



**Royal Commission into  
Victoria's Mental Health System**



**WITNESS STATEMENT OF EMERITUS PROFESSOR TERRY CARNEY AO**

I, Terry Carney, Emeritus Professor of Law at the University of Sydney Law School, of the Law School, Eastern Avenue, Camperdown NSW 2006, say as follows:

- 1 I make this statement on the basis of my own knowledge, except where otherwise stated. Where I make statements based on information provided by others, I believe that information to be true.
- 2 I am giving evidence to the Royal Commission in my personal capacity and not on behalf of my employers or organisations of which I am a member.

**Background**

***Qualifications and experience***

- 3 I hold an undergraduate Honours LLB and a graduate Diploma of Criminology from the University of Melbourne and a PhD in Law from Monash University. My areas of expertise includes mental health law, and spans welfare law, adult guardianship, health law and social security.
- 4 In 1980, I completed a PhD in law at Monash University on the topic of Drug Users and the Law.
- 5 I am an Emeritus Professor of Law at the University of Sydney Law School, where I previously served as Director of Research and as Head of Department.
- 6 I am a Fellow of the Australian Academy of Law. From 2005 to 2007, I was the President of the International Academy of Law and Mental Health.
- 7 I have chaired a number of Commonwealth government bodies, such as the National Advisory Council on Social Welfare and the Board of the Institute of Family Studies.
- 8 I have also chaired various state government inquiries, including Victorian inquiries on Child Welfare Practice and Legislation (1982-84) and Health Law (1986-87). I was a member of Australia's pioneering inquiry into Adult Guardianship (1980-82).
- 9 I oversaw the writing of the *Social Security Act 1991* (Cth) and I served (for nearly 40 years) as a member of the Social Security Appeals Tribunal, and its successor, the Social Services and Child Support Division of the Administrative Appeals Tribunal (AAT).

*Please note that the information presented in this witness statement responds to matters requested by the Royal Commission.*

- 10 I was the Chief Investigator on a recently completed study titled 'National registration of health practitioners: a comparative study of the complaints and notification system under the national system and in NSW'.
- 11 I am currently working on a study funded by the Australian Research Council titled, 'Effective Decision Making Support for People with Cognitive Disability', in collaboration with C Bigby, J Douglas, I Wiesel and S-N Then.
- 12 I am the author of nearly a dozen books and monographs, and have published over two hundred academic papers.
- 13 I was the lead Chief Investigator and first author of the 2011 monograph reporting findings of the Australian Research Council funded collaborative study of the Victorian, NSW and ACT mental health tribunals titled 'Australian Mental Health Tribunals: Space for fairness, freedom, protection & treatment'.<sup>1</sup> This study provides a comprehensive examination of mental health tribunal hearings in Australia, going beyond a critical assessment of the individual tribunals to an examination of the supporting mental health services, and of the complex area of human rights as they relate to the care and treatment of people with a mental illness.

### **The overarching role and functions of mental health tribunals**

#### ***The role to be played by mental health tribunals in discharging monitoring and accountability functions for the oversight of compulsory treatment***

- 14 In my view, a mental health tribunal should continue to serve as the apex body in performing monitoring and accountability functions for the oversight of compulsory treatment. However, a tribunal will only be capable of properly performing this and other necessary functions if it is adequately resourced to do so. That is the sentiment captured in the sub-title of our 2011 monograph, about creating the 'space for fairness, freedom protection and treatment'.
- 15 A key metric in considering the proper resourcing of a tribunal is how much time it is able to devote to each individual case (or hearing). In my experience, the role of mental health tribunals in Australia has traditionally been confined by limited budgets to operating as part of a "production line" of justice, in which the priority is completing as many cases as possible (rather than devoting more time to each case).
- 16 At the time of our research for the 2011 monograph, the median length of Tribunal hearings in Victoria, ACT and NSW was 20 minutes.<sup>2</sup> By contrast, the average duration

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<sup>1</sup> Carney T, Tait D, Perry J, Beaupert F and Vernon A, 'Australian Mental Health Tribunals: Space for fairness, freedom, protection & treatment', Sydney: Themis/NSW Law Foundation, 2011.

<sup>2</sup> Carney et al (n 1 above) at 309.

of tribunal hearings in other countries (such as the United Kingdom) typically were of vastly greater duration (averaging 75 nationally in 2003 and 160 minutes in parts of the country).<sup>3</sup>

- 17 Plainly, the amount of time a tribunal has to devote to each case will impact on how effectively it is able to perform its oversight functions and I have no reason to believe that median durations of Victorian hearings have increased since the time of our 2011 study.

#### Expanding the role of mental health tribunals

- 18 One key issue is properly defining the scope of a tribunal's functions and powers. In my view, based on the views of mental health consumers interviewed as part of the fieldwork for our 2011 study, the proper function of a mental health tribunal should not be confined to consideration of legal issues and assessing a patient's need for compulsory treatment; rather, it should extend to conducting a thorough qualitative analysis of the clinical and social needs of patients.
- 19 Consideration of a patient's clinical needs might involve, for example, identifying the form(s) of medication prescribed by their clinician, and the side-effects (if any) of that medication, to determine the appropriateness of the medication for that patient. At present, the Victorian Mental Health Tribunal does not have any formal powers in respect of a patient's clinical treatment; the only form of engagement with these issues would at best be a passing comment by a tribunal member. This is despite the fact that our fieldwork demonstrated that the appropriateness of a patient's clinical treatment is one of the primary concerns of people with a mental illness when appearing before the tribunal.<sup>4</sup>
- 20 One informal way in which the appropriateness of a patient's treatment has been addressed is through informal exchanges occurring between the sitting psychiatrist tribunal member and the clinician responsible for treating the patient appearing before the tribunal. Our research found that the psychiatrist tribunal member was often far more experienced than the treating clinician; consequently these informal discussions proved quite influential in a number of cases, because the treating clinician respected (and therefore properly considered) the views and suggestions expressed by the psychiatrist tribunal member.<sup>5</sup>
- 21 The social needs of a patient, such as employment and housing needs, are another aspect found by our study to be of considerable concern to patients who typically however do not get an opportunity to raise those matters at tribunal hearings. Again, this is

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<sup>3</sup> Ibid, 307, 309; Terry Carney and Fleur Beaupert, 'Mental Health Tribunals: Rights drowning in un-chartered' health waters?' (2008) 13(2) *Australian Journal of Human Rights* 181 at 196.

<sup>4</sup> Carney et al (n 1 above) 222-226, 260-262, 272-273.

<sup>5</sup> Carney et al (n 1 above) at 110.

something that could be addressed if a mental health tribunal were properly resourced such that it had time to meaningfully engage with these issues in each case.

#### A power to make recommendations

- 22 As noted above, mental health tribunals do not currently have any formal powers to make recommendations, for example in relation to the appropriateness (or otherwise) of a patient's treatment. Although I do not hold a clear view on whether mental health tribunals ought to have such powers, I tend to favour the view that these powers would be beneficial.
- 23 One example of a tribunal having formal powers to make recommendations is the now abolished Victorian Intellectual Disability Review Panel (IDRP). This tribunal was able to make recommendations in respect of the particular kinds of supports people with an intellectual disability were being provided. Although this tribunal did not have any enforcement powers, its recommendations did often serve to aid in marshalling the resources required to support individuals and helping to alleviate their legitimate concerns about accessing needed services and supports.
- 24 Prior to the abolition of the IDRP I undertook a study on the impact of its unusual power of being confined to making recommendations rather than being empowered to impose its decisions. That study concluded that, on balance, this power was quite effective.<sup>6</sup>
- 25 As noted above, this ability to make recommendations could also emerge in a more informal way if tribunal members had more time to focus on such conversations with clinicians during the course of hearings.

#### Rendering decisions relating to service provision justiciable

- 26 The IDRP notion of treating decisions regarding the provision of services to people with intellectual disabilities as being justiciable was largely unprecedented. There was one comparable body established in California in the United States, but I am not aware of any other international examples of such bodies.
- 27 One issue that arises in rendering decisions regarding the provision of mental health services, or the quality of those services, subject to merits review is that such decisions are often the product of a complex, evolving and multi-faceted decision-making process. These decisions typically cannot be reduced to a simple binary choice; rather, they may be the result of a complex assessment in which numerous factors are taken into account. There is also the valid concern about distortion of administrative equity in delivery of those

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<sup>6</sup> Carney, T., Akers, K., *The Victorian Disability Review Panel: 'Legitimacy in Reviewing Welfare Entitlements'*. Clayton: Monash University, 1990, i-iii, 1-54; Carney, T., Akers, K., 'A Coffee Table Chat or a Formal Hearing' (1991) 2, *Australian Dispute Resolution Journal*, 141-158.

services. The availability of this kind of merits review would also raise broader public policy considerations in relation to the fairness of such a review mechanism. It may be that such a mechanism would tend to favour more privileged individuals who are better educated, more financially secure and have greater access to advice, and who are consequently more likely to take advantage of a merits review function conferred on a tribunal.

- 28 These are some of the reasons why other accountability mechanisms are favoured, such as Official Visitors, complaints bodies, Offices of the Senior Practitioner or Chief Psychiatrist and so forth. But the balance between individual justice or accountability on the one hand and equity in service delivery remains a vexed one in every setting. Shifts from one form of accountability for service access and quality to another model tends to be driven by ‘fashion’ rather than any solid findings from evidence-based policy foundations.
- 29 It is however critical to avoid concentrating unduly on the civil rights aspects of mental health accountability at the expense of accountability for honouring the socio-economic right to health. Imperative though it is to rectify deficiencies in accountability protections against unwarranted coercion into care and treatment, there is an equal or arguably more pressing need for accountability protections against *denial of access* to needed treatment or other care and support. Currently there are essentially no such accountability protections at all. And as resources for mental health services stagnate or decline, the number of people inappropriately denied access to mental health and allied services continues to outgrow the number who are aggrieved about being unwilling recipients of treatment. Our 2011 monograph identified the concerns of this group and raised the prospect of giving the Tribunal jurisdiction to hear applications against denial of access.<sup>7</sup> It would be timely for the Commission to revisit that or other ways of addressing this issue.

## **The current approach in Victoria**

### ***Constraints on the uptake and use of supported decision-making mechanisms to date and how they could be addressed***

#### Confusion between the support and substitute-attorney roles

- 30 The *Mental Health Act 2014* (Vic) (**Act**) established a supported decision-making model that aims to enable and assist compulsory patients to make or participate in decisions about their treatment.

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<sup>7</sup> Carney et al (n 1 above) at 314.

- 31 I have written extensively on the development of and challenges posed by the supported decision-making framework in Australia.<sup>8</sup> In my view, one contributing factor is that the Victorian framework for supported decision-making does not sufficiently distinguish between the role of a “supporter” and the traditional role of a substitute decision-maker (such as that conferred by a power of attorney). The use of words such as “attorney” conjures up many of the associations people typically attribute to a power of attorney. That is, most people understand an attorney to be someone who can take certain actions (or make decisions) on behalf of another. This leads people to confuse the notion of “supported decision-making” with the more familiar concept of substitute decision-making.<sup>9</sup>
- 32 This confusion is exacerbated by the general lack of understanding of the core mechanisms (such as advance statements) that comprise the supported decision-making framework under the Act.

#### Cultural bias towards informal support networks

- 33 For the vast majority of people, there is also a general acceptance that their informal social support networks (including friends and family) are adequate to support them in difficult times. There is also a corresponding reticence on the part of individuals about formalising those support networks, for example by signing a legal document. This is more prevalent in some cultures than others; for example, research conducted in the United States showed that some communities value individual autonomy far less than other cultural groups. However the reality is that only a minority of the population as a whole will ever elect to use any such instruments, no matter how attractive they are made to appear or how well promoted.<sup>10</sup>
- 34 This calls attention to feminist legal literature which explores the ways in which individuals are connected to one another via a complex web of relationships, and illustrates how any legal framework designed to facilitate individual choice needs to account for this social context (a web of relationships). Studies of the operation of ‘circles of support’ and ‘representation agreement’ models, such as those in the Canadian province of British Columbia, have demonstrated how those forms of support mechanisms can boost uptake among groups such as people with an intellectual disability because they are better

<sup>8</sup> See, for example, Carney, T, ‘Supported Decision-making for People with Cognitive Impairments: An Australian perspective?’ (2015) 4, i, *Laws* 37-59. Available at

<[https://www.researchgate.net/publication/272182424\\_Supported\\_Decision-Making\\_for\\_People\\_with\\_Cognitive\\_Impairments\\_An\\_Australian\\_Perspective](https://www.researchgate.net/publication/272182424_Supported_Decision-Making_for_People_with_Cognitive_Impairments_An_Australian_Perspective)> [accessed 13 July 2020]. Carney, T, ‘Supporting People with Cognitive Disability with Decision-making: Any Australian law reform contributions?’ (2015) 2, i, *Research and Practice in Intellectual and Developmental Disabilities* 6-16.

<sup>9</sup> Carney, T, ‘Supported Decision-making in Australia: Meeting the challenge of moving from capacity to capacity-building?’ (2017) 35, ii, *Law in Context* 44-63 at 51.

<sup>10</sup> See the review in Carney, T., ‘Adult Guardianship and Other Financial Planning Mechanisms for People with Cognitive Impairment in Australia’ in Ho, L., Lee, R (eds) *Special Needs Financial Planning: A Comparative Perspective* (CUP, 2019) 3-29.

attuned to existing social networks, but even so the machinery lacks universal appeal and does little to solve the overall problem of low uptake.<sup>11</sup>

#### The importance of preserving familial relationships

- 35 A particular reason for the lack of uptake of supported decision-making mechanisms in the context of mental health is the strain that the use of such mechanisms may put on the relationships between a person with a mental illness and their relatives or friends. For example, a relative may be reluctant to appear at a tribunal hearing on behalf of a person with a mental illness if the relative considers that this may harm their relationship with them. The desire to maintain and preserve existing relationships is intrinsic to human nature.

#### Nominated supporter

- 36 One way of addressing this lack of uptake could perhaps be to consider replicating the approach taken in many jurisdictions of legislating for a default 'list' of people able automatically to act as medical decision-makers in the event that no actual health power nomination has been made. An equivalent hierarchy of "supporters" able to assist a mentally ill person and who would have authority to appear at tribunal hearings on behalf of that person could be legislated for. These lists (as with statutory wills on intestacy) are always controversial in their privileging of spouses ahead of other close relatives or friends on the 'list' of people able to so act, and in any event it may still result in most of these 'statutory supporters' declining to act for reasons such as to avoid jeopardising existing relationships. Consequently, it may be that we are stuck with the low levels of uptake revealed in for example the work of Brophy and others.<sup>12</sup>

### **People with lived experience**

#### ***The importance of consumer attendance at mental health tribunal hearings***

- 37 In my view, consumer attendance at tribunal hearings is critical. There is no substitute for tribunal members being able to see and directly communicate with a mentally ill person. Such direct contact also provides an opportunity for the kind of spontaneous discussion or advice giving that simply would not manifest if tribunal hearings were simply conducted on the papers (or without any physical appearance by the consumer).
- 38 The value of consumer attendance has been clearly demonstrated in the context of social security tribunal hearings. Early studies conducted in the late 1970s and early 1980s

<sup>11</sup> Sophie Nunnelley, 'Personal Support Networks in Practice and Theory: Assessing the implications for supported decision-making law' (Toronto: Law Commission of Ontario, 2015); Carney (n 9 above) at 52-53.

<sup>12</sup> Lisa Brophy et al, 'Community Treatment Orders and Supported Decision-Making' (2019) 10(414) (2019-June-11) *Frontiers in Psychiatry*.

showed that, even at hearings of a relatively short duration (then under 30 minutes), consumer attendance dramatically improved the success rate of hearings.<sup>13</sup>

#### Impact on outcomes

- 39 The impact of attendance on outcomes in a mental health context will depend upon how the outcomes are defined, and does not in any event detract from the importance of the principle of participation. If the outcomes were viewed only through the lens of ensuring the correct decision is made about a patient's treatment (such as refusing the grant of a compulsory treatment order), then the impact of consumer attendance may be more marginal. This is partly due to the very short duration of most tribunal hearings, and also because it is typically only people with the most severe illness who are subject to an application for compulsory treatment. These people are less likely to be able to effectively engage with tribunal members in a way that might improve their chances of success.
- 40 However, if the outcomes of tribunal hearings were considered more broadly in terms of the clinical and social needs of the person with a mental illness as discussed above, then attendance could be seen as being more influential. That is, attendance can play a critical role in ensuring that tribunal members properly engage with and understand the full range of clinical and social needs. As noted above however, this is contingent on the tribunal having adequate time at each hearing to properly perform this inquisitorial role.

#### ***Ways in which mental health tribunals can meaningfully engage consumers***

- 41 As discussed above, mental health tribunals can more meaningfully engage consumers if they are properly equipped to consider the appropriateness of the treatment being administered to the consumer.
- 42 First and foremost, this requires sufficient time for each hearing to allow tribunal members to properly engage with consumers. For example, in order for a tribunal to properly assess whether a proposed treatment plan is the least restrictive alternative available, the tribunal members would need to thoroughly understand a consumer's individual circumstances, including both their clinical and social needs: where they live, whether they live with others who are able to provide help and support, what their treatment history is (if any) and the success (or failure) of any previous treatments. This is the kind of information that can prove decisive in determining whether a tribunal decides to delay making or reverse the need for a compulsory treatment order.
- 43 Our research suggests that much of this important information can be obtained informally, by tribunal members simply putting questions to or noting reactions of the consumer. The

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<sup>13</sup> Terry Carney and Elizabeth Marshall, 'Social Security Appeals Tribunals: Report on tribunal procedures in Victoria' (Melbourne: Melbourne SSAT and the authors, 1978).



community member of the tribunal, for instance, is typically quite adept at reading facial expressions and body language; they are often able to glean important information from a consumer, even when the consumer is very ill and perhaps not capable of responding coherently to questions.

## **Tribunal processes and decision-making**

### ***The merits and limitations of having legal, medical and community expertise in the composition of mental health tribunals***

- 44 These three domains each have a key role to play in tribunal decision-making, as argued at some length in our 2011 monograph.<sup>14</sup>
- 45 Legal expertise is critical in a mental health context; often, mental health tribunal hearings will be dealing with the issue of whether some form of compulsory treatment should be administered to the consumer. As a result, one of the most fundamental human rights (freedom of personal autonomy and movement) will be at stake. Legal expertise is therefore essential to ensure that the protection of this fundamental human right is appropriately balanced against any countervailing considerations (such as the risk of harm to self or others).
- 46 The Australian approach to compulsory treatment differs somewhat from many other countries, such as the United States, where the compulsory detention and compulsory treatment of individuals are separate and distinct stages. Authority to detain an individual in those jurisdictions does not include any accompanying right to administer compulsory treatment.
- 47 Clinical or medical expertise is also important in understanding any issues concerning the diagnosis of a person's mental illness, and which form(s) of treatment is most appropriate based on that diagnosis. It is also key to properly evaluating whether there may be a less restrictive alternative means of treatment (such as community-based treatment) available.
- 48 Community or lived experience is equally important to tribunal decision-making. We have seen the composition of other tribunals, such as the Social Services and Child Support Division of the AAT, change from three members to a single member, who is often a lawyer. This inevitably results in a loss of breadth of expertise; while this may be easier to reconcile in a social security context, in my view this is not the case in mental health. The balancing (and counter-balancing) of each of the legal, clinical and community domains is critical to the proper functioning of tribunal decision-making.

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<sup>14</sup> Carney et al (n 1 above) at 96-99.

***Addressing the presumption against the credibility of consumers' evidence at tribunal hearings***

- 49 Some studies suggest that it is common for consumers' evidence to be disbelieved at tribunal hearings. In my view, the most critical reform to address this issue is imposing on tribunals a requirement to provide written reasons as a matter of course.
- 50 As a former tribunal member in social security, I have personally experienced how frequently one can change one's mind in respect of a given decision. It is a real discipline to record one's own process of reasoning in writing, regardless of the outcome of the decision.
- 51 Written reasons can serve to reveal a tribunal member's prejudices or gaps in reasoning in relation to their findings in respect of a consumer's credibility. At the very least, the process of recording written reasons may prompt a tribunal member to revisit the documents on file. Quite often, doing this may encourage the tribunal member to re-evaluate any adverse credibility findings they have made. In some cases, it may even change their mind about a consumer's credibility.
- 52 At present, written reasons are only provided upon request. In my experience, the number of requests for written reasons made by consumers has always been quite small. As discussed above, this process tends to favour the more privileged, educated and articulate consumers who have greater access to supports and advice; it is they who are most likely to request the written reasons for an adverse decision.

**Reasons why the provision of written reasons is not mandatory**

- 53 For many tribunals, the established practice of only providing written reasons upon request is a cost-saving measure. Recording written reasons is a time-intensive task. In addition, some tribunal members who do not have formal legal training find the task of recording written reasons very challenging.
- 54 The Council of Australian Tribunals (COAT) offers a number of resources for tribunal members, which include resources to aid in the preparation of written reasons. There are some tribunals that also have their own internal resources, such as pro forma reasons, which can assist less experienced tribunal members in structuring their written reasons.

***Factors that should be taken into account in decision-making by mental health tribunals***

- 55 As discussed above, a key consideration that should, in my view, be addressed by mental health tribunals is the availability of the least restrictive alternative form of treatment.

- 56 The treatment criteria in the Victorian Act includes that ‘there is no less restrictive means reasonably available to enable the person to receive the immediate treatment.’<sup>15</sup> However, in the current system where tribunal hearings are very short, I would question whether tribunal members are consistently able to properly investigate this issue. In the absence of written reasons, it is difficult to discern the extent to which this is currently dealt with by tribunals.
- 57 There have been several isolated cases in which the availability of a less restrictive form of treatment proved decisive. The New South Wales Supreme Court’s decision in *S v South Eastern Sydney & Illawarra Area Health Service*<sup>16</sup> is an example of a case in which a mental health tribunal’s decision was overturned by a court on the basis of the court’s finding that there was a less restrictive form of care that was appropriate and reasonably available. In that case, the Mental Health Review Tribunal had made a community treatment order requiring the patient to attend hospital to receive anti-psychotic depot medication by injection. Justice Brereton found that a treatment plan that gave the patient the option of either oral or depot medication would be a less restrictive alternative to the treatment prescribed under the community treatment order.<sup>17</sup>

***The benefits of mental health tribunals publishing written reasons as standard practice***

- 58 As noted above, this practice requires tribunal members to turn their mind to all of the relevant considerations and materials in a given case, rather than relying on matters of impression, memory and instinct in reaching a decision.
- 59 The greater accountability provided by written reasons would be particularly significant in cases concerning a community treatment order that is made by the tribunal in circumstances where that order was not necessary, or where there was a less restrictive alternative form of treatment available. In such cases, the availability of written reasons would greatly assist the appellate body in identifying any errors or gaps in reasoning on the part of the tribunal in reaching its decision.
- 60 Written reasons can also be of great assistance to the clinical staff who administer the treatment set out in community treatment orders. If written reasons for a tribunal’s decision are kept on the patient’s clinical file, the treating staff will benefit from being able to review any ad hoc recommendations or observations made by the tribunal as recorded in its written reasons.

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<sup>15</sup> *Mental Health Act 2014* (Vic) s 5(d).

<sup>16</sup> [2010] NSWSC 178 (*S v South Eastern Sydney*).

<sup>17</sup> *S v South Eastern Sydney* [2010] NSWSC 178 at [40].

- 61 Our research for the 2011 monograph suggests that the capacity of a person with an acute and often severe episode of mental illness to comprehend and retain information provided by tribunal members at an oral hearing, and then pass that information on to his or her treating clinician who is often not in attendance, is very limited. Although the recording of written reasons would not be a perfect solution, it would be one way of ensuring that a patient's clinical file provides a more complete picture of matters discussed at the tribunal hearing, including any suggestions or recommendations made by tribunal members.

The normative value of written reasons

- 62 The normative effect of written reasons should not be underestimated. From time to time, an influential tribunal decision may raise awareness and improve standards of practice in relation to a particular issue (such as the merits of a specific configuration of treatment options). It would also give clinicians and practitioners greater exposure to the experience and wisdom of senior tribunal members (some of whom are very experienced practitioners themselves).
- 63 To enhance the normative value of published reasons, I consider there is scope for them to be more effectively reported and shared within professional circles. One example of this is at La Trobe University, where all of the AAT's decisions in respect of the National Disability Insurance Scheme are now reported on regularly in the form of a consolidated and critical analysis of these decisions.

***The benefits and drawbacks of tribunals having greater capacity to scrutinise or vary treatment plans***

- 64 The role of tribunals in overseeing and reviewing treatment plans prepared by clinicians represents one of the sharpest friction points between the law and medicine. In proposing any expansion of the powers of mental health tribunals, one must never lose sight of the unintended consequences of how those powers would affect and interact with the important work of clinicians. For example, how would clinicians respond if a treatment plan they have prepared is reviewed by a tribunal and ultimately rejected in favour of a different course? Would clinicians be comfortable in administering a treatment plan devised by a review tribunal, rather than clinical staff?
- 65 These tensions that arise in the review of professional decision-making are not unique to mental health. For example, the AAT's powers of review in respect of the obligations imposed on unemployed individuals in the mutual obligations 'agreements' that accompany unemployment benefits (such as the former "Newstart" now "Job Seeker" payment) are limited; while the AAT can review the content of these obligations, it cannot change the content. Instead, it must remit that aspect of the decision back to the primary

decision-maker to be made anew. This is in part an acknowledgement that such decisions require a particular expertise (in this context, expertise held by employment services staff), such that an administrative review body like the AAT is not equipped to make such decisions.

- 66 Although I am firmly of the view that mental health tribunals should play a role in reviewing and, potentially, recommending variations to mental health treatment plans, I am not clear on precisely how the scope of that role ought to be defined.

## **Safeguards**

### ***My observations on the procedural impacts of legal representation in tribunal hearings***

- 67 There can be little doubt that the presence of lawyers at tribunal hearings dramatically increases the duration of hearings. This is particularly so in the case of generalist lawyers (or lawyers who are not mental health specialists), who in my view tend to stifle the key inquisitorial function that tribunals should be performing.
- 68 Clearly, there is a very significant cost associated with legal representation, not just due to the extended duration of hearings, but also due to the appearance fees charged by lawyers.

#### The impact (if any) of legal representation on hearing outcomes

- 69 In my view, the presence or absence of legal representation is only material at the fine margins. It is difficult to precisely determine the impact lawyers have on the success of their clients, given that many of the people who are able to secure legal representation are more likely to be well-resourced and therefore may be more likely to obtain a successful outcome at the hearing even without legal representation.

### ***The merits and limitations of recording tribunal hearings as a safeguard in relation to procedural fairness***

- 70 I do not see any advantages in terms of procedural fairness in recording tribunal hearings.
- 71 There may in fact be additional risks involved with recording mental health tribunal hearings. Generally speaking, those directly affected by their attendance at their tribunal hearing have a severe mental illness; such people are likely to be far more sensitive to the recording of their hearing, and for some people (for example, those who experience paranoia), the knowledge that the hearing is being recorded may even negatively impact their mental state during the hearing.

- 72 While some tribunal members might initially find recordings to be helpful in the process of preparing written reasons, I do not share this view. In my experience, the use of recordings only increases the time it takes to prepare written reasons.

***Benefits and risks involved with consumers having greater access to information contained in their clinical files ahead of tribunal hearings***

- 73 The starting presumption, in my view, is that there should be greater consumer access to information. However, proper consideration should be given to both the consumer interest in accessing information prior to a tribunal hearing, and the need for at least some protection for especially sensitive information that otherwise might not be placed on file by clinicians if everything is directly accessible by the consumer. While strictly limited, there may be particular circumstances that warrant the restriction of consumer access to information; for example, people at risk of suicide may be vulnerable to further suicidal thoughts, were they to read records of previous discussions about their suicidal thoughts.
- 74 Some form of prehearing planning and assistance for consumers is therefore vital in providing appropriate checks and balances in the process. The fieldwork evidence collected in the course of researching our 2011 monograph demonstrated the strong demand for such support (which cannot adequately be delivered by procedural or other changes within the tribunal and its staff) and the monograph outlined some of the ways in which such support could be provided.<sup>18</sup>


***Avenues of appeal from tribunal decisions***

- 75 Principally, issues raised by consumers on appeal from tribunal decisions will involve merits review (as opposed to questions of law). Consumers who appear before the Mental Health Tribunal may apply for merits review of the Tribunal's decision to the Victorian Civil and Administrative Tribunal (VCAT). Decisions of VCAT may be appealed in the Supreme Court of Victoria, but appeals must be based on a question of law (they cannot simply seek further merits review).
- 76 To the extent that consideration is given to expanding or altering consumers' rights of appeal, one avenue worthy of further consideration would be reconsideration by a differently constituted Tribunal membership. This would retain advantages of consideration by three members from different disciplinary and community backgrounds, and at a marginal loss of VCAT's role as the ultimate 'mega-tribunal' for all state merits review issues. An alternative might be to keep VCAT as the second tier of merits review but confer a power to remit matters to the Mental Health Tribunal for fresh consideration by a differently constituted Tribunal either by agreement or at the option of VCAT. These

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<sup>18</sup> Carney et al (n 1 above) at Chapter 8 generally and especially at 281-293.

approaches retain the benefit of avoiding wasting the limited resources of the courts, which primarily deal with questions of law, when in practice most appeals from tribunal decisions merely seek merits review, while achieving greater expertise and efficiency in handling of reviews.

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date Friday, 17 July 2020