature of his illness, and possibly the role of treatment, including Clozapine medication he does understand that he is in hospital and does not wish to remain there. It is not to the point to consider if he understands the distinction between having leave or discharge, as under s 8(2) he is entitled to leave or discharge himself at any time. In fact the Act only refers to grants of leave for involuntary or detained patients.

The wording of s 9(2) strongly suggests that the consent of a patient is a key consideration. It is the only consideration identified and it must be considered. The section does not define consent. A patient's capacity to make an informed decision to leave or discharge themselves from hospital is not addressed under s 9. This is in contrast to s 91 of the Act where for the purposes of ECT the requirements of "informed consent" are set out. These requirements apply to both voluntary patients and involuntary patients. Apart from the medical provisions such as ECT and surgery there is no requirement under the Act that a patient's capacity to make decisions has to be otherwise considered.

It is likely that the legislative omission to require the Tribunal consider a person's capacity to consent was intentional. The section emphasises that the will and preference of the patient is a key consideration. His remaining in hospital has to be voluntary. The meaning of "voluntary patient" was addressed by Justice Slattery in the case of Sarah White (Sarah White v The Local Health Authority & Anor [2015] NSWSC 417), at para 66 as follows:

> "Chapters 2 and 3 reinforces the concept of voluntariness in ordinary usage, as a decision made with free will and without coercion. Macquarie Dictionary defines "voluntary" in its primary meaning as (1) "done, made, brought about, undertakes etc… of one's own accord, or by free choice (for example) a voluntary contribution and (2) acting of one's own will or choice (for example) a voluntary substitute. Chapter 2, s 8(2) reinforces this, declaring the general liberty for a "voluntary patient" that such a patient may "discharge himself or herself from or leave a mental health facility at any time". In contrast Chapter 3 is couched thoughout in language denying free choice or the patients acting of his or her own accord…"

The Tribunal considers that Mr Peters' clear lack of consent to remaining is a key matter to take into account. Although he appears to be recently benefitting from treatment and care the balance is tipped in favour of his unequivocal preference. Accordingly, the Tribunal discharges Mr Peters but the order is deferred for up to 14 days. It is in his best interests that appropriate arrangements are made for his accommodation and support in the community.

The Tribunal will now deal with the argument of the Public Guardian. Mr Smith quoted at length passages from the decision in Sarah White. He argues that as the Public Guardian can override the wishes of a person in relation to their admission to a mental health facility, logically the guardian can override the decision of a patient to discharge themselves. Further that the notice that must be given to the guardian under s 8(3) is to provide an opportunity for the guardian to seek their re-admission to the facility. The Tribunal agrees that the Act as it is worded allows a guardian to request that a person who has discharged themselves from a mental health facility be re-admitted. In practical terms, a patient's consent can be overridden by the guardian.

On the question of whether it is logical that the Guardian can request admission but not effect a decision to leave, the difference in approach to the two situations is express and unambiguous in the Act. The difference can be understood in policy terms that the decision to admit allows the Guardian to facilitate the opportunity for voluntary admission that the person might otherwise not

consider. It allows the admission but the choice of whether it should continue is then left with the patient and the authorised medical officer. On this point the Tribunal agrees with Mr Peters' lawyer's submission as follows:

> "Justice Slattery's words at paragraph 71 in relation to the operation of Section 8(3) supports the Applicant's position. In our submission there is no other way to understand the words of sections 8(2) and 8(3). Section 8(2) states without adornment that a voluntary patient may discharge him or herself or leave a mental health facility at any time. Section 8(3) merely requires the guardian to be notified, and its inclusion would be redundant if the patient was not empowered to make the request. It makes no mention of seeking the Guardian's consent."

The third consideration for the Tribunal was the issue of whether Mr Peters might well deteriorate if he left voluntary care. The Tribunal accepts that this may well happen but this possibility is a necessary consequence of any system of voluntary admission where many patients may leave in circumstances where others may consider that such a decision is clearly not in their best interests. The anticipation of deterioration does not displace the key consideration of whether Mr Peters consents to his admission or not.

The practical response to issues of serious potential deterioration is that if Mr Peters, like any other resident of NSW, is a mentally ill person and owing to that illness there are reasonable grounds for believing that care, treatment or control is necessary for the person's own protection or the protection of others from serious harm, he or she, under the Act, may be involuntarily detained.

Signed:

Maria Bisogni
Chairperson
Dated: 8 May 2015