

**GUARDIANSHIP AND ADMINISTRATION BOARD  
HOBART**

**E N T on the application of MENTAL HEALTH SERVICES**

GAB No. XXXX of 2008

**REASONS FOR DECISION**

Anita Smith (President)  
Elizabeth Love (Member)  
Lindi Wall (Member)

Decision: 31 January 2008

Guardianship – man with head injury being held in secure psychiatric ward – inappropriate accommodation – possible false imprisonment – not appropriate to appoint guardian to legitimise inappropriate accommodation option – freedom of decision and action, best interests, wishes

*Guardianship and Administration Act 1995* ss 6, 20

1. This is an application under section 20 of the *Guardianship and Administration Act 1995* for appointment of a guardian. The hearing of this application commenced on 25 January 2008 and was adjourned part-heard when the evidence raised certain questions about the legality of the current accommodation arrangements for Mr T. The Board issued an interim order and this statement of reasons outlines the reasons for the interim order.
2. Mr T is a 32-year-old man who presently resides at the Tyenna Unit of Mental Health Adult Inpatient Services which is at New Norfolk. He is resident in a secure unit but is not currently the subject of any mental health or guardianship order. He does not want to live there.
3. An application was received by the Board on 11 December 2007. The hearing on 25 January 2008 was attended by Mr T and his advocate, Ms Val Williams, the applicant was represented by Ms Mary Rayner.

Mr Michael Condon represented the Office of the Public Guardian. Ms Anne Perks, Manager of Investigation and Liaison for the Board also attended.

***Section 20(1)(a) and (b) - Disability and Incapacity:***

4. The pro forma Health Care Professional Report signed by both Dr R. Soin and Dr M. McArthur indicates that Mr T has an acquired brain injury of 12 years standing and a psychiatric disability described as '*some psychosis due to his injury*'. His psychosis, moods and behaviour are treated with Clozapine, Zuclopenthixol Decanoate and Sodium Valproate.
5. Dr Soin answered the questions relating to Mr T's planning and reasoning ability. He noted that Mr T cannot reliably make reasonable plans and follow them through, is prone to impulsive acts and is susceptible to influence. He notes that Mr T is '*easily led by others*' and has '*little idea of consequences and little input into his actions*'.
6. Dr McArthur answered the questions relating to Mr T's ability to make 'lifestyle decisions'. He notes that Mr T '*... has poor insight and judgment, often acts impulsively, often does not understand need for containment or medical treatment*' and notes that he needs long term supported or supervised care.
7. There did not appear to be any dispute about the fact that Mr T is a person with a disability, nor any dispute that he does not have the capacity to make reasonable judgments about his accommodation. Noting the absence of any mental health or guardianship order and the evidence of Dr.'s Soin and McArthur, the Board cannot conclude

that Mr T is a voluntary patient or resident at Tyenna as his level of capacity is insufficient for the purposes of giving informed consent for treatment or detention.

***Section 20(1)(c) - Need for a Guardian:***

8. Mental Health Services' application states that:

*"This application is for T's protection and best interests regarding accommodation options. ... at times, T either requests to leave Tyenna Blue, or states that he plans to leave. At present there are no viable accommodation options for T. A guardianship order would assist in requesting him to return to Tyenna Blue if he was to abscond."*

9. However the Services' representative, Mary Rayner Social Worker, gave a different account of the reason for the application at the commencement of the hearing:

*"The initiative for this case came from Dr McArthur and Dr Soin. I think that they feel they need protection of a legal, something legal because T is residing in a secure unit which is really not ideal. It's not, it's certainly wouldn't be what you would want for T long term. It's a locked unit, it doesn't mean he doesn't go out, he certainly does go out. I think there's a feeling that, I feel that T needs the protection of someone overseeing the fact that he is in a secure unit. So a guardian would take responsibility I think whether that's a good decision or not and be protection for them."*

10. The Manager of Investigations and Liaison reported her conversation with a nurse at Tyenna, Danny Hyland, as follows:

*"... approximately every three weeks, when T has money, he leaves and gets drunk. They need to put him on an IO [Initial Order section 26 Mental Health Act 1996] as he wants to leave. They also have to cope with his aggressive behaviour at these times. This is only a short term fix. Danny believes T will be housed for the foreseeable future at Tyenna Blue."*

Of her interview with Mr T she reports:

*"T told me he wants to move out into his own flat and manage on his own with assistance from Headway. ... T said he last lived in the community by himself about 8 years ago. He said he is better now."*

*He is unsure what medication he is on but says it has made him better. He asked several times when I thought he could leave Tyenna.”*

***Circumstances of Mr T’s Accommodation at Tyenna:***

11. Ms Rayner outlined for the Board the structure of the Tyenna facility. It has three distinct units, “Clyde” which is an unlocked unit, “Tyenna Green” (which is meant to be an unlocked facility but has been a locked facility for at least 2 years on account of one resident there who ‘wanders’) and “Tyenna Blue” which is a highly restrictive locked unit for acutely unwell patients where, because some residents are suicidal, residents cannot have possessions in their room and shoe laces etc. are removed. “Clyde” is unavailable to Mr T because the current occupancy is relatively fixed.

12. There is no suggestion that Mr T is acutely unwell or that he is suicidal so it appears that he does not meet the criteria for admission to Tyenna Blue. During discussions at the hearing about conditions in that Unit, Mr T made asides to his advocate “Like gaol, it’s just like being in gaol”.

13. Mr T’s advocate, Ms Val Williams from Advocacy Tasmania, gave the following narrative to explain Mr T’s history:

*“... T’s been initially at Royal Derwent before it closed and I have had a ten year relationship with T. He has an acquired brain injury and for quite a long time there was no diagnosis of a mental health illness at all and ... the reason he was at Tyenna or Royal Derwent was that it was the place to go when he first went there.*

*When they closed Royal Derwent and redeveloped it, I actually got T accepted by Disability Services because there was a number of people with intellectual disability or acquired brain injury and so at that point Disability Services took T up as a client. They just didn’t do anything.*

*Now the reason he was in a locked ward, and the story has changed over time, but I was there originally so ... I know why it started. He didn't get on with another patient and the decision was made to separate the two patients. So one patient went to Tyenna Green and unfortunately T drew the short straw and copped Tyenna Blue which is the locked ward.*

*That's changed over time with new people coming and different perspectives and there was a view that T has a relationship with another patient so she tends to be in Tyenna Green and he in Tyenna Blue. But the other patient is still in Tyenna Green, the original patient that E doesn't get on with.*

*Now about three years ago I basically said 'enough is enough' so I contacted Disability Services and I said 'you have a client here, you need to be doing something.' T was placed on an order and he was discharged from that order by the Mental Health Tribunal who discharged him into the community.*

*He was unsupported and it all fell through and things happened and he eventually ended up at DPM [Department of Psychological Medicine at the Royal Hobart Hospital].*

*At that stage my understanding is that Dr Reid gave him a diagnosis of schizophrenia. Now that diagnosis is disputed by other clinicians, not by me I have no clue, but other clinicians have said before the Mental Health Tribunal that he does not have schizophrenia because for one thing his delusions are not fixed. The Tribunal decided in their wisdom to discharge T. He went out, he had problems, he came back. I then got involved and arranged under the strategic collaboration to get everybody involved in working for T to get him out of Tyenna to be accommodated appropriately with appropriate programs. That occurred and it was extremely successful. We had the managers of Disability Service, we had Drug and Alcohol, we had everybody, we also had Richmond Fellowship.*

*What happened was T was taken from Tyenna. He was supposed to go to Richmond Fellowship because it was stated quite clearly by everybody that T should not be at Tyenna. He was going to go to Richmond Fellowship. He was going to be supported, there was going to be five days of programs. There was a delay in the vacancy and so he was temporarily until the mid January, to go to Campbell Street so he moved from Tyenna to Campbell Street temporarily until he went to Richmond Fellowship.*

*I actually dropped out of the process at this point it was all planned there was a treatment plan, a social plan everything was perfect you*

*couldn't ask for anything more. T ended up staying at Campbell Street for two years.*

*Now Campbell Street is, in my opinion, a mini Tyenna. It is staffed by nurses and with the same regime as Tyenna. Anyhow he stayed there two years and eventually one day he was put in a car and he was driven to Tyenna and that's where he is at the moment."*

14. Ms Rayner indicated that she had not been aware of the attempts to house Mr T at Richmond Fellowship. However, she contradicted Ms Williams' narrative only in the following respects:
  - The discharge by the Mental Health Tribunal was an unplanned discharge and, while there was some support level of from a case manager, the basic problem was that there had been no time to prepare Mr T for a gradual return to independent living.
  - While Mr T was at Campbell Street, he was assessed by Dr M. Morrissey who stated that Mr T does have a psychotic illness.
15. While Mr T clearly is given some freedoms, Ms Rayner confirmed to the Board that he must seek permission to leave Tyenna Blue and *'he can't just choose to go out the door'*.
16. Based on the above evidence, the Board drew the conclusion that Mr T is living in a highly restrictive, secure facility that is inappropriate for his needs. The Board also concluded that Mr T is incapable of making reasonable judgments about his accommodation and therefore is incapable of being 'voluntarily' detained at Tyenna Blue. In any event, he does not choose to live there.
17. Given that the above evidence was all that was available to the Board and appeared to be undisputed, the Board believed that the facts alleged were extremely serious and required verification by an independent authority. The Board also believed that the applicants ought to seek legal advice about their potential liability for an action

of in false imprisonment or similar tort and for the criminal charge (as principals or accessories) for the criminal charge of assault as constituted by unlawful deprivation of liberty.

***Section 6(c) - Mr T's wishes:***

18. The application states that Mr T requests or makes plans to leave Tyenna. The interview with the Manager of Investigations and Liaison, as detailed above, confirms his desire to leave Tyenna. He said at the hearing that he would like to live at Richmond Fellowship.

***Section 6(a) and Section 20(5) – Mr T's Freedom of Decision and Action:***

19. Mr T would appear from the evidence to be a man whose primary disability is a head injury which at times produces psychosis. He also has a periodical propensity to dangerous levels of binge drinking and aggression. This profile of a man with a head injury is not significantly aberrant in terms of clients of the Department of Health and Human Services of a similar age and disability, most of whom have accommodation in suitably supported premises.
20. On the evidence presented so far, Mr T has very little freedom of decision and action. He is not allowed personal possessions in his room and his consumption of alcohol is restricted. His behaviour and mood are controlled by medication. His relationship with a woman in Tyenna Green is controlled to the extent that they are not allowed to live in the same facility.
21. Mr T must have permission to enter and leave the facility where he is currently housed. He does not want to be at Tyenna. At present, his presence at Tyenna is controlled either by the application of Initial Orders under the *Mental Health Act 1996* or by simply

refusing his release if he should wish to leave against the advice or opinion of those responsible for the facility. There may be good reasons behind each of these restrictions, but the evidence suggests that they have all been imposed without legal authority and for an extended period of time.

22. All of the statements by the two medical practitioners, the nurse and the social worker from Mental Health Services clearly show that there is no plan for future accommodation for Mr T anywhere other than Tyenna Blue. The applicant stated at the hearing that the purpose of the application was in fact to provide protection to officers in Mental Health Services for the ongoing accommodation of Mr Tin an inappropriate and highly restrictive facility. The reason for him being in that unit was apparently a lack of availability of less restrictive facilities within Mental Health Services.
23. The principle in section 6 requires the Board to promote the means which is least restrictive of Mr T's freedom of decision and action *as is possible in the circumstances*. What appears from the evidence presented so far is that it is possible for Mr T to exercise a greater level of freedom of decision and action than is currently afforded him. The evidence presented so far suggests that the only reason alternative accommodation is currently considered to be *impossible* is because of a lack of resources within Mental Health Services. Thus the relevant circumstances that lead to his continued detention at Tyenna are the circumstances of the Agency, not the particular circumstances of Mr T.
24. The Board heard that Mr T is entitled to alternative services from Disability Services and Alcohol and Drug Services and presently receives some services from Headway, a support service for persons

with head injuries. While there was no evidence of any current collaborative effort to generate a less restrictive alternative, the Board considers that in the foregoing 3 years, it may have been *possible* for the agencies within the Department of Health and Human Services to have located a suitable less restrictive facility because, according to Ms William's evidence, it had been achieved before.

25. The Board is not so far satisfied that Tyenna Blue represents the means for safe accommodation which is the least restrictive of Mr T's freedom of decision and action as is possible in the circumstances.
26. The applicants are seeking the guardian's sanction upon Mr T's current accommodation 'alternative', when no genuine alternative is being presented. Presumably if "discharged" from Tyenna, he would be homeless and this is also unsafe and inappropriate. Thus the guardian would not be asked to make a decision among genuine alternatives, only to sanction the continuation of the present restrictions upon Mr T's lifestyle.
27. In section 20(2) the Board must consider whether the needs of the person might be met by other means less restrictive of the person's freedom of decision and action. All parties appear to agree that Mr T *needs* alternative accommodation. The Board is of the view that Mr T needs, above all, to be suitably and safely housed away from Tyenna. Mr T may well be able to meet those needs by pursuing legal action and such litigation would be less restrictive than the appointment of a guardian with accommodation powers.
28. Accordingly the Board is not satisfied that appointing a guardian to sanction present accommodation arrangements is the least

restrictive alternative but provision of the abilities to pursue litigation are.

***Best Interests – Section 6 (b) and 20(3):***

29. The Board adjourned this matter part heard because the above evidence, if verified, could have very serious implications for Mental Health Services. Firstly, the evidence presented to date suggests that Mr T has, on and off, been detained at Tyenna Blue involuntarily but without any lawful authority for possibly up to ten years or the better part of his adult life.
30. The picture that has emerged on the evidence about the high degree of control of Mr T's movements is that Mr T has submitted himself to Mental Health Services' power, reasonably thinking that he had no way of escape which could reasonably be taken by him. That power has been reinforced by the use of "Initial Orders" pursuant to section 26 of the *Mental Health Act 1996*.
31. Such use of "Initial Orders" in relation to long term residents appears to be highly questionable. The intention and purpose of initial orders concerns the application for admission of a new patient to the protective custody of an approved hospital and is to facilitate his or her assessment.
32. Laws relevant to Mr T's present circumstances and an assessment of his best interests include the following:

There is settled law that:

*“So long as he is able to exercise [free] will, there would be no imprisonment, but the moment that will was interfered with, or any restraint placed upon him, an imprisonment commenced.”<sup>1</sup>*

It is also settled law that:

*“ ... a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is lunatic ... the person might properly complain if he were imprisoned, the imprisonment began and ceased while he was in that state.”<sup>2</sup>*

33. Australia is a party to significant international treaties that recognise certain fundamental human rights, such rights are enforceable in Australia by law under the *Human Rights and Equal Opportunity Act 1986* (Cth).

34. Article 3 of the *Universal Declaration of Human Rights* states:

*“Everyone has the right to life, liberty and the security of person.”*

[A similar provision in the *European Convention on Human Rights* was considered by the European Court of Human Rights in the case of *HL v United Kingdom* [2004] ECHR 45508/99 (“The Bournemouth case”) which may be of assistance to parties seeking legal advice]

Article 9 of the *Universal Declaration of Human Rights* states:

*“No one shall be subjected to arbitrary arrest, detention or exile.”*

Article 12 of the *United Nations International Covenant on Civil and Political Rights* states:

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<sup>1</sup> *R v Macquarie* (1875) 13 S.C.R. (N.S.W.)264, 277

<sup>2</sup> *Meering v Graham-White Aviation Co.* (1919) 122 L.T. 44 at 53-4

*“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”*

35. Section 182 of the *Criminal Code Act 1924* (Tas) defines an assault as *inter alia* “the act of depriving another of his liberty”.
36. The rights and responsibilities of health service users and providers are also the subject of the *Health Complaints Act 1995*.

**Conclusion:**

37. The appointment of a guardian has been sought to protect the officers responsible from any charge that Mr T’s rights have been abused. The Board may not make an order merely to legitimise Mr T’s current residential arrangements when there is cogent evidence that this is not in his best interests.
38. A guardian, especially a statutorily independent officer such as the Public Guardian, should not be appointed to assume responsibility from Mental Health Services for a practice which appears to the Board to be *prima facie* illegal and a breach of fundamental human rights. Nor should that officer be called upon to give superficial legitimacy to an action that is in substance plainly wrong.
39. The Public Guardian has been ordered to make certain investigations in light of the above evidence and relevant laws. While the report has been ordered within 3 months, it is imperative that these matters be attended to as quickly as possible.
40. Parties to this application are given liberty to make submissions within 21 days regarding whether the contents of this decision are of public interest for the purposes of section 13 of the Act.

For the foregoing reasons, the Board issued the interim order in the following terms:

“AFTER hearing an application by Mental Health Services for a guardianship order in respect of E N T of Tyenna Blue, Millbrook Rise Centre, New Norfolk

And the Board being satisfied that there are grounds for making an interim guardianship order pursuant to S73A of *the Guardianship and Administration Act 1995* in respect of E N T

### **THE BOARD ORDERS**

1. That the application be adjourned sine die.
2. That pursuant to section 73A the Public Guardian is appointed for the period of the adjournment and any subsequent adjournment as the limited guardian for the represented person.
3. That the powers and duties of the guardian are limited to the following:
  - (i) To investigate (which includes the power to access any information, files or records held by the Department of Health and Human Services or to interview any officer or former officer of any relevant service or any advocate or family member on behalf of the represented person with or without the consent of the represented person) and to report to the Board within 3 months on the following:
    - (a) The circumstances under which the represented person has resided at Tyenna at any time from 1 January 1997 to present
    - (b) The lawfulness of any previous incarceration or detention in a secure or locked ward whether such incarceration or detention was deemed to be ‘voluntary’ or ‘involuntary’ at the time
    - (c) Any suitable alternative accommodation presently available to the represented person
  - (ii) To seek legal advice as to any remedy due to the represented person
4. The hearing shall be reconvened following the receipt of the report detailed in paragraph 3(i) above.”

Anita Smith  
PRESIDENT

Elizabeth Love  
BOARD MEMBER

Lindi Wall  
BOARD MEMBER