

AN ANALYSIS OF OPEN JUSTICE AND PRIVACY IN QUEENSLAND'S MENTAL HEALTH REVIEW TRIBUNAL

Andrew Caple, a doctoral candidate at the Queensland University of Technology is currently undertaking a comparative analysis of open justice in Queensland's Mental Health Review Tribunal and the related quasi-judicial bodies in all other Australian States and Territories. The research will, in many respects, build upon that recently conducted by the Queensland Law Reform Commission in its investigation of open justice in the guardianship system.

Queensland's *Mental Health Act 2000* authorises the involuntary detention and treatment of persons diagnosed with a mental illness upon the satisfaction of certain criteria. The Act establishes the Mental Health Review Tribunal, a quasi-judicial body conferred with the responsibility of safeguarding the rights of those mentally ill persons subject to the Act's provisions. As a part of this responsibility the tribunal makes important decisions regarding the liberty of an increasing number of mentally ill persons. Therefore, it is important that there exists an acceptable level of accountability in the tribunal's decision making. A well recognised principle of common law legal systems that facilitates accountability is 'open justice'. Open justice generally requires that judicial proceedings be conducted in full public view and be capable of publication. The recognition of open justice in the tribunal's processes is currently limited, largely because proceedings are closed to public observation. In addition, the Act effectively prohibits the open discussion of tribunal processes by creating an offence for publishing information relating to those proceedings.

The hypothesis of the research posits that given the tribunal's power to restrict a person's liberty, it should be subjected to greater levels of accountability. By holding tribunal hearings in secret there exists the potential for unchecked incompetence and bias in decision making. The opening up of proceedings then would allow for greater scrutiny of decision making and facilitate the avoidance of these outcomes.

In the course of a comparative study between Queensland's Mental Health Court; Mental Health Review Tribunal; Guardianship and Administration Tribunal and other mental health jurisdictions the research will enunciate how, if at all, the implementation of greater levels of open justice may balance accountability in decision making with the sensitive nature of Australian mental health systems that place a high priority on privacy.

The critical problem resides in the tension between accountability and privacy. Adhering to open justice principles may well exacerbate the stigma associated with mental illness. However, holding proceedings in secret may also conceal abusive or incompetent legal and clinical judgments.

The key research problem is whether the tension between the principles of open justice and privacy can be appropriately balanced to enhance the level of accountability and quality in decision making. The research will synthesise the relevant Australian and international legal frameworks and analyse how the Queensland framework deals with the tension between open justice and privacy at tribunal proceedings. The research will identify the legal impediments to accountability in decision making within the current legislative regime principally through the lens of open justice.

Prior to the introduction of the Queensland Mental Health Review Tribunal in 2002 there was very little literature analysing the former tribunal's decision making processes. Since the introduction of the new legislative framework there has been no literature that directly analyses the tension between the principles of open justice and privacy with respect to tribunal hearings. There is also a lack of any analysis regarding the level of accountability in tribunal processes generally. Therefore the quality of decision making at the tribunal remains unknown.

The concept of open justice heavily influences Australian jurisprudence. It asserts that judicial functions should be held publicly in an open court so that justice can be seen to be done. The foundation of the principles of open justice derives largely from criminal laws because of the serious consequences applicable to those convicted. The criminal law so often punishes criminals through the deprivation of liberty.

Under Article 14(1) of the *International Covenant on Civil and Political Rights* all persons are entitled to a public hearing except where the interests of private lives requires otherwise. Australian legislatures have the authority to overturn the principle of open justice, which renders it a guiding principle, not one of right. Informal quasi-judicial tribunals in Australia are frequently authorised to depart from open justice in jurisdictions involving the regulation of vulnerable persons such as the mentally ill and those without the capacity to make decisions. Statutory exemptions aim to protect the personal sensitive information of such persons where a strict adherence to open justice would result in the public dissemination of information such as a person's mental state, injuries, loss and the nature of personal relationships.

Under section 460 of the Queensland Act tribunal hearings are closed to the public unless directed otherwise by the tribunal in limited circumstances. Sections 525 to 527 create a criminal offence for the publication of any report that disseminates any information regarding proceedings of the tribunal or proceedings of the Mental Health Court on appeal from the tribunal without leave of the tribunal or the Court. Leave may be granted where publication is considered to be in the public interest and when the report will not identify any person involved in the proceeding. Sections 528 to 529 create an offence if an official or a patient's allied person or agent discloses confidential information. Although these

provisions serve to protect the privacy of personal information they effectively prevent the open discussion and public scrutiny of tribunal proceedings. These provisions then conflict with the fundamental principles of open justice by imposing a blanket ban on the public discussion and reporting of tribunal proceedings. By protecting the personal information of patients there is a concern that the concept of privacy can stymie the critical analysis of decision making and conceal the potential inadequacies of legal and clinical judgments.

Because tribunal decisions are not reported and the fact that very few tribunal decisions are appealed, there is very little case law or tribunal decisions available for public scrutiny in Australian jurisdictions except Victoria. The Victorian Mental Health Review Board publishes what it considers to be 'significant decisions' on a tri-annual basis. These publications constitute the only significant body of quasi-judicial decisions reported in an Australian mental health jurisdiction.

The Queensland Mental Health Review Tribunal has not published any decisions since its establishment in 2002. The Review of the *Mental Health Act* in 2006 recommended that there should be selected publications of appropriately de-identified reports of proceedings when that publication serves the public interest. The public interest may include instances where matters of principle or precedence are raised. The publication of decisions and reasons for decisions for public scrutiny may well enhance transparency and accountability and therefore encourage higher quality decision making.

In the absence of a minimal level of public scrutiny can there be an acceptable level of accountability in tribunal decision making? Under the provisions of the Queensland Act neither the media nor anybody else can gain access to or provide any information about why a decision was made. The difficulty with this type of sensitive subject matter is establishing an appropriate objective balance between accountability in decision making on the one hand and the protection of personal information on the other. In any case, there may be an argument in favour of permitting media reporting where the parties involved are de-identified.

An analysis of media reporting of mental illness is important. By opening tribunal proceedings to the public and media coverage there is a danger that any subsequent reporting of proceedings may have a negative impact on the mental health of those subject to tribunal proceedings. The media assumes an important role in a well functioning democracy by informing the public of the performance of Government and its institutions. This research hypothesises that the 'performance of Government' includes the medical treatment of persons diagnosed with a mental illness and the legal responses to those persons. The limiting of a person's liberty is a legitimate subject for public discussion. However, media reporting can often be either inaccurate or sensationalised and has at times served to reinforce a negative social stereotype that fosters social exclusion and reluctance by mentally ill persons to seek treatment. It is important for media organisations to address these issues

Much work is undertaken by non-government organisations and family and friends to educate the community about mental health issues. There are also several national and

regional government initiatives designed to further journalists' understanding of mental illness and its social impacts. The Commonwealth Department of Health and Ageing implemented a program in June 2002 to educate journalists regarding the desirability of sensitive and accurate media reporting of mental health issues. The *National Mental Health Strategy* has formulated a number of policies and funding arrangements with the objective of promoting mental health and reducing the onset and impact of mental illness within the community while also protecting the legal rights of sufferers. Andrew will publish the results of this ongoing research incrementally throughout 2009.